Court of Appeal File No: C65861
Motion File No.: M49615
Superior Court File Nos: CV-18-00603797-0000
CV-18-00602494-0000
CV-18-00603633-0000

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in Appeal – Responding Party)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in Appeal – Responding Party)

and

ONTARIO (HON. DOUG FORD, PREMIER OF ONTARIO), ONTARIO (ATTORNEY GENERAL)

Respondents
(Appellants – Moving Parties)

and

CITY OF TORONTO

Respondent
(Respondent in appeal – Responding Party)

(Title of Proceedings Continued on p. 2)

BOOK OF AUTHORITIES OF THE MOVING PARTY, THE ATTORNEY GENERAL OF ONTARIO (STAY PENDING APPEAL)

AND BETWEEN:

CHRIS MOISE, ISH ADERONMU, and PRABHA KHOSLA, on her own behalf and on behalf of all members of Women Win TO

Applicants
(Respondents in appeal – Responding Parties)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

and

JENNIFER HOLLET, LILY CHENG, SUSAN DEXTER, GEOFFREY KETTEL AND DYANOOSH YOUSSEFI

Interveners
(Respondents in appeal – Responding Parties)

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INDEX

TAB 1

Baier v. Alberta, [2007] 2 S.C.R. 673

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

Heard: November 9, 2006;

Judgment: June 29, 2007.

File No.: 31526.

[2007] 2 S.C.R. 673 | [2007] 2 R.C.S. 673 | [2007] S.C.J. No. 31 | [2007] A.C.S. no 31 | 2007 SCC 31

Ronald David Baier, George Ollenberger, Liam McNiff, Evelyn Alexandra Keith and Alberta Teachers' Association, Appellants; v. Her Majesty The Queen in Right of Alberta, Respondent, and Attorney General of Ontario, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Prince Edward Island, Canadian Teachers' Federation, Alberta Federation of Labour and Public School Boards' Association of Alberta, Interveners.

(123 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Case Summary

Catchwords:

Constitutional law — Charter of Rights — Freedom of expression — School board elections — Ineligibility of school employees — Provincial government enacting legislation imposing province-wide restriction on school employees serving as school trustees — Whether legislation infringes freedom of expression — Canadian Charter of Rights and Freedoms, s. 2(b) — Local Authorities Election Act, R.S.A. 2000, c. L-21, s. 22 — School Trustee Statutes Amendment Act, 2002, S.A. 2002, c. 23, s. 1(2)(a).

Catchwords:

Constitutional law — Charter of Rights — Right to equality — School board elections — Ineligibility of school employees — Provincial government enacting legislation imposing province-wide restriction on school [page674] employees serving as school trustees — Whether legislation infringes right to equality — Whether occupational status an analogous ground — Canadian Charter of Rights and Freedoms, s. 15(1) — Local Authorities Election Act, R.S.A. 2000, c. L-21, s. 22 — School Trustee Statutes Amendment Act, 2002, S.A. 2002, c. 23, s. 1(2)(a).

Catchwords:

Education law — School authorities — School board elections — Ineligibility of school employees — Provincial government enacting legislation imposing province-wide restriction on school employees serving as school trustees — Whether legislation infringes freedom of expression or right to equality — Canadian Charter of Rights and Freedoms, ss. 2(b), 15(1) — Local Authorities Election Act, R.S.A. 2000, c. L-21, s. 22 — School Trustee Statutes Amendment Act, 2002, S.A. 2002, c. 23, s. 1(2)(a).

Summary:

The *Local Authorities Election Act* ("LAEA") governs the proceedings for election to municipal councils and school boards in Alberta. Prior to the amendments at issue here, it restricted school employees from running for election as school trustees only in the jurisdiction in which they were employed. In 2004, the *School Trustee Statutes Amendment Act, 2002* amended the LAEA to restrict school employees from running for election as school trustees anywhere in the province unless they took a leave of absence and then resigned if elected. The appellants sought to have the LAEA amendments declared unconstitutional as violating ss. 2(*b*) and 15(1) of the *Charter*. The Court of Queen's Bench granted an order that the LAEA amendments were contrary to s. 2(*b*) of the *Charter*, and were not justified under s. 1. The Court of Appeal set aside the decision, concluding that the LAEA amendments do not infringe s. 2(*b*) or 15 of the *Charter*.

Held (Fish J. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Binnie, Deschamps, Charron and Rothstein JJ.: The expressive aspects of school trustee candidacy and school trusteeship are sufficient to consider whether s. 2(*b*) of the *Charter* is violated. Section 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance. Here, the right claimed is a positive one, as the appellants are seeking access to the statutory platform of school trustee candidacy and school trusteeship. The fact that they had access to this platform prior to the LAEA amendments cannot convert [page675] their claim into a negative one. Since the appellants are making a positive claim, the question is whether their claim meets the grounds for an exception to the general rule that s. 2(*b*) only protects from government interference. [para. 20] [para. 33] [paras. 35-36] [para. 43]

Claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime. Since the appellants' claim is grounded in access to the particular regime of school trusteeship, it does not meet this first *Dunmore* criterion. Nor does the claim meet the second *Dunmore* factor. The appellants have not established that their practical exclusion from school trusteeship substantially interferes with their ability to express themselves on matters relating to the education system. The LAEA amendments may deprive them of one particular means of expression, but it has not been demonstrated that absent inclusion in this statutory scheme, they are unable to express themselves on education issues. Nor have the appellants proved that the purpose of the LAEA amendments was to infringe their freedom of expression. Because the appellants have not established a substantial interference with their ability to exercise their freedom of expression, it is unnecessary to consider the third *Dunmore* factor. [para. 44] [para. 48] [para. 54]

Using s. 3 of the *Charter* to read down the scope of s. 2(*b*) would stray from the long-standing recognition of the overlapping relationship of various *Charter* rights. A finding that s. 3 does not apply does not foreclose consideration of a claim under s. 2(*b*). Nevertheless, there is no s. 2(*b*) violation in this case. [paras. 59-60]

There was no infringement of s. 15(1) of the *Charter*. While there is differential treatment of school employees under the LAEA amendments as compared with municipal employees, this differential treatment is not based on an enumerated or analogous ground. There is no basis for identifying occupational status as an analogous ground on the evidence presented here. Neither the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics. Moreover, school [page676] employees cannot be characterized as a discrete and insular minority. The appellants have not established that the occupational status of school employees is a constant marker of suspect decision making or potential discrimination. [para. 63] [para. 65] [para. 67]

Per Bastarache, LeBel and Abella JJ.: Despite the undeniable breadth of the constitutional guarantee of freedom of expression, the guaranteed freedom does not protect a right to run for office as a school trustee and, if elected, to take part in the management of the school board. At its foundation, the appellants' claim concerns a democratic right that the *Charter* does not protect. The LAEA amendments' ban on school employees running for office and serving as school trustees does not prevent them from expressing views on any subject, let alone education. The appellants seek to secure constitutional protection for a right to be elected to a management role in the local education system of the province of Alberta, but this falls outside the scope of the *Charter* unless the equality rights of s. 15 are engaged. The appellants have not made out their claim of a breach of equality rights in the circumstances of this case. [para. 72] [para. 75] [para. 77]

Per Fish J. (dissenting): The deliberate suppression of political expression by Alberta in this case violates s. 2(*b*) of the *Charter*. A legislature which sets up a system of democratically elected boards to administer a fundamental aspect of government activity may not then exclude a certain category or group of otherwise qualified persons from serving on those boards, without any need to justify that exclusion under s. 1 of the *Charter*. [para. 79] [para. 86]

This Court has traditionally interpreted the freedom of expression guaranteed by s. 2(*b*) of the *Charter* broadly and the decision in *Dunmore* should not be applied so as to narrow s. 2(*b*). A narrow interpretation of *Dunmore* would allow legislatures, limited only by their obligations under s. 15 of the *Charter*, to systematically deny groups access to statutory platforms of expression otherwise available to the public at large. Rather, *Dunmore* should be viewed in light of this Court's practice of construing freedom of expression broadly and considering limits on expressive activity at the justification stage of the analysis. This is even more important where, as here, political expression [page677] associated with participation in an important democratic institution is involved. [para. 100] [para. 103]

The appellants' claim is grounded in the fundamental, constitutionally protected freedom to express oneself meaningfully on matters related to education. This freedom clearly exists independently of any statutory enactment. Seeking and holding office as a school trustee is a uniquely effective means of expressing one's views on education policy. While diminished effectiveness in conveying a message may not always engage s. 2(*b*), the difference between writing a letter to a trustee and serving as a trustee is not simply one of degree. By prohibiting school employees from participating in school board elections and governance, Alberta has done more than restrict a particular channel of expression. By excluding school employees from running for office, Alberta has substantially interfered with their freedom of expression. [para. 105] [paras. 107-109]

Where a legislature establishes a universal and democratic system of local governance and then effectively prohibits the participation in that system of a particular group of otherwise qualified citizens, the state must be required to justify that prohibition. It has not done so in this case. On the first branch of the *Oakes* test, the trial judge was entitled to find, as she did, that Alberta's assertion of a pressing and substantial concern could not succeed, and nothing before this Court permits of a different conclusion. In any event, the LAEA amendments would clearly fail the minimum impairment branch of the *Oakes* test. [paras. 110-111] [paras. 119-120]

Cases Cited

By Rothstein J.

Applied: *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; **referred to:** *R. v. Zundel*, *[1992] 2 S.C.R. 731*; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989; [page678] *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Siemens v. Manitoba (Attorney General)*, [2003] 1 S.C.R. 6, 2003 SCC 3; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15; *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203.

By LeBel J.

Referred to: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214.

By Fish J. (dissenting)

Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627; *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94; *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*), (*d*), 3, 15, 27.

Local Authorities Election Act, R.S.A. 2000, c. L-21, ss. 21, 22.

School Act, R.S.A. 2000, c. S-3.

School Trustee Statutes Amendment Act, 2002, S.A. 2002, c. 23, s. 1(2).

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[page679]

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (Picard, Costigan and Ritter JJ.A.) (2006), 57 Alta. L.R. (4th) 205, 384 A.R. 237, 367 W.A.C. 237, 269 D.L.R. (4th) 241, [2006] 8 W.W.R. 33, [2006] A.J. No. 447 (QL), 2006 ABCA 137, allowing an appeal and dismissing a cross-appeal from a judgment of Sulyma J. (2004), 38 Alta. L.R. (4th) 303, 369 A.R. 159, 123 C.R.R. (2d) 215, [2005] 7 W.W.R. 68, [2004] A.J. No. 1003 (QL), 2004 ABQB 669. Appeal dismissed, Fish J. dissenting.

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The judgment of McLachlin C.J. and Binnie, Deschamps, Charron and Rothstein JJ. was delivered by

ROTHSTEIN J.

I. Introduction

1 This case concerns whether legislation that limits the ability of school employees to run for [page680] election and serve as school trustees in Alberta is constitutional.

2 I agree with the conclusion reached by the Alberta Court of Appeal. The legislation does not infringe s. 2(*b*) or 15 of the *Canadian Charter of Rights and Freedoms*. Therefore I would dismiss the appeal.

II. Factual Background

3 The *Local Authorities Election Act*, R.S.A. 2000, c. L-21 ("LAEA"), governs the proceedings for election to municipal councils and school boards in Alberta. The LAEA sets out the qualifications required to be a candidate for school trustee. A person may be nominated as a candidate if he or she is eligible to vote, meets certain residency requirements, and is not otherwise ineligible (s. 21).

4 Ineligibility to be nominated as a candidate is dealt with in s. 22 of the LAEA. Prior to the amendments at issue in this appeal, it restricted school employees from running for election as a school trustee only in the jurisdiction in which they were employed ("own-employer restriction"). Any public school employees who wished to seek election to their employing school board were required to take a leave of absence and were deemed to have resigned if elected (ss. 22(1)(b) and 22(9)). There was no requirement to take a leave of absence or to resign if a school employee was elected as a school trustee to any other school board.

5 In 2004, Alberta legislated to expand the "own-employer" restriction into a province-wide restriction on school employees serving as school trustees. The *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23

("LAEA Amendments"), amended the LAEA by adding a provision stating that, unless on a leave of absence, a person is not eligible to be nominated as a candidate for election as a trustee of *any* school board if that person is employed by *any* school district or division, charter school, or private school in Alberta. If a school employee is ultimately elected as a school trustee, [page681] s. 22(9) of the LAEA is engaged, which deems the school employee to have resigned his or her position of employment in order to carry out the role of school trustee. There is therefore a deemed resignation even when a school employee is elected to a school board which is not his or her employer.

6 The appellants Baier, Ollenberger and McNiff are teachers who, at the time the LAEA Amendments were passed, were serving as school trustees on school boards that did not employ them. The appellant Keith is a teacher who intended to seek election to a school board. The parties agree that "average school trustee remuneration in 2002-2003 was approximately $12,677". According to the chambers judge, in 2004 the appellants Baier, Ollenberger and McNiff had annual salaries as teachers of $71,536.68, $83,626.80 and $69,165.96 respectively.

7 The appellants sought to have the LAEA Amendments declared unconstitutional as violating ss. 2(*b*) and 15(1) of the *Charter*. At the hearing of the appeal in this Court, the appellants conceded the constitutionality of the prior legislation, which prohibited school employees from serving as trustees solely on their own employer boards. It is the blanket restriction from sitting on any school board in the province that they challenge.

8 The chambers judge, Sulyma J. granted an order that the LAEA Amendments were contrary to s. 2(*b*) of the *Charter* and were not justified under s. 1. At the Alberta Court of Appeal, Alberta's appeal was allowed.

III. Relevant Statutory Provisions

9 The relevant statutory provisions are set out in the Appendix. The main provision that the appellants challenge in this appeal is s. 1(2)(a) of the [page682] LAEA Amendments, which amends the LAEA in order to restrict school employees from sitting on any school board in Alberta. This amendment adds to s. 22 of the LAEA the following:

> **22** ...
>
> (1.1) A person is not eligible to be nominated as a candidate for election as a trustee of a school board if on nomination day the person is employed by
>
> (a) a school district or division,
>
> (b) a charter school, or
>
> (c) a private school,
>
> in Alberta unless the person is on a leave of absence granted under this section.

Under the amendments, a school employee may request a leave of absence in order to be a candidate for school trustee and his or her employer must grant that leave of absence (LAEA, ss. 22(5.1) and 22(6.1)). Should the employee not be elected he or she may return to work (LAEA, s. 22(8)). If the employee is elected he or she will be deemed to have resigned as a school employee (LAEA, s. 22(9)).

10 The appellants also challenge s. 1(2)(b) of the LAEA Amendments, which provides that the prior more limited ineligibility provision, the "own-employer restriction", no longer applies to school trustee elections.

11 Section 2(*b*) of the *Charter* provides:

> **2.** Everyone has the following fundamental freedoms:
>
> ...

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

12 Section 15(1) of the *Charter* provides:

> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal [page683] benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

IV. Issues

13 On August 17, 2006, the Chief Justice stated the following constitutional questions:

1. Do ss. 1(2)(a) and 1(2)(b) of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
3. Do ss. 1(2)(a) and 1(2)(b) of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?
4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Judgments Below

A. *Court of Queen's Bench of Alberta* (2004), 38 Alta. L.R. (4th) 303, 2004 ABQB 669

14 Sulyma J. held that running for office is an activity which conveys or attempts to convey meaning and therefore falls within the scope of the s. 2(*b*) guarantee. She held that the purpose of the amendments did not infringe s. 2(*b*) since the legislation was meant to protect the democratic process by ensuring the business of school boards can be carried on without concerns about conflicts of interest. However, with respect to the effects, Sulyma J. found that given the significant disparity between a teacher's salary and trustee remuneration, forcing teachers to resign from their employment for the duration of their term as trustees rendered [page684] illusory any opportunity for teachers to run for office as school trustee under the LAEA Amendments. Unless they gave up teaching, they would be forced to live on the remuneration paid to school trustees, and this was so onerous as to result in a violation of the s. 2(*b*) guarantee.

15 Sulyma J. concluded that the LAEA Amendments could not be saved by s. 1 of the *Charter*. She did not rule on the *Charter* s. 15 claim.

B. *Court of Appeal of Alberta* (2006), 57 Alta. L.R. (4th) 205, 2006 ABCA 137

16 Alberta appealed Sulyma J.'s findings with respect to s. 2(*b*). The appellants cross-appealed alleging an infringement of s. 15(1).

17 Costigan J.A., for the court, considered whether seeking election to a school board is a fundamental freedom protected by s. 2(*b*) or whether it is a statutory platform for expression. He found that whether to have school board elections and, if so, who can run in those elections, was purely a matter of legislative policy governed by the LAEA Amendments. The appellants' claim of underinclusion was therefore grounded in a statutory regime and not in a fundamental *Charter* freedom. Their exclusion under the LAEA Amendments did not interfere with a fundamental freedom or with the exercise of a constitutional right, and this was not an exceptional case in which the context mandated positive government action under s. 2(*b*). Therefore, he found that the LAEA Amendments did not infringe s. 2(*b*) of the *Charter*.

18 Examining whether the LAEA Amendments infringed s. 15(1) of the *Charter*, Costigan J.A. relied on the test established in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. [page685] He held that the LAEA Amendments "draw a formal distinction between the respondents as school board employees and other Albertans on the basis of the personal characteristic of employment status" (para. 49). However, he found that the appellants' "occupational status is not an analogous ground" (para. 56). Moreover, he held that a distinction on the basis of the teaching occupation does not bring into play prejudice, stereotyping or historical disadvantage, and exclusion from seeking election to a school board did not affect the appellants' dignity. Therefore, the distinction was not discriminatory and there was no infringement of s. 15(1). He allowed the appeal and dismissed the cross-appeal.

VI. Analysis

Freedom of Expression

19 In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, a two-part analysis was established for determining whether a violation of freedom of expression has occurred. The first step asks whether the activity is within the protected sphere of free expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. Once it is established that the activity is protected, the second step asks if the impugned legislation infringes that protection, either in purpose or effect. This analysis has been used in many subsequent cases (e.g. *R. v. Zundel*, *[1992] 2 S.C.R. 731*; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083).

20 While the *Irwin Toy* test defined the scope of freedom of expression broadly, in subsequent cases this Court has clarified that s. 2(*b*) protection is not without limits and that governments should not be required to justify every exclusion or regulation [page686] of expression under s. 1 (*Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at para. 79). In *City of Montréal*, McLachlin C.J. and Deschamps J., for the majority, found that the *method* or *location* of expression may remove it from s. 2(*b*) protection (paras. 56 and 60). For example, with respect to the *method* of expression, s. 2(*b*) does not protect violent expression (*Irwin Toy*, at pp. 969-70), and with respect to *location*, expression on public property may in some circumstances remain outside the protected sphere of s. 2(*b*) (*City of Montréal*, at para. 79). In addition, the Court has held that s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 26).

21 In *Haig*, this Court considered whether freedom of expression includes a positive right to be provided with a specific means of expression. L'Heureux-Dubé J. for the majority, noted that freedom of expression has typically been conceptualized in terms of negative rights rather than positive entitlements:

> The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones. [p. 1035]

22 That case arose in the context of federal and Quebec referenda concerning proposed constitutional amendments in 1992. Mr. Haig had moved from Ontario to Quebec and was unable to vote in either the federal or Quebec referendum because of different residency requirements in the federal and provincial legislation. He challenged the federal legislation as violating his freedom of expression. The majority held that the right to vote in the referendum was governed by the *Referendum Act*, S.C. 1992, c. 30, and s. 2(*b*) did not require the government to extend that right to all. L'Heureux-Dubé J. stated:

[page687]

> The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(*b*) of

> the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [Emphasis added; p. 1041.]

23 The statutory platform analysis in *Haig* has been followed in a number of subsequent cases which have held that underinclusive legislative schemes or government action did not infringe s. 2. In *Native Women's Assn. of Canada v. Canada*, *[1994] 3 S.C.R. 627* ("*NWAC*"), the Native Women's Association of Canada alleged that the government's funding of some Aboriginal organizations, along with the opportunity to participate in constitutional discussions, required the government to bestow upon the Association an equal chance for expression of its views, and funding to enable it to do so. The Court determined that there was no positive duty on the government to provide funding to the Association in the circumstances. Sopinka J., for the majority, stated:

> [I]t cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view. [p. 656]

an d The freedom of expression guaranteed by s. 2(*b*) of the *Charter* does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. [p. 663]

24 In *Siemens v. Manitoba (Attorney General)*, *[2003] 1 S.C.R. 6*, *2003 SCC 3*, the Court considered [page688] legislation, the *Gaming Control Local Option (VLT) Act*, S.M. 1999, c. 44, enabling municipalities to hold binding plebiscites on prohibiting video lottery terminals ("VLTs"). The legislation also deemed a previous non-binding plebiscite in the Town of Winkler, in which the residents had voted to prohibit VLTs, to be binding. The appellants, owners of the Winkler Inn who relied on VLTs for revenue, claimed that the effect of the "deemed vote" was to deny them the right to vote in a plebiscite under the Act, and therefore violated their freedom of expression. Following *Haig*, the Court held there was no breach of s. 2(*b*). A municipal plebiscite, like a referendum, was a creation of legislation, and any right to vote in it must be found within the language of that legislation.

25 The statutory platform analysis in *Haig* has also been applied in cases raising claims under *Charter* s. 2(*d*) freedom of association. In *Delisle*, the Court considered whether underinclusive labour legislation offended s. 2(*d*) or 2(*b*). Bastarache J., for the majority, found that neither s. 2(*d*) or 2(*b*) required that RCMP officers be included in a statutory labour regime. He made clear that underinclusive legislation would generally not offend s. 2:

> The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground (on this issue, see *Schachter v. Canada*, *[1992] 2 S.C.R. 679*), is because this is contemplated in the wording itself of s. 15. ... However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of [page689] the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard. [para. 25]

Citing Dickson J.'s definition of "freedom" as "the absence of coercion or constraint" (*R. v. Big M Drug Mart Ltd.*,

[1985] 1 S.C.R. 295, at p. 336), Bastarache J. went on to state at para. 26:

> It is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance.

As Bastarache J. stated at para. 27 of *Delisle*, except in exceptional circumstances, ss. 2(*d*) and 2(*b*) require only that Parliament not interfere with these fundamental freedoms.

26 While *Haig, NWAC, Siemens* and *Delisle*, found s. 2 was not offended by underinclusive legislation or underinclusive government action and that there was no right to a particular platform for expression, the Court left open the possibility that, in exceptional cases, positive action by government may be called for under s. 2. In *Haig*, for example, L'Heureux-Dubé J. left the door open to positive government action being required in some cases. At p. 1039, she stated:

> ... a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

27 In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, a majority of the Court found such an exception to the general rule that s. 2 does not require positive government action. Labour legislation excluding agricultural workers from a protective regime was found to infringe s. 2(*d*). Bastarache J., for the majority, [page690] considered the factors relevant to establishing an exception:

(1) Claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime (para. 24).

(2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under s. 2 (para. 25), or that the purpose of the exclusion was to infringe such activity (paras. 31-33). The exercise of a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms (para. 25).

(3) The state must be accountable for the inability to exercise the fundamental freedom: "[U]nderinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms" (para. 26).

28 In *Dunmore*, these factors were met. The appellant agricultural workers sought protection for the freedom to establish and maintain an employee association. They were substantially incapable of exercising their fundamental freedom to organize without protective legislation. Furthermore, their exclusion from the legislative regime "function[ed] not simply to permit private interference with their fundamental freedoms, but to substantially reinforce such interferences" (para. 35). Agricultural workers were distinguished from the RCMP officers in *Delisle* because RCMP officers were capable of associating despite exclusion from a protective regime. Unlike agricultural workers, for RCMP officers, inclusion in a statutory regime would serve to enhance rather than safeguard their exercise of a fundamental freedom.

[page691]

29 While *Dunmore* concerned freedom of association rather than freedom of expression, the three factors for challenging underinclusive legislation were described as applicable to s. 2 in general. As Bastarache J. noted, *Haig, NWAC* and *Delisle* circumscribed, but did not foreclose, the possibility of challenging underinclusion under s. 2 of the *Charter*. Thus, *Dunmore* makes clear that while claims of underinclusion may raise concerns under *Charter* s. 15 equality rights, in certain cases, underinclusion may offend s. 2 itself.

30 In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*), a court must proceed in the following way. First, it must consider whether the activity for which the claimant seeks s. 2(*b*) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(*b*) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(*b*); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(*b*) claim will fail. If the three factors are satisfied then s. 2(*b*) has been infringed and the analysis will shift to s. 1.

[page692]

VII. Application to the Case

Question 1

> Do ss. 1(2)(a) and 1(2)(b) of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

A. *Expressive Activity*

31 The threshold to any s. 2(*b*) claim must be that there is expression involved. The appellants claim that "[s]tanding for election to the office of school trustee and serving as a school trustee" are expressive activities, the restriction of which they claim violates s. 2(*b*) (appellants' factum, at para. 27). These activities, they argue, represent "unique and important opportunities to engage in political debate, persuasion and voting on the governance, funding and management of the public and separate education systems" (*ibid*.). The respondent concedes that seeking nomination for school trustee and some of the activities of school trustees may be characterized as having an expressive nature (respondent's factum, at paras. 1 and 18).

32 It might be said that the expressive nature of school trusteeship is merely incidental, and that school boards are primarily concerned with school management rather than expression. However, there is nothing that requires that the activity in question be purely or predominantly expression to count as expression for s. 2(*b*) purposes (see e.g. *RWDSU v. Dolphin Delivery Ltd.*, [*[1986] 2 S.C.R. 573*], at p. 588).

33 The LAEA Amendments only restrict who has access to the platform of school trusteeship for expressive activity. They do not constrain the expressive activities of those with access to the platform, i.e. those not ineligible to be school trustees. I interpret the appellants' complaint as "I do not have access to school trusteeship to express myself" rather than, "as a school trustee I cannot express a particular view". Expressive activity is in [page693] issue, although what is restricted is the platform on which that expression may take place rather than the content of the expression. I find that the expressive aspects of school trustee candidacy and school trusteeship are sufficient to continue consideration of whether s. 2(*b*) is violated.

B. *Is a Positive Right Claimed?*

34 Having decided that expression is involved, it must next be determined whether that expression is protected under s. 2(*b*). As previously observed, s. 2(*b*) is not without limits and not every expressive activity is accorded constitutional protection. Alberta submits that the appellants are claiming a positive right, because the activities at issue exist only by virtue of the school board system set up under the *School Act*, [*R.S.A. 2000, c. S-3*], and the trustee election provisions in the LAEA. The appellants claim that they are not seeking a positive right but simply wish to preserve the legislative *status quo ante* in existence since from at least 1961 until the LAEA Amendments

were enacted. They ask for the Court's assistance in respect of what they claim is their negative right to be free from a newly imposed government restraint on their freedom of expression, not in respect of a positive right to a particular platform or benefit to which they previously had no access.

35 To determine whether a right claimed is a positive right, the question is whether the appellants claim the government must legislate or otherwise act to support or enable an expressive activity. Making the case for a negative right would require the appellants to seek freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage, without any need for any government support or enablement.

[page694]

36 The appellants in this case make a claim for the government to legislate to enable expressive activity. Their claim is thus a positive one. The appellants seek access to the statutory platform of school trustee candidacy and school trusteeship. The fact that the appellants had access to this statutory platform prior to the LAEA Amendments cannot convert their claim into a negative one. There is no meaningful distinction in this case between a hypothetical situation where the government for the first time provides for elected school boards with provisions to disqualify school employees from running and serving as trustees, and the present situation where pre-existing legislation has been amended to that end. To hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*) and justifying such changes under s. 1.

37 In *Dunmore*, the statutory platform at issue had previously been extended to the claimants and had been withdrawn by amending legislation. The Court in that case nonetheless concluded that the claim presented was one of positive entitlement. The same is true in this case. The appellants had previously been included in the statutory scheme in question. The LAEA Amendments excluded them. They now seek inclusion in an underinclusive statutory scheme, the hallmark of a positive rights claim.

38 The appellants are asking this Court in effect to constitutionalize the prior regime. Although school boards play an important role in educational governance by carrying out the mandatory and discretionary duties prescribed to them in Alberta by the *School Act*, they are creatures of the provincial government, and their existence is not constitutionally protected. As this Court held in *Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, [2001] 1 S.C.R. 470, 2001 SCC 15, at paras. 57-58:

[page695]

> Subject to s. 93, public school boards as an institution have no constitutional status.
>
> Campbell J. correctly stated the law in this regard in *Ontario Public School Boards' Assn.*, *supra*, at p. 361:
>
> > Municipal governments and special purpose municipal institutions such as school boards are creatures of the provincial government. Subject to the constitutional limits in s. 93 of the *Constitution Act, 1867* these institutions have no constitutional status or independent autonomy and the province has absolute and unfettered legal power to do with them as it wills.
>
> See also *Alberta Public Schools, supra*, at paras. 33 and 34.

39 Voting and candidacy rights are explicitly protected in s. 3 of the *Charter* but only in relation to the House of Commons and provincial legislatures. The intervener Public School Boards' Association of Alberta submits that school boards as institutions of local government have constitutional status in the "conventional or quasi-constitutional sense". However, it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so.

40 The appellants argued that s. 2(*b*) engages the interest of the receiver as well as the sender of expression and that the LAEA Amendments deprive the receiver of the right to decide to hear school employees' messages, and to

decide that a particular school employee is or is not the best candidate to serve as trustee. While it may be true that s. 2(*b*) generally includes a right to receive as well as broadcast expression (see e.g. *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, at para. 26), just as there is no s. 2(*b*) right of access to statutory platforms, there is no s. 2(*b*) right to receive expression through a particular statutory platform.

[page696]

41 The appellants argue that s. 2(*b*) would be very limited if it applied only to areas unregulated by statute. However, the distinction between positive and negative rights does not rest on whether expression or activity is unregulated by statute, but rather on whether what is sought is positive government legislation or action as opposed to freedom from government restrictions on activity in which people could otherwise freely engage without government enablement. For example, *Libman* involved a successful challenge of legislation that regulated referendum campaign expenditures by providing that only the agents of official "Yes" or "No" committees were permitted to incur or authorize certain expenditures. Those not part of the official committees were thus unable to make expenditures to, for example, publicize their point of view on the referendum. The Court held that their fundamental freedom of expression to incur expenditures in promoting their views was infringed. The activity, incurring expenditures to promote views on the referendum, was regulated by statute, but the claim was a negative one, to be free from statutory restrictions on incurring such expenditures. Thus, the fact that a matter is regulated by statute is not what limits s. 2(*b*) protection. What is limited is a right to a platform under the statute.

42 The appellants submit that their claim should have been considered under the *Irwin Toy* test and that the Court of Appeal wrongly applied *Haig* to their case. They argue that the Court of Appeal's approach would allow Alberta to enact legislation forbidding school trustees from criticizing government underfunding of schools. However, challengers to such a law would not be seeking access to a statutory platform. They would be seeking freedom from a constraint placed upon their expression, a typically negative right. Their prior ability to criticize government underfunding would be by virtue, not of their school trusteeship, but their underlying freedom of expression. Their complaint [page697] would not be that the legislation is underinclusive and thus would not be considered under the *Haig* line of authority. The case at bar is different. The Court of Appeal was correct in looking to the line of authority based on *Haig* when what was sought was access to a statutory platform.

C. *Are the Dunmore Factors Met Here?*

43 Having determined that the appellants are making a positive claim that the government legislate their inclusion into the platform of school trusteeship, the question is whether their claim meets the grounds for an exception to the general rule that s. 2(*b*) only protects from government interference. This involves a consideration of the three factors identified by Bastarache J. in *Dunmore* as stated above.

44 First, claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime. In this case, the appellants assert the right to run for election and to serve as school trustees. The appellants argue that the unique role of a school trustee means that when a teacher seeks to be able to run as a school trustee it is a fundamental freedom. However, claiming a unique role is not the same as claiming a fundamental freedom. The appellants' claim, as they have articulated it, is grounded in access to the particular statutory regime of school trusteeship. As such it would not meet the first of the *Dunmore* criteria.

45 Even if the appellants could meet the first *Dunmore* factor, they would fail at the second. Under the second *Dunmore* criterion, the claimant must demonstrate that exclusion from a statutory [page698] regime has the effect of a substantial interference with activity protected under s. 2. The question is whether the LAEA Amendments substantially interfere with the appellants' freedom to express themselves on matters related to the education system.

46 I agree with Sulyma J., the chambers judge, that the effect of the LAEA Amendments will in many cases amount to school employees being practically excluded from school trusteeship. School employees may be unable to afford

to resign from their posts in order to serve as trustees. However, the question remaining is whether this exclusion substantially interferes not with *being* a trustee, but with *expression* on matters related to the education system.

47 The appellants submit that there are no "alternatives" to the forms of expression they would enjoy by standing for election to the office of school trustee and serving in that role. Alberta claims that every school employee remains free to express him or herself in relation to school board operations in a myriad of other ways. Such persons, it submits, can participate and make presentations at school board meetings, lobby trustees, sit on school councils, write letters to newspapers, give media interviews, and write to MLAs and other public officials.

48 In my view, the appellants have not established that their practical exclusion from school trusteeship substantially interferes with their ability to express themselves on matters relating to the education system. The LAEA Amendments may deprive them of one particular means of expression, but it has not been demonstrated that absent inclusion in this statutory scheme, they are unable to express themselves on education issues. As Bastarache J. noted in *Delisle* at para. 41, diminished effectiveness in the conveyance of a message does not mean that s. 2(*b*) is violated. There must be substantial interference with the fundamental freedom. School employees may express themselves in many ways [page699] other than through running for election as, and serving as, a school trustee.

49 While the chambers judge mentioned the "uniqueness" of running for election and trusteeship as a form of expression and that the LAEA Amendments "drastically impair" freedom of expression, this was in the context of her s. 1 analysis (paras. 155 and 157). Having found, in error, that school trusteeship and candidacy were protected expression, her findings on the "uniqueness" of trusteeship were in respect of whether that specific form of expression was minimally impaired. However, the analysis under the second *Dunmore* factor involves a different question. The inquiry is whether *freedom of expression on educational matters*, as a more generally defined fundamental freedom under s. 2(*b*), is substantially interfered with by exclusion from school trusteeship. As stated above, the appellants' ability to be a candidate and serve as a school trustee *is* significantly impaired by the legislation. But school trusteeship in itself is not a protected freedom.

50 In their factum in this Court, the appellants made brief reference to the purpose of the legislation as infringing s. 2(*b*): "Alberta's purpose was to restrain the Appellants' expressive activities" (para. 60). If it were shown that the purpose of any legislation was to substantially interfere with the exercise of freedom of expression, and not merely a purpose of excluding a group from a particular statutory regime, that legislation might violate s. 2(*b*). As Dickson J. for the majority in *Big M Drug Mart* stated, at p. 334, effects can never be relied on to save legislation with an invalid purpose.

[page700]

51 However, the appellants did not support their claim of improper purpose with reference to specific evidence. Elsewhere in their factum they allege that conflict of interest, Alberta's asserted purpose for the legislation, was "simply the 'straw man' to excuse the draconian provisions of the [LAEA Amendments]" (para. 7). In that context they say that the amendments were introduced "hard on the heels of a series of strikes by teachers ... and a government back-to-work order" that was struck down by the Court of Queen's Bench (para. 8).

52 On the other hand, as indicated, Alberta submits that the purpose of the amendments was avoidance of conflict of interest. Alberta referred to occasions on which the appellants, Ollenberger, McNiff and Baier recused themselves from discussions and voting on collective agreements and salary negotiations.

53 The chambers judge found "the purpose of the *LAEA* Amendments ... does not infringe s. 2(b) as the legislation is meant to protect the democratic process by ensuring the business of school boards can be carried on without concerns about conflicts of interest" (para. 79). The party alleging improper purpose has the onus of demonstrating that to be true (*Delisle*, at para. 76, *per* Cory and Iacobucci JJ.). If there is a connection between the strike, the back to work order and the purpose of the legislation, it is, without more, attenuated. On this basis, I would not interfere with the findings of the chambers judge on this point.

54 The appellants have not met the evidentiary burden of demonstrating that exclusion from the statutory regime permits a substantial interference with their freedom of expression on school board issues or education generally. Rather they seek a particular channel of expression. Nor have the appellants proved that the purpose of the LAEA Amendments was to infringe their freedom of expression. Therefore, their claim does not meet [page701] the second *Dunmore* factor. Because the appellants have not established a substantial interference with their ability to exercise their freedom of expression, it is unnecessary to consider the third *Dunmore* factor.

55 In finding against the appellants here, I leave open the possibility that there may be exceptional situations where exclusion from a statutory platform interferes substantially with fundamental freedom of expression and meets the *Dunmore* criteria. While s. 2(*b*) does not give a right to a specific statutory platform, so that restricting access to such a platform will not generally offend s. 2(*b*), and while *Dunmore* itself was decided under s. 2(*d*) rather than s. 2(*b*), there may be exceptional cases where exclusion from a platform so substantially interferes with freedom of expression that it may infringe s. 2(*b*). However, the case at bar is not such a case.

D. *Interrelationship of Charter Rights*

56 LeBel J. characterizes the appellants' claim as the "right to take part in the management of Alberta's local education systems", although he concedes that "significant aspects of the role of a school trustee involve ... expressive activities [which] belong in large part to the class of political expression" (para. 75). Despite this, he argues that freedom of expression is not engaged where the activity is "running for office and serving as a trustee on a school board" because what is fundamentally being claimed is a democratic right not protected by the *Charter*. I understand his idea to be that because the democratic rights enshrined in s. 3 of the *Charter* extend only to Parliamentary and legislative elections, the *Charter* does not protect the right to participate in other elections.

[page702]

57 I agree with LeBel J. that the appellants' claim could be characterized as a claim for a democratic right. However, it does not follow that s. 2(*b*) is not engaged. In *Haig*, the right to vote in a referendum was held not to be protected under s. 3. Notwithstanding the unsuccessful s. 3 claim, voting was held to be a form of expression (at p. 1040) and the claim was considered under s. 2(*b*). This approach was followed in *Siemens*, a unanimous decision of this Court (para. 41). Under LeBel J.'s approach, the Court would have held in each of these cases that at its foundation, the claim was for a democratic right which the *Charter* did not protect. Thus, the expressive aspects of voting would have been irrelevant and there would have been no consideration under s. 2(*b*).

58 As LeBel J. concedes, *Charter* rights overlap and cannot be pigeonholed. The interrelationship between the *Charter*'s various rights and freedoms is a long-standing principle that informs *Charter* analysis. As the Court noted in *R. v. Lyons*, [*[1987] 2 S.C.R. 309*], at p. 326:

> Before entering into a detailed discussion of the issues, it may be useful to note that this case exemplifies the rather obvious point that the rights and freedoms protected by the *Charter* are not insular and discrete... . Rather, the *Charter* protects a complex of interacting values, each more or less fundamental to the free and democratic society that is Canada (*R. v. Oakes*, [*[1986] 1 S.C.R. 103*], at p. 136), and the particularization of rights and freedoms contained in the *Charter* thus represents a somewhat artificial, if necessary and intrinsically worthwhile attempt to structure and focus the judicial exposition of such rights and freedoms. The necessity of structuring the discussion should not, however, lead us to overlook the importance of appreciating the manner in which the amplification of the content of each enunciated right and freedom imbues and informs our understanding of the value structure sought to be protected by the *Charter* as a whole and, in particular, of the content of the other specific rights and freedoms it embodies.

[page703]

Accordingly, the scope of one *Charter* right does not circumscribe the scope of another. As La Forest J., writing for himself, Sopinka and Gonthier JJ., articulated in *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 320:

> [A] person is not deprived of protection under a provision of the *Charter* merely because protection may also be derived under another. The rights overlap in defining Canadian society, and I see no reason for depriving a litigant of success because he has chosen one provision that legitimately appears to cover the matter of which he or she complains, rather than another. That would often be the effect if the individual rights and freedoms were construed as discrete rather than overlapping.

59 The right to run for elected office is a right protected by s. 3 in the case of legislatures and Parliament. However, s. 3 does not "occupy the field" just because the right claimed in this case involves standing for election. Where both ss. 3 and 2(*b*) are implicated, *each* right must be given effect: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 80, *per* Bastarache J. A finding that s. 3 does not apply does not foreclose consideration of a claim under s. 2(*b*). LeBel J.'s approach strays from the long-standing recognition of the overlapping relationship of various *Charter* rights by using s. 3 to read down the scope of s. 2(*b*) of the *Charter*.

60 Nevertheless, for the reasons I have given, I would not find a s. 2(*b*) violation in this case. The consistent approach of this Court has been to characterize a claim such as the appellants' as a claim to a platform for expression, which engages s. 2(*b*). The platform approach strikes an appropriate balance by maintaining this Court's traditional broad approach to freedom of expression, without constitutionalizing a positive obligation on governments to provide platforms of expression except in unusual [page704] circumstances. I have found that such unusual circumstances are not present in the appellants' case.

E. *Conclusion on Section 2(b)*

61 The appellants' claim is one of access to a statutory platform . It does not meet the criteria set out in *Dunmore* to warrant an exception to the general rule that freedom of expression under s. 2(*b*) of the *Charter* does not grant the right to a statutorily created platform for expression. The appellants' s. 2(*b*) claim must therefore be dismissed.

Question 2

> If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

62 As s. 2(*b*) is not infringed, there is no need to consider s. 1.

Question 3

> Do ss. 1(2)(a) and 1(2)(b) of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, infringe s. 15 of the *Canadian Charter of Rights and Freedoms*?

63 The appellants submit that the LAEA Amendments violate s. 15(1) of the *Charter* by infringing their right to the equal protection and equal benefit of the law without discrimination on the alleged analogous ground of occupational status. There is no need to describe here the steps in a s. 15(1) analysis, which were elaborated by Iacobucci J. in *Law v. Canada (Minister of Employment and Immigration)*, at paras. 21-87, and summarized at para. 88, and have been reiterated in many cases since. Applying this approach, I find that there is differential treatment of school employees under the LAEA Amendments, as compared with the comparator group identified by the appellants, which consists of municipal employees. However, this differential treatment is not based on an enumerated or analogous ground.

[page705]

64 In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *[1999] 2 S.C.R. 203*, at para. 13, McLachlin J. (as she then was) and Bastarache J. for the majority discussed how to identify analogous grounds:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity... . Other factors identified in the cases as associated with the enumerated and analogous grounds, like the fact that the decision adversely impacts on a discrete and insular minority or a group that has been historically discriminated against, may be seen to flow from the central concept of immutable or constructively immutable personal characteristics, which too often have served as illegitimate and demeaning proxies for merit-based decision making.

They also stated at para. 8 that analogous grounds "stand as constant markers of suspect decision making or potential discrimination".

65 I cannot find any basis for identifying occupational status as an analogous ground on the evidence presented in this case. Neither the occupational status of school employees nor that of teachers have been shown to be immutable or constructively immutable characteristics. School employees cannot be characterized as a discrete and insular minority. The appellants have not established that the occupational status of school employees is a constant marker of suspect decision making or potential discrimination.

66 In *Delisle*, Bastarache J. for the majority, at para. 44, held:

[page706]

> ... the appellant has not established that the professional status or employment of RCMP members are analogous grounds. It is not a matter of functionally immutable characteristics in a context of labour market flexibility. A distinction based on employment does not identify, here, "a type of decision making that is suspect because it often leads to discrimination and denial of substantive equality" (*Corbiere*, at para. 8), in view in particular of the status of police officers in society.

It has not been demonstrated that this reasoning with respect to RCMP officers should not apply to teachers and other school employees.

67 I agree with Costigan J.A. for the Court of Appeal that the appellants have failed to establish that the LAEA Amendments infringe s. 15(1).

Question 4

> If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

68 As s. 15 is not infringed, there is no need to consider s. 1.

VIII. Conclusion

69 The appeal should be dismissed with costs.

The reasons of Bastarache, LeBel and Abella JJ. were delivered by

LeBEL J.

70 I have read the reasons of my colleagues Rothstein and Fish JJ. While I agree with Rothstein J. that this appeal must be dismissed, I reach this conclusion for different reasons. With respect, I cannot agree that this case engages the protection of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and in my view, the appellants' claim must therefore fail.

71 I need not summarize the facts of this case or details of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23 ("LAEA Amendments"), [page707] and the legislative scheme at issue in this appeal. They have been discussed thoroughly in my colleagues' comprehensive reasons.

72 As I see it, the appellants claim a right to participate in a political and managerial function in a democratically elected public body, namely a school board. The question that must be asked is whether the constitutional guarantee of freedom of expression protects a right to run for office as a school trustee and, if elected, to take part in the management of the school board. In my view it does not, despite the undeniable breadth of the guaranteed freedom. It should be noted that no right is asserted under s. 3 of the *Charter.*

73 This Court has adopted and employed a very expansive definition of expression. In the seminal case on freedom of expression, *Irwin Toy Ltd. v. Quebec (Attorney General)*, *[1989] 1 S.C.R. 927*, at p. 968, the majority of the Court explained that "[a]ctivity is expressive if it attempts to convey meaning". That meaning is the content of expression, and s. 2(*b*) protects expressive activities from government-imposed restrictions on content. The protection provided by the s. 2(*b*) guarantee is based on communication. There must be a communicative purpose for an act to qualify as protected expression: P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 40-8.

74 In *R. v. Keegstra*, *[1990] 3 S.C.R. 697*, the majority of this Court rejected an approach under which the scope of s. 2(*b*) would be narrowed to accommodate the exercise of another *Charter* right (see also *B.C.G.E.U. v. British Columbia (Attorney General)*, *[1988] 2 S.C.R. 214*, *per* Dickson C.J.). *Keegstra* concerned hate speech, which can be considered "pure expression" despite its nature and low value. Any attempt to restrict the scope of s. 2(*b*) in that case would have improperly targeted [page708] the content of expression. It was therefore more appropriate to balance s. 2(*b*) against the guarantee of equality (s. 15) and the recognition of multiculturalism (s. 27) at the s. 1 stage.

75 The situation in the case at bar is different. The activities at issue are running for office and serving as a trustee on a school board. No doubt some significant aspects of the role of a school trustee involve the communication of ideas about education and the operation of schools. However, that content of expression is not affected by the LAEA Amendments. At its foundation, the appellants' claim concerns a democratic right that the *Charter* does not protect. These expressive activities belong in large part to the class of political expression that this Court has held to be deserving of the highest protection. But political expression is not at issue in the present appeal. The LAEA Amendments' ban on school employees running for office and serving as school trustees does not prevent them from expressing views on any subject, let alone education. What they are being deprived of is not freedom of expression but a claimed right to take part in the management of Alberta's local education systems. In my view, that is not what is contemplated by freedom of expression.

76 Nearly everything people do creates opportunities for expression if "expression" is viewed expansively enough. Other *Charter* rights and freedoms concern activities that could be characterized as expressive. At some point, one must question whether the guarantee of freedom of expression should be viewed so broadly that every human activity with a communicative content might be swept under it. The recourse to the notion of "platforms of

expression" and the reliance on the sometimes delicate distinction between positive and negative rights evidence the concerns arising from such a broad definition of freedom of expression and application of s. 2(*b*) of the *Charter.*

[page709]

77 Courts should neither hope nor seek to pigeonhole *Charter* rights, which are usually broad and often overlapping. Nevertheless, they are not formless and boundless. Each of them has a part to play within the broad framework of the *Charter.* In the end, it is necessary to determine what the claim is actually about and whether the asserted right is applicable to it. Viewed realistically, the purpose of the claim in the instant case is to secure constitutional protection for a right to be elected to a management role in the local education system of the province of Alberta, but this falls outside the scope of the *Charter* unless the equality rights of s. 15 are engaged. On this last point, I agree that the appellants have not made out their claim of a breach of equality rights in the circumstances of this case.

78 For these reasons, I would dismiss the appeal without costs.

The following are the reasons delivered by

FISH J. (dissenting)

I

79 This case concerns political expression and the issue is whether its deliberate suppression by Alberta violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. With respect for those who see the matter differently, I believe that it does.

80 Section 2(*b*) of the *Charter* provides that everyone in Canada enjoys, as a fundamental freedom, "freedom of thought, belief, opinion and expression".

81 In 2004, Alberta enacted legislation effectively prohibiting school employees from seeking election and holding office as trustees of any school board in the province. The appellants are school employees and Alberta acknowledges that "some of the [page710] activities of school trustees [are of] an expressive nature". There is no dispute that seeking election to a school board and holding office as a school trustee necessarily involve expressive activities.

82 Indeed, Alberta concedes from the outset that "seeking nomination for school trustee has expressive content" and rests its case, essentially, on the proposition that "freedom of expression under the *Charter* does not require government to create statutory platforms for expression". Here, however, the government has *removed* the appellants from an *existing* platform of expression to which, like other qualified members of the public, they have long had access.

83 This was done, Alberta says, "for reasons of policy". But if the appellants' removal from that platform substantially impedes their freedom of expression -- as I believe it does -- this limitation on the appellants' constitutional rights must be shown by Alberta to be saved by s. 1 of the *Charter* as a reasonable limit that "can be demonstrably justified in a free and democratic society". That, Alberta has not even attempted to do.

84 In any event, the Court of Appeal held in this case that seeking election is a form of political expression ((2006), *57 Alta. L.R. (4th) 205*, *2006 ABCA 137*). I agree with that conclusion. And it follows inexorably, in my respectful view, that the impugned legislation restricts the appellants' freedom to express themselves politically -- a form of expression that is manifestly entitled to the highest degree of constitutional protection.

85 A limitation on freedom of expression may in some cases, as in this one, curtail political or democratic rights as well. Whether or not these political or democratic rights enjoy constitutional protection [page711] has no bearing on the protection afforded by s. 2(*b*). Even if it were found that other provisions of the *Charter* might address the appellants' claim, and may even do so more directly, this cannot deprive them of a full analysis of that claim under s. 2(*b*). Where there is an overlap between different constitutional rights, "[e]ach right is distinct and must be given effect": *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 80. And where there is no overlap because only one of the rights is protected by the *Charter*, that right must likewise be given its full constitutional effect.

86 Framed in terms of constitutional principle, the decisive question on this appeal is whether a legislature which sets up a system of democratically elected boards to administer a fundamental aspect of government activity may then exclude a certain category or group of otherwise qualified persons from serving on those boards, without any need to justify that exclusion under s. 1 of the *Charter*.

87 For the reasons that follow, I would answer that question in the negative and allow the appeal.

II

88 Until 2004, school board employees could not serve in Alberta as trustees of the board that employed them but were otherwise free to run for election and to serve as school trustees. In 2004, following a bitter labour dispute involving school board employees, Alberta enacted the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23 ("LAEA Amendments"). In purpose and effect, the LAEA Amendments bar *all* school employees from seeking election or serving as school trustees for *any* school board in the province, and not just their own employer board.

[page712]

89 The appellants claim that these restrictions on their ability to run for office and serve as school board trustees violate the freedom of expression to which they are constitutionally entitled in virtue of s. 2(*b*) of the *Charter*.

90 As a matter of constitutional principle, the Court has traditionally defined freedom of expression in broad terms and required the government to justify any infringement under s. 1. See, e.g., *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Osborne v. Canada (Treasury Board)*, *[1991] 2 S.C.R. 69*; and *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569.

91 In *Libman*, a unanimous Court reaffirmed this principled approach in these terms:

> The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian *Charter* to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(*b*) of the Canadian *Charter* (*Irwin Toy, supra*, at p. 970; *Zundel, supra*, at p. 753). [para. 31]

92 The Court has held in only two cases that exclusion from a platform for expression created by the government did not violate s. 2(*b*): *Haig v. Canada*, [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 ("*NWAC*"). Neither of these decisions is of particular assistance to Alberta in this case. Nor is *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, with which I shall deal as well.

93 Mr. Haig "fell between the legislative cracks" of a provincial referendum conducted by Quebec and a federal referendum conducted in the nine other provinces. Mr. Haig, who had recently moved from Ontario to Quebec, lacked the residency requirement of both referenda and was therefore unable to vote in either one. The Court found that voting is an expressive activity, but nonetheless dismissed [page713] Mr. Haig's appeal on the ground that s. 2(*b*) of the *Charter* does not impose on the government "any positive obligation to consult its citizens through the

particular mechanism of a referendum [or] confer upon all citizens the right to express their opinions in a referendum" (p. 1041). Voting in a referendum, albeit an expressive activity, therefore did not fall within the scope of s. 2(*b*).

94 Unlike this case, *Haig* involved a referendum for information purposes in which a small number of people were incidentally prevented from voting on a single occasion because the residency requirements of the two referenda did not mirror one another. They were unlikely ever to be affected again in this way, even if the impugned residency requirements remained unchanged. And, again unlike this case, there was no indication that the government had *intentionally* prevented Mr. Haig *or anyone else* from engaging in an expressive activity -- in that case, voting in a single referendum.

95 In the case at bar, by contrast, school board employees, who had recently been involved in a bitter labour dispute with the government, have been permanently and deliberately barred from participation in the governance of school boards throughout the province. This systematic exclusion of otherwise qualified persons from participation in an important institution of local governance raises a far greater concern for protecting freedom of expression than a one-time, incidental inability to vote in an informational referendum.

96 In *NWAC*, the Court held that s. 2(*b*) did not require the government to provide the Native Women's Association of Canada funding or invite their participation in constitutional discussions. McLachlin J. (as she then was), concurring in the result, found that "the freedom of governments to choose and fund their advisors on matters of [page714] policy is not constrained by the *Canadian Charter of Rights and Freedoms*" (p. 668) and that it was therefore unnecessary to consider whether the failure to fund the Association violated s. 2(*b*).

97 No such active support or consultation is sought in this case: The appellants simply ask us instead to set aside a statutory bar adopted by Alberta to deprive them of their longstanding right to express themselves politically by seeking and holding office as school board trustees.

98 Again, allowing this appeal would in no way burden the government with any obligation to fund or consult a particular group or association, or to establish for anyone a previously non-existent platform of expression. It would merely restore to the appellants access to a generally available platform of expression, unless of course their exclusion from it were found to be justified under s. 1 of the *Charter*.

III

99 I turn now to *Dunmore*, which concerned the freedom of association protected by s. 2(*d*) of the *Charter*. As I have demonstrated, the freedom of expression guaranteed by s. 2(*b*), which concerns us here, has until now been broadly interpreted by the Court as a matter of principle. Prior to *Dunmore*, this was not seen to be the case for s. 2(*d*). In the unforgiving words of one commentator,

> the pattern was set in 1987, when a majority of the Supreme Court gave section 2(d) what can only be described as a deadening interpretation. In concluding that associational freedom is an individual right and does not protect collective bargaining or the right to strike, the *Labour Trilogy* relegated the guarantee to irrelevance.
>
> (B. J. Cameron, "The 'Second Labour Trilogy': A Comment on *R. v. Advance Cutting, Dunmore v. Ontario*, [page715] and *R.W.D.S.U. v. Pepsi-Cola*" *(2002), 16 S.C.L.R. (2d) 67*, at p. 69)

100 I would find it most ironic for the Court's generous interpretation of freedom of association under s. 2(*d*) in *Dunmore* to now be invoked here for the purpose of *narrowing* the Court's traditionally broad interpretation of the historically and conceptually distinct freedom of expression guaranteed by s. 2(*b*). And in my respectful view we are not bound by the language of *Dunmore* to do so: Even if we characterize the appellants' claim as one of underinclusion, as Rothstein J. does, it would meet the *Dunmore* criteria.

101 In *Dunmore* the Court identified three considerations which circumscribe claims that an underinclusive statute violates s. 2:

> "claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime" (para. 24);
>
> "a proper evidentiary foundation must be provided before creating a positive obligation under the *Charter*" (para. 25); and
>
> "the state [must be] accountable for any inability to exercise a fundamental freedom" (para. 26).

102 The Court distinguished *Haig* and *NWAC* on the ground that the claimants in those cases had been unable to show that "the fundamental freedom at issue, as opposed to merely their requested statutory entitlement, was impossible to exercise" (para. 25). In *Dunmore*, by contrast, the agricultural worker claimants were not simply seeking inclusion in the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, but protection of their s. 2(*d*) freedom of association.

103 The criteria identified in *Dunmore* should not be applied narrowly -- particularly with respect [page716] to freedom of expression. Unlike this Court's decisions in *Haig* and *NWAC*, a narrow interpretation of *Dunmore* would allow legislatures, limited only by their obligations under s. 15 of the *Charter*, to systematically deny groups access to statutory platforms of expression otherwise available to the public at large. Rather, *Dunmore* should be viewed in light of this Court's practice of construing freedom of expression broadly and considering limits on expressive activity at the justification stage of the analysis. This is even more important where, as here, we are concerned with political expression associated with participation in an important democratic institution.

104 In his careful and extensive reasons, Justice Rothstein finds that this case fails to meet the first two *Dunmore* criteria since, in his view, the appellants are merely seeking access to a particular statutory regime, and have not established substantial interference with a fundamental freedom. In *Dunmore*, Bastarache J. explained the relevant difference this way: In order to succeed, he said, a claimant must seek "more than a particular channel for exercising his or her fundamental freedoms" and must "demonstrate that exclusion from a statutory regime permits a *substantial* interference with the exercise of protected s. 2(*d*) activity" (para. 25 (emphasis in original)).

105 In my view, the appellants' claim is grounded in the fundamental, constitutionally protected freedom to express oneself meaningfully on matters related to education. This freedom clearly exists independently of any statutory enactment. By excluding school employees from the ability to run for and serve as trustees, Alberta has substantially interfered with their ability to exercise this freedom.

106 Justice Rothstein finds that the LAEA Amendments deprive the appellants of only one [page717] particular channel of expression, leaving open a range of alternative means for them to express themselves on education-related issues. School employees remain free, for example, to participate in school board meetings, lobby trustees, sit on school councils, write letters to newspapers, give media interviews, and write to members of the legislature and other public officials.

107 Seeking and holding office as a school trustee, however, is a *uniquely effective means of expressing one's views on education policy*. It is cold comfort indeed for school employees, who are barred from themselves serving as trustees, to be told that they nonetheless remain free to talk to those who can, or to write letters to their local newspapers. The voices of school employees are simply unlikely to be heard over the din of those who actually run for office and serve if elected.

108 While diminished effectiveness in conveying a message may not always engage s. 2(*b*), the difference between writing a letter to a trustee and serving as a trustee is not simply one of degree. Active participation in an election and service as a trustee are *qualitatively* different means of expression than simply shouting from the sidelines. Section 2(*b*) is not so restricted as to protect only the latter. As McLachlin C.J. and Major J., dissenting in

part, stated in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, 2004 SCC 33, at para. 20:

> The ability to speak in one's own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens. Pell J.'s observation could not be more apt: "[s]peech without effective communication is not [page718] speech but an idle monologue in the wilderness"; see *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), at p. 415.

109 By prohibiting school employees from participating in school board elections and governance, Alberta has done more than restrict a "particular channel" of expression. It has created a system and process grounded in the democratic election of school board trustees. That process has naturally become the focus of public debate regarding education policy. By proceeding then to exclude school employees from running for office, Alberta has "substantially interfered" with their freedom of expression: It has denied them access to the unique platform upon which debate on local education policy is meant mainly and effectively to proceed.

110 Representative democracy is fundamental to our system of government. Where a legislature establishes a universal and democratic system of local governance, and then effectively prohibits the participation in that system of a particular group of otherwise qualified citizens, the state must be required to justify that prohibition.

111 It has not done so in this case.

IV

112 I agree with the trial judge that this violation cannot be justified under s. 1.

113 In this Court, Alberta faces insurmountable obstacles in respect of that finding. First, because it did not appeal the trial judge's decision on this issue; second, because Alberta, understandably in that light, has made no submissions on the issue in this Court; and finally, because Alberta, on the record as we have it, plainly failed to satisfy the four-pronged test laid down in *R. v. Oakes*, [1986] 1 S.C.R. 103.

[page719]

114 Alberta asserts as a pressing and substantial concern -- the first requirement under *Oakes* -- the need to prevent the conflicts of interest inherent in permitting school trustees to make decisions that affect school employees, particularly with respect to collective bargaining.

115 The prevention of conflicts of interest is doubtless a matter of substantial public importance. And while the assertion by the government of a pressing and substantial concern will normally require little or no evidentiary support, it cannot pass muster where, as in this case, the record demonstrates that the concern asserted is in fact neither pressing nor substantial.

116 To begin with, school board employees were already prohibited from serving as school trustees for their employer board even before the LAEA Amendments were adopted. Yet, of the 420 school trustees throughout the province, only three were school board employees, and just one other took steps to seek office. Accordingly, fewer than 1 percent of Alberta's school trustees could be exposed, on Alberta's view of the matter, to potential conflicts of interest.

117 Second, the appellants' uncontradicted evidence demonstrated that potential conflicts arose only two or three times a year and have been adequately dealt with by recusals.

118 Third, the trial judge found that Alberta presented no reliable evidence on either the frequency of conflicts of interest, or of their impact on decision making.

119 In short, on the first branch of the *Oakes* test, the trial judge was entitled to find, as she did, that Alberta's assertion of a pressing and substantial concern could not succeed and nothing before this Court permits of a different conclusion.

[page720]

120 But even if Alberta's declared objective were to be considered pressing and substantial, the LAEA Amendments would clearly fail the minimum impairment branch of the test laid down in *Oakes*. Legislatures are not bound to adopt the "least impairing" means of furthering pressing and substantial objectives. They cannot, however, interfere with or limit constitutionally protected rights or freedoms in a manner that plainly overshoots the mark. And, as already mentioned, Alberta presented no evidence that the previous legislative scheme, which had been in place for over 40 years, was in any way inadequate to address Alberta's stated concerns.

121 Finally, I note that Alberta permits municipal employees to seek election to the councils of municipalities other than their employer, and no evidence was adduced to explain why they can or should be treated differently in this respect. Nor has *any* of the parties suggested that holding office as a school trustee is more "managerial" than serving as a municipal councillor and subject for that reason to different considerations under either s. 2(*b*) or s. 1 of the *Charter.*

V

122 With respect for those who see the matter differently, I am therefore persuaded that s. 1 of the LAEA Amendments, which violates the freedom of expression afforded Alberta school employees by s. 2(*b*) of the *Charter*, is not justified under s. 1 of the *Charter.*

123 As stated at the outset, I would for all of these reasons allow the appeal with costs, and declare that s. 1 of the LAEA Amendments is of no force and effect.

* * * * *

APPENDIX

Relevant Statutory Provisions

Prior to the amendments at issue in this appeal, the relevant ineligibility provisions of the *Local Authorities Election Act*, *R.S.A. 2000, c. L-21*, [page721] were as follows:

> **22(1)** A person is not eligible to be nominated as a candidate in any election under this Act if on nomination day
>
> ...
>
> (b) the person is an employee of the local jurisdiction for which the election is to be held unless the person is on a leave of absence granted under this section;
>
> ...
>
> **(7)** An employee who has been granted a leave of absence is subject to the same conditions that apply to taking a leave of absence without pay for any other purpose.
>
> **(8)** If an employee who has been granted a leave of absence is not elected, the employee may return to work, in the position the employee had before the leave commenced, on the 5th day after election day or, if the 5th day is not a working day, on the first working day after the 5th day.

(9) If an employee who has been granted a leave of absence is declared elected, the employee is deemed to have resigned that position as an employee the day the employee takes the official oath of office as an elected official... .

The provisions of the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, relevant in this appeal provide:

1(1) The *Local Authorities Election Act* is amended by this section.

(2) Section 22 is amended

(a) by adding the following after subsection (1):

(1.1) A person is not eligible to be nominated as a candidate for election as a trustee of a school board if on nomination day the person is employed by

[page722]

(a) a school district or division,

(b) a charter school, or

(c) a private school,

in Alberta unless the person is on a leave of absence granted under this section.

(b) in subsection (3) by striking out "Subsection (1)(c) to (f) do not apply" **and substituting** "Subsection (1)(b) to (f) do not apply";

(c) by adding the following after subsection (5):

(5.1) An employee referred to in subsection (1.1) who wishes to be nominated as a candidate for election as a trustee of a school board may apply to his or her employer for a leave of absence without pay on or after July 1 in the year of an election but before the employee's last working day prior to nomination day.

(d) by adding the following after subsection (6):

(6.1) A school district or division, a charter school or a private school shall grant every application it receives under subsection (5.1).

After the *School Trustee Statutes Amendment Act, 2002*, S.A. 2002, c. 23, the relevant provisions of the LAEA as amended read:

22 ...

(1.1) A person is not eligible to be nominated as a candidate for election as a trustee of a school board if on nomination day the person is employed by

(a) a school district or division,

(b) a charter school, or

(c) a private school,

in Alberta unless the person is on a leave of absence granted under this section.

...

(5.1) An employee referred to in subsection (1.1) who wishes to be nominated as a candidate for election as a trustee of a school board may apply to his [page723] or her employer for a leave of

absence without pay on or after July 1 in the year of an election but before the employee's last working day prior to nomination day.

...

(6.1) A school district or division, a charter school or a private school shall grant every application it receives under subsection (5.1).

...

(8) If an employee who has been granted a leave of absence is not elected, the employee may return to work, in the position the employee had before the leave commenced, on the 5th day after election day or, if the 5th day is not a working day, on the first working day after the 5th day.

(9) If an employee who has been granted a leave of absence is declared elected, the employee is deemed to have resigned that position as an employee the day the employee takes the official oath of office as an elected official.

(Amendments in bold)

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Solicitor for the intervener the Attorney General of Prince Edward Island: Attorney General of Prince Edward Island, Charlottetown.

[page724]

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Solicitor for the intervener the Public School Boards' Association of Alberta: Dale Gibson, Edmonton.

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TAB 2

2010 ONCA 814
Ontario Court of Appeal

Bedford v. Canada (Attorney General)

2010 CarswellOnt 8998, 2010 ONCA 814, [2010] O.J. No. 5155, 199 A.C.W.S. (3d) 1057, 265 C.C.C. (3d) 390, 271 O.A.C. 155, 330 D.L.R. (4th) 162, 93 W.C.B. (2d) 434

Terri Jean Bedford, Amy Lebovitch and Valerie Scott (Applicants / Respondents in appeal) and Attorney General of Canada (Moving Party / Respondent / Appellant in appeal) and Attorney General of Ontario (Intervener / Respondent in appeal)

Marc Rosenberg J.A.

Heard: November 22, 2010
Judgment: December 2, 2010
Docket: CA M39380, C52799

Counsel: Michael Morris, Gail Sinclair, Julie Jai, Roy Lee for Attorney General of Canada
Alan Young for Terri Jean Bedford, Amy Lebovitch, Valerie Scott
Shelley Maria Hallett for Attorney General of Ontario

***Marc Rosenberg J.A.*:**

I. Overview

1 The Attorney General of Canada supported by the Attorney General of Ontario moves for a stay of the judgment of Himel J. of September 28, 2010 concerning three provisions of the *Criminal Code* that prohibit various types of conduct associated with prostitution. The application judge found s. 210 of the *Criminal Code* as it relates to prostitution to be unconstitutional. She therefore struck the word "prostitution" from the definition of common bawdy-house in s. 197(1). She also declared ss. 212(1)(j) and 213(1)(c) to be unconstitutional and struck down those provisions.

2 The effect of the judgment is to strike down the common bawdy-house provisions of the *Code* as they apply to prostitution, the living on the avails of adult prostitution offence, and the communicating for the purpose of prostitution offence. The judgment leaves intact a large number of other provisions that touch on prostitution such as provisions prohibiting procuring, living on the avails of prostitution of a person under the age of 18 years and bawdy-house provisions relating to acts of indecency.

3 The application judge stayed her judgment until November 27, 2010. On November 22, at the conclusion of argument of this motion I continued the stay until I released my decision on this motion.

4 The fundamental submission of the moving party and the Attorney General of Ontario on this motion is that the judgment creates a legislative void that has profound implications for the public interest. They argue that the judgment should be stayed until this court can conduct a full review of the decision. The responding parties submit that the government evidence of harm to the public interest if a stay is not imposed is speculative. Counsel submits that only after the judgment has been in place for some time will it be possible to measure the impact; in effect, the motion is premature and the court should wait and see what happen. Further, the responding parties submit that there would be substantial harm if the judgment is stayed because to do so would perpetuate the law's contribution to violence against a vulnerable population.

5 For the following reasons, I am satisfied that it is in the public interest that the judgment be stayed for a relatively short period to permit appellate review of the decision. Accordingly, the judgment will be further stayed until April 29, 2011.

II. Role of the Motion Judge and the RJR-MacDonald Test

6 At para. 135 of her reasons, the application judge made the important point that the evidence before her supported "the notion that prostitution is an intractable social problem" and that there is "disagreement about the proper legislative approach to prostitution". It is not the role of the courts to either solve that problem or fashion the appropriate legislation; that is the realm of Parliament, the legislatures, municipal governments and social agencies. As the application judge said at para. 25, it was not her role to decide what policy model is better. She recognized her duty was to determine whether the legislative scheme met minimum constitutional standards. She found that it did not and it will be for this court to determine whether she was correct. My role is more modest. I must determine, by applying a test laid down by the Supreme Court of Canada, whether the *status quo* should be maintained pending the relatively short time it will take to review the decision in this court.

7 It bears special emphasis that my perspective in deciding this motion is very different from that of the application judge. This different perspective explains in part why despite the concerns expressed by the application judge, I have decided that a temporary stay of the judgment is required. In particular, the Supreme Court of Canada has warned against a judge, hearing a stay motion, attempting to ascertain whether actual harm will result from the stay. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at p. 346, the court pointed out that to do so

> would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

8 One further point to note regarding this motion is that I am not sitting in appeal of the application judge's decision not to suspend the declaration of invalidity. She gave very careful consideration to this issue at paras. 508 to 535 of her reasons. In making her determination she was bound by decisions from the Supreme Court of Canada and in particular *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), to which she made extensive reference. As she pointed out at para. 511, the Supreme Court has considered a suspension of invalidity to be a "serious matter" from the point of view of enforcement of the *Charter.* The perspective of the application judge is driven by that context. I am bound by a different body of law and by a different test, the test enunciated in *RJR-MacDonald*, where the context is the *prima facie* right of the government to a full review of the first-level decision and, as I will explain, the presumption of irreparable harm if the judgment is not stayed pending that review.

9 The test for granting a stay pending appeal is set down in *RJR-MacDonald*. The court must be satisfied that:

> (i) There is a serious issue to be tried;
>
> (ii) The party seeking the stay would suffer irreparable harm should the stay not be granted; and
>
> (iii) The balance of convenience and public interest considerations favour a stay.

10 The first part of the test has been satisfied; it is not disputed by the respondents that the issue before the court is a serious issue. The focus of the analysis will be on stages two and three of the *RJR-MacDonald* test. In cases involving the constitutionality of legislation, irreparable harm and balance of convenience tend to blend together and they are often considered together. This blending of the two stages in cases involving the constitutionality of legislation is understandable because the public interest is engaged at both stages: *RJR-MacDonald*, at p. 349.

11 *RJR-MacDonald* instructs a motion judge that, in *Charter* cases, the onus of demonstrating irreparable harm to the public interest is less on a public authority than on a private applicant: p. 346.

12 At the balance of convenience stage, I must determine which of the two parties will suffer the greater harm from the granting or refusal of the stay: *RJR-MacDonald* at p. 342. In constitutional cases, the public interest is a "special factor" that must be considered in assessing where the balance of convenience lies: p. 343. As I will explain more fully below, while the Attorney General does not have a monopoly on the public interest, a private party relying on the public interest to justify continuing suspension of legislation must, at the balance of convenience stage, demonstrate that the "suspension of the legislation would itself provide a public benefit": *RJR-MacDonald* at p. 349.

13 Therefore, unlike the application judge, I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

14 This application is particularly difficult because of the findings made by the application judge concerning the link between the impugned provisions and the violence suffered by prostitutes. The application judge found that the applicants had established that there are ways in which the risk of violence towards prostitutes can be reduced but that the impugned provisions throw up barriers, enforced by criminal sanction, that prevent prostitutes from taking measures that could reduce the risk of violence.

15 There are obvious advantages to maintaining the *status quo* by staying the judgment. A stay will minimize public confusion about the state of the law in Ontario; for the time being the law in Ontario will be the same as in the rest of Canada. The police will be able to continue to use the tools associated with enforcement of the law that they say provides some safety to prostitutes, especially those working on the streets. The various levels of government will have the opportunity, should they choose to do so, to consider a legislative response to the judgment, which might be better informed following a full review by this court of the application judge's decision. Further, if a legislative response is required, sufficient time is needed because a response may be difficult to design not only because of the complexity of the issues surrounding prostitution but because of the uncertainty of the role of the province and municipalities in light of the Supreme Court of Canada's decision in *R. v. Westendorp*, [1983] 1 S.C.R. 43 (S.C.C.). In that case, the court struck down a municipal by-law directed at control of street prostitution.

16 On the other hand, maintaining the *status quo* will leave in place a legislative framework that the application judge found seriously impacts on the physical security of a group of people, mostly women, who are pursuing an occupation that is not *per se* illegal. While it is not my task to review the correctness of the application judge's decision, I cannot simply ignore those findings as they may inform the test for granting a stay. I am also conscious of the application judge's concern about staying the judgment as expressed at para. 2 of her reasons on October 15, 2010, granting a further temporary stay:

> I expressed to counsel that I was concerned about extending the period of stay in light of my findings that the impugned provisions were being rarely enforced or were ineffective and that the law as it stands is currently contributing to danger faced by prostitutes. However, because all the parties consented and the extension was only for an additional thirty days, I am exercising my discretion and granting a stay of my judgement that the provisions are unconstitutional and should be of no force and effect, for an additional thirty days.

III. Decision Below

17 The application judge based her decision on a voluminous record. In careful and lengthy reasons she found that the impugned provisions deprived the applicants of security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*. I will refer to more of the application judge's reasons below. But, in short, she found that prostitutes,

especially street prostitutes, are vulnerable to acts of violence and the impugned provisions prevent them from taking precautions that can decrease the risk of violence. She went on to find that the provisions deprive the applicants of their security of the person in a manner that is not in accordance with the principles of fundamental justice. Finally, she found that the s. 7 violations could not be saved under s. 1 of the *Charter.* Additionally, the application judge found that s. 213(1)(c) violates freedom of expression under s. 2(b) of the *Charter* and was not a reasonable limit under s. 1.

18 The application judge dealt at length with the harm faced by prostitutes in Canada. As she pointed out, most of the evidence of harm was in relation to street prostitutes. She also considered whether violence is intrinsic to prostitution or whether there are ways to reduce the risk of harm. She found that the risk of harm could be reduced. This was the key finding in her reasons; because she then went on to find that enforcement of the impugned provisions prevents prostitutes from reducing the risk of harm. This finding established the crucial causal link between state action and the infringement of sex-trade workers' security of the person. The government had argued before the application judge that it was the clients who put prostitutes at risk, not the legislation. The government attacks this finding of causality in their appeal.

19 The application judge then found that the infringement of the prostitutes' security of the person was not in accordance with the principles of fundamental justice. She began with the principle of fundamental justice that laws should not be arbitrary and found that s. 212(1)(j), living on the avails, is inconsistent with its objective of protecting prostitutes from exploitation and is therefore arbitrary. She found that on their own the bawdy-house and communicating provisions were each not arbitrary.

20 However, the application judge found that the bawdy-house provision, when acting in conjunction with the other impugned provisions, is arbitrary. She made the same finding with respect to the communicating provision. The clearest case was in relation to the bawdy-house provision. While the application judge determined that in-call work is the safest form of prostitution, it is rendered illegal. While out-call work is legal, it is not as safe and the living on the avails provision prevents prostitutes from taking measures such as hiring a driver or security guard that would make out-call work safer. The other alternative is street prostitution which the application judge found to be the most dangerous, especially because the communication prohibition forces prostitutes into brief encounters where they are unable to adequately assess risk: see reasons of the application judge at para. 385. The application judge similarly found that the communicating provision, in conjunction with the other impugned provisions, was arbitrary since moving prostitutes off the streets to combat social nuisance may exacerbate the harm that the bawdy-house provision seeks to prevent.

21 The application judge also considered the overbreadth principle of fundamental justice. She found that the bawdy-house provision was overbroad because none of the harms the provision is aimed at, such as threats to public health or safety or eliminating neighbourhood disorder, need to be proved to obtain a conviction. Similarly, the living on the avails prohibition was overbroad because it caught non-exploitative arrangements. The communicating offence was not overbroad.

22 Finally, the application judge found that all three provisions are grossly disproportionate to their objectives and therefore violate the proportionality principle of fundamental justice.

IV. Analysis: Applying the RJR-MacDonald Test for Granting a Stay

A. Findings on serious issue to be tried

23 There was no dispute at the hearing of this motion that the Attorney General has met the first part of the test. These are serious questions, some of which have already been reviewed by the Supreme Court of Canada in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) [the *Prostitution Reference*]. In the *Prostitution Reference*, a majority of the court upheld the validity of s. 193 (now s. 210) and s. 195.1(1)(c) (now 213(1)(c)) against challenges that those provisions infringe s. 7, albeit on different grounds than argued before the application judge. The majority also held that while the communication provision infringes s. 2(b) of the *Charter*, the violation is

justifiable under s. 1. In his notice of appeal, the Attorney General of Canada submits, among other things, that the trial judge erred in failing to follow the *Prostitution Reference*.

B. Review of Evidence as it relates to Public Interest

24 The real issues on this motion concern the second and third parts of the *RJR-MacDonald* test and particularly the third part, the balance of convenience. In cases involving the constitutionality of legislation, irreparable harm and balance of convenience tend to blend together and they are often considered together. See for example, *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1997), 35 O.R. (3d) 304 (Ont. C.A. [In Chambers]) at p. 311. This blending of the two stages in cases involving the constitutionality of legislation is understandable because, where the government is the applicant, the public interest is engaged at both stages: *RJR-MacDonald*, at p. 349. As well, the irreparable harm is not easily quantified in a case such as this in which monetary issues are not engaged and any harm to one side or the other cannot be cured by an award of damages at the end of the litigation: *RJR-MacDonald*, at p. 341. In the result, the same considerations that concern a court at the irreparable harm stage resurface in the balance of convenience stage.

25 The focus of the government evidence on this application is the impact of a legislative void if the police are deprived of the power to investigate the impugned offences. Most of the evidence concerned the impact of the inability to enforce s. 213(1)(c), the communicating provision. To their credit, the police affiants generally make relatively modest claims about the effectiveness of s. 213(1)(c). The Attorneys General also filed material directed to the harm to the public interest resulting from failure to grant a stay in relation to the living on the avails and bawdy-house provisions, and the overall impact of the invalidity of all three of the impugned provisions.

26 Before dealing with these two stages, I will set out the objectives of the impugned legislation as identified by the application judge, as a means of setting the context for this motion. I will then summarize the evidence that the parties adduced, evidence directed to the issues of irreparable harm and balance of convenience and particularly to the question of properly identifying and situating the public interest.

(i) Section 213(1)(c) - the communicating provision

1. The Objectives of s. 213(1)(c)

27 In her reasons, the application judge considered the objectives of the impugned legislation at length. Adopting the view of the Supreme Court of Canada in the *Prostitution Reference*, the application judge found at para. 274, that the objective of s. 213(1)(c), communicating for the purpose of prostitution, is to "address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex" and to take "solicitation for the purposes of prostitution off the streets and out of public view". In the *Prostitution Reference*, pp. 1134-35, a majority of the Supreme Court found that the eradication of nuisance-related problems caused by street solicitation was a pressing and substantial concern.

2. The Legislative void and s. 213(1)(c)

28 Staff Sergeant Randy Cowan is a member of the Peel Regional Police with 25 years experience as a police officer including 5 years as the Coordinator of the Vice Unit. He concedes that street prostitution "continues to be widespread in Peel Region". The police respond to complaints by citizens through so-called "john sweeps" in which the police "rely heavily on the ability to lay charges under s. 213(1)(c) of the *Criminal Code*". After a sweep, there is a noticeable drop in street prostitution. He does not say in his affidavit how long the drop in street prostitution lasts. Further, while on the one hand he says that prostitutes and johns are deterred from returning to the area, he also concedes that "this activity continues in these areas despite this section being in force". Still, the police rely on s. 213(1)(c) as a means of deterring the worst excesses of public solicitation. He said the following:

> With this section of the *Criminal Code* intact, the john and the prostitute are forced to keep their activity as undetected as possible, yet as it stands we still receive complaints from residents regarding their activity. Without

> this section there would be no deterrent. This could lead to johns and prostitutes becoming more overt in their activity and thus becoming more of a community problem, with the police powerless to intervene because their activity is no longer unlawful.

29 There are several important points to observe from this key passage of Staff Sergeant Cowan's affidavit. First, the application judge found that the communicating provision forces prostitutes and their customers to conduct their negotiations in a manner that is least likely to be detected. The evidence referred to by the application judge shows that it is this very fact that leads to the greater risk of harm to prostitutes, since they have less time to assess the potential dangerousness of the client. As well, these sweeps may force prostitutes into more isolated and dangerous areas. The application judge quotes at length from the government's own reports to support this premise. For example, according to the application judge, the 1998 *Report of the Federal, Provincial and Territorial Deputy Ministers Working Group on Prostitution* found that the legislation has not had a serious impact on controlling street prostitution: para. 161 of her reasons. The 1998 *Working Group Report* also referred to research that "suggests that the illegal status of prostitution activities, especially those that occur in public or on the street, has contributed to a large amount of violence": see para. 330. To a similar effect is the 2006 *Report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws*. The application judge quoted from this report at para. 331 of her reasons:

> In many of the cities we visited, a number of witnesses indicated that the enforcement of section 213 forced street prostitution activities into isolated areas, where they asserted that the risk of abuse and violence is very high. *These witnesses told us that by forcing people to work in secrecy, far from protection services, and by allowing clients complete anonymity, section 213 endangers those who are already very vulnerable selling sexual service on the street. ...*
>
> . . . . .
>
> During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. *While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.*
>
> . . . . .
>
> *According to a number of witnesses, section 213 also places street prostitutes in danger by forcing them to conclude their negotiations with clients more quickly, often leading them to get into the client's car too quickly. ...*
>
> . . . . .
>
> Working out the details of the transaction before getting into a vehicle or going to a private location was considered important by all the prostitutes who testified. They told us that public bargaining would give them an opportunity to assess the likelihood of a potential client having violent tendencies.
>
> [Emphasis added.]

30 Staff Sergeant Cowan also stated that the police use s. 213(1)(c) to help prostitutes, whom they view as victims. He says that the possibility of laying charges allows the police to detain prostitutes for investigation and in this way "keep track of them, gain their trust, and sometimes help them get out of prostitution". He says that: "[w]ithout a statutory authority or purpose to engage persons involved in this activity, police activity could and would be construed as harassment". [1] Staff Sergeant Cowan also referred to the AVERT initiative to "monitor street prostitutes and guard against anonymous victimization and undetected foul play". The database associated with this initiative contains the profile of 24 women. The program allows the police to assist women in overcoming their drug addictions and in exiting prostitution. Staff Sergeant Cowan asserts that without s. 213(1)(c) there would be no AVERT program and no ability to take proactive measures to assist prostitutes, or to search for them if they go missing resulting in a "reduced ability to protect prostitutes from violence". I did not find this statement particularly compelling. In particular, I fail to see the

link between s. 213(1)(c) and the ability to search for missing people. And, counsel for the responding parties makes the point that this "compassionate enforcement" only benefits a small group of sex workers.

31 More compelling is Staff Sergeant Cowan's evidence concerning the use of s. 213(1)(c) to reduce public solicitation in residential neighbourhoods and the associated problems identified by the Supreme Court of Canada in the *Prostitution Reference*. Staff Sergeant Cowan's evidence in this respect is supported by the evidence from members of the Parkdale Community in Toronto and the Hintonburg community near Ottawa. These community members speak eloquently of the impact of street prostitution, which is often associated with drug use, on the quality of life in those communities. Finally, Staff Sergeant Cowan speaks of the possible increase in street prostitution in Ontario and more frequent confrontations between prostitutes and members of the public, should the judgment not be stayed.

32 The possible impact on the Hintonburg community of the invalidity of s. 213(1)(c) is explained by the community member in her affidavit. While she speaks of the impact of the invalidity of all of the impugned provisions, a close examination of her affidavit shows that it is the inability to enforce s. 213(1)(c) that would have the greatest impact on the community:

> None of the alternatives to the prostitution laws would work. Legalizing would not stop the illegal sex trade. A lot of johns want anonymity and visiting a brothel is not anonymous; their car is parked there. In contrast, street prostitution takes minutes, it's anonymous and only costs $10. Also the drug-addicted women could not work in brothels; neither could the ones who have STDs. ... In addition, the prostitutes in my neighbourhood were generally older (30-55 years of age) and most were drug-addicted. These are not the kind of women would could get work in a brothel.

33 The evidence provided in the affidavit of Inspector Howard Page of the Toronto Police Service is similar to that of Staff Sergeant Cowan. He also makes the somewhat broader statement that:

> Section 213(1)(c) is also one of the most effective tools the police have to investigate pimps and the exploitation of women within the sex trade. Information on pimps and related organized crime would often not come to light if arrests were not made for communicating for the purpose of prostitution.

While Inspector Page referred to no empirical data to support this rather bold claim, since the responding parties chose not to cross-examine him on his affidavit, the statement stands unchallenged on this motion.

34 The Attorney General of Ontario provided two affidavits from Derek Parenteau who is employed as a Street Youth Worker at Evergreen Centre for Street Youth in Toronto. Through a drop-in centre operated by the Evergreen Centre, Mr. Parenteau has had contact with many pimps and prostitutes. While I found his information interesting it was difficult to draw any helpful inferences from it. If nothing else, Mr. Parenteau's affidavits demonstrate the complexity of the treatment of prostitution by the law. His first affidavit is a summary of brief conversations he has had with pimps and prostitutes since the application judge rendered her decision. They have told him that there will be an increase in street prostitution, including prostitution by underage girls. He also provided the opinion that the average age of entry into prostitution for girls is 13 to 14 years and for boys is 12 to 13 years. It is difficult to know what conclusions to draw from this kind of information; the criminal prohibitions relating to living on the avails of prostitutes under the age of 18 years have not been not struck down, and the alleged involvement of underage youth in prostitution was obviously the state of affairs well before the application judge's decision. Finally, the pimps have also told Mr. Parenteau that they fear organized crime will become more involved in street prostitution. This statement is pure speculation from unnamed sources whose qualifications to make the observations are unknown. I give it no weight.

35 The Attorney General of Canada also filed an affidavit from John Fenn who runs a diversion program in Toronto for persons charged with the communicating offence and being found in a bawdy-house. He attests to the success of this program, so-called "John Schools" in Toronto and elsewhere. He feels that these programs as well as a program to assist prostitutes called "Streetlight" will fold if the judgment of the application judge is not stayed because these programs are

funded by fees charged to the accused for attending the school. I would point out that the evidence given by Natashe Falle, who actually manages the Streetlight program, was to the effect that even without the support from fees charged to accused, there would be "a lot of other avenues" for funding.

36 Mr. Fenn also offered the opinion that previous graduates will return to purchasing the services of prostitutes, that there will be more prostitutes in communities and that pimps will try to lure more women, and younger girls into prostitution. He also said, "It will be very difficult to reverse the harms done." It is not clear to me that Mr. Fenn had the required expertise to offer these latter opinions and accordingly, I have attached no weight to these bald claims unsupported by any empirical or other data.

37 Staff Sergeant Cowan and Inspector Page filed affidavits before the application judge and those affidavits were also filed on this application. The application judge did not expressly refer to those affidavits, but she did refer generally to the evidence of police officers filed by the Attorney General of Canada at paras. 89 to 94 of her reasons. She noted at para. 94 that those officers who were cross-examined "admitted that the level of violence faced by prostitutes on the streets is worse than it is indoors, and that safety precautions can be taken in indoor locations to reduce the level of violence".

38 To conclude, the Attorneys General have provided, on this motion, evidence of harm to the public interest, should the judgment not be stayed in relation to s. 213(1)(c). Admittedly, some of that evidence is less than compelling, for reasons I have provided. I will consider the impact of that evidence below in applying the irreparable harm and balance of convenience parts of the test.

(ii) Section 210 - Bawdy-house provision

1. The Objectives of s. 210

39 The application judge found, based on the historical record, that the objectives of the bawdy-house provisions (ss. 197 and 210), as they relate to prostitution, are to combat neighbourhood disruption or disorder, and to safeguard public health and safety.

40 The application judge rejected the Attorney General of Ontario's broader or "modern" objective based on a "concern for the dignity of persons involved in prostitution and the prevention of physical and psychological harm to them". Even if this was an objective of the legislation, the evidence placed before the application judge made her doubt the effectiveness of the legislation in meeting that objective. The application judge found, at para. 361, that with respect to the bawdy-house provision, "the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction".

2. The Legislative Void and s. 210

41 In para. 539 of her reasons, the application judge recognized that a consequence of holding the provisions unconstitutional "may be that unlicensed brothels may be operated and in a way that may not be in the public interest". She stayed her decision for up to 30 days to enable the parties to make fuller submissions on whether her decision should be stayed. As noted, the parties subsequently agreed to a further stay pending this motion. The Attorneys General did not attempt to place evidence before the application judge despite her invitation to do so.

42 The evidence of Staff Sergeant Cowan and Inspector Page provided on this motion is not so much directed to the question of the impact of operation of unlicensed brothels (the question raised by the application judge). Rather, their evidence was directed to the impact of the declaration of invalidity of the bawdy-house provision on the ability to investigate other offences. As I understand the import of most of this evidence, while there was some nuisance associated with the operation of bawdy-houses, the bawdy-house provision was most useful as a way to leverage investigations to uncover more serious criminal activities. Staff Sergeant Cowan described the bawdy-house investigations as "multi-layered":

> The first layer that often presents itself is the street level or bawdy-house layer, which begins with a complaint or discovery that a place is operating as a house of prostitution. This causes the police [to] begin an investigation regarding bawdy-houses. In the course of this investigation other layers become visible. These are usually more serious, and thus the effort to conceal them is greater. These layers are the human trafficking, extortions, assaults, threatening, exploitation and procuring layers. These investigations initially present as bawdy-house, communication for the purpose or living on the avails. If the police were no longer to have the legislated mandate to enforce those laws, then these very serious crimes would go undetected.

43 The application judge reviewed in her reasons at paras. 514 to 535 the many other *Criminal Code* provisions that, in her view, would be available to investigate these other offences. Staff Sergeant Cowan explains in his affidavit filed on this motion why many of these provisions would not be as effective as the bawdy-house investigation.

44 Inspector Page gave similar evidence as that of Staff Sergeant Cowan. Unfortunately, for the applicant, the cogency of his assertions is undermined by the example he provided as to the supposed utility of the bawdy-house provisions. At paras. 14 to 17 of his affidavit, Inspector Page discusses a case reported in the Toronto Star in September of this year which he alleged came to light through a bawdy-house investigation, where a prostitute complained to police that she was being subjected to extortion. Inspector Page goes on to describe how "a couple of months later" the investigating officers noticed that these same premises, which were offering escort services through Craigslist, were being used for babysitting young children. Inspector Page goes on to make the claim that, "[n]one of this activity would have been discovered in the absence of the bawdy-house investigation." Counsel for the responding parties made the point that this investigation could have been undertaken in view of the complaint of the criminal offence of extortion and the apparent commission of the corrupting children offences contrary to s. 172 of the *Criminal Code*. Although counsel for the responding parties chose not to cross-examine Inspector Page, I attach little weight to his assertions concerning the operation of s. 210. The lack of empirical evidence and the frailty of his anecdotal evidence leave me unconvinced on this aspect of Inspector Page's evidence.

45 Inspector Page goes on to assert that, "[i]n many instances, s. 210 is the only effective tool which law enforcement officers have to uncover human trafficking and links to organized crime". Inspector Page also says that the provision provides a mechanism for seizing the proceeds of crime. He provides no empirical data or even anecdotal evidence to support these assertions. Finally, he asserts that bawdy-houses would be free to operate in residential areas "providing venues for organized crime, pimps, drug traffickers and the exploitation of vulnerable women and youth". This assertion suffers to some extent from the failure to explain, in particular, why the drug laws do not provide adequate enforcement mechanisms.

46 The information provided by Staff Sergeant Cowan and Inspector Page are supported by the affidavits of two community members. However, the affiant from Parkdale appears to associate the harm caused by a proliferation of bawdy-houses with their use as "crack houses". It is unclear why drug enforcement legislation is incapable of coping with this problem. Indeed, the affiant from Hintonburg makes this point in her affidavit:

> In addition to the work of the police, in particular, the prostitution sweeps, *the decrease in prostitution occurred in part because the community was able to get rid of the really active drug houses, the crack-houses*. As well, with urban renewal, the run-down houses in our neighbourhood have been torn down and rebuilt, and there are fewer drug houses. In the past year or so, prostitution has moved away, along with the drug trade.
>
> [Emphasis added.]

47 The Hintonburg neighbourhood association formed a taskforce whereby community groups shared concerns regarding drugs and prostitution with various city departments. There did not appear to be any association between the bawdy-house provision and this community initiative.

48 Staff Sergeant Cowan and Inspector Page deal at some length with the regulation of strip clubs. According to Staff Sergeant Cowan there is "already a large problem with strip club owners and massage parlour owners being wilfully blind to the prostitution occurring in their clubs". It is unclear what inference is to be drawn from this information, except that there may be more prostitution in these clubs. Paradoxically, Detective Constable Balaga, of the Toronto Police Service, who provided an affidavit for the Attorney General of Ontario, offered the opinion that the application judge's decision would lead to the closing down of strip clubs.

49 Standing against the government evidence on this motion is the wealth of information before the application judge about the safety advantages of indoor prostitution. At para. 305, she referred to the finding of the 1998 *Working Group Report*:

> Available data tends to demonstrate that indoor prostitution is less harmful physically than that which takes place on the street. The vast majority of crimes against prostitutes, including murders, are perpetrated against street prostitutes by customers and pimps, largely because of the anonymity, tension and high level of drug use that characterize street prostitution.

50 And, at para. 306, the 2006 *Subcommittee Report*:

> Much less is known about violence against people involved in off-street prostitution. As we have seen, these people are often invisible to conventional research, or at least more difficult to reach. However, according to witnesses, it would appear that off-street prostitutes are generally subject to less violence.

51 Interestingly, Staff Sergeant Cowan supports at least some form of indoor prostitution. He said this at para. 27 of the affidavit placed before the application judge:

> *Under the Criminal Code, prostitution itself is not illegal. There are legal, safe ways to practice prostitution in Canada. I support this approach*, and believe it is preferable to the legal regime in some parts of the United States, where prostitution itself is illegal, and police spend a lot of their time going after prostitutes rather than the pimps.
>
> [Emphasis added.]

52 Counsel for the Attorney General of Canada explained that the legal way to practice prostitution involved some form of advertising in which the customer and the prostitute make contact and then the prostitute goes to the customer's hotel room or residence (so-called "out-call work"). Staff Sergeant Cowan also went on in the same affidavit to offer the opinion, that "there would be a huge increase in prostitution in Canada" if the impugned provisions were struck down and that "Canada would become a sex tourism destination and the number of young women and girls caught up in prostitution would greatly increase". He made this claim in the face of his own opinion that the price of sexual services is already "much lower" than it is in the United States because of our "already relatively liberal prostitution laws" and that prostitution is "already a large industry among business travellers". Even taking into account the difficulty of predicting the impact of decriminalization of bawdy-houses, I find this part of Staff Sergeant Cowan's affidavit too speculative to warrant giving it much weight.

53 The Attorney General of Ontario relied in this application on the affidavit of Cecilia Benoit, who had been a witness for the responding parties before the application judge. In the affidavit, Dr. Benoit refers to reports that sex-trade workers operating indoors experience fewer instances of violence and that those working independently in their own homes were able to retain most of their earnings. The Attorney General of Ontario relied upon a portion of para. 23 of Dr. Benoit's affidavit to highlight the importance of a regulatory framework. The complete paragraph is as follows:

> Sex workers operating out of their own homes are also not immune to the threat of violence, as one respondent commented: "I had one trick threaten to kill me when I was working out of my home." These violent episodes, however, occur with far greater frequency and severity on the outdoor strip. It is therefore not solely the nature of

> the profession, but also the nature of the venue, that makes women susceptible to violence under the current laws. *In order to maximize the safety of sex workers it is not sufficient to simply repeal bawdyhouse prohibitions, as this repeal must be complimented or accompanied by a rational regulatory regime.*
>
> [Emphasis added.]

54 Dr. Benoit's report, *Dispelling Myths and Understanding Realities: Working Conditions, Health Status, and Exiting Experiences of Sex Workers*, was also relied upon by the Attorney General of Ontario for the evidence that some bawdy-houses operate like sweatshops where the workers are vulnerable to economic exploitation by those in positions of control.

55 The Attorney General of Ontario also relied upon portions of the transcript of the cross-examination of Dr. Frances Shaver that was before the application judge. These excerpts support the view that decriminalization alone will not ensure the safety of prostitutes. For example, Dr. Shaver agreed with this statement from a report she wrote:

> Legislative review is one area in need of attention. *Legislative change in and of itself, however, will not be sufficient to improve the situation for sex workers*. Such changes must be combined with social policy changes, including education, support and advocacy, as other factors (e.g., public attitudes and opinion; the stigma attached to sex work) also have a negative impact on sex workers' lives.
>
> [Emphasis added.]

56 As noted, the application judge found that the safest way to conduct prostitution is generally in-call and noted that the bawdy-house provisions make this type of prostitution illegal. She made this finding on the basis of government and Parliamentary reports and the evidence of Dr. John Lowman, an expert who had prepared several reports on prostitution for the federal Department of Justice. On this motion, however, I must consider the short-term impact of decriminalization, in the absence of any regulatory framework, since without a stay of the judgment, governments and social agencies would have little time to respond.

57 Accepting the application judge's identification of the harm from enforcement of the bawdy-house provision, I must also take into account that there is no evidence from the responding parties as to how, in the relatively short time before this appeal is heard, and in the absence of any regulatory regime, the safety of prostitutes will be measurably increased by suspending the bawdy-house provisions.

(iii) Section 212(1)(j) - Living on the avails

1. Objective of s. 212(1)(j)

58 The application judge found, at para. 259, that the objective of s. 212(1)(j), the living on the avails of prostitution offence, "is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps".

2. The Legislative Void and s. 212(1)(j)

59 Staff Sergeant Cowan and Inspector Page provided some information on the impact of the striking down of s. 212(1)(j). Staff Sergeant Cowan states that this provision is used to investigate pimps who are exploiting girls and women. He states that the police are able to prosecute this offence without the evidence of the prostitute, who is often unwilling to testify. Also, these investigations may lead to the laying of human trafficking charges. Staff Sergeant Cowan provided some information to substantiate this assertion. Inspector Page provided similar evidence in his affidavit. Mr. Parenteau offered the opinion that the living on the avails offence protects prostitutes from exploitation by pimps to an extent that other charges do not, apparently because the prostitute does not have to testify to support the charge.

60 One concern raised by Staff Sergeant Cowan is the impact of what he termed the "open market" should the judgment not be stayed. In his opinion, this open market would increase the demand for prostitutes and he noted that prostitutes

are often recruited and exploited at a young age. This opinion is, in some respects, merely an educated guess and I weigh its value accordingly. The opinion is also somewhat at odds with the affidavit the officer filed before the application judge where he attests to the success in deterring juvenile prostitution. However, I would not wholly discount this opinion.

61 The application judge found that the living on the avails provision infringed the *Charter* rights of prostitutes and exposed them to risk of serious harm because, as interpreted by the courts, the provisions prevent prostitutes from taking steps to protect themselves such as allowing the prostitute to hire an assistant or bodyguard. She went on to find that the provision, whose objective was to protect prostitutes from exploitation "may actually serve to increase the vulnerability and exploitation of the very group it intends to protect": para. 379. The affidavits of the officers meet this issue to some extent by stating that, in their experience, charges are only laid in circumstances where the police believe there is evidence of exploitation.

(iv) The Overall Impact of the Legislative Void

62 Both Staff Sergeant Cowan and Inspector Page provided information on the overall impact of a declaration of invalidity with respect to all three provisions. The general import of these parts of the affidavits was that the police would have to abandon all ongoing investigations, that "red light districts" and street prostitution would proliferate, and that pimps and others would be free to exploit and victimize vulnerable women and children. Staff Sergeant Cowan and Inspector Page also explained in some detail why investigations into offences under other provisions of the *Criminal Code* would not provide viable alternatives.

63 Finally, the Attorney General of Canada relies upon the experience during the period that lap-dancing appeared to be legal following the trial decision in *R. v. Mara*, [1994] O.J. No. 264 (Ont. Prov. Ct.)), rev'd (1996), 27 O.R. (3d) 643 (Ont. C.A.), aff'd in part [1997] 2 S.C.R. 630 (S.C.C.). The material shows that it was difficult for municipalities to respond to what was considered a public health problem as well as increased risk of violence and coercion of employees of strip clubs. The difficulties that ensued as a result of the trial decision in that case may have been attributable to the lengthy (17-month) delay between the trial decision and when the Crown appeal was heard by this court. I am confident that there will not be that kind of delay in this case.

64 While I found some of the claims somewhat overblown, particularly the claim that "all" ongoing investigations would have to be abandoned, the unchallenged evidence from these experienced police officers as to the short term harm that would occur cannot be ignored. This, it seems to me, is the strength of the governments' claim on irreparable harm and balance of convenience. The invalidity of the impugned provisions would leave unregulated an area of activity that is associated with serious potential short-term harm to communities. Municipalities and provincial governments would not be able to quickly respond with a regulatory framework that would be necessary to address some of the harms that the application judge recognized in her reasons. Further, as ineffective and perhaps counter-productive as some of the enforcement of the s. 213(1)(c) offence may be, it is unclear whether the police would be able to quickly develop lawful strategies to respond to the legitimate concerns of the public, like those identified by the community members from Parkdale and Hintonburg.

65 I will now turn to parts two and three of the *RJR-MacDonald* test, dealing briefly first with the question of irreparable harm.

C. Findings on Irreparable Harm

66 The applicant and the responding parties spent some time in argument about whether the government was entitled to a presumption of irreparable harm. The concept of such a presumption "in most cases" was enunciated in *RJR-MacDonald*, where the court held as follows at p. 346:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. *The test will nearly always be satisfied simply upon proof that the authority is charged with the*

duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[Emphasis added.]

67 Courts have held that this presumption is applicable even where a court has struck down the impugned legislation. As Richard C.J. said in *Canadian Council for Refugees v. R.*, 2008 FCA 40 (F.C.A.), at para. 34:

I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

68 I agree with Richard C.J. that the presumption that Parliament was acting in the public interest in enacting the impugned provisions remains, although the application judge has struck down the legislation. The public interest is particularly engaged where criminal law is the focus of the challenge since criminal law is "designed to promote public peace, safety, order, health or other legitimate public purpose": *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571 (S.C.C.) at para. 74.

69 In enacting these provisions, Parliament was attempting to promote or protect the public interest and so *prima facie* the government is entitled to the *RJR-MacDonald* presumption of irreparable harm. The responding parties argue, however, that the harm is not only not irreparable but also speculative and tentative.

70 In addition to the presumption of irreparable harm to the public interest, the harm to which the Attorney General points, and which is supported by some evidence tendered on this motion, may be summarized as follows:

- Inability to protect vulnerable neighbourhoods from nuisance associated with street prostitution;
- Inability to assist prostitutes through investigative detention of the s. 213(1)(c) offence;
- Inability to continue the John School diversion programme;
- Inability to use the bawdy-house provision to initiate "multi-layered" investigations into crimes against prostitutes such as human trafficking, extortion, assault, threatening, exploitation and procuring;
- Inability to use living on the avails charges as a means of interrupting human trafficking and other serious criminal offences.

71 Finally, as noted, the Attorney General relies upon the lack of any regulation of prostitution-related conduct as a result of the *de facto* legalization of street prostitution, bawdy-houses and pimping. The government argues that even if some decriminalization was seen as an appropriate response to the danger faced by prostitutes, governments at all levels need time to put a suitable regulatory framework in place.

72 I am satisfied that the moving party has satisfied the irreparable harm test. While some of the evidence relied upon is somewhat speculative, that is the nature of the irreparable harm test in a case, like this, where the harm is not measured in monetary terms. The responding parties argue that the Attorney General has not demonstrated any irreparable harm because the provisions are rarely enforced and there are other methods open to the police to achieve the objectives of the legislation. They point to the long list of other *Criminal Code* provisions that the police could use to investigate prostitution-related crimes and to the evidence of other enforcement techniques that have been employed in the past. Against this submission is the unchallenged evidence of two experienced police officers of the difficulties of using many of these other provisions and other enforcement techniques. Finally, as pointed out in *RJR-MacDonald*, at p. 341, the term "irreparable" refers to "the nature of the harm suffered rather than its magnitude". Much of the responding parties'

submissions are more directed to the magnitude of the harm, an issue that is better analyzed at the third stage, balance of convenience.

D. Findings on Balance of Convenience

73 While I have found that the Attorney General has met the test for irreparable harm, that finding does not determine the question of balance of convenience. At this stage, I must determine which of the two parties will suffer the greater harm from the granting or refusal of the stay: *RJR-MacDonald* at p. 342. In constitutional cases, the public interest is a "special factor" that must be considered in assessing where the balance of convenience lies: p. 343. The Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of the public interest, including concerns of identifiable groups.

74 Here, the responding parties are private parties. As pointed out in *RJR-MacDonald* at p. 344, a private party alleging that a public interest is at risk must demonstrate that harm because a private applicant is "normally" presumed to be pursuing their own interest. While the responding parties here also rely on the public interest, there is an element of private interest in this case; the three applicants before the application judge stated that they would like to work as prostitutes or conduct activity that may infringe the prostitution provisions free from criminal sanction: see evidence of Ms. Bedford summarized at para. 31 of the application judge's reasons; Ms. Lebovitch at para. 36; and Ms. Scott at para. 43.

75 In the context of a suspension case, a private applicant relying on public interest must, at the balance of convenience stage, demonstrate that the "suspension of the legislation would itself provide a public benefit". However, because the government benefits from the presumption that it acts to promote the public interest, the "same principles would apply" where it is the government and not a private party that is the applicant: *RJR-MacDonald* at p. 349. That is, it is for the private party to show that suspension of the legislation would provide a public benefit.

76 In this case, the respondent relies, as an aspect of the public interest, upon the considerations of an identifiable group; prostitutes who operate within a legally ambiguous context in which their occupation is not *per se* criminal, but virtually every method for carrying on that occupation is prohibited. Yet, as the application judge found, the impugned legislation regulating the occupation prevents prostitutes from taking relatively modest steps to increase their security.

77 I am satisfied that the applicant has established that the balance of convenience favours staying the judgment in relation to communicating for the purpose of prostitution, the s. 213(1)(c) offence. The evidence establishes that it is the short-term consequences of an inability to enforce this prohibition that will have the most deleterious impact on vulnerable communities such as Parkdale and Hintonburg. The nature and ability to implement a short-term, constitutional federal response, in light of the application judge's findings and the complexity of the issues, is far from clear. The experience with the lap-dancing case shows that municipalities will not be able to respond immediately to this gap in the legislative scheme. Moreover, in light of the *Westendorp* case, it is not obvious how affected municipalities could legally respond to the nuisance that would return to their communities. I also point out that the term "nuisance" masks the seriousness of the problem facing these communities because of the attendant social problems that are associated with street prostitution including increased violence, accosting of women and girls, and drug use.

78 I appreciate the compelling evidence placed before the application judge that street prostitution is the most dangerous form of prostitution and that the communicating provision contributes to the risk of harm. The dreadful experience in Vancouver revealed by the *Pickton* case (see *R. v. Pickton*, 2010 SCC 32 (S.C.C.)) is a compelling reminder of the danger of street prostitution. However, the police also say that they use the communicating provision to intervene to attempt to mitigate the harm. I repeat the point made earlier that on this kind of a motion, on the one hand, I have a limited right to review the impugned government action for effectiveness. On the other hand, the responding parties have not provided sufficient evidence to show that the suspension of the legislation, in the absence of regulation and social programs, would itself provide a public benefit during the brief time that the judgment will be stayed pending the

appeal. The balance of convenience test is by definition a balancing and I have been persuaded that, on balance, the *status quo* is preferable as it relates to the communicating offence.

79 Similarly, I am satisfied that the declaration of invalidity of the living on the avails offence should be stayed. The evidence of harm to the public interest if a stay were not granted is less extensive for this offence than it is for the communicating offence. However, there is unchallenged evidence filed on this motion that this provision is used by police to protect against exploitation and physical harm to prostitutes in a context in which other provisions are ineffective because they depend upon evidence from the prostitute. As well, this provision is used to further investigations into the very serious offence of human trafficking.

80 The most serious problem with the living on the avails provision, identified by the application judge, is that it overshoots the mark by criminalizing non-exploitive relationships, thus potentially preventing prostitutes from employing people who could provide a measure of safety. On the other hand, there is the evidence referred to earlier suggesting that, at least in the experience of the police officers who filed affidavits on this motion, police do not lay the living on the avails charge in the absence of evidence, which they believe shows an exploitive relationship. Police charging practices may not be relevant to whether the legislation meets minimum constitutional standards, see *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.) at p. 1078-79. That evidence may, however, assist in measuring the magnitude of the short-term harm should the judgment be stayed. Further, the respondent put little evidence before me of the benefit of a temporary suspension in the context of a regulatory void. Again, I highlight this point because I am bound by this consideration.

81 The Attorney General has also met the balance of convenience test as it applies to the bawdy-house provision. Consideration of a stay in relation to the bawdy-house provision starkly demonstrates the different perspectives the application judge had to bring to bear as opposed to the perspective I must apply on this motion. For example, in finding that the bawdy-house provision infringed the proportionality principle of fundamental justice, the application judge's focus, applying *Malmo-Levine*, was on whether the deprivation of security of the person was grossly disproportionate to its objective of preventing public nuisance and interference with public health and safety. She found, based on the evidentiary record, that complaints about nuisance are rare and that enforcement has the potential of preventing prostitutes from taking measures to enhance their health and safety.

82 However, as I have noted earlier, it is not the nuisance of bawdy-houses which represents the harm to the public interest upon which the government relies in its motion before me. Rather, the government relies on the inability to use bawdy-house investigations to investigate other potentially much more serious offences involving exploitation of prostitutes. The responding parties did not suggest that I could not consider this kind of harm to the public interest. In any event, I am satisfied that *RJR-MacDonald* allows me to take into account these broader considerations, as the court explained at p. 344 of the reasons for judgment:

> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. *Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought*. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> *We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application*.
>
> [Emphasis added.]

83 Admittedly, I have found some of the government's evidence of harm less than compelling. My principal concern, however, is with the regulatory void, a matter also referred to by the application judge. In that respect, I am concerned about the suggestion from counsel for the responding parties that the stay simply be lifted and to see what would happen. I cannot accept that this approach is in the public interest. The evidence of the responding parties' witnesses, Dr. Benoit

and Dr. Shaver, relied upon by the Attorney General of Ontario, is that simple repeal of the bawdy-house prohibition will not maximize the safety of prostitutes. The extensive review, conducted by the application judge, of the legislative framework in other western democracies shows that decriminalization has been accompanied, with varying degrees of success, by a regulatory scheme or improved social supports: see paras. 178-213 of her reasons.

84 To conclude, by pointing to the findings of the application judge, the responding parties have demonstrated harm should a stay be granted in relation to each impugned provision. However, I am not satisfied that suspension of the legislation during the short period pending this appeal, in the absence of regulation and social programs, provides a sufficient public benefit to tip the balance of convenience in the responding parties' favour.

85 Finally, I intend my order staying the judgment to be time-limited. This again, may to some extent, meet the application judge's concern expressed in her reasons on the application and on the motion to extend the stay. It is not satisfactory that the perfection of this appeal be delayed as occurred with the lap-dancing case.

V. Disposition

86 Accordingly, an order will go staying paras. 1 to 3 of the judgment of Himel J. This stay will be in effect until April 29, 2011 or until the appeal is argued, whichever is the earlier, unless varied by a further order of this court or a judge of this court. The parties may wish to reconsider the timetable to which they had previously agreed and which would have delayed hearing of this appeal to sometime in late June, 2011. I note that counsel for the responding parties was prepared to argue the appeal as soon as possible. This court is available to hear this appeal at the end of April, before the expiration of this order. This is not a case for costs.

Motion granted.

Footnotes

1 While I accept what Staff Sergeant Cowan says, I should not be taken as approving of this use of the investigative detention power, a matter not argued before me.

TAB 3

2010 ONSC 4264
Ontario Superior Court of Justice

Bedford v. Canada (Attorney General)

2010 CarswellOnt 7249, 2010 ONSC 4264, [2010] O.J. No. 4057, 102 O.R. (3d) 321, 199 A.C.W.S. (3d) 1136, 217 C.R.R. (2d) 1, 262 C.C.C. (3d) 129, 327 D.L.R. (4th) 52, 80 C.R. (6th) 256, 91 W.C.B. (2d) 184

Terri Jean Bedford, Amy Lebovitch and Valerie Scott, Applicants and Attorney General of Canada, Respondent and Attorney General of Ontario, Intervener and The Christian Legal Fellowship, Real Women of Canada and the Catholic Civil Rights League, Intervener

Himel J.

Heard: October 6-26, 2009
Judgment: September 28, 2010
Docket: 07-CV-329807 PD1

Counsel: Alan N. Young, for Applicant, Terri Jean Bedford
Ron Marzel, for Applicant, Amy Lebovitch
Stacey Nichols, for Applicant, Valerie Scott
Michael H. Morris, Gail Sinclair, Julie Jai, Roy Lee, for Respondent
Shelley Hallet, Christine Bartlett-Hughes, for Intervener, Attorney General of Ontario
Robert W. Staley, Derek J. Bell, Ranjan K. Agarwal, for Intervener, the Christian Legal Fellowship, REAL Women of Canada, Catholic Civil Rights League

Headnote

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Miscellaneous

Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted; provisions were struck down with 30-day stay — Experts agreed that street prostitution is dangerous activity, all prostitution carries risk of violence, indoor prostitution can be dangerous, and violence faced by prostitutes is due to multiple factors — Laws violated s. 7 of Canadian Charter of Rights and Freedoms, as they forced prostitutes to choose between liberty interest and right to security of person — Bawdy-house provisions were intended to prevent public nuisance and promote public health and safety — Living on avails was intended to prevent exploitation — Communicating was for purpose of controlling social nuisance arising from street prostitution — Possibility of imprisonment was enough to trigger scrutiny of s. 7 — Psychological stress was both serious and state-imposed and engaged s. 7 — Evidence showed prostitutes faced high risk of physical violence — Evidence showed laws contributed to deprivation of security of person — Laws played contributory role in stopping prostitutes from taking precautions to reduce risk of violence — Effect was to force prostitutes to choose between their liberty and safety — Laws placed prostitutes at greater risk of violence, which was severe deprivation of right to security of person — Effects of laws were disproportionate to identified state interests — Bawdy-house law was grossly disproportionate as it severely infringed applicants' s. 7 rights due to increased risk of violence — Infringement was not proportionate to goal of reducing public nuisance — Living on avails targeted exploitation of prostitutes, but actual effect of law was to make them less secure, as it prevented them from hiring help and placed them at greater risk, which made it grossly disproportionate — Law was severe violation of s. 7 — Choice between increased safety and incarceration was perverse — Communicating law was intended to target nuisance of noise, street congestion, and possibility that prostitution will interfere with others — Law forced prostitutes to forego screening process, which increased danger — Law was grossly

disproportionate — As laws were all grossly disproportionate and some were arbitrary and overbroad, there was no way to say there was minimal impairment of right.

Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Principles of fundamental justice — Overbreadth

Applicants B, L and S were prostitutes who wanted to work without fear of danger but feared consequences of offences — S wanted to resume prostitution from her home but was afraid due to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted; provisions were struck down with 30-day stay of order — Experts agreed that street prostitution is dangerous activity, all prostitution carries risk of violence, indoor prostitution can be dangerous, there is significant social stigma attached to prostitution and violence faced by prostitutes is due to multiple factors — Offences violated s. 7 of Canadian Charter of Rights and Freedoms, as they forced prostitutes to choose between their liberty interest and their right to security of the person — Offences were overbroad — Bawdy-house provisions were intended to prevent public nuisance and promote public health and safety — Living on avails provision is intended to prevent exploitation of prostitutes by pimps — Communicating offence had purpose of controlling social nuisance arising from street prostitution — Availability of imprisonment for challenged offences was enough to trigger scrutiny of s. 7 interest — Evidence showed prostitutes faced high risk of physical violence, including risk of death — Evidence was sufficient to show that impugned provisions contributed to deprivation of security of person for applicants — Some ways of conducting prostitution might reduce risk of violence, but provisions made methods illegal — Bawdy-house provisions were overbroad — Provisions were not necessary to achieve objective of order and public safety — Living on avails was overbroad, as means were broader than necessary to meet objective of protecting women from exploitation — Communicating provision sufficiently contributed to deprivation of liberty and security of person of prostitutes and was threshold violation of s. 7 — Communicating offence included screening measures intended to increase safety — Offence was overbroad — Effect of offences was to force prostitutes to choose between their liberty interest and their own personal security — Offences placed prostitutes at greater risk of experiencing violence, which was severe deprivation of right to security of person — Effects of laws were disproportionate to identified state interests .

Criminal law --- Offences — Prostitution and related offences — Living on avails of prostitution — Miscellaneous

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due to bawdy- house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted — Living on avails prevented women from entering into certain business relationships that could enhance their safety and thus was not connected to objective and was arbitrary — Acting together, offences were arbitrary, as they were inconsistent with Parliament's objectives and there was no rational connection between them and their objectives — Living on avails provision targeted exploitation of prostitutes, but actual effect of provision was to make them less secure — Provision prevented prostitutes from hiring help and placed them at greater risk and was grossly disproportionate — Provision was severe violation of s. 7 of Canadian Charter of Rights and Freedoms — Choice of increased safety and incarceration was perverse — Overall effect was to force prostitutes to choose between their liberty interest and their personal security — Provisions were all grossly disproportionate to their legislative objectives and thus were not in accordance with principles of fundamental justice — Violations were not able to be saved by s. 1 of Charter — As provisions were all grossly disproportionate and some were arbitrary and overbroad, there was no way to say there was minimal impairment of right to liberty.

Criminal law --- Offences — Prostitution and related offences — Soliciting — Miscellaneous

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due

to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted — Communicating offence was intended to target nuisance of noise, street congestion, and possibility that prostitution will interfere with others — As provision forced prostitutes to forego screening process that could increase their safety, it was dangerous to applicants — There was little or no benefit to community and damage could actually result from effect of provision — Effect of provision was grossly disproportionate to its aim — Effect of offences was to force prostitutes to choose between their liberty interest and their own personal security — Offences placed prostitutes at greater risk of experiencing violence, which was severe deprivation of right to security of person — Effects of laws were disproportionate to identified state interests — Overall effect was to force prostitutes to choose between their liberty interest and their personal security — Provisions were all grossly disproportionate to their legislative objectives and thus were not in accordance with principles of fundamental justice — Violations were not able to be saved by s. 1 of Canadian Charter of Rights and Freedoms — As provisions were all grossly disproportionate and some were arbitrary and overbroad, there was no way to say there was minimal impairment of right to liberty.

Criminal law --- Offences — Bawdy-house offences — Keeping common bawdy-house — Keeping

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted — Bawdy-houses can cause nuisance to community and section did have real connection to its objective and was arbitrary — Bawdy-house provisions were grossly disproportionate — Provisions severely infringed applicants' right to security of person, as their effect was to increase risk of violence — Infringement was far not proportionate to goal of reducing public nuisance — Complaints about indoor prostitution are rare and there was very little neighbourhood disruption — Effect of offences was to force prostitutes to choose between their liberty interest and their own personal security — Offences placed prostitutes at greater risk of experiencing violence, which was severe deprivation of right to security of person — Effects of laws were disproportionate to identified state interests — Overall effect was to force prostitutes to choose between their liberty interest and their personal security — Provisions were all grossly disproportionate to their legislative objectives and thus were not in accordance with principles of fundamental justice — Violations were not able to be saved by s. 1 of Canadian Charter of Rights and Freedoms — As provisions were all grossly disproportionate and some were arbitrary and overbroad, there was no way to say there was minimal impairment of right to liberty.

Criminal law --- Charter of Rights and Freedoms — Freedom of expression [s. 2(b)]

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted; provisions were struck down with 30-day stay of order — Experts agreed that street prostitution is dangerous activity, all prostitution carries risk of violence, indoor prostitution can be dangerous, there is significant social stigma attached to prostitution and violence faced by prostitutes is due to multiple factors — Communicating provision was prima facie infringement of s. 2(b) of Canadian Charter of Rights and Freedoms — Provision did serve pressing and substantial purpose, as combatting street prostitution is valid legislative purpose — More than economic liberty was at stake — Evidence showed safety precautions were being compromised by consequences of conviction for communicating — Provision led prostitutes to forego safety screening procedures — Communicating provision caught speech that was meant to safeguard physical and psychological integrity of individuals — Need to safeguard bodily integrity was near core of expression meant to

be protected by s. 2(b) — Crown could not show that prohibition on communication was justified — Provision was rationally connected to its aim, but freedom of expression was not minimally impaired — With new evidence it could not be said that section was sufficiently tailored to objective — Expression being impaired was not purely economic but was closely related to personal security — Section forbid all communication for purpose of engaging prostitute and not just those that contributed to social nuisance — Negative effects on prostitutes were disproportionate to goals — Section was unreasonable limit on freedom of expression — Evidence showed that communicating law did not effectively cut down on social nuisance of street prostitution and showed no reduction in trade — Communicating provision prevented communication for purpose of improving personal security, which was significant negative effect — Negative effects outweighed rights and thus was not justifiable limit under s. 1 of Charter.

Constitutional law --- Procedure in constitutional challenges — Standing

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted — L had private interest standing, as she was currently working as prostitute and had interest in consequence of conviction including, loss of her home and charges of living off avails for her live-in partner — To distinguish between L who was working as prostitute and B and S who wanted to return to prostitution was to make false distinction — Applicants claimed to be prevented from engaging in their livelihood by offences in Criminal Code and that gave them direct, personal interest in outcome of application different from general public.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Declaration of invalidity

Applicant B had 14 years experience in prostitution and had experienced violence but wanted to resume dominatrix work — Applicant L had worked as prostitute for 13 years, including at current time out of her home — L feared violence and being charged under bawdy-house provisions and losing her home — Applicant S had worked as prostitute in different ways but had left 17 years earlier — S wanted to resume prostitution from her home but was afraid due to bawdy-house offences and their consequences — Applicants brought application for declaration that Criminal Code provisions criminalizing living on avails of prostitution, keeping common bawdy-house and communicating in public place for purpose of engaging in prostitution were unconstitutional — Application granted; provisions were struck down with 30-day stay of order — Experts agreed that street prostitution is dangerous activity, all prostitution carries risk of violence, indoor prostitution can be dangerous, there is significant social stigma attached to prostitution and violence faced by prostitutes is due to multiple factors — Offences violated s. 7 of Canadian Charter of Rights and Freedoms, as they forced prostitutes to choose between their liberty interest and their right to security of person — Communicating provision also violated s. 2(b) of Charter — Many other offences were available to address street disturbances and unwanted confrontations — There would be no legal vacuum created by striking down provisions — Police had used and could continue to use kidnapping, uttering threats, assault, theft, robbery, torture, sexual assault offences and trafficking to prosecute pimps and customers — Striking down would not pose danger to public — Law was contributing to danger faced by prostitutes and that danger greatly outweighed any harm faced by any other members of public, so temporary suspension of declaration was not appropriate.

Annotation

This decision awards the applicants all of the remedies they were seeking, namely a declaration of invalidity of most of the adult prostitution provisions of the *Criminal Code*. Justice Himel suspended that declaration of invalidity for a period of 30 days. That suspension has since been extended pending appeal for an additional six months by Justice Rosenberg of the Ontario Court of Appeal: *Bedford v. Canada (Attorney General)*, 2010 ONCA 814 (Ont. C.A.).

Given the potential impact of this decision, should it ultimately be upheld by the Ontario Court of Appeal and the Supreme Court of Canada, some critical reflection on the conclusions that it reaches is warranted in advance of those appeals.

Justice Himel begins her decision by noting that there is no social consensus on the proper role of the criminal law in relation to prostitution. She also rejects the Crown's characterization of the applicants' argument as based on recognition of a constitutional right to engage in prostitution. Yet her reasons for striking these provisions down are premised on the idea that prostitution is an activity that cannot be criminally prohibited without violating s. 7 of the *Canadian Charter of Rights and Freedoms*. This conclusion is reached not through directly recognizing the right of men to buy women for sexual purposes, but by relying on the applicants' claim that prostitution is a "legal activity" in Canada. This leads to the conclusion that prostitution must be permitted in both its least and most dangerous forms. This sounds suspiciously like a right to prostitution.

Parliament's decriminalization of the status of offence of being a common prostitute is not the same thing as a declaration that prostitution is a lawful activity. Prostitution has always been far more criminal than legal. The challenged provisions effectively prohibit all brothel and street prostitution, as well as escort prostitution that involves the operation of an office or "out-calls" to the same location on multiple occasions. They apply in various ways to both male buyers and to the (mostly) women in prostitution as sellers. The mischaracterization of prostitution as "lawful" should not determine the constitutional analysis.

Justice Himel rejected the relevance of the Crown's expert testimony on trafficking and youth prostitution, finding it incidental to the questions raised by the appeal. Yet Canada's international commitment to fight trafficking is directly related to the demand for prostitution, demand that will certainly not decrease if johns are decriminalized, and which is outsourced to vulnerable women from other countries when domestic demands exceed supply.

Justice Himel finds that decriminalizing street prostitution gives women more time to assess the dangers posed by potential johns. It is hard to believe that men who pick up street prostitutes will linger for long periods of time in public places so that women can assess them. More importantly, it is impossible for women to predict which men will turn violent, as numerous cases of marital and other intimate violence indicate. A woman can spend a lot of time with a man and still not be able to predict his propensity for violence.

This case is an example of the limits of the adversary system in addressing complex questions of rights in the context of the criminal law. The applicants argued for the striking down of the laws in their entirety; the Crown argued for their total retention. Neither party argued that prostituted women and male buyers are not substantively equal parties to this transaction and ought to be treated differently. Viewing the case through an equality lens produces a very different approach, one that would support striking down the laws as they apply to prostitutes but retain them as they apply to buyers and pimps. It makes little sense to argue that women's security of the person is violated through criminalizing the very men who are the source of the danger and harm, whether it occurs indoors or out.

The gendered nature of prostitution is neither coincidental nor unimportant. Prostitution is a global industry that preys on women's poverty and inequality on the basis of sex, race, disability and Aboriginality. The focus of the criminal law ought to be on this exploitation and these women, with a recognition of harm that extends beyond individual acts of physical violence. Criminalizing the women in prostitution worsens, rather than improves, these inequalities. Criminalizing male buyers targets the demand, which is the source of the harm.

If legalizing johns really made prostitutes safer, we would be advocating for legalization of teenagers and children in prostitution as well. But in that context, we accept the logic and efficacy of a provision that criminalizes only the buyers. We should not take a different approach merely where those teenagers remain in prostitution into adulthood. Men's demand for women in prostitution remained largely invisible in this case, consistent with its current invisibility in the enforcement of prostitution laws, which are used much more often against women than buyers in most Canadian cities.

Justice Himel does recognize that various other legislative models exist. A legislative model premised on gender equality was pioneered in Sweden a decade ago and has since spread to Norway and Iceland. It criminalizes the purchase of sexual services in all settings and is accompanied by both public education to deter buyers and social supports for women to

exit prostitution. A report issued this summer evaluating this approach credits it with making Sweden an unattractive destination for traffickers and with sharply decreasing street prostitution. It is encouraging that Justice Himel appears to have left this legislative model within Parliament's list of alternatives if the current laws are not upheld.

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R. v. Abbey (2009), 68 C.R. (6th) 201, 2009 ONCA 624, 2009 CarswellOnt 5008, 254 O.A.C. 9, 97 O.R. (3d) 330, 246 C.C.C. (3d) 301 (Ont. C.A.) — followed
R. v. Abbey (2010), 2010 CarswellOnt 4827, 2010 CarswellOnt 4828 (S.C.C.) — referred to
R. c. Alexandre (2010), [2010] R.J.Q. 1372, *(*sub nom. *R. c. Marceau)* 77 C.R. (6th) 70, 2010 CarswellQue 5972, 2010 QCCA 1155 (Que. C.A.) — considered
R. v. Allan (1993), 1993 CarswellOnt 3191 (Ont. C.A.) — referred to
R. v. B. (D.) (2008), 374 N.R. 221, 237 O.A.C. 110, 293 D.L.R. (4th) 278, [2008] 2 S.C.R. 3, 171 C.R.R. (2d) 133, 92 O.R. (3d) 399 (note), 2008 CarswellOnt 2708, 2008 CarswellOnt 2709, 2008 SCC 25, 231 C.C.C. (3d) 338, 56 C.R. (6th) 203 (S.C.C.) — considered
R. v. Barrow (2001), 42 C.R. (5th) 203, 155 C.C.C. (3d) 362, 54 O.R. (3d) 417, 146 O.A.C. 363, 2001 CarswellOnt 2010 (Ont. C.A.) — considered
R. v. Barrow (2002), 287 N.R. 400 (note), 2002 CarswellOnt 236, 2002 CarswellOnt 237, 160 O.A.C. 199 (note) (S.C.C.) — referred to
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R. v. Bedford (2000), 2000 CarswellOnt 4200, 2000 CarswellOnt 4201, 145 O.A.C. 199 (note), 264 N.R. 199 (note) (S.C.C.) — referred to
R. v. Bernard (1988), 67 C.R. (3d) 113, 32 O.A.C. 161, [1988] 2 S.C.R. 833, 90 N.R. 321, 45 C.C.C. (3d) 1, 38 C.R.R. 82, 1988 CarswellOnt 93, 1988 CarswellOnt 971 (S.C.C.) — referred to
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R. v. Bodnaruk (2002), 217 Sask. R. 89, 265 W.A.C. 89, 2002 SKCA 21, 2002 CarswellSask 98 (Sask. C.A.) — considered
R. v. Boivin (1993), 27 B.C.A.C. 17, 45 W.A.C. 17, 1993 CarswellBC 991 (B.C. C.A.) — referred to
R. v. Butler (1992), [1992] 2 W.W.R. 577, [1992] 1 S.C.R. 452, 11 C.R. (4th) 137, 70 C.C.C. (3d) 129, 134 N.R. 81, 8 C.R.R. (2d) 1, 89 D.L.R. (4th) 449, 78 Man. R. (2d) 1, 16 W.A.C. 1, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.) — considered
R. v. Canadian Pacific Ltd. (1995), 41 C.R. (4th) 147, 17 C.E.L.R. (N.S.) 129, 99 C.C.C. (3d) 97, 125 D.L.R. (4th) 385, *(*sub nom. *Ontario v. Canadian Pacific Ltd.)* 183 N.R. 325, *(*sub nom. *Ontario v. Canadian Pacific Ltd.)* 24 O.R. (3d) 454 (note), *(*sub nom. *Ontario v. Canadian Pacific Ltd.)* 82 O.A.C. 243, *(*sub nom. *Ontario v. Canadian Pacific Ltd.)* [1995] 2 S.C.R. 1031, 1995 CarswellOnt 968, *(*sub nom. *Ontario v. Canadian Pacific Ltd.)* 30 C.R.R. (2d) 252, 1995 CarswellOnt 532 (S.C.C.) — considered
R. v. Celebrity Enterprises Ltd. (1977), [1978] 2 W.W.R. 562, 41 C.C.C. (2d) 540, 1977 CarswellBC 477 (B.C. C.A.) — considered
R. v. Chaulk (1990), 2 C.R. (4th) 1, 62 C.C.C. (3d) 193, 69 Man. R. (2d) 161, [1991] 2 W.W.R. 385, 1 C.R.R. (2d) 1, 119 N.R. 161, [1990] 3 S.C.R. 1303, 1990 CarswellMan 385, 1990 CarswellMan 239 (S.C.C.) — referred to
R. v. Clay (2003), 70 O.R. (3d) 95 (note), 114 C.R.R. (2d) 137, 16 C.R. (6th) 117, [2003] 3 S.C.R. 735, 2003 CarswellOnt 5179, 2003 CarswellOnt 5180, 2003 SCC 75, 181 O.A.C. 350, 179 C.C.C. (3d) 540, 233 D.L.R. (4th) 541, 313 N.R. 252 (S.C.C.) — considered

R. c. Corbeil (1991), [1991] 1 S.C.R. 830, 1991 CarswellQue 13, 5 C.R. (4th) 62, 40 Q.A.C. 283, 64 C.C.C. (3d) 272, 124 N.R. 241, 1991 CarswellQue 103 (S.C.C.) — considered
R. v. Dalli (1996), 1996 CarswellOnt 745 (Ont. Prov. Div.) — considered
R. c. Demers (2004), 20 C.R. (6th) 241, *(*sub nom. *R. v. Demers)* 240 D.L.R. (4th) 629, *(*sub nom. *R. v. Demers)* 185 C.C.C. (3d) 257, 2004 SCC 46, 2004 CarswellQue 1547, 2004 CarswellQue 1548, *(*sub nom. *R. v. Demers)* 323 N.R. 201, [2004] 2 S.C.R. 489, 120 C.R.R. (2d) 327 (S.C.C.) — considered
R. v. Downey (1992), 2 Alta. L.R. (3d) 193, 136 N.R. 266, 125 A.R. 342, 14 W.A.C. 342, 90 D.L.R. (4th) 449, [1992] 2 S.C.R. 10, 13 C.R. (4th) 129, 9 C.R.R. (2d) 1, 72 C.C.C. (3d) 1, 1992 CarswellAlta 56, 1992 CarswellAlta 467 (S.C.C.) — considered
R. v. Dyck (2008), 57 C.R. (6th) 275, 90 O.R. (3d) 409, 236 O.A.C. 26, 2008 CarswellOnt 2291, 2008 ONCA 309, 232 C.C.C. (3d) 450, 171 C.R.R. (2d) 187 (Ont. C.A.) — considered
R. v. Ford (1993), 1993 CarswellOnt 1067, 15 O.R. (3d) 173, 65 O.A.C. 40, 106 D.L.R. (4th) 325, 84 C.C.C. (3d) 544 (Ont. C.A.) — considered
R. v. Goltz (1991), 8 C.R. (4th) 82, 5 B.C.A.C. 161, 11 W.A.C. 161, [1991] 3 S.C.R. 485, 7 C.R.R. (2d) 1, 67 C.C.C. (3d) 481, 61 B.C.L.R. (2d) 145, 131 N.R. 1, 31 M.V.R. (2d) 137, 1991 CarswellBC 280, 1991 CarswellBC 924 (S.C.C.) — considered
R. v. Gowan (1998), 1998 CarswellOnt 1748 (Ont. Prov. Div.) — considered
R. v. Graves (1999), 138 Man. R. (2d) 279, 202 W.A.C. 279, 1999 CarswellMan 417 (Man. C.A.) — considered
R. v. Gregory (2001), 2001 CarswellBC 1108, 2001 BCCA 358 (B.C. C.A.) — referred to
R. v. Grilo (1991), 2 O.R. (3d) 514, 64 C.C.C. (3d) 53, 44 O.A.C. 284, 5 C.R. (4th) 113, 1991 CarswellOnt 89 (Ont. C.A.) — considered
R. v. Hayes (1998), 115 B.C.A.C. 22, 189 W.A.C. 22, 1998 CarswellBC 2622 (B.C. C.A.) — considered
R. v. Head (1987), 59 C.R. (3d) 80, 1987 CarswellBC 501, 36 C.C.C. (3d) 562 (B.C. C.A.) — considered
R. v. Heywood (1994), 34 C.R. (4th) 133, 174 N.R. 81, 50 B.C.A.C. 161, 82 W.A.C. 161, 24 C.R.R. (2d) 189, 120 D.L.R. (4th) 348, 94 C.C.C. (3d) 481, 1994 CarswellBC 592, 1994 CarswellBC 1247, [1994] 3 S.C.R. 761 (S.C.C.) — considered
R. v. Hutt (1978), [1978] 2 S.C.R. 476, 82 D.L.R. (3d) 95, 19 N.R. 331, 38 C.C.C. (2d) 418, 1 C.R. (3d) 164, [1978] 2 W.W.R. 247, 1978 CarswellBC 372, 1978 CarswellBC 555 (S.C.C.) — considered
R. v. Jones (1921), [1921] 3 W.W.R. 411, 17 Alta. L.R. 86, 36 C.C.C. 208, 62 D.L.R. 413, 1921 CarswellAlta 53 (Alta. C.A.) — considered
R. v. Keegstra (1990), 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1, 114 A.R. 81, 61 C.C.C. (3d) 1, 3 C.R.R. (2d) 193, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.) — followed
R. v. Knowles (1913), 4 W.W.R. 1341, 21 C.C.C. 321, 12 D.L.R. 639, 6 Alta. L.R. 219, 1913 CarswellAlta 58, 25 W.L.R. 294 (Alta. S.C.) — considered
R. c. Kouri (2004), 2004 CarswellQue 11904, 2004 CarswellQue 1724, [2004] R.J.Q. 2061, 191 C.C.C. (3d) 42 (Que. C.A.) — considered
R. c. Kouri (2005), 34 C.R. (6th) 86, 203 C.C.C. (3d) 217, *(*sub nom. *R. v. Kouri)* 260 D.L.R. (4th) 643, *(*sub nom. *R. v. Kouri)* 342 N.R. 379, [2005] 3 S.C.R. 789, 2005 SCC 81, 2005 CarswellQue 11497, 2005 CarswellQue 11498 (S.C.C.) — referred to
R. c. Labaye (2005), 34 C.R. (6th) 1, *(*sub nom. *R. v. Labaye)* 203 C.C.C. (3d) 170, *(*sub nom. *R. v. Labaye)* 260 D.L.R. (4th) 595, *(*sub nom. *R. v. Labaye)* 136 C.R.R. (2d) 220, *(*sub nom. *R. v. Labaye)* 342 N.R. 304, [2005] 3 S.C.R. 728, 2005 SCC 80, 2005 CarswellQue 11495, 2005 CarswellQue 11496 (S.C.C.) — considered
R. v. Lawrence (2002), 2002 ABPC 189, 2002 CarswellAlta 1644, 9 Alta. L.R. (4th) 356, 332 A.R. 188, 10 C.R. (6th) 101 (Alta. Prov. Ct.) — considered
R. c. Lemieux (1991), 1991 CarswellQue 4, 11 C.R. (4th) 224, 70 C.C.C. (3d) 434, [1992] R.J.Q. 295 (Que. C.A.) — considered
R. v. Lucas (1998), 224 N.R. 161, 157 D.L.R. (4th) 423, [1998] 1 S.C.R. 439, 50 C.R.R. (2d) 69, 163 Sask. R. 161, 165 W.A.C. 161, 14 C.R. (5th) 237, [1999] 4 W.W.R. 589, 123 C.C.C. (3d) 97, 1998 CarswellSask 93, 1998 CarswellSask 94, 5 B.H.R.C. 409 (S.C.C.) — considered

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R. v. Mills (1999), 180 D.L.R. (4th) 1, 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, [1999] 3 S.C.R. 668, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201 (S.C.C.) — considered

R. v. Mohan (1994), 18 O.R. (3d) 160 (note), 29 C.R. (4th) 243, 71 O.A.C. 241, 166 N.R. 245, 89 C.C.C. (3d) 402, 114 D.L.R. (4th) 419, [1994] 2 S.C.R. 9, 1994 CarswellOnt 1155, 1994 CarswellOnt 66 (S.C.C.) — followed

R. v. Mooney (1993), 23 B.C.A.C. 274, 39 W.A.C. 274, 1993 CarswellBC 941 (B.C. C.A.) — considered

R. v. Morgentaler (1988), 63 O.R. (2d) 281 (note), *(*sub nom. *R. v. Morgentaler (No. 2))* [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 26 O.A.C. 1, 37 C.C.C. (3d) 449, 62 C.R. (3d) 1, 31 C.R.R. 1, 82 N.R. 1, 1988 CarswellOnt 954, 1988 CarswellOnt 45 (S.C.C.) — considered

R. v. Murray (1995), 169 A.R. 307, 97 W.A.C. 307, 1995 CarswellAlta 645 (Alta. C.A.) — considered

R. v. Nakpangi (2008), 2008 CarswellOnt 9334 (Ont. C.J.) — considered

R. v. Nest (1999), 228 A.R. 369, 188 W.A.C. 369, 1999 ABCA 46, 1999 CarswellAlta 92 (Alta. C.A.) — considered

R. v. Oakes (1986), [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 53 O.R. (2d) 719, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.) — followed

R. v. Omer (1990), 66 Man. R. (2d) 45, 1990 CarswellMan 156 (Man. C.A.) — referred to

R. v. Pake (1995), 1995 CarswellAlta 821, 45 C.R. (4th) 117, 103 C.C.C. (3d) 524, 178 A.R. 53, 110 W.A.C. 53 (Alta. C.A.) — considered

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R. v. Pierce (1982), 37 O.R. (2d) 721, 1982 CarswellOnt 1312, 66 C.C.C. (2d) 388 (Ont. C.A.) — considered

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R. v. Roper (1997), 98 O.A.C. 225, 32 O.R. (3d) 204, 1997 CarswellOnt 663 (Ont. C.A.) — referred to

R. v. S. (R.J.) (1995), 1995 CarswellOnt 2, 36 C.R. (4th) 1, 26 C.R.R. (2d) 1, 177 N.R. 81, 21 O.R. (3d) 797 (note), 96 C.C.C. (3d) 1, 1995 CarswellOnt 516, [1995] 1 S.C.R. 451, 78 O.A.C. 161, 121 D.L.R. (4th) 589 (S.C.C.) — considered

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R. v. Seaboyer (1991), 7 C.R. (4th) 117, 128 N.R. 81, 6 C.R.R. (2d) 35, [1991] 2 S.C.R. 577, 66 C.C.C. (3d) 321, 83 D.L.R. (4th) 193, 1991 CarswellOnt 109, 4 O.R. (3d) 383 (headnote only), 48 O.A.C. 81, 1991 CarswellOnt 1022 (S.C.C.) — considered

R. v. Searle (1994), 163 N.B.R. (2d) 123, 419 A.P.R. 123, 1994 CarswellNB 481 (N.B. Prov. Ct.) — considered

R. v. Senior (1997), 200 A.R. 222, 146 W.A.C. 222, [1997] 2 S.C.R. 288, 1997 CarswellAlta 629, 1997 CarswellAlta 628, 212 N.R. 235, 116 C.C.C. (3d) 152 (S.C.C.) — considered

R. v. Sheikh (2008), 2008 CarswellOnt 2275 (Ont. S.C.J.) — considered

R. v. Smith (1987), 1987 CarswellBC 198, 1987 CarswellBC 704, [1987] 5 W.W.R. 1, [1987] 1 S.C.R. 1045, *(*sub nom. *Smith v. R.)* 40 D.L.R. (4th) 435, 75 N.R. 321, 15 B.C.L.R. (2d) 273, *(*sub nom. *Smith v. R.)* 34 C.C.C. (3d) 97, 58 C.R. (3d) 193, *(*sub nom. *Smith v. R.)* 31 C.R.R. 193 (S.C.C.) — considered

R. v. Therens (1985), 38 Alta. L.R. (2d) 99, 1985 CarswellSask 851, 1985 CarswellSask 368, [1985] 1 S.C.R. 613, 13 C.R.R. 193, [1985] 4 W.W.R. 286, 18 D.L.R. (4th) 655, 59 N.R. 122, 40 Sask. R. 122, 18 C.C.C. (3d) 481, 45 C.R. (3d) 97, 32 M.V.R. 153 (S.C.C.) — considered

R. v. Videoflicks Ltd. (1986), 1986 CarswellOnt 1012, 87 C.L.L.C. 14,001, *(*sub nom. *R. v. Edwards Books & Art Ltd.)* [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1, 71 N.R. 161, 19 O.A.C. 239, 30 C.C.C. (3d) 385, 55 C.R. (3d) 193, 28 C.R.R. 1, 58 O.R. (2d) 442 (note), 1986 CarswellOnt 141 (S.C.C.) — considered

R. v. Wasylyshyn (October 31, 1988), Doc. Vancouver Registry CC880832 (B.C. Co. Ct.) — considered

R. v. Westendorp (1983), 1983 CarswellAlta 1, 1983 CarswellAlta 316, [1983] 2 W.W.R. 385, 144 D.L.R. (3d) 259, [1983] 1 S.C.R. 43, 46 N.R. 30, 23 Alta. L.R. (2d) 289, 41 A.R. 306, 2 C.C.C. (3d) 330, 32 C.R. (3d) 97, 20 M.P.L.R. 267 (S.C.C.) — considered

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R. v. Worthington (1972), 22 C.R.N.S. 34, 10 C.C.C. (2d) 311, 1972 CarswellOnt 48 (Ont. C.A.) — considered

R. v. Woszczyna (1983), 6 C.C.C. (3d) 221, 1983 CarswellOnt 1219 (Ont. C.A.) — considered

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R. v. Zundel (1992), 95 D.L.R. (4th) 202, 16 C.R. (4th) 1, 75 C.C.C. (3d) 449, 10 C.R.R. (2d) 193, *(*sub nom. *R. v. Zundel (No. 2))* 56 O.A.C. 161, [1992] 2 S.C.R. 731, *(*sub nom. *R. v. Zundel (No. 2))* 140 N.R. 1, 1992 CarswellOnt 109, 1992 CarswellOnt 995 (S.C.C.) — considered

Reference re Firearms Act (Canada) (2000), [2000] 10 W.W.R. 1, [2000] 1 S.C.R. 783, 34 C.R. (5th) 1, 2000 SCC 31, 2000 CarswellAlta 517, 2000 CarswellAlta 518, 261 A.R. 201, 225 W.A.C. 201, 82 Alta. L.R. (3d) 1, 254 N.R. 201, 185 D.L.R. (4th) 577, 144 C.C.C. (3d) 385 (S.C.C.) — referred to

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Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada) (1990), 1990 CarswellMan 378, 1990 CarswellMan 206, 77 C.R. (3d) 1, 48 C.R.R. 1, [1990] 1 S.C.R. 1123, 109 N.R. 81, 68 Man. R. (2d) 1, [1990] 4 W.W.R. 481, 56 C.C.C. (3d) 65 (S.C.C.) — considered

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Southcott Estates Inc. v. Toronto Catholic District School Board (2009), 78 R.P.R. (4th) 285, 2009 CarswellOnt 494 (Ont. S.C.J.) — referred to

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Thorson v. Canada (Attorney General) (No. 2) (1974), 1974 CarswellOnt 228, 1974 CarswellOnt 228F, [1975] 1 S.C.R. 138, 1 N.R. 225, 43 D.L.R. (3d) 1 (S.C.C.) — referred to

United States v. Burns (2001), 39 C.R. (5th) 205, 265 N.R. 212, [2001] 3 W.W.R. 193, [2001] 1 S.C.R. 283, 85 B.C.L.R. (3d) 1, 2001 SCC 7, 2001 CarswellBC 272, 2001 CarswellBC 273, 151 C.C.C. (3d) 97, 195 D.L.R. (4th) 1, 81 C.R.R. (2d) 1, 148 B.C.A.C. 1, 243 W.A.C. 1 (S.C.C.) — followed

Vriend v. Alberta (1998), 50 C.R.R. (2d) 1, 224 N.R. 1, 212 A.R. 237, 168 W.A.C. 237, 31 C.H.R.R. D/1, [1999] 5 W.W.R. 451, 67 Alta. L.R. (3d) 1, [1998] 1 S.C.R. 493, 98 C.L.L.C. 230-021, 4 B.H.R.C. 140, 1998 CarswellAlta 210, 1998 CarswellAlta 211, 156 D.L.R. (4th) 385 (S.C.C.) — considered

Wakeford v. Canada (Attorney General) (2001), 81 C.R.R. (2d) 342, 2001 CarswellOnt 352 (Ont. S.C.J.) — considered

Wakeford v. Canada (Attorney General) (2001), 2001 CarswellOnt 4368, 156 O.A.C. 385 (Ont. C.A.) — referred to

Wakeford v. Canada (Attorney General) (2002), 300 N.R. 197 (note), 2002 CarswellOnt 1097, 2002 CarswellOnt 1098, 169 O.A.C. 196 (note) (S.C.C.) — referred to

Winko v. Forensic Psychiatric Institute (1999), (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute)*) [1999] 2 S.C.R. 625, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.)*) 241 N.R. 1, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute)*) 63 C.R.R. (2d) 189, 1999 CarswellBC 1266, 1999 CarswellBC 1267, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute)*) 135 C.C.C. (3d) 129, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.)*) 124 B.C.A.C. 1, (sub nom. *Winko v. Forensic Psychiatric Institute (B.C.)*) 203 W.A.C. 1, 25 C.R. (5th) 1, (sub nom. *Winko v. British Columbia (Forensic Psychiatric Institute)*) 175 D.L.R. (4th) 193 (S.C.C.) — followed

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 7 — considered

s. 11(d) — referred to

s. 12 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, reprinted R.S.C. 1985, App. II, No. 44

s. 52(1) — considered

Criminal Code, 1892, S.C. 1892, c. 29

Generally — referred to

Title IV, Pt. XIV — referred to

Title IV, Pt. XV — referred to

s. 195 "common bawdy-house" — considered

Criminal Code, R.S.C. 1906, c. 146

s. 225 "common bawdy-house" [am. 1907, c. 8, s. 2] — considered

s. 225 "common bawdy-house" [am. 1917, c. 14, s. 3] — considered

Criminal Code, S.C. 1953-54, c. 51

Cited paragraph: 365-366, 506

Pt. IV — referred to

Pt. V — referred to

s. 168(1)(b) "common bawdy-house" — considered

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

s. 193 — referred to

s. 195.1 [en. 1972, c. 13, s. 15] — referred to

s. 195.1(1)(c) [en. 1985, c. 50, s. 1] — referred to

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

Generally — referred to

Pt. XII.2 [en. R.S.C. 1985, c. 42 (4th Supp.), s. 2] — referred to

Pt. XIII — referred to

s. 151 — considered

s. 152 — considered

s. 153 — considered

s. 163 — considered

s. 170 — referred to

s. 171 — referred to

s. 172.1 [en. 2002, c. 13, s. 8] — referred to

s. 173 — referred to

s. 173(2) — referred to

s. 174 — referred to

s. 175 — referred to

s. 177 — referred to

s. 180 — considered

s. 183 — referred to

s. 197(1) — considered

s. 197(1) "common bawdy-house" — considered

s. 197(1) "common bawdy-house" (a) — considered

s. 197(1) "common bawdy-house" (b) — considered

s. 197(1) "keeper" — considered

s. 197(1) "place" — considered

s. 197(1) "place" (a) — considered

s. 197(1) "place" (b) — considered

s. 197(1) "place" (c) — considered

s. 197(1) "prostitute" — considered

s. 210 — considered

s. 210(1) — considered

s. 210(2) — considered

s. 210(2)(a) — considered

s. 210(2)(b) — considered

s. 210(2)(c) — considered

s. 210(3) — considered

s. 210(4) — considered

s. 212 — considered

s. 212(1) — considered

s. 212(1)(a)-212(1)(i) — referred to

s. 212(1)(j) — considered

s. 212(2) — considered

s. 212(2.1) [en. 1997, c. 16, s. 2(3)] — considered

s. 213 — considered

s. 213(1) — considered

s. 213(1)(a) — considered

s. 213(1)(b) — considered

s. 213(1)(c) — considered

s. 213(2) "public place" — considered

s. 264 — referred to

s. 264.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 38] — referred to

s. 266 — referred to

s. 267 — referred to

s. 268 — referred to

s. 269 — referred to

s. 269.1 [en. R.S.C. 1985, c. 10 (3rd Supp.), s. 2] — referred to

s. 271 — referred to

s. 272 — referred to

s. 273 — referred to

s. 279 — referred to

s. 279.01 [en. 2005, c. 43, s. 3] — considered

s. 279.02 [en. 2005, c. 43, s. 3] — considered

s. 280 — referred to

s. 322 — referred to

s. 343 — referred to

s. 346 — considered

s. 423 — referred to

s. 487.04 "primary designated offence" [en. 1998, c. 37, s. 15(2)] — referred to

Criminal Code, Act to amend the, S.C. 1947, c. 55

Generally — referred to

Criminal Code Amendment Act, 1913, S.C. 1913, c. 13

Generally — referred to

Criminal Code Amendment Act, 1915, S.C. 1915, c. 12

Generally — referred to

Criminal Code (prostitution), Act to amend the, R.S.C. 1985, c. 51 (1st Supp.)

Generally — referred to

Criminal Law Amendment Act, 1972, S.C. 1972, c. 13

Generally — referred to

Offences against Public Morals and Public Convenience, Act respecting, R.S.C. 1886, c. 157

Generally — referred to

Prostitution Act 1999, No. 73 (Qld), 1999

Generally — referred to

Prostitution Act, 2002

Generally — referred to

Prostitution Amendment Act 2008, No. 13 (WA), 2008

Generally — referred to

Prostitution Reform Act 2003, 2003, No. 28

Generally — referred to

Safe Streets Act, 1999, S.O. 1999, c. 8

Generally — referred to

Sexual Offences Act, 1956 (4 & 5 Eliz. 2), c. 69
s. 30 — considered

s. 30(1) — considered
Violence Against Women Act, 1999
Generally — referred to
Rules considered:
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 13.02 — referred to

R. 14.05(3)(g.1) [en. O. Reg. 396/91] — pursuant to
Words and phrases considered:

qualitative research

Due to the relatively hard-to-reach and fluid nature of prostitution, research on the subject has some limitations. .... Much of the research presented by the parties' experts has been designed as qualitative, as opposed to quantitative research. In *Research Decisions: Quantitative and Qualitative Perspectives*, 3rd ed. (Scarborough: Thomson, 2003) at p. 313, Professor Ted Palys describes qualitative research as follows:

...typically inductive..., places a high value on preliminary exploration..., extols the virtues of target or purposive sampling..., and emphasizes that one should maintain flexibility and reap the advantages of more open-ended research instruments.

bawdy-house

... Bawdy-house has been interpreted broadly to include any defined space if there is localization of a number of acts of prostitution within its boundaries.

A bawdy-house for the purpose of prostitution has been defined to include "*any defined space*...if there is localization of a number of acts of prostitution within its specified boundaries.... [It] does not have to be covered or enclosed, and it can be used temporarily whether or not any person has an exclusive right of user with respect to it": *R. v. Pierce*, *supra* at p. 725 (emphasis added). As stated at p. 407 of the *Fraser Report*, the definition is "very extensive" and "covers a far greater range of establishments than the traditional brothel, embracing even very transitory locales, such as parking garages or lots."

In addition to having a wide geographic scope, bawdy-houses vary in size and sophistication of operation: included are small, independent operations as well as large-scale commercial establishments. The impact on a neighbourhood of a prostitute working independently and discreetly from home, or with another person in order to enhance safety, may be different than the impact of a large "brothel-style" establishment overseen by an owner/manager employing a large number of prostitutes. The evidence in this case shows that in Canada most prostitutes are independent operators, not managed by anyone other than themselves (see p. 378 of the *Fraser Report*).

pimp

The objective of s. 212(1)(*j*) was considered by Cory J., for the majority of the Supreme Court, in *Downey* at p. 32:

Section 195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [Citations omitted]

At p. 36, Cory J. further defined a pimp as one who "personifies abusive and exploitative malevolence."

living on the avails of prostitution

In *Shaw*, Viscount Simonds considered the potential breadth of s. 30(1) of the *Sexual Offences Act* and enunciated a test for determining when a person can be said to be living on the earnings of prostitution at pp. 449-50:

What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries of life if she can pay for them.

. . . . .

My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes.

[Emphasis added.]

Lord Reid, in separate reasons, introduced the notion of a parasitic relationship into the meaning of the provision at p. 454:

'Living on' normally, I think, connotes living parasitically. It could have a wider meaning but, if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.

If a merchant sells goods to tradesmen is he living on the earnings of their trades? or if a landlord lets premises for business purposes is he living on the earnings of those businesses? or if he lets them to a man of leisure is he living on that man's dividends? Those are the sources of the rent which he receives but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words — only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so.

Like Viscount Simonds, Lord Reid found that a person lives on the avails of prostitution where a service is rendered to the prostitute precisely because she is a prostitute. At p. 453-54 Lord Reid stated:

Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some such capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes.

In *R. v. Grilo*, *supra*, the Ontario Court of Appeal dealt with the issue of to what extent a person may derive benefits from living with a prostitute before that person can be said to be living on the avails. Justice Arbour, for the court, adopted the requirement of a parasitic relationship, but modified the test in *Shaw* at p. 521:

...In the case of a person living with a prostitute, one must turn to indicia which will serve to distinguish between legitimate living arrangements between roommates or spouses, and living on the avails of prostitution. When a person receives money directly or indirectly from a prostitute in exchange for services rendered, the test, according to *Shaw*, is whether the service is rendered to the prostitute because she is a prostitute or, alternatively, whether the same service would be rendered to anybody else. In the case of living arrangements the test obviously must be modified. In my view, the proper question is whether the accused and the prostitute had entered into a normal and legitimate living arrangement which included a sharing of expenses for their mutual benefit or whether, instead, the accused was living parasitically on the

earnings of the prostitute for his own advantage. The occasional buying of a donut or a cup of coffee would hardly amount to feeding a parasite in the ordinary acceptance of that word.

Insofar as this test refers to mutual benefits, it is not to be taken to mean that each of the parties living together must make an equal contribution to the living expenses. There may not be a parasitic relationship when people contribute, for instance, in proportion to their means, unless one partner makes little or no contribution because he chooses to live as a parasite.

According to the court, the relationship is parasitic when there is an element of exploitation present. At pp. 521-22, Arbour J.A. explained:

The parasitic aspect of the relationship contains, in my view, an element of exploitation which is essential to the concept of living on the avails of prostitution. For example, when a prostitute financially supports a disabled parent or a dependent child, she clearly provides an unreciprocated benefit to the recipient. However, in light of her legal or moral obligations towards her parent or child, the recipient does not commit an offence by accepting that support. The prostitute does not give money to the dependent parent or child because she is a prostitute but because, like everybody else, she has personal needs and obligations. The true parasite whom s. 212(1)(*j*) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations.

[Emphasis added.]

solicit

The history of s. 213(1)(*c*) was summarized by Lamer J., concurring in the result, in the *Prostitution Reference* at pp. 1191-92:

At one point in our history, specifically between the years 1869-1972, our legislation made prostitution a "status offence". This was accomplished through the use of vagrancy laws such as the one that appeared in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1)(*c*):

(*c*) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;

That provision was repealed by S.C. 1972, c. 13, s. 12, and was replaced by a law based on the concept of "solicitation". The new s. 195.1 made it a summary conviction offence to solicit any person in a public place for the purpose of prostitution. Courts differed on the interpretation of the term "solicit" until this Court's decision in *Hutt v. The Queen* [1978] 2 S.C.R. 476. In that case Spence J., speaking for the majority, held at p. 482 that in order to be seen as a crime, "soliciting" had to be "pressing or persistent". ...

place

"Place" is defined in s. 197(1) as including "any place, whether or not (a) it is covered or enclosed, (b) it is used permanently or temporarily, or (c) any person has an exclusive right of user with respect to it."...

prostitution

"Prostitution" has been defined as "lewd acts for payment for the sexual gratification of the purchaser": *R. v. Bedford* (2000), 184 D.L.R. (4th) 727 (Ont. C.A.) at paras. 19 and 25, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 328 (S.C.C.).

prostitute

..."Prostitute" is defined in s. 197(1) as "a person of either sex who engages in prostitution." ..."

public place

... "Public place" is defined in s. 213(2) as including "any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view."

security of the person

In *Rodriguez*, Sopinka J. held, at pp. 587-88, that security of the person encompasses "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity...at least to the extent of freedom from criminal prohibitions which interfere with these." Interests that have been held to be basic to individual dignity and autonomy have included "a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed": *Blencoe* at p. 358, *per* Basterache J.

arbitrary

It is a well-recognized principle of fundamental justice that laws should not be arbitrary: *Manitoba (Director of Child & Family Services) v. C. (A.)*, [2009] 2 S.C.R. 181, 2009 SCC 30 (S.C.C.), at para. 103; *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.), at paras. 129 and 231; *Malmo-Levine*, *supra* at para. 135; *Rodriguez*, *supra* at pp. 594-95. In *Chaoulli*, McLachlin C.J. and Major J. (with Basterache J. concurring) stated at paras. 130-131:

A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it]'. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.

In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

inmate

"Inmate" in s. 210(2)(*a*) is not defined in the *Criminal Code*, but has been defined by the court as "inmate for the purposes of prostitution": *R. v. Knowles* (1913), 12 D.L.R. 639 (Alta. S.C.) . In the annotations to *Martin's Annual Criminal Code 2010* (Aurora, Ont.: Canada Law Book, 2009) at p. 417, an inmate is described to include "a resident or regular occupant." A person must be "found in" a bawdy-house to be found guilty under s. 210(2)(*b*). The accused must have been perceived there or seen by someone; mere proof of presence on the premises in question at some earlier time is not sufficient: *R. c. Lemieux* (1991), 70 C.C.C. (3d) 434 (Que. C.A.).In *Corbeil*, *supra*, L'Heureux-Dubé J., dissenting on other grounds, clarified the meaning of ss. 210(2)(*a*) and 210(2)(*b*) at pp. 857-58:

Persons who are regularly in a common bawdy-house as employees and who are actively engaged in activities other than, or in addition to, sexual activities, cannot be said to be simple "inmates" under s. 210(2)(*a*) or "found-ins" for the purposes of subs. (2)(*b*). Inmates and "found-ins" are not involved in the operation of the business beyond the simple provision and partaking of "services". The inmate under subs. (2)(*a*) is the prostitute who works on the premises with some regularity but is not responsible for any of the organizational duties involved in running the business as a business. The

so-called "found-in" is simply the client who is caught in the premises. These persons only commit an offence punishable on summary conviction. Other persons who are on the premises solely for the purposes of their trade (for example, an electrician, plumber, or gardener), and who are not intended to fall within the offences in s. 210, would, under the present interpretation, escape liability.

***Himel J.*:**

1 There has been a long-standing debate in this country and elsewhere about the subject of prostitution. The only consensus that exists is that there is no consensus on the issue. Governments in Canada, as well as internationally, have studied the topic and produced recommendations ranging from creating laws aimed at protecting individuals, families and communities by promulgating tough criminal laws to decriminalizing or legalizing prostitution. Other legal solutions look at the reasons for the existence of prostitution in our society and emphasize the need for social and economic responses. None of the schemes proposed are without controversy.

2 This case demonstrates the tension that exists around the moral, social and historical perspectives on the issue of prostitution and the effect of certain criminal law provisions on the constitutional rights of those affected. It highlights the role of the courts and their relationship to the other branches of government.

3 Prostitution is not illegal in Canada. However, Parliament has seen fit to criminalize most aspects of prostitution. The conclusion I have reached is that three provisions of the *Criminal Code* that seek to address facets of prostitution (living on the avails of prostitution, keeping a common bawdy-house and communicating in a public place for the purpose of engaging in prostitution) are not in accord with the principles of fundamental justice and must be struck down. These laws, individually and together, force prostitutes to choose between their liberty interest and their right to security of the person as protected under the *Canadian Charter of Rights and Freedoms*. I have found that these laws infringe the core values protected by section 7 and that this infringement is not saved by section 1 as a reasonable limit demonstrably justified in a free and democratic society.

I. Introduction

4 This is an application brought pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, by Terri Jean Bedford, Amy Lebovitch, and Valerie Scott ("the applicants") seeking declaratory relief in the nature of:

> (a) an order declaring that ss. 210, 212(1)(*j*), and 213(1)(*c*) of the *Criminal Code*, R.S.C. 1985, c. C-46, violate s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 (the "*Charter*"), and as such are unconstitutional and of no force or effect;
>
> (b) an order declaring that s. 213(1)(*c*) of the *Criminal Code* violates s. 2(*b*) of the *Charter* and as such is unconstitutional and of no force and effect.

5 The application is opposed by the Attorney General of Canada ("the respondent") and by the two interveners: the Attorney General of Ontario ("AG Ontario") and the Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League ("CLF").

II. The Impugned Provisions

6 The applicants do not challenge all of the prostitution-related provisions in the *Criminal Code*. They only challenge three provisions dealing with adult prostitution: ss. 210, 212(1)(*j*), and 213(1)(*c*). The laws relating to living on the avails of a person under the age of 18 and obtaining sexual services from a person under the age of 18 are *not* being challenged. The impugned provisions are as follows:

> 210. (1) Every one who keeps a common bawdy-house [1] is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(2) Every one who

(a) is an inmate of a common bawdy-house,

(b) is found, without lawful excuse, in a common bawdy-house, or

(c) as owner, landlord, lessor, tenant, occupier, agent or otherwise having charge or control of any place, knowingly permits the place or any part thereof to be let or used for the purposes of a common bawdy-house,

is guilty of an offence punishable on summary conviction.

(3) Where a person is convicted of an offence under subsection (1), the court shall cause a notice of the conviction to be served on the owner, landlord or lessor of the place in respect of which the person is convicted or his agent, and the notice shall contain a statement to the effect that it is being served pursuant to this section.

(4) Where a person on whom a notice is served under subsection (3) fails forthwith to exercise any right he may have to determine the tenancy or right of occupation of the person so convicted, and thereafter any person is convicted of an offence under subsection (1) in respect of the same premises, the person on whom the notice was served shall be deemed to have committed an offence under subsection (1) unless he proves that he has taken all reasonable steps to prevent the recurrence of the offence.

212. (1) Every one who

. . . . .

(j) lives wholly or in part on the avails of prostitution of another person,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years. [2]

213. (1) Every person who in a public place or in any place open to public view [3]

. . . . .

(c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person

for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

7 The indictable offences of keeping a common bawdy-house and living on the avails of prostitution are deemed "designated offences" for the purposes of the forfeiture provisions dealing with proceeds of crime as set out in Part XII.2 of the *Criminal Code*. They are also included in the list of offences found in s. 183 of the *Criminal Code* for which judicial authorization for electronic surveillance can be obtained by the police. As well, the living on the avails of prostitution provision is deemed a "primary designated offence" under s. 487.04 of the *Criminal Code* for the purposes of obtaining DNA samples from offenders.

III. The Positions of the Parties

1. The Applicants

8 Prostitution *per se* is not illegal in Canada, although many prostitution-related activities are prohibited by provisions in the *Criminal Code*. The applicants' case is based on the proposition that the impugned provisions prevent prostitutes from conducting their lawful business in a safe environment. [4]

9 The applicants allege that s. 213(1)(*c*) of the *Criminal Code* violates s. 2(*b*) of the *Charter* and ss. 210, 212(1)(*j*), and 213(1)(*c*) of the *Criminal Code* violate s. 7 of the *Charter*, and that these provisions are not saved as a reasonable limit under s. 1 of the *Charter*. They argue that the Supreme Court's decision in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.) ("the *Prostitution Reference*"), in which the Court dismissed *Charter* challenges to ss. 193 (now s. 210) and 195.1(1)(*c*) (now s. 213(1)(*c*)) of the *Criminal Code*, is distinguishable and/or no longer binding on the case at bar.

10 With respect to s. 7 of the *Charter*, the applicants argue that not only do the impugned provisions violate liberty, due to the possibility of imprisonment upon conviction for each of the offences, but also security of the person as the operation and intersection of the impugned provisions materially contribute to the violence faced by prostitutes.

11 Under s. 210, the bawdy-house provisions, it is illegal to conduct prostitution in an indoor location on a habitual and frequent basis. The applicants maintain that the evidence demonstrates that violence is significantly reduced or eliminated in most indoor settings. Under s. 212(1)(*j*), the living on the avails of prostitution provision, the applicants argue that it is illegal to hire managers, drivers, and security personnel and that these type of services can reduce or eliminate the incidence of violence faced by prostitutes. Finally, it is illegal under s. 213(1)(*c*) to communicate in public for the purposes of prostitution. The applicants take the position that this prohibition has compelled prostitutes to make hasty decisions without properly screening customers when working on the streets, thereby increasing their risk of danger.

12 The applicants assert that the liberty and security violations are not in accordance with the principles of fundamental justice, as they run contrary to the principles that laws must not be arbitrary, overbroad, and grossly disproportionate and that the government must obey the law. They submit that none of the provisions are saved by s. 1 of the *Charter*.

13 With respect to s. 2(*b*) of the *Charter* the applicants argue that, in light of new evidence and a material change in circumstance since the *Prostitution Reference*, the s. 1 analysis should be reconsidered. They ask the court to find that the violation of the communicating provision is not a reasonable limit in light of numerous government reports attesting to the inefficacy of the law.

2. The Attorney General of Canada (the "Respondent")

14 The respondent submits that Parliament has made difficult choices in determining which aspects of prostitution should be criminalized, and has decided to criminalize the most harmful and public emanations of prostitution.

15 The respondent maintains that the applicants have failed to demonstrate any basis in new evidence or in law that would justify a reconsideration of the Supreme Court's conclusions in the *Prostitution Reference* or cast doubt on the constitutionality of the impugned provisions.

16 However, if this court decides to reconsider the constitutionality of the provisions, the respondent argues that the applicants have not met their evidentiary burden of proving a *Charter* violation. The respondent states that the applicants' s. 7 argument is based on the false premise that there is a constitutional right to engage in prostitution. The *Charter*, according to the respondent, does not mandate Parliament to design a regime allowing the applicants to engage in prostitution with fewer hindrances.

17 According to the respondent, prostitution entails a high level of risk for individuals who engage in it and significant harms to society at large. The respondent asserts that social science evidence in Canada and internationally demonstrates that the risks and harms flowing from prostitution are inherent to the nature of the activity itself. Thus, the risks and harms exist regardless of the many ways in which prostitution is practised, whether "street" or "off-street," and regardless of the legal regime in place. Moreover, prostitution is associated with other harmful activities that include physical violence, drug addiction and trafficking, the involvement of organized crime and the globalization of the sex industry and trafficking in persons.

18 In the event that this court finds a violation of ss. 2(*b*) or 7 of the *Charter*, the respondent submits that such a violation is demonstrably justified as a reasonable limit under s. 1 of the *Charter*.

3. The Attorney General of Ontario ("AG Ontario")

19 Much of the AG Ontario's argument mirrored what is submitted by the respondent.

20 According to the AG Ontario, the physical and psychological harms experienced by prostitutes stem from the inherent inequality that characterizes the prostitute-customer relationship, and not from the *Criminal Code*. In fact, AG Ontario states that the impugned provisions operate to limit the negative effects of prostitution on both the prostitute and the public, as they curtail commercialized institutional prostitution and prohibit public prostitution.

21 The AG Ontario stresses the importance of societal values and human dignity in interpreting the legislative objectives of the impugned provisions.

4. The Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League ("CLF")

22 The CLF was granted leave to intervene in this application as a friend of the court pursuant to rule 13.02 of the *Rules of Civil Procedure*: *Bedford v. Canada (Attorney General)*, 2009 ONCA 669 (Ont. C.A.). The Court of Appeal held that the CLF met several of the criteria for intervention outlined in *Ontario (Attorney General) v. Dieleman* (1993), 16 O.R. (3d) 32 (Ont. Gen. Div.): they have a real, substantial, and identifiable interest in the subject matter of the application and an important perspective different from the parties. A description of the Christian Legal Fellowship, REAL Women of Canada, and the Catholic Civil Rights League can be found at para. 8 of *Bedford v. Canada (Attorney General)* [2009 CarswellOnt 3795 (Ont. S.C.J.)], 2009 CanLII 33518.

23 The CLF agrees with the respondent and the AG Ontario that the impugned provisions are not unconstitutional from the standpoint of actual harm caused to prostitutes and to society. They add that the impugned provisions are a reflection of society's views, soundly rooted in interfaith morality, which is that prostitution is an act that offends the conscience of ordinary Canadian citizens. The thrust of the CLF's argument deals with the legislative objectives of the impugned provisions.

24 The CLF agrees with the applicants that mere moral assertions cannot sustain a law, but argues that there are certain core values entrenched in society that must be valid as legislative objectives. The CLF submits that prostitution is immoral and should be stigmatized, and that these sensibilities are fundamental social values that are rooted in *Charter* values. According to the CLF, the government's decisions to enact these laws are based on legitimate, pressing and substantial concerns. If the laws are struck down, the CLF argues, it would send a signal to vulnerable people in society that they can always make a living as a last resort by selling their bodies.

IV. The Role of the Court

25 It is important to state at the outset what this case is not about: the court has not been called upon to decide whether or not there is a constitutional right to sell sex or to decide which policy model regarding prostitution is better. That is the role of Parliament. Rather, it is this court's task to decide the merits of this particular legal challenge, which is whether certain provisions of the *Criminal Code* are in violation of the *Charter*: see *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74 (S.C.C.) at p. 591. The fact that prostitution is a controversial and complex issue is not a bar to *Charter* review. I find the words of Rowles J.A. instructive, in her concurring reasons in *PHS Community Services Society v. Canada (Attorney General)* (2010), 250 C.C.C. (3d) 443, 2010 BCCA 15 (B.C. C.A.), at para. 61:

> Canada argues that the question of whether safe injection sites such as Insite ought to exist in Canada is a "controversial one". That is not a reason to cause the court to fail to carry out its constitutional function and duty. There are many cases where the courts have intervened to invalidate laws that might be described as controversial: laws pertaining to abortion, gay and lesbian rights, private health care, collective bargaining and any number of

criminal laws such as constructive murder. The fact that a law may be controversial law does not, for that reason alone, bar judicial review and invalidation. Chief Justice McLachlin's comments in *Chaoulli*, at para. 107, are apposite:

> [107] While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 497, *per* Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of Saskatchewan*, [1977] 2 S.C.R. 576, at p. 590, *per* Dickson J. (as he then was).
>
> [Emphasis added.]

V. The Applicants

1. Terri Jean Bedford

26 Terri Jean Bedford has 14 years of experience working as a prostitute in Windsor, Calgary, Vancouver, Toronto, Edmonton, and Fort McMurray. Ms. Bedford has, at various times in her life, worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford says she encountered brutal violence while working as a street prostitute in Windsor, Calgary, and Vancouver. She stated in her affidavit that she was "raped and gang-raped too many times to talk about," beaten on the head with a baseball bat, and tortured physically and psychologically. She added, "when a streetwalker goes to meet a john, she never knows what will happen to her." In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that the safety of an indoor location can vary, depending on how it is run and the safety measures implemented. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house for the purpose of prostitution. Although she is not currently working in prostitution, Ms. Bedford wishes to resume work as a dominatrix.

27 Ms. Bedford was born on October 15, 1959, in Collingwood, Ontario. She had a difficult childhood, and was subjected to physical, psychological, and sexual abuse. At the age of 16, she was sent to a boarding house in Windsor, Ontario by the Children's Aid Society. Shortly thereafter, she met an abusive 37-year-old drug dealer and drug addict who became her live-in boyfriend. He introduced her to drugs and she became addicted. Ms. Bedford says that she began prostituting as a "necessary evil" to fund her and her boyfriend's addictions. During this period, she worked as a street prostitute and in massage parlours. It appears her relationship with her boyfriend ended following his arrest for murder.

28 From 1984 to 1986, Ms. Bedford ran an escort service from her house, and later, from a studio, eventually employing 18 escorts. She claims that she was not aware of any incidents of violence by the clientele towards her employees. Ms. Bedford outlined some safety measures she instituted: ensuring someone was present during in-calls, [5] except during appointments with well-known clients; ensuring that escorts were accompanied by a boyfriend, husband, or driver during out-call appointments; if an appointment was at a hotel, calling the hotel to verify the client's name and address; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying credit card numbers and names of clients. Ms. Bedford maintained that the work environment provided the escorts with a sense of security, dignity, and self-respect. In 1986, the escort service was raided by the police and Ms. Bedford was charged with a number of prostitution-related offences. She absconded to Calgary and Vancouver, where she worked as a street prostitute and as an escort. Ms. Bedford returned to Windsor in 1988 to face the charges. She served 15 months in prison.

29 In 1989, Ms. Bedford moved to Toronto and found work as an administrative assistant. Shortly after, she was laid off and found herself ineligible for unemployment insurance and with few marketable employment skills. In the early 1990s, she returned to work at massage parlours and was charged multiple times with being an inmate in a bawdy-house.

30 In 1993, at age 33, Ms. Bedford was at a turning point in her life and decided to become a dominatrix and to stop working as a prostitute. She opened a business, the Bondage Bungalow, which offered sado-masochistic services. She stated that she did not offer sex or extreme sado-masochistic role play. Ms. Bedford held consultation sessions with potential clients to screen out those who might be violent. As well, she hired a male employee to provide security and she utilized a baby monitor during an appointment so that someone on the receiving end could hear sounds of distress and intervene. She only experienced one incident of "real violence" at Bondage Bungalow when a client choked her. She managed to call for help, and her male employee intervened. In 1994, the police raided Bondage Bungalow. On October 9, 1998, she was convicted of unlawfully keeping a bawdy-house (*R. v. Bedford*, [1998] O.J. No. 4033 (Ont. Prov. Ct.), aff'd (2000), 184 D.L.R. (4th) 727 (Ont. C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 328 (S.C.C.)). The Ontario Court of Appeal affirmed, *inter alia*, that the services Ms. Bedford was providing constituted prostitution under the *Criminal Code*.

31 In 2001, Ms. Bedford opened the Sissy Maid Academy and Charm School for Crossdressers, a business that did not offer sexual services. Ms. Bedford maintained that she stopped working due to illness. She asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

2. Amy Lebovitch

32 Since approximately 1997, Amy Lebovitch has worked as a prostitute in Montreal, Ottawa, and Toronto. She has worked as a street prostitute, as an escort, and in a fetish house. She is the only applicant who currently works as a prostitute, which she does independently out of her home. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She is also concerned that her partner, with whom she co-habits, will be charged with living on the avails of prostitution. Ms. Lebovitch has never been charged with a criminal offence, prostitution-related, or otherwise. Ms. Lebovitch is a spokesperson for Sex Professionals of Canada (SPOC), a political group that works towards decriminalization through political activism, community building and public awareness. In that capacity, she gives talks at universities and to the media and records information from women calling to report "bad dates." [6]

33 Ms. Lebovitch was born on January 24, 1979, in Montreal, Quebec. She says that she had a good relationship with her parents, was not abused, and had no problems with drugs or alcohol. Ms. Lebovitch graduated from high school and CEGEP with high academic standing. Although she says that she had other options for employment, Ms. Lebovitch decided to work as a street prostitute in Montreal in order to make money quickly and gain independence. She stated that she was lucky that she was not subjected to serious violence during her year on the streets. She moved off the streets to work at an escort agency after seeing other street prostitutes "black and blue," and hearing frightening accounts of dangerous clients.

34 Ms. Lebovitch maintained that she was able to achieve more control over her environment than she had on the street. However, she admitted that out-calls "still carry with them the potential for danger," and that she was often compelled by the owner of the escort agency to work inconvenient hours. She attributed the reduced safety she experienced to poor management.

35 In 1999, Ms. Lebovitch moved to Ottawa to study criminology and psychology at the University of Ottawa. In Ottawa, she worked at an indoor fetish house where she performed BDSM (bondage, discipline, sado-masochism), as well as traditional sex services. She says that she felt safer than she did on the streets, but that she still had a low level

of control over her environment. As with the escort agency, she attributed the reduced safety she experienced to poor management that did not take safety precautions, such as screening clients. She experienced one notable instance of violence at this location, when she was tied up and raped by a client. Ms. Lebovitch did not report this incident to the police, out of fear of police scrutiny and the possibility of criminal charges.

36 In 2001, she moved to Toronto to attend the social work program at Ryerson University. She decided to work independently as a prostitute from her home, and occasionally from hotel rooms. She says that she takes security precautions such as making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; and getting referrals from regular clients. When she has an appointment with a client, she gives the name of the client to her "safe call" (either her partner or a friend). She telephones her safe call when the client arrives, so that the client is aware that someone is downstairs or nearby, and again ten minutes before he leaves. She feels safer in her home where she knows how to escape if necessary. Ms. Lebovitch stated that if she was attacked by a client, she would not likely report the incident to the police as she wants to avoid prostitution-related charges laid against her. She says that the fear of being criminally charged for working out of her home has caused her to work on the street on occasion. She stated that she enjoys her job and does not plan to leave it in the foreseeable future.

3. Valerie Scott

37 Valerie Scott is currently the executive director of SPOC. In the past, she worked as a prostitute on the street, in massage parlours, and independently from her home or in hotels. For a period of four and a half years she ran a small escort business with another colleague. She left prostitution in 1993 due to chronic pain. Ms. Scott stated that she would like to resume working in prostitution in an indoor location; however, she feels compelled to abstain from this work due to the consequences of the bawdy-house provisions. She has never been charged with an offence under the *Criminal Code*.

38 Ms. Scott was born on April 9, 1958, in Moncton, New Brunswick. When she was approximately 15 years old, she "dabbled" in the sex trade when she worked at a massage parlour. In the mid-1970s, she moved to Toronto with her boyfriend. From the age of 18, until she was 24 years old, she worked as an erotic dancer. At the age of 24, Ms. Scott decided to engage in prostitution. She worked from home by responding to newspaper advertisements. Ms. Scott stated that she would ask clients for their home or office telephone number and their name, which she would verify using the telephone book. She screened clients by meeting new clients in public locations, such as a library or a cafe. She maintained that she never experienced significant harm working from home.

39 Sometime in 1983-1984, Ms. Scott became aware of the AIDS epidemic. Consequently, she turned away clients who refused to wear condoms. She saw an 85 per cent reduction in business. She believes that these clients felt entitled not to wear condoms because they were paying a higher price for an indoor prostitute. She says that she felt compelled to work as a street prostitute. While working on the street she was subjected to many instances of threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong. After four months on the street, she was able to move back indoors as AIDS awareness grew and clients were prepared to practise safe sex.

40 In the mid-1980s, Ms. Scott joined the Canadian Organization for the Rights of Prostitutes (CORP), a group which advocated decriminalization of prostitution. In 1984, Ms. Scott provided submissions to the Legislative Committee on Bill C-49 (which included the current communicating provision). She warned that the enactment of the communicating law would result in the death and injury of street prostitutes. Following the enactment of Bill C-49 in 1985, Ms. Scott issued an emergency resolution with the National Action Committee on the Status of Women, which called for the repeal of the new law, as well as the bawdy-house and living on the avails provisions. Ms. Scott stated that following the enactment of the communicating law, CORP received an increased number calls from women working in prostitution reporting bad dates.

41 Ms. Scott helped establish Maggie's, a drop-in and phone centre for people working in prostitution in Toronto. In the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrests. Maggie's began compiling bad date lists that were distributed to prostitutes. Ms. Scott ended her involvement with Maggie's in approximately 1990.

42 In 2000, Ms. Scott formed SPOC. As part of her advocacy, she began a new, expanded bad date list. As executive director of SPOC, she testified before the 2005 House of Commons Subcommittee on Solicitation Laws about legal reform. Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution, during her years working as a prostitute, at Maggie's, and at SPOC.

43 If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

VI. Standing

44 In order to challenge the constitutional validity of a law, a person must demonstrate a "special interest" in the impugned legislation: see Thomas A. Cromwell, *Locus Standi: A Commentary on the Law of Standing in Canada* (Toronto, ON: Carswell, 1986) at p. 9. The respondent argues that Ms. Bedford and Ms. Scott do not have private interest standing to bring this application as they are no longer engaged in the practice of prostitution and, accordingly, do not have any direct right or interest at stake engaged in the current claim. Although both Ms. Bedford and Ms. Scott say that they would like to return to work in the sex industry if the laws are struck down, the respondent argues that these aspirations are too speculative and hypothetical. The respondent further submits that Ms. Bedford and Ms. Scott have failed to apply for public interest standing. The respondent does not take issue with the private interest standing of Ms. Lebovitch as she says that she continues to be engaged in prostitution.

45 The applicants argue that there is no issue that Ms. Lebovitch has private interest standing and that Ms. Bedford and Ms. Scott have public interest standing as they have a genuine and informed interest in this application, and both wish to return to the sex industry. Counsel for the applicants submitted that Canadians should not have to break the law in order to challenge its validity.

1. Private Interest Standing

46 Parties assert private standing by simply beginning their action or application, although they must present facts and relevant evidence to support their assertion of standing. It falls to the party challenging standing to raise the issue. In a civil application for declaratory relief, the applicant bears the burden to establish his or her standing to raise *Charter* issues: *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.) at p. 692.

47 Private standing refers to the standing of parties who have a "direct, personal interest" in the proceedings. The causal relationship between the prejudice caused to the plaintiff and the legislation cannot be "too indirect, remote or speculative": *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.).

48 In some cases, a private party can initiate proceedings for the sole purpose of challenging the constitutional validity of legislation, even if he or she has no right to damages or other coercive relief: see Peter Hogg, *Constitutional Law of Canada*, 5th ed. looseleaf (Scarborough: Carswell, 2007) vol. 2 at 59-4. A party will not have private standing to pursue such an action when he or she is affected by the statute no differently than any other member of society. However, if the law applies to a party differently from other members of the general public, he or she is said to be "exceptionally prejudiced" and is entitled to seek a declaration of invalidity: *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331 (S.C.C.).

49 None of the applicants in this case are defending a criminal offence or a civil wrong under the provisions they seek to challenge. However, the respondent has conceded, and I agree, that parties do not have to wait to be charged with an offence before they can challenge criminal provisions provided their interest in the constitutionality of the law(s) is real and not speculative.

50 Ms. Lebovitch is currently working as a prostitute and has been since 1997. As such, she is in jeopardy of being charged or convicted under some of the impugned provisions. She stated that she fears being charged and convicted under the bawdy-house provisions and also fears that her live-in partner will be charged and convicted under the living on the avails of prostitution provision. This fear of being charged and convicted under these provisions (and the possible consequences such convictions may entail) has led her to work as a street prostitute on occasion, which she believes increases the risk to her personal safety.

51 Consequently, Ms. Lebovitch has an interest in the validity of the impugned provisions, which is different from that of a member of the general public. Ms. Lebovitch is thus exceptionally prejudiced by the application of the challenged laws and is entitled to private standing to seek a declaration that these laws are constitutionally invalid. The respondent does not challenge Ms. Lebovitch's standing to bring this application.

52 However, the respondent argues that Ms. Bedford and Ms. Scott are in a different position. Neither one is presently engaged in prostitution. Ms. Bedford says that since her conviction for keeping a common bawdy-house for the purposes of prostitution was upheld in 2000, she has been struggling with illness and has not been working in the sex industry. She states:

> However, it is my hope and intention to resume work as a dominatrix once all of my health concerns have been addressed. I do not know if this hope will ever be realized because working as a dominatrix in a secure, indoor setting exposes me to criminal liability for bawdy-house charges and I do not wish to be exposed to this risk. I also do not wish to expose those who will assist me to laws relating to living on the avails. The financial and emotional toll of my arrest and prosecution in the late 90's was devastating and I will only return to my vocation if and when the bawdy-house law is repealed or invalidated.

53 Similarly, Ms. Scott, who left prostitution in the 1990's due to chronic pain, deposes that:

> In the future, I hope to be able to continue my involvement in sex work in an indoor location where I can have the ability to better protect myself. At the present, however, I am compelled to abstain from this work as I feel that the consequences of receiving a conviction under the 'bawdy-house legislation' are too great.

54 The respondent argues that these aspirations are too speculative to allow Ms. Bedford and Ms. Scott standing as of right. The respondent relies upon the words of Noël J.A. in *Canadian Council for Refugees v. R.* (2008), [2009] 3 F.C.R. 136, 2008 FCA 229 (F.C.A.), leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 422 (S.C.C.), who stated at para. 102: "*Charter* challenges cannot be mounted on the basis of hypothetical situations."

55 In my view, to distinguish between Ms. Lebovitch, who is currently engaged in prostitution, and Ms. Bedford and Ms. Scott, who wish to return to prostitution, is to draw an illusory distinction. All three applicants allege that they are prevented from engaging in their livelihood, either safely or at all, by the provisions. This gives all three applicants a direct, personal interest in the outcome of this application that is different than the general member of the public.

56 In a very recent case concerning similar issues, Ehrcke J. of the Supreme Court of British Columbia held that the plaintiff, Ms. Kiselbach, a former prostitute, did not have private standing to bring a claim challenging the validity of various *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* (2008), 305 D.L.R. (4th) 713, 2008 BCSC 1726 (B.C. S.C.), currently under appeal to the British Columbia Court of Appeal. Ehrcke J. stated at para. 48:

> The impugned laws do not presently cause Ms. Kiselbach to work in unsafe conditions because she is not currently engaged in sex work. For the same reason, she is not currently in jeopardy of being charged or convicted, because she is not doing any of the activities that the impugned laws prohibit.

57 Ehrcke J. determined that the plaintiff was not entitled to private interest standing as the impugned laws applied to Ms. Kiselbach in the same way as other members of the general public. However, in that case, Ms. Kiselbach had deposed that she had no solid plan to return to prostitution, but could not "rule it out" in the future. Ehrcke J. found that this potential future interest was too speculative to sustain private interest standing. In contrast, Ms. Bedford and Ms. Scott have genuine plans to return to prostitution-related activities pending the outcome of this application. Their situations are different in my view and, accordingly, I find that all three applicants in the case before me have private interest standing.

2. Public Interest Standing

58 Unlike private standing, public interest standing may be granted by the court at its discretion, provided certain requirements are met. The requirements for a discretionary grant of public interest standing to challenge the validity of legislation were recognized by the Supreme Court in a trilogy of cases: *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.); *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.); *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.). Public interest standing was reviewed several years later by the Supreme Court in *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.). The Supreme Court wrote at para. 37 that the court must be satisfied of the following criteria before it will exercise its discretion in favour of an applicant:

> a) There is a serious issue raised as to the validity of the legislation in question;
>
> b) The applicant must be directly affected by the legislation or have a genuine interest in its validity; and
>
> c) There is no other reasonable and effective way this issue could be brought before the court.

59 The proper approach to these criteria was discussed in the case of *Canadian Civil Liberties Assn. v. Canada (Attorney General)* (1998), 40 O.R. (3d) 489 (Ont. C.A.) where the Ontario Court of Appeal said at para. 18:

> ...the criteria should not be considered as mere technical requirements to be applied in a mechanistic fashion. They have been extracted from various judicial responses to concerns arising out of any proposed extension of the scope of public interest standing. In order to understand and to apply these criteria properly these underlying concerns should be kept in mind.

3. Should Ms. Bedford and Ms. Scott be Granted Public Interest Standing?

60 Although I have found that all three applicants have private interest standing, in the event that I am not correct, I consider whether Ms. Bedford and Ms. Scott should be granted public interest standing.

61 I have no difficulty concluding that Ms. Bedford and Ms. Scott raise a serious issue as to the constitutional validity of the impugned provisions and have a genuine interest in their validity. However, I am of the view that neither Ms. Bedford nor Ms. Scott can succeed in gaining public interest standing as they must establish that there exists no other reasonable and effective way to bring the issues raised in this application to court. Justice Major, for the majority of the Court, explained the role of this final factor in *Hy and Zel's*, *supra* at para. 16:

> The third criteria, that there be no other reasonable and effective way to bring the issue before the court, lies at the heart of the discretion to grant public interest standing. If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations.

62 Justice Major affirmed the comments of Cory J. in *Canadian Council of Churches* that "[t]he granting of public interest standing is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant." Ms. Lebovitch is a private litigant who has standing to challenge the validity of the provisions that Ms. Bedford and Ms. Scott also seek to challenge. If public interest standing is denied to Ms. Bedford and Ms. Scott, the provisions in question will not be immunized from constitutional review. Accordingly, there are other reasonable methods of bringing the matter before the court.

VII. Stare Decisis

63 In the *Prostitution Reference*, the Supreme Court considered whether ss. 193 (now s. 210) and 195.1(1)(*c*) (now s. 213(1)(*c*)), or a combination of both, violated s. 2(*b*) or s. 7 of the *Charter*; and if so, whether either one or a combination of both could be justified under s. 1 of the *Charter*.

64 The entire Court found that s. 195.1(1)(*c*), the communicating offence, represented a *prima facie* infringement of s. 2(*b*) of the *Charter*. Chief Justice Dickson, for the majority, upheld the provision as a reasonable limit on expression under s. 1 of the *Charter*, whereas Wilson and L'Heureux-Dubé J.J. found that the impugned provision was not sufficiently tailored to its objective.

65 With respect to s. 7, the majority held that both provisions clearly infringed the right to liberty as the impugned provisions contained the possibility of imprisonment. The majority found it unnecessary to address the question of whether s. 7 protected the economic liberty of individuals to pursue their chosen professions, although Lamer J. considered this question in his separate, concurring reasons. With respect to the principles of fundamental justice, the majority considered whether the impugned provisions were void for vagueness and whether it is impermissible for Parliament to send out conflicting messages whereby the criminal law says one thing but means another. They rejected both arguments and found that the liberty infringement was in accordance with the principles of fundamental justice. Thus, the constitutional challenge to both provisions failed.

66 The *Prostitution Reference* is *prima facie* binding on this court.

67 The Ontario Court of Appeal provided a review of the values underlying *stare decisis* in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2005), 76 O.R. (3d) 161 (Ont. C.A.). Laskin J.A. for the court held as follows at paras. 119-120:

> The values underlying the principle of *stare decisis* are well known: consistency, certainty, predictability and sound judicial administration. Adherence to precedent promotes these values. The more willing a court is to abandon its own previous judgments, the greater the prospect for confusion and uncertainty. "Consistency", wrote Lord Scarman, "is necessary to certainty — one of the great objectives of law": see *Farrell v. Alexander*, [1976] 1 All E.R. 129, [1977] A.C. 59 (H.L.), at p. 147 All E.R. People should be able to know the law so that they can conduct themselves in accordance with it.
>
> Adherence to precedent also enhances the legitimacy and acceptability of judge-made law, and by so doing enhances the appearance of justice. Moreover, courts could not function if established principles of law could be reconsidered in every subsequent case. Justice Cardozo put it this way in his brilliant lectures on *The Nature of the Judicial Process* (New Haven: Yale University Press, 1960) at p. 149:
>
> > [T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him.

68 However, Justice Laskin suggested a flexible approach to the application of the principle of *stare decisis*, as a rigid adherence might lead to "injustices in individual cases, continued application of legal principles long since outdated as society has changed, and uncertainty bred by judges who draw overly fine distinctions to avoid *stare decisis*."

69 The applicants make a number of arguments in favour of reconsidering the issues addressed by the *Prostitution Reference*. First, the applicants contend that this case deals with legal arguments that were not considered by the Court in 1990. The *Prostitution Reference* only dealt with the right to liberty and the vagueness principle of fundamental justice and that it is impermissible for Parliament to send out conflicting messages. In the present case, the applicants argue that the impugned laws violate both liberty and security of the person and are not in accordance with four principles of fundamental justice: arbitrariness, overbreadth, gross disproportionality, and what the applicants refer to as "the rule of law."

70 The applicants point out that s. 7 jurisprudence has greatly developed since 1990 by subsequent decisions of the Supreme Court which have recognized the constitutional "vices" of arbitrariness, overbreadth, and gross disproportionality: *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.); *R. c. Demers*, [2004] 2 S.C.R. 489, 2004 SCC 46 (S.C.C.); *R. v. Heywood*, [1994] 3 S.C.R. 761 (S.C.C.); *Malmo-Levine*, *supra*; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.); *R. v. Seaboyer*, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.). In 2003, the Ontario Court of Appeal held that it is a principle of fundamental justice that the state must obey the law and promote compliance with the law: *Hitzig v. R.* (2003), 231 D.L.R. (4th) 104, 177 C.C.C. (3d) 449 (Ont. C.A.), leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 5 (S.C.C.). The applicants argue that in light of the evolution of the principles of fundamental justice, the new arguments ought to be heard.

71 Second, the applicants submit that the context in which this case is being heard has changed dramatically. In part, as a result of the serial murders of prostitutes in Vancouver's Downtown Eastside, as well as the work of advocacy groups and academics, new light has been shed upon the violence faced by prostitutes in Canada. Although undoubtedly present in 1990, the issue of harm faced by prostitutes is forefront in the present case, and supported by two decades of new research.

72 Third, the applicants argue that the 1990 decision was a reference, whereas this court is hearing these arguments by way of application with the benefit of a full factual record. Twenty years ago, the Supreme Court did not have most of the empirical evidence that is before this court when it decided that the communicating provision was a reasonable limit on freedom of expression. This evidence is said to reveal a material change in circumstances, which demonstrates that the law cannot be reasonably justified. Furthermore, the applicants take the position that the evidence that the international legal context has evolved in the last two decades suggests that the communicating provision no longer represents a minimal impairment of s. 2(*b*) of the *Charter*.

73 The applicants submit that the government's own research has acknowledged the need to revisit the decision. In 1992, a Working Group on Prostitution was established by the Federal, Provincial and Territorial Deputy Ministers Responsible for Justice. The task of the Working Group was to review legislation, policy, and practices concerning prostitution-related activities and to present recommendations. At p. 7 of its 1998 report, *Report and Recommendations in respect of Legislation, Policy and Practices Concerning Prostitution-related Activities* [the "*Working Group Report*"], the Working Group commented upon an earlier report by the House of Commons' Standing Committee on Justice and the Solicitor General, which conducted a three-year review of s. 213, and which was released a few months after the *Prostitution Reference*:

> The research results indicated that the law was not meeting its objectives as its main effect in most centres has been to move street prostitutes from one downtown area to another, thus merely displacing the problem. However, as mentioned in the previous paragraph, the Supreme Court of Canada had already ruled that the communicating law was a justifiable infringement because its strengths (reducing the street nuisance associated with street prostitution) outweighed the infringement on freedom of expression. Had the research results been made available prior to the

> Supreme Court decision, the question whether s. 213 is a justifiable infringement on freedom of expression might have been considered differently.
>
> [Emphasis added.]

74 In response, the respondent denies that there is any basis in law or in the evidence to justify revisiting the *Prostitution Reference*. The respondent recognizes that the Supreme Court has the discretion to overrule its own decisions in limited circumstances and that the standard it has set for itself is very high. The respondent argues that the applicants have not cited any decisions from the Supreme Court that have questioned the conclusions of the *Prostitution Reference*. According to the respondent, a lower court may only disregard a higher court's decision in cases that are "beyond compelling."

75 I am persuaded that I am not foreclosed from hearing the challenge based on s. 7 of the *Charter* as the issues argued in this case are different than those argued in the *Prostitution Reference*. Although "the principles of fundamental justice are to be found in the basic tenets of our legal system" (*Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 (S.C.C.), *per* Lamer J. at p. 503), the principles at issue in this case were not clearly articulated as such when the reference was heard. The jurisprudence on s. 7 of the *Charter* has evolved considerably in the last two decades.

76 I am also persuaded that I may reconsider whether s. 213(1)(*c*) of the *Criminal Code* is in violation of s. 2(*b*) of the *Charter*.

77 There is an implicit need for courts to reconsider constitutional interpretation in particular due to the difficult process of constitutional amendment that serves as the only alternative to judicial reconsideration: see J.D. Murphy and R. Rueter, *Stare Decisis in Commonwealth Appellate Courts* (Toronto: Butterworths, 1981), and P. Hogg, *Constitutional Law in Canada*, *supra*, at 8.7. The constitution is a "living tree capable of growth and expansion within its natural limits," and the rights therein ought to be subject to changing judicial interpretations over time: see *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Canada P.C.) at p. 136, *per* Lord Sankey.

78 It is clear that the Supreme Court has the authority to revisit its previous decisions: *Canada (Minister of Indian Affairs & Northern Development) v. Ranville*, [1982] 2 S.C.R. 518 (S.C.C.); *R. v. Bernard*, [1988] 2 S.C.R. 833 (S.C.C.), *per* Dickson C.J.; *R. v. Chaulk*, [1990] 3 S.C.R. 1303 (S.C.C.), *per* Lamer C.J; *R. v. Salituro*, [1991] 3 S.C.R. 654 (S.C.C.). Lower courts must only do so in very limited circumstances.

79 In *Wakeford v. Canada (Attorney General)* (2001), 81 C.R.R. (2d) 342 (Ont. S.C.J.), 2001 CanLII 28318, aff'd (2001), 156 O.A.C. 385 (Ont. C.A.), leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 72 (S.C.C.), Swinton J. commented as follows at para. 14:

> It is true that the Supreme Court of Canada has the power to overrule its past decisions. However, a lower Court should not be quick to assume that it will do so, given the importance of the principle of *stare decisis* in our legal system. In my view, on a motion such as this, where there is a decision of the Supreme Court squarely on point, there must be some indication - either in the facts pleaded or in the decisions of the Supreme Court - that the prior decision may be open for reconsideration....

80 In *Wakeford v. Canada (Attorney General)*, there was no indication that the Supreme Court decision at issue was open to reconsideration due to a shift in the jurisprudence. Furthermore, there were no new developments in public policy or new facts that may have called into question the basis for the Supreme Court decision, so that there would be a realistic possibility that the decision might change, should it be reconsidered.

81 In *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*., *supra*, at paras. 124-25, Laskin J.A. discussed the circumstances that would lead the Supreme Court to revisit one of its own decisions:

> In *Bernard* [[1988] 2 S.C.R. 833], *Chaulk* [[1990] 3 S.C.R. 1303], *Salituro* [[1991] 3 S.C.R. 654], and other cases, the Supreme Court has articulated five factors that would allow it to overrule one of its previous decisions: where a previous decision does not reflect the values of the *Canadian Charter of Rights and Freedoms*; where a previous decision is inconsistent with or "attenuated" by a later decision of the Court; where the social, political, or economic assumptions underlying a previous decision are no longer valid in contemporary society; where the previous state of the law was uncertain or where a previous decision caused uncertainty; and, in criminal cases, where the result of overruling is to establish a rule favourable to the accused.
>
> These five factors were not meant to be a comprehensive list, nor need they all be present to justify overruling a previous decision. Instead, as Lamer C.J.C. said in *Chaulk* at p. 1353 S.C.R., "They are ... guidelines to assist this Court in exercising its discretion." But overruling a previous decision based on one or more of these five factors promotes the interests of justice and the court's own sense of justice by bringing judge-made law into line with constitutional, legislative, or social changes, by removing conflicts and uncertainties in the law, or by protecting individual liberty.

82 In *Leeson v. University of Regina* (2007), 301 Sask. R. 316, 2007 SKQB 252 (Sask. Q.B.), Laing C.J. cited Laskin J.A.'s reasoning, and outlined when a lower court may revisit the decisions of a higher court at para. 9:

> ...there are reasons why earlier decisions can and should be revisited, and necessarily such revisitations must commence at the trial court level....The position of the applicants is that [the Supreme Court decision at issue] should be revisited because in the 17 years since it was decided, the social, political or economic assumptions underlying the decision are no longer valid. When such change is alleged, and there are at least some facts alleged which support such change, it is not appropriate to prevent the matter from proceeding on the basis of *stare decisis*.

83 In my view, the s. 1 analysis conducted in the *Prostitution Reference* ought to be revisited given the breadth of evidence that has been gathered over the course of the intervening twenty years. Furthermore, it may be that the social, political, and economic assumptions underlying the *Prostitution Reference* are no longer valid today. Indeed, several western democracies have made legal reforms decriminalizing prostitution to varying degrees. As well, the type of expression at issue in this case is different from that considered in the *Prostitution Reference*. Here, the expression at issue is that which would allow prostitutes to screen potential clients for a propensity for violence. I conclude, therefore, that it is appropriate in this case to decide these issues based upon the voluminous record before me. As will become evident following a review of the evidence filed by the parties, there is a substantial amount of research that was not before the Supreme Court in 1990.

VIII. The Evidence

84 Evidence in this case was presented by way of a joint application record and a supplementary joint application record. Over 25,000 pages of evidence in 88 volumes, amassed over two and a half years, were presented to the court. The applicants' witnesses include current and former prostitutes, an advocate for prostitutes' rights, a politician, a journalist, and numerous social science experts who have researched prostitution in Canada and internationally. The respondent's witnesses include current and former prostitutes, police officers, an assistant Crown Attorney, a social worker, advocates concerned about the negative effects of prostitution, social science experts who have researched prostitution in Canada and internationally, experts in research methodology, and a lawyer and a researcher at the Department of Justice. The affidavit evidence from all of these witnesses was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard, and many other documents.

1. Evidence from Prostitutes and Former Prostitutes

85 The applicants submitted affidavits from eight witnesses who described their perceptions and experiences of working as prostitutes. During oral argument, the applicants' counsel submitted that the purpose of these witnesses was to provide "corroborative voices" to demonstrate that the applicants' experiences are shared with many other women.

86 The affiants came from varied backgrounds and from across Canada, but largely shared the experience of finding prostitution in indoor venues generally safer than street prostitution (indeed, a few experienced no violence at all working indoors). However, some suggested that the level of safety in indoor venues could decrease with poor management. The women described various strategies to increase their personal safety, such as working in a familiar environment; having regulars as clients; verifying price, services, and contact information with a potential client before a session; and hiring a driver to wait during appointments. The affiants recounted that they entered into prostitution without coercion (although financial constraints were a large factor) and most reported being addiction-free and working without a pimp. [7]

87 The respondent tendered nine affidavits from prostitutes and former prostitutes, whose stories painted a much different picture. The respondent's witnesses gave detailed accounts of horrific violence in indoor locations and on the street, controlling and abusive pimps, and the rampant use of drugs and alcohol.

88 While this evidence provided helpful background information, it is clear that there is no one person who can be said to be representative of prostitutes in Canada; the affiants are an extremely diverse group of people whose reasons for entry into prostitution, lifestyles, and experiences differ.

2. Evidence from Police Officers and an Assistant Crown Attorney

89 The respondent submitted affidavits from nine police officers who have experience in enforcing prostitution-related provisions or in investigating crimes against prostitutes. The officers worked in various police forces and divisions (for example, a Special Victims Unit, the Royal Canadian Mounted Police (RCMP), Vice/Morality Squad) in Toronto, Brampton, Edmonton, Vancouver, and Winnipeg. The officers were in agreement that prostitution occurs mainly in indoor locations, with ten to 20 per cent of prostitution occurring on the street. Most of the officers' experiences appear to be with street prostitution and enforcing the communicating provision.

90 Prostitution was generally described as being a harmful activity with links to drugs, violence, organized crime, child exploitation, and human trafficking (one officer called prostitution a form of "slavery"). Prostitutes were characterized as victims, commonly poverty-stricken, abused, and drug-addicted (although some officers described a street hierarchy where those on top were drug-free and earned more money). A few officers deposed that aboriginal women are over-represented on the street. Clients, in contrast, were twice described as being "from all walks of life;" that is, of varying social and economic backgrounds. Some officers detailed the exploitive pimp-prostitute dynamic, while another officer stated that there were very few pimps working on the street.

91 The police officers outlined different enforcement strategies used by their particular units to enforce the communicating provision, such as "sweeps" (generally, a concerted effort at charging numerous suspects in a short period of time, in a particular geographic area) or "compassionate enforcement" (only arresting prostitutes if a complaint is made or for the purpose of getting them to attend a diversion program). Diversion programs, for the most part, were seen as a useful strategy to encourage prostitutes to exit prostitution.

92 An RCMP officer described Project KARE, an operation established in 2003 in response to a growing number of missing persons and unsolved homicide cases in Alberta, a number of which involved missing female prostitutes. Project KARE's Pro Active Team focused on the missing prostitutes; one "proactive" strategy they used was to collect identifying information and DNA samples from women currently working as street prostitutes, in order to provide the team with information and assistance in identifying remains, if necessary.

93 Many police officers described the difficulties of enforcement of the bawdy-house and living on the avails offences. In Toronto, for example, between 2005 and 2007, only 49 charges were laid under s. 212(1)(*j*) and 82 charges under ss. 210(1) and 210(2)(*c*); whereas 2,377 charges were laid under s. 213(1)(*c*) in the same years. Despite these difficulties and the low conviction rate, two officers maintained that bawdy-house laws were important in human trafficking investigations.

The respondent also submitted an affidavit from an assistant Crown attorney in Toronto, who confirmed the difficulties of successful prosecution under the bawdy-house and procuring provisions.

94 Officers who were cross-examined admitted that the level of violence faced by prostitutes on the streets is worse than it is indoors, and that safety precautions can be taken in indoor locations to reduce the level of violence.

3. Evidence from Other Lay Witnesses

95 The applicants tendered evidence from an advocate from an organization that seeks to improve the safety and work conditions of prostitutes, and to assist prostitutes in exiting from the trade; a politician highly concerned with the victimization of street prostitutes; and a journalist who has written extensively on the sex trade. Much of this evidence mirrored what was said by other witnesses.

96 The respondent presented affidavits from a social worker and three advocates concerned about the negative effects of prostitution. These witnesses almost exclusively focused on street prostitution and its impact on the community, such as: increased traffic, the presence of used condoms and needles, foul language, explicit sexual behaviour, and harassment of community members.

4. Expert Evidence

(A) Prostitution Research and its Limitations

97 Due to the relatively hard-to-reach and fluid nature of prostitution, research on the subject has some limitations. This was acknowledged by both parties. Much of the research presented by the parties' experts has been designed as qualitative, as opposed to quantitative research. In *Research Decisions: Quantitative and Qualitative Perspectives*, 3rd ed. (Scarborough: Thomson, 2003) at p. 313, Professor Ted Palys describes qualitative research as follows:

> ...typically inductive..., places a high value on preliminary exploration..., extols the virtues of target or purposive sampling..., and emphasizes that one should maintain flexibility and reap the advantages of more open-ended research instruments.

98 The method and degree to which qualitative researchers can make causal inferences was debated amongst the experts in this case. Random sampling methods, which minimize sampling error, are generally not possible in prostitution research because the overall population size (or "sampling frame") is typically not known. It is, therefore, important for researchers to limit their conclusions to the discrete sample studied and avoid making generalizations. Both parties also agreed that most prostitution-related research to date has focused on street-based populations, largely due to their accessibility to researchers. Indoor prostitution, which both sides agreed is much larger than street prostitution, is under-researched.

99 While neither party disputed that the other party's witnesses were, in fact, experts, a great deal of argument and evidence was devoted to criticizing these witnesses. Both parties alleged that certain experts were biased, that conclusions were generalized beyond the sample studied, that studies were methodologically flawed (for example, for using former prostitutes as researchers or only interviewing prostitutes from a particular social class or venue), and that conclusions were not properly drawn from the research. In order to properly consider and assess the evidence, it is necessary to understand the role of the expert in a case such as this.

a. The Role of the Expert

100 The role of any expert in litigation is to assist the court. This role does not change regardless of whether the expert is appointed by the court or retained by a party to the litigation. The duties and responsibilities of expert witnesses are set out in the U.K. case, *National Justice Compania Naviera SA v. Prudential Assurance Co.*, [1993] 2 Lloyd's Rep. 68 (Eng. Q.B.)), at pp. 81-82: [8]

> 1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
>
> 2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his [or her] expertise. An expert witness...should never assume the role of an advocate.
>
> 3. An expert witness should state the facts or assumptions upon which his [or her] opinion is based. He [or she] should not omit to consider material facts which could detract from his [or her] concluded opinion.
>
> 4. An expert witness should make it clear when a particular question or issue falls outside his [or her] expertise.
>
> 5. If an expert's opinion is not properly researched because he [or she] considers [there to be] insufficient data...available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.... [Citations omitted.]

101 Qualified expert witnesses are granted a right to give opinions for the assistance of the court. Lay witnesses are not granted this right. Corollary to this right is a responsibility of maintaining an attitude of strict independence and impartiality. The expert's evidence must be uninfluenced as to form and content by the exigencies of the litigation: *Ikarian Reefer*. The expert evidence should not be influenced by the interests of the party calling him or her. The judge's role as gatekeeper requires vigilance to ensure that the necessary responsibilities of an expert are adhered to: *Southcott Estates Inc. v. Toronto Catholic District School Board* (2009), 78 R.P.R. (4th) 285 (Ont. S.C.J.) at para. 110, varied on other grounds, 2010 ONCA 310 (Ont. C.A.).

102 To remedy concerns about expert opinions and their misuse (including bias and advocacy), the Inquiry into Pediatric Forensic Pathology in Ontario (the "Goudge Inquiry") recommended using an evidence-based approach to evaluating expert opinions. An evidence-based approach was summarized by Professor David Paciocco in "Taking a 'Goudge' out of Bluster and Blarney: an 'Evidence-Based Approach' to Expert Testimony" (2009) 13 Can. Crim. L.Rev. 135. Professor Paciocco stated that an evidence-based approach can be "synthesized into four predicates" at pp. 146-47:

> (1) the theory or technique utilized by the expert must be reliable, and used in a manner that is reliable;
>
> (2) the expert must keep an open mind to a "broad menu of possibilities" (not be biased);
>
> (3) the expert must be objective and comprehensive in collecting evidence -including rejecting information not germane and transparent about the information and influences involved; and
>
> (4) the expert must proffer more than the mere opinion, including the complete reasoning process, shortcomings and fair guidance on the confidence in the opinion.

103 The concerns about expert evidence are not limited to the criminal sphere. The Honourable Coulter A. Osborne, Q.C. devoted an entire chapter of his 2007 *Civil Justice Reform Project: Summary of Findings & Recommendations* to the problems of expert evidence. Although his focus was more on the proliferation of experts and the negative effects this has on litigants, he noted and shared many of the same concerns underlying the Goudge Inquiry. Clearly, the potential pitfalls of expert opinion evidence cross the spectrum of cases in the judicial system.

b. Admissibility of Expert Evidence

104 The procedure used in this application was to place large volumes of expert opinion on the record. Simply placing this evidence before the court does not automatically render it admissible. In a trial, any inadmissible information would be distilled and segregated. The application process is not generally amenable to that same process. It can facilitate a

litigation strategy where parties may be more concerned with placing potentially important information on the record, as opposed to engaging in a rigorous admissibility analysis. As an impartial adjudicator, an application judge cannot disregard his or her role as gatekeeper simply because there is no jury.

105 The leading case on expert evidence admissibility is *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), which held that there are four criteria to be met for expert opinion evidence to be admissible: relevance, necessity in assisting the trier of fact, the absence of any exclusionary rule, and a properly qualified expert.

106 The Ontario Court of Appeal recently proposed a helpful approach to consider the *Mohan* criteria in *R. v. Abbey* (2009), 97 O.R. (3d) 330, 2009 ONCA 624 (Ont. C.A.), leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 125 (S.C.C.). At para. 76, Doherty J.A., for the court, explained the suggested two-step approach:

> First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence [citations omitted.]

107 Justice Doherty listed at para. 80 the four preconditions that must be established at the first stage of the analysis:

- the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- the witness must be qualified to give the opinion;
- the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- the proposed opinion must be logically relevant to a material issue.

108 Evidence is to be excluded when it fails to meet all of the preconditions. Where the trial judge is satisfied that all of the preconditions have been met, he or she is to engage in a discretionary cost-benefit analysis to determine legal relevance. Justice Doherty referred to this as the "gatekeeper" stage.

109 Weighing the benefits involves a consideration of "the probative potential of the evidence and the significance of the issue to which the evidence is directed." Looking at the potential probative value requires a consideration of the reliability of the evidence. Determining reliability includes looking at the subject-matter of the evidence, the methodology used by the proposed expert, the expert's expertise, and the extent to which the expert is shown to be impartial and objective.

110 The opinion evidence at issue in *Abbey* was based on qualitative research, as is much of the expert opinion in the present case. Justice Doherty suggested a useful series of potentially relevant questions to determine the reliability of such evidence at para. 119.

111 Weighing the costs involves "address[ing] the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 at para. 47 as 'consumption of time, prejudice and confusion.'"

112 This gatekeeper stage requires a consideration of "the extent to which the proffered opinion evidence is necessary to a proper adjudication of the fact(s) to which that evidence is directed": *Abbey* at para. 93.

113 In the case before me, it is not practicable to engage in an admissibility analysis for each piece of evidence contained in the record. Furthermore, the parties did not object to the opinion evidence tendered by the opposing side. I am aware that in *Charter* cases, judges are also the triers of fact. Judges are expected to disabuse themselves of irrelevant and inflammatory evidence: see *Masters' Assn. of Ontario v. Ontario (Attorney General)*, [2001] O.J. No. 1444 (Ont. Div.

Ct.). While the evidence may be received at the hearing, it may not meet the strict rules of admissibility outlined in the *Mohan* and *Abbey* cases. Rather than engage in a time-consuming analysis of each piece of evidence, I have chosen to exercise the gatekeeper function by assigning little or no weight to evidence which does not meet the *Mohan* and *Abbey* requirements. This is the most practical method to address the concerns raised about the legal relevance and reliability of certain expert opinions in the circumstances of this case.

c. Independence of Expert Witnesses

114 The following factors are relevant to the consideration of the weight to be given to expert evidence:

a) Unwillingness of the expert to qualify an opinion or update it in the face of new facts provided (often in cross-examination);

b) Bold assertions without a properly outlined basis for the claim;

c) Refusal to restrict opinions to expertise or the expertise demarked by the judge as required by the court;

d) Lack of sufficient independence from the party proffering the expert; and

e) Prior history as an advocate on the topic.

115 This list is not necessarily exhaustive. Certain facts or areas of expertise may be more vulnerable to some of these indicia than others. Each case must be analyzed on its own facts in deciding what weight should be given to the evidence of experts.

(B) Areas of Agreement and Disagreement amongst the Experts

116 The experts generally agree on the following statements:

a) Street prostitution is a dangerous activity;

b) All prostitution, regardless of venue, carries a risk of violence;

c) Prostitution conducted in indoor venues can be dangerous;

d) There is significant social stigma attached to prostitution; and

e) There are multiple factors responsible for the violence faced by prostitutes.

117 The following are the key matters in dispute amongst the experts:

a) Whether indoor prostitution is, or can be made, less dangerous than street prostitution;

b) Whether indoor prostitutes are in a better position to prevent harm to themselves than street prostitutes; and

c) Whether the impugned provisions materially contribute to the risk of harm suffered by prostitutes.

(C) Summary of the Applicants' Expert Evidence

118 The following is a brief summary of the evidence given by the applicants' expert witnesses.

a. The Nature of Prostitution in Canada

119 Most prostitutes in Canada are women. It is estimated that approximately 80 per cent of prostitution occurs predominantly in indoor locations, although the exact number is not known. Indoor prostitution can occur "in-call," where the clients attend at a fixed indoor location such as a prostitute's home or a massage parlour, or "out-call," where

prostitutes meet clients at different locations such as in hotel rooms or clients' homes. Street prostitution was described as being divided between low and high "tracks" or "strolls" (which are areas where prostitutes congregate). Prostitutes working the low track were described as being on the bottom of the spectrum of prostitution in terms of health, safety, and earnings.

120 Many of the applicants' experts gave opinions on stereotypes and misperceptions about the sex trade in Canada. For example, some experts challenged the notion of the prostitute as a victim, maintaining that some turn to prostitution not out of desperation, but because they see it as a better option than other opportunities, such as unskilled labour. As well, evidence was led that homeless, drug-addicted prostitutes represent a small percentage of prostitutes, also known as "survival sex workers." Some experts opined that pimping is far less prevalent in Canada than some popular literature and media depictions would hold, and that the "mythology of the pimp" is rooted in racial and sexual bias.

b. Violence in Prostitution [9]

121 Violence in prostitution is primarily inflicted by male clients against female prostitutes. The applicants' experts maintained that street prostitution is much riskier, in terms of violence, than indoor prostitution. Some of the experts stated that street prostitutes are more likely to be victims of homicide than other prostitutes and much more likely than women in the general population. Factors that can increase safety levels for indoor prostitutes include greater control over their physical environment, close proximity to others who can intervene if help is needed, the ability to better screen out dangerous clients (taking names and credit cards in advance for example), a more regular clientele, the use of drivers to get to and from appointments, and response plans for dangerous situations.

122 As mentioned above, the applicants' experts did not state that working in indoor locations eradicates the risk of violence; they agreed that there is always the potential for danger from any client. Additionally, in some of the experts' opinions, conducting indoor in-call work is relatively safer than indoor out-call work. Some of the dangers associated with out-call work include that it is difficult to assess the safety of a destination beforehand, the client may not be alone, and exit routes may not be easily identifiable or accessible. As well, many of the applicants' experts asserted that how an indoor location is run (for example, what screening measures and other safety precautions are taken) can have an impact on the level of safety.

123 Dr. Elliott Leyton, Professor Emeritus at Memorial University and an expert in serial murder, asserted that prostitutes are often targeted by serial killers. He maintained that while the case of Robert Pickton may have brought this to the attention of Canadians in recent years, there are many other examples of persons who have targeted prostitutes in the past. For example, Jack the Ripper murdered between five and eleven prostitutes in London in the late-nineteenth century; in the same period, Dr. Thomas Cream, the "Lambeth Poisoner" killed up to nine victims, many of whom were prostitutes. In 2003, Gary Ridgway, also known as the Green River Killer, confessed to killing and disposing of the bodies of 48 women, most of whom were prostitutes. In the late 1970s, Peter Sutcliffe, the Yorkshire Ripper, killed at least 13 women, many of whom were prostitutes. Arthur Shawcross, the Genesee River Killer, strangled 11 victims, most of them prostitutes, in the late 1980s. Joel Rifkin was convicted of murdering nine women in New York State in the early 1990s, most of whom were young prostitutes. In December of 2006, the bodies of five prostitutes were discovered in England; two men were arrested for these murders.

124 The RCMP established Project KARE in Edmonton in 2003. It was a special division created to attempt to solve 41 unsolved homicides and locate more than 30 missing persons from "high-risk lifestyles" involving prostitution and drugs. Since its inception, only two of the murders have been solved, while five additional prostitutes have been killed.

c. Effect of the Impugned Provisions

125 Many of the applicants' experts provided the opinion that the impugned provisions increase the level and risk of violence against prostitutes. For example, they contended that the provisions at issue:

a) Limit the places and ways in which prostitution can be practised that can lower the risk of violence;

b) Sustain stigmatization of prostitutes and prostitution; and

c) Create a conflicting victim/criminal status in the eyes of the police, which leads many prostitutes to believe that the police are not willing to protect them.

126 Thus, according to the applicants' experts, safer ways to conduct prostitution are criminalized, whereas riskier ways are not.

127 For example, the applicants' experts tended to agree that working in-call is the safest way to conduct prostitution; however, it is illegal due to the bawdy-house provisions. Working out-call can be done without violating the law, but carries its own set of risks. Some strategies to reduce these risks, such as hiring a driver or bodyguard or meeting a client in a public place beforehand, run afoul of the law, according to the experts.

128 Additionally, street prostitutes reported employing client-screening strategies (such as working out client expectations in advance and checking for weapons and the presence or absence of door handles and lock release buttons); however, many reported that such strategies take time, which elevates the risk of arrest under the communicating provision. Consequently, some prostitutes reported feeling rushed and reluctant to work out the details of a transaction before moving to a private location, thereby limiting their ability to screen for potentially violent clients. Similarly, working in isolated areas minimizes arrest under the communicating provision, but increases the risk of potential violence, and limits the ability for prostitutes to share information with each other (such as the identity of dangerous clients).

129 Dr. John Lowman, one the applicants' key witnesses, is a Professor at the School of Criminology at Simon Fraser University. He has a Ph.D. in geography from the University of British Columbia. Dr. Lowman has studied prostitution in and around Vancouver for over 30 years and has published extensively in the area. He has been commissioned by the Department of Justice on a number of occasions to research prostitution in Canada. The respondent acknowledges that Dr. Lowman has expertise in the fields of criminology and sociology but not in psychology or law.

130 Dr. Lowman reported how various law enforcement initiatives to enforce the communicating provision in Vancouver have had the effect of displacing street prostitutes from some of the city's traditional strolls into a more isolated commercial and industrial area. Dr. Lowman described this area as an "orange light district," which was not actively patrolled by police in order to diminish complaints from residents in more populated areas. He says that from 1995 to 2001, approximately 50 women who worked in this orange-light district went missing.

(D) Summary of Respondent's Expert Evidence

131 Most of the respondent's experts did not comment specifically on the impugned provisions or on prostitution in Canada. Rather, the focus of their evidence was on prostitution in general. The respondent's experts largely maintained that all prostitution is inherently harmful, as prostitution is a form of violence against women. [10] According to some of the respondent's experts, prostitution is violent or harmful because of a systemic power imbalance between female prostitutes and male clients.

132 Dr. Melissa Farley was one of the respondent's key witnesses. Dr. Farley has a Ph.D. in counselling psychology from the University of Iowa and has been a practising psychologist and researcher for over 40 years.For the last 15 years, she has conducted social science research on the harms associated with prostitution and human trafficking. She has published 17 peer-reviewed articles on prostitution, and has provided testimony on prostitution to the governments of South Africa and New Zealand. Dr. Farley's research has involved interviews with over 900 prostitutes and former prostitutes in ten countries. In 1995, she founded Prostitution Research and Education (PRE), a non-profit organization

that seeks to abolish prostitution. She is currently the executive director of PRE. According to Dr. Farley, prostitution is better understood as domestic violence, rather than as a job.

133 The respondent's experts stated that prostitution is linked to a number of harmful activities, such as violence, drug and alcohol addiction, organized crime, and human trafficking. The respondent's experts concluded, for the most part, that there is fluidity between different prostitution venues, and, consequently, distinctions between indoor and outdoor prostitution are not meaningful. That said, Dr. Farley, who has arguably conducted more research on prostitution than the respondent's other experts, found in one of her major studies "significantly" more physical violence in street prostitution, as compared to prostitution in brothels. In Dr. Farley's opinion, however, there is little difference in the level of psychological violence as between indoor and outdoor venues.

134 Prostitutes were described by the respondent's experts as a vulnerable, victimized population. Most of the prostitutes interviewed by their experts were street prostitutes or victims of trafficking. Some of the experts opined that childhood abuse overwhelmingly precedes entry into prostitution. One expert's view was that the average age of recruitment into prostitution in Canada is 14 years old. Some of the respondent's experts went into detail explaining tactics that pimps use to control and manipulate prostitutes. Finally, the respondent's experts commented that the vast majority of prostitutes want to "exit" or leave prostitution, but face difficulties in doing so.

5. Evidence Contained in Government Debates and Reports

135 The parties submitted several volumes of legislative and other government-generated evidence. This evidence tends to support the notion that prostitution is an intractable social problem, one which researchers have a difficult time accessing, and policy-makers have a difficult time solving. There is disagreement about the proper legislative approach to prostitution.

(A) Early Developments

136 Canada's vagrancy laws, inherited from England and unchanged for over 80 years, were removed from the *Criminal Code* in 1972: *Criminal Law Amendment Act, 1972*, S.C. 1972, c. 13. The provisions aimed at street prostitutes were replaced by s. 195.1, which prohibited "solicitation" for the purpose of prostitution. In *R. v. Hutt*, [1978] 2 S.C.R. 476 (S.C.C.), the Supreme Court held at p. 482 that the solicitation in question had to be "pressing or persistent" to make out the offence. This interpretation led to law enforcement officials complaining that the control of street prostitution had become very difficult.

137 In March of 1983, the House of Commons Standing Committee on Justice and Legal Affairs agreed that existing *Criminal Code* provisions were not sufficient to halt solicitation for the purposes of prostitution. The Committee recommended that the law preventing any person from soliciting be defined to include the person soliciting the service of the prostitute, that public place be defined to include private places in public view (for example, a vehicle), that offering or accepting an offer to engage in prostitution in public be punishable on summary conviction, that a new offence of being involved with a prostitute under the age of 18 be created, and that a review of the amendments be conducted three years after their coming into force.

138 In June of 1983, the Minister of Justice rejected the Committee's recommendations and instead formed the Special Committee on Pornography and Prostitution, chaired by Vancouver lawyer Paul Fraser. This Committee commissioned a great deal of empirical research and ultimately published the *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply and Services Canada, 1985) [the "*Fraser Report*"] in April 1985.

(B) The Fraser Report - 1985

139 The *Fraser Report* began by mapping the ideological landscape and philosophical and ethical traditions within which debates on prostitution were taking place, concluding that policies addressing prostitution ought to be guided by the principles of equality, individual adult responsibility, liberty, human dignity, and an appreciation of human sexuality.

140 In light of these principles, the *Fraser Report* recommended that the adult prostitute be given leeway to conduct his or her business in privacy and dignity, by moving indoors in small numbers in order to better protect safety. Further, the *Fraser Report* recommended that adults engaging in prostitution could and should be counted on to be responsible for themselves, and therefore should be entitled to give their earnings to whomever they wish provided no coercion or threats were present.

141 After touring the country for several years, the Committee was unequivocal in concluding at p. 345 that "there is no consensus on the subject of prostitution in this country." The *Fraser Report* identified the causes of prostitution as economic disadvantage, childhood sexual abuse, drug use, and the effect of pornography on young persons. The *Fraser Report* rejected the idea that most prostitutes work to support a drug habit at p. 375:

> The notion that prostitutes are on the street in order to earn the large amounts of money necessary to support a serious drug habit, does not find significant support from the research. There are some prostitutes who are in this position but they appear to be a very small part of the business and not at all typical. While some use alcohol and drugs in order to be able to cope with their work, the majority are not heavy users and do not use these substances while working because they do not want to lower their levels of awareness. In what is often a violent business, prostitutes need to keep all their wits about them.

142 Many of the applicants' arguments find support in the *Fraser Report*. For example, the *Fraser Report* concluded at p. 378 that "the way in which street prostitution is currently carried out, results in a profession which is often dangerous, especially to the prostitute, but also to the customer at times." The *Fraser Report* found no evidence to support a connection between prostitution and organized crime. The *Fraser Report* noted that prostitutes were aware that a husband or lover with whom they shared a voluntary and supportive relationship could be seen as their pimp, and were therefore unwilling to be open about these relationships for fear of the repercussions for their partners.

143 At pp. 388 and 392, the *Fraser Report* stated:

> Laws which are designed to control activities such as extortion, fraud, blackmail or intimidation in normal businesses, are seen to be inadequate with respect to prostitution. Instead we have a series of special laws. This legislation reflects the thinking of earlier generations which saw prostitution and related activities as immoral, the people engaged in these activities as truly depraved or of sub-normal intelligence, and always, the danger of innocent women being seduced into the business.
>
> . . . . .
>
> The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens.

144 Some of the arguments made by the respondent are also supported by findings in the *Fraser Report,* which found at p. 383 that:

> Street prostitution increases traffic and impedes the flow of traffic as potential customers and simple onlookers cruise the streets. It increases the noise in neighbourhoods, particularly in the early morning hours, as car doors are slammed or altercations occur between the various parties to the business. Although prostitutes are rarely pressing and persistent in their solicitation of customers, most prostitutes have at some time approached someone they thought was a potential customer, but who, in fact, was not looking for sexual services. Similarly, women walking through these areas have sometimes been approached by men who thought they were prostitutes.

145 In assessing the overall effect of the matrix of laws preventing aggressive solicitation, living on the avails of prostitution, and keeping a bawdy-house, the *Fraser Report* stated at p. 532:

> Because of the haphazard and inconsistent way in which the law of prostitution has developed, it ignores the tensile quality of prostitution and the linkages between the various forms of prostitution. More particularly, the law, in both its substance and enforcement, fails to recognize the reality that if pressure by the law is exerted in one context or location, it will produce a shift of the activity to another setting or location. This is seen in street prostitution where police charges or harassment in one location will produce a migration or dispersal of prostitutes to other areas which appear to be less subject to police scrutiny and public concern.

146 Members of the Fraser Committee concluded that in those jurisdictions where prostitution or its related activities were criminalized, the laws had failed to eliminate prostitution.

147 The Committee presented sixteen recommendations on prostitution to the Minister of Justice, concluding that an overall strategy to deal with prostitution ought to emphasize both legal and social change. Five of these recommendations were directed at social reform. The remaining recommendations addressed legal reform. The *Fraser Report* was critical of the matrix of prostitution laws at p. 531: "as so often happens with the development of criminal law, the present *Criminal Code* provisions reflect a number of underlying policies introduced at different times which do not sit well with each other." Some of the recommendations included the following:

> a. Removing the prostitution-related activities of both street prostitutes and customers from the *Criminal Code* except where they contravene existing *Criminal Code* provisions by creating a definable nuisance;
>
> b. Rewriting the procuring and living on the avails sections of the *Criminal Code* that deal with exploitive behaviours (pimping) to prohibit instead behaviour which involves force or threats of force; and
>
> c. Rewriting the bawdy-house sections to enable small numbers of prostitutes to work from their homes and to permit provinces (and municipalities) to regulate small scale prostitution establishments through zoning, licensing, and health and safety provisions.

148 The *Fraser Report* ultimately concluded that the law on prostitution had failed to achieve its underlying objective of reducing prostitution. Instead, it operated to victimize and dehumanize prostitutes.

149 Parliament did not adopt the recommendations of the *Fraser Report*. Instead, in November of 1985, it introduced Bill C-49, which included the current communicating provision. Some Members of Parliament criticized the Bill as a hasty response to a complicated problem. Justice Minister John Crosbie promised the House that the remainder of the recommendations in the *Fraser Report* would be addressed in the following year. Bill C-49 became law in December of 1985, subject to a three-year review of its effectiveness. No further legislative changes were made.

(C) The Three-Year Review: Synthesis Report - 1989

150 In 1989, the Department of Justice published research that was conducted as part of the three-year review of Bill C-49 in a report titled *Street Prostitution: Assessing the Impact of the Law Synthesis Report* (Ottawa: Department of Justice Canada, 1989) [the "*Synthesis Report*"]. The *Synthesis Report* integrated research commissioned by the Department of Justice in five jurisdictions across Canada from a variety of leading researchers, including Dr. John Lowman and Dr. Augustine Brannigan, who are affiants for the applicants. The research was designed to evaluate whether Bill C-49 had caused a reduction in the nuisance associated with street prostitution.

151 The *Synthesis Report* concluded that while the law had had a short-term effect in reducing street prostitution in Halifax, Niagara Falls, London, and Ottawa, in the cities where street prostitution posed the largest problem, Toronto, Vancouver, Winnipeg, Regina, and Montreal, the law had little or no effect besides displacing prostitutes from their usual strolls. While the profile of street prostitutes had not been changed by the law, those working after the legal change tended to have lengthier criminal records than street prostitutes surveyed before the legal change.

152 The *Synthesis Report* found that police enforced the communicating subsection of s. 195.1 (now s. 213) rather than subsections referring to stopping vehicles or impeding traffic, as these were regarded by police as imprecise and difficult to prosecute. With the exception of London, Ontario, in all major cities studied, prostitutes were arrested under the communicating provision more often than customers. Conviction rates were high, between 75 per cent and 90 per cent across the country. While fines of up to $400 were imposed more frequently in Montreal, Halifax, and Calgary, courts in Vancouver and Toronto were more likely to discharge or sentence those convicted to custodial sentences. Neither sentences nor fines were viewed as deterrents; instead, the *Synthesis Report* found that fines were viewed by most in the prostitution business as a "licence fee."

153 In addition, the *Synthesis Report* noted instances where police had been able to reduce street prostitution in residential areas without the use of the communicating provision as an enforcement tool.

154 In Montreal, Winnipeg, Toronto and Vancouver, bail practices with area restrictions had forced prostitutes into remote areas, prostitutes worked later at night or on weekends to avoid police, and the working atmosphere had become more tense. In Calgary, the numbers of bad dates had increased, while in Vancouver, prostitutes reported being less likely to report bad dates to police for fear of being arrested themselves.

155 In October of 1990, the House of Commons Standing Committee on Justice and the Solicitor General responded to the *Synthesis Report* and the decision of the Supreme Court of Canada in the *Prostitution Reference* by recommending funding for services to assist prostitutes in leaving prostitution and recommending statutory amendments to allow prostitutes and customers to be fingerprinted and photographed.

(D) The Calgary/Winnipeg Study on the Victimization of Prostitutes - 1994

156 In 1994, the Solicitor General and the Department of Justice funded a field study in Calgary and Winnipeg investigating whether or not s. 213 had put prostitutes at an increased risk of harm. Dr. Augustine Brannigan, a professor of sociology at the University of Calgary, was the head researcher and drafter of the formal report, *Victimization of Prostitutes in Calgary and Winnipeg* (Ottawa: Department of Justice Canada, 1994) [the "*Calgary/Winnipeg Study*"].

157 The *Calgary/Winnipeg Study* made use of statistics available through the Canadian Centre for Justice Statistics showing that 63 known prostitutes were killed between 1991 and 1995, making up five per cent of all female homicides in Canada. While 20 per cent of all homicides remained unsolved, 54 per cent of the homicides of known prostitutes remained unsolved at the end of 1995. The *Calgary/Winnipeg Study* concluded the following at p. 2:

> Since the law outlaws simple communication in public for the purposes of prostitution, it has been suggested that to escape surveillance prostitutes might be pressured to work in more remote locations and might be less careful in screening potential dates. In addition, the increased liability of arrest might make the prostitutes more dependent on exploitative pimps for protection in order to work, and subject to violence and coercion to ensure continued dependency. As a consequence, the suppression of street communication might increase the exposure of sellers to dangerous johns and pimps and might further entrench them in the street trade.

158 The *Calgary/Winnipeg Study* found that while the street prostitution industry appeared to be growing in Canada, due to innovative policing, street prostitution in Calgary was shrinking. Police in Calgary had turned their attention away from enforcing s. 213, and had made the detection and prosecution of pimps their primary task. By erecting traffic barricades and asking prostitutes to relocate to other known strolls outside of residential areas, nuisance had been largely controlled.

159 Dr. Brannigan was reluctant to draw direct connections between s. 213 and incidents of violence or homicide. The *Calgary/Winnipeg Study* concluded at p. 36 as follows:

> The role of s. 213 is remote. This section, along with all the other laws designed to suppress prostitution, simply make the buying and selling of sex a comparatively underground activity. The secrecy of the trade not only shields prostitution from public view but provides a cover for violence against prostitutes which would be more likely to be detected and deterred if the activities operated completely in the open.

(E) The Federal, Provincial and Territorial Deputy Justice Ministers' Working Group on Prostitution - 1998

160 In 1992, the Federal, Provincial and Territorial Deputy Ministers responsible for Justice established the Working Group on Prostitution to review legislation, policy and practices related to prostitution and to present recommendations. In 1998, the Working Group released its formal report, the *Working Group Report*, paying particular attention to street prostitution and the effects of s. 213. The *Working Group Report* concluded that strategies related to street prostitution should have two major objectives: (1) to reduce the community harm associated with street prostitution, and (2) to prevent violence to prostitutes. The *Working Group Report* concluded that these two objectives could most effectively be met if prostitution were permitted to occur indoors as "indoor establishments appear to provide some protection to prostitutes as well as decreasing the level of street prostitution and its associated harm."

161 The *Working Group Report* recognized the dangers faced by street prostitutes at p. 32:

> There is little doubt that the street is a particularly dangerous place for prostitutes. Research indicates a relationship between victimization of prostitutes, including assaults and homicides, and the venue of the sex trade. Nearly all assaults and murders of prostitutes occur while the prostitute is working on the street (Lowman and Fraser, 1995). Street prostitution often involves women getting into vehicles with strangers and travelling to remote areas, which is very risky. There have been few known murders of prostitutes who work indoors.

The *Working Group Report* went on to explain that violence against prostitutes is perpetrated primarily by customers and pimps. Due to inconsistent enforcement, informal zones of tolerance have emerged. The *Working Group Report* concluded at p. 58 that the "legislation has not had a serious impact on controlling street prostitution."

162 The *Working Group Report* considered the Supreme Court of Canada's decision in *R. v. Westendorp*, [1983] 1 S.C.R. 43 (S.C.C.), where the Court held that municipal by-laws in Calgary prohibiting street solicitation were in pith and substance criminal, and thus an unconstitutional foray into federal criminal law-making power. The *Working Group Report* observed that despite this decision, many municipalities continued to require escort services and massage parlours, which are "more likely than not" bawdy-houses, to comply with licensing and zoning regulations. Moreover, s. 210, the bawdy-house provisions, were found by the *Working Group Report* to be infrequently used; this was said at p. 64 to result in a "a two-tier system of enforcement: more affluent buyers and sellers engage in prostitution-related activities with relative impunity while those who are poorer and less well organized are subject to arrest."

163 The *Working Group Report* concluded that the recommendation in the *Fraser Report* allowing one or two prostitutes to operate out of their home would make the law consistent and would prevent some of the problems associated with street prostitution. As a corollary, the *Working Group Report* recommended regulatory power over such venues be exercised by interested municipalities.

(F) House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws - 2006

164 In May of 2003, the House of Commons Standing Committee on Justice and Human Rights established a Subcommittee on Solicitation Laws. Member of Parliament Libby Davies, who was an affiant on behalf of the applicants, was a member. The mandate of the Subcommittee was to "review the solicitation laws in order to improve the safety of sex-trade workers and communities overall, and to recommend changes that will reduce the exploitation of and violence against sex-trade workers." In December of 2006, the Subcommittee presented its report entitled *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Communication Canada, 2006) ["*Subcommittee Report*"].

165 The *Subcommittee Report* suggested that although street prostitution is highly visible, and arrests under the communicating provision represent over 90 per cent of prostitution-related incidents reported by police, street prostitution represents only five per cent to 20 per cent of all prostitution activity in the country. Between 75 per cent and 85 per cent of those selling sexual services in Canada are women, with a disproportionately high prevalence of aboriginal women. As well, 20 per cent of those involved in street prostitution are transgendered or transvestites. While those charged under the communicating provision tended to be relatively even as between prostitutes and clients, prostitutes ultimately had higher conviction rates and faced harsher sentences than clients.

166 In contrast, the *Subcommittee Report* found that police rarely laid charges under the bawdy-house provisions, as sting operations are time-consuming and expensive, and complaints about indoor prostitution activities are rare. Witnesses appearing before the Subcommittee stated at p. 56 that "across Canada our law enforcement approach is detrimentally unbalanced, targeting...an already vulnerable population of street sex workers while overlooking the johns and pimps...."

167 Similarly, the *Subcommittee Report* found that activities prohibited by all of s. 212 made up less than one per cent of all prostitution-related incidents reported. In 2003-2004, only 38 per cent of charges laid under this provision resulted in conviction. The Subcommittee found that this was most likely because these charges are dependent upon prostitutes turning to police for help, and testifying against their pimp. The mistrust between police and prostitutes, and the types of questions typically directed against prostitutes in cross-examination in court tended to discourage prostitutes from coming forward. The Subcommittee expressed concern that the provision was broad enough to encompass the employers and security guards of prostitutes who are "essential to ensuring the prostitutes' safety."

168 The nuisances associated with street prostitution were identified by the *Subcommittee Report* at p. 29 as "screaming and fighting, abusive behaviour, harassment by clients, used condoms and needles littering public places, noise, etc." Some witnesses told the Subcommittee that harassment of women mistaken for prostitutes tended to worsen after police "cracked-down" on an area, as prostitutes then tended to disperse and disguise themselves to avoid arrest. This made it more difficult for clients to distinguish who was and was not a prostitute. As well, for many residents the most frightening aspect of street prostitution was said to be the accompanying drug-related activities, including "turf wars," violence among street gangs and drug dealers, or strange behaviour exhibited by drug users. The *Subcommittee Report* noted at p. 62 that s. 213 "has not adequately reduced the incidence of street prostitution or even the social nuisance associated with its practice."

169 The Subcommittee also explored the prevalence of violence against prostitutes in Canada, finding that the violence to which prostitutes are subjected ranges from whistles and insults to rape and murder. According to the *Subcommittee Report*, violence towards street prostitutes is perpetrated by clients, pimps, drug dealers, the public, and even police officers. Indoors, working conditions range from clean, respectful environments to establishments with management policies akin to slavery. Based on information from the Canadian Centre for Justice Statistics, the *Subcommittee Report* stated that between 1994 and 2003, at least 79 prostitutes were killed while engaging in prostitution activities, and that 95 per cent of these victims were women. Three quarters of the 79 homicides occurred in Vancouver, Edmonton, Toronto, Montreal, Winnipeg, and Ottawa-Gatineau. The *Subcommittee Report* cited a study conducted by Statistics Canada in the 1990s, which found that over 85 per cent of the victims were killed by a client. The Subcommittee concluded at p. 19 that it appears that "off-street prostitutes are generally subject to less violence."

170 The *Subcommittee Report* summarized the views provided by witnesses on the relationship between prostitution laws and violence at pp. 61-66:

> Like many of the witnesses heard during the Subcommittee's study, the literature concerning the impact of prostitution laws on the health, safety and wellbeing of prostitutes indicates that criminalization intended to control prostitution related activities in Canada jeopardizes the safety of prostitutes, as well as their access to health and social services.

. . . . .

During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.

. . . . .

The vulnerability of persons engaging in street prostitution is also related to the fact that they frequently change locations. As a result of an arrest, fear of arrest, or a court order, [street prostitutes] are often forced to move to another area, effectively separating them from friends, co-workers, regular customers and familiar places. A number of witnesses indicated that this instability jeopardizes prostitutes' health, safety and well-being.

. . . . .

Although section 210, which prohibits bawdy-houses, is seldom enforced, witnesses indicated that many people are at risk every day of being charged with being found in a common bawdy-house. Throughout our study, witnesses also maintained that this section leaves prostitutes with few options if they wish to sell their sexual services under safer conditions. One prostitute made the following points in [an anonymous] brief submitted to the Subcommittee:

> Preventing those with the objective of engaging in prostitution from creating a safe place to do so only serves to create unsafe places to do business. As the law is now, the only possible way to carry out sex work is by going to the home of a client. The unknown factors involved in a home visit (under current code) for the sex worker create a dangerous situation. One does not know if the client has any cemented connections to the address provided and therefore cannot be provided with security even if measures are taken to inform a friend or colleague where they are and who they are with. In fact, article 212 actually prevents a sex worker from taking such precautionary measures.

. . . . .

According to the testimony of a number of former prostitutes, section 212 increases the isolation of those who engage in prostitution by criminalizing cohabitation and the establishment of an employer-employee relationship....

171 Dr. Gayle MacDonald, who is a Professor of sociology and an affiant for the applicants, told the Subcommittee at p. 64 that:

> Continued criminalization, specifically the communications provision of the *Criminal Code,* puts the sex worker in danger by increasing the speed of the negotiation of terms between the sex worker and her client, which is the most critical point for her to assess the client's propensity to violence. If the sex worker is rushing to avoid encounters with the police, she may misjudge - at great peril to her - the safety of a client.

172 The *Subcommittee Report* suggested that most prostitutes do not report incidents of violence against them out of fear that they might be arrested and incur other consequences such as losing custody of their children, losing their lawful employment, and being stigmatized as a result of being found guilty of a prostitution-related activity. The Subcommittee also discussed the impact of criminalization on the economic security of prostitutes, who may lose housing, employment, or savings as a result of fines, imprisonment, or proceeds of crime legislation.

173 The Subcommittee heard testimony from those who believed the laws remained an important message against prostitution in all its forms and thus an important part of the campaign to end the oppression of women by men. As well, many law enforcement and social service officials felt that the laws represented an important point of prevention and contact with prostitutes and their clients, acting as a temporary "wedge between the sex trade worker and her pimp," or a tool for compelling a prostitute through "a condition of probation that requires they meet with a counsellor who can help them develop exit strategies."

174 Members of the Subcommittee were concerned about the unequal application of the existing laws such that many indoor prostitutes operate with virtual impunity, while vulnerable and marginalized street prostitutes, especially aboriginal and transgendered persons as well as drug addicts, are routinely criminalized. Just like their predecessors, the Subcommittee recommended funding for further prostitution research, exit programs, and social services.

175 A majority of the Subcommittee concluded that Canada's approach to adult prostitution is contradictory and inefficient, and ought to reserve criminal sanction for harmful situations rather than sexual activities between consenting adults that do not harm others. At p. 90, the *Subcommittee Report* stated:

> In order to ensure that both individuals selling sexual services and communities are protected from violence, exploitation and nuisance, the majority of the Subcommittee urges reliance on *Criminal Code* provisions of general application targeting various forms of exploitation and nuisance, such as public disturbance, indecent exhibition, coercion, sexual assault, trafficking in persons, extortion, kidnapping, etc....

176 Meanwhile, a minority of the Subcommittee concluded that prostitution is a form of violence, not commerce, and that as such, prostitutes are victims. Therefore, there can be no such thing as consent to prostitution or harmless sales of sexual services. These members advocated for legal reform criminalizing pimps and clients, who would pay hefty fines upon conviction, while largely decriminalizing prostitutes, who would benefit from programs funded by the fines paid.

177 On March 30, 2007, the government of Canada issued a formal response to the *Subcommittee Report.* In its response, the government stated that it continues to view prostitution as a form of exploitation and does not support legal reform that would facilitate this exploitation. Instead, the government suggested that it would continue to focus on reducing the prevalence of prostitution by supporting education initiatives, programs to assist individuals to exit prostitution, and consistent law enforcement.

6. International Evidence

178 Evidence of the legal framework in other jurisdictions is often considered during constitutional litigation in order to provide a context and for particular reference to the application of section 1 of the *Charter*. In this case, the parties tendered expert evidence from several foreign jurisdictions that have responded legislatively to prostitution. They explained that these jurisdictions were chosen because they represent political regimes similar to Canada's, that is, western liberal democracies; and because there is adequate information available to accurately describe these regimes.

179 The applicants argue that this evidence is demonstrative of an evolving international trend of decriminalization that often improves prostitutes' access to social services including job training, health care, and contractual rights of compensation, improves relations between police and prostitutes, and is accompanied by municipal regulation and taxation.

180 The respondent submits that this evidence demonstrates that the risk of harm is inherent to prostitution regardless of the legal regime in which it is practised. Furthermore, indoor prostitution is not safer and sex tourism, human trafficking and child exploitation often increase as a result of decriminalization.

181 The following section is a summary of the background of the affiants and the nature of the opinions of these international experts on the issue of prostitution.

(A) Respondent's Witnesses: International Experts

a) Dr. Lotte Constance Van de Pol - She has a Ph.D. in history from Erasmus University, Rotterdam. She has studied the history of prostitution in the Netherlands, especially in Amsterdam, from the 15th century to the present day. She has not engaged in any present day empirical research. It is her view that the Dutch experience with decriminalization has, on balance, negatively impacted prostitutes. She asserted that, because drugs and crime

remain a part of decriminalized prostitution, the state should not sanction it, even if this makes individual prostitutes more vulnerable.

b) Dr. John Pratt - He is a Professor of criminology at Victoria University of Wellington, New Zealand. He holds a Ph.D. from the Centre for Criminological Studies, University of Sheffield and is an expert in research methodology. He has not studied prostitution nor has he done any research on the subject. He presented evidence of methodological weaknesses in the official follow-up studies commissioned by the New Zealand government to measure the effects of decriminalization. He also conceded that the number of street-based sex workers in Christchurch has not increased since decriminalization.

c) Dr. Janice Raymond - She is a Professor Emerita at the University of Massachusetts, Amherst. She holds a Ph.D. in medical ethics from Boston College. From 1994 to 2007, she served as the co-executive director of the Coalition Against Trafficking in Women ("CATW"), a non-governmental organization that seeks to abolish prostitution and advocates against decriminalization of prostitution. She has published extensively on the subject of prostitution, and argues that prostitution is a form of violence against women. It is her view that there is a connection between decriminalization of the sex industry and human trafficking, and has testified about this before legislative committees around the world. She takes the position that the legislative regime in Sweden that criminalizes buying sex has been more beneficial to prostitutes than the regime in Germany which decriminalizes prostitution.

d) Dr. Mary Lucille Sullivan- She is a public policy consultant on the issue of prostitution legislation. She holds a Ph.D. in political science from the University of Melbourne, Victoria, and completed her doctoral thesis on prostitution in Victoria, where selling sex has been decriminalized for two decades. She is an active member of CATW. She asserts that the sex industry has grown in Victoria since decriminalization, that it is connected to organized crime, and that prostitution is inherently dangerous regardless of where it takes place.

e) Dr. Melissa Farley - As outlined earlier, Dr. Farley has conducted social science research on the harms associated with prostitution and human trafficking. In 1995, she founded Prostitution Research and Education (PRE), a non-profit organization that seeks to abolish prostitution and is the organization's executive director. She concluded that legal indoor prostitution in Nevada has not succeeded in ameliorating violence and forced prostitution.

(B) Applicants' Reply Witnesses: International Experts

f) Dr. Barbara Sullivan - She has a Ph.D. and is a senior lecturer in political science at the University of Queensland, Australia. Her scholarly studies have focused on prostitution-related issues. She concluded that indoor prostitution reduces the risk of violence to prostitutes and that decriminalization does not result in the growth of the sex industry. She was very critical of Dr. Mary Sullivan's assertions regarding the effects of decriminalization across Australia.

g) Dr. Ronald Weitzer - He is a Professor of sociology at George Washington University in Washington, D.C. He holds a Ph.D. in sociology from the University of California, Berkeley. He is an expert on research on the sex industry. His comments focused upon the research methodology of Drs. Farley and Raymond. He was critical of Dr. Farley's conclusions on the brothel system in Nevada.

182 In reviewing the extensive record presented, I was struck by the fact that many of those proffered as experts to provide international evidence to this court had entered the realm of advocacy and had given evidence in a manner that was designed to persuade rather than assist the court. For example, some experts made bold assertions without properly outlined bases for their claims and were unwilling to qualify their opinions in the face of new facts provided. While it is natural for persons immersed in a field of study to begin to take positions as a result of their research over time, where these witnesses act primarily as advocates, their opinions are of lesser value to the court.

183 The evidence from some of these witnesses tended to focus upon issues that are, in my view, incidental to the case at bar, including human trafficking, sex tourism, and child prostitution. While important, none of these issues are directly relevant to assessing potential violations of the *Charter* rights of the applicants.

184 Fortunately, these witnesses relied in large part upon comprehensive studies generated by the governments of the foreign jurisdictions that have undergone legal change. I have relied significantly upon the underlying government reports in summarizing the experiences of foreign jurisdictions.

(C) The Netherlands

185 Dutch law dating back to the early 20th century prohibited living on the avails of prostitution and owning a brothel. Prostitution itself was lawful. Yet by the end of the 20th century, the law prohibiting brothel ownership was rarely enforced due to a policy of tolerance in the interests of harm reduction. On October 1, 2000, these laws were repealed.

186 The goal of this legislative change was to eliminate forced prostitution, de-link organized crime and the sex trade, and improve the position of prostitutes by allowing municipalities to regulate and control the sex trade through licensed brothels subject to health and safety regulations. Other existing laws were reformed at the same time to prevent violence towards and the exploitation of prostitutes, as well as to prevent human trafficking [11] and the exploitation of children.

187 The law requires that all prostitutes working in licensed brothels hold a European Union work permit, and prevents anyone with a criminal record from operating such a business. Approximately half of all prostitution occurring today in the Netherlands happens outside of this legal sector, and often involves foreign prostitutes providing out-calls set up by telephone and over the internet. [12] Some evidence of the continuing involvement of organized crime in prostitution has emerged in recent years, and new regulatory reforms are being aimed at these syndicates. Recent United Nations reports suggest that there are approximately 20,000 women involved in prostitution in the Netherlands, with two-thirds of them coming from Eastern Europe and developing countries.

188 According to reports commissioned by the Ministry of Justice, Dutch decriminalization has been moderately successful in improving working conditions and safety in the legal practice of prostitution. The reports suggest that the women working in the licensed sector are neither underage nor exploited. Sexually transmitted diseases are now less prevalent among prostitutes than among the population at large, and free anonymous health services are available within Amsterdam's Red Light District. Approximately 90 per cent of reported incidents of violence against prostitutes are against women working illegally. These reports conclude that the supply of and demand for prostitution in the Netherlands has decreased since the legislative changes.

189 Despite the option to move indoors, up to ten per cent of prostitution continues to occur on the street. Street prostitutes are often drug addicts or suffer from mental illness, are unwanted in brothels, and unable to pay to rent a window. Some Dutch municipalities have created zones of tolerance, "tippelzones," where street prostitution is permitted. Nurses, doctors and social workers inhabit tippelzones, providing needle exchanges, drop-in shower facilities, and advice to women who want to stop taking drugs or receive mental health treatment.

190 Through ease of access to social services, many addicted prostitutes are connected with social welfare benefits, and this is at times enough to help them leave the sex industry. For those not yet ready to quit prostitution, the police tolerate a few well-behaved drug dealers, whose presence prevents the prostitutes from working outside the tippelzone. Less than a kilometre from the Utrecht tippelzone, Dutch authorities built a set of 14 parking stalls, divided by concrete barriers, so that prostitutes and their customers would not conduct business in residential areas; the proximity to other prostitutes at the stalls also contributes to safety.

(D) New Zealand

191 Before 2003, New Zealand's criminal legislation prohibited brothel-keeping, living on the earnings of prostitution, procuring, and soliciting sexual services. Prostitution itself was not a crime. Law reform was undertaken to address the health and safety of prostitutes.

192 In June 2003, New Zealand introduced the *Prostitution Reform Act 2003* (N.Z.) 2003/28 ("*PRA*"). The stated objectives of the legislation were to safeguard the human rights of prostitutes, protect public health, and prevent the prostitution of persons under the age of 18. The law decriminalized consensual adult prostitution in all forms, and implemented a licensing regime for brothels. Small owner-operator brothels comprising four or fewer prostitutes were permitted without a licence. The law was reviewed five years after its enactment by the Prostitution Law Review Committee ("PLRC"), culminating in the *Report of the Prostitution Law Review Committee on the Operation of the Prostitution Reform Act 2003* (Wellington: Ministry of Justice, 2008) [the "*PLRC Report*"].

193 The *PRA* created a certification system for brothel operators and made it a summary conviction offence for clients, prostitutes, or brothel operators to fail to promote or adopt safer sex practices. This particular legal change gave prostitutes greater power to demand safer sex. Those who previously had not carried condoms or lubrication for fear of it being used as evidence for a conviction told the PLRC that they now felt safe being in possession of these items.

194 According to the *PLRC Report*, incidents of violence, threats, forcible confinement, theft, and refusal to pay for services have continued after the *PRA*. However, these incidents are infrequent, except among street-based prostitutes. One noted change since the law reform was an increased likelihood that prostitutes would report incidents of violence to the police. Street prostitutes are now more likely to work during daylight hours or in well-lit areas and are taking greater care to screen clients before entering their vehicles. Under-aged prostitution does not appear to have increased post-decriminalization and, as of 2007, no situations involving trafficking in the sex industry had been identified.

195 The *PRA* permits territorial authorities to make bylaws addressing the location and promotion of commercial sexual services. Seven territorial authorities (out of 73 across New Zealand) have implemented local licensing systems for the commercial sex business. In one territory, closed-circuit television cameras were installed in areas known for street prostitution.

196 The *PLRC Report* concluded that the size of the sex industry has not been affected by the legal changes; however prostitutes are slowly moving from the managed sector (brothels, massage parlours, escort services) to the private indoor sector. While it was hoped that the *PRA* would lead street-based prostitutes (11 per cent of the New Zealand sex trade) to move indoors, evidence suggests there is little movement between the street and indoor sectors of the industry.

(E) Germany

197 Before 2002, German law prohibited anything done in "furtherance of prostitution," including operating a brothel. Prostitution was deemed legally immoral, and this made contracts for sale of sexual services unenforceable by the prostitute seeking payment for services rendered. Prostitutes were compelled to register with the government and undergo mandatory disease screening.

198 In 2002, Germany passed *An Act Regulating the Legal Situation of Prostitutes (Prostitution Act) 2001* ["*Prostitution Act*"], which decriminalized brothels and lifted the prohibition against promoting prostitution. The *Prostitution Act* adopted the position that the law must "respect a person's voluntary, autonomous decision to engage in prostitution as long as it does not violate any rights of others." Pimping, "for material benefit to supervise another person's engagement in prostitution, to determine the place, time, extent of other circumstances of the engagement in prostitution," in the absence of a voluntary agreement, remains a crime. Mandatory disease screening was abandoned. The statute also mandated a three-year review of the legislation which led to an official report in 2007, *Report by the Federal Government on the Impact of the Act Regulating the Legal Situation of Prostitutes (Prostitution Act)* (Berlin: Federal Ministry for Family Affairs, Senior Citizens, Women and Youth, 2007) ["*German Report*"].

199 According to the *German Report*, the goals of the *Prostitution Act* were to remove the illegality of prostitution which "acts as a breeding ground for crime," improve working conditions for prostitutes, increase their access to social benefits, and facilitate exit. Legislators also hoped that the *Prostitution Act* would protect children from exploitation and curb human trafficking. Although not widely used, prostitutes are now able to receive social assistance and pursue

civil remedies in order to claim unpaid remuneration. Germany funds community programs that include support for prostitutes with mental health issues, financial planning, drug counselling, and assistance in leaving the trade.

200 One of the major goals of the *Prostitution Act* was to add transparency to the sex industry to deter organized crime, as it was believed that legal isolation is what leads to dependence on pimps and criminals. While there is no real evidence that prostitution has become more transparent, the *German Report* indicates that the fear that prosecutions of trafficking and other serious crimes would be more difficult after the legal change is not supported by the evidence.

201 The *German Report* states that no measurable improvements are detectable in achieving social protection for prostitutes, improving working conditions, encouraging prostitutes to exit the industry, or reducing crime. However, the fears that decriminalization would open the floodgates to organized crime, human trafficking, or the exploitation of minors have not materialized as a result of the legal changes. The *German Report* concludes at p. 12 that:

> In a free democratic state ruled by law, the risks, disadvantages and problematical implications associated with prostitution cannot be countered by forcing prostitution into the shadows using repressive measures. Rather, it must be possible to limit the problematical aspects associated with it by taking prostitution out of the shadows and monitoring the conditions under which it is practiced in a manner that is based on the principles of the rule of law.

(F) Australia

202 Australia's federal system of government assigns jurisdiction over prostitution to the state or territorial level of government. Decriminalization has occurred in six of Australia's eight jurisdictions. The current situation in each is described below:

a) *South Australia:* Prostitution-related activities remain criminal.

b) *Western Australia:* Passed the *Prostitution Amendment Act 2008* (W.A.) but has yet to bring its decriminalization provisions (allowing brothels) into force. Public soliciting for the purpose of prostitution is illegal.

c) *New South Wales:* Since law reform occurred in 1979, there have been few restrictions on soliciting (it is not permitted near schools or places of worship, for example), and indoor prostitution is governed only by municipal rules.

d) *Victoria:* Has permitted indoor prostitution since 1984. The law requires all brothels (maximum six rooms), home-based businesses, and escort agencies to obtain a licence (pending a police check) and demands all prostitutes undergo disease screening. Soliciting remains illegal.

e) *Australian Capital Territory*: Since 1992, brothels, escorts, and independent operators (who must work alone) have been permitted provided they register with the government; condom use is required by law. Street prostitution remains illegal.

f) *Northern Territory:* Licensed escort agencies and indoor operators (working alone) are permitted, while brothels and street prostitution remain illegal.

g) *Tasmania:* Individual workers operating indoors are permitted (and can work in pairs), while brothels, escort agencies, and street solicitation remain illegal. The 2005 legislation permitting indoor operations adds provisions against intimidating, assaulting, and threatening prostitutes, and mandates higher sentences for these crimes.

h) *Queensland:* In response to a scandal that revealed the police had been operating brothels and were engaged in racketeering, Queensland's *Prostitution Act 1999* (Qld.) allowed licensed brothels to operate in restricted locations. Escort agencies and street prostitution remain illegal (in fact, the fine for solicitation has increased). Unique to Queensland, the legislation mandated a five-year review published as *Regulating Prostitution: An Evaluation of the Prostitution Act 1999 (QLD)* (Brisbane: Crime and Misconduct Commission, 2004) ["*Queensland Report*"].

203 Queensland's government opted to permit indoor prostitution. The Honourable T.A. Barton, Member for Waterford-ALP, and the Minister for Police and Corrective Services, stated the reasons for this change at the Second Reading of the Bill on November 10, 1999 at 4826:

> Licensed brothels are the Government's preferred option as they provide a safer work environment for workers and clients; workers can receive peer support from other workers; workers can be relieved of the responsibility of running a business; brothels provide an access point for health and other service providers; and it is easier to monitor and control safe sex practices in a brothel environment.

204 The *Queensland Report* concluded that sole operators, as a result of their complete isolation, are at greater risk of violence than their counterparts in legal brothels. Street-based prostitution, for which the legal reform created stiffer penalties, has been reduced through aggressive policing. According to the *Queensland Report*, 75 per cent of the sex industry has not elected to move into the legal sector, and continues to operate contrary to the law. Decriminalization has not led to an increase in the size of the sex industry.

205 In New South Wales, which permits public soliciting except in proximity to schools, homes, or places of worship, the government has established "safe house brothels" where, for a small fee, street prostitutes can bring their clients and they will be protected by a monitored intercom, a single entrance with cameras, and they can have access to health and welfare services.

(G) Sweden

206 After decades of decriminalization, Sweden introduced a unique legal response to prostitution in 1999. The *Act on Violence Against Women 1999*, 1 January 1999, criminalized buying sex and pimping, while the selling of sex by prostitutes remains legal. According to the *Fact Sheet on Prostitution and Trafficking in Human Beings* (Stockholm: Ministry of Industry, Employment and Communications, Division for Gender Equality, 2005), the *Act on Violence Against Women* treats prostitutes as victims:

> In Sweden, prostitution is regarded as an aspect of male violence against women and children. It is officially acknowledged as a form of exploitation of women and children that constitutes a significant social problem, which is harmful not only to the individual prostituted woman or child, but also to society at large. The Swedish Government has long given priority to combating prostitution and trafficking in human beings for sexual purposes. This objective is an important part of Sweden's goal of achieving equality between women and men at the national level as well as internationally. Gender equality will remain unattainable as long as men buy, sell and exploit women and children by prostituting them.

207 Promoting or encouraging casual sexual relations for commercial services can be punished by up to eight years' imprisonment where significant exploitation is present. State-run exit programs are accompanied by poverty-reduction measures aimed at women in order to prevent their entry into the sex trade. Estimates suggest that the number of women involved in prostitution in Sweden has decreased from 2,500 in 1999 to less than 1,500 in 2002. The number of women in street prostitution has decreased from 650 in 1999 to less than 500 in 2002. Government reports suggest that there are almost no foreign women remaining in street prostitution, and there is some suggestion that human traffickers may now find Sweden to be an unattractive destination for trafficked women.

208 The legal change has been accompanied by activities targeting male demand for prostitution including a nationwide poster campaign raising awareness about prostitution and trafficking in women. Additional education programs have been established for police personnel to increase their understanding of the conditions that make women vulnerable to becoming victims of prostitution and trafficking. According to the government fact sheet, after this program began in 2003, complaints that the law was difficult to enforce ceased and there was a 300 per cent increase in arrests. Convictions, however, remain rare. The law applies equally to Swedish peacekeeping forces stationed abroad; in 2002, three Swedish soldiers stationed in Kosovo who were found with prostitutes were arrested and discharged from the military.

(H) Nevada, United States of America

209 Since 1971, licensed brothels have been permitted throughout the state of Nevada, except in Las Vegas, while procuring and forced prostitution are illegal. A more recent law requires condom use in prostitution and the regular testing of prostitutes for sexually transmitted infections, including HIV.

210 No government report was submitted reviewing Nevada's experiences with legal indoor prostitution. However, a study by Barbara Brents and Kathryn Hausbeck of the University of Nevada entitled: "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk and Prostitution Policy" (2005) 20 Journal of Interpersonal Violence 270, was filed as an exhibit to the affidavits of Drs. Lowman and Weitzer. Furthermore, Dr. Melissa Farley's 2006 study, *Prostitution and Trafficking in Nevada*, published as a book (San Francisco: Prostitution Research & Education, 2007), was filed on this application.

211 According to Barbara Brents and Kathryn Hausbeck, a number of safety measures are in place in licensed Nevada brothels in order to protect prostitutes from customer violence. For example:

a) Prices are negotiated up front while management listens in over an intercom;

b) Cash is taken up front and brought to a manager, providing the prostitute with an opportunity to communicate any reservations she may have about the client;

c) Panic buttons are available in every room to call management or set off an alarm if pressed;

d) The brothel setting prevents clients from leaving very quickly and removes client anonymity; and

e) After payment and before the sexual encounter, prostitutes perform a visual scan for sores or other indications of sexually transmitted infections; if there are issues, the money is returned and the client is asked to leave.

212 Dr. Farley suggested that the intercom system is in place to prevent prostitutes from denying a share of their earnings to their pimp. Dr. Farley also suggested that panic buttons may not be enough to prevent violence which can occur very quickly. At p. 21, Dr. Farley commented upon the conclusions of Brents and Hausbeck:

> In another study, women were asked if they felt safe in legal prostitution and many responded affirmatively. Usually, however, women mean safe in comparison to other prostitution. Thus the concept of safety is relative, given that prostitution is associated with a high likelihood of violence. One woman described a near-lethal assault by a john in a brothel where he cornered and choked her, fracturing her larynx. She stated that she would probably be dead if another woman hadn't heard the scuffle and broken into her room.

213 While Brents and Hausbeck cited numerous problems with brothel prostitution in the state, with respect to the issue of violence, the study found that only two and a half per cent of prostitutes surveyed had experienced violence while working lawfully indoors and 84 per cent of licensed prostitutes agreed that their job was safe. The authors concluded at p. 293 that, "Legal brothels generally offer a safer working environment than their illegal counterparts."

IX. The Charter Analysis

1. General Approach to Charter Analysis

214 It is well-established that courts are to take a generous, purposive, and contextual approach to *Charter* interpretation: *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] 2 S.C.R. 145 (S.C.C.); *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.); *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.); *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, *supra*; *Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research)*, [1990] 1 S.C.R. 425 (S.C.C.); *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.); *R. v. S. (R.J.)*,

[1995] 1 S.C.R. 451 (S.C.C.); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (S.C.C.); *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.); *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.); *Canadian Federation of Students v. Greater Vancouver Transportation Authority*, [2009] 2 S.C.R. 295, 2009 SCC 31 (S.C.C.).

215 In In *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)* (2000), 49 O.R. (3d) 662 (Ont. S.C.J.), aff'd (2002), 57 O.R. (3d) 511 (Ont. C.A.), aff'd, [2004] 1 S.C.R. 76, 2004 SCC 4 (S.C.C.), McCombs J. summarized the general approach to constitutional analysis at paras. 37-39:

> Constitutional analysis must proceed with the legislative purpose in mind and in its broader social and political context: *R. v. Mills*, [1999] 3 S.C.R. 668 at 714-15, 139 C.C.C. (3d) 321. Courts must presume that Parliament intended to act constitutionally, and give effect to this intention where possible: *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1078; *R. v. Mills*, supra, at 711.
>
> It is irrelevant that [the impugned provision] of the *Criminal Code* was in place long before the *Charter of Rights and Freedoms*. Parliament has chosen to leave it intact. If possible, therefore, the section must be construed so that it meets constitutional criteria.
>
> The specific constitutional questions raised by this case should be considered with the history and purpose of the legislation in mind. Further, the issues should be viewed in the light of the expert evidence gathered by the parties, and in the current social, political and legal context. [...]

2. Legislative Objectives

216 In light of the fact that the s. 7 arguments raised in this case call into question the means chosen by Parliament to achieve its objectives, it is essential to properly identify the state objective underlying each of the impugned provisions. Each of the parties presented detailed arguments outlining why their interpretation of the objective of Parliament was the correct one.

217 Before analyzing the objective of each of the impugned provisions, I turn to an issue raised by the parties concerning whether or not moral disapproval of prostitution represents a constitutionally permissible legislative objective.

(A) Is Morality a Constitutionally Valid Legislative Objective?

218 The applicants argue that the historical moral objectives of the impugned provisions are no longer constitutionally permissible and should not be considered during the *Charter* analysis.

219 The CLF argues that prostitution is immoral, should be stigmatized and that it demeans the dignity of the prostitute and her client and harms women and the community at large. The CLF takes the position that morally based legislative objectives are constitutionally permissible where the laws are a reflection of society's core values that are otherwise compatible with *Charter* values.

220 The AG Ontario submits that all sexual gratification in exchange for payment is inconsistent with respect for the human dignity of the seller of sexual services. Because the law requires that a criminal prohibition must be founded upon a demonstrable apprehension of harm, the AG Ontario argues that the term "harm" should be interpreted to include the commodification of sex and attitudinal harm that would accrue to women as a result of legally sanctioned prostitution. Accordingly, the prevention of harm to and exploitation of prostitutes, and the protection of their dignity as human beings are valid constitutional objectives.

221 The framework of the *Charter* provides for a balancing of individual rights and societal objectives to be conducted in accordance with the values that underlie our legal system.

222 It is clear that Parliament is entitled to legislate in order to protect societal values where there is a reasonable apprehension that harm will result if the legislature fails to act. It is also the case that Parliament may pass criminal laws which are based on a notion of right and wrong.

223 In *R. v. Butler*, [1992] 1 S.C.R. 452 (S.C.C.), the accused shop owner was charged with selling and possessing for distribution or sale obscene material consisting of pornographic videotapes, magazines and sexual paraphernalia. The Supreme Court was asked to decide whether possession of these materials was protected by the guarantee of freedom of expression under s. 2(*b*) of the *Charter*. The Supreme Court held that s. 163 of the *Criminal Code* seeks to prohibit certain types of expressive activity and thereby infringes s. 2(*b*) of the *Charter*. However, the Court held that such an infringement is justifiable under s. 1 of the *Charter*. In conducting the s. 1 analysis, Sopinka J., discussed the morality issue and wrote at p. 492:

> I agree with Twaddle J.A. of the Court of Appeal that this particular objective is no longer defensible in view of the *Charter*. To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367, at p. 370, refers to this as "legal moralism", of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.
>
> On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus, *supra*, at p. 376, writes:
>
> > Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.
>
> As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.
>
> In my view, however, the overriding objective of s. 163 is not moral disapprobation but the avoidance of harm to society. In *Towne Cinema*, Dickson C.J. stated, at p. 507:
>
> > It is harm to society from undue exploitation that is aimed at by the section, not simply lapses in propriety or good taste.

224 In *R. v. Malmo-Levine*, *supra*, the Supreme Court considered the constitutionality of a law prohibiting possession of marijuana and wrote at p. 635:

> No doubt, as stated, the *presence* of harm to others may justify legislative action under the criminal law power. However, we do not think that the *absence* of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused.
>
> The appellants cite in aid of their position the observation of Sopinka J., writing for the majority in *Butler, supra*, that "[t]he objective of maintaining conventional standards or propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*" (p. 498). However, Sopinka J. went on to clarify that it is open to Parliament to legislate "on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society" (p. 498 (emphasis added)).

225 These decisions recognize that a law grounded in morality remains a proper legislative objective so long as it is in keeping with *Charter* values. While the avoidance of harm is not a principle of fundamental justice, the Court recognized that there is a state interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.

(B) Canada's Prostitution Laws: History, Interpretation, Objectives

226 In order to consider the constitutionality of the prostitution laws in issue, it is necessary to review the legislative history, objectives, and the interpretation of the impugned provisions.

227 Adult prostitution has never been a crime in Canada. Rather, Parliament has chosen to control prostitution indirectly, by making many of the acts related to prostitution illegal: *Prostitution Reference* at p. 1141. Prostitution laws have a long history in Canada, pre-dating Confederation, and have developed in a rather *ad hoc* manner, reflecting differing concerns of legislators over the years. The authors of the *Fraser Report* summarized the history of prostitution-related laws in Canada as follows, at p. 403:

> The earliest provisions in Canadian criminal law relating specifically to prostitution dealt with bawdy-houses and street walking. The bawdy-house provisions which were 'received' from England made it an offence to 'keep' a bawdy-house (typically a brothel). However, unlike the parallel English law, they also embraced both being an inmate of or one 'found in' (a customer in) a bawdy-house. The law on streetwalkers which developed from more general provisions on vagrancy made it an offence to be a prostitute or streetwalker 'not giving a satisfactory account of [herself]'.
>
> In the 1860s, in the wake of concern in official circles in Britain about the supposed connection between prostitutes, venereal disease and demoralization in the armed forces, Canada, following the British lead, introduced a regulatory regime which made it possible for prostitutes to be subjected to medical inspection and, if found to be diseased, detained for compulsory treatment in a certified hospital. However, in Canada the legislation was rarely enforced and was soon allowed to lapse.
>
> In all of this early legislation, with the partial exception of the bawdy-house provisions, the emphasis of the law was on penalizing the prostitute. The philosophy seems to have been that the male population was entitled, without sanction, to seek the services of prostitutes, but insofar as the morality or health of the community might be compromised by such activity, the target of the law was properly the purveyors and not the customers of the business.
>
> In the late 19th and early 20th century, the emergence of a more paternalistic concern on the part of the legislators with the protection of girls and young women from the ravages of vice, often associated with the alleged scourge of 'white slavery', led to the addition of a series of provisions which had the protection of 'virtuous womanhood' as their objective. These included a litany of offences proscribing procuring, and 'living on the avails' of prostitutes. Together with the earlier streetwalker and bawdy-house offences, they were included in the Canadian *Criminal Code*.
>
> Largely as a result of the efforts of women involved in the so-called 'social purity movement', legislation designed both to rehabilitate prostitutes and to prevent children opting for that way of life was also enacted across the country at the provincial level. These regimes, which allowed for special detention orders for prostitutes and the removal of female adolescents from their own homes, were often as repressive in application as the streetwalking provisions.
>
> The dual elements in the thinking of lawmakers of the prostitute as both moral and legal outcast, and the need to protect respectable women from the wiles of perverse males, has continued to influence the law and its enforcement through the 20th century. The bawdy-house provisions, with their uniquely Canadian focus on keeper, prostitute and customer, remain in the *Criminal Code* in sections 193 and 194. The purely status offence of streetwalking was retained in the *Code* until 1972 when it was replaced by the present soliciting provision, section 195.1.

The list of procuring offences continues to exist in section 195(1) of the *Code*, subject to recent changes which extend their application to both males and females. Although the special regulatory regimes designed to deal with the public health or morals problems caused by prostitution are now historic memories, more general legislation on public health and child welfare exists which provides the possibility of regulatory control over prostitution and its side effects.

228 I now examine the history, interpretation, and legislative objective of each of the impugned provisions.

a. History of s. 210 - Bawdy-House Provisions

229 The bawdy-house provisions "find their roots in ancient English criminal law": *R. c. Corbeil*, [1991] 1 S.C.R. 830 (S.C.C.) at p. 841. The first post-Confederation legislative provisions dealing with bawdy-houses can be found in *An Act respecting Vagrants*, S.C. 1869, c. 28, which defined a "vagrant" as including "all keepers of bawdy-houses and houses of ill-fame, or houses for the resort of prostitutes, and persons in the habit of frequenting such houses, not giving a satisfactory account of themselves." In 1886, inmates of bawdy-houses were included in the definition of a "vagrant": *An Act respecting Offences against Public Morals and Public Convenience*, R.S.C. 1886, c. 157.

230 In Canada's first *Criminal Code* (*The Criminal Code, 1892*, S.C. 1892, c. 29), prostitution laws were found under Title IV, "Offences against Religion, Morals and Public Convenience," which was subdivided into further parts. [13]

231 In Part XIV, "Nuisances," keeping a common bawdy-house was an indictable offence, liable to one year imprisonment. "Common bawdy-house" was defined as "a house, room, set of rooms or place of any kind kept for purposes of prostitution."

232 In Part XV, "Vagrancy," it was a summary offence, liable to six months' imprisonment (with or without hard labour) to be a "loose, idle or disorderly person or vagrant." Such people included a keeper or inmate of a bawdy-house or "house for the resort of prostitutes," and a person in the habit of frequenting such houses without giving a satisfactory account of himself or herself.

233 Parliament amended the definition of "common bawdy-house" in 1907 to include any place "kept for purposes of prostitution or occupied or resorted to by one or more persons for such purposes" (*The Criminal Code Amendment Act, 1907*, S.C. 1907, c. 8)

234 Amendments to the *Criminal Code* in 1913 (*The Criminal Code, Amendment Act, 1913*, S.C. 1913, c. 13) included extending the offence of keeping a common bawdy-house to include those who assisted in keeping a common bawdy-house. It also became an offence for a landlord, lessor, tenant, occupier or agent of a place to knowingly permit the place to be used as a bawdy-house. As well, the language of "frequenting" a common bawdy-house was replaced by being "found in" a disorderly house without a lawful excuse.

235 In 1915, further amendments were made to the *Criminal Code* (*The Criminal Code Amendment Act, 1915*, S.C. 1915, c. 12), which included the addition of an offence for being an inmate of a common bawdy-house and removing the bawdy-house provisions from the vagrancy section. In 1917, the definition of a common bawdy-house was amended to include premises used for "acts of indecency": (S.C. 1917, c. 14). In 1947, a summary conviction offence of transporting a person to a bawdy-house was added to the *Criminal Code*, and the maximum penalty for keeping a bawdy-house was increased to three years' imprisonment (*An Act to amend the Criminal Code*, S. C. 1947, c. 55).

236 In the 1953-54 revision of the *Criminal Code* (*An Act respecting the Criminal Law*. S.C. 1954, c. 51), bawdy-house offences were moved into Part V, "Disorderly Houses, Gaming and Betting." This served to distance these offences from the vagrancy and nuisance provisions, which were located in Part IV, "Sexual Offences, Public Morals and Disorderly Conduct." The definition of "common bawdy-house" was amended to mean "a place that is (i) kept or occupied, or (ii)

resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency." The penalty for keeping a bawdy-house was reduced to two years' imprisonment.

237 Since the revision in 1953-54, the core elements of the bawdy-house provisions have remained largely unchanged.

b. Objective of s. 210 - Bawdy-House Provisions

238 In *R. v. Rockert*, [1978] 2 S.C.R. 704 (S.C.C.), Estey J., writing for a majority of the Supreme Court, considered the objective of the common gaming house provisions in the *Criminal Code*. In doing so, he examined the objective of offences relating to disorderly houses generally, which includes common bawdy-houses at pp. 711-12:

> This conclusion as to the proper construction of the word "used" as employed in the definition of 'common gaming house' in s. 179 of the *Code* is further reinforced by an examination of the historical antecedents and development of the offences relating to disorderly houses. These offences are collectively dealt with in Part V of the *Code*. This task was ably carried out by the learned trial judge in the case at bar with reference to common gaming houses, and it is sufficient in this regard to refer to that part of his reasons for judgment in which he discussed this point:
>
> > Historically, the keeping of a common gaming house was also a common or public nuisance, as distinct from a private nuisance, and as such was also an offence, indictable as a misdemeanour, at common law. Common gaming houses were said to be "detrimental to the public, as they promote cheating and other corrupt practices; and incite to idleness and avaricious ways of gaining property persons whose time might otherwise be employed for the good of the community." Bac. Abr. Tit. "Nuisances" (4); 1 Hawk. c. 75, s. 6; *Russell on Crime*, 12th ed., vol. 2, p. 1442.
>
> The authorities leave little, if any, doubt that the mischief to which these offences were directed was not the betting, gaming and prostitution *per se*, but rather the harm to the interests of the community in which such activities were carried on in a notorious and habitual manner. (*Vide Jenks v. Turpin* [(1864), 13 Q.B.D. 505].)
>
> A similar historical analysis of the offence of keeping a common bawdy-house was carried out by Schroeder J.A. in *R. v. Patterson* [[1967] 1 O.R. 429, 3 C.C.C. 39, revd. [1968] S.C.R. 157], at p. 46 C.C.C., cited with approval by this Court on appeal [1968] S.C.R. 157 at p. 161:
>
> > Viewed in historical perspective the keeping of a brothel or a common bawdy-house was a common nuisance and, as such, was indictable as a misdemeanour at common law. It was treated as a public nuisance "not only in respect of its endangering the public peace by drawing together dissolute and debauched persons but also in respect of its apparent tendency to corrupt the manners of both sexes, by such an open profession of lewdness": *Russell on Crime*, 12th ed., vol. 2, p. 1440. It consisted of maintaining a place to the disturbance of the neighbourhood or for purposes which were injurious to the public morals, health, convenience or safety. The maintenance of a nuisance of this character later became the subject of legislation in England in 1752 when the *Disorderly Houses Act*, *1752* (U.K.), c. 36, was enacted and the offence is now embraced (sic) in the provisions of the *Sexual Offences Act, 1956* (U.K.), c. 69, s. 33, the English counterpart of s. 168(1) (b), (h) and (i) of our *Criminal Code*.
> >
> > [Emphasis added.]

239 Although morality was clearly one of the original objectives of the bawdy-house provisions, the provisions were intended to address a number of concerns under the relatively broad objective of preventing common or public nuisance. These concerns included health, safety, and neighbourhood disruption or disorder, as well as the prevention of immorality: see Edward Coke, *The Third Part of the Institutes of the Laws of England* (London: E. and R. Brooke, 1797) at p. 204; William Hawkins, *Pleas of the Crown, 1716-1721*, 3rd ed. (London: Professional Books, 1973) at p. 196; J.W. Ehrlich, *Ehrlich's Blackstone* (Westport: Greenwood Press, 1973) vol. 1 at pp. 823-24; *R. v. Mercier* (1908), 13 C.C.C. 475 (Y.T. Terr. Ct.), at 485; *R. v. Jones* (1921), 62 D.L.R. 413 (Alta. C.A.) at p. 414 *per* Beck J.A.; *R. v. Patterson*, [1967]

1 O.R. 429 (Ont. C.A.) at p. 435, *per* Schroeder J.A. (dissenting), rev'd (1967), [1968] S.C.R. 157 (S.C.C.); *R. v. Wong*, [1976] A.J. No. 329 (Alta. Dist. Ct.) at para. 5; *R. c. Alexandre*, 2010 QCCA 1155 (Que. C.A.).

240 The applicants argue that it is no longer constitutionally valid to justify criminal law on the basis of legal moralism. As stated by Sopinka J. in *Butler* at pp. 492-93, "the prevention of 'dirt for dirt's sake' is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*."

241 Bawdy-houses include places for the purpose of prostitution or for the practice of acts of indecency: s. 197(1) of the *Criminal Code*. In *R. c. Labaye*, [2005] 3 S.C.R. 728, 2005 SCC 80 (S.C.C.), the appellant appealed from a conviction of keeping a bawdy-house for the practice of acts of indecency. In its analysis, the Supreme Court outlined the history and meaning of criminal indecency in Canada. While indecency was historically inspired and informed by the moral views of the community, "courts increasingly came to recognize that *morals and taste were subjective, arbitrary and unworkable in the criminal context*, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices." [Emphasis added.]: *Labaye* at para. 14. Today, criminal indecency is defined using an objective harm-based approach. Three types of harm that are capable of supporting a finding of indecency include: (1) harm to those whose autonomy and liberty may be restricted by being confronted with inappropriate conduct, (2) harm to society by predisposing others to anti-social conduct, and (3) harm to individuals participating in the conduct: *Labaye* at para. 36. Harm, or a significant risk of harm, must be of a degree that is incompatible with society's proper functioning, and must be established on the evidence. Unlike criminal indecency, "[p]rostitution does not require as a component factor the performance of acts that are indecent or harmful": *Marceau c. R. supra* at para. 21.

242 In my view, the subjective moral component of the objective (for example, "dissolute and debauched persons") is no longer properly regarded as a legislative objective of the provision in light of the interpretation of that provision in *Labaye*. Thus, I find that the objectives of the bawdy-house provisions for the purpose of prostitution are combating neighbourhood disruption or disorder and safeguarding public health and safety.

243 The AG Ontario argues that the modern objective of the bawdy-house provisions in general is a concern for the dignity of persons involved in prostitution and the prevention of physical and psychological harm to them. I cannot find any support in the history of s. 210(1) for such a conclusion: see also *Marceau c. R.*, *supra*, at para. 72 *per* Dalphond J.A. in dissent. It is, therefore, not a permissible shift in emphasis of the legislative objective: *R. v. Zundel*, [1992] 2 S.C.R. 731 (S.C.C.), at pp. 746-47.

c. Interpretation of s. 210 - Bawdy-House Provisions

244 Section 210 targets all direct participants of bawdy-house prostitution: operators, prostitutes, and clients. Section 210(1) makes it an indictable offence for anyone to keep a common bawdy-house. Section 210(2) creates three different summary conviction offences: (a) being an inmate of a common bawdy-house; (b) being found without lawful excuse in a common bawdy-house; and (c) knowingly permitting a place to be let or used for the purposes of a common bawdy-house, as an owner or someone in charge or control of the place. Sections 210(3) and (4) create a duty on the owner, landlord, or lessor of a bawdy-house which has been the subject of conviction under s. 210(1).

245 The terms "keeper," "common bawdy-house," and "place" are defined in s. 197(1) of the *Criminal Code*.

246 To constitute a common bawdy-house under s. 197(1), premises must have been used "frequently or habitually" either for the purposes of prostitution or for acts of indecency: *R. v. Patterson* (1967), [1968] S.C.R. 157 (S.C.C.), at pp. 162-63.

247 In *R. v. Pierce* (1982), 37 O.R. (2d) 721 (Ont. C.A.), MacKinnon A.C.J.O. held the following about the location of bawdy-houses at p. 725:

> ...In my opinion, any defined space is capable of being a common bawdy-house if there is localization of a number of acts of prostitution within its specified boundaries. This does not mean that acts of prostitution must take place in

> every nook and cranny of the defined place for it to be held to be a common bawdy-house although it obviously must take place within a reasonably substantial portion of the defined place. Hotels or floors of hotels have been held to be a common bawdy-house although there has not been proof that every room in the hotel or on the particular floor has been used for acts of prostitution. *R. v. Jerry Wong* (B.C.C.A.) released February 7, 1980; *R. v. McLellan* (1980), 55 C.C.C. (2d) 543 at 544. By definition "place" does not have to be covered or enclosed, and it can be used temporarily whether or not any person has an exclusive right of user with respect to it....

248 "Prostitution" has been defined as "lewd acts for payment for the sexual gratification of the purchaser": *R. v. Bedford* (2000), 184 D.L.R. (4th) 727 (Ont. C.A.) at paras. 19 and 25, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 328 (S.C.C.).

1) s. 210(1)

249 To constitute the offence of keeping a common bawdy-house there must be proof that the accused (a) had some degree of control over the care and management of the premises, and (b) participated, to some extent, in the "illicit" activities of the common bawdy-house. The accused does not need to personally participate in the "illicit" activities that occur in the place, provided that he or she participates in the use of the house as a common bawdy-house: *Corbeil*, *supra* at p. 834.

250 The offence of keeping a common bawdy-house implies a higher degree of participation and involvement than s. 210(2)(*c*). The owner's wilful blindness or the mere delegation of responsibility is not sufficient to justify a conviction under s. 210(1): *R. c. Kouri* (2004), 191 C.C.C. (3d) 42 (Que. C.A.) at para. 24, aff'd [2005] 3 S.C.R. 789 (S.C.C.). However, it is unnecessary to show that the accused participated in the day-to-day running of the premises where he or she is shown to be the directing mind of the corporation which owned the premises, to have participated in the management, to have received the proceeds, and to have been aware of the activities taking place on the premises: *R. v. Woszczyna* (1983), 6 C.C.C. (3d) 221 (Ont. C.A.) at p. 226. An accused person may be found guilty under this provision for using his or her own residence for the purpose of prostitution: *R. v. Worthington* (1972), 10 C.C.C. (2d) 311 (Ont. C.A.).

2) s. 210(2)(a) and s. 210(2)(b)

251 "Inmate" in s. 210(2)(*a*) is not defined in the *Criminal Code*, but has been defined by the court as "inmate for the purposes of prostitution": *R. v. Knowles* (1913), 12 D.L.R. 639 (Alta. S.C.). In the annotations to *Martin's Annual Criminal Code 2010* (Aurora, Ont.: Canada Law Book, 2009) at p. 417, an inmate is described to include "a resident or regular occupant."

252 A person must be "found in" a bawdy-house to be found guilty under s. 210(2)(*b*). The accused must have been perceived there or seen by someone; mere proof of presence on the premises in question at some earlier time is not sufficient: *R. c. Lemieux* (1991), 70 C.C.C. (3d) 434 (Que. C.A.).

253 In *Corbeil*, *supra*, L'Heureux-Dubé J., dissenting on other grounds, clarified the meaning of ss. 210(2)(*a*) and 210(2)(*b*) at pp. 857-58:

> Persons who are regularly in a common bawdy-house as employees and who are actively engaged in activities other than, or in addition to, sexual activities, cannot be said to be simple "inmates" under s. 210(2)(*a*) or "found-ins" for the purposes of subs. (2)(*b*). Inmates and "found-ins" are not involved in the operation of the business beyond the simple provision and partaking of "services". The inmate under subs. (2)(*a*) is the prostitute who works on the premises with some regularity but is not responsible for any of the organizational duties involved in running the business as a business. The so-called "found-in" is simply the client who is caught in the premises. These persons only commit an offence punishable on summary conviction. Other persons who are on the premises solely for the purposes of their trade (for example, an electrician, plumber, or gardener), and who are not intended to fall within the offences in s. 210, would, under the present interpretation, escape liability.

3) s. 210(2)(c)

254 The "permitting" offence is directed towards the "owner, landlord, etc..." who has actual charge or control of the premises and "who has the right to intervene forthwith and prevent the continued use of the premises as a common bawdy-house and whose failure to do so can be considered as the granting of permission to make such use of the premises as and from the time [he or she] gained such knowledge": *R. v. Wong* (1977), 33 C.C.C. (2d) 6 (Alta. C.A.) at p. 10).

255 In summary, I have found that the legislative objective of the bawdy-house provisions is the control of common or public nuisance. The bawdy-house provisions apply to all direct participants in bawdy-house prostitution. Bawdy-house has been interpreted broadly to include any defined space if there is localization of a number of acts of prostitution within its boundaries.

d. History of s. 212(1)(j) - Living on the Avails of Prostitution

256 The legislative history of s. 212(1)(*j*) of the *Criminal Code* was reviewed by Arbour J.A., in *R. v. Grilo* (1991), 2 O.R. (3d) 514 (Ont. C.A.), at pp. 516 -518:

> As had been the case in England, the offence of living on the avails of prostitution was originally part of the offence of vagrancy. From 1892 [S.C. 1892, c. 29] until the reform of the *Criminal Code* in 1953-54 [S.C. 1953-54, c. 51], the *Code* contained the two separate offences of vagrancy and procuring. "Vagrancy" was defined as follows:
>
> > Every one is a loose, idle or disorderly person or vagrant who...having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution.
>
> (*Criminal Code*, S.C. 1892, c. 29, s. 207(*l*); s. 207(*a*) was substituted by the *Criminal Code Amendment Act, 1900*, S.C. 1900, c. 46, s. 3; *Criminal Code*, R.S.C. 1906, c. 146, s. 238(*l*); subss. 238(*j*) and (*k*) were repealed by the *Criminal Code Amendment Act, 1915*, S.C. 1915, c. 12, s. 7; s. 238(*b*) was repealed and substituted by the *Act to Amend the Criminal Code*, S.C. 1936, c. 29, s. 8; s. 238(*f*) was repealed and substituted by the *Act to Amend the Criminal Code*, S.C. 1938, c. 44, s. 14, and then repealed by the *Act to Amend the Criminal Code*, S.C. 1947, c. 55, s. 5)
>
> The *Code* made that conduct an offence in the following terms:
>
> > Every loose, idle or disorderly person or vagrant is liable, on summary conviction, to a fine not exceeding fifty dollars or to imprisonment, with or without hard labour, for any term not exceeding six months, or to both...
>
> (*Criminal Code*, S.C. 1892, c. 29, s. 208; *Criminal Code*, R.S.C. 1906, c. 146, s. 239)
>
> The section on 'procuring' dealt specifically with prostitution-related offences. In 1913, the procuring provisions were expanded to include living on the earnings of prostitution. It was an indictable offence punishable by a maximum of five (later ten) years' imprisonment for anyone who:
>
> > (i) for the purposes of gain, exercises control, direction or influence over the movements of any woman or girl in such a manner as to show that he is aiding, abetting or compelling her prostitution with any person or generally; or
> >
> > (l) being a male person, lives wholly or in part on the earnings of prostitution.
>
> (*Criminal Code*, R.S.C. 1906, c. 146, s. 216; s. 216 was repealed and replaced by the *Criminal Code Amendment Act, 1913*, S.C. 1913, c. 13, s. 9; the maximum term of imprisonment was altered by the *Act to Amend the Criminal Code*, S.C. 1920, c. 43, s. 18; sub s. (2) was repealed and replaced by the *Act to Amend the Criminal Code*, S.C. 1939, c. 30, s. 5)

The vagrancy offences imported an element of bad character, as they were "status" offences, *i.e.*, the isolated commission of acts falling within the section was not necessarily sufficient to warrant conviction if the accused was not a vagrant by nature. Persons "following a lawful occupation or having legitimate means of maintaining themselves, and enjoying a generally good reputation" had a valid defence: see *R. v. Kneeland* (1902), 6 C.C.C. 81, 11 Que. Q.B. 85 (C.A.), at p. 86 C.C.C.; *Presseau v. Paquette* (1951), 101 C.C.C. 256, [1952] 1 D.L.R. 642, [1952] Que. S.C. 6 (S.C.), at p. 259 C.C.C.

The difference between the "vagrancy" (then s. 238(*j*)) and "procuring" (then s. 216(*l*)) offences of living on the avails of prostitution was explained as follows (*R. v. Novasad* (1939), 72 C.C.C. 21, [1939] 3 D.L.R. 479, [1939] 2 W.W.R. 293 (Sask. C.A.), *per* Mackenzie J.A. at p. 26 C.C.C.:

> The distinction between the two sections really seems to be that s. 238(*j*) is intended for the transient who wanders about and occasionally falls back upon the avails of prostitution as a means of eking out a precarious existence, while s. 216(*l*) is aimed at the man who engages himself in gleaning the earnings of prostitution as a business or stable means of livelihood. As supporting this view reference may be had to the second paragraph of s. 216.

(The second paragraph of the then s. 216 was equivalent to the present s. 212(3) [rep. & sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 9], which creates the presumption that a person is living on the avails (then earnings) of prostitution on evidence that he is living with a prostitute.)

In the 1953-54 amendments to the *Code*, prostitution offences were consolidated in the procuring section, then s. 184. Vagrancy and disorderly conduct appeared separately and without any reference to prostitution. Moreover, the language of the procuring section was modified from living on the "earnings" to living on the "avails" of prostitution, the latter being the terminology of the original vagrancy provision. It is that provision which now appears as s. 212(*1*)(*j*).

The old s. 216(*1*)(*i*), which dealt with exercising control or influence remained practically unchanged in s. 184(*h*) of the 1953-54 *Code* and today appears as s. 212(*1*)(*h*).

257 Recent amendments to the procuring provisions, including the living on the avails offence, have been in relation to child prostitution: (*An Act to amend the Criminal Code and the Canada Evidence Act*, S.C. 1987, c. 24, s. 9; *An Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, S.C. 1997, c. 16, s. 2(3); *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 10.1).

e. Objective of s. 212(1)(j) - Living on the Avails of Prostitution

258 As stated above, the living on the avails of prostitution provision has its origin in the old offence of vagrancy. It is currently situated within a group of indictable offences in s. 212 of the *Criminal Code*, the majority of which "are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution":*R. v. Downey*, *supra*, at p. 11. Section 212 reads as follows:

> 212. (1) Every one who
>
> (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
>
> (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution,
>
> (c) knowingly conceals a person in a common bawdy-house,

> (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
>
> (e) procures or attempts to procure a person to leave the usual place of abode of that person in Canada, if that place is not a common bawdy-house, with intent that the person may become an inmate or frequenter of a common bawdy-house, whether in or out of Canada,
>
> (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
>
> (g) procures a person to enter or leave Canada, for the purpose of prostitution,
>
> (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally,
>
> (i) applies or administers to a person or causes that person to take any drug, intoxicating liquor, matter or thing with intent to stupefy or overpower that person in order thereby to enable any person to have illicit sexual intercourse with that person, or
>
> (j) lives wholly or in part on the avails of prostitution of another person,
>
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

259 The living on the avails provision, s. 212(1)(*j*), is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps.

260 In *Shaw v. Director of Public Prosecutions*, [1961] 2 All E.R. 446 (U.K. H.L.), the House of Lords considered the purpose of s. 30(1) of the *Sexual Offences Act, 1956* (U.K.), 4 & 5 Eliz. II, c. 69, a provision comparable to the current s. 212(1)(*j*). Section 30 read as follows:

> (1) It is an offence for a man knowingly to live wholly or in part on the earnings of prostitution.
>
> (2) For the purposes of this section a man who lives with or is habitually in the company of a prostitute or who exercises control, direction or influence over a prostitute's movements in a way which shows he is aiding, abetting or compelling her prostitution with others shall be presumed to be knowingly living on the earnings of prostitution, unless he proves the contrary.

261 At p. 453, Lord Reid stated:

> The mischief is plain enough. It is well-known that there were and are men who live parasitically on prostitutes and their earnings. They may be welcome and merely cohabit, or they may bully women into earning money in this way. They prey or batten on the women. Such men are clearly living on the earnings of prostitution: if they have or earn some other income then they are living in part on such earnings.

262 The objective of s. 212(1)(*j*) was considered by Cory J., for the majority of the Supreme Court, in *Downey* at p. 32:

> Section 195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [Citations omitted]

263 At p. 36, Cory J. further defined a pimp as one who "personifies abusive and exploitative malevolence."

f. Interpretation of s. 212(1)(j) - Living on the Avails of Prostitution

264 In *Shaw*, Viscount Simonds considered the potential breadth of s. 30(1) of the *Sexual Offences Act* and enunciated a test for determining when a person can be said to be living on the earnings of prostitution at pp. 449-50:

> What, then, is meant by living in whole or in part on the earnings of prostitution? It was not contended by the Crown that these words in their context bear the very wide meaning which might possibly be ascribed to them. The subsection does not cover every person whose livelihood depends in whole or in part upon payment to him by prostitutes for services rendered or goods supplied, clear though it may be that payment is made out of the earnings of prostitution. The grocer who supplies groceries, the doctor or lawyer who renders professional service, to a prostitute do not commit an offence under the Act. It is not to be supposed that it is its policy to deny to her the necessities or even the luxuries of life if she can pay for them.
>
> . . . . .
>
> My Lords, I think that (apart from the operation of subsection (2)) a person may fairly be said to be living in whole or in part on the earnings of prostitution if he is paid by prostitutes for goods or services supplied by him to them for the purpose of their prostitution which he would not supply but for the fact that they were prostitutes.
>
> [Emphasis added.]

265 Lord Reid, in separate reasons, introduced the notion of a parasitic relationship into the meaning of the provision at p. 454:

> 'Living on' normally, I think, connotes living parasitically. It could have a wider meaning but, if it is to be applied at all to those who are in no sense parasites, then I think its meaning must be the same whether we are considering the earnings of prostitution or of any other occupation or trade.
>
> If a merchant sells goods to tradesmen is he living on the earnings of their trades? or if a landlord lets premises for business purposes is he living on the earnings of those businesses? or if he lets them to a man of leisure is he living on that man's dividends? Those are the sources of the rent which he receives but I do not think that one would normally say that he is living on those sources. It is not an impossible use of the words — only unusual. And a penal statute ought not to be widened by reading its words in an unusual sense unless there is very good reason for doing so.

266 Like Viscount Simonds, Lord Reid found that a person lives on the avails of prostitution where a service is rendered to the prostitute precisely because she is a prostitute. At p. 453-54 Lord Reid stated:

> Such men may render services as protectors or as touts, but that cannot make any difference even if their relationship were dressed up as a contract of service. And a man could not escape because he acted in some such capacity for a number of women. His occupation would still be parasitic: it would not exist if the women were not prostitutes.

267 The reasoning in *Shaw* was adopted by the British Columbia Court of Appeal in *R. v. Celebrity Enterprises Ltd.* (1977), 41 C.C.C. (2d) 540 (B.C. C.A.). The case concerned the liability of owners of a nightclub patronized by prostitutes. Prostitutes, like all other patrons of the nightclub, were required to pay an admission fee. Consequently, the court found at p. 580 that the nightclub "was in the position of the grocer, the doctor, the lawyer and the landlord referred to in *Shaw*;" it did not supply anything to the prostitutes that it would not have supplied to any other patron.

268 In In *R. v. Grilo*, *supra*, the Ontario Court of Appeal dealt with the issue of to what extent a person may derive benefits from living with a prostitute before that person can be said to be living on the avails. Justice Arbour, for the court, adopted the requirement of a parasitic relationship, but modified the test in *Shaw* at p. 521:

> ...In the case of a person living with a prostitute, one must turn to indicia which will serve to distinguish between legitimate living arrangements between roommates or spouses, and living on the avails of prostitution. When a person receives money directly or indirectly from a prostitute in exchange for services rendered, the test, according to *Shaw*, is whether the service is rendered to the prostitute because she is a prostitute or, alternatively, whether

> the same service would be rendered to anybody else. In the case of living arrangements the test obviously must be modified. In my view, the proper question is whether the accused and the prostitute had entered into a normal and legitimate living arrangement which included a sharing of expenses for their mutual benefit or whether, instead, the accused was living parasitically on the earnings of the prostitute for his own advantage. The occasional buying of a donut or a cup of coffee would hardly amount to feeding a parasite in the ordinary acceptance of that word.
>
> Insofar as this test refers to mutual benefits, it is not to be taken to mean that each of the parties living together must make an equal contribution to the living expenses. There may not be a parasitic relationship when people contribute, for instance, in proportion to their means, unless one partner makes little or no contribution because he chooses to live as a parasite.

269 According to the court, the relationship is parasitic when there is an element of exploitation present. At pp. 521-22, Arbour J.A. explained:

> The parasitic aspect of the relationship contains, in my view, an element of exploitation which is essential to the concept of living on the avails of prostitution. For example, when a prostitute financially supports a disabled parent or a dependent child, she clearly provides an unreciprocated benefit to the recipient. However, in light of her legal or moral obligations towards her parent or child, the recipient does not commit an offence by accepting that support. The prostitute does not give money to the dependent parent or child because she is a prostitute but because, like everybody else, she has personal needs and obligations. The true parasite whom s. 212(1)(*j*) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. Being a prostitute is not an offence, nor is marrying or living with a prostitute. A person may choose to marry or live with a prostitute without incurring criminal responsibility as a result of the financial benefits likely to be derived from the pooling of resources and the sharing of expenses or other benefits which would normally accrue to all persons in similar situations.
>
> [Emphasis added.]

270 In *R. v. Barrow* (2001), 54 O.R. (3d) 417 (Ont. C.A.), leave to appeal to S.C.C. refused, (2002), [2001] S.C.C.A. No. 431 (S.C.C.), the Court of Appeal confirmed that the *Shaw* test still applied to the provision of business services to prostitutes, and that Arbour J.A.'s analysis, which modified *Shaw*, be applied only in instances involving shared living arrangements with prostitutes.

271 In *Barrow*, the appellant ran an escort agency where she kept one-third of the fee charged for the escorts' services. Although the evidence "tended to show that the appellant did not coerce the escorts and that she was supportive of them," Rosenberg J.A., for the court, held at p. 420 that the required element of parasitism was nonetheless present because "she was in the business of rendering services to prostitutes *because they are prostitutes*" (emphasis added).

272 In summary, the legislative aim of the living on the avails of prostitution provision is to prevent the exploitation of prostitutes and profiting from prostitution by pimps. A parasitic relationship is required in order to make out the offence. However, the determination of what is parasitic appears to be different based on whether the person lives with a prostitute, or provides business services to a prostitute. In the former circumstance, parasitism requires an element of exploitation. In the latter circumstance, parasitism is found solely on the basis that the service is provided to a prostitute because they are a prostitute. No proof of exploitation is required.

g. History of s. 213(1)(c) - Communicating for the Purpose of Prostitution

273 The history of s. 213(1)(*c*) was summarized by Lamer J., concurring in the result, in the *Prostitution Reference* at pp. 1191-92:

> At one point in our history, specifically between the years 1869-1972, our legislation made prostitution a "status offence". This was accomplished through the use of vagrancy laws such as the one that appeared in the *Criminal Code*, R.S.C. 1970, c. C-34, s. 175(1)(*c*):

> (c) being a common prostitute or night walker is found in a public place and does not, when required, give a good account of herself;

That provision was repealed by S.C. 1972, c. 13, s. 12, and was replaced by a law based on the concept of "solicitation". The new s. 195.1 made it a summary conviction offence to solicit any person in a public place for the purpose of prostitution. Courts differed on the interpretation of the term "solicit" until this Court's decision in *Hutt v. The Queen*, [1978] 2 S.C.R. 476. In that case Spence J., speaking for the majority, held at p. 482 that in order to be seen as a crime, "soliciting" had to be "pressing or persistent". In support of this conclusion Spence J. had occasion to pass comment on the purpose underlying this section of the *Code*, at p. 484:

> Section 195.1 is enacted in Part V which is entitled "DISORDERLY HOUSES, GAMING AND BETTING". Offences in reference to all three of these subject-matters are offences which do contribute to public inconvenience or unrest and ... Parliament was indicating that what it desired to prohibit was a contribution to public inconvenience or unrest.

In light of this decision, law enforcement officials indicated that the control of street prostitution was made very difficult if not impossible. In 1983, the federal government established the Special Committee on Pornography and Prostitution, hereinafter referred to as the Fraser Committee, to study the problem of street prostitution and to report to the Minister of Justice. The Fraser Committee reported its findings in 1985, and concluded that prostitution was a social problem that required both legal and social reforms. The Committee recommended that s. 195.1 be repealed, and that the nuisance aspect of street prostitution be dealt with via amendments to the sections of the Code in respect of disorderly conduct. The legislative response came in the form of Bill C-49 which was passed in December of 1985, and which established the current provision of the *Code* that is under constitutional scrutiny in the case at bar.

h. Objective of s. 213(1)(c) - Communicating for the Purpose of Prostitution

274 The legislative objective of the communicating provision was considered by the Supreme Court in the *Prostitution Reference*. In the judgment for the majority, Dickson C.J. referred to the objective of the provision as seeking to curtail street solicitation and the *social* nuisance which it creates. Chief Justice Dickson explained his reasoning at pp. 1134-35:

> ...Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

i. Interpretation of s. 213(1)(c) - Communicating for the Purpose of Prostitution

275 Section 213 reads as follows:

> 213. (1) Every person who in a public place or in any place open to public view
>
> (a) stops or attempts to stop any motor vehicle,
>
> (b) impedes the free flow of pedestrian or vehicular traffic or ingress to or egress from premises adjacent to that place, or
>
> (c) stops or attempts to stop any person or in any manner communicates or attempts to communicate with any person
>
> for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute is guilty of an offence punishable on summary conviction.

276 "Place" is defined in s. 197(1) as including "any place, whether or not (a) it is covered or enclosed, (b) it is used permanently or temporarily, or (c) any person has an exclusive right of user with respect to it." "Prostitute" is defined in s. 197(1) as "a person of either sex who engages in prostitution." "Public place" is defined in s. 213(2) as including "any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view."

277 There have been a number of cases interpreting aspects of the communicating provision:

a) Any one of the four types of conduct (stop, attempt to stop, communicate, attempt to communicate) is sufficient to establish the offence of communicating: *R. v. Head* (1987), 36 C.C.C. (3d) 562 (B.C. C.A.).

b) There is no legal requirement that the communication specify the sexual services and the money to be paid for them so long as these elements can be inferred from the context of the communication: *R. v. Lawrence* (2002), 332 A.R. 188, 2002 ABPC 189 (Alta. Prov. Ct.) at para. 19.

c) There is no requirement in law for an actual agreement to be reached between the prostitute and the customer for the sale of sexual services in order to constitute an offence, (for example, shopping for sex may constitute an offence): *R. v. Searle* (1994), 163 N.B.R. (2d) 123 (N.B. Prov. Ct.) at para. 21; *R. v. Lawrence*, *supra* at para. 19.

d) Something more than mere communication is required to make out the offence; there must be a purpose for the communication, other than the communication itself: *R. v. Pake* (1995), 103 C.C.C. (3d) 524 (Alta. C.A.) at p. 529. It must be established that the accused had an intention to engage in prostitution or to obtain the sexual services of a prostitute; this intention may be inferred from the circumstances. The court looks at the intent at the time of the conversation; a change of heart to not follow through after the conversation would not afford a defence: *ibid* at pp. 530-31.

e) Communication for a collateral or indirect purpose (such as a prostitute stopping a taxi to ask for transportation to a well-known downtown location or a prostitute asking a pharmacist for a package of condoms) has been held not to fall within the meaning of s. 213(1)(*c*): *R. v. Wasylyshyn*, [1988] B.C.J. No. 3210 (B.C. Co. Ct.) at para. 8; *R. v. Lawrence*, *supra* at para. 20.

278 In summary, the Supreme Court has established that the communicating offence has as its purpose controlling the social nuisance associated with street prostitution. The provision applies to a broad range of expressive behaviour (as long as it is for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute) and it applies to a broad geographical area, as defined in s. 213(2) of the *Criminal Code*.

X. Section 7 of the Charter

279 Section 7 of the *Charter* provides:

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

280 A person who alleges a breach of s. 7 must prove that there has been or could be a deprivation of the right to life, liberty and security of the person, and that the deprivation was not or would not be in accordance with the principles of fundamental justice. If a claimant is successful in doing so, the burden shifts to the government to justify the deprivation under s. 1, which provides that the rights guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society: *Charkaoui, Re*, [2007] 1 S.C.R. 350, 2007 SCC 9 (S.C.C.), at para. 12.

1. Do the Laws Deprive the Applicants of Liberty?

281 The availability of imprisonment for all of the impugned provisions is sufficient to trigger s. 7 scrutiny: *Re B.C. Motor Vehicle Act*, *supra* at p. 500; *Prostitution Reference*, *supra* at p. 1140. Thus, the first branch of the s. 7 analysis is made out; however, the applicants also argue that the impugned provisions violate their security of the person.

2. Do the Laws Deprive the Applicants of Security of the Person?

282 The Supreme Court has held that security of the person protects both the physical and psychological integrity of the individual: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.) at p. 56, *per* Dickson C.J., and at p. 173, *per* Wilson J.; *Rodriguez*, *supra* at pp. 587-88, *per* Sopinka J.; *Prostitution Reference*, *supra* at p. 1174, *per* Lamer J.).

283 Only psychological stress which is "serious" and "state-imposed" will engage s. 7: *Morgentaler*, *per* Dickson C.J. at p. 56. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.), Basterache J. for the majority stated at p. 344: "[t]he words 'serious state-imposed psychological stress' delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be *state imposed*, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be *serious*." [Emphasis in original.]

284 In *Rodriguez*, Sopinka J. held, at pp. 587-88, that security of the person encompasses "personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity...at least to the extent of freedom from criminal prohibitions which interfere with these." Interests that have been held to be basic to individual dignity and autonomy have included "a woman's choice to terminate her pregnancy, an individual's decision to terminate his or her life, the right to raise one's children, and the ability of sexual assault victims to seek therapy without fear of their private records being disclosed": *Blencoe* at p. 358, *per* Basterache J.

285 The applicants submit that the operation and intersection of ss. 210, 212(1)(*j*) and 213(1)(*c*) deprive them of security of the person. They recognize that the impugned provisions do not directly cause harm to prostitutes, as it is generally male clients that directly inflict violence upon female prostitutes. Rather, they argue that these provisions "materially contribute" to the harm faced by prostitutes by creating legal prohibitions on the conditions required for prostitution to be conducted in safe and secure settings.

286 The respondent relies on *Blencoe* to argue that there needs to be a direct causal connection between the harm alleged and the state action in order to find a violation of security of the person. Even if "material contribution" is found to be a sufficient causal standard, it argues that there is no causal connection between the impugned provisions and the harm alleged by the applicants, as prostitution is inherently harmful. The respondent argues that many of the complaints by the applicants are due to the enforcement of the laws, rather than the laws themselves. Furthermore, the respondent contends that many of the harms alleged by the applicants stem from violations of the impugned provisions.

The respondent states that refusing to comply with the law and experiencing adverse consequences associated with the criminal justice system are not adverse effects that can support a finding of constitutional invalidity.

(A) What Level of Causality is Required to Find a Threshold Violation of Security of the Person?

287 As part of the s. 7 analysis, the applicants must show a connection between the impugned provisions and the alleged deprivation of security of the person. There is disagreement between the parties about the degree of causality required. The impugned provisions do not need to directly cause the deprivation. Rather, the guarantee of fundamental justice applies to deprivations of life, liberty, and security of the person if there is a *sufficient* causal connection between the state action and the deprivation ultimately effected: *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.); *Blencoe*, *supra*; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3 (S.C.C.).

288 The central issue in *Blencoe* was whether the respondent's s. 7 rights were violated by state-caused delay in a human rights proceeding against him. Justice Basterache, for the majority, held that there must be a "sufficient causal connection" or a "significant connection" between the harm alleged and the impugned state action to invoke s. 7 of the *Charter*. Justice Basterache found that the most prejudicial impact on the respondent, namely anxiety, stress, and stigma, was caused by events occurring prior to the human rights complaint by non-governmental actors such as the press, employers, and a soccer association. Justice Basterache held that unlike the situations in *Morgentaler* and *Rodriguez*, the state action at issue in *Blencoe* was not the direct cause of the prejudice to the respondent. He then went on to consider whether the delay in the human rights process was a "contributing cause" to the respondent's prejudice. At p. 351, Basterache J. "assume[d] without deciding that there [was] a sufficient nexus between the state-caused delay and the prejudice to Mr. Blencoe." Ultimately, he found that the harm alleged by the respondent did not amount to a violation of security of the person as the type of prejudice suffered by the respondent was not constitutionally protected. He did not foreclose the possibility that state-caused delays in human rights proceedings could never trigger an individual's s. 7 rights. Thus, in my view, Basterache J. did not preclude a security of the person violation where the direct cause of the deprivation is not due to the state. What is required, rather, is a *sufficient* causal connection between the state action and the alleged violation of security of the person.

289 In *Suresh*, the Court held that there was a sufficient connection between the government's decision to deport a refugee to a place where he faced a substantial risk of torture and the deprivation of life, liberty, and security of the person. At pp. 35-36, the Court held as follows:

> While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
>
> [Emphasis added.]
>
> We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security. [Emphasis in original.]

290 The Supreme Court recently reaffirmed the requirement of a sufficient causal connection between government action and a deprivation of life, liberty, or security of the person in *Khadr v. Canada (Prime Minister)*, *supra*. Omar Khadr was held by the United States of America for the purpose of trying him on charges of war crimes; thus, the United States was the primary source of the deprivation of Mr. Khadr's liberty and security of the person. The Court found that interviews conducted by the Canadian Security Intelligence Service and the Foreign Intelligence Division of the Department of Foreign Affairs and International Trade provided significant evidence in relation to the war crimes charges. At paras. 19 and 21, the Court stated as follows:

> The United States is holding Mr. Khadr for the purpose of trying him on charges of war crimes. The United States is thus the primary source of the deprivation of Mr. Khadr's liberty and security of the person. However, the allegation on which his claim rests is that Canada has also contributed to his past and continuing deprivation of liberty. To satisfy the requirements of s. 7, as stated by this Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, there must be "a sufficient causal connection between [the Canadian] government's participation and the deprivation [of liberty and security of the person] ultimately effected" (para. 54).
>
> . . . . .
>
> An applicant for a *Charter* remedy must prove a *Charter* violation on a balance of probabilities (*R. v. Collins*, [1987] 1 S.C.R. 265, at p. 277). It is reasonable to infer from the uncontradicted evidence before us that the statements taken by Canadian officials are contributing to the continued detention of Mr. Khadr, thereby impacting his liberty and security interests. In the absence of any evidence to the contrary (or disclaimer rebutting this inference), we conclude on the record before us that Canada's active participation in what was at the time an illegal regime has contributed and continues to contribute to Mr. Khadr's current detention, which is the subject of his current claim. The causal connection demanded by *Suresh* between Canadian conduct and the deprivation of liberty and security of person is established.

291 In *Khadr*, unlike in *Suresh* or *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), it does not appear that Canada's actions were a "necessary precondition" to the deprivation; rather, the Court held that the government need only *contribute* to the deprivation in a way the Court finds to be *sufficient*.

292 Thus, using the principle as articulated in *Suresh*, the applicants must demonstrate that there is a sufficient connection between the impugned provisions and the deprivation of security of the person alleged. I do not agree with the respondent that a direct causal connection is required.

(B) What is the Harm Faced by Prostitutes in Canada?

293 Evidence from nearly all of the witnesses, the government reports, and additional statistical information provided to the court confirms that prostitutes in Canada face a high risk of physical violence. It should be noted, however, that most of the evidence provided was in relation to street prostitutes.

294 Statistics Canada has reported that some people are at a heightened risk of violence and homicide due to their profession. These "occupations at risk" are said to include those in the sex trade, police officers, and taxi drivers.

295 In its 1997 report, *Street Prostitution in Canada* by Doreen Dushesne (Ottawa: Minister of Industry, 1997), Statistics Canada found that between 1991 and 1995, 63 known prostitutes were murdered. Almost all were female, seven were aged 15 to 17, and most were thought to have been killed by clients. During this period, known prostitutes accounted for five per cent of all female homicides reported (1,118 deaths).

296 Subsequent Statistics Canada *Homicide in Canada* reports note that prostitutes continue to be killed as a direct result of their profession. From approximately 1996 to 2006, seven prostitutes per year were killed on average as a result of their profession. The reports qualify the results by stating that the number of prostitutes reported killed as a result of their profession most likely *under-represents* the actual figure, as only those incidents where the police are certain that the victim was killed in the course of engaging in prostitution-related activities were counted.

297 According to the 2007 *Homicide in Canada* report by Geoffrey Li (Ottawa: Minister of Industry, 2008), 15 prostitutes were reported killed due to their profession (although five deaths occurred in previous years). [14]

298 There are additional examples of evidence presented in this case respecting the high degree of violence experienced by prostitutes:

a) In 1985, the *Fraser Report* stated that "it is apparent that [prostitutes] suffer enormous indignities and violence" and that "[c]ustomers are the primary source of sexual violence against prostitutes and may be the cause of most of the violence the prostitutes experience, depending on the prevalence of pimps. The majority of prostitutes have been sexually assaulted at least once by a customer, and have had money stolen from them or withheld despite the provision of services."

b) The 1989 *Synthesis Report* stated at p. 13, "[s]treet prostitution is certainly not a healthy, safe or productive means to earn a livelihood. Indeed, for many prostitutes, the street becomes another source of violence and intimidation."

c) In 1995, Dr. Lowman was commissioned (along with another researcher, Laura Fraser) by the federal Department of Justice to investigate an apparent increase in violence against street prostitutes after the passage of the communicating law. In the study, Dr. Lowman included the results of a 1993 Vancouver study on victimization of prostitutes. Street prostitutes from Vancouver's Downtown Eastside and Strathcona districts were interviewed. Nearly every respondent stated that they were victims of violence on multiple occasions; over three quarters had experienced violence in the past six months with an average of seven incidents per person. Extremely high rates of physical assault and sexual assault were reported.

d) In 2003, Dr. Melissa Farley and seven other researchers published the results of their nine-country study (which included Canada) on the harms of prostitution. Interviews were conducted with 854 people currently or recently working in prostitution; interviewees were asked about their current and lifetime history of sexual and physical violence. As well, participants were given a self-report inventory for assessing the symptoms of post-traumatic stress disorder (PTSD). The authors found that physical and emotional violence among the interviewees was "overwhelming." They found that 71 per cent of respondents had been assaulted; 63 per cent had been raped; and 68 per cent met the criteria for post-traumatic stress disorder (Melissa Farley et. al., "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2003) The Haworth Press 33.)

e) Dr. Gayle MacDonald has researched prostitution for over eight years and has written four publications, including a book on the sex trade in the Maritimes. In 2006, Dr. MacDonald co-authored a three-year study of prostitutes in Halifax, Moncton, and Saint John. Of the 66 prostitutes interviewed, 90 per cent were engaged in street work. Violence was experienced by all interviewees, and was primarily inflicted by clients (Leslie Ann Jeffrey and Gayle MacDonald, "'It's the Money, Honey': The Economy of Sex Work in the Maritimes" (2006) 43 CRSA/ RCSA 313.)

f) The 2006 *Subcommittee Report* noted the following at p. 17:

> ...[w]ith the disappearances and sadistic murders of a number of prostitutes, particularly in Vancouver and Edmonton, the public has become aware of the violence to which many prostitutes fall prey in Canada. This violence is not new, and is by no means confined to Vancouver or Edmonton. People who engage in prostitution, particularly street prostitution, are faced with many different types of abuse and violence, ranging from whistles and insults to assault, rape and murder. The violence comes from clients, pimps, drug pushers, members of the public, coworkers and even police officers.

299 While both parties agree that prostitutes in Canada face a high risk of violence, they disagree as to whether violence is intrinsic to prostitution, or whether there are ways that prostitution can be practised that may reduce the risk of violence to prostitutes.

a. Can the Harm Faced by Prostitutes in Canada be Reduced?

300 The evidence led on this application demonstrates on a balance of probabilities that the risk of violence towards prostitutes can be reduced, although not necessarily eliminated. The two factors that appear to affect the level of violence against prostitutes are location or venue of work and individual working conditions. With respect to venue, working indoors is generally safer than working on the streets. Working independently from a fixed location (in-call) appears to be the safest way for a prostitute to work in Canada. That said, working conditions can vary indoors, affecting the level of safety. For example, working indoors at an escort agency (out-call) with poor management may be just as dangerous as working on the streets.

301 Factors that may enhance the safety of a prostitute include being in close proximity to people who can intervene if needed, taking the time to screen a client (for example, smelling a potential client's breath, taking credit card numbers, working out expectations and prices), having a more regular clientele, and planning an escape route. While such measures may seem basic in their ability to reduce the risk of danger, the evidence supports these findings on a balance of probabilities.

b. Government Reports

302 The authors of the *Fraser Report* believed that as long as prostitution exists, it should operate in the "least offensive setting," which in their opinion, was indoors. At p. 535 they stated:

> To its credit, the law has traditionally sought to deprecate and punish the commercialization and exploitation associated with prostitution. We are inclined to believe, however, that the concern has been too broad. We are of the opinion that prostitution-related activities should not take place in public places because of the offence involved and the proven dangers to prostitutes which the street life produces. The question thus arises whether some leeway should be provided to it off the street. We believe that it should. However, if some allowance is made for its legal operation in private, it should operate in a way which will minimize the chances of harm to third parties and the community at large, reduce the opportunities for commercial crime, and ensure the health and welfare of the prostitutes. The question is how far to go in removing or limiting the present *Criminal Code* provisions in order to achieve these objectives.

303 The Fraser Committee recommended at p. 538 meeting these objectives by allowing small numbers of prostitutes to organize their activities out of a place of residence or provincially-regulated "small-scale, non-residential commercial prostitution establishments employing adult prostitutes."

304 The 1998 *Working Group Report* concluded at p. 3 that "[t]he street is a dangerous place for prostitutes. There is a relationship between violence against prostitutes, including assaults and homicides, and the venue of its occurrence. Nearly all assaults and murders of prostitutes occur while the prostitute is working on the street." Similarly, at p. 33 the Working Group stated:

> Results of the research and the consultations suggest that the two objectives of harm reduction and violence prevention could most likely occur if prostitution was conducted indoors. Indoor establishments appear to provide some protection to prostitutes as well as decreasing the level of street prostitution and its associated harm.

305 Furthermore, the Working Group found at p. 63:

> Available data tends to demonstrate that indoor prostitution is less harmful physically than that which takes place on the street. The vast majority of crimes against prostitutes, including murders, are perpetrated against street prostitutes by customers and pimps, largely because of the anonymity, tension and high level of drug use that characterize street prostitution.

306 More recently, the 2006 *Subcommittee Report* stated the following at pp. 19-20:

Much less is known about violence against people involved in off-street prostitution. As we have seen, these people are often invisible to conventional research, or at least more difficult to reach. However, according to witnesses, it would appear that off-street prostitutes are generally subject to less violence.

c. Expert Evidence

1) The Applicants' Experts

307 Dr. Augustine Brannigan described street prostitution as a "far riskier sector" than indoor prostitution because street workers are not able to make use of the safety precautions and screening mechanisms available to indoor prostitutes.

308 In Dr. Gayle MacDonald's 2006 study on the experiences of prostitutes in the Maritimes, indoor prostitution was generally viewed as safer by the interviewees. Many escorts felt "much safer" because of their ability to screen and refuse clients if they perceive the potential for violence and/or have someone know where they are. However, Dr. MacDonald notes that violence is a continuing threat for indoor workers, particularly out-call workers who are exposed to a heightened risk of violence because they may find themselves in a secluded location with a client.

309 Dr. Eleanor Maticka-Tyndale is a Professor in the Department of Sociology and Anthropology at the University of Windsor, and is the Canada Research Chair in Social Justice and Sexual Health. She received her Ph.D. in sociology from the University of Calgary. Dr. Maticka-Tyndale has published over 100 journal articles, chapters in books and reports. Her research focus has been on the sexual health of marginalized populations and general health of populations marginalized because of how they express or practice their sexuality. She has published five peer-reviewed articles on the sex industry, with topics including methodology in prostitution research, safety of people who work in prostitution, licensing prostitution, and public health issues affecting prostitutes.

310 From 2001 to 2004, Dr. Maticka-Tyndale and others (including Dr. Shaver, who is discussed below) interviewed 120 prostitutes who worked in indoor and outdoor locations in Toronto and Montreal. In Dr. Maticka-Tyndale's opinion, the physical safety of prostitutes depends on the location (for example, indoors or outdoors) and organization of the work (for example, independently, with colleagues, for someone else), and the extent to which the work environment is made secure. Dr. Maticka-Tyndale described a hierarchy within prostitution, with street-based prostitutes on the lower end experiencing the greatest amount of harassment and violence, and independent off-street workers on the higher end experiencing the least amount of harassment and violence.

311 Dr. Cecilia Benoit is a Professor of sociology at the University of Victoria, and a research associate at the Population Research Group at the University of Washington. Dr. Benoit received her Ph.D. in sociology from the University of Toronto. She has published several books, monographs, government reports, and peer-reviewed articles on the health and safety of prostitutes. Over her career, Dr. Benoit has interviewed over 300 prostitutes. Dr. Benoit's opinions are largely based on a qualitative study she co-conducted in Victoria, British Columbia of 201 current and former, indoor and street prostitutes. Those interviewed were asked about their level of control over four key dimensions of the job: earnings, pace of work, clientele and activities performed, and job danger and harassment.

312 According to Dr. Benoit, in the hierarchy of prostitution, street prostitutes are at the bottom. Their public visibility makes them the primary targets of public complaints and law-enforcement efforts. Prostitutes operating independently out of their own homes are in the best relative position regarding safety, earnings, pace of work, and activities performed. Dr. Benoit also provided the view that street prostitutes are more likely to experience violence because they are more exposed and accessible to those who would harm them. As well, street prostitutes are more vulnerable to exploitation by third parties, especially pimps, than those working in less visible, indoor venues.

313 Some factors that can increase safety for indoor prostitutes include greater control over their environment, close proximity to others who can intervene if help is needed, the ability to better screen out dangerous clients, a more regular

clientele, the use of drivers to get to and from appointments, and response plans for dangerous situations. Dr. Benoit acknowledged that indoor prostitution can still present risks. Those interviewed expressed alienation from the police and a reluctance to report violence or turn to the police for help. Many felt that because of the nature of their work they would not be helped by police or would not be taken seriously.

314 Dr. Frances Shaver is a Professor of sociology, and Chair of the Department of Sociology and Anthropology at Concordia University. She received her Ph.D. in sociology from the Université de Montréal. Dr. Shaver has worked as a research officer for the Canadian Advisory Council on the Status of Women and has conducted research for the Department of Justice.

315 Dr. Shaver is a founding member of Sex Trade Advocacy and Research ("STAR"), a group that allows researchers and community partners to work together to "improve the health safety, and well-being of sex workers." STAR is funded by the Social Sciences and Humanities Research Council and the National Network on Environments and Women's Health. Drs. Benoit and Maticka-Tyndale are also contributing researchers to STAR. Dr. Shaver and her STAR colleagues presented a report to the House of Commons Subcommittee on Solicitation Laws recommending the decriminalization of prostitution in Canada; she also appeared before the subcommittee in her academic capacity. During her career, Dr. Shaver has written or contributed to 15 peer-reviewed publications on prostitution and has conducted or supervised the interviews of some 500 male, female, and transgendered prostitutes in San Francisco, Montreal, and Toronto.

316 Dr. Shaver is of the view that the physical safety of individuals in the sex industry depends on the location and organization of the work and the extent to which the work environment can be made secure. In Dr. Shaver's opinion, street-based venues hold the greatest risk to safety. Independent in-call and out-call workers, who had a list of regular clients, and relied on classified advertisement to meet clients seemed to feel the farthest removed from violence and victimization. In-call prostitutes are familiar with their space and can make advance plans for how to protect themselves and what to do in potentially dangerous situations. In addition, in-call prostitutes report that when clients are guests in their space, the clients tend to be better behaved.

317 In Dr. John Lowman's opinion, street prostitution is more violent than prostitution that occurs in indoor venues. Dr. Lowman's 1995 study on violence against prostitutes in Vancouver involved interviews with "key players" in prostitution (three prostitutes, one pimp, seven police officers, and six social service providers), and a review of the following: a victimization survey completed by 65 prostitutes, Vancouver Police Department records on sexual assaults of prostitutes and on prosecutions for procuring and living on the avails offences, bad date lists, newspaper articles, a study on violence against street prostitutes, and the RCMP Violent Crime Unit database. A key finding in Dr. Lowman's report was that prostitutes experienced a lesser degree of violence when working from indoor locations.

318 One of the studies to which Dr. Lowman referred in his affidavit for the assertion that prostitution is not inherently dangerous is the 2007 M.A. Thesis of Tamara O'Doherty: *Off-street Commercial Sex: An Exploratory Study* (Master of Arts Thesis, Simon Fraser University School of Criminology, 2007 [unpublished]. Dr. Lowman acted as Ms. O'Doherty's senior advisor. She conducted victimization surveys and in-depth interviews with women working in the middle and upper echelons of Vancouver's sex trade in massage parlours, as escorts, or independently (or a combination thereof). Ms. O'Doherty found that while violence and exploitation occur in the off-street industry, her study indicated that some women sell sex without experiencing any violence. Some of her specific findings include:

a) The majority of the women who participated in the project had not experienced *any* violence while working in the sex industry;

b) Independent workers reported the lowest rates of victimization, whereas escorts comparatively faced the highest rates of violence; and

c) The majority of respondents used specific safety strategies. The most frequently used strategies included screening clients, using intuition, and ensuring an emergency plan was in place. Other security measures included use of security cameras, weapons and personal alarms, meeting clients in upscale hotels because the client's reservation can be easily confirmed, avoiding working in isolation (such as checking in with the escort agency or a friend), discussing fees upfront, using references from other clients and getting money upfront.

2) The Respondent's Experts

319 Dr. Melissa Farley asserts that there is little difference in prostitution's link with violence, whether it occurs indoors or outdoors. Dr. Farley includes psychological violence in her definition of violence.

320 In a 1998 five country study on prostitution, Dr. Farley and her co-authors found "significantly more physical violence in street as opposed to brothel prostitution." Furthermore, in a 2005 article Dr. Farley wrote that "some types of prostitution are associated with more severe harm than others" and that "[t]here is some research evidence suggesting that outdoor prostitution may subject women in prostitution to higher rates of physical violence [than indoor prostitution]": "Prostitution Harms Women Even if Indoors: Reply to Weitzer" (2005) 11 Violence Against Women 950 at pp. 954-955. In cross-examination Dr. Farley stated that she is not aware of any study that shows that indoor prostitution is as risky, or riskier, than street prostitution.

321 With respect to psychological violence, Dr. Farley deposed that there is no difference between extreme emotional distress or post-traumatic stress disorder ("PTSD") in indoor and outdoor prostitution. However, on cross-examination, she acknowledged the difficulty in directly linking PTSD with prostitution, as opposed to events unrelated to prostitution, such as childhood abuse.

322 Dr. Janice Raymond was a principal investigator for two studies on the harms associated with prostitution and trafficking. Like Dr. Farley, Dr. Raymond advocates for the abolition of prostitution, but sees the role of her research as separate from her role as a board member with the Coalition Against Trafficking in Women ("CATW"). One of Dr. Raymond's assertions was that the distinction between indoor and outdoor prostitution is illusory. However, Dr. Raymond admitted during cross-examination that she has not conducted any empirical research on the topic. Her opinions on this subject appear to be largely based on a report on sex trafficking for the European Parliament (Transcrime, "Study on National Legislation on Prostitution and the Trafficking in Women and Children" (2005) European Parliament: Policy Department C - Citizen's Rights and Constitutional Affairs ["*Transcrime Report*"]) and a study on prostitution in Chicago (Jody Raphael and Deborah Shapiro, "Violence in Indoor and Outdoor Prostitution Venues" (2004) 10 Violence Against Women 126 [the "Chicago Study"]). The authors of the *Transcrime Report* write that if "trafficked prostitution" (that is, human trafficking for the purpose of sexual exploitation in the sex industry) is exercised much more in one of the two sectors (indoors or outdoors), this could be the sector that has a higher level of violence, probably due to a concentration of criminal actors and increased competition. The Chicago study measured the prevalence of violence that customers, managers, pimps, and intimate partners perpetrated against 222 women in indoor and outdoor prostitution venues in Chicago. They found that street prostitutes generally reported higher levels of physical violence, but women working indoors were frequently victims of sexual violence and threatened with weapons.

323 Dr. Ronald Weitzer, a reply witness for the applicants, was critical of the Chicago study as the researchers themselves explained that the study was designed within a framework of prostitution as a form of violence against women and likely biased to some degree. Furthermore, the researchers included domestic violence in their total figures on violence faced by prostitutes, meaning the findings conflated violence at home and violence at work.

324 Dr. M. Alexis Kennedy is an Assistant Professor in the Department of Criminal Justice at the University of Nevada. She has a Ph.D. in forensic psychology from the University of British Columbia. Dr. Kennedy's evidence is largely based on two peer-reviewed empirical studies in which she was one of the principal researchers. One study was on techniques used to recruit women into street prostitution and was based on interviews with 43 prostitutes in Vancouver's

Downtown Eastside. The other study focused on male clients of prostitutes completing a diversion program in British Columbia. While Dr. Kennedy has not conducted any research on indoor prostitution, six of the 43 street prostitutes she interviewed in the former study had some experience working in indoor venues. Some of those women described exploitative experiences working indoors.

3) Other Evidence

325 There were a number of studies filed as evidence on this application which had findings that were relevant to the issue of whether the risk of violence towards prostitutes can be reduced. Some of the most relevant studies include the following:

a) Stephanie Church *et al.*, "Violence by Clients Towards Female Prostitutes in Different Work Settings: Questionnaire Survey" (2001) 322 British Medical Journal 524: This is a report on the prevalence of violence by clients against female prostitutes working outdoors or indoors in three major British cities. Here, 240 female prostitutes (115 outdoors, 125 indoors) were contacted. The authors of the study found that prostitutes working outdoors were younger, involved in prostitution earlier, reported more illegal drug use, and experienced significantly more violence from clients than those who worked in indoor venues (81 per cent vs. 48 per cent). Prostitutes who worked outdoors most frequently reported being slapped, punched, and kicked, whereas those who worked indoors most frequently reported attempted rape.

b) Libby Plumridge & Gillian Abel, "A 'Segmented' Sex Industry in New Zealand: Sexual and Personal Safety of Female Sex Workers" (2001) 25 Australian and New Zealand Journal of Public Health 78: The authors of this study stated that their objective was to assess differences in personal circumstances, risk exposure and risk-taking among female prostitutes in different sectors of the New Zealand sex industry regarding issues of sexual safety, drug use, violence, and coercion. A cross-sectional survey of 303 female prostitutes in Christchurch was conducted, comprised of 26 per cent street workers, 47 per cent parlour workers, 23 per cent escorts, and four per cent who worked in bars. The authors found that street prostitutes generally experienced more frequent and more severe violence, harassment and adversity and were more likely to have had money stolen by a client, been physically assaulted, held against their will, subjected to verbal abuse, raped or forced to have unprotected sex.

c) Priscilla Pyett & Deborah Warr, "Women at Risk in Sex Work: Strategies for Survival" (1999) 35 Journal of Sociology 183: This paper reports findings from a qualitative study of 24 female prostitutes in Melbourne, Australia who were identified by the researchers as potentially vulnerable to risks to their sexual health and physical safety. Physical assault and difficulties with enforcing condom usage were reported more frequently by street workers than by brothel workers. All of the street prostitutes interviewed had been exposed to frequent and considerable risks of violence from clients and had experienced at least one serious assault. Most of the women interviewed who worked in legal brothels reported feeling safe, and only one reported a violent incident while working. The study revealed that brothel workers' security was enhanced by supportive management, firm policies relating to condom use and price, duration and type of service, alarm systems, proximity to others and the right to legal protection. The authors noted a potential for rape and police raids in illegal massage parlours.

d) Dawn Whittaker & Graham Hart, "Research note: Managing Risks: the Social Organisation of Indoor Sex Work" (1996) 18 Sociology of Health & Illness 399: This U.K. study looks at the occupational risk of violence, and the protective strategies used to reduce risks to prostitutes working out of "flats" and to prostitutes working on the street. The authors found that working in a flat was safer. Safety was defined in terms of guaranteed payment, sex with condoms, and less potential for client violence. The authors concluded that there are two characteristics of "flat work" that make it safer: (1) it takes place indoors in a lit, contained environment (2) the prostitutes work with an assistant, or "maid." The maid makes a provisional assessment of prospective clients through a peephole and can veto undesirable clients (such as those that appear drunk), and sits in an adjacent room during the transaction.

e) Barbara Brents & Kathryn Hausbeck, "Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk, and Prostitution Policy" (2005) 20 Journal of Interpersonal Violence 270: This article examines the issue of violence within legalized brothels in Nevada, U.S.A. The authors conducted eight years of fieldwork in the Nevada brothel system, visited 13 of the 26 brothels in Nevada, participated in debates, analyzed laws, interviewed 40 prostitutes, surveyed 25 prostitutes, interviewed 11 managers/owners, interviewed approximately ten state regulators and activists, and informally interviewed five clients. Of the prostitutes interviewed, only one reported any personal experience with violence in the brothels. The interviewees reported that they worked in brothels because they feel safe there. The authors reported that the mechanisms most commonly in place in brothels for safety included: guidelines for the negotiation process, call buttons and audio room monitoring, control of customer behaviour, good relations with the police, limiting out-of-brothel services, limiting the movement of prostitutes, adhering to health regulations, and engaging in preventative practices.

326 These studies, as with the other prostitution-related studies before me, must be viewed in context and the discreet findings cannot be generalized. That said, upon a consideration of the evidence *as a whole* presented on this issue, in my view, the applicants have established on a balance of probabilities that there are ways in which the risk of violence towards prostitutes can be reduced.

(C) Do the Impugned Provisions Sufficiently Contribute to the Harm Faced by Prostitutes?

327 As discussed above, the onus is on the applicants to demonstrate on a balance of probabilities that the impugned provisions sufficiently contribute to the harm suffered by prostitutes and that there is a sufficient connection between the impugned provisions and the deprivation of security of the person.

a. Government Evidence

328 The *Fraser Report* emphasized a connection between the laws dealing with prostitution and the safety and dignity of prostitutes, particularly those that are the most vulnerable:

> The fact that we have special laws surrounding prostitution does not, however, result in curtailing all of the worst aspects of the business, or in affording prostitutes the same protection as other members of the public. Indeed, because there are special laws, this seems to result in prostitutes being categorized as different from other women and men, less worthy of protection by the police, and a general attitude that they are second-class citizens. [p. 392]
>
> The current special status of prostitution in the *Criminal Code* does not appear to have given society the protection it seeks from the harmful consequences of prostitution, nor to have given prostitutes the right to dignity and equal treatment in society. Information from the public hearings and the Department of Justice's research program, leads to the conclusion that the current law and its practice is unsatisfactory from virtually everyone's point of view: prostitutes, public and police. [p. 393]
>
> Although, as we have pointed out, the law on prostitution is only enforced in a perfunctory way, it is nevertheless enforced from time to time, even in relation to activities in private. The result is that there is just enough in the way of uncertainty about the prostitute's legal status whether on the street, using a private residence, or while employed by an escort service or massage parlour, that the individual concerned has the sense of being a legal outcast. Needless to say, the greater facility one has for operating in complete privacy and confidence, a facility which is typically a reflection of relative wealth, the easier it is to escape scrutiny. Accordingly, the law in its operation favours those who have the resources to be discreet, while victimizing those who are not so blessed. In the result, while we talk of prostitution being free of legal sanction, we in reality use the law indirectly and capriciously to condemn or harass it, providing no safe context for its operation except that which can be bought by the prostitute of means, or, as is more likely, the well-heeled sponsor or sponsors. [p. 533]

> The law on prostitution, as presently constituted, has not achieved what is presumably its theoretical object, that of reducing prostitution (or even of controlling it within manageable limits). Moreover, it operates in a way which victimizes and dehumanizes the prostitute. Change in the law is, in our opinion, clearly needed. [p. 533]
>
> [Emphasis added.]

329 The Department of Justice's 1989 *Synthesis Report* looked at whether the practice of street prostitution changed as a result of the enforcement of the communicating law.The *Synthesis Report* found that some prostitutes in all of the main study sites stated that they worked under more tense conditions and that they were more likely to be "less choosy" with respect to accepting clients. Violence between customers and prostitutes was said to have increased in Vancouver and Calgary since the enactment of the communicating law.

330 In 1998, the Federal, Provincial, and Territorial Working Group on Prostitution observed that the research before it suggested the existence of a nexus between the prostitution laws and violence towards prostitutes. However, the Working Group did not believe that the evidence revealed a specific causal link between the enforcement of the communicating provision and the deaths of street prostitutes. The *Working Group Report* stated at p. 60:

> Some participants [in consultations that were held] argued that decriminalizing or regulating prostitution would reduce violence towards prostitutes. In fact, as mentioned earlier, this view is supported by current research, which suggests that the illegal status of prostitution activities, especially those that occur in public or on the street, has contributed to a large amount of violence. The reasons for this were discussed previously and include the anonymity and isolation associated with street prostitution. Violent acts have increased since enforcement of the 1985 street prostitution law.
>
> [Emphasis added.]

331 The 2006 *Subcommittee Report* stated as follows at pp. 62-65:

> In many of the cities we visited, a number of witnesses indicated that the enforcement of section 213 forced street prostitution activities into isolated areas, where they asserted that the risk of abuse and violence is very high. These witnesses told us that by forcing people to work in secrecy, far from protection services, and by allowing clients complete anonymity, section 213 endangers those who are already very vulnerable selling sexual service on the street....
>
> . . . . .
>
> During our hearings, a number of witnesses maintained that the introduction of the communicating law (section 213) also led to the scattering of prostitutes, making them more vulnerable to violence and exploitation. Whereas in the past street prostitutes frequently worked in teams in an effort to reduce the risk of violence (for example by helping take down information such as clients' licence plate numbers and descriptions), they now tend to work in isolation from one another. While this practice has the advantage of attracting less attention from police, it also minimizes information-sharing, making prostitutes more vulnerable to meeting violent clients since they are not as well informed and are often less aware of the resources available to assist them.
>
> . . . . .
>
> According to a number of witnesses, section 213 also places street prostitutes in danger by forcing them to conclude their negotiations with clients more quickly, often leading them to get into the client's car too quickly....
>
> . . . . .
>
> Working out the details of the transaction before getting into a vehicle or going to a private location was considered important by all the prostitutes who testified. They told us that public bargaining would give them an opportunity to assess the likelihood of a potential client having violent tendencies.

332 The majority of the Subcommittee concluded at p. 89 that Canada's "quasi-legal" approach to adult prostitution "causes more harm than good" and "marginalizes prostitutes, often leaving them isolated and afraid to report abuse and violence to law enforcement authorities."

b. Expert Evidence

1) The Applicants' Experts

333 In Dr. Augustine Brannigan's opinion, the prostitution-related provisions of the *Criminal Code* put prostitutes into risky situations, as they feel compelled to make hasty decisions due to the communicating provision, are made dependant on strangers in vehicles for their safety due to the bawdy-house provisions, and work without a security guard due to the living on the avails provision.

334 In 1987, the Department of Justice commissioned a series of studies on the effectiveness of Bill-C-49 throughout Canada. Dr. Brannigan was one the researchers selected to conduct the study on the Prairies, which focused on Calgary, Winnipeg, and Regina: Minister of Justice and Attorney General of Canada, *Street Prostitution: Assessing the Impact of the Law - Calgary, Regina, Winnipeg* (Ottawa: Minister of Supply and Services Canada, 1989). They found, *inter alia*, that as a result of the communicating law, prostitutes were more passive in their behaviour on the stroll, more evasive in their conversations with clients, and more paranoid about undercover entrapment by the police. In Calgary, nearly half of the street prostitutes interviewed felt that the streets were more dangerous since the enactment of the communicating law.

335 In 1994, Dr. Brannigan conducted the *Calgary/Winnipeg Study*. Eleven out of 16 prostitutes and former prostitutes interviewed in Calgary agreed with the proposition that the communicating provision "forces women to work in more remote and less safe places." However, in the study Dr. Brannigan wrote at p. 42 that "violence [against prostitutes] does not appear to be related to the communicating law, at least not directly." He described street work as a "far riskier sector" regardless of the communicating provision, because street workers are not able to make use of the safety precautions and screening mechanisms that indoor workers may utilize.

336 In Dr. Gayle MacDonald's opinion, the criminal law increases the level and risk of violence against prostitutes: (1) by sustaining stigmatization of prostitutes, (2) by creating a conflicting victim/criminal status in the eyes of the police, which may dissuade prostitutes from accessing police protection, and (3) by limiting the ways in which prostitution may be made safer. For example, Dr. MacDonald described the negotiation between a street prostitute and a potential client as the most critical point for the prostitute to assess the client's propensity for violence. If a prostitute increases the speed of the communication, out of fear of arrest under s. 213(1)(*c*), she may misjudge a client. Furthermore, she may not be able to move to a safer indoor location, due to the bawdy-house provisions.

337 According to Dr. Eleanor Maticka-Tyndale, certain strategies that are used by prostitutes in order to minimize health and safety risks run contrary to the prostitution-related provisions in the *Criminal Code*. In her opinion, safer ways to conduct prostitution are criminalized, whereas riskier ways are not. For example, street prostitutes reported employing client-screening strategies (such as checking for the presence or absence of door handles and lock release buttons); however, many reported that such strategies take time, which elevates the risk of arrest under s. 213(1)(*c*). Consequently, some prostitutes reported being reluctant to work out the details of a transaction before moving to a private location, or working in isolated areas to avoid police detection. Working in-call increased the sense of control and personal safety of prostitutes; this type of work, however, is illegal due to the bawdy-house provision.

338 In the report prepared for the House of Commons Subcommittee on Solicitation Laws, Dr. Maticka-Tyndale and her co-authors detailed some risks of conducting legal out-call work: it is difficult to assess the safety of a destination beforehand, the client may not be alone, exit routes may not be easily identifiable or accessible, and prostitutes may be filmed without their knowledge. Some strategies to reduce these risks, such as hiring a driver or bodyguard or meeting and communicating with a client in a public place beforehand, run afoul of the law.

339 According to Dr. Cecilia Benoit, the prostitution laws exacerbate the vulnerable situation of street prostitutes. Out of fear of being detected by police when negotiating sexual transactions in public, street prostitutes tend to deal with clients hastily, often in the client's car. The negotiation of the terms and conditions of the sexual act is then done in isolation from others. In this situation, street prostitutes have little or no opportunity to screen clientele or control the venue for the sexual act.

340 Like Dr. Maticka-Tyndale, Dr. Frances Shaver described how actions taken by street prostitutes to increase their security often conflict with the law, forcing prostitutes to chose between their personal safety and violating the law. For example, working in isolated areas minimizes arrest under s. 213(1)(c), but increases the risk of violence, and limits the ability for prostitutes to share information with each other (such as the identity of dangerous clients). Some interviewees stated that they and their clients were reluctant to take the time to fully work out expectations (for example, agreement of services to be provided, fees, condom use) before moving to a private location due to fear of arrest. According to Dr. Shaver, this limits prostitutes' ability to screen for potential bad dates, thereby increasing their risk of violence. Furthermore, in Dr. Shaver's opinion, the bawdy-house provisions prevent prostitutes from working in-call, which is the safest way to conduct prostitution.

341 In his research, Dr. John Lowman found an increase in the rate of violence and murder of street prostitutes in British Columbia after the 1985 enactment of the communicating law. It was his opinion that the impugned provisions "materially contribute" to violence against prostitutes (along with other causal factors such as poverty, drug addiction, and lack of education) in the following ways:

a) the impugned provisions force "survival sex workers" [15] to work outdoors and into vulnerable areas, such as isolated streets and industrial areas;

b) street prostitution is more violent than working in off-street venues; and

c) in spite of this increased vulnerability, prostitutes do not benefit from the same level of protection and response from police authorities, especially when compared to other citizens.

342 In Dr. Lowman's opinion, the impugned provisions are a sufficient and indirect cause of violence because, by preventing prostitutes from organizing safe work conditions, they play a decisive role in creating opportunities for violence against prostitutes to occur.

343 One of the questions Dr. Lowman researched in his 1995 study for the Department of Justice was whether there had been an increase of violence against prostitutes since the enactment of the communicating law in 1985. According to Dr. Lowman, the data suggested there was such an increase in violence. He highlighted in particular the apparent increase in homicides against prostitutes (almost entirely street prostitutes) after 1985. However, he qualified his opinion by stating that it was uncertain whether the apparent increase in violence was a reflection of a greater incidence of violence, more violence being reported, or both.

2) The Respondent's Experts

344 The respondent's experts provided the opinion generally that prostitution is inherently violent, regardless of the legal regime in place or how or where prostitution is practised, citing high rates of violence against prostitutes internationally. Most of their opinions did not deal directly with the legal regime in Canada or its impact, or lack thereof, on violence against prostitutes.

345 According to Dr. Melissa Farley, prostitution is violent regardless of the legal regime in place. She deposed that the definition of the "job" of prostitution *is* sexual harassment and sexual exploitation. In her Nevada study of legal brothels, Dr. Farley reported that 27 per cent of legal brothel workers interviewed had been pressured or coerced into an act of prostitution, 25 per cent had been physically assaulted, and 15 per cent had been threatened with a weapon.

Dr. Farley adds that legalization of prostitution does not reduce the stigma of prostitution as legal brothel workers in Nevada are treated as social outcasts.

346 It is Dr. Farley's view that prostitution in general damages women's sexuality as it treats the female prostitute as a "receptacle."

347 In Dr. Janice Raymond's opinion, it is not the "work conditions" of prostitution nor the laws designed to suppress prostitution that make female prostitutes vulnerable; rather, it is the construction of prostitution itself, especially under decriminalized conditions, in which women are treated as sexual commodities, and where buyers, mostly men, are allowed to purchase women for use as sexual instruments. It is Dr. Raymond's view that under both legal and illegal conditions, the sexual interaction between buyers and female prostitutes is exploitative, and very often violent.

348 According to Dr. Raymond, the German legislation, which decriminalized aspects of prostitution, has had no appreciable impact on the protection of women in prostitution, nor has it reduced crime related to prostitution activities.

349 In Dr. Alexis Kennedy's opinion, removing the communicating provision from the *Criminal Code* will not alleviate the dangerous conditions of street prostitution, which include abusive pimps, abusive customers, a traumatic history of child abuse, sexual abuse, and drug abuse. Dr. Kennedy's view that high levels of dissociation and drug use among street prostitutes interfere with their ability to assess the risk of a potential client. However, she stated during cross-examination that speaking to a potential client for a greater length of time could minimize the ill effects of impaired decision making.

350 Dr. Kennedy's position is that if the bawdy-house provisions were removed from the *Criminal Code*, many female prostitutes would continue to work on the street due to high fees charged to prostitutes at indoor locations, hygiene and age requirements, sexual exploitation by owners, and because drug-addicted women would not be able to show up to work on a regular basis. However, on cross-examination, she stated that her views are largely based on her study of street prostitutes and that she does not know "what works and doesn't work" about bawdy-houses or how street prostitutes would be affected by the removal of the bawdy-house provisions.

351 Dr. Richard Poulin is a Professor in the Department of Sociology and Anthropology at the University of Ottawa. He has a Ph.D. in sociology from the Université de Montréal and has published extensively. His research has focused on prostitution, human trafficking, pornography, and the dynamics of the global sex trade, with a particular focus on minors. Like Drs. Farley and Raymond, Dr. Poulin supports the abolition of prostitution, and states that his position stems from his research. In his affidavit, Dr. Poulin says that physical and sexual violence in prostitution is substantial, regardless of the legal regime in place. Changing the legality of prostitution does not change the "essential violence" that exists in prostitution; in cross-examination, Dr. Poulin defined violence as meaning a systemic power imbalance.

(D) Conclusion: Expert Evidence

352 I find that some of the evidence tendered on this application did not meet the standards set by Canadian courts for the admission of expert evidence. The parties did not challenge the admissibility of evidence tendered but asked the court to afford little weight to the evidence of the other party.

353 I found the evidence of Dr. Melissa Farley to be problematic. Although Dr. Farley has conducted a great deal of research on prostitution, her advocacy appears to have permeated her opinions. For example, Dr. Farley's unqualified assertion in her affidavit that prostitution is inherently violent appears to contradict her own findings that prostitutes who work from indoor locations generally experience less violence. Furthermore, in her affidavit, she failed to qualify her opinion regarding the causal relationship between post-traumatic stress disorder and prostitution, namely that it could be caused by events unrelated to prostitution.

354 Dr. Farley's choice of language is at times inflammatory and detracts from her conclusions. For example, comments such as, "prostitution is to the community what incest is to the family," and "just as pedophiles justify sexual assault of

children....men who use prostitutes develop elaborate cognitive schemes to justify purchase and use of women" make her opinions less persuasive.

355 Dr. Farley stated during cross-examination that some of her opinions on prostitution were formed prior to her research, including, "that prostitution is a terrible harm to women, that prostitution is abusive in its very nature, and that prostitution amounts to men paying a woman for the right to rape her."

356 Accordingly, for these reasons, I assign less weight to Dr. Farley's evidence.

357 Similarly, I find that Drs. Raymond and Poulin were more like advocates than experts offering independent opinions to the court. At times, they made bold, sweeping statements that were not reflected in their research. For example, some of Dr. Raymond's statements on prostitutes were based on her research on trafficked women. As well, during cross-examination, it was revealed that some of Dr. Poulin's citations for his claim that the average age of recruitment into prostitution is 14 years old were misleading or incorrect. In his affidavit, Dr. Poulin suggested that there have been instances of serial killers targeting prostitutes who worked at indoor locations; however, his sources do not appear to support his assertion. I found it troubling that Dr. Poulin stated during cross-examination that it is not important for scholars to present information that contradicts their own findings (or findings which they support).

358 The applicants' witnesses are not immune to criticism. The respondent asks this court to assign little weight to Dr. Lowman's opinion. The respondent called Dr. Melchers, a research methodologist, to provide an opinion on Dr. Lowman's three major prostitution-related studies. Dr. Melchers was highly critical of Dr. Lowman's empirical observations, largely based on the language of causality used in his affidavit. During cross-examination, Dr. Lowman expressed discontent with portions of his affidavit, citing "careless" language and "poorly reasoned argument." Dr. Lowman rightly takes responsibility for the content of his affidavit, which was drafted for him by law students. In his affidavit, Dr. Lowman made a direct causal link between the *Criminal Code* provisions at issue and violence against prostitutes; however, during cross-examination he gave the opinion that there was, rather, an indirect causal relationship. Such inattentiveness on such a crucial issue is indeed concerning. During cross-examination, Dr. Lowman gave nuanced and qualified opinions, which more accurately reflect his research.

(E) Conclusion: The Applicants Have Been Deprived of Security of the Person by the Impugned Provisions

359 Despite the multiple problems with the expert evidence, I find that there is sufficient evidence from other experts and government reports to conclude that the applicants have proven on a balance of probabilities, that the impugned provisions sufficiently contribute to a deprivation of their security of the person.

360 I accept that there are ways of conducting prostitution that may reduce the risk of violence towards prostitutes, and that the impugned provisions make many of these "safety-enhancing" methods or techniques illegal. The two factors that appear to impact the level of violence against prostitutes are the location or venue in which the prostitution occurs and individual working conditions of the prostitute.

361 With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.

362 In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence.

(F) The Reasonable Hypothetical

363 The applicants also presented an alternative s. 7 argument grounded in the use of "reasonable hypotheticals," which are potential fact scenarios constructed to demonstrate the unconstitutional impact of an impugned law.

364 The use of reasonable hypotheticals arose in challenges to mandatory minimum sentences under s. 12 of the *Charter* with the case of *R. v. Smith*, [1987] 1 S.C.R. 1045 (S.C.C.) and subsequently, the case of *R. v. Goltz*, [1991] 3 S.C.R. 485 (S.C.C.). The Court extended their use to s. 7 overbreadth analysis in *Heywood*, *supra*. In *R. v. Canadian Pacific Ltd.*, [1995] 2 S.C.R. 1031 (S.C.C.), the Supreme Court held that reasonable hypotheticals could be used to decide whether a law was overbroad or a punishment was cruel and unusual because those issues require a proportionality analysis comparing law to facts. Fact scenarios beyond the immediate can only assist in that comparison. In *Morgentaler*, *supra*, the Court used a hypothetical set of facts in their s. 7 analysis to determine whether therapeutic abortions, in theory permitted by the *Criminal Code*, were actually attainable in practice. The use of reasonable hypotheticals has been curtailed in the ensuing years.

365 As a result of the voluminous evidentiary record put before me in this case, I have found on a balance of probabilities that the impugned provisions materially contribute to the decreased personal security of the applicants. I therefore do not find it necessary to find a deprivation of security of the person based upon "reasonable hypotheticals."

366 Nonetheless, at the next stage of the s. 7 analysis, reasonable hypotheticals are available as a limited means of demonstrating that the effects caused by the impugned provisions are not proportionate to the underlying legislative objectives. This will only be the case where the principle of fundamental justice that the impugned provision violates requires a proportionality analysis.

3. Are These Deprivations in Accordance with the Principles of Fundamental Justice?

367 The applicants have proven that the impugned provisions deprive them of liberty and security of the person. To succeed in their argument, the applicants must now show that these deprivations are not in accordance with the principles of fundamental justice.

368 The applicants submit that each of the impugned provisions operate contrary to four such principles: (1) laws must not arbitrarily deprive individuals of their protected rights; (2) laws must not be broader than necessary to accomplish their purpose; (3) the harmful effects of a law must not be grossly disproportionate to the benefits gained; and (4) the state must legislate in accordance with the rule of law. I will consider each of these arguments in turn.

(A) Do the Impugned Provisions Arbitrarily Deprive the Applicants of Liberty and Security of the Person?

a. The Law: Arbitrariness

369 It is a well-recognized principle of fundamental justice that laws should not be arbitrary: *Manitoba (Director of Child & Family Services) v. C. (A.)*, [2009] 2 S.C.R. 181, 2009 SCC 30 (S.C.C.), at para. 103; *Chaoulli c. Québec (Procureur général)*, [2005] 1 S.C.R. 791, 2005 SCC 35 (S.C.C.), at paras. 129 and 231; *Malmo-Levine*, *supra* at para. 135; *Rodriguez*, *supra* at pp. 594-95. In *Chaoulli*, McLachlin C.J. and Major J. (with Basterache J. concurring) stated at paras. 130-131:

> A law is arbitrary where 'it bears no relation to, or is inconsistent with, the objective that lies behind [it]'. To determine whether this is the case, it is necessary to consider the state interest and societal concerns that the provision is meant to reflect: *Rodriguez*, at pp. 594-95.
>
> In order not to be arbitrary, the limit on life, liberty and security requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The onus of showing lack of connection in this sense rests with the claimant. The question in every case is whether the measure is arbitrary in the sense of bearing

> no real relation to the goal and hence being manifestly unfair. The more serious the impingement on the person's liberty and security, the more clear must be the connection. Where the individual's very life may be at stake, the reasonable person would expect a clear connection, in theory and in fact, between the measure that puts life at risk and the legislative goals.

370 The applicants submit that all three impugned provisions constitute an arbitrary deprivation of liberty and security of the person. They acknowledge that the provisions bear some relation to their objectives; however, they argue that the current and broad application of the provisions undercuts the rational connection between the offences and their objectives.

371 The applicants argue that the communicating provision has not achieved its purpose of reducing or eradicating public nuisance caused by street prostitution, and therefore "the deprivation of the right in question does little or nothing to enhance the state's interest" (citing Sopinka J. in *Rodriguez* at p. 594).

372 The applicants submit that the bawdy-house and living on the avails provisions also do little or nothing to enhance the state's objectives because the provisions extend far beyond the activities for which they were created. As well, they argue, there exists a *de facto* form of decriminalization for these offences in light of evidence of low police enforcement, a priority placed on policing street prostitution, licensing by some municipalities of various forms of indoor prostitution, and the fact that the majority of prostitution takes place indoors.

373 Finally, the applicants argue that the state objective underlying all three offences will never be achieved because the interplay of all three provisions is a "contradiction in action." They state that the Court held that the communicating provision is aimed at removing solicitation for the purposes of prostitution "off the streets and out of public view" (citing Dickson C.J. in the *Prostitution Reference* at p. 1136); yet, the other impugned provisions foreclose the possibility of moving indoors legally. As well, they maintain that those who move off the street face more significant and serious legal sanctions.

374 The respondent submits that the provisions each have legitimate state objectives and that the applicants have not established that the provisions bear no relation to or are inconsistent with their objectives.

375 The respondent argues that the alleged ineffectiveness of a criminal prohibition is of little or no relevance to its validity under s. 7 of the *Charter*; in any event, the communicating provision is an effective tool regularly used by police forces across the country to address the problem of solicitation in public places.

376 The respondent maintains that the applicants' claim that the interplay of the impugned provisions is arbitrary is a misinterpretation of Dickson C.J.'s reasoning in the *Prostitution Reference*. The respondent states that the aim of taking solicitation "off the streets and out of public view" does not imply an intention to authorize it in an off-street, private setting.

377 In *Chaoulli*, McLachlin C.J. and Major J. held that laws must not be arbitrary both theoretically and on the facts. I find, on a theoretical level, that there does exist at least some connection between all of the impugned provisions and their respective objectives. Therefore, the question I must answer is whether the impugned provisions lack a real connection on the facts to their objectives?

1) Does s. 210 - Bawdy-House - Lack a Real Connection on the Facts to its Objective?

378 The bawdy-house provisions are generally aimed at combating neighbourhood disorder and risks to public health and safety. Evidence from a number of sources supported the view that enforcement of the bawdy-house provisions is generally complaint-driven, and that the low enforcement rate suggests that bawdy-houses do not have a high "nuisance" factor (see, for example, the 1998 *Working Group Report* at p. 58). Just because a provision is not widely enforced does not automatically render it arbitrary. Based on the record before me, I am satisfied that there is some evidence that

bawdy-houses can cause nuisance to the community; therefore, I find there is at least some real connection on the facts to the objective, and that the provisions are not arbitrary.

2) Does s. 212(1)(j) - Living on the Avails - Lack a Real Connection on the Facts to its Objective?

379 As stated above, the legislative objective of this provision is to prevent the exploitation of prostitutes as well as the profiting from prostitution by pimps. Evidence was presented from a number of experts that the effect of this provision is that prostitutes are not able to legally enter into certain business relationships that can enhance their safety. The courts have interpreted the provision to extend to those who are in the business of rendering services to prostitutes, because they are prostitutes. Thus, the provision would appear to capture a security guard, a personal driver, or even an assistant who answers telephone calls to pre-screen potential clientele. Prostitutes, then, are left with some difficult choices including working alone (which can increase vulnerability) or working with a form of illegal protection with people willing to risk criminal charges or conviction (perhaps with the very type of person this provision was intended to address). Such an effect cannot be said to be connected to or consistent with Parliament's objective, as it may actually serve to increase the vulnerability and exploitation of the very group it intends to protect. For these reasons, I find that the living on the avails provision is inconsistent with its objective, and is, therefore, arbitrary.

3) Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Lack a Real Connection on the Facts to its Objective?

380 The state objective in enacting the communicating provision is to "address solicitation in public places and, to that end...eradicate the various forms of social nuisance arising from the public display of the sale of sex": *Prostitution Reference*, at p. 1134 *per* Dickson C.J. The evidence in this case demonstrates that the communicating law has had a minimal impact on reducing street solicitation in public places, merely displacing street prostitution to different areas in some instances (see, for example, the 1989 *Synthesis Report*, p. 92), and has not, consequently, had an appreciable effect on social nuisance. In addition to many of the applicants' witnesses who deposed to this, the government reports also support such a finding. For example, at p. 76 of the 1989 *Synthesis Report*, the authors found:

> In the two Canadian cities where street prostitution presented the greatest problem, Vancouver and Toronto, the legislation had virtually no success in moving prostitutes off the street. Both street counts and interviews with key respondents in these cities suggested that, at best, prostitutes were simply displaced to new areas.

381 Nearly a decade later, the 1998 *Working Group Report* stated at p. 58 that the prostitution-related provisions in the *Criminal Code* "[have] not had a serious impact on controlling street prostitution."

382 Most recently, the 2006 *Subcommittee Report* found the following at pp. 62 and 86:

> Section 213 is the most frequently enforced of all criminal law provisions relating to prostitution. Since it was introduced in 1985, this provision has accounted for 90 per cent of prostitution-related offences reported by the police. Yet numerous studies have shown that section 213 has not had the deterrent effect desired. It has not adequately reduced the incidence of street prostitution or even the social nuisance associated with its practice. These studies indicate that enforcement of section 213 has instead served to move prostitution activities from one place to another, and in so doing, has made those selling sexual services more vulnerable.
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> ...The social and legal framework pertaining to adult prostitution does not effectively prevent and address prostitution or the exploitation and abuse occurring in prostitution, nor does it prevent or address harms to communities. This framework must therefore be reformed or reinforced. This view reflects the position of the vast majority of witnesses who appeared before the Subcommittee, as well as the conclusions of the major studies on prostitution conducted over the last 20 years. [Footnotes omitted; emphasis added.]

383 However, just because a law is largely ineffective does not necessarily mean that it is arbitrary or irrational. I am guided by the reasons of the majority in *Malmo-Levine* at p. 657:

> This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that "[t]he efficacy of a law, or lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis" (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.
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> Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called "ineffectiveness" is simply another way of characterizing the refusal of people in the appellants' position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual's personal discretion and taste.

384 Thus, although I find that the law has only *minimally* impacted the state's interest, I cannot find that the communicating law bears *no* relation to, or is inconsistent with, the state's objective. Consequently, the communicating provision is not arbitrary.

4) Are the Impugned Provisions Acting in Concert Arbitrary?

385 Although I do not find that the bawdy-house provisions are themselves arbitrary, I find that their interplay with the other impugned provisions renders them so. I have found that the safest way to conduct prostitution is generally in-call. The bawdy-house provisions make this type of prostitution illegal. Prostitutes can legally work out-call, which is not as safe, particularly as prostitutes are precluded by virtue of the living on the avails provision from forming certain "safety-enhancing" business relationships (such as hiring a driver or security guard). The other option is for prostitutes to work on the street, which would put them at risk of violating the communicating provision and further contributing to a form of public nuisance. Additionally, putting prostitutes at greater risk of violence cannot be said to be consistent with the goal of protecting public health or safety. Thus, when seen in conjunction with the other impugned provisions, the bawdy-house provisions are arbitrary in the sense that they may actually exacerbate the nuisance Parliament intends to eradicate. The evidence from the government reports and of Dr. Lowman on the issue of displacement supports the notion that when indoor prostitution is targeted by the police, street prostitution increases (and vice versa).

386 This evidence was not before the Supreme Court in 1990 when the Court held that the fact that the sale of sex for money is not a criminal act under Canadian law does not mean Parliament must refrain from using the criminal law to express society's disapprobation of street solicitation": *Prostitution Reference* at p. 1141, *per* Dickson C.J.

387 A similar argument can be made when looking at the communicating provision in conjunction with the other impugned provisions. Moving prostitutes "off the streets and out of public view" in order to combat social nuisance may serve to exacerbate the harm that the bawdy-house provisions target if prostitutes are forced to move indoors. Although prostitutes could conduct out-call work legally, it would be at a risk to their safety, particularly as they are precluded from hiring security guards or drivers. Such an outcome cannot be said to be consistent with Parliament's objectives.

388 I find the impugned provisions acting in concert are arbitrary in that taken together they are inconsistent with the objective and there is no rational connection between the provisions and their objectives.

(B) Are the Impugned Provisions Overbroad?

a. The Law: Overbreadth

389 The Supreme Court has recognized that it is a principle of fundamental justice that criminal legislation must not be overbroad: *Demers*, *supra*; *Heywood*, *supra*; *Winko v. Forensic Psychiatric Institute*, [1999] 2 S.C.R. 625 (S.C.C.);

Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General), *supra*; *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.).

390 In *Heywood*, Cory J., for the majority of the Supreme Court, discussed the overbreadth principle at pp. 792-94:

> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
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> . . . . .
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> In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator. It is true that s. 7 of the *Charter* has a wide scope. This was stressed by Lamer J. (as he then was) in *Re B.C. Motor Vehicles Act*, *supra*, at p. 502. There he observed:
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> > Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice.
>
> However, before it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

391 This approach to determining overbreadth was reaffirmed by the Supreme Court in *Demers*, *supra*.

392 Vagueness, which was considered by the Supreme Court in the *Prostitution Reference*, is different than, but related to, overbreadth. In *Heywood*, Cory J. explained the distinction at p. 792:

> Overbreadth and vagueness are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth the means are too sweeping in relation to the objective.

393 The applicants submit that all three impugned provisions are overbroad. They argue that the elements of all three provisions are not narrowly circumscribed to address situations of nuisance and exploitation, and both the case law and the Crown's evidence from various police officers demonstrate that the enforcement of the provisions extends far beyond the objectives of the legislation.

394 The applicants assert that Parliament does not have a sufficient basis to conclude that a blanket prohibition on indoor prostitution with the assistance of third parties is necessary for the protection of public safety. Such a prohibition, according to the applicants, disregards the legitimate needs of prostitutes who wish to increase their safety and security and unnecessarily exposes them to an increased risk of violence.

395 The respondent argues that the impugned provisions are not overbroad. With regard to the living on the avails offence, the scope of the provision is properly interpreted as applicable only to those who live parasitically on a prostitute's earnings. As for the bawdy-house provisions, the respondent submits that the evidence shows that a risk of harm is always present and it is up to Parliament to determine that public safety is best served by criminalizing all bawdy-houses.

396 In the *Prostitution Reference*, the majority of the Supreme Court held that the communicating provision was not "unduly intrusive" during its minimal impairment analysis under s. 2(*b*) of the *Charter*. The respondent argues that these reasons apply to the current analysis of whether the communicating provision is overbroad under s. 7 of the *Charter*.

1) Is s. 210 - Bawdy-House - Overbroad?

397 The applicants argue that a blanket prohibition on indoor prostitution is a complete disregard for the legitimate needs of prostitutes who wish to increase personal safety and security, and that this blanket prohibition unnecessarily exposes prostitutes to an increased risk of violence. In fact, there is no blanket prohibition on indoor prostitution, as prostitutes can legally work out-call in indoor locations, albeit at a greater risk to their safety.

398 The issue is whether the provisions are necessary to achieve the state objective, which I have found to be eliminating neighbourhood disorder and a concern for public health and safety.

399 A bawdy-house for the purpose of prostitution has been defined to include "*any defined space*...if there is localization of a number of acts of prostitution within its specified boundaries.... [It] does not have to be covered or enclosed, and it can be used temporarily whether or not any person has an exclusive right of user with respect to it": *R. v. Pierce*, *supra* at p. 725 (emphasis added). As stated at p. 407 of the *Fraser Report*, the definition is "very extensive" and "covers a far greater range of establishments than the traditional brothel, embracing even very transitory locales, such as parking garages or lots."

400 In addition to having a wide geographic scope, bawdy-houses vary in size and sophistication of operation: included are small, independent operations as well as large-scale commercial establishments. The impact on a neighbourhood of a prostitute working independently and discreetly from home, or with another person in order to enhance safety, may be different than the impact of a large "brothel-style" establishment overseen by an owner/manager employing a large number of prostitutes. The evidence in this case shows that in Canada most prostitutes are independent operators, not managed by anyone other than themselves (see p. 378 of the *Fraser Report*).

401 To convict a person of a bawdy-house offence, none of the harms the provision is aimed at need to be shown, such as neighbourhood disorder, or threats to public health or safety. The evidence from both parties demonstrates that there are few community complaints about indoor prostitution establishments. In my view, because they assign criminal liability to those direct participants of bawdy-house prostitution who do not contribute to the harms Parliament seeks to prevent, the bawdy-house provisions are overly broad as they restrict liberty and security of the person more than is necessary to accomplish their goal.

2) Is s. 212(1)(j) - Living on the Avails - Overbroad?

402 In considering the living on the avails provision in relation to its purpose (the exploitation of prostitutes and profiting from prostitution by pimps), it is clear that the means chosen are broader than necessary to accomplish the objective. As mentioned earlier, the House of Lords in *Shaw* recognized the potential breadth of a similar provision, and attempted to limit its scope by introducing the notion of parasitism: consequently, "[t]he grocer who supplies groceries, the doctor or lawyer who renders professional service" to prostitutes were excluded from liability. Parasitism, as interpreted by the Ontario Court of Appeal, appears to have a different meaning based on whether the person lives with a prostitute, or provides business services to a prostitute. Exploitation is only required in the former circumstance. If the mischief of the provision is aimed at the "abusive and exploitative malevolence" of pimps, to cite Cory J. in *Downey* at p. 36, then the provision is overbroad as a number of non-exploitative arrangements are caught by this provision. Accordingly, this provision restricts the liberty of such persons "for no reason": *per* Cory J. in *Heywood* at p. 793.

3) Is s. 213(1)(c) - Communicating for the Purpose of Prostitution - Overbroad?

403 In the *Prostitution Reference*, the majority of the Supreme Court held that the communicating provision was not "unduly intrusive" during its minimal impairment analysis under s. 2(*b*) of the *Charter*. The respondent argues that this settles the issue of whether the communicating provision is overbroad pursuant to s. 7 of the *Charter*.

404 Overbreadth is a concept that is relevant both to the consideration of an infringement of a *Charter* right and, if a *prima facie* infringement is found, the assessment of the s. 1 justification: *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75 (S.C.C.) at p. 751 *per* Gonthier and Binnie J.J., for the majority.

405 In *Heywood*, the Court stated at pp. 802-03 that "[o]verbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis."

406 In the *Prostitution Reference*, Chief Justice Dickson, in his section 1 analysis, found that the communicating provision minimally impaired the right to freedom of expression. Dickson C.J. considered whether the provision was overly broad at pp. 1136-37:

> ...It is argued that the legislation is over-broad because it is not confined to places where there will necessarily be many people, or, in fact, any people, who will be offended by the activity. The objective of this provision, however, is not restricted to the control of actual disturbances or nuisances. It is broader, in the sense that it is directed at controlling, in general, the nuisance-related problems identified above that stem from street soliciting. Much street soliciting occurs in specified areas where the congregation of prostitutes and their customers amounts to a nuisance. In effect, the legislation discourages prostitutes and customers from concentrating their activities in any particular location. While it is the cumulative impact of individual transactions concentrated in a public area that effectively produces the social nuisance at which the legislation in part aims, Parliament can only act by focusing on individual transactions. The notion of nuisance in connection with street soliciting extends beyond interference with the individual citizen to interference with the public at large, that is with the environment represented by streets, public places and neighbouring premises.
>
> The appellants' argument that the provision is too broad and therefore cannot be found to be appropriately tailored also focuses on the phrase "in any manner communicate or attempt to communicate". The communication in question cannot be read without the phrase "for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute" which follows and qualifies it. In my opinion, the definition of communication may be, and indeed is, very wide, but the need for flexibility on the part of Parliament in this regard must be taken into account. Certain acts or gestures in addition to certain words can reasonably be interpreted as attracting customers for the purposes of prostitution or as indicating a desire to procure the services of a prostitute. This provides the necessary delineation of the scope of the communication that may be criminalized by s. 195.1(1)(*c*)...
>
> Can effective yet less intrusive legislation be imagined? The means used to attain the objective of the legislation may well be broader than would be appropriate were actual street nuisance the only focus. However, as I find the objective to extend to the general curtailment of visible solicitation for the purposes of prostitution, it is my view that the legislation is not unduly intrusive. [Emphasis in original.]

407 Wilson J. disagreed at pp. 1213-15, finding that the impugned provision was not sufficiently tailored to the objective as the scope of the communication and the places where an offence could occur were overly broad. She further noted that "no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete." Justice Wilson wrote at p. 1214:

> It is not reasonable, in my view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance. [Emphasis in original.]

408 *Charter* interpretation is contextual. In the *Prostitution Reference*, Dickson C.J. analyzed whether the communicating provision minimally impaired the *right to free expression*; furthermore, the communication at issue was one that did not lie near the core of the guarantee. Dickson C.J. stated at p. 1137:

> ...The legislative scheme that was eventually implemented and has now been challenged need not be the "perfect" scheme that could be imagined by this Court or any other court. Rather, it is sufficient if it is appropriately and carefully tailored in the context of the infringed right. I find that this legislation meets the test of minimum impairment of the right in question.
>
> [Emphasis added.]

The finding by Chief Justice Dickson that the legislation is not "unduly intrusive" must be viewed within the context of the right at issue.

409 In this case, I have determined that the communicating provision sufficiently contributes to a deprivation of the liberty and security of the person of prostitutes. I find that it represents a threshold violation of section 7. In particular, a communication that would allow prostitutes to screen potential clients for a propensity for violence is caught by this provision. It is within this context that I evaluate the applicants' overbreadth argument. The question that must be addressed here is whether the communicating provision is *necessary* in order to curtail the harmful effects associated with visible solicitation for the purposes of prostitution: *Heywood* at pp. 792-9. Such effects, as outlined by Dickson C.J., were said to include "street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children": *Prostitution Reference*, at p. 1135.

410 I recognize that the geographical overbreadth argument was rejected by the majority of the Supreme Court in the *Prostitution Reference* in its minimal impairment analysis. In that case, the right being intruded upon was the right to free expression for a commercial purpose. Here, the rights violated are liberty and security of the person. However, I find that the communicating provision is necessary to achieve the objective of eliminating social nuisance as stated by Dickson C.J. who held that Parliament's aim was to discourage the concentration of prostitution activities in any one area as it was the cumulative effect of public solicitation that produces the social nuisance: see *Prostitution Reference supra* at p. 1136. In my view, the alternatives proposed by the applicant for a narrowly tailored law would have the potential effects of moving prostitution activities to an isolated industrial area or a secluded area of a park. That may result in even more dangerous scenarios with an increase to the harm to the security of the person of prostitutes and may fail to achieve the state's objective of curtailment of visible solicitation.

(C) Are the Impugned Provisions Grossly Disproportionate?

411 The principle of gross disproportionality was articulated by the Supreme Court of Canada in the case of *Malmo-Levine*. The majority of the court stated at p. 653:

> In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.

412 In deciding whether a particular law is grossly disproportionate to its objective, I am not to import from s. 1 into s. 7 a balancing of the "salutary" and "deleterious" effects of the law: see *Malmo-Levine*, at p. 658, citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.). Instead, a gross disproportionality analysis proceeds by first determining whether the impugned law pursues a legitimate state interest, and then by considering the gravity of the alleged *Charter* infringement in relation to the state interest pursued: *Malmo-Levine* at p. 645; *PHS Community Services Society*, *supra* at paras. 58 and 296; *Cochrane v. Ontario (Attorney General)* (2008), 92 O.R. (3d) 321 (Ont. C.A.) at p. 332, leave to appeal to S.C.C. refused, [2009] S.C.C.A. No. 105 (S.C.C.).

413 The onus of proving that the negative effects of a law are grossly disproportionate to its objective lies with the applicants: see *Flora v. Ontario Health Insurance Plan* (2007), 83 O.R. (3d) 721 (Ont. Div. Ct.) at para. 220.

414 The standard is a high one. Fundamental justice is not breached by laws that are merely disproportionate. Legislation must be *grossly* disproportionate in order to be found unconstitutional. The ultimate question to be answered is whether the legislative measures are, in effect, "so extreme that they are *per se* disproportionate to any legitimate government interest": see *Suresh v. Canada (Minister of Citizenship & Immigration)*, at p. 32; *Malmo-Levine* at pp. 644-45. Only one law has been held unconstitutional based on a finding that its effects are grossly disproportionate to its legislative objective: *PHS Community Services Society*, *supra*. In that case, the British Columbia Court of Appeal upheld the lower court's decision that a law preventing the continued operation of Insite, a safe-injection site and health care facility frequented by drug addicts in Vancouver's Downtown Eastside, was grossly disproportionate to the effects the denial of access would have on those who frequented Insite.

415 In *PHS Community Services Society*, Smith J.A., dissenting in the result, articulated the test for gross disproportionality at para. 296:

> The principle of disproportionality was discussed in *Malmo-Levine*. The test for disproportionality requires the court to determine whether the impugned law pursues a legitimate state interest, and if so, whether the law is grossly disproportionate to the state interest (at para. 143). The principle does not involve a consideration of the law's penalty, which is dealt with under s. 12 of the *Charter*, but of the broader consequences of the impugned law and whether its effects on the claimants' s. 7 rights are so extreme that they are *per se* disproportionate to the state interest, or whether Canadians would find the effects abhorrent or intolerable when considered in light of the state interest (*Malmo-Levine* at paras. 143, 159 and 169).

416 To apply the principle of disproportionality to the case before me, I ask the following questions:

a) Does the law pursue a legitimate state interest?

b) Are the effects of the law so extreme that they are *per se* disproportionate to the state interest?

417 The second question has two components: (1) the consequences of the impugned law (beyond a term of imprisonment) on the claimant, and (2) the law's effects on the claimant's s. 7 rights.

a. Do the Impugned Provisions Pursue Legitimate State Interests?

418 The communicating provision is aimed at curbing the social nuisance associated with public solicitation for the purposes of prostitution, including traffic congestion, noise, harrasment of persons in the area, and the harmful effect of the open display of prostitution on bystanders, including children. Similarly, the bawdy-house provisions seek to prevent harm to the community by protecting community health and safety, and preventing neighbourhood disruption. The living on the avails provision is aimed at preventing the exploitation of prostitutes and profiting from prostitution by pimps.

419 Each of the aforementioned legislative objectives reflects a legitimate state purpose.

b. Are the Effects of the Laws so Extreme that they are per se Disproportionate to the State Interest?

420 In order to answer this question, I must first identify the consequences of the impugned provisions and their effects on the claimants' s. 7 rights.

421 I find the following facts after weighing all of the evidence presented to me:

1. Prostitutes, particularly those who work on the street, are at a high risk of being the victims of physical violence.

2. The risk that a prostitute will experience violence can be reduced in the following ways:

a. Working indoors is generally safer than working on the streets;

b. Working in close proximity to others, including paid security staff, can increase safety;

c. Taking the time to screen clients for intoxication or propensity to violence can increase safety;

d. Having a regular clientele can increase safety;

e. When a prostitute's client is aware that the sexual acts will occur in a location that is pre-determined, known to others, or monitored in some way, safety can be increased;

f. The use of drivers, receptionists and bodyguards can increase safety; and

g. Indoor safeguards including closed-circuit television monitoring, call buttons, audio room monitoring; financial negotiations done in advance can increase safety.

3. The bawdy-house provisions can place prostitutes in danger by preventing them from working in-call in a regular indoor location and gaining the safety benefits of proximity to others, security staff, closed-circuit television and other monitoring.

4. The living on the avails of prostitution provision can make prostitutes more susceptible to violence by preventing them from legally hiring bodyguards or drivers while working. Without these supports, prostitutes may proceed to unknown locations and be left alone with clients who have the benefit of complete anonymity with no one nearby to hear and interrupt a violent act, and no one but the prostitute able to identify the aggressor.

5. The communicating provision can increase the vulnerability of street prostitutes by forcing them to forego screening customers at an early and crucial stage of the transaction.

422 The effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their own personal security. The provisions place prostitutes at greater risk of experiencing violence. These risks represent a severe deprivation of the applicants' right to security of the person.

423 In my view, the effects of the laws are disproportionate to the identified state interests. But what considerations lead to a finding that the effects of a law are so extreme as to be *per se* disproportionate to its objective?

424 In *R. v. Dyck* (2008), 90 O.R. (3d) 409, 2008 ONCA 309 (Ont. C.A.), Blair, J.A., writing for the court, found that the Ontario Sex Offender Registry, which required designated offenders to register with the police by attending a police station at designated times in violation of their liberty rights, was not grossly disproportionate to its objective of community protection. In so finding, Blair J.A. noted that the law only modestly infringed upon the right in question, did not restrict the appellant's freedom to make independent choices, and did not prevent the appellant from engaging in a range of lawful activities.

425 In *Cochrane v. Ontario (Attorney General)*, *supra*, Sharpe J.A., writing for the court, considered whether Ontario's law banning pit bull dogs, which provided for imprisonment on violation, deprived the applicant of liberty in a manner grossly disproportionate to its objective of safeguarding the public from dog attacks. In finding that the law was in accordance with the principles of fundamental justice, Sharpe J.A. held that the *Charter* violation was neither grave nor severe and that the impairment of the right in question was not significant.

426 The circumstances in the case before me are significantly different from those in *Dyck*, *supra* and *Cochrane*, *supra.*. The impugned provisions constrain the independent choices of prostitutes in relation to their personal safety. Each of the provisions represents a violation of the their right to security of the person that is serious and far-reaching.

Furthermore, in looking at each of the specific provisions, I find the effects of the laws are grossly disproportionate to their legislative purposes.

1) Is s. 210 - Bawdy-House - Grossly Disproportionate?

427 The evidence demonstrates that complaints about nuisance arising from indoor prostitution establishments are rare. The nuisance targeted includes neighbourhood disruption, and interference with public health and safety. These objectives are to be balanced against the fact that the provision prevents prostitutes from gaining the safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate.

428 The considerations in *Dyck*, *supra* and *Cochrane supra* that justified upholding the impugned provisions are absent in the case before me with respect to the effects of the bawdy-house provisions. The provisions drastically infringe upon the applicants' right to security of the person by placing them at a high risk of experiencing violence when practising prostitution outdoors. Specifically, the laws restrict the applicants' ability to make choices capable of reducing the risk of harm to their well-being under threat of penal sanction. I am of the view that the effects of the bawdy-house provisions on the applicants are grossly disproportionate to their purpose.

2) Is s. 212(1)(j) - Living on the Avails - Grossly Disproportionate?

429 The living on the avails provision targets the exploitation of prostitutes and prohibiting others from gaining financially from prostitution. This objective is to be balanced against my conclusion that, by preventing prostitutes from legally hiring bodyguards, drivers, or other security staff, the provision places prostitutes at greater risk of harm and may make it more likely that a prostitute will be exploited.

430 The circumstances considered in *Dyck*, *supra* and *Cochrane supra* that justified upholding the impugned provisions are different from those described in the evidence on the effects of the living on the avails provision. The effect of this provision is to prevent prostitutes from lawfully hiring individuals who may be able to protect them from harm. Prostitutes may in turn be forced to rely upon individuals who are willing to face criminal sanctions, and may be more likely to be exploited as a result. The net effect is to make it more likely that a prostitute will be harmed by a client, or in an effort to avoid this, exploited by a pimp.

431 The provision represents a severe violation of the applicants' *Charter* rights by threatening their security of the person. The law presents them with a perverse choice: the applicants can safeguard their security, but only at the expense of *another's* liberty. In my view, the living on the avails of prostitution provision is, in effect, grossly disproportionate to its objective.

3) Is s. 213(1)(c) - Communicating for the Purpose of Prostitution - Grossly Disproportionate?

432 The nuisance targeted by the communicating provision includes noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby. These objectives are to be balanced against the fact that the provision forces prostitutes to forego screening clients which I found to be an essential tool to enhance their safety.

433 In *PHS Community Services Society*, Rowles J.A. for the majority, held that:

> The effect of the application of the [*Controlled Drugs and Substances Act*, S.C. 1996, c. 19] provisions to Insite would deny persons with a very serious and chronic illness access to necessary health care and would come without any ameliorating benefit to those persons or to society at large. Indeed, application of those provisions to Insite would have the effect of putting the larger society at risk on matters of public health with its attendant human and economic cost.

434 Similarly, in this case, one effect of the communicating provision (as well as the bawdy-house provisions) is to endanger prostitutes while providing little benefit to communities. In fact, by putting prostitutes at greater risk of

violence, these sections have the effect of putting the larger society at risk on matters of public health and safety. The harm suffered by prostitutes carries with it a great cost to families, law enforcement, and communities and impacts upon the well-being of the larger society. In my view, the effects of the communicating provision are grossly disproportionate to the goal of combating social nuisance.

c. Conclusion: Gross Disproportionality

435 In light of all of these considerations, I am of the view that the effects of each of these provisions are *per se* disproportionate to their legislative objective. The overall effect of the impugned provisions is to force prostitutes to choose between their liberty interest and their personal security.

436 Accordingly, I conclude that the impugned provisions are grossly disproportionate to their legislative objectives and are not in accordance with the principles of fundamental justice.

437 It seems to me that there is some confusion in the jurisprudence regarding the relationship between the principle of overbreadth and that of gross disproportionality. I am of the view that they represent two distinct, yet closely related principles of fundamental justice. If I am wrong, and gross disproportionality is the standard against which allegations of overbreadth are to be measured, my conclusions are the same.

(D) Do the Impugned Provisions Promote Non-Compliance with the Law?

438 The rule of law principle of fundamental justice, articulated by the Ontario Court of Appeal in *Hitzig v. R.*, *supra*, holds that the state has an obligation to obey its own laws, and must promote compliance with the law.

439 In that I have found that the impugned provisions are not in accordance with the principles of fundamental justice, it is not necessary for me to consider whether the impugned provisions also offend this principle. Moreover, I am of the view that this principle is not applicable to this case: see *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473, 2005 SCC 49 (S.C.C.) where the Supreme Court held at paras. 58 and 59:

> This Court has described the rule of law as embracing three principles. The first recognizes that "the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power".... The second "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order".... The third requires that "the relationship between the state and the individual...be regulated by law"....
>
> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. [Citations omitted.]

4. Are any of the Section 7 Violations Salvageable by Section 1?

440 The Supreme Court has stated that s. 7 violations are rarely salvageable by s. 1 of the *R. v. B. (D.)*, [2008] 2 S.C.R. 3, 2008 SCC 25 (S.C.C.) at para. 89, *per* Abella J. for the majority. In *Re B.C. Motor Vehicle Act*, at p. 518, Lamer J. observed that "[s]ection 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like." Wilson J., who concurred in the judgment, wrote at p. 531: "I cannot think that the guaranteed right in s. 7 which is to be subject *only* to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system" (emphasis in original).

441 In the case at bar, where I have found all the impugned provisions to be grossly disproportionate, and some to be arbitrary and overbroad, it is not possible to say that the provisions are proportionate or minimally impair the applicants' rights to liberty and security of the person. I, therefore, find that none of the impugned provisions are saved by s. 1.

XI. Section 2(b) of the Charter

442 I turn now to a consideration of whether the communicating provision can continue to be upheld as a reasonable limit on freedom of expression as guaranteed by s. 2(*b*) of the *Charter*. Section 2(*b*) states:

> 2. Everyone has the following fundamental freedoms:
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

443 In 1990, a majority of the Supreme Court of Canada upheld the communicating provision as a reasonable limit on freedom of expression. For the reasons outlined above, I am of the view that the evidence before me requires that this issue be reconsidered.

1. Is there a Violation of Section 2(b) of the Charter?

444 In 1990, the Supreme Court unanimously found the communicating provision to be a *prima facie* infringement of s. 2(*b*) of the *Charter*. None of the parties to this proceeding made submissions to the contrary. I see no reason to revisit this finding.

XII. Section 1 of the Charter

445 Section 1 of the *Charter* states as follows:

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

446 Following the analytical framework set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.), and expanded upon in *Dagenais*, *supra*, the Crown bears the burden at this stage to demonstrate that: (1) the legislative objective serves a pressing and substantial purpose that is sufficiently important to warrant restricting expression, and that (2) the measures chosen to achieve this objective are in their effect proportionate to the importance of the underlying legislative purpose.

447 As discussed earlier, Parliament's objective when prohibiting communication for the purpose of prostitution was to remove such communications from public view, thereby preventing the various forms of social nuisance associated with such activities.

1. Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Serve a Pressing and Substantial Purpose?

448 In the *Prostitution Reference*, Dickson C.J. found that the communication provision had a pressing and substantial objective. At p. 1135, he wrote:

> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. In my opinion, the eradication of the nuisance-related problems caused by street solicitation is a pressing and substantial concern. I find, therefore, that sending the message that street solicitation for the purposes of prostitution is not to be tolerated constitutes a valid legislative aim.

The evidence presented in this case affirms the connection between the concentration of street prostitution and this mix of associated ills. I have no difficulty in finding that combating social nuisance is a valid legislative purpose of pressing and substantial concern.

2. Is s. 213(1)(c) - Communicating for the Purposes of Prostitution - in Effect Proportionate to its Objective?

449 To determine whether the communicating provision's impairment of s. 2(*b*) is proportionate to its objective, I must consider: (1) whether the law is rationally connected to its legislative objective, (2) whether the means chosen to achieve the objective impair the right as little as possible, and (3) whether the deleterious effects of the law are outweighed by the importance of the objective and its salutary effects: *Oakes*, *supra* and *Dagenais*, *supra*.

450 In undertaking this analysis, I am mindful of a governing consideration that reasonable limits on rights and freedoms are to be assessed *in context*: see *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 (S.C.C.); *Dagenais*, *supra*; *R. v. Lucas*, [1998] 1 S.C.R. 439 (S.C.C.). While neither the law under consideration nor the legal test for overriding fundamental freedoms has changed since 1990, the context in which this analysis occurs has.

(A) What is the Nature of the Expression Prohibited by s. 213(1)(c) - Communicating for the Purposes of Prostitution?

451 In *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), Dickson C.J. described the value of free expression as follows at pp. 726-28:

> That the freedom to express oneself openly and fully is of crucial importance in a free and democratic society was recognized by Canadian courts prior to the enactment of the *Charter*. The treatment of freedom of expression by this Court in both division of powers and other cases was examined in *Dolphin Delivery Ltd.*, *supra*, at pp. 583-88, and it was noted that well before the advent of the *Charter* — before even the *Canadian Bill of Rights* was passed by Parliament in 1960, S.C. 1960, c. 44 — freedom of expression was seen as an essential value of Canadian parliamentary democracy. This freedom was thus protected by the Canadian judiciary to the extent possible before its entrenchment in the *Charter*, and occasionally even appeared to take on the guise of a constitutionally protected freedom (see, e.g., *Reference re Alberta Statutes*, [1938] S.C.R. 100, *per* Duff C.J., at pp. 132-33; and *Switzman v. Elbling*, [1957] S.C.R. 285, *per* Abbott J., at p. 326).
>
> . . . . .
>
> ...the reach of s. 2(*b*) is potentially very wide, expression being deserving of constitutional protection if "it serves individual and societal values in a free and democratic society". In subsequent cases, the Court has not lost sight of this broad view of the values underlying the freedom of expression, though the majority decision in *Irwin Toy* perhaps goes further towards stressing as primary the "democratic commitment" said to delineate the protected sphere of liberty (p. 971). Moreover, the Court has attempted to articulate more precisely some of the convictions fueling the freedom of expression, these being summarized in *Irwin Toy* (at p. 976) as follows: (1) seeking and attaining truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed.

452 While the focus of protecting free expression has often been on preserving the underlying conditions necessary to maintain an open and functioning democracy, the Supreme Court has, at times, recognized other reasons for protecting expressive freedom. In *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69 (S.C.C.), Binnie J., for the majority, wrote at p. 1197 that "[f]reedom of expression is central to our identity as individuals and to our collective well-being as a society."

453 In *Edmonton Journal*, *supra*, Wilson J., in concurring reasons, emphasized the importance of considering limits upon free expression in light of the particular factual context of the case at pp. 1355-56:

> ... [A] particular right or freedom may have a different value depending on the context. It may be, for example, that freedom of expression has greater value in a political context than it does in the context of disclosure of the details of a matrimonial dispute. The contextual approach attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it. It seems to be more sensitive to the reality of the dilemma posed by the particular facts and therefore more conducive to finding a fair and just compromise between the two competing values under s. 1.

454 Chief Justice Dickson in *Keegstra*, *supra*, followed the approach of Wilson J. in *Edmonton Journal*, and went on to describe a scale of importance of expressive content at pp. 760-62:

> While we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values, as well as the other values which underlie a free and democratic society, to treat all expression as equally crucial to those principles at the core of s. 2(*b*).
>
> . . . . .
>
> Applying the *Royal College* approach to the context of this appeal is a key aspect of the s. 1 analysis. One must ask whether the expression prohibited by s. 319(2) is tenuously connected to the values underlying s. 2(*b*) so as to make the restriction "easier to justify than other infringements." In this regard, let me begin by saying that, in my opinion, there can be no real disagreement about the subject matter of the messages and teachings communicated by the respondent, Mr. Keegstra: it is deeply offensive, hurtful and damaging to target group members, misleading to his listeners, and antithetical to the furtherance of tolerance and understanding in society. Furthermore, as will be clear when I come to discuss in detail the interpretation of s. 319(2), there is no doubt that all expression fitting within the terms of the offence can be similarly described. To say merely that expression is offensive and disturbing, however, fails to address satisfactorily the question of whether, and to what extent, the expressive activity prohibited by s. 319(2) promotes the values underlying the freedom of expression.

455 Chief Justice Dickson then went on to consider the values underlying freedom of expression that were identified in *Ford c. Québec (Procureur général)*, [1988] 2 S.C.R. 712 (S.C.C.) and *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.): the need to ensure that truth and the common good are attained through the betterment of the political and social milieu, the need to ensure individuals are able to develop and maintain autonomy by crafting and expressing ideas, and the importance of open participation in the political process which is in turn supported by the associated tenet that "all persons are equally deserving of respect and dignity."

456 When applying this scale of importance to hate speech, Dickson C.J. concluded at pp. 766-67 of *Keegstra*:

> As I have said already, I am of the opinion that hate propaganda contributes little to the aspirations of Canadians or Canada in either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged. While I cannot conclude that hate propaganda deserves only marginal protection under the s. 1 analysis, I can take cognizance of the fact that limitations upon hate propaganda are directed at a special category of expression which strays some distance from the spirit of s. 2(*b*), and hence conclude that "restrictions on expression of this kind might be easier to justify than other infringements of s. 2(*b*)" (*Royal College*, *supra*, at p. 247).
>
> As a final point, it should be stressed that in discussing the relationship between hate propaganda and freedom of expression values I do not wish to be taken as advocating an inflexible "levels of scrutiny" categorization of expressive activity. The contextual approach necessitates an open discussion of the manner in which s. 2(*b*) values are engaged in the circumstances of an appeal. To become transfixed with categorization schemes risks losing the advantage associated with this sensitive examination of free expression principles, and I would be loath to sanction such a result.

457 In the *Prostitution Reference*, Dickson C.J. employed the same approach at p. 1136:

> ...expressive activity, as with any infringed *Charter* right, should also be analysed in the particular context of the case. Here, the activity to which the impugned legislation is directed is expression with an economic purpose. It can hardly be said that communications regarding an economic transaction of sex for money lie at, or even near, the core of the guarantee of freedom of expression.

458 The evidence presented in this application goes well beyond conceptualizing street prostitution as a simple exercise of economic liberty. Evidence commissioned and generated by the Canadian government over the last two decades has repeatedly found that individuals engaging in street prostitution are, with some exceptions, marginalized people who are at a high risk of being victims of violent crime. Much of this evidence was not before the Supreme Court in 1990.

459 In my view, the Supreme Court's s. 1 analysis in the *Prostitution Reference* flows naturally from placing communication for the purposes of prostitution at the periphery of constitutionally protected expression.

460 I accept the applicants' evidence that the communicating law and its threat of penal sanction leads street prostitutes to forego proper screening of customers, compelling them instead into making hasty decisions which compromise their personal safety.

461 Communication for the purpose of engaging in prostitution by necessity includes communications that serve to screen customers for safety purposes, as these communications are ultimately in furtherance of the eventual transaction. The language of the section is broad enough to capture these safety-driven communications. A conversation aimed at detecting whether or not a potential customer is belligerent, armed, or intoxicated, even one about something as banal as the weather, is a communication that is ultimately directed at safely exchanging sexual services for payment.

462 In *Keegstra* Dickson C.J. placed political speech at the core of the fundamental expression the *Charter* guarantee protects. Speech protecting individual autonomy, and an underlying respect for human dignity were also said to be at the core of constitutionally protected expression. In my view, speech meant to safeguard the physical and psychological integrity of individuals is also at the core of the constitutional guarantee. Weighing the prohibition on communication for the purpose of prostitution against the core values underlying free expression, including seeking the common good, protecting individual autonomy, political participation and the associated tenet that all people deserve respect and dignity, I find that the applicants' need to safeguard their own bodily integrity through communication with customers lies at or near the core of expression s. 2(*b*) of the *Charter* seeks to protect.

463 Where the state is preventing communication that may reduce the risk of harm, the burden on the Crown to present justification for that prohibition is necessarily high. The state cannot limit protected rights involving core *Charter* values except where the state can provide compelling, evidence-based justifications for those limits. As Dickson C.J. stated in *Oakes* at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

(B) Is s. 213(1)(c) - Communicating for the Purposes of Prostitution - Rationally Connected to its Objective?

464 The question to be answered at this stage of the proportionality analysis is whether the communicating provision is rationally connected to the social nuisance it is aimed at curtailing. In *Oakes*, the Court described this branch of the test, at p. 139:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

465 The applicants argue that the communicating provision is not a reasonable limit on free expression because it is arbitrary, irrational, and unfair. This argument is predicated upon the assertion that the communicating provision is fundamentally ineffective and cannot meet its objectives.

466 In a small number of cases, arguments have been made that a law is not rationally connected to its objective because it is fundamentally ineffective. These arguments have not been successful: see *Reference re Firearms Act (Canada)*, [2000] 1 S.C.R. 783 (S.C.C.). In *Malmo-Levine* at p. 657 the majority rejected the notion that the prohibition against marijuana possession was not a reasonable limit due to the law's ineffectiveness as a deterrent.

467 The respondent suggests that what the applicants describe as inefficacy is simply widespread non-compliance with the law. I do not accept that all ineffective laws will be ineffective as a result of non-compliance. However, in the circumstances of this case, I am of the view that questions about the efficacy of this law are best considered in the final stage of the proportionality analysis. In the text of Professor Kent Roach and Justice Robert J. Sharpe, *The Charter of Rights and Freedoms* (Toronto: Irwin Law, 2009), the authors write at p. 74:

> Courts should be cautious about demanding an unrealistically high level of proof or requiring that the government demonstrate success or effectiveness in pursuing its objective at [the rational connection] stage of section 1 analysis. The effectiveness of the government's measure can be evaluated at a later stage in section 1 analysis when the court assesses the overall balance of the harms and benefits of the impugned measure.

468 In the *Prostitution Reference*, Wilson J., cited with approval by the majority on this point, found that the communicating provision was rationally connected to its objective at p. 1212:

> The next question under *Oakes* is whether s. 195.1(1)(*c*) is rationally connected to the prevention of the nuisance. I believe it is. The logical way to prevent the public display of the sale of sex and any harmful consequences that flow from it is through the twofold step of prohibiting the prostitute from soliciting prospective customers in places open to public view and prohibiting the customer from propositioning the prostitute likewise in places open to public view.

I conclude that the communicating provision is rationally connected to its purpose.

(C) Does s. 213(1)(c) - Communicating for the Purposes of Prostitution - Represent a Minimal Impairment of Expressive Freedom?

469 At this stage of the proportionality analysis, I must determine whether the means chosen to achieve the objective, even if rationally connected to the legislative purpose, minimally impair the applicants' freedom of expression. In the *Prostitution Reference*, Dickson C.J. held that the legislation was not unduly intrusive and met the test of minimal impairment at pp. 1137-38.

470 Justice Lamer, concurring in the result, found at pp. 1197-99 that because the provision was limited in "place and purpose," it impaired free expression as little as reasonably possible.

471 In my view, as a result of the changed context, the impugned provision can no longer be considered to be sufficiently tailored to its objective and does not meet the minimal impairment test. The expression being curtailed is not purely for an economic purpose, but is also for the purpose of guarding personal security, an expressive purpose that lies at or near the core of the guarantee. In light of this conclusion, I find the minority decision of Justices Wilson and L'Heureux-Dubé at pp. 1213-15 of the *Prostitution Reference* to be persuasive:

> I believe, with respect, that the Attorney General has overlooked a number of significant aspects of the impugned legislation which go directly to the question of its proportionality. The first is that it criminalizes communication

> or attempted communication for the prohibited purpose in any public place or place open to public view. "Public place" is then expanded in subs. (2) to include any place to which the public have access as of right or by invitation express or implied. In other words, the prohibition is not confined to places where there will necessarily be lots of people to be offended or inconvenienced by it. The prohibited communication may be taking place in a secluded area of a park where there is no-one to see or hear it. It will still be a criminal offence under the section. Such a broad prohibition as to the locale of the communication would seem to go far beyond a genuine concern over the nuisance caused by street solicitation in Canada's major centres of population. It enables the police to arrest citizens who are disturbing no-one solely because they are engaged in communicative acts concerning something not prohibited by the *Code*. It is not reasonable, in my view, to prohibit all expressive activity conveying a certain meaning that takes place in public simply because in some circumstances and in some areas that activity may give rise to a public or social nuisance.
>
> . . . . .
>
> Directly relevant to the issue of proportionality, it seems to me, is the fact already referred to that under para. (*c*) no nuisance or adverse impact of any kind on other people need be shown, or even be shown to be a possibility, in order that the offence be complete. Yet communicating or attempting to communicate with someone in a public place with respect to the sale of sexual services does not automatically create a nuisance any more than communicating or attempting to communicate with someone on the sidewalk to promote a candidate for municipal election. Moreover, as already mentioned, prostitution is itself a perfectly legal activity and the avowed objective of the legislature was not to make it illegal but only, as the Minister of Justice emphasized at the time, to deal with the nuisance created by street solicitation. It seems to me that to render criminal the communicative acts of persons engaged in a lawful activity which is not shown to be harming anybody cannot be justified by the legislative objective advanced in its support. The impugned provision is not sufficiently tailored to that objective and constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant. Section 195.1(1)(*c*) therefore fails to meet the proportionality test in *Oakes*. [Emphasis in original.]

472 The impugned provision prohibits all communicative activity for the purpose of engaging in prostitution or of obtaining the sexual services of a prostitute, not merely those communications which tend to contribute to social nuisance. Moreover, the evidence presented in this case tends to demonstrate that some of the communication being curtailed is capable of reducing the risk of harm to street-based prostitutes who are statistically more likely than the general population to be victims of violence. Curtailing these communications "constitutes a more serious impairment of the individual's freedom than the avowed legislative objective would warrant." On this basis alone, I find that the communicating provision does not minimally impair the expressive rights of the applicants and cannot be upheld as a reasonable limit under s. 1.

473 Furthermore, a great deal of the evidence presented to me suggests that a number of other jurisdictions have introduced legislative regimes that address the social nuisance often associated with street prostitution without curtailing the fundamental rights and freedoms of prostitutes. I note the comments of Lamer J. in the *Prostitution Reference* regarding international responses to prostitution at p. 1200:

> In addition it cannot be said that Canada's response to the problem is out of step with international responses. In fact, the Fraser Committee noted in its review of foreign legislation, that some jurisdictions, specifically the United States, have adopted regimes that are draconian by our standards: see Chapter 38 of the Fraser Committee report.

As I have outlined, the evidence on this application shows that a number of foreign jurisdictions over the past twenty years have implemented laws decriminalizing prostitution to varying degrees. These laws recognize an intention to minimize harm to prostitutes.

474 Over the last two decades in the Netherlands, New Zealand, Germany, most of Nevada, and some jurisdictions of Australia, legislators have chosen to introduce municipally-based licensing policies that permit cities to address the social harms particular to their localities. Local regulations in these jurisdictions have included citizenship requirements for licensed prostitutes, health and safety requirements for indoor work environments, proscription of daytime outdoor

working hours, preventing street prostitution from occurring near schools, homes, or places of worship, and restrictions on the issuance of new licences in order to prevent the location of brothels in residential neighbourhoods or their proliferation in any one area.

475 The Dutch legislation also permits the creation of zones of tolerance ("tippelzones") wherein street prostitution is permitted. In these non-residential areas, prostitutes are able to work in groups, transactions are monitored by dedicated police officers, and health and social service supports are made available to prostitutes free of charge. Less than a kilometre from the Utrecht tippelzone, a fourteen-stall concrete parking structure was created so that sexual transactions occurring in vehicles would not occur in residential areas and public parks; the proximity of the vehicles to one another also offers a measure of safety to the prostitutes. When prostitutes working in tippelzones are victims of violence, the zones promote positive relations with, and reporting of incidents to, the police. Police in New Zealand, Germany and Australia confirm increasing reporting of incidents of violence since decriminalization.

476 In New Zealand, street prostitutes reported greater comfort in carrying condoms and lubrication, without fear of having these items used as evidence against them, since soliciting for the purpose of prostitution ceased to be an offence. Some New Zealand jurisdictions have installed closed-circuit television cameras in areas known for street prostitution, while others have implemented street ambassador schemes in order to connect with vulnerable communities and prevent youth from engaging in prostitution.

477 In Germany, funding is provided for community run "drop-out programs" that provide support for prostitutes with mental health issues, addictions, and financial troubles, and seek to assist them in exiting prostitution.

478 In Tasmania, Australia, the legislation has provisions prohibiting intimidating, assaulting and threatening prostitutes, such that crimes committed against prostitutes may result in higher penalties as a result of the circumstances of the crime and the vulnerability of the victim.

479 In New South Wales, Australia, soliciting is permitted except in proximity to schools, homes, places of worship, and hospitals. Safe-house brothels have been established, which permit street prostitutes to serve clients indoors for a small fee while being protected by a monitored intercom, a single entrance with closed-circuit television cameras. Local health and welfare services are available. These safe houses protect prostitutes while removing the sexual transaction from public view.

480 In Sweden, where prostitution is approached as an aspect of male violence against women and children, buying sex and pimping are illegal, but the seller of sexual services is seen as a victim and not criminalized. Public education campaigns targeting buyers of sexual services have reduced demand. Intensive police training has led to a 300 per cent increase in arrests and a reduction of complaints that the law is too difficult to enforce.

481 This evidence suggests to me that Canada's prohibition of all public communications for the purpose of prostitution is no longer in step with changing international responses. These legal regimes demonstrate that legislatures around the world are turning their minds to the protection of prostitutes, as well as preventing social nuisance. The communicating provision impairs the ability of prostitutes to communicate in order to minimize their risk of harm and, as such, does not constitute a minimal impairment of their rights.

482 The communicating provision, therefore, fails to meet the proportionality test in *Oakes*.

(D) Is there Proportionality Between the Effects and the Objective of s. 213(1)(c) - Communicating for the Purposes of Prostitution?

483 At this final stage of the *Oakes* test, I must satisfy myself that the deleterious effects of the measure on individuals are not disproportionate to the importance of the legislative objective identified and its salutary effects: see *Dagenais*, *supra*. As was explained in *Oakes*, at p. 140, "[t]he more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society."

484 The final balancing at this stage moves the analysis beyond questioning the law's relationship to its legislative purpose. Instead, the purpose is now weighed against the effects, both intended and unintended, of the impugned provision. While neither the law nor its purpose have changed since 1990, the available evidence demonstrating the effects of the law has grown in strength and volume in the intervening years. It is on the basis of this change that I proceed to weigh the effect that the communicating provision has on prostitutes against the benefit it confers upon communities.

485 In *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.), Dickson C.J. described this balancing at p. 768 by saying that the effects of the limiting measures "must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights."

486 Constitutional scholar Peter Hogg puts it this way: "[this prong of the test] asks whether the *Charter* infringement is too high a price to pay for the benefit of the law": Hogg, *Constitutional Law of Canada*, *supra* at 38-43.

487 In *J.T.I. MacDonald Corp. c. Canada (Procureure générale)*, [2007] 2 S.C.R. 610, 2007 SCC 30 (S.C.C.), at para. 46, McLachlin C.J. for the Court described this step as "essential" because if the analysis were to end at the minimal impairment stage, "the result might be to uphold a severe impairment on a right in the face of a less important objective."

488 In *Hutterian Brethren of Wilson Colony v. Alberta*, [2009] 2 S.C.R. 567, 2009 SCC 37 (S.C.C.), at paras. 76-77, McLachlin C.J. for the majority highlighted the importance of the application of this stage of the *Oakes* test and held as follows:

> It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis — pressing goal, rational connection, and minimum impairment — could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law's purpose. Only the fourth branch takes full account of the "severity of the deleterious effects of a measure on individuals or groups". As President Barak [former Israeli President and Head of the Israeli Supreme Court] explains:
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> > Whereas the rational connection test and the least harmful measure test are essentially determined against the background of the proper objective, and are derived from the need to realize it, the test of proportionality (*stricto sensu*) examines whether the realization of this proper objective is commensurate with the deleterious effect upon the human right.... It requires placing colliding values and interests side by side and balancing them according to their weight. [p. 374]
>
> In my view, the distinction drawn by Barak is a salutary one, though it has not always been strictly followed by Canadian courts. Because the minimal impairment and proportionality of effects analyses involve different kinds of balancing, analytical clarity and transparency are well served by distinguishing between them. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law. Rather than reading down the government's objective within the minimal impairment analysis, the court should acknowledge that no less drastic means are available and proceed to the final stage of *Oakes*.
>
> The final stage of Oakes allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation. In *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, Bastarache J. explained:
>
> > The third stage of the proportionality analysis performs a fundamentally distinct role. The focus of the first and second steps of the proportionality analysis is not the relationship between the measures and the *Charter* right in question, but rather the relationship between the ends of the legislation and the means employed. Although the minimal impairment stage of the proportionality test necessarily takes into account the extent to which a *Charter* value is infringed, the ultimate standard is whether the *Charter* right is impaired as little as

> possible given the validity of the legislative purpose. The third stage of the proportionality analysis provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*. [Emphasis in original; para. 125.]

489 In light of the evidence presented to me and after weighing the importance of the objective and the salutary effects against the deleterious effects of the law, I find the communicating provision to be an unreasonable limit on the freedom of expression.

a. The Salutary Effects of s. 213(1)(c) - Communicating for the Purposes of Prostitution

490 In the *Prostitution Reference* at p. 1201, Lamer J. wrote that "concerns about the wisdom or effectiveness of the section have been taken into account by Parliament." Justice Lamer then noted that the law as written mandated a comprehensive review of its provisions three years after the date of enactment, with a report to be tabled in the House of Commons including any recommended changes to the law. In fact, the evidence gathered for the review in question did not support the law; however, this information was not presented to the Supreme Court.

491 On the issue of the salutary effects of the law, the applicants have presented a great deal of evidence, including a number of reports published by the government, suggesting that the law has not been effective in curtailing the social nuisance associated with prostitution.

492 The 1989 *Synthesis Report* found that while the law had a short-term effect in reducing street prostitution in smaller cities, in major centres where street prostitution posed the largest problem, the law had little or no effect besides displacing prostitutes from their usual strolls.

493 In the October, 1990, *Fourth Report of the Standing Committee on Justice and the Solicitor General on Section 213 of the Criminal Code (Prostitution-Soliciting)*, the House of Commons Standing Committee on Justice and the Solicitor General found that the main effect of the communicating law in most centres was to move street prostitutes from one downtown area to another, thus merely displacing the problem.

494 In the 1994 *Calgary/Winnipeg Study*, Dr. Augustine Brannigan found no substantial decline in the rate of prostitution in Calgary or Winnipeg. One quarter of all female and one third of all male prostitutes he interviewed in Calgary had entered the industry *after* the enactment of the new provision.

495 The 1998 *Working Group Report* concluded the following about the communicating provisions at p. 58:

> ...[The] legislation has not had a serious impact on controlling street prostitution. It continues to thrive. The police are only able to use s. 213 of the *Criminal Code* selectively because of the high resource implications of undercover operations, which police report is the only method of enforcing this section. As a result, informal zones of tolerance have come about.

496 In 2006, the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws *Subcommittee Report* concluded that s. 213 had not "adequately reduced" street prostitution nor the social nuisance associated with it. The Subcommittee suggested that the current legal framework governing adult prostitution failed to effectively address exploitation in prostitution and failed to curtail harms to communities.

497 The respondent presented evidence from police and community groups to counter the suggestion that the communicating provision is ineffective in curtailing social nuisance. The respondent argued that the provision is regularly used by police forces to successfully reduce the presence of solicitation in specified public places. The respondent also suggested that the communicating law is a useful tool that police use to keep prostitutes away from their pimps and the prostitution environment, and that this can lead to the prostitute leaving the sex industry. The respondent summarized this evidence as follows:

> [Edmonton] Det. Jim Morrissey stated that he receives calls about once a month from prostitutes asking to be arrested to recover from fatigue, illness, addiction or to avoid threats made by other prostitutes, their pimps or johns.
>
> Det. Const. Ramos with the Vancouver Police Department stated that officers would regularly talk to prostitutes and check on their well-being to gain their trust, so that they would see the police as their window to get out of prostitution. When the women were ready, they would set up meetings with social service agencies and arrange for transportation to another city and safe housing to help them exit. Sometimes charges under s. 213 would be necessary to get under-age girls out of prostitution, and the conditions of release "*gave them the ability and strength to say no and removed them from the negative influence of their pimps and took them to a more positive environment.*"
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> . . . . .
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> In some situations, sometimes at the request of the prostitute, police officers may charge prostitutes under s. 213 in order to get them into a diversion program to help them to get away from their pimp or from their drug addiction and increase their chances of exiting prostitution. [Emphasis in original.]

The respondent further submits that the applicants' own evidence, describing evasive manoeuvres taken by prostitutes to avoid detection, demonstrates the deterrent effect of the law.

498 I find, based upon the evidence before me, that the law does not effectively curtail the social nuisance associated with street prostitution. While the law may allow the police to direct prostitutes towards social service supports or capture pimps on occasion, I conclude that the salutary effects of the communicating provision in combating the social nuisance associated with street prostitution are minimal.

b. The Deleterious Effects of s. 213(1)(c) - Communicating for the Purposes of Prostitution

499 In the *Prostitution Reference* at p. 1138, Dickson C.J. found that the control of social nuisance achieved by the communicating provision far outweighed the importance of protecting "legitimate expression in the form of communication for the purposes of a commercial agreement exchanging sex for money." In that case, the Court considered the communicating law as an imposition on free expression for an economic purpose. In the case before me, I am considering communication for the purpose of maintaining personal security. The most significant deleterious effect of the communicating provision is that it prevents communications that may reduce the risk of harm to prostitutes. The communicating law prevents street prostitutes from screening customers, resulting in an increased risk of them being subjected to violence.

500 The 1989 *Synthesis Report* reviewing the communicating provision found that while the profile of street prostitutes had not been changed by the law, those working after the legal change tended to have lengthier criminal records than street prostitutes surveyed before the legal change. In the major centres, bail practices with area restrictions had forced prostitutes into remote areas, prostitutes worked later at night or on weekends to avoid police, and the working atmosphere had become more tense. In Calgary, the numbers of bad dates had increased, while in Vancouver, prostitutes reported being less likely to report bad dates to police for fear of being arrested themselves.

501 In his 1994 *Calgary/Winnipeg Study*, Dr. Brannigan suggested that the communicating provision pushed street prostitution underground. This secrecy served to remove prostitution from public view and provided a cover for violence against prostitutes, which would be more easily detected if prostitution was not conducted in secret.

502 In the 2006 *Subcommittee Report*, the Subcommittee reiterated that the communicating provision has not reduced the nuisance associated with street prostitution; instead, its effect has been to displace regular strolls and in so doing, has made prostitutes more vulnerable. The Subcommittee stated that this section makes it more likely that a prostitute who works in a familiar area near friends, co-workers and regular customers, will be arrested. To avoid arrest, the Subcommittee found that a street prostitute must forego these measures that may assist in safety and well-being. The Subcommittee also recognized that the section encourages street prostitutes to conclude negotiations very quickly, impairing their ability to check if clients are sober, in possession of weapons, or likely to demand that the prostitutes

engage in activities with which they are not comfortable. The Report noted that abridged negotiations make it difficult for a prostitute to determine if the potential client has appeared on a list of clients known for behaving violently towards another prostitute in the past.

c. The Final Balancing

503 At this stage, I must weigh the pressing and substantial purpose of controlling the social nuisance associated with prostitution and the minimal salutary effects I have identified against the deleterious effects on the right of prostitutes to express themselves in an effort to protect their personal safety. As I concluded earlier, this sort of communication is at the very core of the *Charter* guarantee.

504 In my view, in pursuing its legislative objective, the communicating provision so severely trenches upon the rights of prostitutes that its pressing and substantial purpose is outweighed by the resulting infringement of rights. This rights infringement is even more severe given the evidence demonstrating the law's general ineffectiveness in achieving its purpose. By increasing the risk of harm to street prostitutes, the communicating law is simply too high a price to pay for the alleviation of social nuisance.

505 The communicating provision, therefore, fails to meet the proportionality test in *Oakes*, *supra*. I find that s. 213(1)(*c*) represents an unjustifiable limit on the right to freedom of expression.

XIII. Conclusion

506 I am satisfied that the applicants have met their onus and have proven on a balance of probabilities that the impugned provisions infringe the *Charter* rights of the applicants. The respondent has not been able to demonstrate that the infringement of those rights is justified under s.1 of the *Charter*. Accordingly, I declare that the bawdy-house provision, the living on the avails of prostitution provision, and the communicating provision (ss. 210, 212(1)(*j*), and 213(1)(*c*) of the *Criminal Code*) violate s. 7 of the *Charter*, and cannot be saved by s. 1, and are, therefore, unconstitutional.

507 I further declare that the communicating provision (s. 213(1)(*c*) of the *Criminal Code*) violates s. 2(*b*) of the *Charter*, and cannot be saved by s. 1, and is, therefore, unconstitutional.

XIV. Remedy

508 Section 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, states that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." I have found all of the impugned provisions to be inconsistent with the *Charter*.

509 In determining which remedy to order, I have taken into consideration the analysis laid out by the Supreme Court in *Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), including consideration of the twin guiding principles of respect for the role of the legislature and respect for the purposes of the *Charter*: *Schachter*, *per* Lamer C.J. at pp. 700-702. I find that in this case it is appropriate to strike down ss. 212(1)(*j*) and 213(1)(*c*), and to strike the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210, as the applicants did not challenge s. 210 insofar as it relates to bawdy-houses for the practice of acts of indecency.

510 The respondent requests that the court suspend the declaration of constitutional invalidity for a period of 18 months in order to allow Parliament a reasonable period of time to enact an appropriate legislative response and to protect public safety in the interim. The applicants made no submissions on this issue.

511 In *Schachter*, Lamer C.J., for the majority, held at p. 716 that a temporary suspension of a declaration of invalidity is "a serious matter from the point of view of the enforcement of the *Charter*" as such a delay "allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation." Chief Justice Lamer outlined the situations where a temporary suspension of a declaration of invalidity is appropriate. He wrote at para. 85 that a suspension is appropriate where:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

512 These factors were re-affirmed recently in *Hislop v. Canada (Attorney General)*, [2007] 1 S.C.R. 429, 2007 SCC 10 (S.C.C.) at paras. 121 and 161.

513 The respondent argues that striking these provisions will leave a legal vacuum. However, I note that there are a number of legal provisions capable of addressing many of the harms associated with prostitution. I include a brief review of these provisions below.

1. Related Legal Provisions

514 This challenge relates only to a sample of *Criminal Code* sections that prohibit prostitution-related activities. A number of sections that address prostitution have not been challenged. For example, ss. 213(1)(*a*) and (*b*), which prohibit stopping or attempting to stop a motor vehicle, or impeding or redirecting pedestrian or vehicular traffic for the purposes of prostitution, remain in effect.

515 Sections 212(1)(*a*) through (*i*), which deal with procuring, were also not challenged by the applicants. These provisions remain in effect.

516 Child prostitution remains unlawful. Sections 151, 152, and 153 create the offences against sexual exploitation of minors, sections 170 and 171 address procuring minors, 172.1 prohibits luring a child, s. 173(2) prohibits indecent exposure, and s. 280 penalizes non-parental child abduction.

517 Besides laws that directly target prostitution-related activities, a number of existing *Criminal Code* provisions offer protection to prostitutes from violence and exploitation, and to communities from the various forms of nuisance associated with prostitution. I will briefly review some of the available provisions.

(A) Criminal Code Provisions that Offer Protection to Communities

518 The harm accruing to communities as a result of street prostitution has been said to include areas where prostitutes, customers, and others congregate may be noisy and intimidating for residents, and where the flow of pedestrian and vehicular traffic may be impeded. As well, Dickson C.J., for the majority of the Supreme Court, stated that there is a general detrimental effect on bystanders and passers-by, especially children.

519 There are a number of *Criminal Code* provisions to address the problem of street disturbances. Section 175 creates the offence of causing a disturbance, including fighting, indecent exhibition, loitering, and other public nuisance activities. Section 177 prohibits loitering at night on another person's property. In both cases, the maximum sentence is six months' imprisonment. Section 180 creates the offence of common nuisance with a maximum sentence of two years' imprisonment.

520 Unwanted confrontations are addressed in the *Criminal Code* as well. Section 264 prohibits criminal harassment through repeated unwanted communications or threatening conduct such that the individual fears for his or her safety. The maximum sentence is ten years' imprisonment. Section 173 prohibits committing an indecent act in a public place, and s. 174 creates the offence of public nudity. The maximum sentence for both is six months' imprisonment; the Attorney General must consent before nudity charges are laid.

521 The 2006 *Subcommittee Report* suggested that these provisions, otherwise available to protect communities from prostitution-related nuisance, are rarely used because police are either unaware of them or are unwilling to use them.

522 However, some prosecutions have occurred. In *R. v. Gowan*, [1998] O.J. No. 1629 (Ont. Prov. Div.), the accused was convicted of indecent exhibition as a result of walking down a busy street during rush hour with uncovered breasts, fondling her breasts while making suggestive comments to motorists, and leaning into passing cars and soliciting drivers. In *R. v. Dalli*, [1996] O.J. No. 762 (Ont. Prov. Div.), the accused was convicted of indecent exposure after a police officer observed him picking up a prostitute, followed his vehicle to a parking lot near a city beach, and watched him have sexual intercourse with the prostitute in his car. In *R. v. Sheikh*, [2008] O.J. No. 1544 (Ont. S.C.J.), the accused was convicted of indecent exposure after police observed him in a busy high school parking lot engaging in sexual acts with a prostitute in his vehicle.

523 There may also be provincial legislation able to offer protection to communities in certain circumstances: see, for example, the *Safe Streets Act, 1999*, S.O. 1999, C. 8.

(B) Criminal Code Provisions that Offer Protection to Prostitutes

524 In many cases, attacks against prostitutes by pimps involve charges laid under both general and specific prostitution-related provisions of the *Criminal Code*. For example, in *R. v. Patterson* (2003), 64 O.R. (3d) 275 (Ont. C.A.), the Court of Appeal upheld a seven-year sentence for a number of offences including kidnapping, forcible confinement, procuring, living on the avails of prostitution, and uttering threats, where a woman was kidnapped, abused, and forced into prostitution. In *R. v. Graves*, [1999] M.J. No. 413 (Man. C.A.), the accused was sentenced to four years' imprisonment on charges of living on the avails of prostitution, robbery, assault, and uttering threats where the complainant was a prostitute.

525 In *R. v. Senior*, [1997] 2 S.C.R. 288 (S.C.C.), the Supreme Court upheld an 18-year sentence for a man who had assaulted his girlfriend and forced her to work as a prostitute. He was convicted of kidnapping, for which he received 12 years, use of a firearm in the commission of an offence, for which he received three years consecutive, living on the avails of prostitution, for which he received three years consecutive, and aggravated assault, assault with a weapon, and uttering threats, for which he received concurrent sentences totalling 22 years' imprisonment. In *R. v. Murray* (1995), 169 A.R. 307 (Alta. C.A.), a global sentence of five years for a number of offences including living on the avails, uttering threats (two counts), and assault causing bodily harm was upheld by the Alberta Court of Appeal.

526 In other cases, pimps have been successfully tried without resort to these provisions. For example, in *R. v. Hayes*, [1998] B.C.J. No. 2752 (B.C. C.A.), a five-year sentence for extortion, three counts of simple assault, and three counts of uttering threats, was upheld by the Court of Appeal after a young woman was forced to attempt to prostitute herself as a result of threats and violence.

527 In many of these cases, the crime of uttering threats found in s. 264.1 of the *Criminal Code*, punishable by up to five years' imprisonment, is used to punish the exploitive conduct of the pimp. In others, s. 423 (intimidation) has been used. This section makes it an offence to use violence or threaten violence or injury to property, intimidate or threaten a person in order to compel them to do something that they have the right to abstain from doing. Intimidation is a hybrid offence; the maximum sentence on indictment is five years' imprisonment. In *R. v. Yu* (2002), 317 A.R. 345, 2002 ABCA 305 (Alta. C.A.), convictions for kidnapping, intimidating, assaulting, menacing, beating, and degrading a prostitute to recover a debt were upheld.

528 In contrast to the aforementioned cases, violent attacks against prostitutes by customers are prosecuted without the use of specific prostitution-related provisions. For example, in *R. v. Bodnaruk* (2002), 217 Sask. R. 89 (Sask. C.A.), the Saskatchewan Court of Appeal sentenced a man to three years' imprisonment and a DNA order for sexual assault, assault with a weapon, common assault and uttering threats after he had beaten and threatened serious harm to three prostitutes. In *R. v. Nest* (1999), 228 A.R. 369, 1999 ABCA 46 (Alta. C.A.), the Alberta Court of Appeal upheld convictions for

sexual assault, uttering death threats, attempted anal intercourse, choking, and unlawful confinement arising out of attacks on two prostitutes. In *R. v. Mooney* (1993), 23 B.C.A.C. 274 (B.C. C.A.), a sentence of eight years for sexual assault, robbery and uttering a threat was deemed fit and upheld by the Court of Appeal.

529 Both s. 322 (theft) and s. 343 (robbery) have been used to punish clients of prostitutes who refused to pay for sexual services or stole property from a prostitute: see *R. v. Boivin* (1993), 27 B.C.A.C. 17 (B.C. C.A.); *R. v. Gregory*, 2001 BCCA 358 (B.C. C.A.); *R. v. Roper* (1997), 32 O.R. (3d) 204 (Ont. C.A.), *R. v. Omer* (1990), 66 Man. R. (2d) 45 (Man. C.A.); *Graves*, *supra* and *Mooney*, *supra*.

530 Section 346, which creates the offence of extortion, has been used to punish crimes against prostitutes both by customers (*R. v. Yews*, 1999 BCCA 699 (B.C. C.A.); *Gregory*, *supra*) and by pimps (*R. v. Allan*, [1993] O.J. No. 3432 (Ont. C.A.); *Hayes*, *supra*). In *Allan*, *supra*, the accused was sentenced to three years for extortion, as well as forcible confinement and living on the avails of prostitution for two years less a day, which was to be served concurrently to the extortion sentence. He had locked a prostitute who worked for him at his escort agency into a room and assaulted her to get more money.

531 Other sections of the *Criminal Code* are available to police to charge pimps and customers who threaten or cause harm to prostitutes: s. 279 (kidnapping/forcible confinement), s. 269 (unlawfully causing bodily harm), s. 266 (assault), s. 267 (assault with a weapon or causing bodily harm), s. 268 (aggravated assault), s. 269.1 (torture), s. 271 (sexual assault), s. 272 (sexual assault with a weapon, threats to a third party or causing bodily harm), and s. 273 (aggravated sexual assault).

532 In *R. v. Ford* (1993), 15 O.R. (3d) 173 (Ont. C.A.), the accused was charged with six prostitution-related offences against two young women, as well as kidnapping, confinement, aggravated assault, and assault against one of them. He had taken the two fifteen-year-olds from Etobicoke to Montreal to work as prostitutes for him. The jury found him not guilty of kidnapping, but convicted him on all other counts. He was sentenced to eight years' imprisonment. As a result of a statutory limitation period which has since been repealed, the prostitution-related convictions were set aside. Nonetheless, the Ontario Court of Appeal imposed a sentence of five years for the remaining convictions.

533 Introduced in November 2005, s. 279.01 prohibits trafficking in persons:

> 279.01 (1) Every person who recruits, transports, transfers, receives, holds, conceals or harbours a person, or exercises control, direction or influence over the movements of a person, for the purpose of exploiting them or facilitating their exploitation is guilty of an indictable offence and liable
>
> (a) to imprisonment for life if they kidnap, commit an aggravated assault or aggravated sexual assault against, or cause death to, the victim during the commission of the offence; or
>
> (b) to imprisonment for a term of not more than fourteen years in any other case.
>
> (2) No consent to the activity that forms the subject-matter of a charge under subsection (1) is valid.

534 Section 279.02 punishes individuals who benefit economically from trafficking in persons and carries a maximum penalty of ten years' imprisonment. In *R. v. Nakpangi*, 2008 CarswellOnt 9334 (Ont. C.J.), the accused was charged under both this section and s. 212(2) in relation to his control over two young persons involved in prostitution, and received a global sentence of five years' imprisonment.

535 In conclusion, I respectfully reject the argument made by the respondent that a legal vacuum would be created by an immediate declaration of invalidity in this case.

2. Conclusion: Remedy

536 The respondent argues that striking down the impugned provisions without enacting something in its place would pose a danger to the public. I am not persuaded that this would be the case. The evidence before me suggests that ss. 210 and 212(1)(*j*) are rarely enforced and that s. 213(1)(*c*) is largely ineffective. As well, the Supreme Court has held that s. 213(1)(*c*) is aimed at curtailing social nuisance, not protecting public safety. Moreover, I have found that the law as it stands is currently *contributing to danger* faced by prostitutes.

537 In his text, *Constitutional Remedies in Canada*, looseleaf (Aurora, Ont.: Canada Law Book, 2009), Professor Kent Roach writes at 14-97 that "[d]elayed declarations of invalidity will not be appropriate if they expose individuals and groups to irreparable harm caused by the continued operation of a law that has been found unconstitutional."

538 I find that the danger faced by prostitutes greatly outweighs any harm which may be faced by other members of the public. I, therefore, do not consider that a temporary suspension of a declaration of invalidity is appropriate in this case.

539 I am mindful of the fact that legislating in response to prostitution raises difficult, contentious, and serious policy issues and that it is for Parliament to fashion corrective legislation. This decision does not preclude such a response from Parliament. It is my view that in the meantime, these unconstitutional provisions should be of no force and effect, particularly given the seriousness of the *Charter* violations. However, I also recognize that a consequence of this decision may be that unlicensed brothels may be operated and in a way that may not be in the public interest. It is legitimate for government to study, consult and determine how to best address this issue. In light of this, I have determined that a stay of my decision for up to 30 days should be granted to enable the parties to make fuller submissions to me on this question or to seek an order for a stay of my judgment.

XV. Costs

540 Counsel did not address the issue of costs in their argument. If costs are being sought, the parties shall file written submissions according to the following timetable: the applicants shall file their submissions within 60 days of the release of this decision, and the respondent shall file its submissions within 20 days of receipt of the applicants' submissions. Should there be a claim for costs against the interveners, the interveners have 20 days to file submissions following receipt of the applicants' submissions.

541 I thank counsel for their detailed, able submissions in presenting these complex issues to the court.

Footnotes

1 "Common bawdy-house" is defined in s. 197(1) of the *Criminal Code* as "a place that is (a) kept or occupied, or (b) resorted to by one or more persons for the purpose of prostitution or the practice of acts of indecency."

2 I also note that s. 212(3) of the *Criminal Code* provides that "[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purposes of paragraph (1)(j)...." The Supreme Court in *R. v. Downey*, [1992] 2 S.C.R. 10, held that this provision does not violate the presumption of innocence set forth in s. 11(*d*) of the *Charter*.

3 "Public place" is defined in s. 213(2) of the *Criminal Code*: "In this section, 'public place' includes any place to which the public have access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view."

4 It has been brought to my attention that some people prefer the term "sex worker" to "prostitute," which they consider to be pejorative. Others decry the use of sex worker as they claim it ignores the plight of victimized women forced into prostitution. This judgment uses the term prostitute as a legal term in accordance with the *Criminal Code*, and should not be understood to enter the debate over the proper political term to be used.

5 Indoor prostitution can occur "in-call," where the clients attend at a fixed indoor location such as a prostitute's home or a massage parlour, or "out-call," where prostitutes meet clients at different locations such as in hotel rooms or clients' homes.

6 One of the applicants' experts defined the term "bad date" as meaning slang for incidents which ended in violence or theft at the expense of prostitutes. Some prostitutes' rights organizations keep lists of bad dates and distribute them to street prostitutes.

7 A pimp has been defined in *R. v. Downey* [1992 CarswellAlta 56 (S.C.C.)], *supra* at p. 32, *per* Cory J. for the majority, as a "person who lives parasitically off a prostitute's earnings."

8 This case has been cited with approval by a number of Canadian courts, including the Ontario Court of Appeal recently in *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.*, 2009 ONCA 388 (Ont. C.A.).

9 The way "violence" towards prostitutes was characterized by the various experts had an impact upon their opinions as to whether violence was inherent to prostitution or whether there were ways that prostitution could be made safer. For example, one view is that violence means a systemic power imbalance. Another view is that violence includes physical *and* psychological violence. When referring to violence, I am referring to physical violence, unless stated otherwise.

10 Discussion of male, transgender, and transsexual prostitutes was absent from much of the respondent's expert opinions.

11 Dutch use of the term human trafficking includes pimping, forced prostitution, and all other instances of sexual exploitation.

12 Both of these may be attributable to a loosening of European mobility restrictions and a global shift in communication technology, and are not necessarily consequences of the new legal regime.

13 Other prostitution-related provisions were found in Part XIII, "Offences against Morality" which included provisions that dealt with the seduction of girls and women of "previously chaste character," the procuring of girls and women by parents or guardians, and the prostitution of "Indian" women.

14 According to the report, it is less common to be a homicide victim as a direct result of legal employment: there were an average of 17 victims killed annually "on-the-job" from 1997 to 2007.

15 In discussing commercial sex, Dr. Lowman draws a distinction between "sexual slavery" (a person who is forced to be a prostitute), "survival sex" (a person who engages in prostitution because he/she has few or no choices), and "opportunistic prostitution" (a person who makes an economic decision to work in prostitution).

TAB 4

2008 CAF 40, 2008 FCA 40
Federal Court of Appeal

Canadian Council for Refugees v. R.

2008 CarswellNat 150, 2008 CarswellNat 3303, 2008 CAF 40, 2008 FCA 40, [2008] F.C.J. No. 131, 164 A.C.W.S. (3d) 564, 373 N.R. 387

Her Majesty the Queen, Appellant and Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe, Respondents

J. Richard C.J.

Heard: January 30, 2008
Judgment: January 31, 2008
Docket: A-37-08

Counsel: Mr. Greg G. George, Ms Matina Karvellas, for Appellant
Ms Barbara Jackman, Mr. Andrew Brouwer, Ms Leigh Salsberg, for Respondents, Canadian Council for Refugees, Canadian Council of Churches, John Doe

Headnote

Immigration and citizenship --- Constitutional issues — Charter of Rights and Freedoms — Visitors and immigrants — Miscellaneous issues

Governor in Council ("GIC") adopted regulations designating United States as safe third country and putting into operation Safe Third Country Agreement ("STCA") between Canada and US — STCA was implemented pursuant to s. 102(1) of Immigration and Refugee Protection Act ("IRPA") for purpose of sharing responsibility with governments of foreign states for consideration of refugee claims — Upon application by respondents in this appeal for declaration invalidating STCA, Federal Court held that GIC exceeded its jurisdiction when it adopted regulation designating US as safe third country and putting into operation STCA, on ground that US did not comply with its non-refoulement obligations under Art. 33 of Convention Relating to the Status of Refugee, and Art. 3 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Judge also held that regulations were contrary to ss. 7 and 15 of Charter of Rights and Freedoms — Crown appealed from decision and brought motion under R. 398(1)(b) of Federal Court Rules for stay of judgment pending determination of appeal and sought order expediting appeal proceedings — Motion granted — Federal Court judgment was to be stayed pending determination of appeal — Appeal was to be expedited in interest of justice — Counsel for parties were ordered to provide court with schedule for timely completion of steps in appeal together with requisition for hearing — Issues in appeal deserved full appellate review on their merits before ordering suspension of STCA — Crown met three-prong test for stay pending disposition of appeal — Appeal involved serious issue to be tried — Issues raised on appeal were not frivolous or vexatious — There would be irreparable harm to public interest — Judgment would suspend operation of STCA and public interest would be detrimentally affected — Balance of convenience favoured granting stay pending determination of appeal — Public interest in maintaining in place regulations made pursuant to legislative authority pending complete constitutional review outweighed any detriment.

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — General principles

Governor in Council ("GIC") adopted regulations designating United States as safe third country and putting into operation Safe Third Country Agreement ("STCA") between Canada and US — STCA was implemented pursuant to s. 102(1) of Immigration and Refugee Protection Act ("IRPA") for purpose of sharing responsibility with governments of foreign states for consideration of refugee claims — Upon application by respondents in this appeal for declaration invalidating STCA, Federal Court held that GIC exceeded its jurisdiction when it adopted regulation designating US as safe third country and putting into operation STCA, on ground that US did not comply with its non-refoulement

obligations under Art. 33 of Convention Relating to the Status of Refugee, and Art. 3 of Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment — Judge also held that regulations were contrary to ss. 7 and 15 of Charter of Rights and Freedoms — Crown appealed from decision and brought motion under R. 398(1)(b) of Federal Court Rules for stay of judgment pending determination of appeal and sought order expediting appeal proceedings — Motion granted — Federal Court judgment was to be stayed pending determination of appeal — Appeal was to be expedited in interest of justice — Counsel for parties were ordered to provide court with schedule for timely completion of steps in appeal together with requisition for hearing — Issues in appeal deserved full appellate review on their merits before ordering suspension of STCA — Crown met three-prong test for stay pending disposition of appeal — Appeal involved serious issue to be tried — Issues raised on appeal were not frivolous or vexatious — There would be irreparable harm to public interest — Judgment would suspend operation of STCA and public interest would be detrimentally affected — Balance of convenience favoured granting stay pending determination of appeal — Public interest in maintaining in place regulations made pursuant to legislative authority pending complete constitutional review outweighed any detriment.

The Government of Canada and the Government of the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner. The Governor in Council ("GIC") promulgated regulations under the authority of ss. 102(1) and 5(1) of the Immigration and Refugee Protection Act ("IRPA") to implement the Safe Third Country Agreement ("STCA") between Canada and the US. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter. The respondents in this appeal brought an application challenging the validity of the GIC's designations of the US as a safe third company and seeking a declaration invalidating the STCA. The Federal Court judge held that the GIC exceeded its jurisdiction when it adopted regulations designating the US a safe third country and putting into operation the STCA, as he was of the view that the US did not comply with its non-refoulement obligations under Art. 33 of the Convention Relating to the Status of Refugee, and Art. 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The judge declared that the regulations were ultra vires and contrary to ss. 7 and 15 of the Charter of Rights and Freedoms on the ground that the US was not a safe third country that complied with its non-refoulement obligations. Judgment was scheduled to become effective on February 1, 2008, at which point STCA would cease to operate in Canada. The Crown appealed from the Federal Court's decision and brought a motion under R. 398(1)(b) of the Federal Court Rules for a stay of judgment pending determination of the appeal, and an order expediting the appeal proceedings.

Held: The motion was granted.

The Federal Court judgment invalidating the regulations implementing the STCA was to be stayed pending determination of the appeal. The appeal was to be expedited in the interest of justice. Counsel for the parties were ordered to provide the court with a schedule for the timely completion of the steps in the appeal together with the requisition for a hearing. The issues in the appeal deserved full appellate review on their merits before ordering the suspension of the STCA between Canada and the US. There was a serious question to be tried. The issues raised on appeal were not frivolous or vexatious. The Federal Court judge certified three serious questions of general importance and the Crown raised other issues concerning the judge's findings of fact. The Crown demonstrated irreparable harm to the public interest. Since the operation of the STCA would be suspended by operation of the judge's order, this was clearly a suspension case and the public interest was more likely to be detrimentally affected. The balance of convenience favoured granting a stay pending the appeal from the judgment of the Federal Court. The public interest groups, who were respondents in this application, would suffer no personal harm. The public interest in maintaining in place the regulations made pursuant to legislative authority pending complete constitutional review outweighed any detriment.

Table of Authorities

Cases considered by *J. Richard C.J.*:

Canadian Council for Refugees v. R. (2007), 2007 CarswellNat 4598, 2007 FC 1262 (F.C.) — referred to

Harper v. Canada (Attorney General) (2000), 2000 SCC 57, 2000 CarswellAlta 1158, 2000 CarswellAlta 1159, 234 W.A.C. 201, 271 A.R. 201, 193 D.L.R. (4th) 38, 92 Alta. L.R. (3d) 1, [2001] 9 W.W.R. 201, [2000] 2 S.C.R. 764 (S.C.C.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 7 — referred to

s. 15 — referred to

Immigration and Refugee Protection Act, S.C. 2001, c. 27

s. 5(1) — referred to

s. 101(1)(e) — referred to

s. 102 — referred to

s. 102(1) — referred to

Rules considered:

Federal Courts Rules, SOR/98-106

R. 398(1)(b) — considered

Treaties considered:

Agreement between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims form Nationals of Third Countries, 2002

Generally — referred to

Article 4(1) — considered

Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, C.T.S. 1987/36; 23 I.L.M. 1027; 1465 U.N.T.S. 85; U.N. Doc. A/39/51

Article 3 — referred to

Convention Relating to the Status of Refugees, 1951, C.T.S. 1969/6; 189 U.N.T.S. 150

Article 33 — referred to

Regulations considered:

Immigration and Refugee Protection Act, S.C. 2001, c. 27

Immigration and Refugee Protection Regulations, SOR/2002-227

ss. 159.1-159.7 [en. SOR/2004-217] — referred to

***J. Richard C.J.*:**

1 The appellant, who was the respondent in the Federal Court, seeks an Order staying the Judgment of Justice Phelan dated January 17, 2008 allowing the respondents' application for a declaration invalidating the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) (*Canadian Council for Refugees v. R.*, [2007] F.C.J. No. 1583, 2007 FC 1262 (F.C.)).

2 The STCA is an agreement pursuant to subsection 102(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims. The essence of the STCA is expressed at article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry [...] and makes a refugee status claim". Similar agreements between European Union (EU) member states have existed for many years.

3 Justice Phelan held that the Governor in Council exceeded its jurisdiction when it adopted Regulations designating the U.S. a safe third country and putting into operation the STCA, as he was of the view that the U.S. did not comply with its non-refoulement obligations under article 33 of the *Convention relating to the Status of Refugee*, 189 U.N.T.S. 150 (April 22, 1954), or the *Refugee Convention* (RC), and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987) or *Convention against Torture* (CAT). He further held that the return of a refugee claimant from Canada for a refugee determination by the U.S. asylum and refugee system would violate sections 7 and 15 of the *Charter of Rights and Freedoms* (*Charter*) because of the U.S.'s apparent failure to comply with its non-refoulement obligations.

4 Justice Phelan's judgment will become effective on February 1, 2008, at which point the STCA, which has been in effect since December 2004, will cease to operate in Canada.

5 The appellant seeks an Order to stay Justice Phelan's judgment until such time as this Court has had an opportunity to consider and render its decision.

6 The appellant submits that the requirements of a stay have been met as: there are serious issues to be determined, the appellant will suffer irreparable harm and the balance of convenience favours the appellant. The appellant also requests that this proceeding be expedited.

7 A brief history of the STCA between Canada and the United States and its implementation in Canada is found in the affidavit of Bruce A. Scoffield sworn September 19, 2006 which was filed in the proceedings before Justice Phelan. Mr. Scoffield is the Director for Operational Coordination in the International Region, Citizenship and Immigration Canada.

> Canada and the U.S. have a long history of cooperation relating to the movement of persons across their shared border. A formal joint commitment to bilateral responsibility sharing came in 1995 through the adoption of the "Shared Border Accord" ("SBA"). In December 1995, a preliminary draft of a responsibility sharing agreement based on the Safe Third Country concept was made public. [...] (para. 16)
>
> [...]
>
> This joint commitment was reaffirmed on December 12, 2001 when the then Minister of Foreign Affairs, the Honourable John Manley, and the Director of the U.S. Office of Homeland Security, Governor Tom Ridge, announced the "Smart Border Declaration" and associated Action Plan. The Declaration and Action Plan committed the two governments to collaborative efforts to enhance the security of our shared border while facilitating the legitimate flow of people and goods. One of the thirty-two specific commitments agreed in the Action Plan was the negotiation of a bilateral safe third country agreement. (para. 19)
>
> [...]
>
> Canada and the U.S. signed the Agreement on December 5, 2002. In its preamble, the two governments set out their objectives related to international cooperation, burden and responsibility sharing. The two governments recognized that the sharing of responsibility for refugee protection must include access to a full and faire refugee status

determination in order to guarantee the effective implementation of the Refugee Convention and the Convention against Torture. [...] (para. 24)

The Agreement applies to situations where a refugee claim is made to one party by a refugee claimant who arrives at a land border port of entry directly from the territory of the other party. The Agreement generally assigns responsibility for adjudicating refugee claims in such cases to the "country of last presence". [...] For the moment, the Agreement is limited in application to refugee claims made at ports of entry where the movement of refugee claimants across the border can easily be observed and the country of last presence can readily be established. [...] (para. 25)

Following a final round of negotiations on the Agreement in the fall of 2002, authority was sought, further to *IRPA* s. 102(1)(a), to designate the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and approval of the Agreement and authority to sign it was al so requested. *IRPA* s. 102(2) required that the Governor in Council consider four factors when considering designating a country as safe. These are: (1) whether it is a party to the Refugee Convention and the Convention against Torture; (2) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention against Torture; (3) its human rights record; and (4) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection. (para. 26)

[...]

Draft implementing regulations were pre-published in the *Canada Gazette Part I* on October 26, 2002. During the public comment period, the government received input from academics, members of the legal community and NGOs. The UNHCR also provided comments relating to the draft regulations. [...] In November 2002, the House of Commons Standing Committee on Citizenship and Immigration held hearings on the draft regulations, and subsequently released a report recommending a number of amendments. The government response to that report was tabled in the Hose of Commons on May 1, 2003, and noted that the Government accepted, in whole or in part, twelve out of seventeen recommendations made by the committee. [...] (para. 28)

[...]

Final regulations were published in the *Canada Gazette Part II* on November 3, 2004. [...] (para. 31)

Two additional rounds of consultations were undertaken by the Government prior to implementation of the Agreement, focusing on the development of operational instructions and manuals. [...] (para. 32)

[...]

A monitoring plan for UNHCR staff in both Canada and the U.S. was jointly agreed upon by each government. UNHCR's mandate under this plan is to assess whether implementation of the Agreement is consistent with its terms and principles as well as with international refugee law. [...](para. 34)

[...]

The UNHCR is presently engaged with the two governments in a review of the first year of the Agreement's implementation which addresses, *inter alia*, specific observations and recommendations made by UNHCR as a result of its monitoring activities. Although the review is not yet final, UNHCR's Representative did provide an overview of UNHCR's assessment of the Agreement's first year to the Standing Committee on Citizenship and Immigration when he appeared as a witness on May 29, 2006. In his remarks, Mr. Asadi noted that overall UNHCR's findings were positive. (para. 36)

[...]

> In response to a question from a member of the Committee, Mr. Asadi went on to state that "We consider the U.S. to be a safe country. Otherwise we would have not agreed to do this monitoring and we would have said so at the very beginning." [...] (para. 38)
>
> [...]
>
> Distinct from the monitoring and oversight of implementation of the Agreement itself is the Government's continuing review of the factors relevant to the designation of the U.S. as a safe third country. Prior to the signing of the Agreement and since its implementation, the Government has continued to monitor developments in U.S. law and policy which could have an impact on the integrity of the Agreement, as mandated by the November 2004 Order in Council on directives for ensuring a continuing review of factors set out in s. 102(3) of *IRPA* with respect to countries designated under s. 102(1)(a) of *IRPA*. The Government makes use of numerous sources of information to this end, including academic and NGO commentary, diplomatic reporting from Canadian missions in the U.S., our ongoing dialogue with the UNHCR, and regular exchanges with American officials. [...] (para. 42)

8 In summary, Canada and the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner.

9 The Governor in Council (GIC) promulgated regulations under the authority of subsections 102(1) and 5(1) of the *IRPA* to implement the STCA. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter.

10 The respondents in this appeal, the applicants in the proceeding before Justice Phelan, three advocacy groups and one individual, challenged the validity of the GIC's designations of the U.S. as a safe third country.

11 Justice Phelan declared the regulations *ultra vires* and contrary to sections 7 and 15 of the *Charter* on the ground that the U.S. is not a safe third country that complies with the non-refoulement requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*.

12 The result of invalidating sections 159.1-159.7 of the *Immigration Refugee Protection Regulations* is the termination of the operation of the STCA in Canada.

13 In allowing the application, Justice Phelan certified the following questions:

> 1. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
>
> 2. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
>
> 3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(*e*) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

14 The appellant has appealed the judgment by a notice of appeal dated January 18, 2008. The appellant brings this motion under Rule 398(1)(*b*) of the *Federal Court Rules* for a stay of the Judgment pending the determination of the appeal, and seeks an Order expediting the appeal proceedings.

15 This Court has authority to grant a stay pending an appeal before it, including the stay of an order that declares legislation to be invalid or that infringes the *Charter* pending a final determination of the issues.

16 Rule 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, as amended, permits this Court to stay an Order of the Federal Court:

> **398.**(1) On the motion of a person against whom an order has been made,
>
> (a) where the order has not been appealed, the court that made the order may order that it be stayed; or
>
> (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.
>
> **398.**(1) Sur requête d'une personne contre laquelle une ordonnance a été rendue:
>
> a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;
>
> b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

17 Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

18 A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.)).

Serious Issue

19 Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

20 In addition to the certified questions, the applicant for a stay raises other issues concerning the judge's findings of fact.

21 The respondents do not dispute that there are serious issues raised in this case based on the questions certified by Justice Phelan. However, they do not accept the further issues raised by the appellant.

22 The issues raised on appeal are not frivolous or vexatious. Therefore, the applicant has satisfied the first stage of the three-fold test for a stay.

Irreparable Harm

23 Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

24 The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81).

25 The Supreme Court of Canada has held that the public interest is to be widely construed in *Charter* cases:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined.

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights (emphasis added) (*RJR-MacDonald Inc.*, para. 73).

26 As noted by the Supreme Court of Canada in *RJR-MacDonald*, above, the public interest considerations will weigh more heavily in a suspension case than in an exemption case where the public interest is more likely to be detrimentally affected. Since the operation of the STCA would be suspended by the operation of the judge's order, this is clearly a suspension case.

27 The applicant for a stay alleges that the appellant will suffer irreparable harm in other respects, which can be summarized as the likelihood of an influx of refugees into Canada from the United States and the corresponding negative impact on border services. This allegation is supported by the affidavit of George Bowles sworn on December 17, 2007.

28 The respondents claim that irreparable harm does not exist merely when there will be administrative inconvenience or expense.

29 The respondents submit that the appellant will not suffer irreparable harm if Justice Phelan's declaration is permitted to take effect. In the alternative, the respondents submit that irreparable harm will be suffered on both sides, but that the harm to the respondents outweighs any alleged harm claimed by the appellant. However, at this second stage of the test, the Court is called upon to consider the harm that the applicant will suffer if the stay is not granted.

30 I am satisfied that the applicant for a stay has satisfied the second requirement of the three-stage test.

Balance of convenience

31 Since the applicant is a government institution, the Court must consider the applicant's inconvenience as well as the respondents' convenience.

32 Once there is some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the government's responsibility for promoting the public interest, a legislative scheme under attack is presumed to benefit the public interest, *RJR-MacDonald*, above, at paras. 71-80.

33 These principles were subsequently reiterated in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.), at para. 9:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid [page 771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR — MacDonald was of s. 2(b). **The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter.** It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (emphasis added).

34 I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

35 The public interest groups, who are the respondents in this application for a stay, will suffer no personal harm. The respondent, John Doe, has been living in the United States since 2000 and his claim for protection is still pending.

36 However, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald*, above, at para. 66).

37 When a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR-MacDonald*, above, at para. 68).

38 The respondents relied on three affidavits (the Moreno affidavit, the Giantonio affidavit and the Benatta affidavit) to demonstrate the public interest component of their position.

39 The Moreno affidavit states that she was granted refugee status in Canada but that her common-law partner was not and was returned to the U.S. and detained. He was subsequently deported to Honduras and three months later he was killed. There is no evidence that he made a refugee claim in the U.S. or of the circumstances surrounding his deportation.

40 Patrick Giantonio is the Executive Director of the Vermont Refugee Assistance. He gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the STCA and were deported back to Columbia by the U.S. There is no information concerning the proceedings followed in the U.S.

41 The Benatta affidavit establishes that, on the same day Mr. Benatta's U.S. asylum claim was rejected in December 2001, he was indicted for possession of false documents. These charges were subsequently dropped by a judge who described them as "a shame". However, Mr. Benatta remained in detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection.

42 A further affidavit filed by the applicant for a stay (the Soskin affidavit) discloses that Mr. Benatta did get a hearing for his asylum application in the U.S. on two occasions. By Statement of Claim dated July 16, 2007 filed in the Ontario Superior Court of Justice, Mr. Benatta commenced an action against The Queen in Right of Canada and various government agencies claiming damages arising out of his alleged illegal transfer to authorities in the U.S. This claim has yet to be adjudicated.

43 The affidavit of David Martin, a professor of law at the University of Virginia, with over 27 years of experience in the study and practice of U.S. immigration and refugee law, sworn July 31, 2006 and filed on behalf of the applicant for a stay, states as follows:

> 229. Therefore, although there have been some unfortunate and misguided steps taken by the U.S. government or certain of its personnel in the treatment of prisoners in government custody, the U.S. legal system ultimately responded and has now set forth explicit laws and rulings both forbidding cruel, inhuman, and degrading treatment and dictating that detainees are covered, at a minimum, by common Article 3 of the Geneva Conventions.

44 The three affidavits filed by the respondents do not establish that the public interest is at risk in accordance with the standard established by the Supreme Court of Canada.

45 In his reasons for judgment, Justice Phelan identified three issues, which individually and collectively undermine the reasonableness of the GIC's conclusion of U.S. compliance: 1) the rigid application of the one-year bar to refugee claims; 2) the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion; 3) the

vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (Reasons for Judgment, para. 239).

46 The respondents argue that, for the time being at least, this decision represents the law. However, it is this very decision that is the subject of an appeal and constitutional review in this Court.

47 At the hearing, counsel for the respondents suggested as an alternative to a stay of the Order of Justice Phelan that the Court consider granting a stay exempting the groups referred to by Justice Phelan in paragraph 239 of his reasons from the application of the STCA.

48 Counsel for the applicant for a stay argued that this proposal would have the same effect as a suspension of the Regulations.

49 Counsel for the applicant for a stay noted that the STCA has been in effect now for more than three years (December 29, 2004 to January 18, 2008).

50 Applying the principles enunciated in the decisions of the Supreme Court of Canada and without pre-judging the outcome of any appeal, I am satisfied that the public interest in maintaining in place the Regulations made pursuant to legislative authority pending complete constitutional review outweighs any detriment.

51 I find that the balance of convenience favours granting the stay pending the appeal from the judgment of the Federal Court.

Disposition

52 I conclude that the issues in this appeal deserve full appellate review on their merits before ordering a suspension of the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) and that the application for a stay should be granted.

53 Accordingly, the Judgment of Justice Phelan dated January 17, 2008 (Reasons for Judgment 2007 FC 1262 (F.C.), November 29, 2007) invalidating the Regulations implementing the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) will be stayed until such time as this Court has heard and determined the appeal.

54 The respondents agree with the appellant that it would be in the interest of justice to expedite this appeal and the Court so orders. Accordingly, counsel for the parties to the appeal will provide the Court with a schedule for the timely completion of the steps in the appeal together with a requisition for a hearing.

Motion granted.

TAB 5

2016 ONSC 6287
Ontario Superior Court of Justice

Catholic Children's Aid Society of Hamilton v. H. (G.)

2016 CarswellOnt 16100, 2016 ONSC 6287, [2016] W.D.F.L. 5984, [2016] W.D.F.L. 5991, [2016] O.J. No. 5233, [2017] 1 C.N.L.R. 47, 272 A.C.W.S. (3d) 332, 367 C.R.R. (2d) 82, 83 R.F.L. (7th) 299

Catholic Children's Aid Society of Hamilton (Applicant) and G.H., T.V. and Eastern Woodlands Métis of Nova Scotia (Respondents)

Deborah L. Chappel J.

Heard: June 27, 2016
Judgment: October 12, 2016
Docket: C 1167/12

Counsel: Imran Kamal, for Applicant
Melinda Graham, for Respondent, G.H.
Norman F. Williams, for Respondent, T.V.

Headnote

Aboriginal law --- Family law — Children in need of protection

Children's Aid Society apprehended child at birth — Society brought motion for summary judgment motion in its application for Crown wardship without access to parents — Métis father applied to challenge s. 3(1) of Child and Family Services Act as violating s. 15 of Canadian Charter of Rights and Freedoms on basis that its definitions of Indian, Native person and Native child did not extend to Métis children — Application granted — Finding child to be Indian or Native had broad impact, as Act granted special protections at every stage of intervention process — Differential treatment resulting from definitions of "Indian" and "Native" was based on analogous grounds, respectively, of registration or eligibility for registration as status Indian and residence in remote communities designated as matter of Ministerial discretion — Distinctions created by definitions created or perpetuated disadvantages for Métis children and their families — Legislative scheme clearly on its face created unfair and objectionable disadvantages for Métis children and their families by denying them access to numerous protections, advantages and benefits available to those who fell within definitions — Special provisions were enacted as part of deliberate plan to reduce number of Indian and Native children in foster care and to increase their chances of remaining connected with their Aboriginal heritage and traditions — Disadvantage to Métis children was clear and discernible, continuing history of disadvantage by affecting their ability to preserve their Aboriginal communities, culture and traditions and perpetuating stereotype of being "less Aboriginal" and less worthy of protection — Differential treatment did not correspond with actual needs and circumstances of Métis peoples — Definitions of Indian, Native person and Native child violated father's rights and child's rights under s. 15(1) of Charter — Appropriate remedy was to declare definitions invalid but suspend such declaration for 10 months to allow legislature to formulate constitutional solution, while granting individual remedy that child be treated as Indian or Native for purposes of these proceedings — There were no further service requirements with respect to child's community, as father's Métis community had decided not to participate or present plan respecting child and, despite extensive efforts, no other Métis organization was willing to be involved.

Family law --- Children in need of protection — Effect of Charter of Rights and Freedoms

Children's Aid Society apprehended child at birth — Society brought motion for summary judgment motion in its application for Crown wardship without access to parents — Métis father applied to challenge s. 3(1) of Child and Family Services Act as violating s. 15 of Canadian Charter of Rights and Freedoms on basis that its definitions of Indian, Native person and Native child did not extend to Métis children — Application granted — Finding child to be Indian or Native within restrictive meaning of s. 3(1) of Act had broad impact, triggering significant special protections at every stage of

intervention process — It was not clear that Society had treated child exactly as if he were Indian or Native so as to render constitutional challenge immaterial — Rights of both father and child were engaged in this case — Differential treatment resulting from definitions was not based on race or ethnicity but, respectively, on registration or eligibility for registration as status Indian and residence in remote First Nations communities designated as matter of Ministerial discretion — These bases were analogous grounds within meaning of s. 15(1) of Charter, as they were immutable and resulting from decisions made by ancestors or others that could not be changed by Aboriginal peoples affected — Legislative scheme clearly on its face created unfair and objectionable disadvantages for Métis children and their families by denying them access to numerous protections, advantages and benefits available to those who fell within definitions — Differential treatment did not correspond with actual needs and circumstances of Métis peoples, who required protections just as much as Indian and Native children and families — Father established that definitions of Indian, Native person and Native child violated s. 15(1) of Charter and no argument was made that this infringement could be saved under s. 1 of Charter — Appropriate remedy was to declare definitions invalid but suspend such declaration for 10 months to allow legislature to formulate constitutional solution, while granting individual remedy that child be treated as Indian or Native for purposes of these proceedings.

Constitutional law --- Charter of Rights and Freedoms — Nature of rights and freedoms — Equality rights — Miscellaneous

Children's Aid Society apprehended child at birth — Society brought motion for summary judgment motion in its application for Crown wardship without access to parents — Métis father applied to challenge s. 3(1) of Child and Family Services Act as violating s. 15 of Canadian Charter of Rights and Freedoms on basis that that its definitions of Indian, Native person and Native child did not extend to Métis children — Application granted — Métis were cultural distinct people, owed full rights and protections as indigenous peoples, grappling with unique set of disadvantages due to exclusion from Indian Act as well as general challenges faced by all Aboriginal peoples — Differential treatment of Métis as opposed to those Aboriginal children who met definitions were based on analogous grounds of registration or eligibility for registration as status Indian and residence in remote First Nations communities designated by Minister — Factual foundation establishing disadvantage did not need to be as strong where claim was based on legislation that clearly on its face created disadvantages or withheld advantages, as opposed to facially neutral legislation that indirectly created disadvantages — Legislative scheme clearly on its face created unfair and objectionable disadvantages for Métis children and their families by denying them access to numerous protections, advantages and benefits available to those who fell within definitions — Disadvantage to Métis children was clear and discernible through logical reasoning — Requiring father to obtain social science evidence and empirical data on actual outcomes of children protection proceedings would effectively preclude remedy for denial of equal protection — Father established that definitions of Indian, Native person and Native child violated s. 15(1) of Charter.

Constitutional law --- Charter of Rights and Freedoms — Nature of remedies under Charter — General principles

Children's Aid Society apprehended child at birth — Society brought motion for summary judgment motion in its application for Crown wardship without access to parents — Métis father applied to challenge s. 3(1) of Child and Family Services Act as violating s. 15 of Canadian Charter of Rights and Freedoms on basis that its definitions of Indian, Native person and Native child did not extend to Métis children — Application granted — Father established that definitions of Indian, Native person and Native child violated s. 15(1) of Charter — Appropriate remedy was to declare definitions invalid but suspend such declaration for 10 months to allow legislature to formulate constitutional solution, while granting individual remedy that child be treated as Indian or Native for purposes of these proceedings — Definitions were foundation blocks for comprehensive, detailed framework for protection of children with Indian or Native status such that implications of decision would be wide-ranging — Resolution of constitutional problem would require careful consideration and consultation among legislators, policy-makers, child welfare professionals and Aboriginal groups — It was most appropriate to allow Legislature necessary time to formulate new framework to make legislation compliant with s. 15(1) of Charter — Legislature might want to consider question of whether decision had broader implications for other Aboriginal children or families who did not fall within definitions — Crown would be granted leave to bring motion to extend 10-month deadline for crafting solution, but not until close to end of period and supported by evidence regarding steps already taken to formulate solution.

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v. Beckman) 295 B.C.A.C. 1, *(*sub nom. *Little Salmon/Carmacks First Nation v. Beckman)* 501 W.A.C. 1 (S.C.C.) — referred to

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Statutes considered:

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s. 1(b) — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 2(b) — considered

s. 11 — considered

s. 15 — considered

s. 15(1) — considered

s. 24(1) — considered

Child and Family Services Act, R.S.O. 1990, c. C.11

Generally — referred to

Pt. X — referred to

s. 1 — considered

s. 1(2) — considered

s. 1(5) — considered

s. 3(1) "Indian" — considered

s. 3(1) "native child" — considered

s. 3(1) "native person" — considered

s. 3(3) — considered

s. 6 — considered

s. 7 — considered

s. 20(4) — considered

s. 34(10) — considered

s. 36(4) — considered

s. 37(3) — considered

s. 37(4) — considered

s. 37(5) — considered

s. 39(1) ¶ 4 — considered

s. 47(2) — considered

s. 51(3.1) [en. 2006, c. 5, s. 8(3)] — considered

s. 56 — considered

s. 57(4) — considered

s. 57(5) — considered

s. 58 — considered

s. 58(4)(d) — considered

s. 59 — considered

s. 61(2) — considered

s. 61(7) — considered

s. 61(8.1) [en. 2006, c. 5, s. 19(2)] — considered

s. 61(8.4) [en. 2006, c. 5, s. 19(2)] — considered

s. 63.1 ¶ 3 [en. 2006, c. 5, s. 21] — considered

s. 64(4) — considered

s. 64(5) — considered

s. 65.1(4) [en. 2006, c. 5, s. 24] — considered

s. 65.1(6) [en. 2006, c. 5, s. 24] — considered

s. 69(1) — considered

s. 136(1) — referred to

s. 141.2(1) [en. 2006, c. 5, s. 35] — referred to

s. 141.2(2) [en. 2006, c. 5, s. 35] — referred to

s. 141.2(3) [en. 2006, c. 5, s. 35] — referred to

s. 153.6(1) [en. 2006, c. 5, s. 40] — referred to

s. 209 — considered

s. 211(1) — considered

s. 211(2) — referred to

s. 211(2)(c) — considered

s. 212 — considered

s. 213 — considered

Citizenship Act, R.S.C. 1985, c. C-29

Generally — referred to

Constitution Act, 1867, (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5

s. 91 ¶ 24 — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44

Pt. I — referred to

s. 35 — considered

s. 35(1) — considered

s. 35(2) — considered

s. 52 — considered

s. 52(1) — considered

s. 52(2) — considered

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

s. 718.2(e) [en. 1995, c. 22, s. 6] — considered

Indian Act, R.S.C. 1970, c. I-6

Generally — referred to

Indian Act, R.S.C. 1985, c. I-5

Generally — referred to

s. 2(1) "Indian" — considered

Metis Settlements Act, R.S.A. 2000, c. M-14

Generally — referred to

Unemployment Insurance Act, R.S.C. 1985, c. U-1

Generally — referred to

Treaties considered:

United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295

Generally — referred to

Regulations considered:

Child and Family Services Act, R.S.O. 1990, c. C.11

Procedures, Practices and Standards of Service for Child Protection Cases, O. Reg. 206/00

Generally — referred to

s. 6 — considered

***Deborah L. Chappel J.*:**

PART I: INTRODUCTION

1 This case is about a seventeen month old boy, E.D.V., born April 29, 2015. E.D.V. was apprehended at birth by the Applicant Catholic Children's Aid Society of Hamilton ("the Society") and has remained in foster care on a consistent basis since that time. The Respondents G.H. and T.V. are the mother and father of E.D.V. This case is also about the equality rights of Métis children and their families in the child protection context in Ontario, and whether the provincial government is respecting those rights. It is an important opportunity for this province to demonstrate its commitment to act upon the Calls to Action that the Truth and Reconciliation Commission of Canada issued in 2015.

2 The Society commenced a Protection Application regarding E.D.V. on May 5, 2015, requesting an order for Crown wardship without access to the Respondents. It decided to pursue a Summary Judgment Motion in relation to that application in February 2016. In the context of the Summary Judgment Motion, the Respondent father T.V. argued that E.D.V. is a Métis child, and that as such, he should be treated in the same manner as children who fall within the definitions of Indian, Native person and Native child under the *Child and Family Services Act*, R.S.O. 1990, c. C-11, as amended (the "*CFSA*"). All parties concede that Métis children do not fall within the scope of those definitions as they now stand, and that E.D.V. therefore does not have Indian or Native status within the meaning of the *CFSA.* However, T.V. alleges that the definitions of Indian, Native person and Native child in the *CFSA* violate section 15(1) of the *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11 (the "*Charter*") on the basis that they do not extend to Métis children. T.V. served and filed a Notice of Constitutional Question outlining the specifics of his constitutional challenge dated May 19, 2016. He later filed an amended Notice of Constitutional Question dated June 6, 2016. He seeks an order pursuant to section 52(1) of the *Constitution Act, 1982* declaring the definitions of Indian, Native person and Native child invalid and suspending the declaration of invalidity for a period of time, as well as an individual remedy pursuant to section 24(1) of the *Charter* directing that E.D.V. be treated as if he were an Indian, Native person or Native child for the purposes of these child protection proceedings.

3 The Society advised that it was not taking a formal position on whether the definitions of Indian, Native person and Native child violate section 15(1) of the *Charter.* However, it opposed the relief sought on two grounds. First, it argued that it is unnecessary to deal with the constitutional issues, since the Society has in all material respects treated E.D.V. as if he were Indian or Native. In addition, it submitted that the only two Métis organizations that have had a connection with this family have chosen not to participate in this proceeding and have not advanced an alternative, culturally appropriate plan for E.D.V. Accordingly, the argument is that finding E.D.V. to have Indian or Native status would not have any impact whatsoever on the outcome of the case. The Society's second argument is that T.V. has not adduced the necessary evidence to support a finding that Métis children are suffering discriminatory disadvantage as a result of the definitions of Indian, Native person and Native child under the *CFSA.*

4 Unfortunately, as detailed below, the Summary Judgment Motion had to be adjourned many times in order to deal with various issues. At the court appearance on June 3, 2016, I scheduled a hearing to address the constitutional issues

raised in T.V.'s Notice of Constitutional Question, whether E.D.V. is an Indian, Native person or Native child within the meaning of the *CFSA*, and if so, which organization or person should be served with the documents filed in relation to the Protection Application as the representative of the child's community.

5 The issues to be determined in this case are as follows:

1. What are the criteria under the *CFSA* for finding a child to be an Indian, Native person or Native child, and what are the implications of such a finding?

2. Is it unnecessary to deal with the constitutional issues in this case, on the basis that the Society has in all respects treated E.D.V. as if he were Indian or Native? For the reasons set out below, I have concluded that it is necessary to deal with the constitutional issues that T.V. has raised.

3. Whose equality rights are at stake in this case? As discussed in further detail below, I have concluded that this case involves the equality rights of both T.V. and the child E.D.V.

4. Do the definitions of Indian, Native person and Native child violate section 15(1) of the *Charter* on the basis that they do not include Métis children? For the reasons set out below, I conclude that the definitions infringe section 15(1).

5. Is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society pursuant to section 1 of the *Charter?* The onus is on the party seeking to uphold the constitutionality of a law to establish that a violation is saved by section 1. The Attorney Generals of Canada and Ontario chose not to participate in this hearing, and the Society did not address the section 1 issue. Accordingly, I have concluded that the violation is not saved by section 1.

6. What is the appropriate remedy for the *Charter* breach? As detailed later in these Reasons, I have determined that the most appropriate remedy in this case is to declare the definitions of Indian, Native person and Native child as set out in section 3(1) of the *CFSA* to be invalid pursuant to section 52(1) of the *Constitution Act, 1982* on the basis that they infringe section 15(1) of the *Charter*. However, I am suspending the declaration of invalidity for a period of 10 months, until August 11, 2017, to allow the Ontario Legislature an opportunity to remedy the constitutional problem. Given that a suspended declaration of invalidity does not assist E.D.V. and T.V., I have also granted T.V. an individual remedy pursuant to section 24(1) of the *Charter*, in the form of an order that for the purposes of the Protection Application and any subsequent child protection proceedings, E.D.V. shall be treated as if he were an Indian, Native person or Native child.

7. Who is the representative of E.D.V.'s Métis community who should be served with the documents relating to the Protection Application? I have determined that the child's Métis community is the Eastern Woodlands Métis of Nova Scotia, that an appropriate representative of that community has been served, and that the community has chosen not to participate in this proceeding. Accordingly, I have determined that there are no further service requirements in this case.

PART II: BACKGROUND AND HISTORY OF COURT PROCEEDINGS

6 I make the findings of fact set out in this Part regarding the background in this matter based on the evidence adduced at the hearing.

7 As noted above, G.H. is the mother of E.D.V. and T.V. is the child's father. G.H. has two older children from a previous relationship, I.M., born October 16, 1998, and P.M., born November 16, 2001. The Respondents G.H. and T.V. are the biological parents of two other children, namely A.V., born March 29, 2007, and T.V., born June 21, 2008. The Society has a longstanding history of involvement with this family dating from 2008. It eventually commenced a Protection Application respecting E.D.V.'s siblings on June 29, 2012. In the context of that application, McLaren, J.

made a final order on February 11, 2013 providing for E.D.V.'s four older siblings to remain in care until March 15, 2013, and to then return to the care of G.H. and T.V. subject to Society supervision. On that date, McLaren, J. also made a finding that those four children were not Indian or Native children within the meaning of the *CFSA*.

8 The Society has remained involved with this family through court intervention on a consistent basis since June 2012. The four older children were apprehended from the care of G.H. and T.V. in July 2014. I.M. was returned to the care of G.H. and T.V. on a temporary basis on February 2, 2015, and on April 27, 2015, Gordon, J. granted a final order providing for him to remain in their care subject to Society supervision for six months. That order was extended for a further period of six months on March 21, 2016. The other three children, P.M., A.V. and T.V., were made Crown wards by order of Brown, J. dated September 3, 2015. Subsequently, on October 15, 2015, I made a final order addressing the issue of access to those children.

9 As previously noted, E.D.V. was apprehended on April 30, 2015 based on the history of concerns respecting the Respondents in relation to their four older children. The Society commenced the Protection Application herein respecting E.D.V. on May 5, 2015, requesting an order for Crown wardship without access. On that date, Brown, J. granted a temporary order providing for the child to remain in care, with access to the parents in the discretion of the Society and supervised in the Society's discretion.

10 The Society commenced the Summary Judgment Motion respecting E.D.V. in February, 2016, requesting an order for Crown wardship without access. On February 12, 2016, the motion was scheduled for a hearing on the Long Motions sittings commencing March 21, 2016. Subsequently, on March 11, 2016, T.V.'s counsel obtained an order removing herself as counsel of record for T.V. The Summary Judgment Motion was called in for a hearing before me on March 30, 2016. At that time, T.V. indicated that he was experiencing difficulties retaining counsel. In addition, he argued that the hearing could not proceed because he had received a notice from the Motherisk review committee that the child protection proceedings respecting his children were under review. Finally, T.V. submitted that he was a card holding member of the Eastern Woodlands Métis of Nova Scotia, and that as such, E.D.V. was also Métis. He stated that he had advised the Society of E.D.V.'s Métis status many times, and submitted that in his view, E.D.V. should be treated as an Indian or Native child within the meaning of the *CFSA*. T.V. requested an adjournment of the Summary Judgment Motion to allow him further time to obtain legal representation and for the Society to address the other issues that he had identified.

11 The concerns relating to the Motherisk review were resolved at the appearance on March 30, 2016, but I concluded that an adjournment of the Summary Judgment Motion was required to address the other issues that T.V. had raised. Therefore, I adjourned the Motion to April 27 and April 28, 2016. I ordered that the statutory findings, including whether E.D.V. has Indian or Native status, would be addressed on April 27, 2016 and that the issues of placement and access would be addressed on April 28, 2016. Given that one of the issues was whether a Métis child qualified as an Indian or Native child or person within the meaning of the *CFSA*, I also directed the Society to serve the Métis Nation of Ontario and the Eastern Woodlands Métis of Nova Scotia with a copy of my endorsement and correspondence indicating that the issue of E.D.V.'s status was to be determined on April 27, 2016. The Society subsequently complied with this direction on March 31, 2016. I included the Métis Nation of Ontario in this direction because I was aware from the evidence filed by the Society that this organization had been involved in providing services for the family. At the court appearance on March 30, 2016, I further directed that if either the Métis Nation of Ontario or the Eastern Woodlands Métis of Nova Scotia wished to take a position respecting the Indian or Native status issue, they should send a representative to appear on April 27, 2016 to address the issue of standing and to adduce evidence and make submissions on the subject if appropriate. My order included a direction that if the Métis Nation of Ontario or the Eastern Woodlands Métis of Nova Scotia intended to participate in the hearing, they were to give notice of their intention to the Society by April 13, 2016.

12 The Society faxed a copy of my endorsement dated March 30, 2016 to the Métis Nation of Ontario's Hamilton office on March 31, 2016. Ms. Lisa Scott of that office forwarded the endorsement and the Society's correspondence to the organization's Toronto office shortly thereafter. On April 10, 2016, Ms. Jean Appel, the Métis Healthy Babies Healthy Children coordinator, sent correspondence to the Society confirming that the Métis Nation of Ontario was aware that

T.V. self-identified as a Métis person connected with the Eastern Woodland Métis of Nova Scotia, and confirmed that she was the proper person with whom the Society should correspond in relation to the Métis Nation of Ontario, this family and the court proceedings. Ms. Appel indicated in this correspondence that the Métis Nation of Ontario would not be seeking standing or taking an interest in the proceedings on the issue of E.D.V.'s status as an Indian or Native child or person within the meaning of the *CFSA*.

13 When the Summary Judgment Motion returned before me on April 27, 2016, T.V. advised that his appeal to Legal Aid respecting his legal representation in this proceeding was still outstanding. In addition, he raised the argument that the definitions of Indian, Native person and Native child in section 3(1) of the *CFSA* violate E.D.V.'s equality rights pursuant to section 15(1) of the *Charter* on the basis that they do not extend to Métis children. He relied on the Supreme Court of Canada decision in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12 (S.C.C.), which had been released on April 14, 2016, as being relevant to his constitutional challenge. No representatives of the Métis Nation of Ontario or the Eastern Woodlands Métis appeared in court. The Eastern Woodlands Métis of Nova Scotia did not respond to the Society's correspondence advising it of the issues to be determined at the hearing and inviting them to participate.

14 At the hearing on April 27, 2016, I concluded that T.V. was actively attempting to address his legal representation dilemma, and that it was important that he have legal representation to advance his constitutional claim and present his defence on the Summary Judgment motion. Furthermore, although the Métis organizations had not up until that point demonstrated an interest in participating in the proceedings, I noted that the deadline of April 13, 2016 that I had previously set for them to give notice of their intention to participate pre-dated the release of the *Daniels* decision. Given the importance of the constitutional issue that T.V. was raising for Métis children and their families, and in particular members of the Eastern Woodlands Métis of Nova Scotia, I made an order adding that community as a party to the Summary Judgment Motion with respect to the finding of Indian or Native status, and directing the Society to serve the community with all of the materials relating to the Summary Judgment Motion. In addition, I ordered that a representative of the community could participate in the hearing via skype, provided that they advised the Trial Coordinator in writing of their request to do so by May 5, 2016. My hope was that these measures would encourage and facilitate the participation of the Métis community in the hearing. I also directed that the Society send a copy of my endorsement to the Attorney General of Canada and the Attorney General of Ontario, so that they would have advance notice of T.V.'s intention to serve and file a Notice of Constitutional Question and the nature of the issues to be determined. The Society complied with all of the directions that I made on April 27, 2016 regarding service of materials.

15 On May 5, 2016, counsel for the Society, Mr. Kamal, spoke with Ms. Mary Lou Parker, who identified herself as the Grand Chief of the Eastern Woodlands Métis of Nova Scotia. During that conversation, Ms. Parker indicated that the community would not be seeking to intervene in the hearing, that it did not have any Métis foster homes or placements for E.D.V., and that it was supporting the Society's plan for adoption for the child. Ms. Parker reiterated these points during a subsequent conversation with Mr. Kamal on June 1, 2016.

16 This matter returned before me on May 9, 2016 to be spoken to. T.V. had finally been able to secure legal counsel, Mr. Williams, who appeared on May 9, 2016. Mr. Williams had just been retained and had not had an opportunity to prepare materials on behalf of T.V. The Eastern Woodlands Métis of Nova Scotia did not send a representative to participate on that date and did not request the right to participate by skype. Ms. Parker sent correspondence to the court on that date confirming that the Eastern Woodlands Métis of Nova Scotia would not be participating in the hearing. I noted in court on May 9, 2016 that the issue of whether E.D.V. was a Native or Indian child under the *CFSA* must be determined before proceeding to the disposition issues in the case, given that there are special considerations that apply with respect to disposition in cases involving Indian and Native children. I set a deadline of May 20, 2016 for T.V. to serve and file his Notice of Constitutional Question and his responding materials for the Summary Judgment Motion. The matter was adjourned to June 3, 2016 to allow the Attorney Generals of Canada and Ontario to determine whether they wished to participate. An adjournment was also required because the Society had only served some of the Summary

Judgment Motion materials on the Eastern Woodlands Métis of Nova Scotia. On this date, I made a finding on consent of all parties finding that E.D.V. is a Métis child, and I gave written reasons for this finding on May 13, 2016.

17 When the matter returned before me on June 3, 2016, T.V. had served and filed his Notice of Constitutional Question on all parties, including the Eastern Woodland Métis of Nova Scotia. Again, nobody appeared on behalf of the Eastern Woodlands Métis of Nova Scotia, despite the fact that the community had again been given notice of the return date. Nobody appeared on behalf of the Métis Nation of Ontario, despite the fact that notice had been given to that organization on March 31, 2016 that the issue of E.D.V.'s Native or Indian status under the *CFSA* was to be determined. Similarly, nobody appeared on behalf of the Attorney Generals of Canada or Ontario. However, I did not have proof of service on the Attorney Generals and I therefore ordered counsel for T.V. to file the relevant affidavits of service. I also granted T.V. leave to serve and file an amended Notice of Constitutional Question, which he subsequently filed on June 6, 2016. I scheduled a hearing for June 27, 2016 to determine the constitutional issues, whether E.D.V. is an Indian, a Native person or a Native child within the meaning of the *CFSA*, and if so, which organization or person, if any, should be served with the documents relating to the Protection Application. I directed the Society to serve the Eastern Woodlands Métis of Nova Scotia with a copy of my endorsement so that it would be aware of the return date. The Society complied with this direction. Finally, I encouraged counsel for the Respondent T.V. to explore whether there were any other Métis organizations that wished to participate in the hearing of the constitutional issues.

18 Following the court appearance on June 3, 2016, an articling student with Mr. Williams' office made numerous efforts to determine whether any Métis organizations or groups would be interested in participating in the hearing of the constitutional issues to be determined in this case or in providing assistance and support to T.V. in addressing the issues. Those efforts are outlined in detail in his affidavit sworn June 13, 2016. The efforts were extensive, and included two emails to the Director of the Métis Nation of Ontario, emailing the President of a Hamilton Métis organization, emailing and calling legal counsel with the Legal Aid Ontario Aboriginal and Legal Services Department, connecting with the Indigenous Bar Association, contacting the Métis National Council, and calling Indian and Northern Affairs Canada to obtain information about potential Métis contacts. On June 8, 2016, Mr. Williams' articling student provided legal counsel for the Métis Nation of Ontario with materials to review, and on June 13, 2016, he sent correspondence and materials to the newly elected president of the Métis Nation of Ontario so that she could decide if that organization would consider intervening.

19 The hearing finally commenced before me on June 27, 2016. The Attorney Generals of Canada and Ontario chose not to participate in the hearing on the constitutional issues, and nobody appeared on behalf of the Eastern Woodlands Métis of Nova Scotia. Furthermore, no representatives from any Métis group appeared, despite the numerous efforts on the part of counsel for T.V. to seek assistance and support from various Métis groups and representatives. On consent, a letter from legal counsel for the Métis Nation of Ontario, dated June 27, 2016 was marked as an Exhibit for the sole purpose of confirming that that organization had decided not to seek intervenor status at the hearing. In that correspondence, counsel indicated that the Métis Nation of Ontario could change its position regarding intervention if it were in receipt of evidence indicating that T.V. or E.D.V are citizens of either an Ontario Métis community or citizens of the broader Métis Nation. This letter was written and sent on the morning of the actual court hearing. The matter proceeded notwithstanding the Métis Nation of Ontario's indication of a possible interest in becoming involved, since that organization had been on notice since March 31, 2016 that the issue of E.D.V.'s Native or Indian status was to be addressed in this proceeding. Furthermore, by that point, the Summary Judgment Motion had been on adjournment since February 12, 2016.

20 At the hearing on June 27, 2016, the Society adduced evidence that it had consulted with both the Eastern Woodlands Métis of Nova Scotia and the Métis Nation of Ontario about whether either was aware of any potential placements for E.D.V. with Métis families. Both organizations advised the Society that they did not have any placements to propose for the child.

PART III: ANALYSIS

ISSUE #1: THE CRITERIA FOR FINDING A CHILD TO BE INDIAN OR NATIVE UNDER THE CFSA, AND THE SIGNIFICANCE OF SUCH A FINDING

21 The starting point for the analysis in this case is section 3(1) of the *CFSA*, which sets out the definitions of Indian, Native person and Native child. The definitions of these terms in the *CFSA* are very restrictive and clearly do not include all individuals with Aboriginal heritage (*Children's Aid Society, Region of Halton v. M. (M.)*, 2016 ONCJ 323 (Ont. C.J.), at para. 48 ("*M. (M.)*"); *Children's Aid Society of Ottawa v. F. (K.)*, 2015 ONSC 7580, 2015 CarswellOnt 18678 (Ont. S.C.J.) at para. 41 ("*F. (K)*"). Dealing first with the term Indian, this is defined in section 3(1) as having the same meaning as under the *Indian Act*, R.S.C. 1970, c. I-5. Section 2(1) of the *Indian Act* provides that Indian means a person who pursuant to the Act is registered as an Indian or is entitled to be registered as an Indian. Sections 6 and 7 of the Act set out a lengthy and very complicated set of criteria for determining whether an individual is entitled to be registered as an Indian under the Act. Starr, J. described those criteria in detail in *M. (M.)* In *F. (K.)*, MacKinnon, J. commented on the criteria for registration under the *Indian Act*, and noted that eligibility for registration is not necessarily based on ethnicity or ancestry.

22 The phrase "Native person" is defined in section 3(1) of the *CFSA* as a person who is a member of a Native community but is not a member of a band. "Native child" is defined as having a corresponding meaning. It is important to note that the various provisions in the *CFSA* relating to children who qualify as Native under the Act use the phrases "Native child," "Native children" or a child who is a "Native person." Section 3(1) further defines "Native community" as meaning a community designated by the Minister of Children and Youth Services ("the Minister") under section 209 of Part X (Indian and Native Child and Family Services) of the Act. Section 209 stipulates that the Minister may designate a community, with the consent of its representatives, as a Native community for the purposes of the Act.

23 The definitions of Native person and Native child under the *CFSA* are very narrow. They do not extend to all individuals who self-identify as being Aboriginal. The Act does not set out any criteria for the Minister to consider in deciding whether to designate an Aboriginal community as a Native community pursuant to section 209 of the Act. However, the inclusion of section 209 in Part X of the Act relating to Indian and Native Child and Family Services indicates that one of the reasons for designating communities as Native under the Act is to allow for the provision of child protection services for those communities by a Native child and family service authority. Section 211(1) of the Act stipulates that a Native community may designate a body as a Native child and family service. In the event that a Native community makes a designation pursuant to section 211(1), the Minister is required, at the Native community's request, to enter into negotiations for the provision of services by the designated body (section 211(2)). In *F. (K.)*, MacKinnon, J. concluded based on evidence from the Ontario Ministry of Children and Youth Services that the intention of allowing the Minister to designate communities as being Native under section 209 was to allow the Minister to designate First Nations communities that are located in the remote north on Crown lands, and that are operating in a manner similar to Indian bands, but that do not have band status under the *Indian Act* (at para. 50).

24 As Starr, J. noted in *M. (M.)*, the Ministry has not published a list of the Aboriginal communities that have been designated as Native communities pursuant to section 209 of the Act. In that case, the court found based on evidence from the Ministry of Child and Youth Services that to date, only thirteen communities in the Districts of Thunder Bay, Ontario and Algoma, Ontario have been designated as Native communities under the Act. The rationale for making the designations was to allow for the designation of Dilico Ojibway Child and Family Services as a Children's Aid Society for the purposes of providing child protection services to members of the communities (at para 53). Starr, J. was not able to make a finding regarding the specific communities that have been designated based on the evidence before her. In this proceeding, the Society adduced evidence in the form of an email from Mr. Peter Kiatipis, the Director of the Child Welfare Secretariat for the Ministry of Child and Youth Services, confirming that the thirteen designated communities are:

Michipicoten

Fort Williams

Whitesand

Gull Bay

Red Rock

Rocky Bay

The Lake Nipigon Ojibways

Longlac #54

Ginoogaming,

Pays Plat

The Ojibways of Pic River

Pic Mobert

Sandpoint

25 The implications of finding a child to be Indian or Native within the meaning of the *CFSA* are broad and very significant for the child and their family members. Starr, J. sets out an excellent summary of these implications in *M. (M.)* As she noted in that case, the *CFSA* identifies the cultural background and ethnicity of all children as an important factor in child protection proceedings. This is apparent from numerous provisions in the Act, including the following:

1. Section 1(2) of the Act provides that one of the objectives of the Act is to recognize that wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

2. Section 37(3) stipulates that the criteria that the court is required to consider in determining the "best interests of the child" include the child's cultural background, their relationships and emotional ties to members of the child's extended family or community.

3. Section 51(3.1), relating to orders for temporary placement, provides that before making a temporary order placing a child in the care of the Society, the court shall consider whether it is in the best interests of the child to make an order placing the child with a relative or a member of the child's extended family or community. Section 3(3) states that for the purposes of the Act, members of a child's community include persons who have ethnic, cultural or religious ties in common with the child or with a parent, sibling, or relative of the child.

4. Section 56 provides that the Plan of Care that the Society must file in support of a final order must include a description of the arrangements made or being made to recognize the importance of the child's culture and to preserve the child's heritage, traditions and cultural identity.

5. Section 57(4), relating to final disposition orders, provides that there the court decides that it is necessary to remove the child from the care of the person who had charge of them immediately before intervention, the court shall, before making an order for Society or Crown wardship, consider whether it is possible to place the child with a relative, neighbour or other member of the child's community or extended family.

6. Section 61(2) states that a Society having care of a child shall choose a residential placement for the child that, where possible, respects the child's linguistic and cultural heritage.

26 While the provisions listed above reinforce the importance of every child's cultural background in the provision of child welfare services and in child protection proceedings, there are far more extensive legislative safeguards respecting the cultural heritage and traditions of Aboriginal children who fall within the definitions of Indian, Native person and Native child. The special protections for Indian and Native children are very significant and come into play at every stage of a child protection intervention, from the provision of voluntary services to the process of adoption planning once a child is made a Crown ward. The special benefits and protections that apply to children who are Indian or Native include the following:

1. Section 1 of the Act sets out the purposes of the Act, which inform the courts in interpreting and applying the provisions of the legislation. Section 1(5) of the Act stipulates that one of the purposes of the Act is to recognize that Indian and Native people should be entitled to provide, wherever possible, their own child and family services, and that all services to Indian and Native children and families should be provided in a manner that recognizes their culture, heritage and traditions and the concept of the extended family.

2. The phrase "extended family" is defined in section 3(1) to mean persons to whom a child is related by blood, through a spousal relationship or through adoption. However, in the case of a child who is an Indian or Native person, the phrase is more expansive and includes any member of the child's band or Native community.

3. There are numerous provisions in the Act which require that notice of important matters relating to children who are Indian or Native persons be given to the relevant Indian band or Native community. For example:

i. Section 20(4) provides that notice must be given to the relevant Indian band or Native community where alternative dispute resolution is being proposed for a child who is an Indian or Native person.

ii. Section 36(4) states that if a recommendation of the Residential Placement Advisory Committee is reviewed by the Child and Family Services Review Board, and the child in question is an Indian or Native person, a representative of the child's band or Native community is entitled to party status.

iii. Section 39(1)(4) provides that in child protection proceedings under Part III of the Act involving a child who is an Indian or Native person, a representative of the child's band or Native community is a party to the proceedings.

iv. Sections 64(5), 65.1(4) and 65.1(6) provide that an Indian band or Native community representative must be given notice of any Status Review proceedings relating to a child who is an Indian or Native person.

v. Section 58(4)(d) stipulates that notice of any access application respecting a child who is an Indian or Native person must be given to the band or Native community representative.

vi. Pursuant to section 61(7), a proposed removal of a Crown ward who is an Indian or Native person from a foster parent who the child has have lived with for at least two years requires at least 10 days advance written notice to the relevant band or native community representative. Furthermore, pursuant to sections 61(8.1) and (8.4), the band or Native community representative must be given notice of an application for review of a proposed removal of the child's placement, and is a party to such a hearing.

4. In addition, there are a number of provisions in the *CFSA* that grant Indian band and Native community representatives the right to initiate court proceedings respecting children who are Indian or Native persons. For example:

i. A representative chosen by an Indian child's band, or by a member of a child's Native community, is entitled to make an application for access under section 58 of the Act.

ii. Section 64(4) provides that a representative of an Indian child's band or a Native child's community may bring a Status Review application respecting the child.

iii. Section 69(1) stipulates that an appeal from a child protection order respecting a child who is an Indian or Native person may be made by a band representative or member of the Native community.

5. The Act also imposes a duty upon child protection agencies to consult regularly with Indian band and Native community representatives about the needs of Indian and Native children. Section 213 stipulates that a society that provides services or exercises child protection powers with respect to Indian and Native children must regularly consult with the child's band or Native community about the provision of the services or the exercise of the powers, and about matters affecting the children.

6. The Act includes provisions that require the court to specifically address its attention to a child's Aboriginal culture and heritage in cases involving Indian and Native children. For instance:

i. Section 34(10) of the Act provides that in reviewing a residential placement of a child, the Residential Placement Advisory Committee must in cases involving children who are Indian or Native persons "consider the importance, in recognition of the uniqueness of Indian and Native culture, heritage and traditions, of preserving the child's cultural identity."

ii. Section 37(4) of the Act provides that in a child protection hearing involving a child who is an Indian or Native person, the best interests analysis must include consideration of the importance, in recognition of the uniqueness of Indian and Native culture, heritage and traditions, of preserving the child's cultural heritage.

7. The Act also includes special protections for Indian and Native children aimed at ensuring that they remain within their community or that they are placed in a culturally appropriate home. For instance:

i. Section 37(5) indicates that in a case involving a child who is an Indian or Native person, a place of safety for the child includes the home of any member of the child's band or Native community, provided that the Society involved approves it as a safe home environment.

ii. Pursuant to section 51(3.1) relating to temporary orders, the court is required in cases involving Indian or Native children to consider whether it is in the child's best interests to place the child with "extended family" which, as indicated above, includes members of the child's band or Native community.

iii. Section 57(5) establishes that in a Protection Application involving a child who is an Indian or Native person, the court shall place the child with a member of the child's extended family, a member of their band or Native community or another Indian or Native family, "unless there is a substantial reason for placing the child elsewhere." In *Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew*, 2014 ONCA 646 (Ont. C.A.), the Ontario Court of Appeal held that this provision and section 37(4) do not require that an Indian or Native child's culture, heritage and traditions be given "super weighted" consideration in child protection proceedings in comparison to other factors that are relevant to the best interests analysis. However, this decision does not detract from the fact that these matters must be specifically considered by the judge in carrying out the best interests analysis.

iv. Section 61(2), relating to residential placement of children, provides that in cases involving children who are Indian or Native persons, the Society must choose a placement that is with a member of the child's extended family, band or Native community or another Indian or Native family, if possible.

v. Pursuant to Part X of the *CFSA*, the band of an Indian child or the Native community of a Native child can place the child with a person who is not the child's parent, according to the custom of the child's band or Native community, and declare that the child is "being cared for under customary care" (s. 212). When such a declaration of customary care is made, a Society or agency may grant a subsidy to the person caring for the child.

vi. Section 63.1(3) stipulates that where a child is made a Crown ward, the Society shall make all reasonable efforts to assist the child to develop a positive, secure and enduring relationship within a family through either adoption or a custody order. However, in the case of a child who is an Indian or Native person, this obligation includes a plan for customary care as defined in Part X as one of the permanency options that the Society is specifically required to explore.

27 The summary outlined above focusses primarily on the special provisions relating to Indian and Native children that are relevant to child protection proceedings. However, there are numerous other provisions in the *CFSA* that set out special protections for Indian and Native children in the context of applications for openness orders (see sections 136(1) and 153.6(1)) and in adoption planning (see sections 141.2(1)(2) and (3)). Most notably, with respect to adoption planning of a Crown ward who is an Indian or Native person, the Society must give written notice of its intention to place the child for adoption to the band or Native community representative, and the band or community is then entitled to prepare and submit its own plan for the care of the child to the Society. The Society is required by section 141.2(3) to consider the plan of the band or Native community before placing the child with another person for adoption. In addition, the Regulations under the *CFSA* include numerous additional safeguards relating to Indian and Native children. Of particular significance for the purposes of child protection proceedings is Section 6 of the *Regulation Respecting Procedures, Practices and Standards of Service for Child Protection Cases*, O. Reg. 206/00, which provides that the Society must use best efforts to consult with the Indian band or Native community representative before conducting an evaluation regarding a proposed placement of a child who is an Indian or Native person with a relative or member of the child's extended family or community.

ISSUE #2: IS IT UNNECESSARY TO DEAL WITH THE CONSTITUTIONAL ISSUES RAISED BY T.V.

A. Position of the Society

28 As noted above, the Society took the position at this hearing that I should not deal with the s. 15(1) *Charter* issue in this case because it is unnecessary to do so. It submitted that a determination of whether E.D.V. is Indian or Native within the meaning of the *CFSA* is inconsequential to the outcome of this case, since the Society has serviced E.D.V. and his family in all respects as if E.D.V. were a Native or Indian child and it will continue to do so through the adoption planning process. Furthermore, it emphasized that the two Métis organizations that have been involved with T.V. and have been put on notice of this proceeding have chosen not to participate and are not presenting any culturally appropriate placement alternatives for the child. For the reasons that follow, I do not accept these submissions, and I decline to dismiss the Notice of Constitutional Question on these grounds.

B. Analysis

29 Counsel for the Society referred me to *Phillips v. Nova Scotia (Commissioner, Public Inquiries Act)*, [1995] 2 S.C.R. 97 (S.C.C.) in support of the Society's position that it is unnecessary to deal with the constitutional issues in this case. The issue in that case was whether the Respondents' section 11 *Charter* rights would be infringed by allowing an inquiry hearing relating to the mining disaster to proceed prior to the hearing of criminal charges against them relating to the tragedy. The concern that the Respondents raised was that the publicity surrounding the inquiry hearing would interfere with their ability to have a fair criminal trial before a jury. However, by the time the appeal was to be argued, the Respondents had elected to proceed with a criminal trial by judge alone. Accordingly, the factual foundation upon which their *Charter* claim had been based had disappeared. The Supreme Court of Canada declined to deal with the

constitutional issue on two grounds. First, it relied on the principle that the court should not decide issues of law that are not necessary to a resolution of an appeal, and it held that this is particularly true with respect to constitutional issues. It stressed that the policy dictating restraint in constitutional cases is sound, noting that "unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen" (at para. 9) (see also *John Deere Plow Co. v. Wharton* (1914), [1915] A.C. 330 (Jud. Com. of Privy Coun.); *Ontario (Attorney General) v. Winner*, [1951] S.C.R. 887 (S.C.C.)). The court also declined to deal with the constitutional issue on the basis that the factual foundation upon which the legal proceeding had been launched had ceased to exist. It held that this type of situation engages the doctrine of mootness, which dictates that the court should decline to exercise its discretion to answer moot questions unless "there is a pressing issue which will be evasive of review" (at para. 12). The court noted in this regard that it is inappropriate for the court to opine on a hypothetical situation and not a real controversy.

30 The circumstances in this case are distinguishable from those in *Phillips*. The factual foundation upon which the claim is based has not become moot, as occurred in *Phillips*, and I am satisfied that it is absolutely necessary to address the constitutional issue that has been raised for a number of reasons. First, section 47(2) of the *CFSA* requires that as soon as practicable after a Protection Application is commenced, and in any event before determining whether a child is in need of protection, the court *shall* (italics added) determine, *inter alia*, whether the child is an Indian or Native person, and if so, the child's band or Native community. The direction to make this finding is not optional; it is mandatory, and a failure to make the finding prior to making a protection finding constitutes a significant error of law. The Respondent T.V. has challenged the constitutionality of the definitions of Indian child, Native person and Native child on the basis that they are under-inclusive and should encompass Métis children. The mandatory nature of section 47(2), coupled with the nature of this constitutional challenge, render a determination of the constitutional issue unavoidable. The court cannot casually ignore the directive set out in section 47(2) on the basis of the Society's assurances that it has in all respects treated the child and his family as if they were Indian or Native.

31 There are additional reasons supporting the need to deal with the constitutional issue in this case. This hearing was scheduled to address the constitutional issues, whether E.D.V. is Indian or Native, and if so, what band or Native community should be served. The actual hearing of the Summary Judgment Motion to address the protection finding and disposition issues is yet to be scheduled. As outlined above, the issue of whether a child is Indian or Native within the meaning of the *CFSA* is a significant factor in carrying out the disposition analysis in a child protection proceeding. The remedies that are available to the court in this constitutional challenge include "reading in", which would result in Métis children being included in the definition of Indian child or Native person or child, or declaring that E.D.V. should in all respects be treated as if he is Native or Indian. A finding of Indian or Native status must be specifically considered by the court in the determination of the child's best interests. This is of particular significance in situations like in this case, where a parent of an Aboriginal child is seeking to have the child placed with them. The fact that the parent and the child share the same Aboriginal heritage may be an important consideration in assessing the merits of the parent's plan. A finding of Native or Indian status also calls into play the special disposition considerations set out in sections 37(4) and 57(5) of the Act. Accordingly, the court cannot carry out the best interests and placement analysis without determining whether the child is Indian or Native or should be treated as such. Counsel for the Society appeared to appreciate this fact when I pointedly asked if the Society was consenting for the purposes of the disposition hearing on the Summary Judgment Motion respecting E.D.V. that the court should apply the best interests and disposition criteria relating specifically to Indian and Native children to E.D.V. He clearly stated that there was no such consent.

32 The Society's position that the section 15(1) claim need not be addressed was based on the argument that the Society has in all respects treated E.D.V. as if he were Indian or Native, and that the outcome of the case would therefore be the same even if the special criteria relating to Indian and Native children were applied. Essentially, counsel invited me to determine on a summary judgment basis in the context of this hearing that all of the disposition criteria and considerations relevant to Indian and Native children have been addressed to the court's satisfaction, and that the application of those considerations and criteria would not result in any different disposition outcome. I decline to do so for two reasons. First, as I have already noted, I clearly defined the scope of this hearing at the court appearance on June 3, 2016. The issues that were to be addressed did not include a determination of whether the disposition considerations

relevant to Indian and Native children had been adequately addressed in the evidence, and if so, whether the application of those considerations would result in any different disposition in this case. The Society did not at that time request that the scope of the hearing be expanded to include those issues. To expand the scope of the hearing in the guise of a defence to the constitutional question, as the Society seeks to do, is in my view highly prejudicial and unfair to the Respondents. In any event, I reject the Society's argument on this point for a second reason. The evidence before me does not in fact support the Society's position that it has in all respects treated E.D.V. as if he were Indian or Native, or that a finding of Native or Indian status would not alter the outcome of the case. In support of its argument, the Society relied on evidence of the following:

1. Its efforts to engage the family in Aboriginal services since before the birth of E.D.V.;

2. The Society's regular communication with Aboriginal service providers involved with the family;

3. The efforts that the Society has made to provide services in a manner that is respectful of the family's culture and heritage;

4. The fact that the parents have not advanced any alternative placements for E.D.V. with families who have Aboriginal ancestry;

5. The Society's attempts to connect with the Métis Nation of Ontario and the Eastern Woodlands Métis of Nova Scotia, and the fact that neither organization has advanced alternative culturally appropriate caregivers for the child; and

6. Efforts that the Society intends to make to find culturally appropriate adoption placement for E.D.V. in the event that he is made a Crown ward without access.

33 While all of this evidence will be relevant to the disposition analysis, there is important evidence missing with respect to the criteria set out in section 57(5) of the *CFSA.* As previously noted, that section directs that where a child is Indian or Native, unless there is a substantial reason for placing the child elsewhere, the court shall place the child with a member of the child's extended family, a member of their band or community or another Indian or Native family. In *Children's Aid Society of Sudbury & Manitoulin (Districts) v. H. (J.)*, [2003] O.J. No. 6192 (Ont. C.J.), the court highlighted the different onus on the court pursuant to section 57(5) as opposed to section 57(4). Pursuant to section 57(4), the court is directed to consider several options, and is not required to prioritize one option among several feasible choices. By contrast, section 57(5) places a mandatory obligation on the court to prefer placement options that are most likely to safeguard a Native or Indian child's Aboriginal heritage. In order to meet this obligation, the court requires evidence about efforts that have been made to locate placements for the child with extended family, members of the child's band or Native community or another Indian or native family. Both the Society and the Respondents should proactively take reasonable efforts to locate those types of culturally appropriate placement alternatives and adduce evidence relating to those efforts. In this case, there is evidence in the Summary Judgment Motion materials of efforts made to find a culturally appropriate placement through the Eastern Woodlands Métis of Nova Scotia and the Métis Nation of Ontario. However, there is no evidence regarding broader efforts made to find placements with families that are Indian or Native. Again, these are issues that would need to be explored further at the protection and disposition hearing.

ISSUE #3: WHOSE CHARTER RIGHTS ARE ENGAGED IN THIS CASE?

34 In his Notice of Constitutional Question and Factum, T.V. has framed the constitutional challenge as involving a breach of the child E.D.V.'s rights. It is important to address at the outset of the *Charter* analysis whose *Charter* rights are at stake for two reasons. First, an attempt to challenge a law on the basis that it violates another person's *Charter* rights raises issues regarding standing. Second, the issue of whose rights are involved is relevant to the type of remedy that may be available to the claimant. As discussed in further depth in these Reasons, section 24(1) of the *Charter*, which is the remedy provision, can only be invoked by a claimant to enforce their own *Charter* rights. For the reasons that follow, I

conclude that although counsel for T.V. referred to E.D.V.'s section 15 equality rights in his materials and submissions, this case also involves T.V.'s own equality rights.

35 I have already discussed in these Reasons how the definitions of Indian child, Native person and Native child impact both children and their parents in numerous significant ways during the course of a child protection proceeding. For instance, the provisions requiring that a representative of the child's band or Native community be given notice and the right to participate in the proceedings increase the opportunities that considerations relating to the family's Aboriginal heritage will be brought to the forefront in the litigation. They support the interest of both the child *and* the parents in having their cultural heritage protected and given the appropriate weight in the child protection proceeding. The involvement of a band or community representative also allows for the possibility of another party supporting the parents' plan and position in the litigation. By way of further example, section 57(5) relating to the test for disposition in cases involving children who are Indian or Native is a means of ensuring that if at all possible, children who cannot remain with their parents are placed with another Indian or Native family. Again, these provisions protect both the child's *and* the parents' interests in protecting their Aboriginal heritage and familial and extended community ties. Furthermore, by creating a presumption in favour of family or community placements, the section also increases the chances of a parent being able to retain some form of contact with the child. This result flows from the differences in the test for access set out in section 59 of the *CFSA* in cases involving family and community placements as compared to situations where a child is made a Crown ward. These examples highlight how this case actually involves the interests and equality rights of both E.D.V. and the father T.V.

36 The Supreme Court of Canada's reasoning in *Benner v. Canada (Secretary of State)*, [1997] 1 S.C.R. 358 (S.C.C.) supports my conclusion that this case engages T.V.'s own rights under section 15(1). The claimant in that case challenged a provision of the federal *Citizenship Act* which provided that a child born outside of Canada before 1977 to a Canadian mother had to make an application to become a citizen, which involved undergoing a security check. He argued that this section violated section 15(1), since a child born outside of Canada to a Canadian father was automatically entitled to Canadian citizenship. An issue arose respecting the claimant's standing, since the impugned distinction created by the legislation applied to the parents of those applying for citizenship, and not to the applicants themselves. The court took a broader approach to the issue of whose rights were at stake, and concluded that the claimant's own rights were engaged since the provision in question directly burdened him and impacted his interests in a significant way. The court found the provision invalid on the basis that it breached the claimant's equality rights pursuant to section 15(1). As in *Benner*, the impugned definitions in this case impact the claimant's own rights and interests in a significant way.

ISSUE #4: DO THE DEFINITIONS OF INDIAN, NATIVE PERSON AND NATIVE CHILD UNDER THE CFSA INFRINGE S. 15(1) OF THE CHARTER?

A. Overview of the Parties' Positions

37 As noted previously in these Reasons, T.V. acknowledges that E.D.V. does not qualify as an Indian or Native person or child as those terms are currently defined in the *CFSA.* However, he argues that those definitions violate section 15(1) of the *Charter* on the basis that they do not extend to Métis children. Counsel for T.V. submitted that the definitions of Indian child, Native person and Native child create distinctions that discriminate against Métis children based on Aboriginal cultural background, and that such distinctions fall within the enumerated grounds of "race" and "ethnic origin" in section 15(1) of the *Charter.* In support of this position, he relies on the Supreme Court of Canada's decision in *Daniels*, where the court referred to the Métis as a "distinct people" (at para. 42) and reiterated its earlier comments in *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development)*, [2011] 2 S.C.R. 670 (S.C.C.) that the Métis are "widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities" (at para. 7). Alternatively, T.V. argues that the definitions discriminate against Métis children on analogous grounds. In this regard, he relies on *F. (K.)*, where MacKinnon, J. concluded that that the definitions of Indian child and Native child create distinctions based on grounds analogous to those listed in section 15(1).

38 T.V. submits that the distinctions created by the definitions of Indian child, Native person and Native child are discriminatory. He referenced the *CFSA* provisions that grant unique rights and protections to children who are Indian or Native and their families, which were specifically implemented to ensure that the Aboriginal heritage of these children is accorded special consideration in the context of child protection proceedings. His position is that the legislative provisions in the *CFSA* relating to Indian and Native children create a clear disadvantage on the face of the legislation for other Aboriginal children, including Métis children such as E.D.V.

39 The Respondent mother G.H. supported the arguments of T.V. and did not take an independent position on any of the issues.

40 Counsel for the Society relayed at the outset of the hearing that the Society is not taking a position on whether the definitions of Indian, Native person and Native child under the *CFSA* violate section 15(1) of the *Charter.* The Society takes the position that it has complied with the law as it currently stands, and that it will comply with whatever decision this court makes regarding the constitutional issue that T.V. has raised. However, the Society opposed the relief sought on the basis that T.V. did not adduce the necessary evidentiary foundation upon which to found a breach of section 15(1) of the *Charter.* Counsel for the Society submitted that the Supreme Court of Canada has been vigilant about requiring that a factual foundation be presented to support a *Charter* challenge. With respect to a section 15(1) claim, he argued that a claimant must adduce factual evidence that they or the group with whom they associate has suffered disadvantage as a result of the distinction created. He submitted that T.V. has not proven that the distinctions created by the definitions of Indian, Native person and Native child cause any deleterious effects for Métis children.

41 The Society also argued that the Legislature is entitled to enact remedial legislation in appropriate circumstances without running afoul of section 15(1) of the *Charter.* Citing the Supreme Court of Canada decision in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), counsel for the Society argued that an important consideration in determining whether remedial legislation that confers benefits on a specified group crosses the line into unconstitutional territory is whether the distinctions result in an affront to the dignity of other groups or promote the notion that the other groups are less deserving of consideration. He submitted that there are numerous provisions in the *CFSA* that require service providers and the courts to consider the cultural background and community ties of all children, and that the existence of those safeguards closes the gap in differential treatment between children who are Indian or Native and other Aboriginal children so as to safeguard the definitions of Indian, Native person and Native child from *Charter* scrutiny.

B. The Law Respecting Section 15(1) of the Charter

1. General Principles

42 Section 15(1) of the *Charter* provides as follows:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

43 Section 15(1) guarantees the equal treatment of individuals by the state without discrimination. It sets out four basic equality rights, namely: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to the equal benefit of the law (*Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at para. 15). The reason for establishing these four formulations of the concept of equality was to embody a fulsome equality guarantee that would not be susceptible to the types of restrictive interpretations that were given to the equality right under section 1(b) of the *Canadian Bill of Rights*, S.C. 1960, c. 44. (Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) at para. 55-13). The Supreme Court of Canada established in *Andrews* that the inclusion of the phrase "in particular" before the listed grounds of discrimination makes

clear that the list is not exhaustive, and that the protection against discriminatory treatment extends also to discrimination based on personal characteristics that are analogous to the listed ones.

44 The analysis of a section 15(1) claim involves two general stages. First, the claimant must establish that the law violates the equality guarantee embodied in the section. If the claimant proves an infringement of section 15(1), the onus shifts to the state to establish on a balance of probabilities that the limit is demonstrably justifiable in a free and democratic society pursuant to section 1 of the *Charter* (*Andrews*, at para. 22; *Droit de la famille - 091768*, 2013 SCC 5, [2013] 1 S.C.R. 61 (S.C.C.)).

45 The equality guarantee that section 15(1) embodies reflects Canada's recognition of the equal worth of all human beings in Canadian society (*Andrews*, at para. 16; *R. v. Kapp*, 2008 SCC 41, 2008 CarswellBC 1312 (S.C.C.) at para. 15; *Law*, at para. 51; *Droit de famille*, at para 136.) As McIntryre, J. stated in *Andrews*, at para. 16:

> It is clear that the purpose of s. 15 is to ensure the equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration.

46 Section 15(1) seeks to remedy the imposition of unfair limitations upon opportunities and benefits, "particularly for those persons or groups who have been subject to historical disadvantage, prejudice and stereotyping" (*Law*, at para. 42). It also reflects our country's recognition of the fundamental importance of safeguarding and promoting human dignity and freedom (*Law*, at para. 51; *Miron v. Trudel*, [1995] 2 S.C.R. 418 (S.C.C.), at paras. 145-146; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), at para. 77; *Gosselin c. Québec (Procureur général)*, 2002 SCC 84, [2002] 4 S.C.R. 429 (S.C.C.), at para. 20; *Kapp*, at para 21; *Droit de famille*, at para 138).

47 The equality guarantee in section 15(1) does not require that all individuals be treated equally in a general or abstract sense by all members of society (*Andrews*, at paras. 7 and 13; *Ermineskin Indian Band & Nation v. Canada*, [2009] 1 S.C.R. 222 (S.C.C.), at para. 188; *Withler v. Canada (Attorney General)*, 2011 SCC 12 (S.C.C.), at para. 31). Rather, section 15(1) "protects every person's equal right to be free from discrimination" (*Withler*, at para. 31). As McIntyre, J. clarified in the early case of *Andrews*, the phrase "without discrimination" in section 15(1) is an important qualifier which clarifies that the section is intended to protect against distinctions that involve prejudice or disadvantage. (*Andrews*, at para. 28; *Kapp*, at para. 17; *Ermineskin Indian Band & Nation*, at para. 188; *Droit de famille*, at para. 180; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, [2015] 2 S.C.R. 548 (S.C.C.), at para. 17). The concept of "equality without discrimination" embodied in section 15(1) guarantees what is referred to in the case-law as "substantive equality." This formulation of equality captures legislation that is directly discriminatory on its face as well as laws that have the indirect effect of discriminating against individuals or groups on the listed or analogous grounds. The concept of substantive equality also recognizes that not every difference in treatment will necessarily engender inequality, and that identical treatment may in fact frequently have a disproportionate effect on a particular group, thereby resulting in serious inequality (*Andrews*, at para. 8; *Withler*, at para. 2). It takes into account the fact that true equality sometimes requires variations in treatment so as to accommodate differences between people and the effects of state action on them (*Andrews*, at para. 8; *Law*, at para. 25; *Withler*, at para. 31; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.) at para. 78).

2. The Test for Establishing Discrimination under section 15(1)

48 The Supreme Court of Canada has described the framework for establishing discrimination within the meaning of section 15(1) of the *Charter* in various ways over the past two decades. Peter Hogg has described the history of the court's analysis of section 15(1) as "a winding course of judicial interpretation." (P.W. Hogg, "*What is Equality? The Winding Course of Judicial Interpretation,*" (2005) 29 Supreme Court L.R. (2d) 39). The evolving nature of the law respecting section 15 over the years is in part attributable to the principle which the Supreme Court of Canada established early on in the history of section 15 jurisprudence that the section 15(1) analysis should not be conducted according to a fixed and limited formula (*Andrews*, at para. 12; *Law*, at para. 3; *R. v. Turpin*, [1989] 1 S.C.R. 1296 (S.C.C.); *R. v. Swain*,

[1991] 1 S.C.R. 933 (S.C.C.); *Withler*, at para. 51). Rather, a consistent theme that has emerged from the case-law is that the court must adopt a contextual and purposive approach to the discrimination analysis, so as to allow for an "evolution and adaptation of the equality analysis over time in order to accommodate new or different understandings of equality as well as new issues raised by varying the fact situation" (*Law*, at para. 3; *Andrews*, at para. 20). The Supreme Court of Canada has emphasized that this approach accords with the strong remedial purpose of the equality guarantee, and avoids "the pitfalls of a formalistic and mechanical approach" (*Law*, at paras. 3 and 88; see also *Ardoch Algonquin First Nation & Allies v. Ontario*, 2000 SCC 37, 2000 CarswellOnt 2460 (S.C.C.), sub nom *Lovelace v Ontario*, at para. 54 (hereinafter referred to as "*Lovelace*")). While general guidelines can be articulated, those principles should not be interpreted as a rigid test and at best should be understood as points of reference for a court carrying out the section 15(1) analysis (*Law*, at paras. 6 and 88; *Lovelace*, at para. 54).

49 In *Droit de famille*, Abella, J. addressed the difficulties that have arisen respecting the Supreme Court of Canada's past articulations of the test for establishing discrimination within the meaning of section 15(1) of the *Charter.* She synthesized the principles that have emerged over the years into a general framework that addresses those challenges. Abella, J. subsequently wrote for a unanimous court in dealing with a section 15(1) challenge in the 2015 decision of *Kahkewistahaw*. The general framework that she articulated in these two cases requires the claimant in a section 15(1) challenge to establish the following:

> 1. The law, either on its face, in its purpose, or in its impact, draws a distinction between the claimant and others based on an enumerated or analogous ground; and
>
> 2. The distinction arbitrarily creates, perpetuates, or exacerbates disadvantage for the claimant (*Droit de famille*, at paras 185-198; *Kahkewistahaw*, at paras. 16, 20.).

The question of whether these elements have been proven must be considered from the perspective of 'the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the claimant" (*Law*, at para 60; *Lovelace*, at para. 55; *Droit de famille*, at paras. 154 and 419).

3. Enumerated or Analogous Grounds

50 With respect to the first branch of the test, the issue of whether an impugned scheme makes a distinction based on an enumerated or analogous ground may be straightforward if the law clearly makes such a distinction on its face. This type of distinction is often referred to as "direct discrimination" (*Withler*, at para. 64). However, as previously indicated, the equality guarantee in section 15(1) also encompasses indirect discrimination. Accordingly, the first part of the test may also be met if the *effect* of the challenged measure is to create a distinction based on a listed or analogous ground. Indirect discrimination may occur if a law on its face purports to treat everyone in the same manner, but it has a disproportionately negative impact on a claimant or group that can be identified based on enumerated or analogous grounds (*Withler*, at para. 64).

51 In analyzing the first part of the test for identifying discrimination, the specifically enumerated grounds and other possible analogous grounds of discrimination must be interpreted in a broad and generous manner, having regard for the constitutional status of section 15 and the need for a long-lasting and adaptable framework for assessing whether the exercise of government power satisfies the equality guarantee (*Andrews*, at para. 20). McLachlin, J. commented on the issue of analogous grounds in *Corbiere v. Canada (Minister of Indian & Northern Affairs)*, [1999] S.C.J. No. 24, [1999] 2 S.C.R. 203 (S.C.C.). She clarified that both the listed and analogous grounds which section 15(1) is concerned with "stand as constant markers of suspect decision making or potential discrimination" (at para. 8). She addressed how analogous grounds may be identified, and concluded that analogous grounds are "personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity" (*Corbière*, at para. 13; see also *Droit de famille*, at para. 335). In other words, a ground of distinction may be analogous if it is based on a characteristic that cannot be changed or that is essential to the claimant's personal identity, or "that the government has no legitimate interest in expecting us to change to receive equal treatment under the law" (*Corbière*, at paras. 13 and 14). The court noted in

Corbière that one factor to consider in answering this question is whether the complainant is a member of a discrete and insular minority that is vulnerable to suffering disadvantage, like some of the groups encompassed by the grounds enumerated in section 15(1) (see also *Andrews*, at paras. 12-13; *Droit de famille*, at para. 144). As Wilson, J. explained in *Andrews*, a characteristic may qualify as an analogous ground under section 15(1) if the individuals characterized by the trait are "lacking in political power," "vulnerable to having their interests overlooked and their rights to equal concern and respect violated" and vulnerable to becoming a disadvantaged group (at para. 51).

4. Creation or Perpetuation of Disadvantage

52 With respect to the second branch of the framework, the determination of whether a distinction creates or perpetuates a discriminatory disadvantage for an individual or group characterized by enumerated or analogous grounds involves an inquiry into whether it "has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed on others," or if it "withholds or limits access to opportunities, benefits and advantages available to other members of society" (*Andrews*, at para. 19; *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at para. 584). In carrying out the second stage of the section 15(1) analysis, it is important to keep in mind that not every disadvantage will be found to be discriminatory. As Lebel, J. emphasized in *Droit de famille*, "substantive equality is not denied solely because a disadvantage is imposed. Rather, it is denied by the imposition of a disadvantage that is unfair or objectionable..." (at para. 180). The existence of discrimination is the central concern of section 15, and thus the overall focus of the inquiry should be "on the nature of the scheme and the appropriateness of the impugned distinctions having regard to the purpose of the scheme and the situation of the claimant" (*Withler*, at para 45). A distinction can be discriminatory either in purpose or effect. However, since the state rarely seeks to discriminate intentionally, the discrimination analysis invariably focusses on the effect of the law or government action on the individual or group claimant, and not the motive or intent of the government in formulating or applying the law (*Andrews*; *Kapp*; *Withler*; *Droit de famille*.). While assessment of legislative purpose and intent are important components of the *Charter* discussion, this exercise is typically undertaken as part of the section 1 analysis once the burden has shifted to the state to justify the reasonableness of the infringement (*Andrews*; *Droit de famille*, at para. 333).

53 The determination at the second stage of the discrimination analysis of whether a distinction creates or perpetuates an unfair or objectionable disadvantage involves a "flexible and contextual inquiry" that takes into account all factors that are relevant to the particular case under consideration. There is no rigid template for determining this issue (*Withler*; *Kapp*; *Droit de famille*; *Turpin*.). The court must take into consideration the purposes and objectives of the impugned scheme, the actual needs, interests and circumstances of the people impacted by it, and all relevant social, political, economic and historical factors concerning the claimant or group in question (*Law*, at para. 30; *Andrews*, at paras 12 and 13; *Withler*, at paras. 39, 67; *Droit de famille*; *Kahkewistahaw*, at para. 20).

54 In *Droit de famille*, Abella, J. referred to the court's previous decisions in *Kapp* and *Withler*, in which the court described the second part of the test for establishing discrimination as requiring the claimant to prove that the distinction creates a disadvantage by "perpetuating prejudice or stereotyping." Abella, J. clarified that *Kapp* and *Withler* did not establish an additional requirement on section 15 claimants to prove that a distinction perpetuates prejudicial or stereotypical attitudes towards them. Rather, the court's intention in those cases was to highlight that the creation or perpetuation of prejudice or stereotyping are two possible indicia that may support a finding that a claimant has been arbitrarily disadvantaged by a distinction. The court described these two indicia as follows:

> a) "Prejudice is the holding of pejorative attitudes based on strongly held views about the appropriate capacities or limits of individuals or the groups of which they are a member."
>
> b) "Stereotyping, like prejudice, is a disadvantaging attitude, but one that attributes characteristics to members of a group regardless of their actual capacities." (*Droit de famille*, at para 326).

55 In *Droit de famille*, Abella, J. also referred to the court's previous decision in *Law*, in which the court held that the second prong of the section 15(1) test requires proof that the impugned law has the effect of "perpetuating or promoting

the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society" (at para 51). This principle has been referred to in the case-law as "the dignity test." Abella, J. clarified in *Droit de famille* that the protection of human dignity is an underlying objective of the *Charter* as a whole, but that the section 15(1) test does not require the claimant to prove that the distinction results in an affront to their dignity. However, evidence of this type of effect may also be one of several relevant factors in determining whether the distinction has created or perpetuated disadvantage.

56 The contextual factors relevant to the second stage of the discrimination analysis will vary from case to case. The Supreme Court of Canada has emphasized that creating a rigid template of factors that the court must consider is not appropriate, as it may result in the court giving consideration to irrelevant matters or overlooking important factors (*Withler*, at para. 66). However, some of the contextual factors that may be relevant in assessing whether a distinction is discriminatory are as follows:

1. Pre-existing disadvantage experienced by the claimant or group of which the claimant is a member:

The existence of historic disadvantage on the part of a claimant or group is not a precondition to success in a section 15(1) claim (*Law*, at para. 65; *Withler*, at para 36). As McLachlin, J. highlighted in *Withler*, "it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group" (at para 36). However, historical disadvantage is a factor to consider in the section 15(1) analysis, since one of the main purposes of section 15 is to ensure fairness and equality for claimants or groups that are "disadvantaged in the larger social and economic context" (*Corbière*, at para. 8; *Kahkewistahaw*, at para. 19; *Withler*, at para. 35; *Law*, at paras. 40-51.)). As Abella, J. stated in *Kahkewistahaw*, the substantive equality guarantee "recognizes that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages" (at para. 17). Accordingly, evidence that the impugned measure "treats a historically disadvantaged group in a way that exacerbates the situation of the group" will be accorded significant weight in determining whether there has been a perpetuation of disadvantage at the second stage of the test (*Withler*, at para. 35). As Iacobucci, J. stated in *Law*, where there is evidence of pre-existing disadvantage, "it is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon [these individuals], since they are already vulnerable" (at para. 63; see also *Kapp; Droit de famille)*. In *Lovelace*, Iacobucci, J. clarified that the inquiry respecting pre-existing disadvantage does not require that the claimants embark upon a "race to the bottom" in terms of their historical disadvantage as compared to that of others (at para. 69).

2. The correspondence, or lack thereof, between the differential treatment and the actual needs, capacity or circumstances of the claimant or group:

McLachlin, J. and Abella, J. emphasized in *Withler* and *Kahkewistahaw* respectively that the second part of the discrimination analysis focusses on the impact of the impugned law on particular individuals or groups, and targets disadvantage that is arbitrary in nature. Accordingly, the contextual analysis at the second stage of the section 15(1) test should include an assessment of whether the differential treatment appears arbitrary taking into consideration the actual needs, capacity and circumstances of the claimant or group. As Iacobucci, J. explained in *Law*, "it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances" (at para. 70). More recently, in *Kahkewistahaw*, Abella, J., explained that this inquiry should focus on "whether the impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage" (at para. 20). McLachlin, J. discussed these considerations in detail in the case of *Withler*, in addressing whether federal supplementary death benefits schemes for survivor spouses which used the age of the plan member at the age of their death as a factor in determining the value of the benefits payable to a dependant contravened section 15(1) on the basis of age discrimination. Although

her comments were directed to pension programs, they provide useful guidance for courts dealing with other types of legislative schemes that confer benefits on some individuals and not on others. McLachlin, J. noted that in the area of pension benefits, the determination of whether a scheme violates section 15(1) must "take into account the fact that such programs are designed to benefit a number of different groups", and that lines must be drawn in terms of the scope of the programs (at para. 67). She held that in these types of cases, the contextual inquiry at the second stage of the section 15(1) analysis should involve consideration of "whether the lines drawn are generally appropriate, having regard to the circumstances of the persons impacted and the objects of the scheme" (at para 67). She added that "perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required," and that "[a]llocation of resources and particular policy goals that the legislature may be seeking to achieve may also be considered" (at para 67).

3. Whether the impugned legislation has an ameliorative purpose or effect for other members of society:

A law that creates a distinction in order to alleviate inequalities affecting other disadvantaged groups will be assessed against the backdrop of its overall ameliorative effects and the multiplicity of interests that it attempts to balance, and is less likely to be considered discriminatory (*Law; Kapp; Withler; Droit de famille).*

4. The nature and scope of the benefit or interest which the claimant claims they have been denied:

Another important contextual factor in carrying out the section 15(1) analysis is the nature and scope of the benefit or interest in question. As Iacobucci, J. stated in *Law*, at para. 88(9)(d), "the more severe and localized the consequences of the legislation for the affected group, the more likely that the differential treatment responsible for these consequences is discriminatory within the meaning of section 15(1)." In discussing this factor in *Corbiere*, L'Heureux-Dube, J. explained that "the more important and significant the interest affected, the more likely it will be that differential treatment affecting this interest will amount to a discriminatory distinction within the meaning of s. 15(1)" (at para. 79).

5. Comparative considerations:

The Supreme Court of Canada has clarified that the discrimination analysis under section 15(1) does not involve a rigid comparative analysis of the impact of the impugned legislation on identified comparator or "similarly situated" groups (*Andrews; Withler*, at para. 40). As Iacobucci, J. stated in *Lovelace*, "[t]he broad and fully contextual s. 15(1) analysis transcends the superficiality of a simple balancing of relative disadvantage" (at para. 58). In *Andrews*, McIntyre, J. rejected the "similarly situated test" that the court had applied in equality jurisprudence in the past, which involved a stringent analysis of whether the law treated the complainant in a worse way than other similarly situated individuals or groups. He concluded that the similarly situated test should no longer be applied as a fixed rule or formula for the determination of equality questions. However, the Supreme Court of Canada has since clarified that although the section 15(1) test does not involve a rigid, comparative "similarly situated" analysis, a comparison of the effect of the legislation on the claimant as opposed to various other groups is one of the various contextual factors that the court may consider in determining whether the law is discriminatory (*Withler; Droit de famille).* To use the words of McLachlin, J. in *Withler*, "comparison may bolster the contextual understanding of a claimant's place within a legislative scheme and society at large" (at para. 65). With respect to the weight that should be given to comparative considerations, McLachlin, J. added that "[t]he probative value of comparative evidence, viewed in this contextual sense, will depend on the circumstances" (at para. 65; see also *Moore v. British Columbia (Ministry of Education)*, 2012 SCC 61 (S.C.C.); *Droit de la famille - 091768*, 2013 SCC 5 (S.C.C.)).

57 As discussed above, the essence of T.V.'s position is that the definitions of Indian, Native person and Native child, violate section 15(1) because they are under-inclusive. The substantive equality analysis pursuant to section 15(1) in cases involving ameliorative laws or programs requires a careful balancing of the two purposes of section 15(1), namely the prevention of discrimination and the amelioration of the conditions of disadvantaged persons (*Eaton v. Brant (County) Board of Education* (1996), [1997] 1 S.C.R. 241 (S.C.C.), at para. 66; *Lovelace*, at para. 60). The Supreme Court of

Canada has recognized on many occasions that an under-inclusive ameliorative law, program or activity may violate section 15(1) (*Lovelace*, at paras. 60 and 61; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 (S.C.C.); *Granovsky v. Canada (Minister of Employment & Immigration)*, [2000] 1 S.C.R. 703 (S.C.C.)). The process of determining whether an ameliorative program crosses the line into discrimination involves a delicate balancing of the two purposes of the equality guarantee and the totality of the contextual framework within which the equality claim has evolved.

C. Analysis of the Section 15(1) Claim

1. The Contextual Framework Surrounding the Section 15(1) Claim

58 As the foregoing discussion of the law highlights, the analysis of an equality claim pursuant to section 15(1) of the *Charter* involves careful consideration of the larger social, economic, political and legal landscape within which the claim has evolved and advanced to litigation. A purposive and contextual approach is required in carrying out the legal analysis, so as to ensure that the equality jurisprudence adapts and evolves in an appropriate manner having regard for changes in this overall landscape. This approach ensures that the remedial purpose of section 15(1) is fully realized in a manner that is reflective of changing values and realities of our society.

59 There have been numerous developments in the social, economic, legal and political landscape in the past several decades that are relevant to the section 15(1) analysis in this case. It is important to recognize that this constitutional challenge has arisen in the context of a broad, nation-wide discussion about a multitude of issues regarding the historical mistreatment of the country's Aboriginal peoples, their current well-being, the need for greater inclusion and the need for increased respect and support of Aboriginal cultures and traditions. By way of overview, there has been an increased awareness of and concern for the social, economic and political challenges that Aboriginal peoples have historically faced and continue to experience in this country. The increased focus on these issues has extended to the Métis peoples of Canada. In tandem with this development, Canada has come to appreciate that many of the challenges which its indigenous peoples have grappled with have been attributable to misguided policies that severely weakened Aboriginal families and cultures by encouraging the removal of children from their families and communities and severing their connections with their cultural traditions and heritage. As a result of these developments, Canada has made a commitment to work on reconciliation between its Aboriginal and non-Aboriginal peoples, with one of the main goals of this commitment being to support and help strengthen Canada's Aboriginal communities and foster the survival of their traditions. This commitment has been made to *all* Aboriginal peoples of Canada, including the Métis. I turn now to a discussion of each of these important contextual developments.

60 The Supreme Court of Canada has played a significant role in recent years in heightening the country's awareness of the many challenges that our Aboriginal peoples have faced. The court commented on these difficulties in *R. v. Gladue*, [1999] 1 S.C.R. 688 (S.C.C.) in the context of an appeal involving the interpretation of s. 718.2(e) of the *Criminal Code*, which requires sentencing judges in criminal cases to give particular attention to the circumstances of Aboriginal offenders. The court highlighted concerns about the over-representation of Aboriginal peoples within the Canadian prison population and the criminal justice system generally, and noted that these problems flowed from "a number of sources, including poverty, substance abuse, lack of education, and the lack of employment opportunities for Aboriginal people," as well as bias against Aboriginal peoples within the criminal system (at para. 65). In *Corbière*, the court found that all Aboriginal peoples have been affected "by the legacy of stereotyping and prejudice against Aboriginal peoples" (at para. 66), and subsequently in *Lovelace*, it noted that Aboriginal peoples generally experience higher rates of unemployment and poverty, and also face serious disadvantages in the areas of education, health and housing (at para. 69).

61 Of particular importance to this case is the fact that the Supreme Court's commentary regarding the challenging conditions of Canada's Aboriginal peoples has included the Métis peoples. The Métis have been legally recognized as Aboriginal peoples of Canada, with their own distinctive characteristics and cultural traditions. This was apparent from the enactment of section 35 of the *Constitution Act, 1982*, which affirmed the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada, and defined "Aboriginal peoples of Canada" as including the Métis. In *R. v. Powley*,

[2003] 2 S.C.R. 207 (S.C.C.), the Supreme Court of Canada described the Métis of Canada as sharing "the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots" (at para. 11), and emphasized that in enacting s. 35, Canada made a commitment to recognizing the Métis and enhancing the survival of their culture and traditions. More recently, the Supreme Court described the Métis as "a culturally distinct Aboriginal people living in culturally distinct communities" (*Peavine Métis Settlement*, at para. 7; *Daniels*, at para. 42). The court has recognized that in addition to the general challenges faced by all Aboriginal peoples, the Métis peoples have grapple with a unique set of disadvantages that can be traced in part from their historical exclusion from the *Indian Act.* In *Lovelace*, the court accepted the findings of the *Royal Commission on Aboriginal Peoples* that Métis and non-status First Nations peoples have suffered additional disadvantages, including vulnerability to cultural assimilation, compromised ability to protect their relationship with traditional homelands, lack of access to culturally specific health, educational and social services programs, and a chronic pattern of being ignored by both federal and provincial governments due to jurisdictional disputes (Canada. Royal Commission on Aboriginal Peoples. *Report of the Royal Commission on Aboriginal Peoples, Vol. 3 (Gathering Strength)*, p. 204. Ottawa: The Commission, 1996). The court also accepted that these two groups have historically suffered from stereotyping as being "less Aboriginal" and accordingly less worthy of recognition by policy-makers than Indians living on reserve (at para. 72). The Supreme Court again commented on the historical disadvantages that Métis peoples have faced in *Peavine Métis Settlement*, and more recently in *Daniels*, in which it was called upon to determine whether Métis and non-status First Nations peoples fall within the term "Indians" for the purposes of section 91(24) of the *Constitution Act, 1867.* The court noted that non-status Indians and Métis have historically suffered the misfortune of being in a "jurisdictional wasteland with significant and obvious disadvantaging consequences" due to both the federal and provincial governments denying having legislative authority over them (at para. 14). It recognized that the disadvantages that these two indigenous groups have faced have included lack of funding for their affairs and deprivation of programs and services due to a jurisdictional tug-of-war between the provinces and the federal government. Furthermore, the court also highlighted that the Métis have historically suffered due to inconsistencies in the federal government's treatment of them. Specifically, it concluded that the federal Crown has recognized Métis as falling within the purview of its jurisdiction whenever it has been convenient to the Crown to do so, and that this has at times been to the detriment of the Métis.

62 The recognition of the Métis as Aboriginal peoples of Canada and the increased awareness of the unique burdens which they have faced have resulted in advances in their legal position over the past several years. For instance, in *Powley*, the Supreme Court of Canada recognized the right of the Respondent Métis to hunt for food pursuant to s. 35(1) of the *Constitution Act.* More recently, in *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, [2013] 1 S.C.R. 623 (S.C.C.), the Supreme Court held that Canada has a fiduciary relationship with the descendants of Manitoba's Red River Métis Settlement, and that the Crown's promise to make a land grant to the children of the Métis in question engaged the honour of the Crown. The court's recent landmark decision in *Daniels* represents another step forward in the protection and advancement of the interests of Canada's Métis peoples. In that case, the court commented on the unacceptable position that the federal/provincial jurisdictional tug-of-war has created for the Métis, and concluded that a resolution of the jurisdictional issue was critical to the protection of Métis interests. It held that the Métis fall within federal jurisdiction pursuant to section 91(24) of the *Constitution Act, 1867.* These and other significant legal developments with respect to the Métis peoples are relevant to the section 15(1) contextual analysis in that they reflect the Supreme Court of Canada's commitment to ensuring that the Métis are accorded the full rights and protections that are owed to them as indigenous peoples of this country.

63 As our awareness of the challenges which our Aboriginal peoples face has increased, so too has our understanding of the connection between those difficulties and misguided policies and programs that have had the effect of removing Aboriginal children from their immediate and extended families and their communities. This development has in turn focussed attention on the importance of providing culturally appropriate services to support and strengthen Aboriginal families, keeping Aboriginal children within their communities or with other Aboriginal families when they cannot remain in the family home, and ensuring that children with Aboriginal ancestry retain a strong connection with their cultural heritage. Again, it is important to emphasize for the purposes of this case that the dialogue about these issues has included the Métis. On a provincial level, a starting point for the discussion of these contextual considerations is the

Canada-Ontario Child Welfare Services Agreement that the Ontario and federal governments executed in 1965 ("the 1965 Agreement"). Pursuant to the 1965 Agreement, the federal government entered into a funding arrangement that allowed Ontario to extend the delivery of its existing child welfare system and services to Indians living on reserves. Although the Agreement required consultation by either Canada, Ontario, or both with Indian bands before provincial child welfare services were extended, such consultation did not occur (*Brown v. Canada (Attorney General)* (2013), [2014] 1 C.N.L.R. 1 (Ont. S.C.J.), at para. 5). From the time that the agreement became effective in 1965 until the proclamation of the *CFSA* in January 1985, thousands of Indian children were apprehended from their families, removed from their communities and placed in non-Aboriginal foster homes (*Brown*, at para. 6). This widespread removal of Aboriginal children from their communities, which has been referred to as "the Sixties Scoop," resulted in these children suffering from loss of their culture, language and identity, and long-lasting psychological and emotional damage due in part to a sense of "non-belonging" to either their communities of origin or the families of their non-Aboriginal care-givers (*Brown*, at paras. 11 to 15; *First Nations Child and Family Caring Society of Canada v. Attorney General of Canada (for the Minister of Indian and Northern Affairs Canada)*, 2016 CHRT 2 (Can. Human Rights Trib.), at para. 218).

64 The enactment of the numerous provisions of the *CFSA* aimed at protecting the culture and heritage of Aboriginal children, and in particular the provisions relating to Indian and Native children, represented an acknowledgement of the long-term negative repercussions of removing Indian children from their families and culture, and a commitment to making aboriginality a significant factor in child protection and placement practices so that history did not repeat itself (*Algonquins of Pikwakanagan v. Children's Aid Society of the County of Renfrew*, 2014 ONCA 646 (Ont. C.A.), at paras. 55-57). As Belobaba, J. stated in *Brown*, at para. 8:

> The *CFSA* provisions did not just list "aboriginality" as another factor for judicial consideration. They inscribed in law for the first time a legislative recognition that the Aboriginal culture had a very different understanding of community, family and children in need of protection and that these differences had to be respected. With the enactment of the *CFSA* provisions, the chances of the Indian or Native children being adopted-out to a non-Aboriginal family and losing their culture and identity were reduced dramatically.

65 As discussed previously in these Reasons, the special provisions in the *CFSA* relating to Indian and Native children apply to only a small cross-section of the Aboriginal child population in Ontario. However, since the enactment of the *CFSA*, it has become increasingly apparent that the widespread removal of Aboriginal children from their families, communities and cultural traditions, with resulting long-term negative repercussions for the children, has been a national phenomenon and tragedy. The country's increased awareness of this problem has been attributable in large part to the commencement of litigation by Aboriginal peoples across the country relating to the abuse and cultural loss that they suffered while attending Indian Residential Schools run by Canada and various religious institutions throughout Canada. As the Supreme Court of Canada pointed out in *Daniels*, many Métis children were enrolled in these schools. The central purpose of the Indian Residential School system was to "christianize and civilize" Aboriginal children. The government of the time stated that this goal involved ensuring that Aboriginal children acquired "the habits and modes of thought of white men." (Canada. Truth and Reconciliation Commission, *Honouring the Truth and Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada.* Winnipeg: The Commission, 2015, at p. 2 (hereinafter referred to as "*Honouring the Truth*")). The realization of these goals involved removing the children from their families and communities, forbidding them to speak their language or practice their cultural traditions, and actively attempting to eradicate their connections to their Aboriginal heritage and assimilate them into the dominant Euro-Canadian culture (*Daniels*, at para. 30; *Honouring the Truth*, at p. 2; *First Nations Child and Family Caring Society of Canada*, at para. 407). The removal of these Aboriginal children from their families and their culture, the abuse that the children suffered at the schools and the destruction of the children's ties to their cultural heritage created longstanding social, psychological and economic problems amongst Aboriginal peoples and posed a serious threat to the sustainability of indigenous cultures and traditions across Canada. (*Honouring the Truth*, pp. 136-37; *First Nations Child and Family Caring Society of Canada*, at paras. 408-418).

66 In 2008, the federal government issued a formal apology on behalf of all Canadians for the Indian Residential School system and its effects on Canada's Aboriginal children, their families, their communities and their cultural traditions. The government formally acknowledged that this school system had a lasting and damaging impact on Aboriginal culture, heritage and language, and that "the legacy of Indian Residential Schools has contributed to social problems that continue to exist in many communities today." In its apology, the Crown acknowledged that Métis children were among those who attended the schools, and that those children were also removed from their families and forbidden to speak their language and practice their cultures. The Crown also highlighted that a cornerstone of its commitment to achieving reconciliation between Aboriginal and non-Aboriginal Canadians was the establishment of the Indian Residential Schools Truth and Reconciliation Commission. In 2010, the federal government took another important step in implementing the promise to pursue reconciliation by signing the United Nations *Declaration on the Rights of Indigenous Peoples*. In May 2016, the government announced that Canada is now a full supporter, without qualification, of this international Declaration.

67 The Truth and Reconciliation Commission released its report in 2015. Of particular relevance for the purposes of the contextual analysis in this case is Volume 3 of the Report, which is devoted to the Métis experience in federal and provincial Indian Residential Schools (Canada. Truth and Reconciliation Commission. *The Final Report of the Truth and Reconciliation Commission of Canada, Vol. 3*, *Canada's Residential Schools: the Métis Experience.* Montreal: McGill-Queen's University Press, 2015 (hereinafter referred to as "*Volume 3*")). In *Volume 3*, the Commission discussed how Métis children experienced unique challenges in attempting to secure an education due to the jurisdictional disputes between the federal, provincial and territorial governments about constitutional responsibility for the Métis and non-status First Nations children (*Volume 3*, pp. 3-5). However, it concluded that numerous Métis children attended the Indian Residential schools across the country, and that many more attended similar Residential Schools operated or funded by the province. It concluded that the provincial and federal Residential Schools experiences caused significant harm to the Métis children who attended, their families, their communities and their culture (*Volume 3*, p. 70). The message that clearly emerges from the Commission's discussion of the Métis experiences is that the Indian Residential Schools system was just as damaging to the Métis children who attended and their culture as it was to other Aboriginal children and cultures, and that the need for repair within Canada's Métis population is therefore just as compelling.

68 Another contextual factor that is relevant in this case is the growing body of evidence indicating that the negative effects of the Residential Schools experience and the Sixties Scoop, coupled with prejudicial attitudes towards Aboriginal peoples and their parenting, have led to an ongoing over-representation of Aboriginal children in foster care, mostly in non-Aboriginal foster homes. In its Final Report, the Truth and Reconciliation Commission noted that a 2011 Statistics Canada study had found that 3.6% of all First Nations children aged fourteen and under were in foster care, compared to .3% of non-Aboriginal children. The Commission concluded that "Canada's child welfare system has simply continued the assimilation that the residential school system started," and called upon the government to address the problem of over-representation of Aboriginal children in foster care (*Honouring the Truth*, p. 138). The Canadian Human Rights Tribunal reiterated this point in its recent decision in *First Nations Child and Family Caring Society of Canada.* In that case, the Tribunal found that a *prima facie* case had been made out that First Nations children and families living on reserve and in the Yukon were being denied equality and were differentiated adversely in the provision of child and family services by Aboriginal Affairs and Northern Development Canada. In reaching its decision, the Tribunal emphasized that the inter-generational trauma that the Residential Schools system caused to Aboriginal peoples and their communities is one of many reasons underlying the need to provide First Nations children with adequate, least intrusive and culturally appropriate child and family services (at para. 151).

69 The increasing awareness of the challenges that Aboriginal peoples have grappled with and which they continue to face has over the past several years led to a general call for reconciliation between non-Aboriginal Canadians and all Aboriginal peoples of Canada. Again, of significance to this case is that this call for reconciliation has clearly included the Métis peoples. Section 35 of the *Constitution Act, 1982* has been an important tool in this reconciliation process. The Supreme Court of Canada has described the "grand purpose" of section 35 as being "the reconciliation of Aboriginal

and non-Aboriginal Canadians in a mutually respectful long-term relationship" (*Little Salmon/Carmacks First Nation v. Yukon (Director, Agriculture Branch, Department of Energy, Mines & Resources)*, [2010] 3 S.C.R. 103 (S.C.C.); *Daniels*, at para 35). As the court noted in *Daniels*, the *Report of the Royal Commission on Aboriginal Peoples*, released in 1996, emphasized the need to rebuild the Crown's relationship with Canada's Aboriginal peoples, including the Métis. The Truth and Reconciliation Commission described the Royal Commission Report as a call for Canadians to begin "a national process of reconciliation that would have set the country on a bold new path, fundamentally changing the very foundations of Canada's relationship with Aboriginal peoples" (*Honouring the Truth*, at p. 7). The Commission noted that most of the recommendations that the Royal Commission made in relation to reconciliation were unfortunately never implemented. The work of the Truth and Reconciliation Commission and the release of its report represent a renewed call for reconciliation, which the Commission has described as being "about establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country" (*Honouring the Truth*, p. 6). It emphasized that this country now has "a rare second chance to seize a lost opportunity for reconciliation" (*Honouring the Truth*, p. 7). A careful review of the Commission's discussion of this need for reconciliation indicates that it clearly embraces the Métis.

70 The Truth and Reconciliation Commission's call for reconciliation was particularly pronounced in the area of child welfare. The Commission's Final Report included numerous calls for action in the child protection context. These included providing sufficient resources to enable Aboriginal communities and child welfare organizations to keep Aboriginal families together where appropriate, establishing as an important priority that placements of *all* Aboriginal children in foster care be culturally appropriate, and developing culturally appropriate parenting programs for Aboriginal families (*Truth and Reconciliation Commission: Calls to Action:* Winnipeg: The Commission, 2015, at p. 1). The Commission specifically highlighted the shortcomings of the child welfare system with respect to the Métis peoples. It noted that Métis communities are not well served due to historical and ongoing jurisdictional disputes between the federal and provincial governments, and emphasized the need for adequately funded, Métis-specific child and family services for Métis children and their families (*Honouring the Truth*, p. 141).

71 The Truth and Reconciliation Commission's emphasis on the need for greater sensitivity to and respect for all Aboriginal cultures and traditions in the child protection context echoes similar calls made by various Aboriginal organizations in Ontario over the past several decades. Of significant importance to the contextual analysis required in this case is the fact that the definitions of Indian, Native person and Native child in the *CFSA* have been a pivotal focus point for the discussions in this area. The Ministry of Children and Youth Services is required to engage in consultations regarding the *CFSA* every five years for the purposes of undertaking a review of the legislation. As MacKinnon, J. noted in *F. (K.)*, in the Ministry's Report on the 2015 review of the Act, the Ministry noted that the participants in the review were virtually unanimous in calling for revisions of the terms Indian, Native person, Native child and Native community. In particular, they sought expanded definitions that incorporate the definition of Aboriginal peoples in section 35(2) of the *Constitution Act, 1982*, while retaining flexibility for those who self-identify as Aboriginal (*F. (K.)*, at para 38). What was not discussed in *F. (K.)* is the fact that this issue was also a major focus of discussion during the 2010 *CFSA* review. In its report respecting the 2010 review, the Ministry wrote as follows with respect to this issue:

> One of the most frequently identified topics throughout the review was the definition of Indian/Native person in the CFSA. All stakeholder groups suggested that the definition should be amended to include all children of Aboriginal descent, consistent with the definition of "Aboriginal" in section 35 of the *Constitution Act...* In addition, it was noted that the *CFSA* obligation for regular consultation should be expanded to include all Aboriginal families rather than for status/eligible for status children only (Ministry of Children and Youth Services, Report on the 2010 Review of the *Child and Family Services Act*, para. 3.4).

72 The Supreme Court of Canada wove the Truth and Reconciliation Commission's call for reconciliation into its decision in *Daniels* as a significant factor in its analysis of the constitutional issues respecting Métis peoples. It described its decision regarding federal/provincial constitutional jurisdiction respecting the Métis as another chapter in the pursuit of reconciliation and redress in Canada's relationship with its indigenous peoples. It clearly accepted the Métis as coming

within the fold of Aboriginal peoples who have suffered significant inequities and whose cultural traditions and heritage the court must safeguard and foster. In this regard, the court stated as follows:

> The constitutional changes, the apologies for historic wrongs, a growing appreciation that Aboriginal and non-Aboriginal people are partners in Confederation, the *Report of the Royal Commission on Aboriginal Peoples*, and the *Final Report of the Truth and Reconciliation Commission of Canada* all indicate that reconciliation with *all* of Canada's Aboriginal peoples is Parliament's goal (at paras 36 to 37).

73 All of the above-mentioned developments form an important contextual backdrop for the analysis of whether the definitions of Indian, Native person and Native child under the *CFSA* are consistent with the equality guarantee in section 15(1) of the *Charter.* The analysis must be carried out with an eye to the historical and ongoing wrongs that Aboriginal peoples, including the Métis, have been subjected to, our growing appreciation of the effects of Canada's wrongdoing on the strength and sustainability of Canada's Aboriginal communities and cultures, and the country's clear promises to its Aboriginal peoples, including the Métis, to actively redress those wrongs in a spirit of meaningful reconciliation.

2. Do the Definitions of Indian, Native Person and Native Child Create Distinctions Based on Enumerated or Analogous Grounds?

74 I turn now to the elements of the test for establishing a claim of discrimination. The first element of the test for determining whether the definitions of Indian, Native person and Native child infringe section 15(1) is whether they create a distinction based on an enumerated or analogous ground. MacKinnon, J. considered this issue in *F.(K).* I agree with the conclusion that she reached in that case that the definitions of these terms, when considered in conjunction with the numerous provisions in the *CFSA* that incorporate them, clearly create a distinction between children with Aboriginal ancestry who qualify as Indian or Native on the one hand and all other Aboriginal children in Ontario with Aboriginal ancestry. Children who qualify as Indian or Native under the Act and their families enjoy all of the special statutory protections discussed in detail above which are aimed at maintaining their connections to their culture and communities, involving their band and communities in decision-making and fostering the strength of their Aboriginal culture. As MacKinnon, J. stated in *F. (K.)*, at para. 41, other children with Aboriginal heritage are not entitled to the mandatory application of the special provisions relating to Indian and Native children, and in fact do not have the ability to access them at all. The real question with respect to the first branch of the discrimination analysis is whether the definitions have the effect of creating distinctions based on enumerated or analogous grounds. T.V. submits that the distinctions drawn by these terms are based on race or ethnic origin.

75 The word "ethnic" is defined in the Oxford English Dictionary as "relating to a population subgroup (within a larger or dominant national or cultural group) with a common national or cultural tradition." The term "race" is defined as "a group of people sharing the same culture, history, language etc.; an ethnic group." Dealing first with the definition of Indian, I agree with the reasoning of MacKinnon, J. in *F. (K.)* that the differential treatment resulting from the term is not based on ethnicity. The court's reasoning in *F. (K.)* also supports the conclusion that the distinction is not based on race. Rather, the differential treatment that arises from the definition is based on registration or eligibility for registration as a status Indian under the *Indian Act.* As the court highlighted in *F. (K.)*, the grounds upon which a child may have or be entitled to status under the *Indian Act*, and the reasons for lack of entitlement, are complex and not necessarily based on the child's cultural background. By way of illustration of this point, the court noted that some Aboriginal peoples who would have been entitled to registration were erroneously excluded due to problems recording names during the treaty process, and that many women who were registered as Indians under the Act lost their status when they married non-Aboriginal men (at paras. 48 and 49). The court also referred to the Federal Court of Appeal decision in *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2014 FCA 101 (F.C.A.), where the court noted that the grounds for registration under the *Indian Act*, and for excluding people from Indian status, are "complex, far-ranging and often unrelated to one another" (at para. 77).

76 In *F.(K)*, the court went on to consider whether the distinction arising from the definition of Indian, based on registration or eligibility for registration as a status Indian, is an analogous ground within the meaning of section

15(1), and determined that it is. I agree with this conclusion. I note that registration or eligibility for registration as a status Indian under the *Indian Act* had prior to the decision in *F. (K.)* been accepted by the Alberta Court of Queen's Bench as being an analogous ground within the meaning of section 15(1) of the *Charter* in *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development)*, 2007 ABQB 517, 2007 CarswellAlta 1103 (Alta. Q.B.). The issue in that case was whether the *Métis Settlement Act*, R.S.A. 2000, c. M-14 violated section 15(1) of the *Charter* on the basis that it precluded Métis peoples who were also registered as status Indians under the *Indian Act* from membership in the Peavine Métis Settlement. The court applied the principles which the Supreme Court of Canada established in *Corbière*, and concluded that registration as a status Indian under the *Indian Act* was an analogous ground. It referred to the decision of Ross, J. in *McIvor v. Canada (Registrar of Indian & Northern Affairs)*, 2007 BCSC 827 (B.C. S.C.) that status or non-eligibility for status under the *Indian Act* is an aspect of personal and cultural identity, and not simply a statutory definition relating to eligibility for a program or benefit. The court in *Peavine* noted that "[w]hile the government created and imposed this identity on First Nations peoples, it has become a central aspect of identity" (at para. 167). In support of its conclusion that registration or entitlement to registration as a status Indian under the *Indian Act* is an analogous ground, the court noted that a lack of eligibility for status is immutable, and that Aboriginal peoples who are not eligible for status under the Act "have not been given equal consideration or respect by the government or by others in Canadian or Aboriginal society" (at para. 169). The court added that decision-makers have not always considered the perspectives and needs of Aboriginal people who have not been registered as Indians under the *Indian Act* (at para 169). It further noted that conversely, those who have registered as Indians under the Act have also suffered disadvantage, stereotyping and prejudice (at para. 169). On appeal from the trial judge's decision in *Peavine Métis Settlement*, the Alberta Court of Appeal and Supreme Court of Canada noted that the parties had accepted that Indian status or eligibility for status was an analogous ground, and the appeal courts accordingly declined to address the issue (see *Peavine Métis Settlement v. Alberta (Minister of Aboriginal Affairs & Northern Development)*, sub nom. *Cunningham v. Alberta (Minister of Aboriginal Affairs and Northen Development)*, 2009 ABCA 239, 2009 CarswellAlta 952; 2011 SCC 37 (S.C.C.)).

77 In *F. (K.)*, MacKinnon, J. echoed the conclusion reached by the trial judge in *Peavine* that the existence of Aboriginal heritage without status or eligibility for status under the *Indian Act* is a personal characteristic arising as a result of decisions made by or imposed on Aboriginal peoples by their ancestors and others. As such, she concluded that this characteristic is immutable and qualifies as an analogous ground. I agree fully with this reasoning. I add that one of the important considerations that the Supreme Court of Canada highlighted in *Corbière* as being relevant to the identification of analogous grounds is whether the individuals characterized by the trait are vulnerable to having their interests overlooked and their rights to equal respect violated. My discussion regarding the relevant contextual factors in this case highlights the unique challenges that Métis peoples have faced throughout history due to various factors, including their exclusion from the *Indian Act* and major disputes about government responsibility that often left them in a jurisdictional "no-man's land." Although the Supreme Court of Canada did not undertake an analysis of the analogous ground issue in its decision in *Peavine*, it did elaborate upon the historical disadvantages that the Métis peoples of Canada have faced. It noted that unlike status Indians, the Métis were not given a collective land base and did not enjoy the benefits of the *Indian Act* or any equivalent benefits. The court concluded that although the Métis are widely recognized as a culturally distinct Aboriginal people living in culturally distinct communities, "the law remained blind to the unique history of the Métis and their unique needs" (at para. 7).

78 I turn now to whether the definitions of Native person and Native child have the effect of creating a distinction based on an enumerated or analogous ground. MacKinnon, J. addressed this issue as well in *F. (K.)*, and concluded that the distinction drawn by the *CFSA* definitions of Native person, Native child and Native community are not rooted in ethnicity or national origin. She concluded that the designation of Native communities is based on remote geographical location of First Nations communities and the operation of the communities in a manner similar to Indian bands. I agree with the conclusion reached in *F. (K.)* that the distinction drawn by the definitions of Native person and Native community, and by extension Native child, is not based on ethnicity or national origin. Furthermore, in my view, the same reasoning leads me to conclude that the distinction is not based on race. There is no evidence before me regarding the specifics of the membership in the 13 communities that have been designated as Native under the Act, or whether there

are even any clear criteria for establishing membership in those communities. For example, it is not clear whether each of the designated communities consists only of Aboriginal peoples, or whether they each include individuals from one distinct indigenous group or various different indigenous groups. Furthermore, neither the *CFSA* nor the Regulations thereunder set out any specific criteria which communities must meet in order to be designated as Native. As previously discussed, the communities that have been designated as Native to date are those which are receiving child protection services from Dilico Ojibway Child and Family Services, which the Minister designated as a Children's Aid Society pursuant to section 211(2)(c) of the *CFSA.* Based on the evidence before me and the findings of MacKinnon, J. in *F. (K.)* and Starr, J. in *M. (M.)*, the designation of communities as Native pursuant to section 209 of the *CFSA* appears to be largely a matter of Ministerial discretion, based not on the specific cultural backgrounds of the members of the communities but rather on the remote location of Aboriginal communities and whether the communities have proposed and designated a body as a Native child and family services authority.

79 As MacKinnon, J. noted in *F. (K.)*, the distinction which the definitions of Native community, Native person, and Native child create is based on Aboriginal ancestry without membership in a community designated to be Native pursuant to section 209 of the *CFSA.* The issue is whether this ground is analogous to those listed in section 15(1). MacKinnon, J. also addressed this issue in *F. (K.)* and concluded that this is an analogous ground. Again, I agree with this conclusion and the reasoning upon which it was based. In *Corbière*, the Supreme Court of Canada held that Aboriginality-residence as it pertains to whether an Aboriginal band member lives on or off the reserve is an analogous ground. The decision turned largely on the fact that the decision of a band member to live on or off the band's reserve, if the decision is available to them at all, is an important one to their identity and personhood, and is therefore fundamental (at para. 62). In accepting Aboriginality-residence as an analogous ground, McLachlin, J. noted that residence on or off the reserve goes to a personal characteristic essential to a band member's identity, and that this characteristic is immutable in that band members are either unable to change their status to on-reserve for personal reasons or are only able to do so at great cost. In the case at hand, the circumstances are somewhat distinguishable from those in *Corbière* in that T.V. has never had any type of connection to the Aboriginal communities that have been designated as Native under the *CFSA.* However, based on the evidence regarding designation of Native communities, it is apparent that one of the criteria is that the community operates like a band, but does not have band status under the *Indian Act.* Taking this into consideration, this case raises very similar considerations to those that arose in *Corbière.* The decision of Métis and non-status First Nations peoples to live within or become a member of an Aboriginal community designated by the Ministry that operates in a similar fashion to a band or to live elsewhere is just as important to their identity and personhood as the decision of a band member to live off their band's reserve. Furthermore, residence outside of the band-like communities that have been designated as Native under the Act is a characteristic that is just as immutable as that of band members who live off their band's reserve. The fact that Métis and non-status First Nations peoples do not live in the designated communities is a characteristic that derives from decisions made by their ancestors that they cannot change, and is one which in my view the government has no legitimate interest in expecting them to change in order to receive equal treatment under the law. I agree with the conclusion reached by MacKinnon, J in *F. (K.)* that "[t]here is no principled reason to distinguish between the choice of a band member to live on or off reserve and the choice of a non-status Indian to live as a member or not of a community that meets the Ministry's criteria for designation as a native community and has been designated as such" (at para. 56). I also concur in her determination that distinctions made on the ground of Aboriginality without membership in a community designated as "Native" under the *CFSA* are analogous to those made on the ground of "Aboriginality-residence" identified in *Corbière.*

3. Do the Distinctions Arising from the Definitions of Indian, Native Person and Native Child Create or Perpetuate Disadvantage for Métis Peoples?

80 The second stage of the discrimination analysis pursuant to section 15(1) involves a determination of whether the distinctions in question create or perpetuate disadvantage for the claimant of the group of which they are a member. As previously noted, T.V. argues that the exclusion of Métis peoples from the operation of the *CFSA* provisions relating to children with Indian or Native status creates disadvantage for Métis children and their families which satisfies the second branch of the discrimination test. The Society's position is based primarily on the argument that the Respondent

has not proven on a balance of probabilities that the definitions of Indian, Native person and Native child create or perpetuate disadvantage for Métis families. For the reasons that follow, I conclude that the distinctions created by the definitions of these terms create or perpetuate disadvantage for Métis children and their families, and that the second branch of the test has therefore been satisfied.

81 The Society referred me to the case of *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (S.C.C.) in support of its argument that the Respondent T.V. has not adduced the necessary evidence in support of his section 15(1) claim. In that case, the Supreme Court of Canada articulated the following general principles regarding the nature of the evidentiary foundation required when challenging the constitutional validity of legislation on the basis of the *Charter*:

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel (at para. 361-362).

82 The Society also relies on the cases of *Moysa v. Alberta (Labour Relations Board)*, [1989] 1 S.C.R. 1572 (S.C.C.), and the reasoning of MacKinnon, J. in *F.(K)*. in support of its position regarding the alleged evidentiary shortcomings in this case. In *Moysa*, the issue was the right of the appellant, a journalist, to refuse to answer questions in a proceeding before the Alberta Labour Relations Board. The journalist refused to testify on the basis that he had a right to protect his sources of information pursuant to s. 2(b) of the *Charter*, which guarantees freedom of thought, belief, opinion and expression, including freedom of the press and other media communication. The appellant raised the concern that if journalists are compelled to disclose sources of their information, this would have a chilling effect on potential informants and the press would lose access to information as news sources. The court declined to deal with the constitutional issues raised on the ground that the appellant did not lead any evidence establishing a link between compelling journalists to testify before bodies such as the Labour Relations Board and a decrease in information sources for journalists. It emphasized that "the mere existence of constitutional questions does not obligate a response on behalf of this court," and held that "if the facts of the case do not require that constitutional questions be answered, the Court will ordinarily not do so. This policy of the Court not to deal with abstract questions is of particular importance in constitutional matters" (at paras. 15 and 16). In *F. (K.)*, the court relied on similar reasoning to dismiss a claim by the maternal grandparents and the mother of the children in question that the definitions of Indian child and Native child violate section 15(1) of the *Charter* on the basis that they do not include non-status Aboriginal children. MacKinnon, J. based her decision on the fact that there was no evidence before the court indicating that the disposition outcomes for Indian and Native children were more favourable than those of other Aboriginal children in terms of preserving the children's ties with their community and Aboriginal heritage. She found that such evidence was required in order to determine whether the definitions create a discriminatory disadvantage for Aboriginal children who fall outside the scope of the definitions of Indian child and Native child (at para. 58).

83 Although the *F. (K.)* case involved the equality rights of non-status First Nations children rather than Métis children, the reasoning of MacKinnon, J. with respect to the disadvantage analysis would have applied equally to Métis children. However, I have reached a different conclusion respecting the existence of disadvantage to Métis children who do not fall within the definitions of Indian, Native person or Native child, and I agree with T.V. that the second branch of the discrimination test has been satisfied. My differing view is based on important case-law regarding the nature of the factual foundation required in *Charter* claims and the numerous important contextual factors and developments discussed above that must inform the equality analysis in this case.

84 Dealing first with the factual evidence required to prove disadvantage, the Supreme Court of Canada has held that disadvantage can be established not only if facially neutral legislation has a disproportionately disadvantageous outcome for the claimant as compared to others, but also if the legislation clearly on its face imposes burdens, obligations or disadvantages on the claimant group not imposed on others, or withholds or limits access to opportunities, benefits and

advantages available to other members of society (*Andrews*, at para. 19; *Egan*, at para. 584; *Miron*, at para. 14). These different manifestations of disadvantage correspond with the fact that the equality guarantee in section 15(1) embodies not only the right to the equal *benefit* of the law, but also the right to equal *protection* of the law. It does not appear that counsel in *F. (K.)* referred the court to case-law that clarifies that the nature and extent of the factual foundation required to establish disadvantage may vary, depending on whether the claim is based on facially neutral legislation that indirectly creates disadvantage, or whether it is based on legislation that clearly on its face creates disadvantages for the claimant. The requirement of a strong factual foundation is much more imperative in the former situation. In addition, the case-law has established that even in cases of alleged indirect discrimination, the extent of the factual foundation required will depend on the particular circumstances of each case. I turn now to a review of the case-law that establishes these points.

85 The Society referred me to the case of *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.) in support of its argument that the Respondent had not laid the necessary factual foundation for his section 15(1) claim. In that case, the court again stressed the importance of establishing a proper factual foundation before measuring legislation against the provisions of the *Charter.* However, the primary focus of the court's discussion of this issue appears to have been situations of indirect discrimination rather than cases where the impugned legislation is discriminatory on its face. In this regard, the court noted at paragraph 26 that the need for a strong factual foundation arises "particularly where the *effects* of impugned legislation are the subject of the attack" (emphasis added). Furthermore, counsel for the Society neglected to reference all relevant portions of the Supreme Court's decision in *Danson* relating to the factual foundation required in *Charter* challenges. The court elaborated upon this issue later in its Reasons by stating as follows:

> This is not to say that such facts must be established in all *Charter* challenges. Each case must be considered on its own facts (or lack thereof). As Beetz, J. pointed out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133:
>
> > There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter*, and might perhaps be struck down right away.

86 The Supreme Court of Canada has since the *Danson* decision elaborated further upon the nature of the factual foundation required in advancing a section 15(1) equality challenge. In *Droit de famille*, the court clarified that the extent of the evidentiary burden on a section 15(1) claimant will depend on whether the claim involves direct discrimination or indirect discrimination. In a case of direct discrimination, disadvantage may be established if the legislative scheme clearly on its face denies the claimant group protections available to others on the basis of enumerated or analogous grounds. (*Droit de famille*, at paras. 244-245). By contrast, as McLachlin, J. emphasized in *Withler*, a section 15 claimant will have a much heavier evidentiary burden in cases involving indirect discrimination, since proof may be required to establish that the facially neutral measure has the effect of creating distinction and a disproportionately disadvantageous outcome for a claimant or group characterized by an enumerated or analogous ground (at para. 64).

87 The Supreme Court of Canada has established that even in cases involving claims of indirect discrimination, the nature and extent of the factual foundation required to succeed on a *Charter* challenge will vary depending on the unique circumstances of every case. Iacobucci, J. clearly made this point in *Law.* He held that although the claimant in a section 15(1) case has the onus of proving an infringement of their equality right through reference to one or more contextual factors, they do not necessarily have to adduce factual evidence to show disadvantage at the second stage of the analysis. He clarified that "[f]requently, where differential treatment is based on one or more enumerated or analogous grounds, this will be sufficient to found an infringement of s. 15(1) in the sense that it will be evident on the basis of judicial notice and logical reasoning that the distinction is discriminatory within the meaning of the provision" (at para. 88). He added that "the requirement that a claimant establish a s. 15(1) infringement in this purposive sense does not entail a requirement that the claimant prove any matters which cannot reasonably be expected to be within his or her knowledge" (at para. 80). He explained that in some cases, such as situations where the impugned distinction does not

correspond with the needs, capacity or merit of the claimant group, it will be relatively easy to establish discrimination. In those circumstances, he noted that "[i]t may be sufficient for the court simply to take judicial notice of pre-existing disadvantage experienced by the claimant or by the group of which the claimant is a member in order for such a s. 15(1) claim to be made out" (at para. 83). In other cases, evidence may be required in order to properly address one or more other contextual factors (at para. 83).

88 Abella, J. also commented on the nature and extent of the evidentiary onus on a section 15 complainant in *Kahkewistahaw*. She reiterated that in determining whether an impugned distinction is discriminatory, the specific evidence required will vary depending on the context of the claim (at para. 21). That case involved a claim of indirect discrimination. The Applicant was a former chief of a First Nation who alleged that election provisions which established a requirement that a candidate for the position of chief have at minimum a grade 12 education was discriminatory on the basis of age and on the basis of residence on reserve. The impugned provisions were neutral on their face, but the Applicant claimed that they resulted in indirect discrimination in that they had a disproportionately negative impact on older members of the band who lived on reserve. The court dismissed the claim on the basis that there was insufficient evidence to establish that the facially neutral requirement disproportionately disadvantaged older band members or members who lived on reserve. However, in reaching this conclusion, Abella, J. emphasized that even in cases involving indirect discrimination, where a law is neutral on its face, statistical evidence regarding disadvantage is not invariably required in order to sustain a s. 15 claim. She noted in some such cases of alleged indirect discrimination, "the disparate impact on an enumerated or analogous ground will be apparent and immediate" (at para. 33).

89 I turn now to the particular circumstances of this claim. This is not a case where it is alleged that a facially neutral legislative scheme has had the indirect effect of creating disproportionate disadvantage to the claimant as compared to other individuals or groups. If that were the case, there would be a compelling need for a strong factual foundation establishing a link between the legislative scheme and the disadvantage alleged to have flowed to the Métis as compared to children who are Indian and Native. Rather, in my view, the various special provisions in the *CFSA* underpinning the legislative scheme relating to Indian and Native children clearly on their face create unfair and objectionable disadvantages for Métis children and their families by denying them access to numerous protections, advantages and benefits that are available to children who fall within the definitions of Indian, Native person and Native child under the Act. The legislative framework respecting children who have Indian or Native status was specifically formulated and implemented in response to the Sixties Scoop, as part of a deliberate plan to reduce the number of Indian and Native children in foster care and to increase their chances of remaining connected with their Aboriginal heritage and traditions. As the court emphasized in *Brown*, the enactment of the special provisions relating to Indian and Native status in and of itself had the immediate effect of dramatically reducing the chances of Indian or Native children being adopted out to a non-Aboriginal family and losing their culture and identity (at para. 8). As discussed in detail earlier in these Reasons, the implications of finding a child to be Indian or Native within the meaning of the *CFSA* are broad and very significant for the child and their family members. All of the special provisions in the *CFSA* relating to Indian and Native children have the effect of providing added protection to ensure that Indian and Native children receive culturally appropriate services and placements, that representatives of their communities can provide fulsome and meaningful input regarding cultural considerations and matters relating to the children's best interests, and that all feasible options for placement within the child's community or with other Aboriginal families are explored. The existence of Indian or Native status within the meaning of the Act impacts every aspect of child protection intervention in Ontario. One of the most significant examples of the manner in which Indian and Native status encourages the preservation of community ties is through the availability of subsidies for members of the Aboriginal community who care for an Indian or Native child under a designated customary care arrangement. Furthermore, the advantage of having an Indian band or native community representative involved at all stages of child welfare intervention and the requirement of consultation with these representatives is enormous. These representatives play a vital role in ensuring that child welfare staff and the courts have a full appreciation of the child's cultural heritage, traditions and needs before making decisions about the child. They work to ensure that the child receives culturally appropriate services and placements. Furthermore, they often support the plan advanced by a parent and assist that parent in advancing the plan by highlighting how it will foster the child's ties to their Aboriginal community (*First Nations Child and Family Caring Society*, para. 229).

90 Métis children are not afforded the benefits and advantages of the very significant protections summarized above, despite their status as Aboriginal peoples of Canada. The disadvantage to them as a result of their exclusion from these provisions is clear and can be discerned through logical reasoning alone. To require a Métis claimant to obtain social science evidence and empirical data to provide evidence about actual outcomes of child protection services and court proceedings for Indian and Native children as compared to other Aboriginal children would effectively preclude them from obtaining a remedy for being denied equal protection of the law in the child protection context.

91 In determining whether the distinctions in this case create or perpetuate disadvantage for Métis children and their families, I have carefully considered all of the relevant contextual factors and developments summarized earlier in these Reasons. These contextual considerations have led me to conclude that the distinctions arising from the definitions of Indian child and Native child create and perpetuate disadvantages to Métis children and their families that are unfair and objectionable. The history of disadvantage that the Métis have suffered has been an important consideration that has guided my decision in this matter. Their exclusion from the special protections afforded to Indian and Native children in the child welfare context continues that history of disadvantage in the most damaging way possible, since the strength and sustainability of Aboriginal communities, cultures and traditions is dependent on Aboriginal children being able to preserve and embrace them and carry them into the future. The exclusion of the Métis from the Indian and Native child provisions also improperly perpetuates the historical problem of Métis peoples being stereotyped as somehow being "less Aboriginal" and therefore less worthy of special protection than other indigenous peoples of Canada. I have considered the needs, capacities and circumstances of the Métis, and whether there is a correlation between the differential treatment and those needs. I conclude that the differential treatment that arises from the operation of the Indian and Native child provisions of the *CFSA* does not correspond with the actual needs and circumstances of the Métis peoples. I have discussed in detail the wrongs that the Métis experienced in the past that have had the effect of eroding their families and communities and undermining their cultural traditions. In *Powley*, the Supreme Court of Canada clearly stated that this country has made a commitment to not only recognizing the Métis as Aboriginal peoples of this country, but to "enhancing their survival as distinctive communities" (at para. 13). This commitment cannot amount to an empty shell. Métis children and their families require the protections afforded by the Indian and Native provisions of the *CFSA* just as much as Indian and Native children and families require them in order to protect and foster their communities, cultures and traditions. Finally, I have considered the nature and scope of the benefits which the Métis peoples are being denied in this case. The protections in question are geared at maintaining Indian and Native children's connections to their families, communities and culture, and giving their communities a voice in all major matters affecting the children in the child protection arena. It is difficult to imagine any other benefits that would be more important to the Métis and critical to their ongoing survival as distinct communities.

92 I have considered this section 15(1) challenge against the backdrop of all of the contextual considerations outlined earlier in these Reasons. This country is currently riding a wave of change with respect to our understanding of historical wrongs committed against all Aboriginal peoples and their cultures, the longstanding damage created by those wrongs, the necessity of repairing their cultural and familial fabrics, and the urgent need for reconciliation as an essential foundation for future healing. The wave must continue and become stronger. There is much work still to be done by all stakeholders. The most critical place for the continuation of this work is in the area of child welfare. The discrimination analysis in this case must be informed by the contextual factors that set the wave into motion and be responsive to the country's call for reconciliation and repair. The Aboriginal peoples of Canada require reassurance that this court has clearly heard and understood the Truth and Reconciliation Commission's Calls to Action. Legal roadblocks should not be placed in the way of efforts on the part of Canada's indigenous peoples to foster the strength of their communities and cultural traditions. Reconciliation requires Parliament and the provincial Legislatures to pro-actively identify and dismantle all such obstacles and pave a clear legal path for such efforts to succeed, so that all future generations of Aboriginal peoples will be able to embrace their traditions and thrive in a country that acknowledges every step of the way the incredible contributions that they have made to the creation of this country.

93 T.V. has satisfied the onus of establishing that the definitions of Indian, Native person and Native child violate section 15(1) of the *Charter.* The onus of establishing that this infringement is saved by section 1 of the *Charter* lies on the Crown or the party seeking to uphold the provisions in question. The Society did not advance a section 1 argument, and as noted previously, neither the provincial nor federal government participated in this constitutional hearing. In the absence of any section 1 argument or evidence, I conclude that the infringement is not saved by section 1.

ISSUE #5: WHAT IS THE APPROPRIATE REMEDY?

A. Positions of the Parties

94 The final issue to determine with respect to the constitutional issue is the appropriate remedy for the breach of section 15(1) of the *Charter.* Counsel for T.V. submitted that the definitions of Indian, Native person and Native child should be declared invalid pursuant to section 52 of the *Constitution Act, 1982* on the basis that they violate section 15(1) of the *Charter*, but that the declaration of invalidity should be suspended for an appropriate period of time to allow the Ontario Legislature to formulate a constitutional solution. In addition, he argued that the court should grant an individual remedy pursuant to section 24(1) of the *Charter* by directing that the provisions of the *CFSA* relating children who are Indian or Native should extend to E.D.V. for the purposes of this and any subsequent child protection proceedings under the *CFSA.*

95 The Society agrees with the position taken by T.V. respecting the appropriate remedy. It submits that a suspended declaration of invalidity, coupled with an individual remedy directing that the child E.D.V. be treated as Indian or Native for the purposes of these proceedings, is the remedy that is most consistent with the best interests of the child. The Society's position is that the remedy of reading in would not be appropriate in the circumstances of this case, since it would require the court to make *ad hoc* choices regarding an appropriate alternative legislative scheme from a variety of options, none of which is clearly the most appropriate having regard for the requirements of section 15(1). The Society argued that the task of formulating and implementing an appropriate constitutional alternative is more appropriate for the Legislature than this court.

96 For the reasons that follow, I conclude that the remedial response that the Society and T.V. have requested is the appropriate one in this case.

B. Relevant Legal Principles Regarding Constitutional Remedies

97 A finding that a legislative provision or scheme is inconsistent with the *Charter* brings into play section 52(1) of the *Constitution Act, 1982*, which is often referred to as "the supremacy clause." That section provides as follows:

> Primacy of Constitution of Canada
>
> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

98 Section 52(2) of the *Constitution Act, 1982* defines "Constitution of Canada," and includes the *Constitution Act, 1982.* The *Charter* is Part I of that Act. Accordingly, any law that is inconsistent with the *Charter* is of no force and effect to the extent of the inconsistency.

99 In addition to the remedies available pursuant to section 52(1) of the *Constitution Act, 1982*, section 24(1) of the *Charter* is a separate remedies provision available to claimants who have specifically established a *Charter* breach. That section provides as follows:

> **Enforcement of guaranteed rights and freedoms**

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

100 Section 24(1) is only available to a person whose own *Charter* rights have been infringed. Unlike section 52(1) of the *Constitution Act, 1982*, it confers discretion on the court as to whether or not any remedy should be granted.

101 A court has a wide discretion in determining the appropriate remedy once a *Charter* breach has been proven and has been found not to survive the scrutiny of section 1. In deciding upon the appropriate disposition, the court must consider the nature of the violation and the context of the legislation under consideration (*Schachter v. Canada*, [1992] 2 S.C.R. 679 (S.C.C.), at para. 25).

102 Section 52(1) is engaged when a law or portion thereof is found to be unconstitutional, rather than simply an action taken under the law (*Schachter*, at para. 85). The language of section 52(1) is mandatory, and requires the court to declare unconstitutional legislative provisions to be invalid. The effect of such an outcome is that the litigation and any subsequent litigation that would have involved the provisions in question must be determined as if the unconstitutional law does not exist. However, in practice, the courts have developed a number of variations upon a simple declaration of invalidity in order to achieve as optimal an outcome as possible for all individuals who may be affected by the decision (*Schachter*). Peter Hogg summarizes the range of remedies that the courts have adopted pursuant to section 52(1) as including the following six options:

> 1. Nullification: This remedy involves a declaration that a statute in its entirety is inconsistent with the Constitution and is therefore of no force and effect.
>
> 2. Severance: This involves a declaration that only part of the legislation is inconsistent with the Constitution and of no force and effect, and severing that portion from the valid remainder of the legislation.
>
> 3. Temporary Suspension of the Declaration of Invalidity: Where either of the first two options are invoked, the court may include as part of the remedy an order suspending the coming into force of the declaration of invalidity for a specified period of time.
>
> 4. Reading in, which involves the court adding words to a statute that is inconsistent with the Constitution so as to make the statue constitutionally valid.
>
> 5. Reading down, which involves the court interpreting the statute in such a way that it is consistent with the Constitution.
>
> 6. Constitutional exemption: this remedy involves creating an exemption from a statute that is partly inconsistent with the Constitution so as to exclude from the scope of the statute the application that would be unconstitutional.

(Peter Hogg, *Constitutional Law of Canada*, 5th edition, Supra., at p. 40-4).

103 The court has a broad discretion as to which of these options to adopt pursuant to section 52(1). In deciding upon the appropriate remedy, the court should seek to avoid undue intrusion upon the legislative sphere, while at the same time crafting a remedy that promotes the purposes of the *Charter* as much as possible (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 (S.C.C.), at para. 104; *Schachter*, at para. 43). With respect to the options of complete nullification of the legislation in its entirety as opposed to severance, Lamer, J. emphasized in *Schachter* that severance is the preferred approach where possible, so that "as much of the legislative purpose as possible may be realized" (at para. 29). He emphasized that the first step in choosing a particular remedial course where only portions of the legislation are found to be unconstitutional is to define with precision the extent of the inconsistency with the requirements of the Constitution,

and to then declare invalid (a) the inconsistent portion; and (b) such portions of the remainder of the legislation of which it cannot safely be assumed that the Legislature would have enacted without the inconsistent portion" (at para. 31).

104 In this case, the Respondent T.V. alleges that the definitions of Indian, Native person and Native child offend section 15(1) of the *Charter* because they are under-inclusive in that they do not extend to Métis children. In circumstances where legislative provisions are found to violate the *Charter* on the basis that they are under-inclusive, a simple declaration of partial invalidity (i.e. severance) can have the undesirable ripple effect of denying the benefits of the impugned legislative provisions to the individuals or groups who already fall within the purview of the legislative scheme. In order to avoid draconian outcomes for such other interested stakeholders, the courts have in certain circumstances resorted to the options of "reading in" or temporarily suspending the declaration of invalidity to allow the government to implement corrective constitutional measures. A careful consideration of each of these options is therefore required in this case. The starting point for this analysis is the Supreme Court of Canada decision in *Schachter*, where the court discussed in detail the options of reading in, declaration of partial invalidity and suspending the declaration of invalidity in the context of a claim that a provision of the federal *Unemployment Insurance Act* violated section 15 of the *Charter* by providing certain child care benefits to adoptive parents that were not offered to biological parents. The court concluded that the legislative provision was under-inclusive in a manner that violated the section 15 equality rights of biological parents. In addressing the issue of the appropriate remedy, it outlined several factors for the court to consider in deciding between the options of reading in or a declaration of partial invalidity. Lamer, J. reiterated the importance of respecting the role of the Legislature, and held that reading in may be a preferable alternative to severance where it allows the court to resolve the constitutional problem while at the same time minimizing interference with the parts of the statute that do not violate the Constitution (at para 43). He noted that the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme which the Legislature has enacted. However, he cautioned that this approach may not always be the least intrusive upon legislative authority, and that a careful analysis of this issue is required in every case in order to craft the optimal remedy. For instance, he noted that in the context of legislative schemes that confer benefits or entitlements on certain specified groups, reading in so as to include additional groups may actually be highly intrusive upon the legislative sphere if there is concern that the Legislature would not have implemented the scheme had it known that it was impermissible to exclude particular individuals or groups (at para 39). Lamer, J. also discussed the need for remedial precision as an important factor in deciding between reading in or severance. He noted that reading in is typically only appropriate in circumstances where the court is able to define with a sufficient degree of precision how the statute ought to be extended in order to be constitutionally valid. He concluded that in some cases, reading in may be too complicated a process due to uncertainty as to what precisely should be read in to remedy the constitutional problems. As Lamer, J. stated, in such circumstances, "to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the Legislature, not the courts" (at para. 57). As Peter Hogg has noted, in making these comments, Lamer, J. was essentially cautioning that in some circumstances, "an unconstitutional statute cannot be salvaged except by changes that are too profound, too policy-laden and too controversial to be carried out by a court" (Peter Hogg, *Constitutional Law of Canada*, Supra., at p. 40-23). Finally, the court held in *Schachter* that another factor to consider in deciding whether to resort to reading in is whether the addition of the proposed language would be consistent with the objectives of the legislation.

105 In *Schachter*, the court also discussed at length the option of suspending a declaration of invalidity for a period of time to allow the Legislature to correct the constitutional shortcomings of the legislative scheme. The effect of such a disposition is that the legislative provisions remain in effect until the expiry of the period of time specified in the order. The court emphasized that this option should be exercised with caution, and should not be viewed as a panacea for the problem of interference with legislative authority. It described a delayed declaration of invalidity as a very serious matter from the perspective of enforcement of the *Charter* for two reasons. First, it allows a state of affairs that has been found to violate *Charter* values to continue for a period of time, notwithstanding the finding of unconstitutionality (at para. 82). Second, a delayed nullification forces the matter onto the Legislature's agenda at a time that is not chosen by the Legislature, and under forced time limits (at para. 83). For these reasons, Lamer, J. concluded that reading in is generally preferable to a delayed declaration of nullity where it is appropriate (at para. 82). However, the court concluded at para

88 that if reading in is not appropriate, a temporary suspension of the declaration may be warranted in the following circumstances:

1. Where a declaration of invalidity without enacting something in its place would pose a danger to the public;

2. Where a declaration of invalidity without enacting something in its place would threaten the rule of law; and

3. Where the legislation is found to be unconstitutional because it is under-inclusive, and a declaration of invalidity would have the unfortunate effect of depriving benefits to those who fall within the purview of the legislation, while at the same time providing no immediate relief to the claimant whose rights have been violated.

Lamer, J. emphasized that these factors are intended simply as guidelines to assist courts in determining the most appropriate remedial course, and should not be viewed as hard and fast rules (at para. 89).

106 The Supreme Court of Canada has since *Schachter* resorted to delayed declarations of nullity in a broader range of circumstances than those referred to in the guidelines which Lamer, J. articulated in *Schachter*. These include the following:

1. The court has ordered suspended declarations of invalidity in circumstances where the decision would have a significant effect on government resources. In *Eurig Estate, Re*, [1998] 2 S.C.R. 565 (S.C.C.), the court held that provisions in Ontario's legislation relating to probate fees were constitutionally invalid, but suspended the declaration of invalidity for six months on the basis of the potential loss of revenue to the province as a result of the decision. (see also *CSN c. Canada (Procureur général)*, [2008] 3 S.C.R. 511 (S.C.C.) at para. 94, where the court found that employment insurance premiums that the government had levied over a three year period were invalid, and the court issued a suspended declaration of invalidity to allow the government to rectify the consequences of the decision.)

2. Delayed nullifications have also been ordered where the unconstitutional provisions were part of a broader legislative scheme, the resolution of the constitutional problems was complex and it was determined that the most prudent course was to allow the Legislature time to carefully consider and craft necessary alterations or adjustments to the scheme as a whole (see for example *Trociuk v. British Columbia (Attorney General)*, [2003] 1 S.C.R. 835 (S.C.C.), at para. 43; *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912 (S.C.C.), at para. 93; *Health Services & Support-Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (S.C.C.), at para. 168; *Ha.-N. (H.) c. Québec (Tribunal administratif)*, [2009] 3 S.C.R. 208 (S.C.C.)).

3. The court has also suspended declarations of invalidity in circumstances where the finding of invalidity gives rise to numerous practical and procedural difficulties that the government and interested parties will need to work out and address in order to accommodate the changes in an orderly manner. For instance, in *Ha.-N. (H.) c. Québec (Tribunal administratif)*, the court declared amendments to Quebec's Charter of the French Language which restricted access to English-language public schools to be unconstitutional, but suspended the declaration of invalidity for a period of 12 months because of the practical difficulties that the declaration may entail (at para. 46).

4. The Supreme Court of Canada has also opted for suspended declarations of invalidity to allow the Legislature to correct the problem, rather than the reading in remedy, in circumstances where there is genuine uncertainty as to whether the Legislature would have made the change proposed if it had known that the legislative scheme or provisions in question were unconstitutional. In this vein, McLachlin, J. held in *Trial Lawyers Assn. of British Columbia v. British Columbia (Attorney General)*, [2014] 3 S.C.R. 31 (S.C.C.) that reading in should be "sparingly used," and "only where it is clear that the Legislature, faced with a ruling of unconstitutionality, would have made the change proposed" (at para. 66). The conclusion that can be drawn from her reasons is that that the court should exercise considerable caution before resorting to the reading in remedy in circumstances where there are several reasonable options for addressing the constitutional wrong, including abandoning the scheme altogether, making substantial changes, or making adjustments to it. In such circumstances, the court should respect the Legislature's

right to make the appropriate choice if this approach is consistent with *Charter* values. The court relied on similar reasoning to support its decision to issue a suspended declaration of invalidity rather than resorting to the reading in remedy in *Federation of Law Societies of Canada v. Canada (Attorney General)*, [2015] 1 S.C.R. 401 (S.C.C.) at paras. 64-66.

5. In other cases, the court has ordered delayed nullification of legislative provisions on the basis that numerous interests were engaged by the decision, and consultations with affected groups were considered to be critical to fashioning an effective and meaningful solution. For instance, in *Bedford v. Canada (Attorney General)*, [2013] S.C.R. 1101 (S.C.C.), the court found that three prostitution-related offences in the *Criminal Code* were invalid, but issued a 12 month suspension of its declaration of invalidity based on the numerous interests at stake (at para. 169). In *Corbière*, the court declared the on-reserve residence requirements in the *Indian Act* for band elections to be invalid pursuant to section 15, but suspended the declaration for a period of 18 months. L'Heureux-Dube, J. held in her concurring decision that a declaration of invalidity is appropriate in cases where dialogue among important stakeholders is critical to ensuring that meaningful and effective solutions are crafted and implemented. She found that the best solution in that case would be one crafted by Parliament, after consulting with the Aboriginal peoples affected by the case. Her decision established that the principle of democracy should guide the exercise of the court's remedial discretion in constitutional cases, and that this principle "encourages remedies that allow the democratic process of consultation and dialogue to occur" (at para. 116).

6. Finally, the court has opted for an order suspending a declaration of invalidity, rather than the remedy of reading in, where there are concerns that the legislative provisions in question may be constitutionally vulnerable on grounds other than those specifically addressed in the court's reasons. (see *R. v. Tse*, [2012] 1 S.C.R. 531 (S.C.C.)).

107 The formulation of an appropriate remedy in the case of under-inclusive legislation is a challenging task, particularly if the court concludes that reading in is not an appropriate remedial response. The alternatives of a simple declaration of invalidity, or making such a declaration and suspending it for a period of time, represent a pyrrhic victory for the claimant, since they do not actually grant them or others in their situation personal redress for the constitutional violation. In these circumstances, section 24(1) of the *Charter* may be invoked to ensure that justice is achieved for claimants. The court has a considerable degree of discretion and flexibility in crafting an individual remedy pursuant to section 24(1) that is just to the claimant and appropriate to the constitutional violation in question. The Supreme Court of Canada has held that this remedy provision should be interpreted purposively and in a large and liberal manner that best attains its objectives (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.); *British Columbia Development Corp. v. British Columbia (Ombudsman)*, [1984] 2 S.C.R. 447 (S.C.C.)).

108 A review of the Supreme Court of Canada case-law indicates that the court has crafted individual remedies for claimants in circumstances where suspended declarations of invalidity would have left them with no meaningful relief. For instance, in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (S.C.C.), at para. 577, the court suggested that an order suspending a declaration of invalidity could be coupled with an individual *Charter* remedy for the claimant in the form of a constitutional exemption. McLachlin, J. recognized the challenges of crafting an appropriate remedy for the claimant in cases involving delayed declarations of nullity in *Miron*, and referred to the court's support in *Rodriguez* of crafting of an individual remedy for the claimant pursuant to section 24(1). In *Eurig Estate, Re*, the court suspended its declaration of invalidity respecting Ontario's probate fee legislation, but nonetheless gave the claimants the immediate benefit of the invalidity. The court also appeared to support the notion of individual remedies for claimants in cases where suspended declarations of invalidity are issued in the case of *Ha.-N. (H.) c. Québec (Tribunal administratif)* As previously noted, in that case, the court held that amendments to Quebec's *Charter of the French Language* which restricted access to English language public schools were unconstitutional, and ordered a declaration of invalidity, to be suspended for a period of one year. With respect to one of the claimants, the court held based on its ruling that the child in question was eligible for instruction in the English language. With respect to another claimant, the court concluded that it did not have sufficient evidence before it to make a decision regarding eligibility. With respect to both of these claimants, the suspended declaration of invalidity did not provide a meaningful remedy for the breach of their *Charter*

right, given the need for immediate relief for the children. The court responded to this problem by crafting individual remedies for each claimant. For the first claimant, it made an order that the claimant's file be returned to the person designated by the Quebec Minister of Education to immediately issue a certificate of eligibility for instruction in English for the child. In relation to the second claimant, it ordered that the claimant's file be returned immediately to the Minister of Education for Quebec, and if appropriate, to the Administrative Tribunal of Quebec to be reviewed in light of the court's decision and the principles established in an earlier decision of the court (see para. 51). While the court did not specifically refer to section 24(1) in making these orders, they were clearly individual remedies crafted for the benefit of the particular claimants before the court as a means of ensuring that they received the benefit of the *Charter* ruling notwithstanding the suspension of the declaration of invalidity.

B. Analysis

109 I agree that the remedial framework that T.V. and the Society have proposed is the most appropriate one in this case. I have carefully considered the alternative of reading in, which would involve ordering that the definitions of Indian, Native person and Native child include Métis children, but I have decided that this would not be an appropriate remedial response. As I have discussed in these Reasons, these definitions are the foundation blocks for a comprehensive, detailed framework for the protection of children who have Indian or Native status. These terms are used throughout the *CFSA* in almost every area of child welfare service covered by the Act. The implications of this decision will therefore be wide-ranging for child welfare practice and litigation. Accordingly, the resolution of the constitutional problem will require careful consideration and consultation amongst legislators, policy-makers, child welfare professionals and Aboriginal groups. There are various possible means of resolving the problem, and in such circumstances, it is most appropriate to allow the Legislature the necessary time to formulate a new framework that will make the legislation compliant with section 15(1). Furthermore, while my decision has focused only on Métis children and their families, it may have broader implications for other Aboriginal children and families who do not fall within the purview of the definitions of Indian, Native person and Native child. That issue was not before me, and therefore I am not specifically deciding that point. However, this is certainly a question that the Legislature may wish to consider in light of my Reasons in this case. The proposed remedial response also has the advantage of allowing the government time to consult and work collaboratively with relevant Aboriginal groups so that they are heard. This approach promotes the goal of reconciliation and provides the best assurance that the interests, needs and wishes of Aboriginal peoples will be considered.

110 A suspension of the declaration of invalidity is required in this case because children with Indian or Native status would be denied the significant benefits and advantages that they are afforded under the current scheme if the declaration were to take immediate effect. I am suspending the declaration of invalidity for a period of ten months, to allow the Ontario government to craft a solution. I am granting the Crown leave to bring a motion to extend this deadline in the event that more time is required to have fulsome and meaningful discussions and consultations. However, I am not allowing any such motion until June 2017 at the earliest, as I will require comprehensive evidence in support of any such motion regarding the steps that have been taken to formulate a solution. The issues at stake are extremely important to Ontario's Métis children and families, and therefore time is of the essence. The government identified the issues that are the subject of this decision as being a high priority for Aboriginal peoples during the 2010 *CFSA* Review. My sincere hope is that significant work has already begun in this area, and that a comprehensive solution will be implemented sooner than August 2017.

111 A delayed declaration of invalidity with no other remedial response would be of no assistance to E.D.V. and his family in this case, since the Protection Application will be proceeding to a hearing shortly. This is an appropriate case in which to order an individual remedy in favour of T.V., so that this family will have the benefit of the protections that are currently available to Indian and Native children. An order will issue directing that E.D.V. shall for all purposes relating to this and any subsequent child protection proceedings be treated as if he were an Indian, Native person or Native child within the meaning of the *CFSA*.

112 Unfortunately, the remedial response that I have adopted does not address the interests of other Métis children who are currently before the courts in child protection proceedings across the province, or who will come before the

courts between now and August 2017. However, this difficulty can be addressed by way of an application in the relevant proceeding seeking a personal remedy such as the one granted in this case.

ISSUE #5: IS THERE A REPRESENTATIVE OF THE CHILD'S METIS COMMUNITY WHO SHOULD BE SERVED?

113 The final issue to be determined in this case is whether there is a representative of E.D.V.'s community who should be served with the documents relating to this proceeding. Since I am ordering that E.D.V. be treated as a Native or Indian child, section 39(1)(4) of the *CFSA* requires that a member of the child's community be served. I find based on the evidence before me that the father T.V., and by extension the child, are connected to the Eastern Woodlands Métis of Nova Scotia. In addition, I find that the appropriate representative of that community has been served with the documents relating to this proceeding, and that the community has decided not to participate or present a plan respecting E.D.V. I am also satisfied that extensive efforts have been made to determine if any other Métis organization is able and willing to be involved in this proceeding, without any response to date. Accordingly, I conclude that there are no further service requirements with respect to the child's community.

PART IV: TERMS OF ORDER TO ISSUE

114 On the basis of the foregoing, a final order shall issue as follows:

1. The definitions of "Indian" "Native person" and "Native child" in section 3(1) of the *Child and Family Services Act* are declared invalid on the basis that they infringe section 15(1) of the *Charter of Rights and Freedoms.*

2. The declaration of invalidity is suspended for a period of ten months, until August 11, 2017. The Attorney General of Ontario may apply by way of motion in this proceeding for an extension of this deadline no earlier than June 15, 2017 on at least 7 days' notice to the parties. Any such motion must include detailed affidavit evidence outlining the steps that the Ontario government has taken to resolve the constitutional issue raised in this case, further steps that are required and an estimate of the time required to complete each outstanding step.

3. The child E.D.V. shall for all purposes relating to the Protection Application herein and any subsequent child protection proceedings be treated as if he were an Indian, Native person or Native child within the meaning of section 3(1) of the *Child and Family Services Act.*

4. If any party seeks costs in connection with this Notice of Constitutional Question, they shall submit a written request to the Trial Coordinator's office no later than October 24, 2016 for a hearing before me for an estimated two hours to address costs. If any such request is made, the party seeking costs shall serve and file a Book of Authorities and Bill of Costs by no later than seven days prior to the costs hearing, and the responding party shall serve and file a Book of Authorities and Bill of Costs by no later than two days prior to the hearing.

5. The Trial Coordinator is directed to schedule a "to be spoken to" date before me as soon as possible to address scheduling issues respecting the Summary Judgment Motion.

Application granted.

TAB 6

1989 CarswellBC 101
British Columbia Supreme Court

Dixon v. British Columbia (Attorney General)

1989 CarswellBC 101, [1989] B.C.W.L.D. 1676, 16 A.C.W.S. (3d) 12, 37 B.C.L.R. (2d) 231, 60 D.L.R. (4th) 445

DIXON v. ATTORNEY GENERAL OF BRITISH COLUMBIA

Meredith J.

Heard: May 11, 1989
Judgment: June 1, 1989
Docket: Vancouver No. A860246

Counsel: *R.D. Holmes*, for petitioner.
E.R.A. Edwards, Q.C., for respondent.

Headnote

Elections --- Electoral boundaries — Federal and provincial

Civil liberties and human rights — Democratic rights — Representation — Court declaring provisions of British Columbia Constitution Act defining provincial electoral boundaries invalid as violating right to electoral equality, but ordering that legislation remain provisionally in place — Court dismissing application for order that stay cease to have effect — Preservation of legislation necessary to avoid consequences of legislature's annulment — Court not having power to fix deadline for new legislation.

In previous proceedings, s. 19 and Sched. 1 of the British Columbia Constitution Act, which define the boundaries of provincial electoral districts and prescribe the number of members for each, was declared null and void as offending s. 3 of the Canadian Charter of Rights and Freedoms. However, the court ordered that the legislation remain provisionally in place to avoid a possible constitutional crisis should a precipitate election be called. The petitioner applied for an order that the stay cease to have effect and asked the court to fix a date on which the order proclaiming the legislation invalid should take effect.

Held:

Application dismissed.

If the legislation was not preserved provisionally, the result would be the annulment of the legislature itself and the consequent neutralization of the votes of its members, thereby transgressing every citizen's rights to electoral equality protected by s. 3 of the Charter. Moreover, the court could not fix a deadline for the enactment of legislation because to do so would be to compel the agreement of the members of legislature and effectively to legislate, which were beyond both the inherent and remedial powers of the court. It was for the legislature to enact remedial legislation and the court had to presume that it would do so in good time.

Table of Authorities

Cases considered:

Hoogbruin v. B.C. (A.G.), 70 B.C.L.R. 1, [1986] 2 W.W.R. 700, 24 D.L.R. (4th) 718, 20 C.R.R. 1 (C.A.) — *considered*

Statutes considered:

Canadian Charter of Rights and Freedoms

s. 3

Constitution Act, R.S.B.C. 1979, c. 62

s. 19 [am. 1984, c. 12, s. 1]

Sched. 1 [renumbered 1984, c. 12, s. 3; am. 1985, c. 3, s. 2]

***Meredith J.*:**

1 The petitioner now applies for an order:

> ... that the stay of the Order of the Honourable Chief Justice McLachlin pronounced April 18, 1989 cease to have effect, and the Order of the Honourable Chief Justice McLachlin pronounced April 18, 1989 that section 19 and schedule 1 of the *Constitution Act*, R.S.B.C. 1979, c. 62 as amended are null, void and of no force and effect take effect as of the 30th day of June, 1989, or as such other date as this Honourable Court may deem just.

2 The application is consequent upon reasons given by the Chief Justice [35 B.C.L.R. (2d) 273] for the order referred to. The following proposed form of order serves to reflect what the petitioner, at least, thinks arises out of the reasons:

> THIS COURT ORDERS that Section 19 and Schedule 1 of the *Constitution Act*, R.S.B.C. 1979 c. 62, as amended, are null, void and of no force or effect in that they are inconsistent with and contravene the Canadian Charter of Rights and Freedoms.
>
> THIS COURT FURTHER ORDERS that the effect of the order and declaration just made be and the same is hereby stayed until further order of this Court.
>
> THIS COURT FURTHER ORDERS that the Petitioner have liberty to apply for an order setting the time at which the said stay shall cease.
>
> AND THIS COURT FURTHER ORDERS that the Petitioner's application for an order setting the provincial electoral boundaries for the 69 electoral districts required by Section 18 of the *Constitution Act*, R.S.B.C. 1979, c. 62 as amended, in default of valid legislation being enacted be and the same is hereby adjourned generally.

3 I am to consider here simply whether an order should be made to terminate the stay. I do not think that the reasons of the Chief Justice should or can require me to make an order. The task would be clarified to some extent if the terms of the formal order were agreed upon.

4 Section 19 of the Constitution Act reads:

> **Electoral districts**
>
> 19. For the returning of members of the Legislative Assembly there shall be electoral districts, the name and boundaries of which are described and defined in Schedule 1, and which shall severally return to the Legislative Assembly the number of members prescribed in Schedule 1.

5 The Chief Justice concluded that s. 19 of the Constitution Act was contrary to the Canadian Charter of Rights and Freedoms. She said in the conclusion to her reasons [p. 312]:

> It is my conclusion that this court cannot escape its constitutional obligation to review the validity of s. 19 and Sched. 1 of the Constitution Act and must declare those provisions be be contrary to the Charter of Rights and Freedoms. Pending submissions on what time period may reasonably be required to remedy the legislation and the expiry of that period, the legislation will stay provisionally in place to avoid the constitutional crisis which would occur should a precipitate election be required.

6 The decision was that s. 3 of the Charter was violated. That section comes under the heading of "Democratic Rights". It reads:

> **Democratic Rights**

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

7 I have concluded that an order fixing a date beyond which the legislation will not "stay in place" cannot be made. The reason for this is that such an order would in itself violate or threaten the violation of very fundamental constitutional rights. These include the very right held by the Chief Justice to have been infringed.

8 I presume in ordering that the "legislation stay in place" even for a limited period, the Chief Justice was relieving against a remedy which, it seems, could cause chaos. That is to say that if the legislation did not "stay in place", the result would be the annulment of the Legislative Assembly itself, with the consequent neutralization of the votes of its mem bers. If that result could conceivably occur, then the rights of citizens to elect members to the Legislative Assembly, preserved by s. 3 of the Charter, would be completely transgressed. That is to say that the right to vote found by the Chief Justice to be impaired for want of equality would vanish altogether. She herself says: "The result would be the disenfranchisement of the citizens of the province."

9 But I think the Chief Justice considered that the legislature, faced with the spectre of crisis, would enact valid legislation in time to fill the void. She said [p. 309]:

> The first answer is that the court must proceed on the premise that, just as the court does what it must do under the Constitution, so will the legislature. This proposition has repeatedly been affirmed by our courts.

She cited this passage in the judgment of Nemetz C.J.B.C., in *Hoogbruin v. B.C. (A.G.)*, 70 B.C.L.R. 1, [1986] 2 W.W.R. 700, 24 D.L.R. (4th) 718 at 722-23, 20 C.R.R. 1 (C.A.), as follows:

> If any law is inconsistent with the provisions of the Charter, it is the court's duty, to the extent of such inconsistency, to declare it to be of no force or effect (s. 52(1)).
>
> Before the Charter, the courts could and did declare legislation invalid on division of powers grounds. When they did so, we know of no recent occasion when the legislative branch of government did not faithfully attempt to correct the impugned legislation. Likewise, when this court declares a statute or portion thereof to be "of no force and effect" where it is inconsistent with the Charter, it is for the Legislature to decide what remedial steps should be taken in view of the declaration. Section 24(1) of the Charter empowers the courts to grant citizens remedies where their guaranteed rights are infringed or denied ... It would be anomalous, indeed, if such powers were reserved only for cases where limitations are expressly enacted and not for cases where an unconstitutional limitation results because of omission in a statute.

10 The first right which would be violated by the imposition of a deadline is the right of the members of the Legislative Assembly to vote according to their convictions. In correcting the equality imbalance, the members of the Legislative Assembly have choices to make. To decree that they make one choice or another, is to deprive those members of their right, to say nothing of their obligation, to vote according to their convictions. I must assume that good faith will ensure that the convictions will be within constitutional bounds.

11 Section 3 itself has been found by the Chief Justice to necessarily imply that the members of the Legislative Assembly should represent proportionate populations, and that this result should arise because the votes of those who elect the members should have equal influence. But s. 3 itself, in providing that a citizen is qualified for membership in a Legislative Assembly, in itself necessarily implies that those members not only are entitled to one vote each, but that the votes be equal. The section also necessarily implies, as do many other features of the Constitution, that legislative assemblies will continue to exist.

12 The people of the province of British Columbia, including the citizens of Canada, have a right to expect that a legislative assembly will exist, and that the members thereof will have equality of votes.

13 To establish a deadline beyond which the legislation will not be "in place" would be to require that the majority of the members of the Legislative Assembly agree on a course of action. I consider it quite beyond the inherent power of the court to compel agreement. In any case, to do so would be to effectively legislate. That must also be beyond the remedial powers that are reposed in the court.

14 So I conclude that the establishment of a deadline would be in direct violation of the rights and obligations of the members of the Legislative Assembly, would threaten the violation of the right of people of the British Columbia to the existence of a Legislative Assembly, and would threaten the violation of the right of citizens of Canada to vote for members of a Legislative Assembly, to say nothing of eradicating the right to vote, whether equal or not.

15 I think it must be left to the legislature to do what is right in its own time.

16 For these reasons I refuse to make the order applied for.

Application dismissed.

TAB 7

Cited Paragraphs: 18-20

East York (Borough) v. Ontario (Attorney General), [1997] O.J. No. 3064

Ontario Judgments

Ontario Court of Justice (General Division)

Motions Court

Borins J.

Heard: July 7-10, 1997.

Judgment: July 24, 1997.

Court File Nos. 97-CU-122390 97-CU-122393 and 97-CU-122492

[1997] O.J. No. 3064 | 34 O.R. (3d) 789 | 43 O.T.C. 287 | 45 C.R.R. (2d) 237 | 41 M.P.L.R. (2d) 137 | 72 A.C.W.S. (3d) 1020

Between The Corporation of the Borough of East York, the Corporation of the City of Etobicoke, the Corporation of the City of Toronto and The Corporation of the City of York, and The Attorney General for Ontario And between The Corporation of the City of Scarborough and Alan Carter, and The Attorney General for Ontario And between Citizens' Legal Challenge Inc., Toronto East Downtown Residents Association Inc., Huron Sussex Residents Organization Inc., Roomers Rights Organization (Toronto) Inc. and 125 Individuals, and The Attorney General for Ontario

(25 pp.)

[Ed. note: A Corrigendum was released by the Court September 10, 1997 and the correction has been made to the text.]

Case Summary

Constitutional law — Powers of parliament and the legislature — Determination of validity of statutes or acts - - Provincial jurisdiction — Municipal institutions.

Toronto municipalities and citizens' groups applied to challenge the City of Toronto Act 1997, S.O. 1997, c. 2. The Act will dissolve the municipalities and constitute the inhabitants of the City of Toronto as one body corporate. The applicants argued that the Act violated rights pursuant to the Canadian Charter of Rights and Freedoms and that by disregarding democratic autonomy of the municipalities, the legislature exceeded its powers under the Constitution Act. They further argued that the government failed to consult effectively with the municipalities and their inhabitants and ignored results of referenda. The respondents submitted that there had been, over the years, adequate public consultation in respect to the mode of governance of Metro Toronto.

HELD: Application denied.

There was merit in the applicants' position that the referenda results were deserving of the government's consideration. The evidence also supported the conclusion that the "megacity" bill simply appeared on the government's legislative agenda with little or no public notice or consultation with inhabitants. Such, however, was the prerogative of government. There was no obligation on government to consult the electorate before introducing legislation. Section 92(8) of the Constitution Act gave the provincial legislature the right to create a legal body for the management of municipal affairs. The applicants failed to establish that the Act infringed or denied freedom of the any elector to express himself or herself in an election for the mayor and councillors of the new city.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982. City of Toronto Act 1997, S.O. 1997, c. 2. Constitution Act, s. 92(8).

Counsel

T. Edgar Sexton, Q.C., David Stratas and Matthew Taylor, for the applicants, The Corporation of the Borough of East York, et al. Chris G. Paliare and Richard Stephenson, for the applicants, The Corporation of the City of Scarborough and Alan Carter. Raj Anand and M. Kate Stephenson, for the applicants, Citizens' Legal Challenge Inc., et al. Robert E. Charney and Janet E. Minor, for the respondents.

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1 BORINS J. (endorsement);— This is an application to challenge, on constitutional and statutory grounds, the City of Toronto Act 1997, S.O. 1997, c. 2 (the Act). On April 21, 1997 Royal Assent was given to the Act. As a result, on January 1, 1998, when ss. 2 to 11 and 28 come into force, the inhabitants of The Municipality of Metropolitan Toronto (Metro Toronto), which comprises the Cities of Etobicoke, North York, Scarborough, Toronto and York and the Borough of East York (the municipalities), will be constituted "as a body corporate under the name of City of Toronto' in English and cité de Toronto' in French," and the municipalities will be dissolved and the assets and liabilities which they had on December 31, 1997 will become vested in and become assets and liabilities of the new City of Toronto (new city), without compensation. The council of the new city will be comprised of the mayor, to be elected by general vote, and 56 other members, two of whom are to be elected from each of its 28 wards, with the election to be held on November 10, 1997. The Act provides for the establishment of neighbourhood committees, and creates six community councils, one for each of the municipalities comprising Metro Toronto. Each community council will be comprised of the members of the council of the new city elected for each ward in each of the former municipalities.

2 Part III of the Act, which comprises ss. 13-24 , has the sub-heading "The Transition Period", which is defined in s. 1 as the period beginning on the day the Act receives Royal Assent and ending on December 31, 1997. Part III of the Act came into force on April 21, 1997, when the Act was given Royal Assent. Section 13(1) creates a financial advisory board, consisting of members appointed by the Lieutenant Governor in Council, which is dissolved on January 31, 1998. The financial advisory board is given a number of powers, including considering the 1997 operating and capital budgets of the municipalities and the establishment of guidelines in respect to transactions into which the municipalities may enter and perform and in respect to employment contracts. Section 18(1) creates a transition team, consisting of members appointed by the Lieutenant Governor in Council, which is also dissolved on January 31, 1998. The transition team is given a number of powers, the most significant being contained in s. 18(4), which reads:

> (4) The transition team shall,
>
> (a) consider what further legislation may be required to implement this Act, and make detailed recommendations to the Minister;
>
> (b) establish the key elements of the new city's organizational structure and hire, in accordance with section 19, the municipal officers required by statute and any other employees of

executive rank whom the transition team considers necessary to ensure the good management of the new city;

(c) hold public consultations on,

(i) the functions to be assigned to neighbourhood committees and the method of choosing their members.

(ii) the functions to be assigned to the community councils and the executive committee, and

(iii) the rationalization and integration of municipal services across the new city and associated opportunities for savings;

(d) give the old councils opportunities to meet with the transition team to discuss the matters described in subclauses (c) (i), (ii) and (iii);

(e) before December 31, 1997, make detailed recommendations to the new council on,

(i) the matters referred to in subclauses (c) (i), (ii) and (iii),

(ii) a procedure by-law for the purposes of subsection 55(2) of the Municipal Act,

(iii) the remuneration of the mayor, the community chairs and the other members of council, and

(iv) transitional issues;

(f) prepare and submit to the new council for its consideration a proposed operating and capital budget for 1998 that provides for property tax stability and continuity of service delivery;

(g) report to the Minister at his or her request;

(h) co-operate with the financial advisory board;

(i) carry out any other prescribed duties. (Emphasis added).

Additional powers are given to the transition team by s. 18(6).

3 Applications challenging the constitutional validity of the Act were brought by: The City of Scarborough and Alan Carter; The Cities of Etobicoke, Toronto and York and the Borough of East York; and Citizens' Legal Challenge Inc., three additional corporate applicants and 125 citizens of Metro Toronto. The three applications were heard together. Cumulatively the Act is challenged on two grounds. The first ground is that the Act violates rights guaranteed by ss. 2(b)(d), 7, 8 and 15(1) of the Canadian Charter of Rights and Freedoms (the Charter).

4 The second ground is that in creating two unelected bodies, the financial advisory board and the transition team, the legislature disregarded the local democratic autonomy of the municipalities and thereby exceeded the powers conferred on it by s. 92(8) of the Constitution Act, 1867 to enact laws in relation to "Municipal Institutions in the Province." A major focus of the second ground is the alleged failure of the provincial government to consult effectively with the municipalities and their inhabitants before Bill 103, which after amendments became the Act, received first reading on December 17, 1996. A further focus of the second ground is that the powers conferred on the appointed financial advisory board and the transition team, are powers customarily exercised by members of the elected council of a municipality, or a local government.

5 As I indicated at the conclusion of the hearing, I am sensitive to the time constraints which affect the parties to these applications. In particular, I understand that municipal elections are scheduled for November 10, 1997, and that it is desirable that all concerned know well before that date whether the election is to be for the mayor and counsel of the new City of Toronto, or for the mayors and councils of the six existing municipalities. In this regard, it is, perhaps, desirable that there be adequate time to permit the parties to obtain appellate review of this decision. Accordingly, time constraints suggested that the reasons for my decision be presented in this endorsement, rather than by more discursive reasons for judgment. It is important to underscore that no fault can be ascribed to the

applicants for the time constraints imposed on the court. They were brought about by the apparent haste which prompted the government to proceed with this legislation, and the time frame mandated by the Act. Indeed, the manner in which counsel advanced these applications toward an early hearing, and co-operated with each other, was exemplary.

6 It is the position of the applicants, considered cumulatively, that Part II of the Act, which creates the new City of Toronto, should be declared invalid because the creation of the new city infringes or denies freedom of expression and association as guaranteed by s. 2(b) and (d) respectively of the Charter, the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice guaranteed by s. 7, the right to be secure against unreasonable seizure guaranteed by s. 8 and the right to equal protection and equal benefit of the law without discrimination on certain stipulated or analogous grounds as guaranteed by s. 15(1). It is the applicants' submission that regardless of the success or failure of the Charter attack on Part II of the Act, Part III of the Act, which establishes and empowers the financial advisory board and the transition team, should be declared invalid because it is ultra vires, or exceeds, the power to legislate in respect to municipal institutions conferred on the province by s. 92(8) of the Constitution Act, 1867. It is submitted that if the Charter argument fails and the excess of powers argument succeeds, the entire Act should be declared invalid because Part III is necessary to the effective operation of the legislation. The general theme which emerged throughout the applicants' submissions was that the government failed to meaningfully consult, or listen to, the people in proceeding with the legislation and that it ignored the results of referenda conducted by the municipalities which indicated that a significant majority of those electors who voted were opposed to the Act.

7 As I have stated, the Act abolished the two-tier structure of the six regional governments and the Metro Toronto government, which have prevailed, in one form or another, since the province enacted the Municipality of Metropolitan Toronto Act, 1953, S.O. 1953, c. 73, and replaced them with a single city, the City of Toronto, commonly referred to as the "megacity", having a single-tier government comprised of a mayor and 56 councillors. The government decided to embark on this restructuring of Metro Toronto even though the evidence indicates that Metro Toronto has generally been regarded as an "urban success story". However, there was an abundance of expert evidence, as well as the "6 Mayors Report, to the effect that some change in the manner of governance of Metro Toronto is required, although there was no uniformity as to what the appropriate model of government should be. In presenting Bill 103, the government expressed its view of the appropriate model of government. Counsel for the respondent, in my view, correctly, submitted that in doing so the province did not exceed the powers conferred on it by s. 92(8) of the Constitution Act, 1867.

8 There was no evidence that before it introduced Bill 103 for first reading on December 17, 1996, the government conducted any study directed specifically to the need to restructure Metro Toronto and the manner of its governance. It did not create a commission to investigate this question, and to prepare a report. There was no draft bill or position paper forthcoming from the government. Any of these could have provided the opportunity for public hearings at which the inhabitants of the municipalities, and other interested parties, could have expressed their views. They could have served as the focus for meaningful consultation, discussion, debate and the presentation of alternative models of restructuring. In short, there was no consultation document available before Bill 103 was introduced for first reading. Indeed, it was submitted that Bill 103 came as a surprise to most inhabitants of the municipalities as the restructuring of Metro Toronto, and the mode of its governance, were not included specifically in the government's 1995 election platform.

9 Counsel for the respondents submitted that there had been, over the years, adequate public consultation in respect to the mode of governance of Metro Toronto. It is true that since 1953 a number of hearings took place, and reports were prepared, which directly, or indirectly, considered this issue. Reference was made to the Cumming Report, which led to the establishment of Metro Toronto in 1953, the 1965 "Report of the Royal Commission on Metropolitan Toronto" (the Goldenberg Report), the 1977 "Report of the Royal Commission on Metropolitan Toronto" (the Robarts Report), the 1996 "Report of Task Force on the Future of the Greater Toronto Area" (the Golden Report), hearings held in early 1996 by the government-formed Review Panel of the Greater Toronto Area, and the "6 Mayors Report" of November 30, 1996. Only the latter dealt specifically with proposals contained in Bill 103.

10 There is considerable force in the applicants' position that none of the above constitutes the type of public consultation which should have preceded the introduction of the legislation and in which a democratically elected government should have engaged, particularly because the legislation profoundly affects the lives of the inhabitants of a large metropolitan area. As well, there is considerable force in the applicants' position that although the Ontario Legislature Standing Committee on General Government conducted hearings on Bill 103 after it had received second reading, they were too little, too late, as the government had long since indicated its determination to proceed with the legislation. Although I agree with the submission of counsel for the respondent that the government was not obliged to withdraw Bill 103 when the results of the referenda conducted by the six municipalities indicated a substantial number of those who voted rejected the creation of the megacity, I cannot agree with counsel's submission that the government was entitled to ignore the referenda on the technical grounds advanced by counsel. While it may be true that the results of the referenda may be suspect, primarily on the basis of the questions asked, there is merit in the applicants' submission that the results were deserving of consideration by the government as representing a significant expression of public opinion.

11 The evidence supports the conclusion that Bill 103 simply appeared on the government's legislative agenda with little, or no, public notice and without any attempt to enter into any meaningful consultation with those people who would be most affected by it - the more than 2,000,000 inhabitants of Metro Toronto. Such, however, is the prerogative of government. The court has made it clear that there is no obligation on government to consult the electorate before it introduces legislation. It may exercise its powers as it sees fit, subject only to constitutional constraints. In doing so, it takes the risk that if its legislation is unpopular the voters will remove it at their first opportunity.

12 It is not the role of the court to pass on the wisdom of the legislation. Specifically, it is not for the court to determine whether the megacity will be good, or bad, for the inhabitants of Metro Toronto. In considering the constitutionality of legislation, the question is not that of policy, reasonableness or expediency, but of legal competence, although when it is attacked on Charter grounds these factors may become relevant should it become necessary to conduct a s. 1 analysis of the legislation. The role of the court is to decide whether the Act infringes or denies certain rights or freedoms guaranteed by the Charter, or whether in enacting the legislation the province exceeded the power to legislate in respect to municipal institutions conferred by s. 92(8) of the Constitution Act, 1867. As I will explain, the applicants have not established the constitutional invalidity of the Act.

13 It is convenient to consider first the applicants' submission that in enacting Part III of the Act, which created, and empowered, the financial advisory board and the transition team, the province exceeded the powers conferred on it by s. 92(8). Since at least 1896 the law has been clear that s. 92(8) gives provincial legislatures the right to "create a legal body for the management of municipal affairs" which includes the amalgamation of such bodies and the establishment of their geographic boundaries: A.G. Ontario v. A.G. Dominion, *[1896] A.C. 348* at 363-364 (P.C.). Section 92(8) gives the legislature the power to delegate to municipalities any authority which is conferred on it by s. 92, and to withdraw any authority previously delegated, and either retain it, or re-delegate it to another body: In Re Gray *(1918), 57 S.C.R. 150*.

14 It is clear from the judicial and academic authorities referred to in the respondent's factum that there are four principles which apply to the constitutional status of municipal governments:

i) municipal institutions lack constitutional status;

ii) municipal institutions are creatures of the legislature and exist only if provincial legislation so provides:

iii) municipal institutions have no independent autonomy and their powers are subject to abolition or repeal by provincial legislation;

iv) municipal institutions may exercise only those powers which are conferred upon them by statute.

From these principles it follows, as the applicants' expert witness, Prof. Sancton, stated: "[T]here are no Canadian

local governments that are politically autonomous in any meaningful sense. They have no constitutional protection whatever against provincial laws that change their structures, functions and financial resources without their consent."

15 The applicants have failed to provide any authority, or evidence, which supports their alternative position that there is a constitutional convention which requires the province to consult with, or obtain, the consent of a municipality before it can legislate the restructuring of a municipality. In any event, a remedy cannot be obtained where there has been a failure to follow a constitutional convention: Re Resolution to Amend the Constitution of Canada, *[1981] 1 S.C.R. 753* at 877 et seq., and I was not made aware of any constitutional convention which has been enforced by a court. As well, absent specific legislation to the contrary, there is no constitutional obligation on the state to consult those specifically affected by legislation, or any other persons, before it enacts legislation: N.W.A.C. v. Canada, *[1994] 3 S.C.R. 627*.

16 In Smith v. The City of London *(1909), 20 O.L.R. 133* (Div. Ct.) at 154 Boyd C. stated: "The term "Municipal Institutions" [in s. 92(8)] appears intended to give compendious expression to a state of affairs which exists in a defined populated area, the inhabitants of which are incorporated and entrusted with privileges of local self-government or administration responsive to the needs, the health, the safety, the comfort, and the orderly government of an organized community ... Having created the municipality, the Province is able to confer upon that body any or every power which the Province itself possesses under [s. 92]." The power to fundamentally restructure the Municipality of Metropolitan Toronto by creating the new City of Toronto is within the powers conferred on the provincial legislature by s. 92(8) and has been exercised in ss. 2 to 11 and s. 28 of the Act. It is not a power that has been delegated to the financial advisory board, or the transition team. The powers conferred on these bodies are necessary to effect an orderly transition from the old to the new and to ensure, as much as possible, that the new City of Toronto will be up and running on January 1, 1998.

17 In the context of valid provincial legislation which provides for the restructuring of Metro Toronto, and the need to provide an orderly, efficient transition, including the safeguarding of municipal assets and establishing a foundation for the governance of the new city, Part III of the Act, which establishes the financial advisory board and the transition team, is integral to the intent and purpose of the Act, and constitutes a valid exercise of the powers conferred by s. 92(8) on the province. It would be difficult, if not impossible, to effect the transition from a two-tier government, for six municipalities and Metro Toronto, to a single-tier government for a single municipality, without some form of a transition team. In my view, the creation of the financial advisory board and the transition team, the appointment of their members, as well as the powers assigned to them, are consistent with the supervisory authority of the province over municipal institutions as necessarily incidental to the restructuring of Metro Toronto, which is the purpose of the Act. It follows that Part III of the Act is intra vires s. 92(8) and constitutes valid provincial legislation.

18 I will now consider whether the applicants have established that the Act contravenes ss. 2(b)(d), 7, 8 and 15(1) of the Charter. I begin by referring to the constitutional status of municipal governments which is set out on pages 12-13 of this endorsement. In my view, there is nothing in the Charter which provides constitutional status to municipalities. Democratic rights are guaranteed by ss. 3, 4 and 5 of the Charter. Section 3 guarantees that every citizen of Canada "has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein." Sections 4 and 5 set out the maximum duration for Parliament and the legislatures and require an annual sitting of these legislative bodies. The Supreme Court of Canada has held that these sections do not apply to municipal elections: Haig v. Canada, *[1993] 2 S.C.R. 995* at 1031. Thus, the Charter confirms the basic constitutional principles which apply to municipalities. The fact that ss. 3, 4 and 5, as well as s. 43(1), have no application to municipal governments demonstrates that the Charter was not intended to alter or limit the legislature's jurisdiction over municipal institutions, or bestow upon municipal institutions any constitutional status.

19 The applicants contend that the Act infringes s. 2(b) of the Charter - in particular, freedom of expression - because it establishes a municipal council of 56 members, which is larger than the council of any of the six municipalities; decreases the ratio of representatives to electors; reduces the number of elected officials; and may

lead to the establishment of municipal political parties. The first three grounds are premised on the proposition that s. 2(b) guarantees municipal councils will be a particular size, and the fourth ground assumes that s. 2(b) guarantees there will not be a political party system in municipal government. Assuming, on the basis of Haig v. Canada, supra, that the act of voting in a municipal election is an expressive activity within the meaning of s. 2(b), the applicants have failed to establish that the provisions of the Act infringe, or deny, the freedom of the residents of Scarborough, or the other five municipalities, to vote in an election for mayor, or councillors, of the new City of Toronto: cf. Irwin Toy Ltd. v. Quebec, *[1989] 1 S.C.R. 927* at 967-977.

20 The activity which is regulated by the Act is municipal governance, and, in particular the territorial boundaries of the new city, the boundaries of each of the 28 wards from each of which two councillors will be elected, and the composition of the municipal council. The Act does not regulate voting, or the communication of citizens with their elected representatives. Citizens remain free to vote and communicate with their councillors. There is nothing in s. 2(b) that guarantees, or elevates to constitutional status, the number of members on a municipal council relative to the number of electors: cf. Reference re Electoral Boundaries Commission Act, *[1991] 2 S.C.R. 158* at 184. Assuming that the speculation or conjecture, advanced by some of the applicants, is correct and "party politics" and a form of "executive municipal democracy" develop in respect to the new City Council, there is no evidence that either violates the freedom of expression of any elector. Thus, it has not been established that either the purpose, or the effect, of the Act infringes, or denies, the freedom of any elector to express himself or herself in an election for the mayor and councillors of the new city.

21 The applicants contend that the Act infringes s. 2(d) of the Charter, which guarantees everyone freedom of association. As I understand the grounds advanced by the applicants, they are based on the argument that freedom of association is a "bilateral freedom which has as its unifying purpose the advancement of individual aspirations," the bilateral aspects being freedom to associate and freedom from compelled association: Lavigne v. OPSEU, *[1991] 2 S.C.R. 211* at 316 et seq, per La Forest J. Specifically, it was submitted that s. 2(d) is infringed because the Act dissolves the six municipalities and forces their inhabitants to associate with a new entity, without any advance or ongoing consultation, and because the Act imposes a form of association which the majority of residents, through the referenda, have indicated they do not want, and denies a form of association which they had expressed a wish to maintain.

22 I have already found, in the context of s. 92(8) of the Constitution Act, 1867, that there is no constitutional requirement on the part of government to consult electors prior to the introduction of legislation, or to be bound by the majority views of electors as to whether they approve, or disapprove, of proposed legislation. This, perhaps, would be sufficient to determine the applicants' s. 2(d) challenge. However, I would add that no authority has been provided that the rights guaranteed s. 2(d) include the right of an inhabitant, or a majority of inhabitants of a municipality, to determine the boundaries of a municipality, or the manner of its governance. Taken to its logical conclusion, if s. 2(d) applied to the formation of municipalities, it would enable citizens to determine their own municipal boundaries, contrary to the power of the province to do so under s. 92(8). In this regard, it is necessary to emphasize that freedom of association is an individual right, not a majority right: Re Public Service Employee Relations Act, *[1987] 1 S.C.R. 313* at 398-40. I find the following observation of La Forest J. in the Lavigne case, supra, at 320-321 to be apt:

> It does not necessarily follow, however, that s. 2(d) of the Charter protects us from any association we may wish to avoid. In a word, I do not think the freedom of association is necessarily a right to isolation. As a matter of metaphysical and sociological reality, "no man is an island," and the Charter must be taken to recognize this. At the very fundamental level, it could certainly not have been intended that s. 2(d) protect us against the association with others that is a necessary and inevitable part of membership in a democratic community, the existence of which Charter clearly assumes. Thus, it could not be said that s. 2(d) entitles us to object to the association with the government of Canada and its policies which the payment of taxes would seem to entail given the comprehensive nature of its authority and functions. In Justice Holmes' phrase, the state is "the one club to which we all belong" and its activities will inevitably associate us with policies and groups with which we may not wish to be associated: see Robert Horn in Groups and the Constitution (1971), at p. 3.

23 Accordingly, it has not been established that either the purpose, or the effect, of the Act infringes, or denies, the freedom of association of any of the applicants.

24 The applicants contend that the Act infringes s. 7 of the Charter which states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The focus of the applicants' submission is the infringement, or denial, of the liberty of the individual, and the grounds asserted for the infringement are the dissolution of Metro Toronto without adequate prior consultation or procedural fairness, and the establishment of the unelected financial advisory board and transition team "empowered to interfere with the applicants' activities and those of the democratically elected municipal councils."

25 I have already stated my reasons why the applicants do not have a constitutionally protected right to be consulted with respect to proposed provincial legislation, and why the creation of the financial advisory board and the transition team are not ultra vires the powers conferred on the province by s. 92(8). In addition, I fail to understand how the liberty of any of the individual applicants within the meaning of s. 7 has been affected as alleged. In B.(R.) v. Children's Aid Society, *[1995] 1 S.C.R. 315*, at 364, La Forest J. observed that the term "liberty" had not as yet been "authoritatively defined" by the Supreme Court of Canada. La Forest J., and the other members of the Supreme Court who delivered reasons for judgment, reviewed earlier cases in which "liberty" was given a broad range of meanings. In my view none of the meanings reviewed in the Children's Aid Society case support the applicants' position. In any event, assuming that the Act violates the applicants' s. 7 rights, they have failed to establish the second component of s. 7, which is that the law that is responsible for the violation must be found to violate the principles of fundamental justice: Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man), *[1990] 1 S.C.R. 1123* at 1140, per Dickson C.J. I would also note that in the Irwin Toy case, supra, it was held that s. 7 does not apply to corporations, with the result that municipal corporations have no rights under s. 7. (Similarly, only human beings, and not corporations, enjoy protection under s. 15(1) of the Charter: R. v. Paul Magder Furs *(1989), 69 O.R. (2d) 172* (C.A.)). It follows that the applicants have failed to establish a violation of their s. 7 Charter rights.

26 The applicants contend that the Act infringes their "right to be secure against unreasonable ... seizure" found in s. 8 of the Charter. It was submitted that the vesting of the assets of the six municipalities in the new city, without compensation, provided by s. 2(5)(b) of the Act, constitutes an unreasonable seizure within the meaning of s. 8.

27 I agree with the submission of counsel for the respondent that s. 2(5)(b) of the Act does not effect a seizure within the meaning of s. 8. The Act does not "take" any property from the municipal corporations or their inhabitants. The Act transfer the assets of the six municipalities, on their dissolution, to the new City of Toronto, and they become the property of the new city. Nothing has been taken away, in the sense that there has been a deprivation. In simple language, what now belongs to the six municipalities will belong to the new city on January 1, 1998. In any event, even if there could be said to be a taking of public property, the right to be secure against unreasonable search and seizure does not give rise to the free standing right to ownership which the applicants assert. Section 8 protects against the physical taking of property only insofar as that taking encroaches on privacy interests, and therefore has no application to the facts of this case. See Unishare Investments v. R. *(1994), 18 O.R. (3d) 603* at 611, per MacPherson J. It follows that the applicants have failed to establish a violation of their s. 8 Charter rights.

28 Finally, the applicants contend that the Act violates the right to equal benefit of the law protected by s. 15(1) of the Charter because the residents of Metro Toronto who are disproportionately comprised of enumerated and analogous groups, are provided with a quality and quantity of democratic expression which is inferior to that of residents of other Ontario municipalities. The argument presented

in respect to this ground is closely related to the submissions made in respect to s. 2(b), which I have rejected.

29 To give effect to this ground, I would have to disregard the decision of the Supreme Court of Canada in Andrews v. Law Society of British Columbia, *[1989] 1 S.C.R. 143*, which I cannot do. Regardless of which of the

three approaches to equality the Supreme Court has employed in recent cases, as reviewed by Iacobucci J. in Benner v. The Secretary of State of Canada, *[1997] 1 S.C.R. 358*, the Act makes no distinction on the basis of the grounds enumerated in s. 15(1), or analogous grounds. It was alleged by the Citizens' Legal Challenge Inc. that the Act will have a disproportionate impact on the following groups: immigrants, visible minorities, single mothers, persons who do not speak English or French, and persons living below the poverty line. Assuming that some, or all, of these groups qualify as enumerated or analogous groups under s. 15(1), the applicants have failed to provide any evidence that members of these groups will be disproportionately disadvantaged (or disadvantaged in any manner) by any section of the Act. Such evidence is necessary to make a disproportionate impact claim under s. 15(1): Symes v. Canada, *[1993] 4 S.C.R. 695* at 764-765. It follows that the applicants have failed to establish a violation of their s. 15(1) Charter rights.

30 After careful consideration of the positions advanced by the applicants, I ask myself: What do they really come down to? In my view, the applicants' real complaints are that the government did not engage in meaningful consultation with the inhabitants of the six municipalities before it introduced Bill 103, and that it ignored the results of the referenda, which opposed the creation of the megacity, by taking the bill to final reading. These complaints were supported by the evidence. It may be that the government displayed megachutzpah[1] in proceeding as it did, and in believing that the inhabitants of Metro Toronto would submit to the imposition of the megacity without being given an opportunity to have a real say in how they were to live and be governed. However, the question for the court is not the government's political posture, but rather its legal and constitutional authority to proceed as it did. In any event, the Charter does not guarantee an individual the right to live his or her life free from government chutzpah or imperiousness.

31 In reality, the concerns of the applicants are political concerns which raise the issue of government accountability to the electorate. There is, of course, the traditional way for the electorate to give expression to such concerns. Although the applicants have been very critical of the process adopted by the government in the introduction and passage of the legislation, the court is unable to interfere with the Act absent its failure to adhere to constitutional norms. I do not believe that I can improve on what was said, almost a century ago, by Chancellor Boyd in Smith v. The City of London, supra, at 160-161:

> However, the Legislature, instead of letting the people vote again on the changed by-law, have in effect assumed or declared that no vote is necessary, and (that being so) no Court can change the situation. This legislative action is, no doubt, a violation pro tanto of the principle of local self-control, and is somewhat of a reversion to an older type of paternal or autocratic rule. But, whatever be its character or effect, the investigation is not for the Courts, but for the politician or the elector. The propriety of any interference with these rights of local self-government is a matter of legislative policy and ethics - not of constitutional law.

32 In the result, the applications are dismissed. If the respondent wishes to ask for costs, arrangements may be made for counsel to make written submissions.

BORINS J.

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1 "... Yiddish is quickly supplanting Latin as the spice in American legal argot." See, Alex Kozinski and Eugene Volokh, Lawsuit, Shmawsuit (1993), 103 Yale Law Rev. 463 at 463.

Cited Paragraphs: 18-20

TAB 8

Cited Paragraphs: 2

East York (Borough) v. Ontario (Attorney General), [1997] O.J. No. 4100

Ontario Judgments

Ontario Court of Appeal

Toronto, Ontario

Abella, Rosenberg and Moldaver JJ.A.

Heard: October 6-7, 1997.

Judgment: October 10, 1997.

Docket No. C27925

[1997] O.J. No. 4100 | 36 O.R. (3d) 733 | 153 D.L.R. (4th) 299 | 47 C.R.R. (2d) 232 | 43 M.P.L.R. (2d) 155 | 74 A.C.W.S. (3d) 584

Between Citizens' Legal Challenge Inc., Toronto East Downtown Residents Association Inc., Huron Sussex Residents Organization Inc. et al., applicants/appellants, and Attorney General of Ontario, respondent/respondent

(8 pp.)

Case Summary

Civil rights — Voting and other democratic rights — Right to vote — Municipal elections — Equality and protection of the law — Denial of, what constitutes — Charter, s. 15, effect of — Constitutional law — Provincial jurisdiction — Municipal institutions — Amendment of.

This was an appeal from a decision dismissing an application by the Borough of East York and others to strike down the City of Toronto Act on the grounds that it violated the Canadian Charter of Rights and Freedoms and was ultra vires the province's authority under the Constitution Act, 1867. The City of Toronto Act created the new City of Toronto. East York alleged that the new municipal organization resulted in a high ratio between numbers of voters and elected representatives, that the ratio was higher than those found in neighbouring municipalities, and that the high ratio diminished access to elected representatives. They also alleged that more disadvantaged people lived within the Greater Toronto Area and this reduced access would had an adverse impact on them.

HELD: The appeal was dismissed.

There was little evidence that the ratios provided by the new legislation would cause a serious reduction in the proportion of elected representatives to the population and no evidence that the new structure would reduce democratic access. Therefore there was no breach of the right to freedom of expression under section 2(b). In order to show the Act violated section 15 of the Charter, East York had to show that a distinction had been made resulting in the denial of its right to equality based on personal characteristics, stereotypical application of presumed group or personal characteristics, or membership in an identifiable group. The changes to Toronto's municipal boundaries and governing structure did not constitute a distinction based on stereotypical assumptions regarding disadvantaged groups. The allegation that the changes would have a discriminatory impact on disadvantaged groups was speculation. East York had not met its burden of proving there had been an infringement of section 15 of the Charter. Section 92 of the Constitution Act 1867 allocated power over municipal institutions to provincial governments. There was no constitutional convention or norm prohibiting provinces from changing municipal institutions without their consent. The courts could only intervene if the provincial government committed a legal, as opposed to political, impropriety.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 2(b), 3, 4, 5, 15.
City of Toronto Act, 1997, S.O. 1997, c. 2.
Constitution Act, 1867, s. 92(8).

Counsel

Raj Anand and M. Kate Stephenson, for the applicants/appellants. Robert E. Charney and Janet E. Minor, for the respondent.

The judgment of the Court was delivered by

ABELLA J.A.

1 The legal issues in this appeal centre on the dismissal by Justice Borins on July 24, 1997 of the appellants' application asserting that the City of Toronto Act, 1997 (S.O. 1997, c. 2) violated ss. 2(b) and 15 of the Canadian Charter of Rights and Freedoms and was ultra vires the province's authority under s. 92(8) of the Constitution Act, 1867. Section 2(b) guarantees freedom of expression, s. 15 protects the right to equality, and s. 92(8) gives the provinces jurisdiction over municipal institutions.

The Charter: (ss. 2(b) and 15)

2 We note at the outset that the Supreme Court of Canada has held that the democratic freedoms found in ss. 3, 4 and 5 of the Charter, including voting rights, do not apply to municipal governance (see Haig v. Canada (Chief Electoral Officer), *[1993] 2 S.C.R. 995*). But we are equally mindful of the following caution articulated in that case by L'Heureux-Dubé J. (at p. 1041):

> While s. 2(b) of the Charter does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of Charter scrutiny continue to apply. Thus, while the government may extend such benefit ... it may not do so in a discriminatory fashion, and particularly not on ground[s] prohibited under s. 15 of the Charter.

3 It is in the spirit of this language that we undertake the following analysis.

4 The appellants' submission is that the City of Toronto Act, 1997 is violative of the appellants' Charter rights. They do not suggest any curtailment of a right to vote. The basis of the Charter submissions appears to be that the ratio

between numbers of voters and elected representatives under the new legislation is too high, and, in any event, higher than the ratios found in the neighbouring municipalities. The extent of the ratio, the appellants argue, necessarily diminishes access to elected representatives. Moreover, since more disadvantaged persons live within the boundaries of the new city than in the rest of the Greater Toronto Area ("G.T.A."), this reduced access will adversely impact on them.

5 There is neither jurisprudential nor evidentiary support for these arguments. While conceding that voter/representative ratios are theoretically relevant, and that the distribution of these ratios may in certain circumstances be found to be discriminatory, there is no reliable evidence that the particular ratios in this case fall below constitutional standards.

6 The issue clearly goes beyond a numerical analysis. As McLachlin J. stated in Reference Re Electoral Boundaries Commission Act (Saskatchewan), *[1991] 2 S.C.R. 158* at p. 183, the issue is not "equality of voting power per se, but the right to 'effective representation' " (see also Haig, supra). Even the appellants' own expert acknowledged this reality when she stated: "I am certainly not arguing ... that access can be measured by the ratio of elected officials to the population simply. ... [T]hat is a wild simplification of what my argument would be."

7 There is, moreover, a serious question about whether the ratios under the new legislation do, in fact, represent either a notable reduction from the status quo or a significant disparity from neighbouring municipal regions. As the respondent pointed out, these are the same ratios as those currently found in Toronto, North York and Scarborough.

8 This quantitative dispute, coupled with the absence of any evidence that the new structure will reduce democratic access to the municipal decision-making process, lead us to conclude that no breach of s. 2(b) has been demonstrated.

9 With respect specifically to s. 15, we are in agreement with the conclusion of Justice Borins that the equality guarantee as first defined in Andrews v. Law Society of British Columbia, *[1989] 1 S.C.R. 143*, has not been violated. The steps to be undertaken in a s. 15 analysis were recently summarized by Iacobucci J. in Benner v. The Secretary of State of Canada, *[1997] 1 S.C.R. 358* (at pp. 389-94). The analysis requires a determination that a distinction has been made resulting in the denial of a claimant's right to equality based on what are variously referred to as "personal characteristics", (Egan and Nesbit v. Canada, *[1995] 2 S.C.R. 513* at p. 584, per Cory J.), "the stereotypical application of presumed group or personal characteristics" (Miron v. Trudel, *[1995] 2 S.C.R. 418* at p. 485 per McLachlin J.), or "membership in an identifiable group" (Egan, supra, at pp. 552-53 per L'Heureux-Dubé J.).

10 We have difficulty identifying what the threshold "distinction" is in this case, let alone concluding that it is discriminatory in intent or impact. The boundaries under the new legislation are not new; they are the boundaries of the former Municipality of Metropolitan Toronto. The levels of governance and institutional responsibility have been changed within those boundaries, but those changes cannot be described as a distinction based on stereotypical assumptions about disadvantaged groups. Further, there was nothing beyond speculation to show that the legislation would have a discriminatory impact on any disadvantaged group. The theoretical concern that adjustments in the ratios would negatively impact on the access of disadvantaged groups to the elected representatives in the new City of Toronto did not meet the burden of proof of a violation of s. 15. There is, therefore, no basis for concluding that there has been an infringement of s. 15.

The Constitution Act, 1867: (s. 92(8))

11 There is, in our view, no merit in the appellants' submission that the provincial government exceeded its jurisdiction under s. 92(8) of the Constitution when it promulgated the City of Toronto Act, 1997. The division of powers between federal and provincial governments found in ss. 91 and 92 of the Constitution, allocated responsibility over "municipal institutions" to provincial governments. The appellants argued alternatively that this

authority was circumscribed by implicit constitutional conventions (before Borins J.), or by implicit constitutional norms (before us) not to effect change to a municipal institution without its consent.

12 There is, with respect, no evidence of the existence either of a constitutional norm or of a constitutional convention so restricting provinces. When altering municipal institutions, there are undoubtedly sound political reasons for a provincial government to exercise great care in the process of consultation and, ultimately, of reform. The expressions of public disapproval with the methodology employed prior to the passage of the City of Toronto Act, 1997 confirm this truism. However, courts can only provide remedies for the public's grievances if those grievances violate legal, as opposed to political proprieties. What is politically controversial is not necessarily constitutionally impermissible.

13 In 1896, the Privy Council confirmed that s. 92(8) gave provincial legislatures the right to create legal bodies for the management of municipal affairs, a right which included the right to amalgamate such bodies and establish their geographic boundaries (A.G. Ontario v. A.G. Dominion, [1996] A.C. 348 (P.C.) at pp. 363-64). Any ambiguity about whether a constitutional norm restricted a province from making changes to municipal institutions without municipal consent was resolved in that case in favour of the province's jurisdiction to do so. (See also Lynch v. Canada N.W. Land Co. *(1891), 19 S.C.R. 204*, at 209.) No case subsequently decided has ever diluted this fundamental authority.

14 We therefore agree with Borins J. that the province did not exceed its jurisdiction under s. 92(8).

15 Accordingly, this appeal is dismissed but, in the unique circumstances of this case, without costs.

ABELLA J.A.
ROSENBERG J.A. -- I agree.
MOLDAVER J.A. -- I agree.

End of Document

TAB 9

2014 ONCA 485
Ontario Court of Appeal

Frank v. Canada (Attorney General)

2014 CarswellOnt 8434, 2014 ONCA 485, 120 O.R. (3d) 732,
241 A.C.W.S. (3d) 521, 313 C.R.R. (2d) 67, 323 O.A.C. 73

Gillian Frank and Jamie Duong, Responding Party/Applicants (Respondents in Appeal) and The Attorney General of Canada, Moving Party/Respondent (Appellant in Appeal)

Sharpe J.A., In Chambers

Heard: June 20, 2014
Judgment: June 23, 2014
Docket: CA M43860 (C58876)

Counsel: Peter Southey, Gail Sinclair, Peter Hajecek, for Applicant, Attorney General of Canada
Shaun O'Brien, Amanda Darrach, for Respondents, Gillian Frank and Jamie Duong

Headnote

Constitutional law --- Procedure in constitutional challenges — Miscellaneous
Stay pending appeal — Applicants were residents in United States for more than five years — Applicants challenged denial of vote to non-resident citizens absent from Canada for more than five consecutive years under Canada Elections Act — Application judge found that to extent Act disenfranchised citizens absent from Canada for more than five years, it violated democratic right to vote guaranteed by s. 3 of Charter — Attorney General appealed — Attorney General brought motion for stay pending appeal — Motion dismissed — There was no presumption approaching automatic right to stay in every case where court of first instance had ruled legislation to be unconstitutional — With respect to serious question to be tried, it could not be said that Attorney General failed to show that appeal was arguable and additionally, there did appear to be argument to be made on other side of s. 1 of Canadian Charter of Rights and Freedoms issue — With respect to irreparable harm, it was neutral factor and did not favour granting stay — With respect to balance of convenience, it favoured refusal of stay because Elections Canada would have had to undo what it had already done and claw back vote of citizen who may well in end have right to cast ballot — With respect to balance of convenience, allowing judgment to operate did not create void or gap in Canada's election law.
Public law --- Elections — Voters — Right to vote — In federal and provincial elections — Residency requirements
Stay pending appeal — Applicants were residents in United States for more than five years — Applicants challenged denial of vote to non-resident citizens absent from Canada for more than five consecutive years under Canada Elections Act — Application judge found that to extent Act disenfranchised citizens absent from Canada for more than five years, it violated democratic right to vote guaranteed by s. 3 of Charter — Attorney General appealed — Attorney General brought motion for stay pending appeal — Motion dismissed — There was no presumption approaching automatic right to stay in every case where court of first instance had ruled legislation to be unconstitutional — With respect to serious question to be tried, it could not be said that Attorney General failed to show that appeal was arguable and additionally, there did appear to be argument to be made on other side of s. 1 of Canadian Charter of Rights and Freedoms issue — With respect to irreparable harm, it was neutral factor and did not favour granting stay — With respect to balance of convenience, it favoured refusal of stay because Elections Canada would have had to undo what it had already done and claw back vote of citizen who may well in end have right to cast ballot — With respect to balance of convenience, allowing judgment to operate did not create void or gap in Canada's election law.
Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — Miscellaneous

Applicants were residents in United States for more than five years — Applicants challenged denial of vote to non-resident citizens absent from Canada for more than five consecutive years under Canada Elections Act — Application judge found that to extent Act disenfranchised citizens absent from Canada for more than five years, it violated democratic right to vote guaranteed by s. 3 of Charter — Attorney General appealed — Attorney General brought motion for stay pending appeal — Motion dismissed — There was no presumption approaching automatic right to stay in every case where court of first instance had ruled legislation to be unconstitutional — With respect to serious question to be tried, it could not be said that Attorney General failed to show that appeal was arguable and additionally, there did appear to be argument to be made on other side of s. 1 of Canadian Charter of Rights and Freedoms issue — With respect to irreparable harm, it was neutral factor and did not favour granting stay — With respect to balance of convenience, it favoured refusal of stay because Elections Canada would have had to undo what it had already done and claw back vote of citizen who may well in end have right to cast ballot — With respect to balance of convenience, allowing judgment to operate did not create void or gap in Canada's election law.

Table of Authorities

Cases considered by *Sharpe J.A., In Chambers*:

Bedford v. Canada (Attorney General) (2010), 265 C.C.C. (3d) 390, 330 D.L.R. (4th) 162, 271 O.A.C. 155, 2010 CarswellOnt 8998, 2010 ONCA 814 (Ont. C.A.) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Sauvé v. Canada (Chief Electoral Officer) (1997), 1997 CarswellNat 825, [1997] 3 F.C. 628, 132 F.T.R. 250, 1997 CarswellNat 2716 (Fed. T.D.) — referred to

Sauvé v. Canada (Chief Electoral Officer) (1997), [1997] 3 F.C. 643, 1997 CarswellNat 2722, 1997 CarswellNat 1289 (Fed. C.A.) — referred to

Sauvé v. Canada (Chief Electoral Officer) (May 26, 1997), Doc. 25992 (S.C.C.) — referred to

Sauvé v. Canada (Chief Electoral Officer) (2002), 98 C.R.R. (2d) 1, 168 C.C.C. (3d) 449, 5 C.R. (6th) 203, [2002] 3 S.C.R. 519, 2002 SCC 68, 2002 CarswellNat 2883, 2002 CarswellNat 2884, 218 D.L.R. (4th) 577, 294 N.R. 1 (S.C.C.) — considered

Statutes considered:

Canada Elections Act, S.C. 2000, c. 9

Generally — referred to

Pt. 11 — referred to

s. 11 — considered

s. 11(d) — considered

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — considered

s. 3 — considered

***Sharpe J.A., In Chambers*:**

1 The Attorney General of Canada moves for a stay pending appeal of a judgment holding that provisions of the *Canada Elections Act*, S.C. 2000, c. 9 (the "*Act*"), relating to the voting rights of non-resident Canadians are too restrictive and extending the vote to all Canadian citizens resident outside Canada.

The Charter challenge to limits on voting by non-residents

2 Voting by non-resident citizens has been a feature of Canadian elections, in one form or another, since the vote was extended to soldiers in World War I. The current regime dates from 1993. The *Act*, s. 11 provides that the following classes of citizens are eligible to vote by mail pursuant to a special procedure found in Part 11 of the Act:

> (a) a Canadian Forces elector;
>
> (b) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada;
>
> (c) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada;
>
> (d) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident;
>
> (e) an incarcerated elector within the meaning of that Part; and
>
> (f) any other elector in Canada who wishes to vote in accordance with that Part.

3 The Part 11 procedure allows the non-resident citizen to register and vote by mail in a riding chosen by the voter based on contacts specified in the Act.

4 The applicants, both resident in the United States for more than five years, challenged the denial of the vote to non-resident citizens absent from Canada for more than five consecutive years.

The judgment under appeal

5 In a lengthy and carefully considered judgment, the application judge held that to the extent the *Act* disenfranchised citizens absent from Canada for more than five years, it violated their democratic right to vote right guaranteed by section 3 of the *Charter:*

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein

6 The application judge struck down s. 11(d) of the *Act* and related provisions and replaced the words of s. 11(d) with "an elector who resides outside of Canada".

7 The Attorney General argued that Parliament had a pressing and substantial objective to limit non-resident voting pursuant to s. 1 of the Charter, namely:

> 1. to extend the right to vote to non-resident citizens but not to the point of giving rise to unfairness for Canada's resident voters, and
>
> 2. to maintain the proper functioning and integrity of Canada's electoral system and system of parliamentary representation.

8 The application judge characterized those objectives as being so abstract, broad and symbolic that they barely qualified, if at all, as pressing and substantial for purposes of s. 1 analysis. However, the application judge proceeded to consider whether the limitation on non-resident citizen voting satisfied the proportionality test. He concluded that it did not. First, he found there was no rational connection between the objectives of fairness and avoiding possible election abuses and denying the vote to certain non-residents. Second, he found the five-year limitation overly drastic and that less

restrictive means were available to achieve the same objectives. Finally, the application judge found that the substantial deleterious effect of losing the right to vote outweighed what he found to be the tenuous salutary impact of the law.

9 The application judge refused to stay or temporarily suspend the declaration of invalidity. He stated, at para. 159: "An immediate declaration of invalidity would create no danger to the public or to the rule of law. Nor is this a situation where Parliament will be unable to hold an election due to the court's decision." He added that there was no evidence that an election was anticipated in the next 12 months.

Events following the judgment

10 The judgment was handed down on May 2, 2014. On May 11, 2014, four federal by-elections were called for June 30, 2014 — two in Ontario and two in Alberta. Elections Canada immediately announced that the judgment would be complied with for all four by-elections and implemented the steps necessary to enable all Canadian citizens resident abroad to register and vote. As of June 16, 2014, thirteen non-resident citizens registered to vote (although it is not known how many of those would have been eligible under the prior regime). One of those individuals is the wife of one of the applicants who has already cast her ballot.

The Attorney General's stay motion

11 I note that Elections Canada was not served with this motion. In my view, it should have been served as it would be immediately and directly impacted by the effect of a stay. I allowed the motion to proceed as it is apparent from correspondence in the record that Elections Canada is fully aware of this motion and its legal counsel has outlined the steps Elections Canada could take in the event a stay is granted.

12 It is common ground that to obtain a stay the Attorney General must satisfy the familiar three-part test and show:

1. that there is a serious question to be determined;

2. that irreparable harm to the public interest will be suffered should the stay not be granted; and

3. that the balance of convenience and public-interest considerations favor a stay.

Serious question to be tried

13 This appeal will almost certainly be decided on the basis of the s. 1 analysis. I share the application judge's concern that the objectives identified by the Attorney General as being sufficient to justify limiting the right to vote are broad, symbolic and rhetorical. In oral argument, counsel insisted that Parliament's central concern was election fairness. It is not clear to me how denying a citizen the right to vote can be justified on the basis of electoral fairness. The objectives identified by the Attorney General obscure what appears to me to be the real issue, namely, whether the five year limit on non-resident voting can be justified on the basis that it is necessary to sustain our geographically determined, constituency-based system of representation. As the Supreme Court of Canada observed in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (S.C.C.), the prisoner voting case, "[v]ague and symbolic objectives" render proportionality analysis hollow. However, I do not say that the Attorney General has failed to show that the appeal is arguable. While the application judge gave full and fair consideration of the s. 1 issue, there does appear to be an argument to be made on the other side.

Does the Attorney General have a presumptive or automatic right to a stay?

14 The Attorney General submits that as guardian of the public interest it has something approaching an automatic right to a stay due to a presumption of irreparable harm and that the balance of convenience favours maintaining the "status quo". I am unable to accept that proposition. It is inconsistent with what occurred in the prisoner voting litigation where a stay was refused pending appeal: *Sauvé v. Canada (Chief Electoral Officer)*, [1997] 3 F.C. 628 (Fed. T.D.), aff'd.

[1997] 3 F.C. 643 (Fed. C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 264 (S.C.C.). It is also inconsistent with the general principle that the decision to grant or withhold a stay lies in the discretion of the court.

15 The Attorney General relies on the following passage from *Bedford v. Canada (Attorney General)*, 2010 ONCA 814, 330 D.L.R. (4th) 162 (Ont. C.A.), at para 13:

> ...I must determine whether a stay should be granted in a context where (1) there is a *prima facie* right of the government to a full review of the first-level decision; (2) the government has a presumption of irreparable harm if the judgment is not stayed pending that review; and (3) the responding parties must demonstrate that suspension of the legislation would provide a public benefit to tip the public interest component of the balance of convenience in their favour.

16 In my view, that passage must be read in its proper context and when so read, it is apparent that a court will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances of the case, that the public interest and the interests of justice warrant a stay. In that case, the government filed a substantial volume of evidence to demonstrate the very real and tangible harm that would result if the matter of prostitution were left completely unregulated. It is clear from reading the reasons as a whole that Rosenberg J.A. only granted a stay in because, after reviewing and weighing that body of evidence, he was (at para. 72) "satisfied that the moving party ha[d] satisfied irreparable harm test".

17 It is the case that very often, the public interest in the orderly administration of the law will tilt the balance of convenience in favour of maintaining impugned legislation pending the final determination of its validity on appeal: See, for example *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at p. 346

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

18 However, I cannot agree with the Attorney General that there is a *presumption* approaching an automatic right to a stay in every case where a court of first instance has ruled legislation to be unconstitutional. As Lamer J. also held in *RJR-MacDonald*, at p. 343, that "the government does not have a monopoly on the public interest." See also *Bedford*, at para. 73: "The Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of public interest, including the concerns of identifiable groups."

19 In my view, it is necessary to carefully review the particular facts and circumstances of this case in order to determine whether or not a stay is warranted.

Irreparable harm

20 Turning to the specifics of this case, the Attorney General argues that irreparable harm would ensue if a close election were decided by the single vote of a non-resident voter ultimately found on appeal not to have the right to vote. I agree that such a scenario would amount to irreparable harm.

21 However, elections decided by a very few votes are rare and in my view, the prospect of irreparable harm on that account is fairly remote.

22 More important, the class of non-resident voters affected by the judgment face precisely the same risk of irreparable harm. Once the election has passed, the constitutional right to vote in that election will be lost forever. If the election

is decided by one or a very few votes and if the judgment is affirmed on appeal, the stay requested by the Attorney General will have improperly disenfranchised voters whose vote could have changed the result of the election. That would constitute irreparable harm to the non-resident voters and to the public.

23 I conclude that any risk if irreparable harm claimed by the Attorney General is matched by the same risk of irreparable harm to non-resident voters.

24 Nor do I see merit in the argument that Members of Parliament elected in an election governed by the judgment would somehow be different in any material way from those previously elected. All Members of Parliament are elected according to the law as it stands at the time of the election. There is no air of reality to the claim that Members of Parliament elected at by-election under a changed or amended law would be seen as different from their parliamentary colleagues elected under the earlier law.

25 In my view, the consideration of irreparable harm is neutral and does not favour granting a stay.

Balance of convenience

26 In my view, the balance of convenience in this case favours refusal of a stay. I reach that conclusion for the following reasons.

27 First, this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgment. In such cases, the balance of convenience will typically favour a stay to avoid the cost and disruption that would flow from implementing a new regime based upon a trial judgment that may need to be undone in the event of a successful appeal.

28 In the present case, Elections Canada immediately took the minimal administrative steps required to permit non-resident citizens to vote in accordance with the decision of the application judge. If a stay is granted, Elections Canada will have to undo what it has already done. It is clear from the record that it may not be possible for Elections Canada to determine in time for the by-elections which non-resident voters who registered after the judgment would have been eligible before the judgment. The terms of the stay requested by the Attorney General recognize that difficulty and ask for a qualified stay that applies "unless Elections Canada is unable to determine" if those who registered meet the pre-judgment requirements. In addition, at least one non-resident has cast her ballot. To grant a stay in this case would require Elections Canada to rescind the registrations of up to 13 non-resident electors and claw back the vote of a citizen who may well in the end have the right to cast her ballot. Granting a stay in this case would not avoid the cost and inconvenience of prematurely erecting or dismantling a scheme — it would do the opposite.

29 Second, this is not a case like *Bedford* where the trial judgment creates a legislative void in an area of activity that needs to be regulated in the public interest. Allowing the judgment to operate does not create a void or gap in Canada's election law. Nor does the judgment radically alter the class of those eligible to vote. The *Act* already grants many non-resident citizens the right to vote. The judgment under appeal merely extends the right to a broader class of non-resident citizens.

30 As counsel for the applicants pointed out, it is highly unlikely that the judgment will produce a floodgate of votes from disinterested and disengaged non-resident Canadians. We know that the number of newly qualified non-resident voters who had registered as of June 16 is 13 or fewer. The non-resident must be both determined and informed. He or she must first register and then obtain a ballot. The non-resident voter cannot vote by simply marking an X beside one of the listed candidates but must complete a special ballot that requires the voter to know and write in the name of an actual candidate.

31 I conclude that the balance of convenience does not favour granting a stay in this case.

Conclusion

32 For these reasons, I conclude that while there is an arguable appeal, both sides demonstrate a similar risk of irreparable harm and the balance of convenience weighs in favour of refusing a stay. Accordingly, I dismiss the Attorney General's motion.

33 If the parties are not able agree as to the costs of this motion, I will receive brief written submissions from the respondents within ten days of the release of these reasons and from the Attorney General within five days thereafter.

Motion dismissed.

TAB 10

Graham Haig, John Doe and Jane Doe *Appellants*

v.

The Chief Electoral Officer *Respondent*

and

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Intervener*

INDEXED AS: HAIG *v.* CANADA; HAIG *v.* CANADA (CHIEF ELECTORAL OFFICER)

File No.: 23223.

1993: March 4; 1993: September 2.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Right to vote — Federal referendum held everywhere in Canada except Quebec — Quebec referendum subject to provincial legislation — Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation — Whether appellant's exclusion from federal referendum infringing s. 3 of Canadian Charter of Rights and Freedoms — Referendum Act, S.C. 1992, c. 30 — Canada Elections Act, R.S.C., 1985, c. E-2.

Constitutional law — Charter of Rights — Freedom of expression — Federal referendum held everywhere in Canada except Quebec — Quebec referendum subject to provincial legislation — Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation — Whether appellant's exclusion from federal referendum infringing s. 2(b) of Canadian Charter of Rights and Freedoms —

Graham Haig et les autres personnes dans une situation semblable *Appelants*

c.

Le directeur général des élections *Intimé*

et

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Intervenant*

RÉPERTORIÉ: HAIG *c.* CANADA; HAIG *c.* CANADA (DIRECTEUR GÉNÉRAL DES ÉLECTIONS)

N° du greffe: 23223.

1993: 4 mars; 1993: 2 septembre.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL FÉDÉRALE

Droit constitutionnel — Charte des droits — Droit de vote — Référendum fédéral tenu partout au Canada, sauf au Québec — Référendum du Québec soumis à une loi provinciale — L'appelant, qui avait quitté l'Ontario pour s'installer au Québec, n'a pu voter ni à l'un ni à l'autre référendum en raison d'exigences différentes en matière de résidence prévues dans les lois fédérale et provinciale applicables — L'exclusion de l'appelant du référendum fédéral contrevient-elle à l'art. 3 de la Charte canadienne des droits et libertés? — Loi référendaire, L.C. 1992, ch. 30 — Loi électorale du Canada, L.R.C. (1985), ch. E-2.

Droit constitutionnel — Charte des droits — Liberté d'expression — Référendum fédéral tenu partout au Canada, sauf au Québec — Référendum du Québec soumis à une loi provinciale — L'appelant, qui avait quitté l'Ontario pour s'installer au Québec, n'a pu voter ni à l'un ni à l'autre référendum en raison d'exigences différentes en matière de résidence prévues dans les lois fédérale et provinciale applicables — L'exclusion de l'appelant du référendum fédéral contrevient-elle à

Whether s. 2(b) includes a positive right to be provided with a specific means of expression — Referendum Act, S.C. 1992, c. 30 — Canada Elections Act, R.S.C., 1985, c. E-2.

Constitutional law — Charter of Rights — Equality rights — Equal benefit of the law — New residents of a province — Province of residence — Federal referendum held everywhere in Canada except Quebec — Quebec referendum subject to provincial legislation — Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation — Whether appellant's exclusion or Quebec's exclusion from federal referendum infringing s. 15(1) of Canadian Charter of Rights and Freedoms — Referendum Act, S.C. 1992, c. 30 — Canada Elections Act, R.S.C., 1985, c. E-2.

Elections — Federal referendum — Interpretation of federal referendum legislation — Powers of Chief Electoral Officer — Federal referendum held everywhere in Canada except Quebec — Quebec referendum subject to provincial legislation — Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation — Whether federal referendum legislation may be interpreted to extend entitlement to vote in federal referendum to appellant — Whether Chief Electoral Officer had power to adapt Canada Elections Act so as to extend entitlement to vote in federal referendum to appellant — Referendum Act, S.C. 1992, c. 30, ss. 3(1), 7(3) — Canada Elections Act, R.S.C., 1985, c. E-2, ss. 9(1), 53, 55(5) — Regulation Adapting the Canada Elections Act, SOR/92-430.

In September 1992, the federal government directed that a referendum be held on October 26, 1992 on a question relating to the Constitution of Canada in all provinces and territories, except Quebec. Quebec was to hold a separate referendum on the same date and on the same question but in accordance with the provincial legislation. As a result of the different requirements as to residency in the federal and provincial legislation, the appellant Haig, who had moved from Ontario to Quebec in August 1992, was not qualified to vote in the Quebec referendum because he had not resided in that province for six months prior to the referendum, or to vote in the federal referendum because, on the enumeration date, he

l'art. 2b) de la Charte canadienne des droits et libertés? — L'article 2b) comporte-t-il le droit positif de se voir fournir un mode précis d'expression? — Loi référendaire, L.C. 1992, ch. 30 — Loi électorale du Canada, L.R.C. (1985), ch. E-2.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Droit au même bénéfice de la loi — Nouveaux résidents d'une province — Province de résidence — Référendum fédéral tenu partout au Canada, sauf au Québec — Référendum du Québec soumis à une loi provinciale — L'appelant, qui avait quitté l'Ontario pour s'installer au Québec, n'a pu voter ni à l'un ni à l'autre référendum en raison d'exigences différentes en matière de résidence prévues dans les lois fédérale et provinciale applicables — L'exclusion de l'appelant ou du Québec du référendum fédéral contrevient-elle à l'art. 15(1) de la Charte canadienne des droits et libertés? — Loi référendaire, L.C. 1992, ch. 30 — Loi électorale du Canada, L.R.C. (1985), ch. E-2.

Élections — Référendum fédéral — Interprétation de la loi fédérale en matière référendaire — Pouvoirs du directeur général des élections — Référendum fédéral tenu partout au Canada, sauf au Québec — Référendum du Québec soumis à une loi provinciale — L'appelant, qui avait quitté l'Ontario pour s'installer au Québec, n'a pu voter ni à l'un ni à l'autre référendum en raison d'exigences différentes en matière de résidence prévues dans les lois fédérale et provinciale applicables — La loi fédérale en matière référendaire peut-elle être interprétée comme attribuant à l'appelant le droit de voter au référendum fédéral? — Le directeur général des élections détenait-il le pouvoir d'adapter la Loi électorale du Canada de manière à ce qu'elle attribue à l'appelant le droit de voter au référendum fédéral? — Loi référendaire, L.C. 1992, ch. 30, art. 3(1), 7(3) — Loi électorale du Canada, L.R.C. (1985), ch. E-2, art. 9(1), 53, 55(5) — Règlement adaptant la Loi électorale du Canada, DORS/92-430.

En septembre 1992, le gouvernement fédéral a décrété la tenue d'un référendum portant sur une question concernant la Constitution du Canada, le 26 octobre 1992, dans chacune des provinces et chacun des territoires, à l'exception du Québec, qui devait tenir, à la même date et sur la même question, un référendum distinct, soumis cependant à la loi provinciale applicable. En raison des différences entre les lois fédérale et provinciale en ce qui concerne les exigences en matière de résidence, l'appelant Haig, qui avait quitté l'Ontario pour s'installer au Québec en août 1992, n'avait pas qualité pour voter au référendum québécois parce qu'il n'avait pas résidé dans cette dernière province pendant

was not ordinarily resident within one of the polling divisions established for the federal referendum. The appellant brought an application in the Federal Court, seeking a declaration that s. 3 of the federal *Referendum Act* included a resident who was ordinarily resident in a province at any time in the six-month period prior to the referendum; or, in the alternative, a declaration that denying him a vote in the federal referendum violated his rights under ss. 3, 2(*b*) and 15(1) of the *Canadian Charter of Rights and Freedoms*. He also sought a mandamus requiring the Chief Electoral Officer to make reasonable provisions to allow him and others in his situation to be enumerated. The court dismissed the application and the majority of the Federal Court of Appeal affirmed the judgment.

Held (Lamer C.J. and Iacobucci J. dissenting): The appeal should be dismissed. The federal *Referendum Act* and the *Canada Elections Act* are constitutional. The appellant's exclusion from the federal referendum did not violate his rights under ss. 2(*b*), 3 and 15(1) of the *Charter*.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ.: The federal *Referendum Act* and the *Canada Elections Act* did not grant the appellant an entitlement to vote in the federal referendum. The purpose of the *Referendum Act* is not to obtain the opinion of electors in all Canadian provinces at all times. Section 3(1) of that Act expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. The appellant was ordinarily resident in Quebec on the enumeration date set for the federal referendum and since Quebec was not one of the provinces listed in the federal proclamation, no polling divisions were established in that province for the federal referendum. Therefore, while the appellant came within the definition of a qualified voter, he was not on the enumeration date ordinarily resident in an established polling division and had no entitlement to vote in the federal referendum. The appellant did not retain a right to vote in Ontario by virtue of s. 55(5) of the *Canada Elections Act*. This section merely states that a person cannot be without an ordinary residence and cannot be construed as meaning that the appellant could not lose his ordinary residence in Ontario for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legles six mois précédant le référendum. Il n'avait pas non plus qualité pour voter au référendum fédéral parce que, le jour du recensement, il n'avait pas sa résidence ordinaire dans une section de vote établie en vue de ce référendum. L'appelant a donc saisi la Cour fédérale d'une demande en vue d'obtenir un jugement déclarant l'art. 3 de la *Loi référendaire* fédérale applicable à une personne qui avait sa résidence ordinaire dans une province à n'importe quel moment pendant la période de six mois précédant le référendum, ou subsidiairement, déclarant que lui refuser la possibilité de voter au référendum fédéral portait atteinte aux droits que lui garantissent l'art. 3, l'al. 2*b*) et le par. 15(1) de la *Charte canadienne des droits et libertés*. Il a sollicité en outre un *mandamus* pour obliger le directeur général des élections à prendre des mesures raisonnables pour que lui et d'autres personnes se trouvant dans la même situation puissent être recensés. La cour a rejeté la demande dans une décision qui a été confirmée par la Cour d'appel fédérale à la majorité.

Arrêt (le juge en chef Lamer et le juge Iacobucci sont dissidents): Le pourvoi est rejeté. La *Loi référendaire* fédérale et la *Loi électorale du Canada* sont constitutionnelles. L'appelant n'a subi, du fait de ne pas avoir pu participer au référendum fédéral, aucune atteinte aux droits que lui garantissent l'al. 2*b*), l'art. 3 et le par. 15(1) de la *Charte*.

Les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Major: La *Loi référendaire* fédérale et la *Loi électorale du Canada* ne conféraient pas à l'appelant le droit de voter au référendum fédéral. L'objet de la *Loi référendaire* ne consiste pas à consulter les électeurs de toutes les provinces canadiennes dans tous les cas. Son paragraphe 3(1) prévoit expressément que la consultation par voie référendaire peut se faire à l'échelle nationale ou dans une ou plusieurs provinces. À la date du recensement en vue du référendum fédéral, l'appelant résidait ordinairement au Québec et, puisque le Québec ne figurait pas parmi les provinces énumérées dans la proclamation fédérale, aucune section de vote n'a été établie dans cette province pour le référendum fédéral. Donc, bien que l'appelant ait eu qualité d'électeur au sens de la définition, à la date du recensement il ne résidait pas ordinairement dans une section de vote établie et n'avait pas le droit de voter à ce référendum. L'appelant ne conservait pas en vertu du par. 55(5) de la *Loi électorale du Canada* le droit de voter en Ontario. Ce paragraphe prévoit uniquement qu'une personne ne peut pas être sans résidence ordinaire et ne saurait s'interpréter comme signifiant que l'appelant ne pouvait perdre sa résidence ordinaire en Ontario, pour ce qui était de voter au référendum fédéral, tant qu'il n'avait pas acquis la

islation. Such an interpretation would go not only against the wording but also against the spirit of the federal *Referendum Act*, which clearly extends an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation.

The Chief Electoral Officer did not have the power to extend the entitlement to vote in the federal referendum to the appellant. Though s. 7(3) of the federal *Referendum Act* gives the Chief Electoral Officer a discretionary power to adapt the *Canada Elections Act* in such a manner as he considers necessary for the purposes of applying that Act in respect of a referendum, this power does not extend to authorize a fundamental departure from the scheme of the *Referendum Act*. Residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation and the Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. The discretionary power of the Chief Electoral Officer could not be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Section 9(1) of the *Canada Elections Act* only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforeseen circumstance". The appellant's situation does not fall within these terms. The exclusion of electors not resident in the provinces in question on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. Further, s. 9(1) is also restricted to adaptations designed to facilitate the execution of the intent of the *Canada Elections Act*. The object of this Act, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote.

Section 3 of the *Charter* does not guarantee Canadians a constitutional right to vote in a referendum. The wording of s. 3 is clear and unambiguous and guarantees only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. The purpose of s. 3 is to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives. Since a referendum is in no way such a selection—a referendum is basically a consultative process—, the Canadian citizens cannot claim a constitutional right to vote in a referendum under s. 3. The appellant's s. 3 *Charter* rights were therefore not infringed.

qualité d'électeur au Québec conformément à la loi québécoise applicable. Non seulement pareille interprétation serait incompatible avec le texte de la *Loi référendaire* fédérale, mais elle le serait aussi avec son esprit, car cette loi vise manifestement à accorder le droit de vote seulement aux personnes résidant ordinairement dans une province ou un territoire mentionnés dans la proclamation.

Le directeur général des élections n'était pas habilité à accorder à l'appelant le droit de voter au référendum fédéral. Bien que le par. 7(3) de la *Loi référendaire* fédérale attribue au directeur général des élections un pouvoir discrétionnaire d'adapter la *Loi électorale du Canada* de la façon qu'il estime nécessaire à son application à un référendum, ce pouvoir ne va pas jusqu'à permettre qu'il s'éloigne fondamentalement du régime qu'établit la *Loi référendaire*. La résidence représente un élément essentiel du régime référendaire établi par les deux lois fédérales en question, et le décret ordonnait la tenue d'un référendum dans des provinces et territoires clairement indiqués. Le directeur général des élections ne pouvait, dans l'exercice de son pouvoir discrétionnaire, accorder un droit de vote qui dépassait les limites fixées dans le décret. Le paragraphe 9(1) de la *Loi électorale du Canada* ne vise que les situations où les dispositions de la loi ne concordent pas avec des besoins particuliers qui naissent par suite «d'une erreur, d'un calcul erroné, d'une urgence ou d'une circonstance exceptionnelle ou imprévue», termes qui ne s'appliquent pas à la situation de l'appelant. L'exclusion d'électeurs qui ne résidaient pas dans les provinces en question à la date du recensement découle clairement et inéluctablement du régime législatif adopté. De plus, le par. 9(1) se borne aux adaptations destinées à faciliter la réalisation de l'objet de la *Loi électorale du Canada*. Cette loi, telle qu'elle a été adaptée en vue du référendum, vise à faire en sorte que les personnes ayant droit de vote se voient accorder la possibilité de l'exercer. Elle n'a pas pour objet d'admettre à voter ceux qui n'en ont pas le droit.

L'article 3 de la *Charte* ne garantit pas aux Canadiens le droit constitutionnel de voter à un référendum. Le texte de l'art. 3 est clair et non ambigu, et n'y est garanti que le droit de voter aux élections législatives fédérales et provinciales. L'article 3 a pour objet d'accorder à tous les citoyens canadiens le droit de jouer un rôle important dans l'élection de députés. Comme un référendum, n'étant au fond qu'un processus de consultation, ne constitue aucunement une telle élection, les citoyens canadiens ne sauraient invoquer un droit constitutionnel, découlant de l'art. 3, de voter à un référendum. Par conséquent, l'appelant n'a subi aucune atteinte à ses droits garantis par l'art. 3 de la *Charte*.

In the context of the 1992 federal referendum, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Though a referendum is undoubtedly a platform for expression, s. 2(*b*) of the *Charter* does not impose upon a government any positive obligation to consult its citizens through the particular mechanism of a referendum, nor does it confer upon all citizens the right to express their opinions in a referendum. In an other context, however, s. 2(*b*) could impose a positive governmental action. A referendum as a platform of expression is a matter of legislative policy and not of constitutional law. While s. 2(*b*) does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Here, the federal government did not violate s. 2(*b*) either in holding its referendum or in holding it in less than all provinces and territories. The appellant was unable to vote simply because, on the enumeration date, he was not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's freedom of expression as guaranteed in the *Charter*.

Dans le contexte du référendum fédéral de 1992, la liberté d'expression ne comprenait pas un droit constitutionnel pour tous les Canadiens de se voir fournir un mode particulier d'expression. Bien qu'un référendum soit assurément une tribune pour favoriser l'expression, l'al. 2*b*) de la *Charte* n'impose à aucun gouvernement une obligation positive de consulter les citoyens par le recours à cette méthode particulière qu'est un référendum. Il ne confère pas non plus à l'ensemble des citoyens le droit d'exprimer leur opinion dans le cadre d'un référendum. Dans un autre contexte, toutefois, l'al. 2*b*) pourrait commander la prise d'une mesure positive par le gouvernement. Le référendum en tant que tribune pour favoriser l'expression relève de la politique législative et non du droit constitutionnel. Quoique l'al. 2*b*) ne confère aucun droit à un mode particulier d'expression, lorsqu'un gouvernement choisit d'en fournir un, il doit le faire d'une manière conforme à la Constitution. En l'espèce, le gouvernement fédéral n'a contrevenu à l'al. 2*b*) ni en tenant son référendum ni en ne le tenant pas dans la totalité des provinces et territoires. Si l'appelant n'a pu voter c'est simplement parce que, à la date du recensement, il ne résidait pas ordinairement dans une province où se tenait le référendum fédéral, et cette restriction ne porte aucunement atteinte à sa liberté d'expression garantie par la *Charte*.

In providing a platform of expression to less than all Canadians, the federal government did not infringe the appellant's s. 15(1) *Charter* guarantee of equal benefit of the law. The new residents of a province do not constitute a disadvantaged group within the contemplation of s. 15(1). People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to vote in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". As well, the exclusion of one province from the federal referendum legislation does not violate s. 15(1). The decision of the Governor in Council to hold a referendum only in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under s. 3(1) of the federal *Referendum Act*. Both the decision to hold a referendum and the decision as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. In a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1), while prohibiting discrimination, does not alter the division of powers between govern-

En fournissant une tribune pour favoriser l'expression à moins que la totalité des Canadiens, le gouvernement fédéral n'a pas lésé l'appelant dans son droit au même bénéfice de la loi reconnu à tous par le par. 15(1) de la *Charte*. Les nouveaux résidents d'une province ne forment pas un groupe désavantagé visé au par. 15(1). Les personnes qui s'installent au Québec moins de six mois avant la date d'un référendum ne souffrent ni de stéréotypage ni de préjugés sociaux. Quoique ses membres n'aient pu voter au référendum québécois, le groupe en question n'est pas de ceux qui ont subi des désavantages historiques ou des préjugés politiques. Il ne semble pas s'agir non plus d'un groupe «distinct et séparé». Par ailleurs, l'exclusion d'une province du champ d'application de la loi fédérale en matière référendaire ne constitue pas une violation du par. 15(1). La décision du gouverneur en conseil de ne tenir un référendum que dans un nombre spécifique de provinces représente un exercice constitutionnel légitime du pouvoir discrétionnaire conféré au gouvernement par le par. 3(1) de la *Loi référendaire* fédérale. Aussi bien la décision de tenir le référendum que celle relative au nombre de provinces dans lesquelles il aura lieu sont des décisions de principe qui relèvent entièrement des gouvernements et des législateurs. Dans un système fédéral, les distinctions

ments, nor does it require that all federal legislation must always have uniform application to all provinces.

Per McLachlin J.: The reasons of L'Heureux-Dubé J. were generally agreed with. Parliament's decision to hold a referendum in only some areas of Canada, and thus to exclude the residents outside these areas from the federal referendum, is not contrary to the *Charter*. However, had the law enacted a truly national referendum, the appellant's freedom of expression would have been violated. But even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible in every situation where that result could be attained without infringing the law, there was no legal basis upon which the Chief Electoral Officer could have registered a Quebec resident in a referendum which by its terms excluded Quebec.

Per Cory J.: The right to vote is of fundamental importance to Canadians and to our democracy. In all enfranchising statutes, the provisions granting the right to vote should be given a broad and liberal interpretation and restrictions on that right should be narrowly construed. Every effort should be made to interpret the statute to enfranchise the voter. These principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in a referendum. The Chief Electoral Officer thus has a duty to insure that as many Canadians as possible are enfranchised in every situation where that result can be attained without infringing the law. Flexibility must be given to the concept of residence, particularly in enfranchising statutes. The concept of residence as a requirement of exercising the right to vote was designed to facilitate the attainment of the principle of "one person one vote" and should not be used as a means of depriving a person of this right. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote. There is no reason for departing from this approach and practice under the federal *Referendum Act*. Here, under the requisite flexible test of residency, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling

entre les provinces ne donnent pas automatiquement naissance à une présomption de discrimination. Le paragraphe 15(1), bien qu'interdisant la discrimination, n'apporte aucune modification au partage des pouvoirs entre les gouvernements ni n'exige que toutes les lois fédérales s'appliquent toujours de façon uniforme à toutes les provinces.

Le juge McLachlin: Les motifs du juge L'Heureux-Dubé sont d'une manière générale acceptés. La décision du Parlement de tenir un référendum dans certaines régions du Canada seulement et, partant, d'exclure de la participation à ce référendum fédéral les résidents qui se trouvent à l'extérieur de ces régions n'est pas contraire à la *Charte*. Toutefois, si la loi avait prévu la tenue d'un référendum véritablement national, il y aurait eu alors violation de la liberté d'expression de l'appelant. Mais même si on interprète de façon large et libérale les exigences en matière de résidence qui visaient à accorder le droit de vote au plus grand nombre de Canadiens possible dans tous les cas où cela était possible sans contrevenir à la loi, il n'y avait pas de fondement légal qui aurait permis au directeur général des élections d'inscrire un résident du Québec à un référendum qui, de par ses termes, excluait le Québec.

Le juge Cory: Le droit de vote revêt une importance fondamentale pour les Canadiens et pour la démocratie canadienne. Toutes les lois conférant un droit de vote doivent recevoir une interprétation large et libérale et il faut interpréter restrictivement les limites à l'exercice de ce droit. Il faut prendre tous les moyens possibles pour interpréter la loi de façon à permettre aux citoyens de voter. Ces principes applicables au droit de voter aux élections devraient être appliqués de la même manière au droit de voter à un référendum. Le directeur général des élections a donc l'obligation de veiller à ce que le plus de Canadiens possible puissent être admis à voter dans tous les cas où cela est possible sans contrevenir à la loi. Il faut faire preuve de souplesse dans l'interprétation du concept de résidence, particulièrement dans le cas des lois conférant un droit de vote. Le concept de résidence comme condition d'exercice du droit de vote visait à assurer le respect du principe «une personne, un vote» et ne devrait pas être utilisé comme moyen de priver une personne de ce droit. Il s'ensuit que l'expression «réside ordinairement» employée dans une loi habilitant à voter doit recevoir une interprétation large dans le contexte de la société mobile moderne et compte tenu de l'importance essentielle du droit de vote. Il n'y a aucune raison d'abandonner cette méthode et cette pratique en vertu de la *Loi référendaire*. En l'espèce, selon le critère souple de résidence qui doit être appliqué, il serait erroné de conclure automatiquement que les personnes

division outside Quebec. Unfortunately, the appellant did not apply to be enumerated in his former riding and it is impossible to determine on the facts presented if there was a sufficient connection to a riding within the federal referendum to warrant his addition to the voter's list. Since the referendum is now long past, this is not a proper case in which to grant declaratory relief.

Per Iacobucci J. (dissenting): The appellant was entitled to vote in the federal referendum. The referendum contemplated by the federal *Referendum Act* was aimed at all Canadians citizens entitled to vote in a federal election; to accomplish that end, the federal referendum was coordinated with the Quebec referendum. While, in a formal sense, two referenda were held, to focus on the technicalities of separate referenda can only obscure the national character of the referendum. Appellant's right to express his political views by participating in a national referendum is guaranteed by s. 2(*b*) of the *Charter*. The right to express opinions in social and political decision-making is clearly protected by s. 2(*b*). The referendum was an important expressive activity relating to constitutional change in this country and Parliament was apparently under a political obligation to follow the referendum's results. The effect of the federal *Referendum Act*, however, was to deprive the appellant and other recently arrived in Quebec of their rights to participate in the referendum. Accordingly, their s. 2(*b*) rights were violated. In the absence of any evidence on s. 1 of the *Charter*, the violation of the appellant's s. 2(*b*) rights has not been justified. The proper remedy would have been to expand the definition of "elector" in s. 3(1) of the *Referendum Act*. The Chief Electoral Officer, relying on s. 7(3) of the *Referendum Act*, could have used s. 9(1) of the *Canada Elections Act* to permit the appellant to vote.

Per Lamer C.J. (dissenting): Cory J.'s approach to the definition of residency for voting purposes and Iacobucci J.'s reasons concerning s. 2(*b*) of the *Charter* were agreed with.

déménagées au Québec avant la date du recensement référendaire pouvaient, pour ce seul motif, être privées du droit de vote dans une section de vote fédérale à l'extérieur du Québec. Malheureusement, l'appelant n'a pas demandé à se faire recenser dans son ancienne circonscription et il est impossible de déterminer à partir des faits présentés s'il avait un lien suffisant avec une circonscription au sein du territoire référendaire fédéral pour justifier l'ajout de son nom à la liste électorale. Comme le référendum est maintenant chose du passé, ce n'est pas un cas où il est opportun de rendre un jugement déclaratoire.

Le juge Iacobucci (dissident): L'appelant avait le droit de voter lors du référendum fédéral. Le référendum prévu par la *Loi référendaire* fédérale s'adressait à tous les citoyens canadiens ayant le droit de voter lors d'une élection fédérale. À cette fin, le référendum fédéral a été coordonné avec le référendum québécois. Même si, d'un point de vue formel, deux référendums ont été tenus, mettre l'accent sur les formalités de référendums distincts ne peut que masquer le caractère national du référendum. Le droit de l'appelant d'exprimer ses opinions politiques en participant à un référendum national est garanti par l'al. 2*b*) de la *Charte*. L'alinéa 2*b*) protège clairement le droit d'exprimer des opinions lors de la prise de décisions d'intérêt social et politique. Le référendum a été une importante activité d'expression relative aux changements constitutionnels dans notre pays et il semble que le Parlement avait une obligation politique d'en suivre les résultats. La *Loi référendaire* fédérale a toutefois eu pour effet de priver l'appelant et d'autres personnes récemment arrivées au Québec de leur droit de participer au référendum. Il y a donc eu violation des droits que leur garantit l'al. 2*b*). En l'absence d'une preuve quant à l'article premier de la *Charte*, la violation des droits garantis à l'appelant par l'al. 2*b*) n'a pas été justifiée. La réparation indiquée aurait consisté à élargir la définition de l'expression «corps électoral» qui figure au par. 3(1) de la *Loi référendaire*. Le directeur général des élections aurait pu, en s'appuyant sur le par. 7(3) de la *Loi référendaire*, utiliser le par. 9(1) de la *Loi électorale du Canada* pour permettre à l'appelant de voter.

Le juge en chef Lamer (dissident): L'avis du juge Cory en ce qui concerne la façon dont il convient d'aborder la définition de la résidence aux fins du vote et celui du juge Iacobucci en ce qui concerne l'al. 2*b*) de la *Charte* sont acceptés.

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By Cory J.

Referred to: *Cawley v. Branchflower* (1884), 1 B.C.R. (Pt. II) 35; *Re Lincoln Election* (1876), 2 O.A.R. 316; *In Re Provincial Elections Act* (1903), 10 B.C.R. 114; *Re Voters' List of the Township of Seymour* (1899), 2 Ont. Elec. 69; *Hipperson v. Newbury District Electoral Registration Officer*, [1985] Q.B. 1060; *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102; *Tenold v. Chapman* (1981), 9 Sask. R. 278; *Fells v. Spence*, [1984] N.W.T.R. 123.

By Iacobucci J. (dissenting)

R. v. Zundel, [1992] 2 S.C.R. 731; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Native Women's Assn. of Canada v. Canada*, [1992] 3 F.C. 192.

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Citée par le juge Cory

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R. c. Zundel, [1992] 2 R.C.S. 731; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Native Women's Assn. of Canada c. Canada*, [1992] 3 C.F. 192.

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APPEAL from a judgment of the Federal Court of Appeal, [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71, dismissing the appellants' appeal from an order of Denault J. (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64, and dismissing their appeal (except on a procedural point) from an order of Joyal J., [1992] 3 F.C. 602, 57 F.T.R. 6. Appeal dismissed, Lamer C.J. and Iacobucci J. dissenting.

POURVOI contre un arrêt de la Cour d'appel fédéral, [1992] 3 C.F. 611, 145 N.R. 233, 97 D.L.R. (4th) 71, qui a rejeté l'appel interjeté par les appelants contre une ordonnance du juge Denault (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64, et qui a rejeté (sauf en ce qui concerne une question de procédure) leur appel contre une ordonnance du juge Joyal, [1992] 3 C.F. 602, 57 F.T.R. 6. Pourvoi rejeté, le juge en chef Lamer et le juge Iacobucci sont dissidents.

Philippa Lawson, for the appellants.

Philippa Lawson, pour les appelants.

N. J. Schultz and *H. McManus*, for the respondent the Chief Electoral Officer.

Jean-Marc Aubry, *Q.C.*, and *Richard Morneau*, for the respondent the Attorney General of Canada.

Jean-François Jobin and *Dominique A. Jobin*, for the intervener.

The following are the reasons delivered by

LAMER C.J. (dissenting)—I agree with Cory J. with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J. concerning s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

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

L'HEUREUX-DUBÉ J.—On October 26, 1992, two referenda were held in Canada, each concerning proposed amendments to the Canadian Constitution. Graham Haig was not able to cast a ballot in either. This was unfortunate. The only issue in the present appeal is this: Was Graham Haig entitled to cast a ballot in the federal referendum?

At that specific moment in Canadian history, there was a confluence of political pressures, concerns and events. Among these was the ongoing and often politically heated constitutional dialogue. In order to seek the views of Canadians on this crucial issue of constitutional change, the federal government and the provincial governments who so desired had available a variety of options: commissions, surveys, opinion polls, referenda, etc. Quebec had legally bound itself to hold a referendum on sovereignty, while British Columbia and Alberta had articulated the possibility that they would hold provincial referenda dealing with constitutional change, and that they would consider themselves bound by the results. It was in this con-

N. J. Schultz et *H. McManus*, pour l'intimé le directeur général des élections.

Jean-Marc Aubry, *c.r.*, et *Richard Morneau*, pour l'intimé le procureur général du Canada.

Jean-François Jobin et *Dominique A. Jobin*, pour l'intervenant.

Version française des motifs rendus par

LE JUGE EN CHEF LAMER (dissident)—Je partage l'avis du juge Cory en ce qui concerne la façon dont il convient d'aborder la définition de la résidence aux fins du vote. Je partage également l'avis du juge Iacobucci en ce qui concerne l'al. 2*b*) de la *Charte canadienne des droits et libertés* et la façon dont il propose de statuer sur le présent pourvoi. Je suis donc d'avis de statuer sur le pourvoi de la façon proposée par le juge Iacobucci.

Le jugement des juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier et Major a été rendu par

LE JUGE L'HEUREUX-DUBÉ—Le 26 octobre 1992 ont eu lieu au Canada deux référendums chacun portant sur des propositions d'amendement à la Constitution canadienne. Or, Graham Haig n'a pu voter ni à l'un ni à l'autre: c'est regrettable. La seule question que pose le présent pourvoi est la suivante: Graham Haig avait-il le droit de voter au référendum fédéral?

À ce moment précis de son histoire, le Canada a connu une convergence d'événements, de pressions et de circonstances sur le plan politique. C'est dans ce cadre que s'insère le dialogue constitutionnel d'alors, souvent passionné, dans les milieux politiques. Afin de consulter le peuple canadien sur la question vitale des changements constitutionnels, plusieurs possibilités (commissions, sondages, référendums, etc.) s'offraient au gouvernement fédéral ainsi qu'aux gouvernements provinciaux désireux de s'en prévaloir. Le Québec s'était légalement engagé à tenir un référendum sur la souveraineté, tandis que la Colombie-Britannique et l'Alberta avaient mentionné qu'il était possible qu'ils tiennent des référendums provin-

text that the federal government undertook to hold a referendum in those provinces where a provincial referendum would not otherwise be held. This choice was in accord with the desire and the authority of the provinces to consult their own electors as they saw fit.

In the end, only two referenda were held: one in Quebec pursuant to Quebec's provincial referendum legislation, the other in the rest of Canada pursuant to the federal referendum legislation. The model chosen by the federal government was one which was open to them under the relevant legislation, which specifically allowed for referenda to be conducted in one or more provinces. The model chosen was, at the time, thought to be politically sound by both the federal and the provincial governments.

The mechanics of the two referenda were governed by the elections legislation of each government. The federal and the Quebec elections legislation, though similar in certain respects, are not mirror images of each other, but contain different provisions on a number of issues including: the preparation of electoral lists, methods of voting, financing, referendum publicity and spending, the roles and functions of the Chief Electoral Officers and their staff, and residency requirements. The residency provisions of the Quebec elections legislation, in particular, diverge from those in the federal legislation by requiring six months residency in order to be eligible to vote. It was this residency requirement which resulted in some Quebec residents, Mr. Haig in particular, not being able to cast their vote, and which is at the heart of this case.

Were the Quebec residents who were not entitled to vote in the Quebec referendum nonetheless entitled to vote in the federal referendum? To answer this question, it is essential to more fully refer to the political events and legislative context leading up to October 26, 1992.

ciaux portant sur les changements constitutionnels, et qu'ils se sentiraient liés par leurs résultats. C'est dans ce contexte que le gouvernement fédéral a décidé de tenir un référendum dans les provinces où il n'y aurait pas de référendum provincial. Cette décision était en accord avec le désir et le pouvoir des provinces de consulter comme bon leur semblait leurs propres électeurs.

Seulement deux référendums ont finalement eu lieu: l'un au Québec en vertu de la loi référendaire de cette province, l'autre partout ailleurs au Canada en vertu de la loi référendaire fédérale. Le modèle de référendum choisi par le gouvernement fédéral était conforme à la loi applicable, qui autorisait expressément la tenue de référendums dans une ou plusieurs provinces. À l'époque, ce modèle a été jugé politiquement acceptable aussi bien par le gouvernement fédéral que par les gouvernements provinciaux.

Le déroulement des deux référendums était régi par la loi électorale de chacun des gouvernements en question. Quoique similaires à certains égards, la loi fédérale et la loi québécoise en matière électorale ne sont pas identiques, mais diffèrent sur plusieurs points, dont l'établissement de listes électorales, le mode de scrutin, le financement, la publicité et les dépenses référendaires, le rôle et les fonctions des directeurs généraux des élections et de leur personnel et les exigences en matière de résidence. En particulier, les dispositions de la loi électorale québécoise relatives à la résidence se distinguent de celles de la loi fédérale en ce sens qu'elles prescrivent une période de résidence de six mois pour qu'une personne soit habilitée à voter. C'est cette exigence qui a privé certains résidents du Québec, et notamment M. Haig, de la possibilité de voter et qui est au cœur du présent appel.

Les résidents du Québec non habilités à voter au référendum québécois avaient-ils, néanmoins, le droit de voter au référendum fédéral? Pour répondre à cette question, il est essentiel d'entreprendre un examen plus approfondi des événements politiques et du contexte législatif au cours de la période qui a précédé le 26 octobre 1992.

Facts

On April 17, 1982, the *Constitution Act, 1982* was proclaimed into force. The Meech Lake Accord, which proposed certain amendments to the *Constitution Act, 1982*, was not ratified by all provincial legislatures within the allotted time period, and failed on June 23, 1990. As a result of these events, Bill 150, *An Act respecting the process for determining the political and constitutional future of Québec*, S.Q. 1991, c. 34, s. 32, came into force on June 20, 1991. According to Chapter I of this Bill, the Government of Quebec was required to hold a referendum on the sovereignty of Quebec no later than October 26, 1992.

On June 23, 1992, the *Referendum Act*, S.C. 1992, c. 30, came into force. This Act provided a mechanism for the federal government to obtain the opinion of the electors of Canada, or the electors of one or more provinces, on issues related to the Canadian Constitution.

On August 28, 1992, the Prime Minister of Canada, the ten provincial premiers, the leaders of the territorial governments and representatives of four aboriginal associations, came to an agreement which has become known as the "Charlottetown Accord". This agreement proposed substantial amendments to the Constitution of Canada.

On September 3, 1992, as a direct result of the Charlottetown Accord, Bill 44, *An Act to amend the Act respecting the process for determining the political and constitutional future of Québec*, S.Q. 1992, c. 47, was introduced into the Quebec National Assembly. This Bill, which came into force on September 8, 1992, amended Bill 150 so that the Government of Quebec was still obligated to hold a referendum on October 26, 1992, but the subject of the referendum would be the Charlottetown Accord, rather than Quebec sovereignty. Similarly, on September 8, 1992, the Prime Minister of Canada announced that a referendum would

Les faits

Le 17 avril 1982, la *Loi constitutionnelle de 1982* est entrée en vigueur. L'Accord du lac Meech, qui proposait certaines modifications à cette constitution, n'ayant pas été ratifié par toutes les assemblées législatives provinciales dans le délai imparti, est, en conséquence, devenu lettre morte à partir du 23 juin 1990. Ces événements ont entraîné l'adoption de la loi 150 intitulée *Loi sur le processus de détermination de l'avenir politique et constitutionnel du Québec*, L.Q. 1991, ch. 34, art. 32, entrée en vigueur le 20 juin 1991. Le chapitre premier de cette loi imposait au gouvernement du Québec l'obligation de tenir un référendum sur la souveraineté du Québec au plus tard le 26 octobre 1992.

Le 23 juin 1992, la *Loi référendaire*, L.C. 1992, ch. 30, est entrée en vigueur. Cette loi prévoyait un mécanisme permettant au gouvernement fédéral de recueillir l'opinion des électeurs canadiens, ou des électeurs d'une ou de plusieurs provinces, sur des questions touchant la Constitution canadienne.

Le 28 août 1992, le premier ministre du Canada, les dix premiers ministres provinciaux, les dirigeants des gouvernements territoriaux et les représentants de quatre associations autochtones en sont venus à un accord, maintenant connu comme l'«Accord de Charlottetown», qui proposait des modifications substantielles à la Constitution du Canada.

Le 3 septembre 1992, comme conséquence directe de l'Accord de Charlottetown, le projet de loi 44 intitulé *Loi modifiant la Loi sur le processus de détermination de l'avenir politique et constitutionnel du Québec*, L.Q. 1992, ch. 47, fut déposé devant l'Assemblée nationale du Québec. Entrée en vigueur le 8 septembre 1992, cette loi modifiait la loi 150, de sorte que le gouvernement du Québec était toujours tenu de procéder à un référendum le 26 octobre 1992 mais la question devait porter sur l'Accord de Charlottetown plutôt que sur la souveraineté du Québec. De même, le 8 septembre 1992, le premier ministre du Canada

be held on October 26, 1992, the subject of which would also be the Charlottetown Accord.

On September 9, the Premier of Quebec, pursuant to s. 8 of the *Referendum Act*, R.S.Q., c. C-64.1, put before the National Assembly the proposed text of the question to be the subject of the October 26, 1992 Quebec referendum. The same day, pursuant to s. 5(1) of the *Referendum Act* (Canada), the proposed text of the question which was to be the subject of the federal referendum was put before the House of Commons. Both questions were identical. The House of Commons approved the text of the federal referendum question on September 10, and the Senate approved the text on September 15. The National Assembly, pursuant to ss. 8 and 9 of the *Referendum Act* (Quebec) approved the text of the Quebec referendum question on September 16.

On September 17, 1992, pursuant to s. 3(1) of the *Referendum Act* (Canada), a proclamation was issued by Order-in-Council P.C. 1992-2045 directing that a referendum be held to obtain the opinion of the electors of "the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, the Yukon Territory and the Northwest Territories" on a question relating to the Constitution of Canada. The referendum was to be held October 26, 1992, its conduct to be governed by the *Canada Elections Act*, R.S.C., 1985, c. E-2, as adapted for the purposes of the referendum. One of these provisions states that any Canadian citizen of 18 years of age who, on the enumeration date, was ordinarily resident within one of the polling divisions established for the referendum, would be entitled to cast a ballot.

On September 27, 1992, pursuant to s. 13 of the *Referendum Act* (Quebec), the Government of Quebec ordered Quebec's Chief Electoral Officer to hold a referendum on October 26, 1992, to be conducted in accordance with the provisions of the *Election Act*, R.S.Q., c. E-3.3, as adapted for the purposes of the referendum. According to one of

annonçait pour le 26 octobre 1992 la tenue d'un référendum qui porterait également sur l'Accord de Charlottetown.

Le 9 septembre, le premier ministre du Québec, conformément à l'art. 8 de la *Loi sur la consultation populaire*, L.R.Q., ch. C-64.1, déposait devant l'Assemblée nationale le texte proposé de la question qui allait faire l'objet du référendum québécois du 26 octobre 1992. Le même jour était déposé à la Chambre des communes, en application du par. 5(1) de la *Loi référendaire* (Canada), le texte proposé de la question référendaire fédérale. Les deux questions étaient identiques. La Chambre des communes approuvait le texte de la question référendaire fédérale le 10 septembre, le Sénat y donnant son assentiment le 15 septembre. Le 16 septembre, en conformité avec les art. 8 et 9 de la *Loi sur la consultation populaire* (Québec), l'Assemblée nationale approuvait le texte de la question référendaire québécoise.

Le 17 septembre 1992, en vertu du par. 3(1) de la *Loi référendaire* (Canada), une proclamation par décret C.P. 1992-2045 ordonnait la tenue d'un référendum pour recueillir l'opinion des électeurs dans «les provinces de l'Ontario, de la Nouvelle-Écosse, du Nouveau-Brunswick, du Manitoba, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, de la Saskatchewan, de l'Alberta et de Terre-Neuve, ainsi que dans le territoire du Yukon et les Territoires du Nord-Ouest» sur une question relative à la Constitution canadienne. Le référendum devait avoir lieu le 26 octobre 1992 sous le régime de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, adaptée aux fins du référendum. L'une des dispositions de cette loi prévoyait que tout citoyen canadien âgé de 18 ans qui, à la date du recensement, résidait ordinairement dans une section de vote établie en vue du référendum, serait habilité à voter.

Le 27 septembre 1992, le gouvernement du Québec, en vertu de l'art. 13 de la *Loi sur la consultation populaire* (Québec), ordonnait au directeur général des élections du Québec de tenir, le 26 octobre 1992, un référendum, qui devait se dérouler en conformité avec la *Loi électorale*, L.R.Q., ch. E-3.3, adaptée pour les besoins du réfé-

these provisions, any Canadian citizen of 18 years of age who, on the polling day, had been domiciled in Quebec for six months, would be entitled to cast a ballot.

In August of 1992, Graham Haig moved from Ontario to Quebec. On the enumeration day for the federal referendum, Mr. Haig was no longer ordinarily resident in a polling division established for the federal referendum, and so, pursuant to the provisions of the *Canada Elections Act*, he was not included on the list of voters entitled to vote in the federal referendum. At the same time, having been domiciled in Quebec for less than six months, he did not meet the eligibility requirements under the *Election Act* (Quebec), and so was not included on the list of voters eligible to vote in the Quebec referendum. The result was, of course, that Mr. Haig was not enumerated and consequently could not vote in either referendum.

Proceedings

On September 30, 1992, Mr. Haig instituted proceedings in the Federal Court, Trial Division, filing an originating notice of motion under s. 18.1 of the *Federal Court Act*, R.S.C., 1985, c. F-7. On behalf of himself and unnamed others (represented by John Doe and Jane Doe), an application was brought against Her Majesty the Queen and the Chief Electoral Officer, seeking a declaration that s. 3 of the *Referendum Act* (Canada) included the applicants, and mandamus, requiring the respondents to make reasonable provisions to allow for the enumeration of the applicants. Notice was given to the Attorney General of Canada that the constitutional validity of the federal Order-in-Council would be challenged.

On October 7, 1992, counsel for Her Majesty the Queen made a preliminary application before Denault J. in the Federal Court, Trial Division, to have Her Majesty the Queen struck as a respondent on the basis that the court had no jurisdiction under s. 18.1 of the *Federal Court Act* to grant the remedies requested against the Queen. Denault J. granted the application, striking the Queen as

rendum. D'après l'une de ces dispositions, tout citoyen canadien âgé de 18 ans qui, le jour du scrutin, était domicilié au Québec depuis six mois, avait le droit de voter.

En août 1992, Graham Haig a quitté l'Ontario pour s'installer au Québec. Le jour du recensement pour le référendum fédéral, M. Haig n'avait plus sa résidence ordinaire dans une section de vote établie en vue de ce référendum, si bien que, suivant la *Loi électorale du Canada*, son nom ne figurait pas sur la liste des électeurs ayant droit de vote audit référendum. Par ailleurs, comme il était domicilié au Québec depuis moins de six mois, il ne satisfaisait pas aux exigences posées par la *Loi électorale* (Québec) pour qu'il soit habilité à voter. Par conséquent, il n'a pas été inscrit sur la liste électorale dressée pour le référendum québécois. Monsieur Haig n'a donc pas été recensé et, en conséquence, n'a pu voter ni à l'un ni à l'autre référendum.

Les procédures

Le 30 septembre 1992, M. Haig a intenté des procédures devant la Section de première instance de la Cour fédérale, déposant en vertu de l'art. 18.1 de la *Loi sur la Cour fédérale*, L.R.C. (1985), ch. F-7, un avis de requête introductive d'instance. En son propre nom et pour le compte d'autres personnes, qui n'ont pas été nommément désignées, il a présenté une demande en vue d'obtenir un jugement déclarant applicable aux requérants l'art. 3 de la *Loi référendaire* (Canada), ainsi qu'un *mandamus* pour obliger Sa Majesté la Reine et le directeur général des élections, intimés, à prendre des mesures raisonnables pour permettre le recensement des requérants. Avis de l'intention de contester la constitutionnalité du décret fédéral a été signifié au procureur général du Canada.

Le 7 octobre 1992, le procureur de Sa Majesté la Reine a soumis au juge Denault de la Section de première instance de la Cour fédérale une demande préliminaire de radiation de Sa Majesté la Reine comme intimée du fait que l'art. 18.1 de la *Loi sur la Cour fédérale* n'habilitait pas cette cour à accorder les redressements sollicités à l'égard de Sa Majesté. Le juge Denault, faisant droit à cette

respondent: (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64. The applicants then brought an additional application to add the Attorney General of Canada as respondent. Both applications were heard before and dismissed by Joyal J. in the Federal Court, Trial Division: [1992] 3 F.C. 602, 57 F.T.R. 6.

The appellants appealed the orders of Denault J. and Joyal J., and the respondent Chief Electoral Officer cross-appealed. The appeals and cross-appeal were joined and heard on October 19, 1992 before the Federal Court of Appeal, which added the Attorney General as a party, dismissed the appeal from the order of Denault J. as moot, dismissed the Chief Electoral Officer's cross-appeal, and also dismissed the original application on its merits: [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71. The appellants now appeal to this Court. The Chief Electoral Officer initially cross-appealed on an issue of jurisdiction related to parliamentary privilege, but that cross-appeal was discontinued on February 25, 1993.

Relevant Legislation

Referendum Act, R.S.Q., c. C-64.1

7. The Government may order that the electors be consulted by referendum

(*a*) on a question approved by the National Assembly in accordance with sections 8 and 9, or

(*b*) on a bill adopted by the National Assembly in accordance with section 10.

As soon as the National Assembly is informed of the question or bill contemplated in the first paragraph, the Secretary General of the National Assembly shall notify the chief electoral officer thereof in writing.

The chief electoral officer shall send a copy of the notice to the returning officer of each electoral division.

16. The lists of electors shall be established within the eighteen days following the day on which the National

requête, a radié Sa Majesté comme intimée: (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64. Les requérants ont alors présenté une nouvelle requête visant à constituer le procureur général du Canada partie intimée. Les deux requêtes ont été entendues et rejetées par le juge Joyal de la Section de première instance de la Cour fédérale: [1992] 3 C.F. 602, 57 F.T.R. 6.

Les appelants ont interjeté appel contre les ordonnances des juges Denault et Joyal tandis que le directeur général des élections, intimé, a formé un appel incident. Les appels et l'appel incident ayant été joints, l'audience a eu lieu le 19 octobre 1992 devant la Cour d'appel fédérale, qui a adjoint le procureur général comme partie, a rejeté, parce qu'il ne présentait qu'un intérêt théorique, l'appel contre l'ordonnance du juge Denault, a rejeté l'appel incident du directeur général des élections et a, en outre, rejeté sur le fond la requête initiale: [1992] 3 C.F. 611, 145 N.R. 233, 97 D.L.R. (4th) 71. Les appelants se pourvoient maintenant devant notre Cour. Le directeur général des élections, qui avait initialement formé un pourvoi incident sur une question de compétence liée au privilège parlementaire, s'en est désisté le 25 février 1993.

Les dispositions législatives pertinentes

Loi sur la consultation populaire, L.R.Q., ch. C-64.1

7. Le gouvernement peut ordonner que les électeurs soient consultés par référendum:

a) sur une question approuvée par l'Assemblée nationale conformément aux articles 8 et 9, ou

b) sur un projet de loi adopté par l'Assemblée nationale conformément à l'article 10.

Dès que l'Assemblée nationale a été saisie de la question ou du projet de loi visé au premier alinéa, le secrétaire général de l'Assemblée doit en aviser, par écrit, le directeur général des élections.

Le directeur général des élections fait parvenir copie de cet avis au directeur du scrutin de chaque circonscription.

16. Les listes électorales sont établies dans les dix-huit jours qui suivent celui où l'Assemblée nationale a

Assembly was informed of the question or bill comtemplated in section 7.

Election Act, R.S.Q., c. E-3.3 (as adapted pursuant to ss. 44 to 47 of the *Referendum Act*, R.S.Q., c. C-64.1)

1. Every person who

(1) has attained eighteen years of age,

(2) is a Canadian citizen,

(3) has been domiciled in Québec for six months or, in the case of an elector outside Québec, for twelve months,

(4) is not under curatorship; and

(5) is not deprived of election rights, pursuant to section 568, is a qualified elector.

Every person registered in the registry of electors outside Québec is deemed to be domiciled in Québec.

2. To exercise his right to vote, a person must be a qualified elector on polling day and be registered on the list of electors of the polling subdivision where his domicile is situated on the day of the notification provided for in section 7 of the Referendum Act, or be registered in the registry of electors outside Québec.

Referendum Act, S.C. 1992, c. 30

3. (1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

. . .

6. (1) On the issue of a proclamation, the Chief Electoral Officer shall, in accordance with the proclamation, issue writs of referendum in the form set out in Schedule I for all electoral districts in Canada or in the province or provinces specified in the proclamation.

. . .

7. (1) Subject to this Act, the *Canada Elections Act*, as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that applica-

été saisie de la question ou du projet de loi visé à l'article 7.

Loi électorale, L.R.Q., ch. E-3.3 (adaptée conformément aux art. 44 à 47 de la *Loi sur la consultation populaire*, L.R.Q., ch. C-64.1)

1. Possède la qualité d'électeur, toute personne qui:

1° a dix-huit ans accomplis;

2° est de citoyenneté canadienne;

3° est domiciliée au Québec depuis six mois ou, dans le cas d'un électeur hors du Québec, depuis douze mois;

4° n'est pas en curatelle;

5° n'est pas privée, en application de l'article 568, de ses droits électoraux.

Est réputée domiciliée au Québec toute personne inscrite au registre des électeurs hors du Québec.

2. Pour exercer son droit de vote, une personne doit posséder la qualité d'électeur le jour du scrutin et être inscrite sur la liste électorale de la section de vote où elle a son domicile le jour de l'avis prévu à l'article 7 de la Loi sur la consultation populaire ou inscrite au registre des électeurs hors du Québec.

Loi référendaire, L.C. 1992, ch. 30

3. (1) Le gouverneur en conseil, s'il estime que l'intérêt public justifie la consultation du corps électoral canadien par voie référendaire sur une question relative à la Constitution du Canada, peut, par proclamation, la lui soumettre lors d'un référendum tenu dans l'ensemble du pays ou dans une ou plusieurs provinces mentionnées dans la proclamation.

. . .

6. (1) Dès la prise de la proclamation, le directeur général des élections délivre, en conformité avec celle-ci, les brefs référendaires selon le modèle figurant à l'annexe I pour toutes les circonscriptions du Canada ou celles de la ou des provinces mentionnées dans la proclamation.

. . .

7. (1) Sous réserve des autres dispositions de la présente loi, la *Loi électorale du Canada*, adaptée en conformité avec le paragraphe (3), s'applique au référen-

tion, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

(2) The provisions of the *Canada Elections Act* referred to in Schedule II do not apply in respect of a referendum.

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

(4) The Chief Electoral Officer may make regulations

(*a*) respecting the conduct of a referendum; and

(*b*) generally for carrying out the purposes and provisions of this Act.

Canada Elections Act, R.S.C., 1985, c. E-2 (as adapted for the purposes of a referendum, SOR/92-430)

9. (1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation.

50. (1) Every person who

(*a*) has attained the age of eighteen years, and

(*b*) is a Canadian citizen,

is qualified as an elector.

. . .

53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration

dum, la délivrance des brefs référendaires étant alors assimilée à celle des brefs relatifs à une élection générale.

(2) Les dispositions de la *Loi électorale du Canada* énumérées à l'annexe II ne s'appliquent pas au référendum.

(3) Sous réserve des autres dispositions de la présente loi, le directeur général des élections peut, par règlement, adapter la *Loi électorale du Canada* de la façon qu'il estime nécessaire à son application au référendum.

(4) Le directeur général des élections peut, par règlement:

a) régir le déroulement d'un référendum;

b) d'une manière générale, prendre les mesures nécessaires à l'application de la présente loi.

Loi électorale du Canada, L.R.C. (1985), ch. E-2 (adaptée aux fins d'un référendum, DORS/92-430)

9. (1) Lorsque, au cours d'un référendum, le directeur général des élections estime que, par suite d'une erreur, d'un calcul erroné, d'une urgence ou d'une circonstance exceptionnelle ou imprévue, une des dispositions de la présente loi ne concorde pas avec les exigences de la situation, le directeur général des élections peut, au moyen d'instructions générales ou particulières, prolonger le délai imparti pour faire tout acte, augmenter le nombre de fonctionnaires référendaires ou de bureaux de scrutin ou autrement adapter une des dispositions de la présente loi à la réalisation de son objet, dans la mesure où il le juge nécessaire pour faire face aux exigences de la situation.

50. (1) A qualité d'électeur toute personne qui, à la fois:

a) a atteint l'âge de dix-huit ans;

b) est citoyen canadien.

. . .

53. (1) Sous réserve des autres dispositions de la présente loi, toute personne qui a qualité d'électeur a le droit d'avoir son nom inscrit sur la liste électorale de la section de vote où elle réside ordinairement à la date du

date for the referendum and to vote at the polling station established therein.

. . .

55. (1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expressions "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Order-in-Council P.C. 1992-2045, dated September 17, 1992

WHEREAS, pursuant to subsection 3(1) of the Referendum Act, the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on the question hereinafter set out relating to the Constitution of Canada;

WHEREAS, pursuant to section 4 of that Act, no proclamation may be issued before the text of the referendum question has been approved under section 5 of that Act;

AND WHEREAS the text of the referendum question hereinafter set out was approved by the House of Commons under section 5 of that Act of September 10, 1992 and was concurred in thereunder by the Senate on September 15, 1992;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Prime Minister, pursuant to subsection 3(1) of the Referendum Act, is pleased hereby to order that a

recensement relative au référendum et de voter au bureau de scrutin établi dans cette section de vote.

. . .

55. (1) Les règles du présent article et des articles 56 à 59 et 62 s'appliquent à l'interprétation des expressions «réside ordinairement», «résidant ordinairement» et «résidait ordinairement» dans tout article de la présente loi où ces expressions sont employées à l'égard du droit de vote d'un électeur.

(2) Sous réserve des autres dispositions du présent article et des articles 56 à 59 et 62, la question de savoir où une personne réside ou résidait ordinairement à une époque pertinente ou pendant une période de temps appréciable doit être décidée en se référant à toutes les circonstances du cas.

(3) Le lieu de résidence ordinaire d'une personne est en général l'endroit qui a toujours été, ou qu'elle a adopté comme étant, le lieu de son habitation ou sa demeure, où elle entend revenir lorsqu'elle en est absente.

(4) Lorsqu'une personne couche habituellement dans un lieu et mange ou travaille dans un autre, le lieu de sa résidence ordinaire est celui où la personne couche.

(5) Une personne ne peut avoir qu'un seul lieu de résidence ordinaire et elle ne peut le perdre que si elle en acquiert un autre.

Décret C.P. 1992-2045, daté du 17 septembre 1992

Attendu que, conformément au paragraphe 3(1) de la Loi référendaire, le gouverneur en conseil estime que l'intérêt public justifie la consultation du corps électoral canadien par voie référendaire sur la question ci-après relative à la Constitution du Canada;

Attendu que, en vertu de l'article 4 de cette loi, il ne peut être pris de proclamation avant que le texte de la question référendaire ne soit approuvé en conformité avec l'article 5 de cette loi;

Attendu que, en conformité avec l'article 5 de cette loi, le texte de la question référendaire ci-après a été approuvé par la Chambre des communes le 10 septembre 1992 et a reçu l'agrément du Sénat le 15 septembre 1992,

À ces causes, sur recommandation du premier ministre et en vertu du paragraphe 3(1) de la Loi référendaire, il plaît à Son Excellence le Gouverneur général en conseil d'ordonner la prise d'une proclamation soumettant

proclamation do issue directing that the opinion of electors be obtained by putting to the electors of the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, the Yukon Territory and the Northwest Territories, at a referendum called for that purpose, the following question relating to the Constitution of Canada:

"Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?

___ ___"

Yes No

au corps électoral canadien, lors d'un référendum tenu dans les provinces de l'Ontario, de la Nouvelle-Écosse, du Nouveau-Brunswick, du Manitoba, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, de la Saskatchewan, de l'Alberta et de Terre-Neuve, ainsi que dans le territoire du Yukon et les Territoires du Nord-Ouest, la question suivante relative à la Constitution du Canada:

«Acceptez-vous que la Constitution du Canada soit renouvelée sur la base de l'entente conclue le 28 août 1992?

___ ___»

Oui Non

Judgments

Federal Court, Trial Division (Denault J.)

On the application by the respondent Her Majesty the Queen for an order striking her from the originating notice, Denault J. refused to hear the merits of the case, emphasizing that the mandatory notice period for constitutional questions had not yet expired, and dealt only with the procedural issues.

Finding s. 18 of the *Federal Court Act* available only where the relief sought arises from a decision of a "federal board, commission or other tribunal", he held that the Crown does not come within the definition of "federal board, commission or other tribunal" set out in s. 2 of the *Federal Court Act* and, in addition, that the s. 18 procedure is not appropriate where the issues to be resolved are of a serious and complex nature. He concluded that ss. 17 and 48 applied and that an action against the Queen had to be commenced by statement of claim. As such, Denault J. granted the respondent's motion, and struck Her Majesty the Queen from the originating notice.

Federal Court, Trial Division (Joyal J.), [1992] 3 F.C. 602

At the hearing on the amended Originating Notice, the Crown (appearing in an institutional capacity and not as a party respondent) argued that

Les jugements

La Cour fédérale, Section de première instance (le juge Denault)

Saisi de la requête de l'intimée, Sa Majesté la Reine, demandant la radiation de la requête introductive d'instance, le juge Denault a refusé d'entendre l'affaire au fond, vu que le délai prescrit pour donner avis de questions constitutionnelles n'était pas encore expiré. Par conséquent, le juge Denault n'a examiné que les questions de procédure.

Ayant déterminé que l'art. 18 de la *Loi sur la Cour fédérale* s'applique seulement dans le cas d'un redressement sollicité par suite d'une décision d'un «office fédéral», le juge Denault a jugé que la Couronne n'est pas visée par la définition donnée à ce terme à l'art. 2 de cette loi et, par surcroît, que le recours à la procédure prévue à l'art. 18 n'est pas approprié si les questions à trancher se révèlent à la fois sérieuses et complexes. Il a conclu que les art. 17 et 48 s'appliquaient et qu'une action intentée contre la Reine devait l'être par voie de déclaration. Le juge Denault a, en conséquence, accueilli la requête de Sa Majesté et l'a radiée de la requête introductive d'instance.

La Cour fédérale, Section de première instance (le juge Joyal), [1992] 3 C.F. 602

Lors de l'audition de la requête introductive d'instance amendée, la Couronne (comparaissant en sa qualité institutionnelle et non d'intimée), a

since the real issue was the constitutional validity of a federal statute, the court lacked any jurisdiction to consider the matter under s. 18 of the *Federal Court Act*. In view of the peculiar circumstances and in spite of the earlier order of Denault J., Joyal J. took the jurisdictional questions under advisement, and allowed the case to proceed on the merits.

In Joyal J.'s view, the right to vote embodied in s. 3 of the *Canadian Charter of Rights and Freedoms* relates only to elections to the federal Parliament and legislative assemblies, and does not include a right to vote in any other instance. Since the federal Order-in-Council did not include Quebec, the question of whether or not Quebec should have been included was a policy decision and not a justiciable issue. He concluded that the applicants had no right to vote in the federal referendum, and that their only recourse, if any, might be to resort to the Quebec courts. In his opinion, at p. 608, the predicament facing the applicants was one

which is often found when the political structure of a community is based on a federal system where both levels of authority enjoy their respective and exclusive jurisdictions.

While concluding that he had jurisdiction under s. 18 of the *Federal Court Act*, Joyal J. dismissed the applicants' *Charter* arguments, finding no violation of freedom of expression under s. 2(*b*), of mobility rights under s. 6, nor of equality rights under s. 15(1). Given this conclusion on the merits, he dismissed the application to add the Attorney General as a party.

Federal Court of Appeal, [1992] 3 F.C. 611 (Hugessen and Stone JJ.A., and Décary J.A. (dissenting))

On the jurisdictional question, Hugessen J.A., for the majority, found that the Chief Electoral Officer fell within the definition of 'federal board, commission or other tribunal'. The appellants'

fait valoir que, comme la véritable question en litige concernait la constitutionnalité d'une loi fédérale, selon l'art. 18 de la *Loi sur la Cour fédérale* la cour n'avait pas juridiction pour se saisir de la question. Compte tenu des circonstances spéciales et en dépit de l'ordonnance antérieure du juge Denault, le juge Joyal a pris en délibéré les questions de juridiction et a procédé à l'instruction au fond.

De l'avis du juge Joyal, le droit de vote consacré à l'art. 3 de la *Charte canadienne des droits et libertés* ne s'applique qu'aux élections législatives fédérales et provinciales et ne confère le droit de voter dans aucune autre circonstance. Comme le décret fédéral ne visait pas le Québec, l'inclusion ou non de cette province dans son champ d'application était une décision de politique législative et non une question relevant de la compétence des tribunaux. Il a conclu que les requérants n'avaient pas le droit de voter au référendum fédéral et que leur seul recours, si tant est qu'ils en avaient un, ne pouvait être que devant les tribunaux du Québec. Selon le juge Joyal, à la p. 608, la situation dans laquelle se trouvaient les requérants en était une

souvent rencontrée lorsque la structure politique d'une collectivité se fonde sur un système fédéral dans lequel les deux paliers de gouvernement ont chacun leur compétence exclusive.

Bien qu'ayant décidé qu'il avait juridiction en vertu de l'art. 18 de la *Loi sur la Cour fédérale*, le juge Joyal a rejeté les arguments des requérants fondés sur la *Charte* parce que, a-t-il conclu, il n'y avait eu aucune violation de la liberté d'expression garantie à l'al. 2*b*), ni de la liberté de circulation prévue à l'art. 6 ni des droits à l'égalité énoncés au par. 15(1). Étant donné cette conclusion sur le fond de l'affaire, il a rejeté la requête aux fins d'adjoindre le procureur général comme partie au litige.

La Cour d'appel fédérale, [1992] 3 C.F. 611 (les juges Hugessen et Stone, et le juge Décary (dissident))

Sur la question de juridiction, le juge Hugessen, au nom de la majorité, a conclu que le directeur général des élections était un «office fédéral» au sens de la définition de ce terme. Les appelants

complaint was that the Chief Electoral Officer had failed to exercise his power and jurisdiction to correctly apply and adapt the *Canada Elections Act* to the referendum. Such an allegation properly comes under s. 18 of the *Federal Court Act*, and the Attorney General of Canada is expressly authorized to be made a party to such proceedings. Since, in the context of a *Charter* challenge to federal legislation, the Attorney General is also a necessary party, the majority found that Joyal J. should have allowed the application to add the Attorney General of Canada.

alléguaient que le directeur général des élections avait négligé d'exercer son pouvoir et sa compétence de manière à appliquer et à adapter correctement au référendum la *Loi électorale du Canada*. Or, ce genre d'allégation relève à juste titre de l'art. 18 de la *Loi sur la Cour fédérale* et il y est expressément prévu que le procureur général du Canada peut être constitué partie à une instance visée à cet article. Puisque, dans le contexte de la contestation d'une loi fédérale en vertu de la *Charte*, le procureur général est également une partie nécessaire, les juges majoritaires ont conclu que le juge Joyal aurait dû faire droit à la demande visant à adjoindre le procureur général du Canada comme partie au litige.

The appeal from the decision of Joyal J. on the procedural point having been allowed, the appeal from Denault J.'s order on the related point was declared moot and quashed. With respect to the Chief Electoral Officer's cross-appeal, Hugessen J.A. observed that, though courts have traditionally acted with restraint in matters relating to the conduct of elections, a Chief Electoral Officer has no historical privilege or statutory immunity against claims which are founded in the *Charter*. The cross-appeal was accordingly dismissed.

L'appel contre la décision du juge Joyal sur la question de procédure ayant été accueilli, celui interjeté contre l'ordonnance du juge Denault sur la question connexe a été déclaré d'intérêt théorique et rejeté. En ce qui concerne l'appel incident formé par le directeur général des élections, le juge Hugessen a fait remarquer que, malgré la retenue qu'ont traditionnellement montrée les tribunaux saisis de questions touchant la tenue d'élections, le directeur général des élections ne jouit historiquement d'aucun privilège ni d'aucune immunité légale contre les demandes fondées sur la *Charte*. Par conséquent, l'appel incident a été rejeté.

On the merits, the majority held that Joyal J. had reached the right conclusion, finding that if there was any denial of the appellants' rights, it flowed exclusively from the operation of the provincial legislation (at p. 616):

Statuant sur le fond de l'affaire, les juges majoritaires ont été d'avis que le juge Joyal avait raison et que toute atteinte à leurs droits qu'ont pu subir les appelants résultait exclusivement de l'application de la loi provinciale (à la p. 616):

> While it is no doubt true that it is the federal order in council restricting the federal referendum to all provinces and territories other than Quebec which has created the background for the appellant's present situation, it remains that it is the Quebec legislation alone which is at the root of his complaint. He does not now reside in any province in which the federal referendum is being held and the federal legislation does not affect him one way or the other. As a resident of Quebec he is subject to that province's referendum legislation and it is solely that legislation which denies him the right to vote.

> Bien qu'il soit tout à fait exact que c'est le décret fédéral limitant le référendum fédéral à toutes les provinces et tous les territoires autres que le Québec qui a tissé la toile de fond de la situation dans laquelle se trouve l'appelant, il demeure que c'est la loi québécoise à elle seule qui est à la source de sa plainte. Il ne réside présentement dans aucune province où le référendum fédéral sera tenu et la loi fédérale ne le touche d'aucune façon. Résident du Québec, il est assujetti à la loi référendaire de cette province et seule cette loi lui nie le droit de vote.

Commenting that the very scheme of the *Referendum Act* (Canada) and the *Canada Elections Act*

Indiquant que, de par le régime même qu'elles établissent, la *Loi référendaire* (Canada) et la *Loi*

is based upon questions of geography, the majority found no constitutional impropriety in the Order-in-Council which limited the number of provinces in which the federal referendum would be held (at p. 617):

> . . . because a referendum is limited to constitutional questions, and because the amending formula (and indeed the Constitution itself) envisages processes and substantive rules which may differ according to the province or number of provinces involved, it is entirely normal that different questions may be put to the electors in one or more provinces or that a question may be put to the electors in some provinces but not others. [Footnote omitted.]

Décary J.A., dissenting, agreed that the Federal Court of Appeal had jurisdiction under s. 18 of the *Federal Court Act*, and that the Attorney General of Canada and the Chief Electoral Officer were properly made parties to the proceedings. However, he disagreed with the majority's conclusion on the merits. Taking judicial notice of "political realities", Décary J.A. was of the view that the federal referendum, though not being held in all ten provinces, was in reality a national referendum, and that Parliament had not intended that any citizen of Canada would be disenfranchised with respect to this important issue.

He asserted that if the appellants were denied the right to participate in the referendum, their freedom of expression guaranteed by s. 2(*b*) of the *Charter* would be infringed. He also found that their rights to the equal benefit of the law guaranteed in s. 15(1) of the *Charter* would be infringed, finding that in the circumstances of this case, province of residence could be a personal characteristic capable of constituting a ground of discrimination. Décary J.A. further commented at p. 622 that:

> The source of the infringement, should the appellant be denied his rights, would not be the Quebec legislation but, rather, the federal legislation which would have failed to take into account for the purposes of a national

électorale du Canada s'appuient sur des considérations d'ordre géographique, les juges majoritaires ont conclu que le décret limitant le nombre de provinces dans lesquelles serait tenu le référendum fédéral ne renfermait aucune irrégularité sur le plan constitutionnel (à la p. 617):

> . . . parce qu'un référendum est limité à des questions constitutionnelles et que la formule d'amendement (et la Constitution elle-même quant à cela) envisage des procédures et des règles de fond qui peuvent varier suivant la province ou le nombre de provinces en cause, il est tout à fait normal que des questions différentes puissent être soumises aux électeurs dans une ou plusieurs provinces ou qu'une question puisse être soumise aux électeurs dans certaines provinces et non dans d'autres. [Renvoi omis.]

Le juge Décary, dissident, a convenu que l'art. 18 de la *Loi sur la Cour fédérale* est attributif de compétence à la Cour d'appel fédérale et que c'est à bon droit que le procureur général du Canada et le directeur général des élections avaient été constitués parties à l'instance. Il n'a toutefois pas souscrit à la conclusion des juges majoritaires sur le fond. Prenant connaissance d'office des «réalités politiques», le juge Décary a estimé que le référendum fédéral, même s'il ne se tenait pas dans chacune des dix provinces, était, dans les faits, un référendum national, et que le Parlement n'avait pas voulu qu'un seul citoyen canadien soit privé du droit de voter sur cette importante question.

D'après le juge Décary, refuser aux appelants le droit de participer au référendum porterait atteinte au droit à la liberté d'expression dont ils jouissent aux termes de l'al. 2*b*) de la *Charte*. Il a conclu également que ce serait une violation du droit au même bénéfice de la loi garanti au par. 15(1) de la *Charte*, car, dans les circonstances de l'espèce, la province de résidence pourrait être une caractéristique personnelle susceptible de constituer un motif de discrimination. Il a fait remarquer en outre, à la p. 622:

> Si l'appelant devait être privé de ses droits, la violation n'aurait pas sa source dans la loi du Québec, mais plutôt dans la loi fédérale qui n'aurait pas tenu compte, aux fins d'un référendum national, des distinctions qui

referendum the existing differences in provincial legislation with respect to electors' qualifications.

Since Parliament is presumed to act in conformity with the *Charter*, Décary J.A. determined that the issue could be resolved through statutory interpretation without placing the holding of the referendum itself in jeopardy. He concluded at p. 623 that the term "elector of a province" could be interpreted to include

> in a particular province electors who are ordinarily resident of that given province on enumeration date and who do not qualify under the residency requirements of the latter, but who were ordinarily resident in that particular province at any time in the six-month period prior to the referendum. . . .

He recognized that his interpretation was "somewhat stretched", but would have granted the declaratory relief sought on the ground that the Federal Court of Appeal was the "next-to-last" resort of people in the appellants' position.

Constitutional Questions

The following constitutional questions were phrased by the Chief Justice:

1. If the *Referendum Act*, S.C. 1992, c. 30, and the *Canada Elections Act*, R.S.C., 1985, c. E-2, exclude from voting at the federal referendum Canadian electors who have moved to Quebec but who failed to meet Quebec's six months residency requirements for voting in the provincial referendum, do these Acts, in whole or in part, violate ss. 2(*b*), 3 or 15(1) of the *Canadian Charter of Rights and Freedoms*?

2. If the answer to the first constitutional question stated herein is in the affirmative, is such infringement justified under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?

3. Does Order-in-Council P.C. 1992-2045, enacted pursuant to s. 3(1) of the *Referendum Act*, S.C. 1992, c. 30, infringe the rights or freedoms guaranteed the applicants under ss. 2(*b*), 3 or 15(1) of the *Canadian Charter of Rights and Freedoms*?

existent dans les lois provinciales à l'égard des qualités exigées des électeurs.

Comme le Parlement est présumé agir en conformité avec la *Charte*, le juge Décary a décidé que la question pouvait être résolue par voie d'interprétation de la loi, sans compromettre la tenue du référendum lui-même. L'expression «corps électoral» d'une province, a-t-il conclu, à la p. 623, pouvait s'interpréter de manière à comprendre

> dans une certaine province les électeurs qui sont des résidents ordinaires de la province donnée à la date du recensement et qui n'ont pas qualité d'électeur en vertu des exigences de cette province en matière de résidence, mais qui étaient néanmoins des résidents ordinaires de cette province à quelque moment que ce soit au cours des six mois précédant la référendum . . .

Reconnaissant le caractère «quelque peu élastique» de son interprétation, le juge Décary aurait tout de même accordé le jugement déclaratoire sollicité, et ce, au motif que la Cour d'appel fédérale constituait l'«avant dernière» instance pour les gens se trouvant dans la situation des appelants.

Les questions constitutionnelles

Le Juge en chef a formulé les questions constitutionnelles suivantes:

1. Si la *Loi référendaire*, L.C. 1992, ch. 30, et la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, empêchent de voter au référendum fédéral les électeurs canadiens qui ont déménagé au Québec mais qui n'ont pas satisfait à l'exigence de résider depuis au moins six mois que pose le Québec pour pouvoir voter au référendum provincial, ces lois, en totalité ou en partie, violent-elles l'al. 2*b*), l'art. 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*?

2. Si la réponse à la première question constitutionnelle formulée ici est affirmative, cette violation est-elle justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* à titre de limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

3. Le décret C.P. 1992-2045, pris conformément au par. 3(1) de la *Loi référendaire*, L.C. 1992, ch. 30, porte-t-il atteinte aux droits ou aux libertés garantis aux requérants par l'al. 2*b*), l'art. 3 ou le par. 15(1) de la *Charte canadienne des droits et libertés*?

4. If the answer to the second constitutional question stated herein is in the affirmative, is such infringement justified under s. 1 of the *Canadian Charter of Rights and Freedoms* as a reasonable limit, demonstrably justified in a free and democratic society?

Issues

The constitutional questions formulated above raise but one central issue: Did Mr. Haig and those persons in a similar situation have the right to cast a ballot in the federal referendum held on October 26, 1992, either as a matter of statutory interpretation, or due to the operation of the *Charter*? I would answer this question by examining the following issues:

1. The proper interpretation of the federal referendum legislation, in particular, s. 3(1) of the *Referendum Act* (Canada), and ss. 53 and 55 of the *Canada Elections Act*.

2. The powers of the Chief Electoral Officer under s. 7(3) of the *Referendum Act* (Canada) and s. 9(1) of the *Canada Elections Act* to modify the provisions of the *Canada Elections Act*.

3. The constitutionality of the *Referendum Act* (Canada) and the Order-in-Council made thereunder, with respect to alleged violations of ss. 3, 2(*b*) and 15(1) of the *Charter*.

Statutory Interpretation of the Referendum Legislation

The first question is whether the federal referendum legislation is capable of bearing an interpretation that would allow the appellants to vote in the federal referendum. The answer to this question lies in the scope that can be given to the phrase "electors of . . . one or more provinces specified in the proclamation" in s. 3(1) of the *Referendum Act* (Canada).

The appellants suggest that the Court should take a broad and purposive approach to this interpretative task. I agree. Following a number of authorities on the subject, the words of Dickson C.J. in *Canadian National Railway Co. v. Canada*

4. Si la réponse à la deuxième question constitutionnelle formulée ici est affirmative, cette atteinte est-elle justifiée en vertu de l'article premier de la *Charte canadienne des droits et libertés* à titre de limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

Les questions en litige

Les questions constitutionnelles formulées ci-dessus se réduisent à une seule question fondamentale: Monsieur Haig et les personnes se trouvant dans une situation semblable à la sienne avaient-ils le droit, résultant soit de l'interprétation des lois, soit de l'application de la *Charte*, de voter au référendum fédéral tenu le 26 octobre 1992? Pour y répondre, j'examinerai les points suivants:

1. L'interprétation qu'il convient de donner à la législation fédérale en matière référendaire, en particulier au par. 3(1) de la *Loi référendaire* (Canada) et aux art. 53 et 55 de la *Loi électorale du Canada*.

2. Les pouvoirs de modifier la *Loi électorale du Canada* que confèrent au directeur général des élections le par. 7(3) de la *Loi référendaire* (Canada) et le par. 9(1) de la *Loi électorale du Canada*.

3. La constitutionnalité de la *Loi référendaire* (Canada) et du décret émis sous son régime, eu égard aux violations qu'on allègue à l'encontre de l'art. 3, de l'al. 2*b*) et du par. 15(1) de la *Charte*.

L'interprétation de la législation référendaire

Se pose en premier lieu la question de savoir si la législation référendaire fédérale peut souffrir une interprétation qui permettrait aux appelants de voter au référendum fédéral. La réponse à cette question tient à la portée à donner à l'expression «corps électoral [. . .] dans une ou plusieurs provinces mentionnées dans la proclamation», qui figure au par. 3(1) de la *Loi référendaire* (Canada).

Les appelants prétendent que la Cour devrait adopter une interprétation à la fois large et fondée sur l'objet. Je suis d'accord. Conformes aux énoncés de plusieurs arrêts à ce sujet, les propos du juge en chef Dickson dans l'arrêt *Compagnie des*

(Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1134, support this proposition:

> Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal *Interpretation Act* which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

The purpose, then, of the *Referendum Act* (Canada) is encapsulated in s. 3(1) of that Act:

> **3.** (1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

Section 3(1) expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. Clearly, the purpose is not to obtain the opinion of electors in all Canadian provinces at all times. There could not be clearer language. In order to achieve its purpose, the *Referendum Act* (Canada) fashions a mechanism for obtaining the opinion of electors on questions relating to the Constitution of Canada.

Section 7(1) of the *Referendum Act* (Canada) adopts the *Canada Elections Act* (as adapted) as the model to be used in seeking the opinion of electors, a model in conformity with the purpose of the Order-in-Council. In order to be qualified as an elector under this model, s. 50 specifies that a person must be 18 years of age and a Canadian citizen. Aside from this preliminary question of qualification, the *Canada Elections Act* model is one which is essentially founded on notions of geography. Once a referendum has been proclaimed, s. 6(1) of the *Referendum Act* (Canada) directs the Chief Electoral Officer to issue writs of referendum for the provinces specified in the proclamation. Writs are issued for these provinces, these

chemins de fer nationaux du Canada c. Canada (Commission canadienne des droits de la personne), [1987] 1 R.C.S. 1114, à la p. 1134, appuient ce point de vue:

> Bien que cela puisse sembler banal, il peut être sage de se rappeler ce guide qu'offre la *Loi d'interprétation* fédérale lorsqu'elle précise que les textes de loi sont censés être réparateurs et doivent ainsi s'interpréter de la façon juste, large et libérale la plus propre à assurer la réalisation de leurs objets.

L'objet de la *Loi référendaire* (Canada) se trouve succinctement énoncé à son par. 3(1):

> **3.** (1) Le gouverneur en conseil, s'il estime que l'intérêt public justifie la consultation du corps électoral canadien par voie référendaire sur une question relative à la Constitution du Canada, peut, par proclamation, la lui soumettre lors d'un référendum tenu dans l'ensemble du pays ou dans une ou plusieurs provinces mentionnées dans la proclamation.

Le paragraphe 3(1) prévoit expressément que la consultation par voie référendaire peut se faire à l'échelle nationale ou dans une ou plusieurs provinces. De toute évidence, l'objet ne consiste pas à consulter les électeurs de toutes les provinces canadiennes dans tous les cas. Le texte de la disposition est on ne peut plus clair. Pour la réalisation de son objet, la *Loi référendaire* (Canada) crée un mécanisme qui permet la consultation des électeurs sur des questions touchant la Constitution du Canada.

Le paragraphe 7(1) de la *Loi référendaire* (Canada) adopte la *Loi électorale du Canada* (adaptée) comme modèle à suivre aux fins de la consultation des électeurs, modèle qui est conforme, d'ailleurs, à l'objet du décret. Aux termes de l'art. 50 de la *Loi électorale du Canada*, pour avoir qualité d'électeur on doit avoir atteint l'âge de 18 ans et être citoyen canadien. Mis à part cette question préliminaire de la qualité d'électeur, le modèle établi par la *Loi électorale du Canada* repose essentiellement sur des considérations d'ordre géographique. Ainsi, une fois le référendum proclamé, le par. 6(1) de la *Loi référendaire* (Canada) ordonne au directeur général des élections de délivrer des brefs référendaires pour les

provinces are divided into electoral districts, and the electoral districts are further divided into polling divisions. The entitlement to vote under this model is contingent upon a person being ordinarily resident in one of these established polling divisions. This entitlement is clearly set out in s. 53(1), which bears repetition:

53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein. [Emphasis added.]

In short, in order to vote in a federal referendum, a person must be both qualified as an elector, and be ordinarily resident in an established polling division in one of the provinces or territories where the referendum is held. Mr. Haig, as a Canadian citizen over the age of 18 years, comes within the definition of a qualified voter under s. 50 of the *Canada Elections Act*. Did he also qualify, on the enumeration date, as "ordinarily resident" in one of the polling divisions established under the federal referendum legislation?

The interpretation of the expression "ordinarily resident" is governed by the rules set out in ss. 55 to 59 and 62 of the *Canada Elections Act*. The general rule is that a person is ordinarily resident in the location where that person makes his or her home. Making that determination can be complex, but s. 55(2), reproduced earlier, provides required flexibility, stating that a person's ordinary residence is to "be determined by reference to all the facts of the case".

In the case before the Court, however, that determination was simple. Mr. Haig's undisputed affidavit evidence is that he ceased to be ordinarily resident in Ontario in August of 1992, and was ordinarily resident in Quebec on the enumeration date set for the federal referendum. Since Quebec was not one of the provinces listed in the federal proclamation, no writ was issued, and no polling

provinces mentionnées dans la proclamation. Des brefs sont donc délivrés pour ces provinces; celles-ci sont divisées en circonscriptions qui, à leur tour, sont divisées en sections de vote. Suivant ce modèle, une personne n'a le droit de vote que si elle réside ordinairement dans une des sections de vote ainsi établies. C'est ce qui ressort clairement du par. 53(1), qu'il est utile de reproduire de nouveau:

53. (1) Sous réserve des autres dispositions de la présente loi, toute personne qui a qualité d'électeur a le droit d'avoir son nom inscrit sur la liste électorale de la section de vote où elle réside ordinairement à la date du recensement relative au référendum et de voter au bureau de scrutin établi dans cette section de vote. [Je souligne.]

Bref, pour pouvoir voter à un référendum fédéral, il faut avoir qualité d'électeur et résider ordinairement dans une section de vote établie dans une des provinces ou un des territoires où le référendum se tient. Or, M. Haig, étant citoyen canadien âgé de plus de 18 ans, a qualité d'électeur au sens de l'art. 50 de la *Loi électorale du Canada*. Mais, à la date du recensement, résidait-il «ordinairement» dans l'une des sections de vote établies en vertu de la loi référendaire fédérale?

L'interprétation de l'expression «réside ordinairement» est assujettie aux règles énoncées aux art. 55 à 59 et 62 de la *Loi électorale du Canada*. La règle générale veut qu'une personne réside ordinairement dans le lieu où elle a établi sa demeure. Quant à savoir si une personne réside ordinairement dans un endroit donné, c'est là une question qui peut s'avérer fort délicate, mais le par. 55(2), reproduit plus haut, est suffisamment souple, car il statue qu'elle «doit être décidée en se référant à toutes les circonstances du cas».

En l'espèce toutefois, cette décision a été facile. En effet, d'après son affidavit non contesté, M. Haig a cessé de résider ordinairement en Ontario en août 1992 et, à la date du recensement en vue du référendum fédéral, il résidait ordinairement au Québec. Puisque le Québec ne figurait pas parmi les provinces énumérées dans la proclamation fédérale, aucun bref n'a été délivré ni aucune

divisions were established in Quebec for the federal referendum. On the enumeration date, Mr. Haig was not ordinarily resident in an established polling division, and he thus had no entitlement to vote in the federal referendum. This would appear to be sufficient to dispose of the matter as far as the statutory interpretation of the *Referendum Act* (Canada) and the *Canada Elections Act* are concerned. Both the purpose and the language of the legislation are clear and unambiguous, and the facts are not contested.

Mr. Haig submits, however, that despite being a resident of Quebec on the federal enumeration date, he retained the right to vote in Ontario, relying on s. 55(5) of the *Canada Elections Act* which states:

55. . . .

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

He argues that, according to this section, he could not lose his ordinary residence for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legislation. In my view, s. 55(5) cannot by any stretch of the imagination bear this meaning.

First, such an interpretation simply cannot be sustained on the wording of the section. Section 55(5) is clear, stating merely that a person cannot be without an ordinary residence. There was no allegation that Mr. Haig was without an ordinary residence at any time. On the contrary, and by his own admission, he had an ordinary residence, and that was in the province of Quebec. What he complains of is not that he lacked an ordinary residence. His complaint is that, though resident in Quebec, he had not yet met the six-month residency requirement set out in s. 1 of the *Election Act* (Quebec), and so was not entitled to vote in the Quebec referendum. Neither was he entitled to cast a ballot in the federal referendum held in Ontario, as he was no longer ordinarily resident in that province. Whether one adopts a plain or purposive

section de vote établie au Québec pour le référendum fédéral. À la date du recensement, M. Haig ne résidait pas ordinairement dans une section de vote établie et il n'avait pas, en conséquence, le droit de voter à ce référendum. Voilà donc qui paraît concluant en ce qui concerne l'interprétation de la *Loi référendaire* (Canada) et de la *Loi électorale du Canada*. Aussi bien l'objet que le texte de ces lois sont clairs et non ambigus et personne ne conteste les faits.

Monsieur Haig prétend, cependant, qu'en dépit de sa qualité de résident du Québec à la date du recensement fédéral, il conservait le droit de voter en Ontario, proposition à l'appui de laquelle il invoque le par. 55(5) de la *Loi électorale du Canada*, qui dispose:

55. . . .

(5) Une personne ne peut avoir qu'un seul lieu de résidence ordinaire et elle ne peut le perdre que si elle en acquiert un autre.

Suivant ce paragraphe, soutient M. Haig, il ne pouvait perdre sa résidence ordinaire pour ce qui était de voter au référendum fédéral tant qu'il n'avait pas acquis la qualité d'électeur au Québec conformément à la loi québécoise applicable. À mon avis, le par. 55(5) n'admet aucunement pareille interprétation.

En premier lieu, une telle interprétation est tout simplement irréconciliable avec le texte de cette disposition. Le paragraphe 55(5) est clair, il prévoit uniquement qu'une personne ne peut pas être sans résidence ordinaire et M. Haig ne prétend pas l'avoir jamais été. Au contraire, de son propre aveu, il avait une résidence ordinaire et elle se trouvait au Québec. Ce dont il se plaint, en fait, ce n'est pas de s'être trouvé sans résidence ordinaire, mais bien de ce que, quoique résident de cette province, il n'avait pas encore rempli l'exigence de six mois de résidence posée à l'article premier de la *Loi électorale* (Québec) et n'avait pas, en conséquence, le droit de voter au référendum québécois. Il ne pouvait pas, non plus, voter au référendum fédéral en Ontario parce qu'il avait cessé d'y résider ordinairement. Or, qu'on l'interprète dans son

reading, s. 55(5) of the *Canada Elections Act* provides no assistance to Mr. Haig.

Second, the interpretation proposed goes not only against the wording, but also against the spirit of the *Referendum Act* (Canada), which expressly allows for a consultation of less than all Canadians. Accordingly, the appellants rely on the incorrect assumption that all Canadians were entitled to vote in this federal referendum, and that the question of where one actually casts one's ballot was a purely technical matter. This is clearly not so. Two distinct referenda were held. The federal referendum was held in nine provinces, and two territories. The entitlement to vote in this referendum was tied to ordinary residence in one of these jurisdictions on the enumeration date. The spirit of the Act was clearly to extend an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation. It would go directly against this spirit and intent to find otherwise.

It is critical to appreciate that residency is not a purely technical matter, but is a fundamental aspect of the referendum scheme itself. This is so for a number of reasons, not the least of which is the sheer mechanics of holding a referendum. The enumeration scheme provided for under the *Canada Elections Act* involves scrutineers going to the ordinary residence of each voter to place his or her name on the electoral roll. In order to apply this statutory structure to the appellants, the Chief Electoral Officer would have had two choices. The first would be to send enumerators into Quebec to find and enumerate those residents of Quebec who were not yet entitled to vote in the provincial referendum. In addition to the time and expense incurred in enumerating those residents who have been in Quebec for less than six months, this option would also require enumerators to operate extra-territorially in a province for which no federal referendum writ was issued. The second

sens clair ou en fonction de son objet, le par. 55(5) de la *Loi électorale du Canada* n'est d'aucun secours à M. Haig.

En deuxième lieu, non seulement l'interprétation proposée est incompatible avec le texte de la *Loi référendaire* (Canada), mais elle l'est aussi avec son esprit, car cette loi autorise expressément la consultation de moins que la totalité des Canadiens. C'est pourquoi les appelants s'appuient sur la proposition, mal fondée, selon laquelle tous les Canadiens avaient le droit de voter à ce référendum fédéral et selon laquelle l'endroit où l'on votait n'était, en fait, qu'une question de forme. De toute évidence, il n'en est rien. Deux référendums distincts ont été tenus. Le référendum fédéral a eu lieu dans neuf provinces et deux territoires. Le droit d'y voter tenait à la résidence ordinaire dans l'un ou l'autre de ces provinces et territoires à la date du recensement. De par son esprit, la Loi visait manifestement à accorder le droit de vote seulement aux personnes résidant ordinairement dans une province ou un territoire mentionnés dans la proclamation. La conclusion contraire serait diamétralement opposée à l'esprit et à l'intention de la loi.

Il importe au plus haut degré de comprendre que la résidence n'est pas qu'une pure formalité, mais qu'elle représente un aspect fondamental du régime référendaire comme tel. Cela tient à plusieurs raisons et, notamment, à tout le côté pratique de la tenue d'un référendum. Sous le régime de recensement prévu à la *Loi électorale du Canada*, des recenseurs se rendent à la résidence ordinaire de chaque électeur afin d'inscrire son nom sur la liste électorale. Il n'y a que deux façons dont le directeur général des élections aurait pu appliquer ce régime aux appelants. La première possibilité aurait été d'envoyer au Québec des recenseurs afin de dépister et de recenser les résidents de cette province qui n'avaient pas encore acquis le droit de voter au référendum provincial. Outre qu'il aurait entraîné des dépenses de temps et d'argent, le recensement des personnes résidant au Québec depuis moins de six mois aurait obligé les recenseurs à exercer leurs fonctions dans une province

choice would be to attempt to enumerate the persons who had recently moved to Quebec in the polling division they left behind. Besides involving similar issues of time, difficulty and expense, this option leaves unanswered the question of how these people would even be located. It goes without saying that both of these options expressly conflict with the requirements of s. 53(1), by allowing for the enumeration of people who are not ordinarily resident in an established polling division. In addition to the difficulties involved in the mechanics of enumeration, there would also have been difficulties related to the mechanics of how these non-residents would be able to vote. It is clear that the interpretation proposed by the appellants would require a highly crafted administrative system, a system that is notably absent from the legislation. In my view, the interpretation of s. 55(5) proposed by the appellants would simply be unworkable, and it cannot be presumed that such an interpretation or result could have been foreseen, let alone intended, by Parliament.

pour laquelle aucun bref n'avait été délivré en vue du référendum fédéral. La seconde possibilité aurait été de tenter de recenser dans la section de vote qu'elles venaient de quitter les personnes qui avaient récemment déménagé au Québec. Non seulement cette option présente des difficultés analogues à celles de la première et pose des problèmes similaires de temps et de frais, mais elle laisse entière la question de savoir comment on aurait même pu repérer ces personnes. Il va sans dire que ces deux options vont directement à l'encontre des exigences du par. 53(1) en permettant le recensement de personnes qui ne résident pas ordinairement dans une section de vote établie. En plus des difficultés que comporte le processus du recensement, auraient surgi également des problèmes quant à savoir comment ces non-résidents allaient pouvoir voter. Visiblement, l'interprétation proposée par les appelants nécessiterait un système administratif hautement perfectionné, système que la loi ne crée manifestement pas. Selon moi, l'interprétation du par. 55(5) avancée par les appelants se révélerait tout simplement impossible à appliquer et on ne saurait supposer que le Parlement a prévu ni, à plus forte raison, voulu une telle interprétation ou conséquence.

Finally, I must add that the interpretative approach proposed by the appellants is one which would do violence to all cannons of interpretation as well as to legislative integrity. The appellants are asking the Court to conclude that ordinary residence under the *Referendum Act* (Canada) cannot be lost until one is entitled to vote under the *Referendum Act* (Quebec). To arrive at such a conclusion, the Court would be required to alter the clear meaning of provisions drafted by the federal government in order to accommodate exigencies arising from provisions drafted by a completely different legislative body, one over which the federal legislator has no authority whatsoever. To do this would be to cut away at the authority of legislative bodies to draft statutory instruments that they feel best reflect their specific purposes and goals. Such a conclusion would strike a blow at the autonomy and independence of legislative bodies in a federal system. It is clear that, carried in different settings,

En dernier lieu, je me dois d'ajouter que la méthode d'interprétation que proposent les appelants ferait violence à tous les principes d'interprétation ainsi qu'à l'intégrité législative. Les appelants demandent à la Cour de conclure que la résidence ordinaire au sens de la *Loi référendaire* (Canada), ne se perd que lorsqu'on acquiert le droit de vote en vertu de la *Loi sur la consultation populaire* (Québec). Mais, pour tirer une telle conclusion, la Cour se verrait contrainte de modifier le sens clair de dispositions qu'a rédigées le gouvernement fédéral afin de faire face à une situation qui résulte de dispositions émanant d'un corps législatif tout à fait différent, sur lequel le législateur fédéral n'a absolument aucune autorité. Ce serait là miner le pouvoir des corps législatifs de rédiger les textes législatifs qui, d'après eux, reflètent le mieux les objets et les buts particuliers qu'ils ont fixés. Ce serait, en outre, porter atteinte à l'autonomie et à l'indépendance des corps légis-

such an interpretative approach would have incredible and untenable consequences.

I conclude that the *Referendum Act* (Canada) and the *Canada Elections Act* could not properly be interpreted to extend an entitlement to vote to those Canadian citizens who, on the enumeration day, were not ordinarily resident in one of the jurisdictions where, pursuant to the Order-in-Council, the federal government held its referendum.

Powers of the Chief Electoral Officer

It was argued and it is the minority's view that, notwithstanding the clear and unambiguous terms of the legislation, the Chief Electoral Officer had, pursuant to s. 7(3) of the *Referendum Act* (Canada) and s. 9(1) of the *Canada Elections Act*, the discretion to adapt or interpret the *Canada Elections Act* so as to assist the appellants. Do these sections, then, confer upon the Chief Electoral Officer the authority to treat residents of Quebec as if they were residents of another province in order to enable them to vote in the federal referendum? In my view, they do not.

According to s. 7(3) of the *Referendum Act* (Canada), the Chief Electoral Officer may "adapt the *Canada Elections Act* in such a manner as [he] considers necessary for the purposes of applying that Act in respect of a referendum". Clearly, the discretion accorded the Chief Electoral Officer may be exercised only where adaptations of the *Canada Elections Act* are deemed necessary to facilitate the holding of a specific referendum. Though the Chief Electoral Officer is given a discretionary power to adapt the legislation, this power does not extend to authorize a fundamental departure from the scheme of the *Referendum Act* (Canada). In exercising his discretion, he must remain within the parameters of the legislative scheme.

latifs dans un système fédéral. Il est évident que, transposée dans des contextes différents, une telle méthode d'interprétation aurait des conséquences à la fois inconcevables et inadmissibles.

Je conclus que la *Loi référendaire* (Canada) et la *Loi électorale du Canada* ne sauraient, à juste titre, être interprétées comme attributives du droit de vote aux citoyens canadiens qui, à la date du recensement, ne résidaient pas ordinairement dans une province ou un territoire où, aux termes du décret, allait se tenir le référendum fédéral.

Les pouvoirs du directeur général des élections

On a fait valoir—et telle est l'opinion qu'a exprimée le juge minoritaire en Cour d'appel fédérale—qu'en dépit de la formulation claire et non ambiguë des dispositions législatives applicables, le directeur général des élections détenait, en vertu du par. 7(3) de la *Loi référendaire* (Canada) et du par. 9(1) de la *Loi électorale du Canada*, le pouvoir discrétionnaire d'adapter ou d'interpréter la *Loi électorale du Canada* de manière à aider les appelants. Ces paragraphes habilitent-ils alors le directeur général des élections à traiter des résidents du Québec comme s'ils étaient des résidents d'une autre province afin de leur permettre de voter au référendum fédéral? Je ne le crois pas.

Suivant le par. 7(3) de la *Loi référendaire* (Canada), le directeur général des élections peut «adapter la *Loi électorale du Canada* de la façon qu'il estime nécessaire à son application au référendum». De toute évidence, le pouvoir discrétionnaire conféré au directeur général des élections ne peut s'exercer que dans les cas où de telles adaptations à la *Loi électorale du Canada* s'avèrent nécessaires afin de faciliter la tenue d'un référendum donné. Bien que le directeur général des élections se voie attribuer un pouvoir discrétionnaire d'adapter la loi, ce pouvoir ne va pas jusqu'à permettre qu'il s'éloigne fondamentalement du régime qu'établit la *Loi référendaire* (Canada). En exerçant son pouvoir discrétionnaire, il doit demeurer dans les limites de ce régime législatif.

As noted above, residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation. The Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. Where electors were not ordinarily resident in those jurisdictions, they had no entitlement to vote in that referendum. The discretionary power of the Chief Electoral Officer cannot be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Were he to adapt the legislation in a manner that extended the reach of the underlying Order-in-Council, the Chief Electoral Officer would exceed the boundaries of his jurisdiction and, in my view, he would be exposed to having his decision quashed upon judicial review.

It was suggested that s. 9(1) of the *Canada Elections Act*, referred to earlier, provides more expansive remedial powers. This section bears repetition here:

> **9.** (1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation. [Emphasis added.]

Although the text of this section seems very broad, it only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforeseen circumstance". The appellants argue that their situation, falling in the gap between the provisions of a provincial and a federal referendum, was just such an unusual and unforeseen occurrence. Clearly, it could not fall within the terms "mistake, miscalculation [or] emergency". In my view, Mr. Haig's situation is neither an unusual nor an unforeseen circumstance. The *Referendum Act* (Canada) expressly states that a referendum may

Comme je l'ai déjà fait remarquer, la résidence représente un élément essentiel du régime référendaire établi par les deux lois fédérales en question. Le décret ordonnait la tenue d'un référendum dans des provinces et territoires clairement indiqués. Les électeurs qui ne résidaient pas ordinairement dans l'un ou l'autre de ces provinces ou territoires n'avaient pas le droit de voter à ce référendum. Le directeur général des élections ne saurait, dans l'exercice de son pouvoir discrétionnaire, accorder un droit de vote qui dépasse les limites fixées dans le décret. Si, en effet, il adaptait la loi de manière à élargir la portée du décret sous-jacent, le directeur général des élections excéderait sa compétence et, à mon avis, il courrait le risque que sa décision soit déclarée nulle sur requête en révision judiciaire.

On a soutenu que le par. 9(1) de la *Loi électorale du Canada*, dont il a déjà été question, confère des pouvoirs curatifs plus étendus. Il y a lieu de reproduire encore une fois ce paragraphe:

> **9.** (1) Lorsque, au cours d'un référendum, le directeur général des élections estime que, par suite d'une erreur, d'un calcul erroné, d'une urgence ou d'une circonstance exceptionnelle ou imprévue, une des dispositions de la présente loi ne concorde pas avec les exigences de la situation, le directeur général des élections peut, au moyen d'instructions générales ou particulières, prolonger le délai imparti pour faire tout acte, augmenter le nombre de fonctionnaires référendaires ou de bureaux de scrutin ou autrement adapter une des dispositions de la présente loi à la réalisation de son objet, dans la mesure où il le juge nécessaire pour faire face aux exigences de la situation. [Je souligne.]

Pour large que puisse en paraître la portée, ce paragraphe ne vise que les situations où les dispositions de la loi ne concordent pas avec des besoins particuliers qui naissent par suite «d'une erreur, d'un calcul erroné, d'une urgence ou d'une circonstance exceptionnelle ou imprévue». Or, les appelants soutiennent que leur situation, qui échappait à l'application des dispositions provinciales, mais aussi des dispositions fédérales, en matière référendaire, constituait précisément une telle circonstance exceptionnelle et imprévue. Il ne s'agissait assurément pas «d'une erreur, d'un calcul erroné [ou] d'une urgence». À mon avis, la situation de M. Haig n'a rien d'exceptionnel ni d'im-

be directed at the electors of specific provinces. The exclusion of electors not resident in those provinces on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. It is entirely foreseeable and in no way unusual that those people who do not meet the minimal requirements set out in the legislation will not be entitled to vote, whether in a referendum or in an election.

Section 9(1) of the *Canada Elections Act* is also restricted to adaptations designed to facilitate the "execution of its intent". The object of the *Canada Elections Act*, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote. To invoke s. 9(1) in aid of the appellants would distort the fundamental voting scheme, in a manner contrary to the intent of both the *Canada Elections Act* and the *Referendum Act* (Canada). In my opinion, the conditions necessary for the exercise of the remedial discretion accorded the Chief Electoral Officer in s. 9(1) of the *Canada Elections Act* were simply not present in this case.

However, even if I were to conclude that the Chief Electoral Officer had the statutory authority to make arrangements to allow for the enumeration of the appellants, he was not required to make such arrangements. The power given the Chief Electoral Officer in s. 9(1) of the *Canada Elections Act* is a discretionary power. In the absence of a *Charter* violation, this discretion remained to be exercised by the Chief Electoral Officer as he saw fit, and he cannot be compelled by a court to exercise it in a specific fashion, unless, of course, such discretion was not exercised judicially, which is not the case here.

In short, I find that the Chief Electoral Officer could not, without acting outside his jurisdiction under the Order-in-Council, accommodate Mr. Haig's circumstances and in no way was he

prévu. La *Loi référendaire* (Canada) prévoit expressément la consultation par voie référendaire des électeurs de provinces déterminées. L'exclusion d'électeurs qui ne résident pas dans ces provinces à la date du recensement découle clairement et inéluctablement du régime législatif adopté. Il est tout à fait prévisible et pas du tout inhabituel que les personnes qui ne satisfont pas aux exigences minimales prescrites par la loi n'auront pas droit de vote, que ce soit à l'occasion d'un référendum ou d'une élection.

De plus, le par. 9(1) de la *Loi électorale du Canada* se borne aux adaptations destinées à faciliter la «réalisation de son objet». Or, la *Loi électorale du Canada*, telle qu'elle a été adaptée en vue du référendum, vise à faire en sorte que les personnes ayant droit de vote se voient accorder la possibilité de l'exercer. Elle n'a pas pour objet d'admettre à voter ceux qui n'en ont pas le droit. Invoquer le par. 9(1) en faveur des appelants reviendrait donc à déformer le régime électoral fondamental, et ce, d'une manière contraire à l'objet tant de la *Loi électorale du Canada* que de la *Loi référendaire* (Canada). À mon avis, les conditions fixées pour l'exercice du pouvoir discrétionnaire curatif conféré au directeur général des élections par le par. 9(1) de la *Loi électorale du Canada* n'ont tout simplement pas été remplies en l'espèce.

Toutefois, même si je concluais que le directeur général des élections détenait aux termes de la loi le pouvoir de prendre des dispositions pour permettre le recensement des appelants, il n'y était nullement tenu. Le pouvoir que le par. 9(1) de la *Loi électorale du Canada* confère au directeur général des élections est discrétionnaire. Pour peu qu'il ne contrevienne pas à la *Charte*, le directeur général des élections peut exercer ce pouvoir comme bon lui semble, et aucun tribunal ne saurait le contraindre à le faire d'une façon particulière, à moins, bien entendu, qu'il ne l'ait pas exercé judicieusement, ce qui n'est pas le cas en l'espèce.

Bref, je suis d'avis que le directeur général des élections ne pouvait, sans outrepasser la compétence que lui attribuait le décret, faire des adaptations qui tiennent compte des circonstances de

remiss in his duty on the basis that he neglected to use the discretionary and remedial powers accorded to him by s. 7(3) of the *Referendum Act* (Canada) and s. 9(1) of the *Canada Elections Act*. These provisions did not entitle nor require him to supersede or extend the purpose and intent, expressed in clear and unambiguous terms, of the legislation. The appellants' argument in this connection must fail.

After writing these reasons, I have had the opportunity to read the reasons of my colleague Cory J. and must emphasize that I find myself in total agreement with the principles he advances, particularly as to the importance to Canadians of the right to vote, in elections as well as referenda. I also agree that the *Referendum Act* (Canada) "encourages a very broad view of residence" (p. 1056).

Since, however, Mr. Haig, in this case, never alleged nor even argued before us that he had an Ontario residence or any connection whatsoever to the province of Ontario on the enumeration date in Ontario, the question of the discretionary power of the Chief Electoral Officer to allow him to vote in the federal referendum on that basis was never raised. The only question raised in this appeal, as far as the Chief Electoral Officer is concerned, was his power to extend the federal referendum residing requirements to persons who were not residents on the enumeration date in a province or territory where the federal referendum was held. This, in my view, the Chief Electoral Officer has no power to do.

As my colleague suggests, however, had Mr. Haig, and others in the same position, applied to the Chief Electoral Officer for a determination of his right to vote in Ontario on the basis of a substantial connection with Ontario on the enumeration date, it would have been up to the Chief Electoral Officer to exercise his discretionary power. This, of course, would be a different case.

M. Haig, et qu'il n'a aucunement failli à son obligation du fait de ne pas avoir exercé les pouvoirs discrétionnaires et curatifs que lui confèrent le par. 7(3) de la *Loi référendaire* (Canada) et le par. 9(1) de la *Loi électorale du Canada*. Ces dispositions ne l'autorisaient ni ne l'obligeaient à écarter ou à élargir l'objet et le but, clairement et nettement exprimés, de la législation. L'argument avancé par les appelants à cet égard doit donc être rejeté.

Après avoir rédigé mes motifs, j'ai eu l'occasion de lire ceux de mon collègue le juge Cory et je dois souligner que je suis tout à fait d'accord avec les principes qu'il énonce, particulièrement en ce qui concerne l'importance pour les Canadiens du droit de vote à l'occasion aussi bien d'élections que de référendums. Je suis d'accord également pour dire que la *Loi référendaire* (Canada) «favorise une perception très large du concept de résidence» (p. 1056).

Cependant, puisque, en l'espèce, M. Haig n'a jamais prétendu ni même fait valoir devant nous qu'il résidait en Ontario ou avait un lien quelconque avec la province d'Ontario à la date du recensement dans cette province, la question du pouvoir discrétionnaire du directeur général des élections de lui permettre de voter au référendum fédéral sur cette base n'a jamais été examinée. La seule question soulevée dans le présent pourvoi, en ce qui concerne le directeur général des élections, concerne son pouvoir d'étendre les exigences de la *Loi référendaire* (Canada) en matière de résidence aux personnes qui n'étaient pas, à la date du recensement, résidents d'une province ou d'un territoire où le référendum fédéral avait lieu. À mon avis, c'est quelque chose que le directeur général des élections n'a pas le pouvoir de faire.

Toutefois, comme le préconise mon collègue, si M. Haig, et d'autres dans la même situation, avait demandé au directeur général des élections de rendre une décision relativement à son droit de vote en Ontario en faisant valoir un lien substantiel avec cette province à la date du recensement, le directeur général des élections aurait pu décider d'exercer son pouvoir discrétionnaire. Ce serait là, il va sans dire, une toute autre affaire.

Constitutionality

It should be emphasized at this point that, though the Quebec referendum legislation did not allow the appellants to vote in the Quebec referendum, the Quebec legislation was never challenged by the appellants. This is hardly surprising since, in Canada's constitutional system, the provinces have and retain authority to establish rules governing voting within the province. Territorial exigencies, such as those present in the northern territories, may justify a host of rules particular to a given province, and the possibility of such divergence is woven into the very fabric of Canadian federalism itself. No one has challenged the residency requirements established in the Quebec legislation, nor argued that they are in any way unconstitutional.

The only enactments challenged are the *Referendum Act* (Canada), the *Canada Elections Act* and the Order-in-Council as infringing upon the *Charter* rights of the appellants. The appellants submit that, to the extent that they were unable to participate in the federal referendum, they were deprived of their constitutional right to vote (s. 3), of their freedom of expression (s. 2(*b*)), and of their right to equal benefit of the law (s. 15(1)). They set out two alternative sources of this *Charter* violation: first, they challenge the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* as constitutionally under-inclusive to the extent that they failed to make provision for the enumeration of the appellants in a "national" referendum; alternatively, they submit that the Order-in-Council itself violated the *Charter* by failing to include the province of Quebec.

Leaving aside for the moment the *Charter* issues, I am of the view that neither of these alternative arguments has any merit. I would make only the following two comments at this juncture. First, the argument that the legislation is constitutionally under-inclusive received some support in the dissenting reasons of Décary J.A. However, the argument rests upon the flawed fundamental assumption that there was a "national" referendum. There

La constitutionnalité

Soulignons ici que, même si la loi québécoise en matière référendaire ne leur permettait pas de voter au référendum québécois, les appelants n'ont jamais contesté cette loi. Cela n'est guère surprenant étant donné que, sous le régime constitutionnel canadien, ce sont les provinces qui détiennent le pouvoir d'établir des règles applicables au déroulement des scrutins sur leur territoire. Des exigences territoriales, comme celles existant dans les territoires du Nord, peuvent justifier une foule de règles propres à une province donnée, et la possibilité de ce genre de divergence fait partie intégrante du fédéralisme canadien lui-même. Personne n'a contesté les exigences en matière de résidence que pose la loi québécoise ni n'a prétendu qu'elles sont de quelque manière inconstitutionnelles.

Seuls sont contestés en l'espèce la *Loi référendaire* (Canada), la *Loi électorale du Canada* et le décret, auxquels on reproche qu'ils portent atteinte aux droits des appelants garantis par la *Charte*. Les appelants font valoir que, dans le mesure où ils n'ont pu participer au référendum fédéral, ils ont été privés du droit constitutionnel de voter (art. 3), de leur liberté d'expression (al. 2*b*)) et du droit au même bénéfice de la loi (par. 15(1)). L'origine de ces violations de la *Charte* serait double d'après les appelants: premièrement, ils contestent la *Loi référendaire* (Canada) et la *Loi électorale du Canada* comme étant trop limitatives sur le plan constitutionnel, en ce sens qu'elles ne prévoyaient pas le recensement des appelants dans le cadre d'un référendum «national»; ils soutiennent, à titre subsidiaire, que le décret lui-même contrevenait à la *Charte* du fait qu'il ne mentionnait pas la province de Québec.

Laissant provisoirement de côté les questions relatives à la *Charte*, je tiens pour mal fondés l'un et l'autre argument. Je me borne ici aux deux observations suivantes. Premièrement, quant à l'argument relatif au caractère constitutionnellement trop limitatif de la législation en question, il reçoit un certain appui dans les motifs dissidents du juge Décary. L'argument repose, cependant, sur la supposition fondamentalement erronée qu'il s'agissait

was in fact no such "national" federal referendum. There were two referenda held on October 26, 1992, both, it is true, concerning the Charlottetown Accord, but pursuant to separate and distinct legislative schemes. Though the federal government may well have taken note of the results of the Quebec referendum, it would be unfounded in law to suggest that the federal government "allowed" Quebec to administer part of what was really a "national" referendum. Quebec did not need the authorization of the federal government to hold its referendum, and the Quebec referendum legislation was not within federal control or authority. Had the federal government wished to hold a "national" referendum, it could have included Quebec in the proclamation. Though it had every right to do so, it chose not to, as it also had the right to do.

Second, the appellants challenge the constitutionality of the federal Order-in-Council itself. In this regard, I fully agree with Hugessen J.A. that "there is no constitutional impropriety in a federal order in council requiring a referendum to be held in some but not all of the provinces". In fact, there is nothing in the Canadian Constitution which relates to referenda, let alone anything that mandates or prevents this type of consultation by either the federal or provincial governments. The propositions of the appellants to the contrary simply cannot be sustained. The decision to hold a federal referendum in nine provinces and two territories was a constitutionally permissible one. It was a political choice, a choice open under the legislation, and a choice consistent with principles of federalism. What is left to consider, then, is whether this choice was also consistent with the obligations of the federal government under the *Charter*. It is to that issue that I now turn.

Section 3: The Right to Vote

Does s. 3 of the *Charter* guarantee to every citizen of Canada the right to participate in a federal referendum, independently of the terms of the federal referendum legislation? Section 3 of the *Charter* reads as follows:

d'un référendum «national» alors qu'en réalité tel n'est pas le cas. Le 26 octobre 1992, il y a eu deux référendums. Certes, l'un et l'autre portaient sur l'Accord de Charlottetown, mais ils ont été tenus sous des régimes législatifs tout à fait distincts. Bien que le gouvernement fédéral aurait bien pu tenir compte des résultats du référendum québécois, il serait juridiquement inexact de prétendre que le fédéral a «permis» au Québec d'administrer une partie de ce qui était, dans les faits, un référendum «national». Le Québec n'avait pas à obtenir l'autorisation fédérale de tenir son référendum et la loi référendaire québécoise ne relevait ni du contrôle ni du pouvoir fédéral. S'il avait voulu tenir un référendum «national», le gouvernement fédéral aurait pu inclure le Québec dans la proclamation. Il était en droit de le faire, mais il s'en est abstenu, comme il avait aussi le droit de le faire.

Deuxièmement, les appelants contestent la constitutionnalité du décret fédéral même. À ce propos, je suis entièrement d'accord avec le juge Hugessen qu'«il n'y a rien d'irrégulier sur le plan constitutionnel à ce qu'un décret fédéral exige la tenue d'un référendum dans certaines provinces, mais non dans toutes». De fait, il n'y a rien dans la Constitution canadienne qui se rapporte aux référendums, et encore moins qui autorise les gouvernements, soit fédéral, soit provinciaux, à procéder à ce type de consultation, ou qui les en empêche. Les assertions contraires des appelants sont tout simplement insoutenables. La décision de tenir un référendum fédéral dans neuf provinces et deux territoires n'allait pas à l'encontre de la Constitution. Il s'agissait d'un choix d'ordre politique, d'un choix qu'admettait la législation applicable et d'un choix conforme aux principes du fédéralisme. Reste donc à examiner si ce choix était également conciliable avec les obligations imposées au gouvernement fédéral par la *Charte*, et c'est cette question que j'aborde maintenant.

L'article 3: le droit de vote

L'article 3 de la *Charte* garantit-il à tous les citoyens du Canada le droit de participer à un référendum fédéral, peu importe les termes de la loi référendaire fédérale? L'article 3 de la *Charte* est ainsi conçu:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The wording of the section, as is immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. As Professor Peter Hogg notes in *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2, the right does not extend to municipal elections or referenda.

In *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158, this Court had occasion to more fully consider the content of s. 3 of the *Charter*. Writing in the context of a provincial election, Cory J., dissenting but not on this point, articulated at p. 165 that "[t]he right to vote is synonymous with democracy". Clearly, in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:

> . . . the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. [Emphasis in original.]

The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

The democratic rights contained in ss. 3, 4 and 5 of the *Charter* are quite explicitly articulated. In his discussion in "Democratic Rights", in G.-A. Beaudoin and E. Ratushny, eds., *The Canadian*

3. Tout citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales.

La portée de cet article, cela saute aux yeux d'ailleurs, est assez restreinte, car n'y est garanti que le droit de voter aux élections législatives fédérales et provinciales. Ainsi que le fait remarquer le professeur Peter Hogg dans *Constitutional Law of Canada* (3e éd. 1992), vol. 2, à la p. 42-2, le droit de vote n'est pas garanti dans le cas d'élections municipales ou de référendums.

Dans l'affaire *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, notre Cour a eu l'occasion d'entreprendre une étude plus approfondie du contenu de l'art. 3 de la *Charte*. Dans le contexte d'élections provinciales, le juge Cory (dissident, mais non sur ce point) écrit, à la p. 165, que «[l]e droit de vote est synonyme de démocratie». Évidemment, dans une société démocratique, l'étendue du droit de vote énoncé à l'art. 3 doit correspondre aux valeurs propres à un État démocratique. Le juge McLachlin, au nom de la majorité, a conclu, à la p. 183, que c'est le système canadien de représentation effective qui constitue l'essence de la garantie:

> . . . l'objet du droit de vote garanti à l'art. 3 de la *Charte* n'est pas l'égalité du pouvoir électoral en soi mais le droit à une «représentation effective». Notre démocratie est une démocratie représentative. Chaque citoyen a le droit d'être représenté au sein du gouvernement. La représentation suppose la possibilité pour les électeurs d'avoir voix aux délibérations du gouvernement aussi bien que leur droit d'attirer l'attention de leur député sur leurs griefs et leurs préoccupations . . . [Souligné dans l'original.]

L'article 3 de la *Charte* a donc pour objet d'accorder à tous les citoyens canadiens le droit de jouer un rôle important dans l'élection de députés qui, eux, sont chargés de prendre des décisions qui seront consacrées dans des lois dont ils auront à rendre compte auprès de leurs électeurs.

Les droits démocratiques prévus aux art. 3, 4 et 5 de la *Charte* sont très clairement énoncés. Dans *Charte canadienne des droits et libertés* (2e éd. 1989), sous la direction de G.-A. Beaudoin et

Charter of Rights and Freedoms (2nd ed. 1989), 265, Professor Beaudoin summarizes these rights at p. 266 as:

> The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights.

The democratic rights guaranteed in the *Charter* are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the *Charter*, would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach.

A referendum, on the other hand, is basically a consultative process, a device for the gathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through the mechanism of a referendum. It may, as did Quebec under Bill 150, bind itself to conduct a specific referendum but, in the absence of such legislation, there is no obligation to hold this type of consultation. Second, though a referendum may carry great political weight and a government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained. In the absence of binding legislation, the citizens of this country would not be entitled to a legal remedy in the event of non-compliance with the results. Were a government to hold a referendum and then ignore the results, the remedy would be in the political and not the legal arena. These differences provide further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum.

E. Ratushny, le professeur Beaudoin résume ainsi ces droits dans son analyse intitulée «Les droits démocratiques», à la p. 309:

> Le droit de choisir ceux qui nous gouvernent, le droit de se porter candidats aux charges publiques, le droit de voter périodiquement, librement et secrètement et le droit pour les élus de siéger régulièrement constituent les assises des droits démocratiques.

Les droits démocratiques garantis par la *Charte* sont donc positifs. Les gouvernements fédéral et provinciaux sont obligés de tenir régulièrement des élections afin de permettre aux citoyens de choisir leurs représentants. L'omission de tenir ces élections constituerait une violation de la *Charte* dont le gouvernement serait comptable et provoquerait sans doute une crise constitutionnelle. Puisque les résultats d'élections lient évidemment les citoyens dans une société démocratique, ne pas donner suite à ces résultats représenterait une contravention grave à la Constitution.

Un référendum, par contre, n'est, au fond, qu'un processus de consultation, un moyen de recueillir des opinions. Voter à un référendum diffère sensiblement de voter à des élections. Premièrement, à moins de s'y astreindre dans une loi, un gouvernement n'est pas tenu de consulter les citoyens par voie référendaire. Il peut, comme l'a fait le Québec dans la loi 150, s'obliger à tenir un référendum particulier, mais, sauf une telle loi, ce type de consultation n'a rien d'obligatoire. Deuxièmement, bien qu'un référendum puisse peser très lourd sur le plan politique et qu'un gouvernement puisse choisir de donner suite aux résultats référendaires, ceux-ci ne lient le gouvernement que si un texte législatif le prescrit. En l'absence d'un texte législatif ayant force obligatoire, les citoyens du pays n'auraient droit à aucun remède juridique si le gouvernement n'agissait pas en conformité avec les résultats. L'unique remède en pareil cas relèverait de l'arène politique plutôt que judiciaire. Ces différences viennent donc renforcer le point de vue selon lequel le droit de vote garanti par la Constitution ne comprend pas le droit de voter à un référendum.

Section 3 of the *Charter* is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives. Consequently, since a referendum is in no way such a selection, the citizens of this country cannot claim a constitutional right to vote in a referendum under s. 3 of the *Charter*. Accordingly, Mr. Haig's s. 3 *Charter* rights were not infringed because he could not cast his ballot in the federal referendum.

La formulation de l'art. 3 de la *Charte*, tout comme son objet d'ailleurs, est claire et non ambiguë: il se limite aux élections de députés provinciaux et fédéraux. Comme un référendum ne constitue donc aucunement de telles élections, les citoyens canadiens ne sauraient invoquer le droit constitutionnel, découlant de l'art. 3 de la *Charte*, de voter à un référendum. Par conséquent, le fait de n'avoir pu voter au référendum fédéral n'a entraîné pour M. Haig aucune atteinte à ses droits garantis par l'art. 3 de la *Charte*.

Section 2(*b*): Freedom of Expression

Mr. Haig also claims that the fact that he could not vote in the federal referendum infringed his freedom of expression. Expressing one's opinion on the Charlottetown Accord, according to Mr. Haig, is an attempt to convey meaning, the content of which relates to political discourse, which is at the core of s. 2(*b*) of the *Charter* and enjoys the highest degree of protection. The content of this expression, he says, cannot be meaningfully examined apart from its form, namely, participation in the referendum itself. Consequently, he urges the Court to find that the actual casting of a ballot in a federal referendum is a protected form of expression, asserting that s. 2(*b*) of the *Charter* mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression.

L'alinéa 2*b*): la liberté d'expression

Monsieur Haig prétend, en outre, qu'on a porté atteinte à sa liberté d'expression parce qu'il n'a pu voter au référendum fédéral. Selon M. Haig, exprimer son opinion sur l'Accord de Charlottetown représente une tentative de transmettre une pensée dont le contenu relève du discours politique qui, lui, est au cœur même de l'al. 2*b*) de la *Charte* et bénéficie du plus haut degré de protection. Le contenu de cette expression, affirme-t-il, ne saurait être valablement examiné indépendamment de sa forme, à savoir la participation au référendum lui-même. Il invite, en conséquence, la Cour à conclure que l'acte de voter à un référendum fédéral est lui-même une forme protégée d'expression, car, dit-il, non seulement l'al. 2*b*) de la *Charte* prescrit l'immunité contre l'ingérence étatique, mais il prévoit que l'État doit veiller activement à fournir ce mode précis d'expression.

The Court has, on many occasions, considered the freedom of expression guaranteed in s. 2(*b*) of the *Charter*. (See *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *BCGEU v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123; *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Canada*

Notre Cour s'est penchée à maintes occasions sur la question de la liberté d'expression garantie par l'al. 2*b*) de la *Charte*. (Voir *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *BCGEU c. Colombie-Britannique (Procureur général)*, [1988] 2 R.C.S. 214; *Ford c. Québec (Procureur général)*, [1988] 2 R.C.S. 712; *Devine c. Québec (Procureur général)*, [1988] 2 R.C.S. 790; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927; *Slaight Communications Inc. c. Davidson*, [1989] 1 R.C.S. 1038; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123; *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *R. c. Keegstra*, [1990]

(Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; *R. v. Butler*, [1992] 1 S.C.R. 452; and *R. v. Zundel*, [1992] 2 S.C.R. 731). Both Canadian society and the courts have at all times recognized that freedom of expression is a fundamental value in Canada. This Court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one. As Dickson C.J. and Lamer and Wilson JJ. noted in *Irwin Toy, supra*, at p. 968, "'Expression' has both a content and a form, and the two can be inextricably connected". Referenda are in fact an illustration of this phenomenon, and in this context, it would be artificial to separate the form of expression from its content. The casting of a ballot in a referendum is undoubtedly a means of expression, but again, this is not in dispute here.

At issue is whether s. 2(*b*) of the *Charter* guarantees to all Canadians the right to vote in a referendum. In failing to ensure that each Canadian was provided with the opportunity to vote in the federal referendum, did the federal government infringe upon their freedom of expression guaranteed in s. 2(*b*) of the *Charter*? Does freedom of expression include a positive right to be provided with specific means of expression?

As a starting point, I would note that case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements. In *The System of Freedom of Expression* (1970), T. I. Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian *Charter* counterpart, observes at p. 627:

The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communication. In supporting this system, the

3 R.C.S. 697; *Canada (Commission des droits de la personne) c. Taylor*, [1990] 3 R.C.S. 892; *R. c. Butler*, [1992] 1 R.C.S. 452; et *R. c. Zundel*, [1992] 2 R.C.S. 731.) La société canadienne et les tribunaux ont toujours reconnu que la liberté d'expression représente, au Canada, une valeur fondamentale. Notre Cour a longuement analysé les valeurs qui sous-tendent la liberté d'expression et, comme celles-ci ne font pas l'objet de contestation en l'espèce, point n'est besoin de s'y attarder ici. Il est, en outre, incontesté que voter constitue un mode d'expression. Ainsi que l'ont fait remarquer le juge en chef Dickson et les juges Lamer et Wilson dans l'arrêt *Irwin Toy*, précité, à la p. 968: «L'«expression» possède à la fois un contenu et une forme et ces deux éléments peuvent être inextricablement liés». Les référendums illustrent en fait ce phénomène et, dans le présent contexte, il serait artificiel de séparer de son contenu la forme de l'expression. Indubitablement, voter à un référendum constitue un mode d'expression, ce qui, encore une fois, n'est aucunement contesté en l'espèce.

La question qui se pose ici est de savoir si l'al. 2*b*) de la *Charte* garantit à tous les Canadiens le droit de voter lors d'un référendum. En ne veillant pas à ce que chaque Canadien ait la possibilité de voter au référendum fédéral, le gouvernement fédéral a-t-il porté atteinte à la liberté d'expression prévue à l'al. 2*b*) de la *Charte*? La liberté d'expression comporte-t-elle le droit positif de se voir fournir un mode précis d'expression?

D'entrée de jeu, je ferai observer que la jurisprudence et la doctrine ont généralement conceptualisé la liberté d'expression en fonction de droits négatifs plutôt que positifs. En effet, dans *The System of Freedom of Expression* (1970), T. I. Emerson, traitant du Bill of Rights des États-Unis, dont la disposition constituant le Premier amendement est encore plus sévère que la disposition analogue de la *Charte* canadienne, fait l'observation suivante, à la p. 627:

[TRADUCTION] Les prémisses traditionnelles du régime [de la liberté d'expression] traduisent essentiellement une attitude de laisser-faire. Elles envisagent un libre échange d'idées dans le cadre duquel tout le monde et tous les points de vue jouissent d'un accès égal aux

First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other social interests that the government seeks to safeguard. The development of legal doctrine has been primarily in the evolution of a series of negative commands. [Emphasis added.]

Like its United States First Amendment counterpart, the Canadian s. 2(*b*) *Charter* jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose or effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with s. 1 of the *Charter*.

]It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(*b*) of the *Charter* to provide a particular platform to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(*b*) prohibits gags, but does not compel the distribution of megaphones. A case on point is *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467 (N.W.T.S.C.), aff'd (1983), 8 D.L.R. (4th) 230 (C.A.), leave to appeal to S.C.C. denied, [1984] 1 S.C.R. v. Mr. Allman challenged the constitutionality of a three-year residency requirement contained in a territorial *Plebiscite Ordinance* that prevented him from vot-

moyens de communication. Or, dans son soutien de ce régime, le Premier amendement a joué un rôle surtout négatif: il a été appliqué de manière à protéger le régime contre toute ingérence gouvernementale. Par conséquent, les questions soulevées ont pour la plupart concerné la façon de réconcilier la liberté d'expression et d'autres droits sociaux que le gouvernement cherche à sauvegarder. La doctrine juridique a évolué principalement dans le sens d'une série d'injonctions négatives. [Je souligne.]

C'est selon ces mêmes prémisses fondamentales qui jouent à l'égard du Premier amendement de la Constitution américaine, qu'a été façonnée la jurisprudence portant sur l'al. 2*b*) de la *Charte* canadienne. Il s'agit d'une jurisprudence qui s'arrête principalement aux tentatives gouvernementales d'imposer des limites au contenu de l'expression. La question traditionnellement soumise aux tribunaux a été la suivante: dans quelle mesure la restriction de la liberté d'expression peut-elle être justifiée? Ce à quoi on a répondu que les particuliers ont le droit de n'être exposés à aucune mesure gouvernementale ayant pour objet ou pour effet de dénier ou de limiter la liberté d'expression, à moins que la restriction ne puisse se justifier dans le cadre d'une société libre et démocratique conformément à l'article premier de la *Charte*.

Il n'existe pas encore de décision établissant que, dans des circonstances comme celles qui se présentent en l'espèce, un gouvernement est constitutionnellement tenu, aux termes de l'al. 2*b*) de la *Charte*, de fournir une tribune particulière destinée à faciliter l'exercice de la liberté d'expression. Selon le point de vue traditionnel, exprimé dans le langage courant, la garantie de la liberté d'expression énoncée à l'al. 2*b*) interdit les bâillons mais n'oblige pas à la distribution de porte-voix. Une décision pertinente à ce propos est *Re Allman and Commissioner of the Northwest Territories* (1983), 144 D.L.R. (3d) 467 (C.S.T.N.-O.), conf. par (1983), 8 D.L.R. (4th) 230 (C.A.), autorisation de pourvoi devant la Cour suprême du Canada refusée, [1984] 1 R.C.S. v. Monsieur Allman contestait la constitutionnalité d'une exigence d'une période de résidence de trois ans, posée dans une ordonnance territoriale en matière référendaire (*Plebiscite Ordinance*), qui l'empêchait de voter lors

ing in an upcoming referendum. The trial judge made the following observation at p. 479:

> The "freedom of thought, belief, opinion and expression" referred to in para. 2(*b*) of the Charter, on which the applicants rely, is therefore to be understood as recognition of a claim which anyone may make against the state . . . to non-interference in matters of thought, belief, opinion and expression. . . .
>
> The applicants' complaint in these proceedings . . . falls instead into the class of a "demand for state intervention" to provide access to the means of expression available to those designated as voters by the Ordinance. . . .

The trial judge concluded that no such entitlement existed, and that Mr. Allman did not have a right to be provided with access to a specific means of expression. The Court of Appeal agreed with that conclusion at p. 236:

> . . . the expression of opinion sought by a plebiscite under the *Plebiscite Ordinance* has nothing at all to do with the fundamental freedom of expression guaranteed by the Canadian Charter. It does not abridge or abrogate the fundamental freedom of expression previously enjoyed by the applicants as a guaranteed birthright. It is a supplementary forum created by the territorial government for its own information purposes. The fact that the applicants were denied the opportunity to participate in a public opinion poll did not detract from their fundamental right to speak out and express their views on the subject-matter, whether individually or through the media. [Emphasis added.]

The approach followed in *Allman*, *supra*, rests firmly on the traditional foundational premises outlined above. However, it is these very premises that are being challenged by the appellants. While the basic theoretical framework underlying freedom of expression has remained unchanged over the past two hundred years, the appellants point out that the political, economic and social conditions under which the theory must be applied have changed significantly. They urge that true freedom of expression must be broader than simply the right to be free from interference, referring to

d'un référendum qui devait avoir lieu. Le juge de première instance a fait l'observation suivante, à la p. 479:

> [TRADUCTION] La «liberté de pensée, de croyance, d'opinion et d'expression» visée à l'al. 2*b*) de la Charte, sur lequel s'appuient les requérants, doit en conséquence être considérée comme la reconnaissance d'une revendication du droit, que n'importe qui peut faire valoir contre l'État, [. . .] d'être à l'abri de toute ingérence dans tout ce qui à trait à la pensée, à la croyance, à l'opinion et à l'expression. . .
>
> La plainte formulée par les requérants en l'espèce [. . .] constitue plutôt une «demande que l'État intervienne» pour donner accès au mode d'expression mis à la disposition des personnes ayant qualité d'électeur aux termes de l'Ordonnance. . .

Le juge de première instance a conclu qu'un tel droit n'existait pas et que M. Allman n'avait aucun droit d'accès à un mode particulier d'expression, conclusion à laquelle a souscrit la Cour d'appel, à la p. 236:

> [TRADUCTION] . . . l'expression d'opinion recherchée dans le cadre d'un référendum tenu en vertu de la *Plebiscite Ordinance* n'a absolument rien à voir avec la liberté fondamentale d'expression garantie par la Charte canadienne. Il n'y a ni restriction ni suppression de la liberté fondamentale d'expression garantie aux requérants dès leur naissance. Le référendum constitue une tribune supplémentaire établie par le gouvernement territorial en vue d'obtenir des renseignements à ses propres fins. Les requérants se sont certes vu refuser la possibilité de participer à une consultation de l'opinion publique, mais cela ne portait nullement atteinte à leur droit fondamental de s'exprimer et d'émettre leur opinion sur la question référendaire, que ce soit à titre individuel ou bien dans les médias. [Je souligne.]

L'approche adoptée dans l'affaire *Allman*, précitée, repose fermement sur les prémisses fondamentales traditionnelles déjà exposées. Ce sont toutefois ces prémisses mêmes que contestent les appelants. Quoique le cadre théorique essentiel sous-jacent à la liberté d'expression soit resté inchangé au cours des derniers deux cents ans, les appelants signalent que les conditions politiques, économiques et sociales dans lesquelles doit être appliquée cette théorie ont subi de profonds changements. Selon les appelants, la véritable liberté d'expression ne saurait se ramener au simple droit

Emerson's claim in *The System of Freedom of Expression*, *supra*, at p. 4, that the state "has a more affirmative role to play in the maintenance of a system of free expression in modern society".

I would agree, and it is well understood, that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas. Clare Beckton notes in "Freedom of Expression" in W. S. Tarnopolsky and G.-A. Beaudoin, eds., *The Canadian Charter of Rights and Freedoms: Commentary* (1982), 75, at p. 76:

> Generally the fundamental freedoms are guaranteed by placing limitations on the state's ability to abrogate or abridge them. While this can ensure that the state will not erode these guarantees, it does not ensure that freedom of expression will be fostered.

Owen M. Fiss, for his part, in "Free Speech and Social Structure" in J. Lobel, ed., *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (1988), 346, at p. 352, writes that in modern society, freedom of expression "depends on the resources at one's disposal, and it reminds us that more is required these days than a soapbox, a good voice, and the talent to hold an audience." As he points out, speech often takes place under conditions of scarcity. Both the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information.

Does this inevitably lead to the conclusion that the constitutional guarantees of freedom of expression may import more than the absence of government interference? Some people have suggested that it might. Jean Jacques Blais, in "Freedom of Expression and Public Administration" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (1991), 446, expresses the view that, for example, the concentration of media ownership in Canada may not be in the public interest, and

d'être à l'abri de toute ingérence. Ils se réfèrent, à cet égard, à l'assertion d'Emerson, dans *The System of Freedom of Expression*, *op. cit.*, à la p. 4, que l'État [TRADUCTION] «doit jouer un rôle plus positif dans le maintien d'un régime de liberté d'expression au sein de la société moderne».

Je partage cette opinion. Il est d'ailleurs généralement accepté que la philosophie de la non-ingérence ne permettra peut-être pas, dans tous les cas, d'assurer le fonctionnement optimal du libre échange des idées. Comme le fait remarquer Clare Beckton dans l'article intitulé «La liberté d'expression» dans G.-A. Beaudoin et W. S. Tarnopolsky, dir., *Charte canadienne des droits et libertés* (1982), à la p. 96:

> En général, on garantit les libertés fondamentales en imposant des limites à la capacité de l'État de les abroger ou de les restreindre. Ceci peut assurer que l'État n'entamera pas ces garanties, mais cela n'assure pas que la liberté d'expression sera privilégiée.

Owen M. Fiss, pour sa part, dans «Free Speech and Social Structure» paru dans J. Lobel, dir., *A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution* (1988), 346, écrit à la p. 352, que dans la société moderne la liberté d'expression [TRADUCTION] «tient aux moyens dont on dispose, ce qui nous rappelle que, de nos jours, il ne suffit plus d'une tribune de fortune, d'une bonne voix et du talent de retenir l'attention d'un auditoire». Comme le souligne Fiss, l'expression a souvent lieu dans des conditions difficiles. Les moyens et les possibilités mêmes de s'exprimer peuvent être soumis à des limites imputables aux contraintes de temps, au manque de fonds, à l'absence de locaux ou même à notre capacité restreinte de digérer et d'assimiler les renseignements.

Mais cela amène-t-il inévitablement à conclure que les garanties constitutionnelles de liberté d'expression peuvent impliquer davantage que l'absence d'ingérence gouvernementale? D'aucuns prétendent que c'est possible. Jean Jacques Blais dans «Freedom of Expression and Public Administration», paru dans D. Schneiderman, dir., *Freedom of Expression and the Charter* (1991), 446, exprime l'avis que, par exemple, la concentration des médias qui s'opère au Canada nuit peut-être à

that there may be a more positive role for government to play in diffusing ownership to ensure a more vigorous exercise of freedom of expression amongst the mass media. Along the same lines, Allan C. Hutchinson, in "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990), 17 *Can. Bus. L.J.* 2, at pp. 31 and 33, observes that literature produced by striking Molson workers could not gain wide dissemination due to restrictions set by the mass media. Yves de Montigny, in "The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits" (1992), 55 *Law & Contemp. Probs.* 35 expresses a similar view at p. 40:

> While it is accurate to claim that government interference is very often inconsistent with individual freedom, it is equally accurate to say that genuine autonomy presupposes the legislature's active intervention if necessary.

In *Reference re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313, a case dealing with the boundaries of freedom of association, Dickson C.J. (dissenting) addressed this same concern at p. 361:

> Section 2 of the *Charter* protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (e.g., regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). [Emphasis added.]

Although that case did not involve a request for government action, but dealt rather with legislative action alleged to interfere with a freedom, Dickson C.J. seems to imply that fundamental freedoms

l'intérêt public, et que le gouvernement pourrait jouer un rôle plus positif en brisant cette concentration afin d'assurer un exercice plus vigoureux de la liberté d'expression parmi les médias. Dans le même ordre d'idées, Allan C. Hutchinson, dans «Money Talk: Against Constitutionalizing (Commercial) Speech» (1990), 17 *Can. Bus. L.J.* 2, aux pp. 31 et 33, fait remarquer que des tracts produits par des travailleurs en grève de la Molson ne pouvaient obtenir une large diffusion en raison de restrictions imposées par les médias. Yves de Montigny, dans «The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits» (1992), 55 *Law & Contemp. Probs.* 35 exprime un point de vue analogue, à la p. 40:

> [TRADUCTION] Il est certes exact de prétendre que l'ingérence gouvernementale s'avère bien souvent incompatible avec la liberté individuelle, mais il l'est tout autant de dire que l'autonomie réelle présuppose l'intervention active du législateur si besoin est.

Dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, [1987] 1 R.C.S. 313, portant sur les limites de la liberté d'association, le juge en chef Dickson (dissident) a abordé ce même point, à la p. 361:

> L'article 2 de la *Charte* garantit des «libertés» fondamentales et non des «droits». Si parfois ces deux termes sont utilisés indifféremment, une distinction d'ordre conceptuel est souvent faite entre les deux. On dit au sujet des «droits», qu'ils imposent à une autre partie une obligation correspondante de protéger le droit en question, alors qu'on dit au sujet des «libertés», qu'elles comportent simplement une absence d'intervention ou de contrainte. Cette conception de la nature des «libertés» est peut-être trop étroite étant donné qu'elle ne reconnaît pas l'existence de certains cas où l'absence d'intervention gouvernementale est effectivement susceptible de porter atteinte sensiblement à la jouissance de libertés fondamentales (par exemple, une réglementation limitant la monopolisation de la presse peut être nécessaire pour assurer la liberté d'expression et de presse). [Je souligne.]

Bien qu'il ne s'agissait pas, dans cette affaire, d'une demande d'intervention gouvernementale mais qu'il ait été plutôt question d'une mesure législative qui, prétendait-on, portait atteinte à une liberté, le juge en chef Dickson semble laisser

might, in some situations, impose affirmative duties on a state.

At this point, it is important to emphasize that, in talking about freedom of expression, a variety of vocabularies have been employed. People have sometimes used the language of negative and positive entitlements, sometimes focusing on distinctions between rights and freedoms, other times on distinctions between "liberty to" and "liberty of". (For example, see I. Berlin, "Two Concepts of Liberty", in *Four Essays on Liberty* (1969), at pp. 118-72; A. W. Mackay, "Freedom of Expression: Is It All Just Talk?" (1989), 68 *Can. Bar Rev.* 713; and W. R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985), 11 *Queen's L.J.* 1). There may be value to these conceptual distinctions as they provide frameworks which can assist in an analysis of the issues, interests and values that shape a conclusion that a right has or has not been violated.

However, as Dickson C.J. rightly observed, this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required. However, these considerations do not arise in our

entendre que les libertés fondamentales pourraient peut-être, dans certaines situations, entraîner pour l'État des obligations positives.

Or, il importe de souligner ici la diversité du langage employé relativement à la liberté d'expression. Certains ont parlé de droits négatifs ou positifs, insistant tantôt sur les distinctions entre droits et libertés tantôt sur celles entre les expressions anglaises «*liberty to*» et «*liberty of*» (correspondant toutes les deux à «liberté de»). (Voir, par exemple, I. Berlin, «Deux conceptions de la liberté» dans *Éloge de la liberté* (1988), aux pp. 167 à 218; A. W. Mackay, «Freedom of Expression: Is It All Just Talk?» (1989), 68 *R. du B. can.* 713, et W. R. Lederman, «Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms» (1985), 11 *Queen's L.J.* 1.) Il se peut que ces distinctions conceptuelles aient une certaine utilité puisqu'elles forment des grilles susceptibles d'aider dans l'analyse des questions, des intérêts et des valeurs qui sous-tendent la conclusion qu'il y a eu ou non violation d'un droit.

Toutefois, comme le fait remarquer, avec raison, le juge en chef Dickson, il faut se garder de tout dogmatisme dans l'utilisation de ce langage. Les distinctions entre «libertés» et «droits» et entre droits positifs et droits négatifs ne sont pas toujours nettes ni utiles. On ne doit pas s'éloigner du contexte de l'approche fondée sur l'objet énoncée par notre Cour dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295. Suivant cette approche, il pourrait se présenter une situation dans laquelle il ne suffirait pas d'adopter une attitude de réserve pour donner un sens à une liberté fondamentale, auquel cas une mesure gouvernementale positive s'imposerait peut-être. Celle-ci pourrait, par exemple, revêtir la forme d'une intervention législative destinée à empêcher la manifestation de certaines conditions ayant pour effet de museler l'expression, ou à assurer l'accès du public à certains types de renseignements.

Dans le contexte approprié, ces considérations pourraient être pertinentes et amener un tribunal à conclure à la nécessité d'une intervention gouvernementale positive. Ce sont, toutefois, des considé-

case. The context here is a referendum whose legality and legitimacy have been recognized. First, the provisions of the *Referendum Act* (Canada) allow for a referendum to be held in some provinces and not others, and that is what was done here. Second, as discussed earlier, s. 3 of the *Charter* does not guarantee Canadians a constitutional right to vote in a referendum. Third, the referendum itself, far from stifling expression, provided a particular forum for such expression.

The observations of Le Dain J. (Beetz and La Forest JJ. concurring) in *Reference re Public Service Employee Relations Act (Alta.), supra*, provide some insight. In the context of s. 2(*d*) of the *Charter*, he commented at p. 391:

> What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to s. 2(*d*) of the *Charter*, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation. . . . [Emphasis added.]

These comments find application to the issue before us. As I stated at the outset, there is no dispute concerning the importance of freedom of expression. Nor is it disputed that voting is a form of expression. Further, in the context of legislative elections, it is clear that voting as a means of expression is constitutionally entrenched in s. 3 of the *Charter*. However, there is just as clearly no constitutionally entrenched right to vote in a referendum.

A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statrations qui ne jouent pas en l'espèce. Nous nous trouvons, en effet, dans le contexte d'un référendum dont la légalité et la légitimité sont reconnues. Premièrement, la *Loi référendaire* (Canada) autorise la tenue d'un référendum dans certaines provinces mais non dans d'autres, comme cela s'est fait en l'espèce. Deuxièmement, comme je l'ai déjà indiqué, l'art. 3 de la *Charte* ne garantit pas aux Canadiens le droit constitutionnel de voter à un référendum. Troisièmement, le référendum lui-même, loin d'étouffer l'expression, a créé une tribune particulière pour favoriser l'expression.

Les observations du juge Le Dain (avec l'appui des juges Beetz et La Forest) dans le *Renvoi relatif à la Public Service Employee Relations Act (Alb.)*, précité, fournissent un certain éclairage à ce sujet. Dans le contexte de l'al. 2*d*) de la *Charte*, il fait remarquer, à la p. 391:

> Ce qui est en cause en l'espèce est non pas l'importance de la liberté d'association en ce sens, qui est celui que je prête à l'al. 2*d*) de la *Charte*, mais la question de savoir si une activité particulière qu'exerce une association en poursuivant ses objectifs, doit être protégée par la Constitution ou faire l'objet d'une réglementation par voie de politiques législatives. Les droits au sujet desquels on réclame la protection de la Constitution, savoir les droits contemporains de négocier collectivement et de faire la grève, qui comportent pour l'employeur des responsabilités et obligations corrélatives, ne sont pas des droits ou libertés fondamentaux. Ce sont des créations de la loi . . . [Je souligne.]

Ces observations sont applicables à la question dont nous sommes saisis en l'espèce. Ainsi que je l'ai dit au début, l'importance de la liberté d'expression ne suscite aucune controverse. On ne conteste pas non plus que voter constitue une forme d'expression. En outre, il est évident que, dans le contexte d'élections législatives, le vote en tant que mode d'expression est consacré à l'art. 3 de la *Charte*. Il est tout aussi évident, cependant, qu'aucun droit de voter lors d'un référendum n'est inscrit dans la Constitution.

Un référendum est une création de la loi. Abstraction faite de la loi prévoyant le référendum, il n'existe aucun droit d'y prendre part. Le droit d'y voter découle de la loi et c'est celle-ci qui régit les

ute, and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(*b*) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

The following caveat is, however, in order here. While s. 2(*b*) of the *Charter* does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of *Charter* scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on ground prohibited under s. 15 of the *Charter*.

I would add that issues of expression may on occasion be strongly linked to issues of equality. In *Schachter v. Canada*, [1992] 2 S.C.R. 679, the Court said that s. 15 of the *Charter* is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals. However, despite obvious links between various provisions of the *Charter*, I believe that, should such situations arise, it would be preferable to address them within the boundaconditions auxquelles est soumis le droit d'y participer. On demande à la Cour de conclure que cette tribune créée par la loi pour favoriser l'expression revêt un caractère constitutionnel. À mon avis, bien qu'un référendum soit assurément une tribune pour favoriser l'expression, l'al. 2*b*) de la *Charte* n'impose à aucun gouvernement, provincial ou fédéral, une obligation positive de consulter les citoyens par le recours à cette méthode particulière qu'est un référendum. Il ne confère pas, non plus, à l'ensemble des citoyens le droit d'exprimer leur opinion dans le cadre d'un référendum. Le gouvernement n'a aucune obligation constitutionnelle d'offrir cette tribune pour favoriser l'expression à qui que ce soit, et encore moins à tous. Le référendum en tant que tribune pour favoriser l'expression relève, selon moi, de la politique législative et non du droit constitutionnel.

Une réserve s'impose toutefois: quoique l'al. 2*b*) de la *Charte* ne confère aucun droit à un mode particulier d'expression, lorsqu'un gouvernement choisit d'en fournir un, il doit le faire d'une manière conforme à la Constitution. Les règles traditionnelles qui régissent l'examen fondé sur la *Charte* continuent à s'appliquer. Donc, bien qu'il soit loisible au gouvernement d'accorder un tel avantage à un nombre restreint de personnes, il ne saurait, ce faisant, commettre un acte de discrimination, surtout si cette discrimination se fonde sur un motif prohibé par l'art. 15 de la *Charte*.

J'ajouterais que les questions en matière d'expression peuvent, parfois, être intimement liées à celles touchant l'égalité. Dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, la Cour a observé que l'art. 15 de la *Charte* offre bel et bien une protection hybride, c'est-à-dire positive mais aussi négative, et qu'un gouvernement peut se voir obligé de prendre des mesures positives afin d'assurer l'égalité de personnes ou groupes visés à l'art. 15. Il est fort possible, d'ailleurs, que, dans le contexte d'une revendication particulière d'égalité, ces mesures positives puissent comprendre l'obligation de fournir un mode d'expression à certains groupes ou particuliers. Cependant, en dépit des liens évidents entre diverses dispositions de la *Charte*, je crois que, si de telles situations se pré-

ries of s. 15, without unduly blurring the distinctions between different *Charter* guarantees.

In short, I am of the view that, in the context of the federal referendum held in this case, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Accordingly, the federal government did not violate s. 2(*b*) of the *Charter* either in holding its referendum or in holding it in less than all provinces and territories. The appellants were unable to cast their ballot simply because, on the enumeration date, they were not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellants' freedom of expression as guaranteed in the *Charter*.

This leads us to the third alleged *Charter* violation. In providing a platform of expression to less than all Canadians, did the government infringe the appellants' s. 15(1) guarantee to the equal benefit of the law?

Section 15(1): Equality

Section 15(1) of the *Charter* guarantees the right to equality in the following terms:

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

To the extent that they were unable to vote in the federal referendum, the appellants allege that they were denied the equal benefit of the law. In their opinion, once the federal government decided to hold a "national" referendum on the Charlottetown Accord, it was compelled by s. 15(1) of the *Charter* to afford every qualified Canadian citizen the opportunity to participate in that vote. Since the appellants were not given this opportunity, they forward the proposition that the differential treatment

sentaient, il vaudrait mieux les examiner en fonction du seul art. 15, sans indûment escamoter les distinctions entre différentes garanties énoncées dans la *Charte*.

Somme toute, j'estime que, dans le contexte du référendum fédéral dont il s'agit en l'espèce, la liberté d'expression ne comprenait pas un droit constitutionnel pour tous les Canadiens de se voir fournir un mode particulier d'expression. Par conséquent, le gouvernement fédéral n'a contrevenu à l'al. 2*b*) de la *Charte* ni en tenant son référendum ni en ne le tenant pas dans la totalité des provinces et territoires. Si les appelants n'ont pu voter c'est simplement parce que, à la date du recensement, ils ne résidaient pas ordinairement dans une province où se tenait le référendum fédéral, et cette restriction ne porte aucunement atteinte à leur liberté d'expression garantie par la *Charte*.

Voilà qui nous amène à la troisième atteinte à la *Charte* qui est alléguée. Il s'agit de savoir si, en fournissant une tribune pour favoriser l'expression à moins que la totalité des Canadiens, le gouvernement a lésé les appelants dans leur droit au même bénéfice de la loi reconnu à tous par le par. 15(1).

Le paragraphe 15(1): l'égalité

Le paragraphe 15(1) de la *Charte* garantit dans les termes suivants le droit à l'égalité:

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Puisqu'ils n'ont pu voter lors du référendum fédéral, les appelants prétendent avoir été privés du même bénéfice de la loi. D'après eux, du moment que le gouvernement fédéral a décidé de tenir un référendum «national» sur l'Accord de Charlottetown, il était tenu, aux termes du par. 15(1) de la *Charte*, d'accorder à tous les citoyens canadiens ayant qualité d'électeur la possibilité de participer au vote. Privés de cette possibilité, les appelants font valoir que le traitement différent qu'ils ont

ment they received was based on a prohibited ground of discrimination. They advance two arguments in this regard: first, that they were improperly denied equal benefit of the law as new residents of a province; alternatively, that all residents of Quebec were improperly denied equal benefit of the law as a result of the failure to include Quebec in the Order-in-Council.

At the outset, I would reiterate the earlier observation that there was in fact no "national" referendum. The appellants were not afforded an opportunity to vote in the federal referendum simply because they were not ordinarily resident in a polling division established under the *Referendum Act* (Canada). However, was this distinction, one made between the appellants and those Canadians who were ordinarily resident in one of those polling divisions, a distinction which was based on a prohibited ground of discrimination?

In *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, McIntyre J. at p. 174 defined prohibited discrimination under s. 15(1) as:

> . . . a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

He also noted that not all distinctions and differentiations are discriminatory. A complainant under s. 15(1) must establish that he or she is a member of a discrete and insular minority group, that the group is defined by characteristics analogous to the enumerated grounds of discrimination set out in s. 15(1), and that the law has a negative impact. In determining whether a group is analogous to those that are enumerated within s. 15(1) of the *Charter*, Wilson J. in *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333, focused on the larger context by searching for indicia of discrimination such as "stereotyping,

reçu était fondé sur un motif interdit de discrimination. Ils avancent à cet égard deux arguments: premièrement, que le même bénéfice de la loi leur a été illégitimement refusé en leur qualité de nouveaux résidents d'une province et, subsidiairement, que ce bénéfice a été illégitimement refusé à tous les résidents du Québec par suite de l'omission d'inclure cette province dans le décret.

D'entrée de jeu, je répète mon observation antérieure qu'aucun référendum «national» n'a, en fait, été tenu. La possibilité de voter au référendum fédéral n'a pas été accordée aux appelants pour la simple raison qu'ils ne résidaient pas ordinairement dans une section de vote établie en vertu de la *Loi référendaire* (Canada). Mais cette distinction, faite entre les appelants et les Canadiens qui, effectivement, résidaient ordinairement dans une de ces sections de vote, était-elle fondée sur un motif interdit de discrimination?

Dans l'arrêt *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143, le juge McIntyre a défini ainsi, à la p. 174, la discrimination prohibée par le par. 15(1):

> . . . une distinction, intentionnelle ou non, mais fondée sur des motifs relatifs à des caractéristiques personnelles d'un individu ou d'un groupe d'individus, qui a pour effet d'imposer à cet individu ou à ce groupe des fardeaux, des obligations ou des désavantages non imposés à d'autres ou d'empêcher ou de restreindre l'accès aux possibilités, aux bénéfices et aux avantages offerts à d'autres membres de la société.

Il a fait remarquer, en outre, que ce ne sont pas toutes les distinctions et différences qui constituent une discrimination. Un plaignant qui invoque le par. 15(1) doit, en effet, établir qu'il appartient à une minorité distincte et séparée, que cette minorité se définit par des caractéristiques analogues aux motifs de discrimination énumérés au par. 15(1) et que la loi en question porte préjudice à cette minorité. Appelée à déterminer si un groupe donné est analogue à ceux visés au par. 15(1) de la *Charte*, le juge Wilson, dans l'arrêt *R. c. Turpin*, [1989] 1 R.C.S. 1296, à la p. 1333, s'est arrêtée au contexte général et a cherché des indices de discrimination tels que «des stéréotypes,

historical disadvantage or vulnerability to political and social prejudice".

Against this background, the appellants submit that a person's place of residence may be a personal characteristic which is analogous to those prohibited grounds listed in s. 15(1). Though this may well be true in a proper case, this case is not such a case. It would require a serious stretch of the imagination to find that persons moving to Quebec less than six months before a referendum date are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. As they do not exhibit any of the traditional indicia of discrimination, I cannot find that new residents of a province constitute a group which merits the creation of a new s. 15(1) category.

The appellants' alternative argument was that not simply new residents, but rather all residents of Quebec suffered discrimination. That is, they state that the federal government discriminated against all residents of the province of Quebec by failing to include Quebec in the proclamation. It is clear that at the base of the appellants' complaint is the existence of a scheme which allows for one province to be exempted from the scope of federal legislation. Even had the appellants been entitled to vote in the Quebec referendum, the central question would remain: Does the exclusion of one province from a piece of federal legislation violate s. 15(1) of the *Charter*?

des désavantages historiques ou de la vulnérabilité à des préjugés politiques ou sociaux».

Dans cette foulée, les appelants font valoir que le lieu de résidence d'une personne peut constituer une caractéristique personnelle analogue aux motifs prohibés énumérés au par. 15(1). Il peut bien en être ainsi dans certaines circonstances, mais ces circonstances n'existent pas en l'espèce. Ce serait fantaisiste au plus haut degré de conclure que les personnes qui déménagent au Québec moins de six mois avant la date d'un référendum sont assimilables aux victimes d'une discrimination fondée sur la race, la religion ou le sexe. Les personnes qui s'installent au Québec moins de six mois avant la date d'un référendum ne souffrent ni de stéréotypage ni de préjugés sociaux. Quoique ses membres n'aient pu voter au référendum québécois, le groupe en question n'est pas de ceux qui ont subi des désavantages historiques ou des préjugés politiques. Il ne semble pas s'agir non plus d'un groupe «distinct et séparé». Sa composition est hautement changeante: des gens s'y ajoutent constamment puis cessent d'en faire partie dès qu'ils satisfont aux exigences posées par le Québec en matière de résidence. Puisqu'ils ne manifestent aucun des signes traditionnels de discrimination, je ne puis conclure que les nouveaux résidents d'une province forment un groupe pour lequel il convient de créer une nouvelle catégorie relevant du par. 15(1).

Les appelants soutiennent, à titre subsidiaire, que non seulement les nouveaux résidents mais bien tous les résidents du Québec ont été victimes de discrimination. Ils affirment, en effet, que le gouvernement fédéral a usé de discrimination envers tous les résidents du Québec en n'incluant pas cette province dans la proclamation. De toute évidence, la plainte des appelants repose essentiellement sur l'existence d'un régime qui permet qu'une province puisse être exemptée de l'application d'une loi fédérale. Même si les appelants avaient eu le droit de voter au référendum québécois, il faudrait encore se poser cette question fondamentale: L'exclusion d'une province du champ d'application d'une loi fédérale constitue-t-elle une violation du par. 15(1) de la *Charte*?

The appellants contend that the differential application of federal law to the provinces can only be tolerated if it is "legitimate" and advances the values of a federal system. In their view, the decision to hold a referendum in only nine provinces did not advance these values. The appellants thus ask the Court to assess the legitimacy of the political decision not to include Quebec in the federal referendum, and to find that this decision was based on the prohibited ground of province of residence, and that it thus violated the s. 15(1) rights of all citizens of Quebec to the equal benefit of the law.

In *Turpin*, *supra*, the Court considered a provision in the *Criminal Code* which allowed for murder trials by judge alone only in the province of Alberta. An accused outside of Alberta who wanted a trial by judge alone argued that his equality rights were violated. Wilson J., finding that province of residence did not form the basis of a claim in the case before her, clearly left open that possibility that in some situations it might. Residence based equality rights were more fully articulated by Dickson C.J. in *R. v. S. (S.)*, [1990] 2 S.C.R. 254. In that case, the *Young Offenders Act* permitted provinces to set up "alternative measures" programs to deal with young offenders. The Attorney General for Ontario made the decision not to implement such a program. The Court held that this was not a violation of s. 15(1), emphasizing at p. 285 the discretion of the Attorney General to implement such federal programs:

Once it is determined that there is no duty on the Attorney General for Ontario to implement a program of alternative measures, the non-exercise of discretion cannot be constitutionally attacked simply because it creates differences as between provinces. To find otherwise

Les appelants prétendent que l'on ne saurait tolérer de différences dans l'application aux provinces d'une loi fédérale que si elles sont «légitimes» et qu'elles servent à promouvoir les valeurs propres à un système fédéral. Selon eux, la décision de ne tenir un référendum que dans neuf provinces ne servait pas à promouvoir ces valeurs. Ils demandent, en conséquence, à la Cour d'évaluer la légitimité de la décision politique de ne pas inclure le Québec dans le référendum fédéral. Ils nous demandent, également, de statuer que cette décision était fondée sur un motif interdit de discrimination, à savoir la province de résidence, et portait, en conséquence, atteinte au droit de tous les citoyens du Québec, garanti au par. 15(1), au même bénéfice de la loi.

Dans l'arrêt *Turpin*, précité, la Cour s'est penchée sur une disposition du *Code criminel* qui permettait que, dans la seule province d'Alberta, des procès pour meurtre se déroulent devant un juge siégeant sans jury. Un accusé à l'extérieur de l'Alberta qui désirait subir son procès devant un juge siégeant seul, s'est prétendu victime d'une violation de ses droits à l'égalité. Le juge Wilson, en concluant que la province de résidence ne pouvait pas fonder une plainte dans cette affaire, n'a manifestement pas écarté la possibilité qu'il puisse en être autrement dans certaines situations. La question des droits à l'égalité fondés sur la résidence a fait l'objet d'une étude plus approfondie par le juge en chef Dickson dans l'arrêt *R. c. S. (S.)*, [1990] 2 R.C.S. 254. Dans cette affaire, il était question de la *Loi sur les jeunes contrevenants*, qui autorisait les provinces à établir des programmes de «mesures de rechange» pour les jeunes contrevenants. Or, le procureur général de l'Ontario a décidé de ne pas mettre en œuvre un tel programme. La Cour a statué que cela n'allait pas à l'encontre du par. 15(1), et, à la p. 285, a insisté sur le caractère discrétionnaire du pouvoir du procureur général de mettre en œuvre ce type de programme fédéral:

Une fois qu'on décide qu'il n'incombe au procureur général de l'Ontario aucune obligation de mettre en œuvre un programme de mesures de rechange, le non-exercice du pouvoir discrétionnaire ne peut, du seul fait qu'il engendre des différences entre les provinces, don-

would potentially open to *Charter* scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces. The Attorney General for Ontario was under no *legal* obligation to implement a program and, in my opinion, the decision is unimpeachable because, for the purposes of a constitutional challenge on the basis of s. 15(1) of the *Charter*, "the law" is s. 4, which grants the discretion. [Emphasis added; the third emphasis is from Dickson C.J.]

Dickson C.J. added at p. 286 his opinion that the result "would be no different had s. 4 of the *Young Offenders Act* been challenged directly".

These comments are apposite here. Section 3(1) of the *Referendum Act* (Canada) confers upon the Governor in Council a discretionary power to direct that a referendum be held in any number of provinces. Nowhere in the Canadian Constitution is there mention of an obligation on the Governor in Council to hold a referendum, or to see that a referendum is held in all provinces. Both the decision to hold a referendum, and the decision as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. They involve matters of political consideration. Besides, the Governor in Council is not required to justify the reasons for any particular exercise of his discretion. As Dickson J. said in *Thorne's Hardware Ltd. v. The Queen*, [1983] 1 S.C.R. 106, at pp. 112-13:

Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations.

Clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the *Charter*, while prohibiting discrimination, does not alter the division of powers between governments,

ner prise à une attaque fondée sur la Constitution. La conclusion contraire pourrait avoir pour conséquence d'exposer à l'examen en vertu de la *Charte* tout exercice par une province d'un pouvoir relevant de sa compétence, examen dont l'unique fondement serait que cet exercice crée une distinction quant au traitement accordé aux particuliers dans différentes provinces. Le procureur général de l'Ontario n'avait aucune obligation légale de mettre en œuvre un programme et, selon moi, sa décision est inattaquable parce que, aux fins d'une contestation constitutionnelle fondée sur le par. 15(1) de la *Charte*, la «loi» est l'art. 4, qui est attributif du pouvoir discrétionnaire. [Je souligne; le troisième soulignement est du juge en chef Dickson.]

À la page 286, le juge en chef Dickson a ajouté qu'à son avis l'issue «n'aurait pas été différente si l'on avait contesté directement l'art. 4 de la *Loi sur les jeunes contrevenants*».

Ces observations sont ici pertinentes. Le paragraphe 3(1) de la *Loi référendaire* (Canada) investit le gouverneur en conseil du pouvoir discrétionnaire d'ordonner la tenue d'un référendum dans une ou plusieurs provinces. Or, la Constitution canadienne ne fait aucune mention d'une obligation incombant au gouverneur en conseil soit de tenir un référendum, soit de voir à ce qu'un référendum se tienne dans toutes les provinces. Aussi bien la décision de tenir le référendum que celle relative au nombre de provinces dans lesquelles il aura lieu, sont des décisions de principe qui, de par leur nature, relèvent entièrement des gouvernements et des législateurs. Elles comportent des considérations d'ordre politique. Par ailleurs, le gouverneur en conseil n'est pas tenu de justifier un exercice particulier de son pouvoir discrétionnaire. Ainsi que le note le juge Dickson dans l'arrêt *Thorne's Hardware Ltd. c. La Reine*, [1983] 1 R.C.S. 106, aux pp. 112 et 113:

Les gouvernements ne publient pas les motifs de leurs décisions; ils peuvent être mus par une foule de considérations d'ordre politique, économique ou social, ou par leur propre intérêt.

Manifestement, dans un système fédéral, les distinctions entre les provinces ne donnent pas automatiquement naissance à une présomption de discrimination. Le paragraphe 15(1) de la *Charte*, bien qu'interdisant la discrimination, n'apporte

nor does it require that all federal legislation must always have uniform application to all provinces. It is worth emphasizing that, as Dickson C.J. commented in *R. v. S. (S.)*, *supra*, at pp. 289-92, differential application of federal law in different provinces can be a legitimate means of promoting and advancing the values of a federal system. Differences between provinces are a rational part of the political reality in the federal process. Difference and discrimination are two different concepts and the presence of a difference will not automatically entail discrimination.

aucune modification au partage des pouvoirs entre les gouvernements ni n'exige que toutes les lois fédérales s'appliquent toujours de façon uniforme à toutes les provinces. Il convient de souligner que, comme le fait remarquer le juge en chef Dickson dans l'arrêt *R. c. S. (S.)*, précité, aux pp. 289 à 292, des différences dans l'application d'une loi fédérale d'une province à l'autre peuvent représenter un moyen légitime de promouvoir les valeurs propres à un système fédéral. Les différences existant entre les provinces font rationnellement partie de la réalité politique d'un régime fédéral. Ce sont deux concepts distincts que ceux de différence et de discrimination et la première n'emporte pas inéluctablement la seconde.

The motives which might have guided the decision of the Governor in Council to hold a referendum are not here in dispute, and it is not the task of courts to second-guess the legislature on its political judgment. The decision to hold a referendum in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under s. 3(1) of the *Referendum Act* (Canada). The fact that the legislature decided not to hold a referendum in the province of Quebec did not violate the constitutional guarantees contained in s. 15(1) of the *Charter*. The appellants had no constitutional right to an Order-in-Council directing that a federal referendum be held in all Canadian provinces and territories.

Les motifs qui ont pu inciter le gouverneur en conseil à la tenue d'un référendum ne sont pas contestés en l'espèce et il n'appartient pas aux tribunaux de se substituer au législateur et à son jugement politique. La décision de tenir un référendum dans un nombre spécifique de provinces représente un exercice constitutionnel légitime du pouvoir discrétionnaire conféré au gouvernement par le par. 3(1) de la *Loi référendaire* (Canada). En décidant de ne pas tenir de référendum dans la province de Québec, le législateur fédéral n'a pas violé les garanties constitutionnelles énoncées au par. 15(1) de la *Charte*. La Constitution ne reconnaît aux appelants aucun droit à un décret ordonnant la tenue d'un référendum fédéral dans toutes les provinces et tous les territoires du Canada.

In conclusion, the provisions of the *Referendum Act* (Canada) and the *Canada Elections Act* are constitutionally valid and, properly interpreted, they did not grant the appellants an entitlement to vote in the federal referendum. In not enumerating the appellants, the Chief Electoral Officer did not err in the exercise of the discretionary and remedial powers accorded him by s. 7(3) of the *Referendum Act* (Canada) and s. 9(1) of the *Canada Elections Act*. Finally, the exclusion of the appellants from the federal referendum did not violate the appellants' constitutional rights under ss. 3, 2(*b*) or 15(1) of the *Charter*. In light of these findings, I would dismiss the appeal and answer the

Pour conclure, les dispositions de la *Loi référendaire* (Canada) et de la *Loi électorale du Canada* sont constitutionnelles et, correctement interprétées, ne conféraient pas aux appelants le droit de voter au référendum fédéral. L'omission de recenser les appelants ne constituait pas une erreur dans l'exercice par le directeur général des élections des pouvoirs discrétionnaires et curatifs que lui confèrent le par. 7(3) de la *Loi référendaire* (Canada) et le par. 9(1) de la *Loi électorale du Canada*. En dernier lieu, les appelants n'ont subi, du fait de ne pas avoir pu participer au référendum fédéral, aucune atteinte aux droits constitutionnels garantis à l'art. 3, à l'al. 2*b*) et au par. 15(1) de la *Charte*. Vu

constitutional questions articulated by the Chief Justice as follows:

1. No.

2. Not necessary to answer.

3. No.

4. Not necessary to answer.

As in the courts below, I will make no order as to costs.

The following are the reasons delivered by

CORY J.—I have read with great interest the excellent reasons of Justice L'Heureux-Dubé. However, with respect to residency requirements, I differ from her with regard to the authority, the duties and the nature of the role of the Chief Electoral Officer.

In this appeal consideration must be given to the nature of the right to vote and how statutes which enact that right should be interpreted.

The Approach to the Interpretation of Statutory Franchise Provisions

All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the *Canadian Charter of Rights and Freedoms* guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

The principle was captured by J. P. Boyer in *Election Law in Canada: The Law and Procedure*

ces conclusions, je suis d'avis de rejeter le pourvoi et de répondre comme suit aux questions constitutionnelles formulées par le Juge en chef:

1. Non.

2. Il n'est pas nécessaire de répondre.

3. Non.

4. Il n'est pas nécessaire de répondre.

À l'instar des juridictions inférieures, je n'adjugerais pas de dépens.

Version française des motifs rendus par

LE JUGE CORY—J'ai lu avec grand intérêt les excellents motifs du juge L'Heureux-Dubé. Toutefois, en ce qui concerne les exigences en matière de résidence, je diffère d'opinion relativement aux pouvoirs, aux fonctions et à la nature du rôle du directeur général des élections.

Dans le présent pourvoi, il faut examiner la nature du droit de vote ainsi que la façon dont doivent être interprétées les lois qui l'établissent.

L'interprétation des lois relatives au droit de vote

Le droit de vote est le fondement de toutes les formes de gouvernement démocratique. En l'absence de ce droit, il n'y a pas de démocratie. La marque apposée sur un bulletin de vote est la marque distinctive des citoyens d'un pays démocratique. C'est le fier symbole de la liberté. Bien que la *Charte canadienne des droits et libertés* garantisse certains droits en matière d'élection, le droit de vote est généralement conféré et défini dans une loi. Ce droit légal est tellement fondamental qu'il doit recevoir une interprétation large et libérale. Il faut prendre tous les moyens possibles pour permettre aux citoyens de voter. De même, on doit veiller à ne pas les priver du droit de vote.

Ce principe a été exprimé par J. P. Boyer dans *Election Law in Canada: The Law and Procedure*

of Federal, Provincial and Territorial Elections (1987), vol. 1, at p. 383:

Drawing two short lines to form an "X" is the simplest act imaginable. Yet the right to so mark a ballot is as profound as the act is simple. Such marks, systematically compiled, are transformed by our beliefs and our laws into the most eloquent voice the people have.

. . .

The right to cast a vote for those seeking public office is encircled by procedures and laws designed not to make the exercise of this right difficult (although someone frustrated at not being able to vote for a technical reason may feel this is the case), but rather to ensure that it cannot be easily swept away.

The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in *Cawley v. Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37:

The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with. . . . It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute. [Emphasis added.]

To the same effect in *Re Lincoln Election* (1876), 2 O.A.R. 316, Blake V.C. stated (at p. 323):

The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise . . . .

It can be seen that enfranchising statutes have been interpreted with the aim and object of providing

of Federal, Provincial and Territorial Elections (1987), vol. 1, à la p. 383:

[TRADUCTION] Tracer deux petites lignes en forme de croix est le geste le plus simple qu'on puisse imaginer. Pourtant, ce droit de faire une marque sur un bulletin de vote a une signification aussi profonde que le geste est simple. Ces marques, systématiquement compilées, deviennent grâce à nos croyances et à nos lois le meilleur moyen d'expression de la population.

. . .

Le droit de voter pour un candidat à une charge publique est régi par un ensemble de procédures et de lois qui ne visent pas à rendre difficile l'exercice de ce droit (quoiqu'une personne inhabile à voter pour une raison d'ordre technique puisse être d'avis contraire), mais plutôt à garantir que ce droit ne puisse être facilement aboli.

Les tribunaux ont toujours reconnu l'importance fondamentale du vote ainsi que la nécessité d'interpréter d'une façon large les lois conférant ce droit. Cette méthode traditionnelle n'est pas seulement logique, mais elle est essentielle à la préservation des droits démocratiques. Ce principe a été bien exprimé dans l'arrêt *Cawley c. Branchflower* (1884), 1 B.C.R. (Pt. II) 35 (C.S.), dans lequel le juge Crease écrit, à la p. 37:

[TRADUCTION] La loi accorde une protection jalouse au droit de vote et ne privera pas un électeur de ce droit si le texte législatif a été raisonnablement bien respecté. [. . .] Ce sont les réalités qui comptent et non les détails techniques ou les simples formalités, sauf dans le cas où les formalités sont de par la loi, tout particulièrement en droit criminel, essentielles ou touchent l'objet même du différend. [Je souligne.]

Dans l'arrêt *Re Lincoln Election* (1876), 2 O.A.R. 316, le vice-chancelier Blake tient des propos similaires, à la p. 323:

[TRADUCTION] La Cour tient beaucoup à ce que la personne qui revendique le droit de vote puisse l'exercer, dans tous les cas où il y a eu un respect raisonnable de la loi lui donnant le droit qu'il veut exercer. Les simples questions de forme ou d'intérêt négligeable ne devraient pas permettre une atteinte à l'exercice du droit de vote par l'électeur . . .

On peut constater que les lois constitutives du droit de vote ont reçu une interprétation qui tend à

citizens with the opportunity of exercising this basic democratic right. Conversely restrictions on that right should be narrowly interpreted and strictly limited.

The Importance of the Right to Vote on the Referendum

During the course of the hearing an argument was advanced that a referendum was distinct from and less important than an election. It was argued that, as a result, the generous principles applicable to the right to vote in elections should not apply with the same force to a referendum. I cannot accept that contention. A vast amount of public study, effort and time was expended in drafting the terms of the Charlottetown Accord. Every effort was made to advise Canadians of the importance of the referendum pertaining to it and the significance of the vote of every citizen. The number of voters exercising their franchise in the referendum was comparable to the turnout in federal elections. In the minds of most Canadians, the referendum was every bit as important as an election. If it was not, then Canadians would be clearly justified in wondering what all the fuss was about. The same principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in a referendum.

Residency Requirements and the Interpretation of "ordinarily resident"

It follows that it was the duty of the Chief Electoral Officer to insure that as many Canadians as possible were enfranchised in every situation where that result could be attained without infringing the law.

Let us review the legislation governing the referendum and the right to vote in that referendum.

Section 7 of the *Referendum Act*, S.C. 1992, c. 30, provides in part:

accorder aux citoyens la possibilité d'exercer ce droit démocratique fondamental. Par ailleurs, il faut interpréter restrictivement les limites à l'exercice de ce droit et veiller à les circonscrire strictement.

L'importance du droit de vote à un référendum

Au cours de l'audience, on a avancé, entre autres, qu'un référendum est différent d'une élection et qu'il est moins important. On a de ce fait soutenu que les généreux principes applicables au droit de voter aux élections ne devraient pas s'appliquer avec la même vigueur à un référendum. Je ne saurais accepter cet argument. Beaucoup d'études, d'efforts et de temps ont été consacrés à la rédaction de l'Accord de Charlottetown. On a pris tous les moyens possibles pour informer les Canadiens de l'importance du référendum s'y rapportant ainsi que de la signification du vote de chaque citoyen. Le nombre d'électeurs qui ont exercé leur droit de vote lors du référendum était comparable à celui des électeurs qui exercent leur droit à l'occasion d'une élection fédérale. Dans l'esprit de la plupart des Canadiens, le référendum était tout aussi important qu'une élection. Si tel n'était pas le cas, les Canadiens seraient en droit de se demander pourquoi on a accordé tant d'attention à cette question. Les principes applicables au droit de voter aux élections devraient être appliqués de la même manière au droit de voter à un référendum.

Les exigences en matière de résidence et l'interprétation de «réside ordinairement»

Il s'ensuit que le directeur général des élections avait l'obligation de veiller à ce que le plus de Canadiens possible puissent être admis à voter dans tous les cas où cela était possible sans contrevenir à la loi.

Examinons la législation référendaire ainsi que le droit de vote au référendum.

L'article 7 de la *Loi référendaire*, L.C. 1992, ch. 30, prévoit notamment:

7. (1) Subject to this Act, the *Canada Elections Act*, as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

. . .

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the *Canada Elections Act* in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

Sections 50(1), 53(1) and 55(1) to (5) of the *Canada Elections Act*, R.S.C., 1985, c. E-2 (as adapted for the purposes of a referendum by SOR/92-430) read:

50. (1) Every person who

(*a*) has attained the age of eighteen years, and

(*b*) is a Canadian citizen,

is qualified as an elector.

53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55. (1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expressions "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place or ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

7. (1) Sous réserve des autres dispositions de la présente loi, la *Loi électorale du Canada*, adaptée en conformité avec le paragraphe (3), s'applique au référendum, la délivrance des brefs référendaires étant alors assimilée à celle des brefs relatifs à une élection générale.

. . .

(3) Sous réserve des autres dispositions de la présente loi, le directeur général des élections peut, par règlement, adapter la *Loi électorale du Canada* de la façon qu'il estime nécessaire à son application au référendum.

Les paragraphes 50(1), 53(1) et 55(1) à (5) de la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2 (adaptée aux fins d'un référendum par DORS/92-430) disposent:

50. (1) À qualité d'électeur toute personne qui, à la fois:

a) a atteint l'âge de dix-huit ans;

b) est citoyen canadien.

53. (1) Sous réserve des autres dispositions de la présente loi, toute personne qui a qualité d'électeur a le droit d'avoir son nom inscrit sur la liste électorale de la section de vote où elle réside ordinairement à la date du recensement relative au référendum et de voter au bureau de scrutin établi dans cette section de vote.

55. (1) Les règles du présent article et des articles 56 à 59 et 62 s'appliquent à l'interprétation des expressions «réside ordinairement», «résidant ordinairement» et «résidait ordinairement» dans tout article de la présente loi où ces expressions sont employées à l'égard du droit de vote d'un électeur.

(2) Sous réserve des autres dispositions du présent article et des articles 56 à 59 et 62, la question de savoir où une personne réside ou résidait ordinairement à une époque pertinente ou pendant une période de temps appréciable doit être décidée en se référant à toutes les circonstances du cas.

(3) Le lieu de résidence ordinaire d'une personne est en général l'endroit qui a toujours été, ou qu'elle a adopté comme étant, le lieu de son habitation ou sa demeure, où elle entend revenir lorsqu'elle en est absente.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Haig deposed that he resided in Ottawa from June 18, 1989 until August 1992 when he moved to Hull, Quebec. Thus he did not qualify to vote in the Quebec referendum because he had not been a resident of that province for the requisite statutory period of six months. It must be remembered that Haig did not seek to challenge the validity of the Quebec legislation. Rather he sought to be enfranchised pursuant to the provisions of the federal Act.

My colleague takes the position that Haig, when he moved to Hull, lost his Ontario residency for voting purposes. With respect, I think the Chief Electoral Officer could well have come to a different conclusion.

At the outset, it must be remembered that originally the right to vote was tied to ownership of property. A person owning property in several ridings could cast a vote in each of them. The provisions pertaining to residency were aimed at preventing "plural voting" by prohibiting property owners from voting in more than one riding. The residency requirement was designed to facilitate the attainment of the principle of one person one vote. It should not be used too readily as a means of depriving a person of any right to vote.

The residential requirement was considered in *In Re Provincial Elections Act* (1903), 10 B.C.R. 114 (S.C. *en banc*). This case was concerned with persons who were temporarily outside the province but who nonetheless wished to be sworn as voters. Walkem J. stated (at pp. 120-21):

It is a rule that franchise Acts should be liberally construed. The object of the Elections Act is to enfranchise and not disfranchise, persons who possess the necessary

(4) Lorsqu'une personne couche habituellement dans un lieu et mange ou travaille dans un autre, le lieu de sa résidence ordinaire est celui où la personne couche.

(5) Une personne ne peut avoir qu'un seul lieu de résidence ordinaire et elle ne peut le perdre que si elle en acquiert un autre.

Monsieur Haig a témoigné qu'il résidait à Ottawa du 18 juin 1989 jusqu'en août 1992, lorsqu'il est déménagé à Hull, au Québec. Il n'avait donc pas qualité d'électeur au référendum du Québec parce qu'il n'y avait pas résidé pendant la période réglementaire prévue de six mois. Je tiens à rappeler que M. Haig n'a pas cherché à contester la validité de la loi québécoise, mais qu'il a plutôt cherché à obtenir qualité d'électeur conformément aux dispositions de la Loi fédérale.

Ma collègue est d'avis que M. Haig, en déménageant à Hull, n'était plus résident de l'Ontario aux fins du vote. Avec égards, je crois que le directeur général des élections aurait bien pu arriver à une conclusion différente.

Au départ, je tiens à signaler que le droit de vote se rattachait initialement à la propriété. Une personne possédant des propriétés dans plusieurs circonscriptions pouvaient voter dans chacune d'elles. L'adoption des dispositions relatives à la résidence avait pour but d'empêcher le «vote plural» en interdisant aux propriétaires de voter dans plus d'une circonscription. L'exigence en matière de résidence visait à assurer le respect du principe «une personne, un vote». Cette exigence ne devrait pas être utilisée trop facilement comme moyen de priver une personne d'un droit de vote.

L'exigence en matière de résidence a été examinée dans la décision *In Re Provincial Elections Act* (1903), 10 B.C.R. 114 (C.S. en banc). Dans cette affaire, il s'agissait de personnes qui se trouvaient temporairement à l'extérieur de la province, mais qui désiraient néanmoins être assermentées comme électeurs. Le juge Walkem affirmait, aux pp. 120 et 121:

[TRADUCTION] Il est de règle que les lois relatives au droit de vote devraient être interprétées de façon libérale. L'Elections Act vise à admettre à voter les per-

qualifications for being placed on the Voters' List; and hence the Act should, if possible, be so construed as to forward that object. . . .

This approach had been earlier affirmed by the Ontario Court of Appeal in *Re Voters' List of the Township of Seymour* (1899), 2 Ont. Elec. 69 where, with respect to harvesters, MacLennan J.A. held: ". . . temporary absence, even of very considerable duration, is not inconsistent with continuous residence, where the franchise is concerned" (pp. 74-75).

This repetition of the principle of enfranchisement coupled with a recollection of the historical object of the residency requirement provides a useful point of commencement for considering the key phrase "ordinarily resident". The *Canada Elections Act* deals specifically with various specific aspects of residency as well as the general rule to be applied in determining a voter's residence. For example, the residence of summer residents is determined by s. 57; that of students and migrant workers in s. 58; those in charitable missions by s. 59 and members of Parliament by s. 60. The general residency rule is expressed under s. 55(2). It provides that the ordinary residence of a voter "shall be determined by reference to all the facts of the case". Subsections 3 and 4 of the same section provide:

(3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

Subsection 3 uses the word "generally" and subs. 4 uses the word "usually". By the use of these words, it can be seen that the framers of the legislation expected that there would be exceptions to the usual residency rule. Human existence itself is transitory. The residence of human beings is even

sonnes qui possèdent les qualités requises pour être inscrites sur la liste électorale et non à les priver du droit de vote; en conséquence, la Loi devrait, dans la mesure du possible, être interprétée de façon à favoriser cet objet . . .

Ce point de vue avait déjà été confirmé par la Cour d'appel de l'Ontario dans l'arrêt *Re Voters' List of the Township of Seymour* (1899), 2 Ont. Elec. 69, dans lequel le juge MacLennan avait dit relativement aux moissonneurs: [TRADUCTION] «[. . .] l'absence temporaire, même d'une durée très considérable, n'est pas incompatible avec la résidence continue, en ce qui concerne le droit de vote» (pp. 74 et 75).

Il est utile de répéter ce principe du droit de vote et de rappeler l'objet historique de l'exigence en matière de résidence avant d'entreprendre l'examen de l'expression clef «réside ordinairement». La *Loi électorale du Canada* porte spécifiquement sur divers aspects spécifiques du lieu de résidence de même que sur la règle générale à suivre pour déterminer le lieu de résidence d'un électeur. Par exemple, le lieu de résidence des résidents d'été est déterminé par l'art. 57; celui des étudiants et des travailleurs itinérants, par l'art. 58; celui des personnes résidant dans des institutions de charité, par l'art. 59 et celui des députés, par l'art. 60. La règle générale concernant la résidence est formulée au par. 55(2), qui prévoit que la question du lieu de résidence ordinaire d'un électeur «doit être décidée en se référant à toutes les circonstances du cas». Les paragraphes (3) et (4) de cet article prévoient:

(3) Le lieu de résidence ordinaire d'une personne est en général l'endroit qui a toujours été, ou qu'elle a adopté comme étant, le lieu de son habitation ou sa demeure, où elle entend revenir lorsqu'elle en est absente.

(4) Lorsqu'une personne couche habituellement dans un lieu et mange ou travaille dans un autre, le lieu de sa résidence ordinaire est celui où la personne couche.

Le paragraphe 3 emploie l'expression «en général» et le par. 4, le terme «habituellement». L'emploi de ces termes indique bien que les auteurs de la loi avaient prévu qu'il y aurait des exceptions à la règle générale de résidence. L'existence humaine elle-même est transitoire. Le lieu de résidence des

more so. It is seldom that a Canadian can now be referred to as "a lifetime resident of such and such a district". Ours is now a highly mobile society whose members will frequently move about the country. This mobility does not mean that the right to vote should be considered any less important than it was in earlier times. Indeed if a modern democracy is to function effectively the right is even more precious than before. Our whole concept of residency must be more flexible than ever before. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote.

The case which in my view demonstrates the proper approach that should be taken to residency as it pertains to the right to vote is *Hipperson v. Newbury District Electoral Registration Officer*, [1985] Q.B. 1060 (C.A.). In that case the English Court of Appeal determined that the nuclear protesters who were camped outside the Greenham Common air base were residents of that district. The court came to this conclusion despite the obviously temporary nature of this town of tents. Sir John Donaldson M.R. found that the issue of the permanence of a settlement was a question of fact and degree. At page 1073 he wrote:

> Permanence, like most aspects of residence, is a question of fact and degree. . . . All human affairs have a degree of impermanence, the precise degree being best forecast in the light of experience.

Another example of the flexibility which must be given to the concept of residence is presented by the much older case of *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102 (Div. Ct.). Fitzmartin lived on a farm. The farm was located partly in one municipality while the farmhouse was in another. Middleton J. sensibly held (at p. 104):

> "Residence" is a word of very elastic meaning. . . . the "residence" required by the statute is not governed by such narrow considerations, but is such a residence

êtres humains l'est davantage. Il est rare que l'on puisse aujourd'hui dire d'un Canadien qu'il réside depuis toujours dans tel ou tel district. Notre société est maintenant très mobile et ses membres déménageront souvent à travers le pays. Cette mobilité ne signifie pas que le droit de vote doit être considéré comme moins important qu'il ne l'était auparavant. En fait, pour qu'une démocratie moderne puisse fonctionner efficacement, le droit de vote revêt encore plus d'importance qu'auparavant. Il s'ensuit que l'expression «réside ordinairement» employée dans une loi habilitant à voter doit recevoir une interprétation large dans le contexte de la société mobile moderne et compte tenu de l'importance essentielle du droit de vote.

À mon avis, l'arrêt *Hipperson c. Newbury District Electoral Registration Officer*, [1985] Q.B. 1060 (C.A.), est celui qui illustre bien la façon d'aborder la question de la résidence par rapport au droit de vote. Dans cet arrêt, la Cour d'appel de l'Angleterre a établi que les protestataires antinucléaires campés à l'extérieur du périmètre de la base aérienne Greenham Common étaient des résidents de ce district. La cour est arrivée à cette conclusion malgré le caractère de toute évidence temporaire de cette ville de tentes. Le maître des rôles sir John Donaldson a affirmé que la question de la permanence d'une agglomération est une question de fait et de degré. Il écrit à la p. 1073:

> [TRADUCTION] La permanence, comme la plupart des aspects de la résidence, est une question de fait et de degré. [. . .] Toute chose humaine possède un degré d'instabilité, et c'est l'expérience qui permet le mieux d'en prévoir le degré précis.

La décision beaucoup plus ancienne *Re Fitzmartin and Village of Newburgh* (1911), 24 O.L.R. 102 (C. div.), offre un autre exemple de la souplesse dont il faut faire preuve dans l'interprétation du concept de résidence. Fitzmartin vivait sur une ferme. L'exploitation agricole était en partie située dans une municipalité, et la maison de ferme, dans une autre. Le juge Middleton a affirmé judicieusement, à la p. 104:

> [TRADUCTION] Le terme «résidence» est un mot qui a un sens très souple [. . .] la «résidence» exigée par la loi ne saurait être régie par des considérations étroites de ce

as can be fairly regarded as giving the voter the right to be recognised as a citizen of the municipality in question. [Emphasis added.]

Turning to more recent Canadian cases, *Tenold v. Chapman* (1981), 9 Sask. R. 278 (Q.B.), held that a person who had been living in Ottawa since 1974, first as an M.P. for a Saskatchewan riding and subsequently as a senatorial assistant was, for voting purposes, to be deemed ordinarily resident in Saskatchewan. The court balanced the facts presented. For example, although the applicant rented and maintained a small apartment in Ottawa, had a bank account in that city and obtained and used a province of Ontario health card, his relationship to Saskatchewan was such that he could properly be found to be ordinarily resident in that province.

In the case of *Fells v. Spence*, [1984] N.W.T.R. 123 (S.C.), the term "ordinarily resident" for electoral purposes was again considered. An application was brought to strike Spence as a candidate on the grounds that he did not meet the residency requirements. Spence had moved to the Territory with his family when he was ten years old. However he left to attend university, travel and work. In 1976 he declared himself a resident of Kingston, Ontario, in order to run for mayor. Later he worked as an assistant to a cabinet minister in Ottawa for three years. However he frequently travelled to Yellowknife and stayed with his parents on those occasions. He expressed the intention of returning to live permanently to Yellowknife. He held a territorial driver's licence and health insurance card. In those circumstances it was held that he complied with the residential requirement. Marshall J. appropriately held (at p. 130):

In my view, "ordinarily resident" under the Elections Ordinance of the Northwest Territories ought to be generously interpreted. . . .

genre; il s'agit plutôt de la résidence que l'on peut équitablement considérer comme conférant à l'électeur le droit d'être reconnu comme citoyen de la municipalité en question. [Je souligne.]

J'examinerai maintenant des décisions canadiennes plus récentes; dans *Tenold c. Chapman* (1981), 9 Sask. R. 278 (B.R.), la cour a statué qu'une personne qui vivait à Ottawa depuis 1974, tout d'abord comme député pour une circonscription de la Saskatchewan et ensuite comme adjoint sénatorial, était, aux fins de vote, réputée avoir son lieu de résidence ordinaire en Saskatchewan. La cour a soupesé les faits présentés. Par exemple, bien que le requérant ait loué et gardé un petit appartement à Ottawa, y ait possédé un compte en banque et obtenu et utilisé une carte santé de la province d'Ontario, le lien qu'il avait avec la Saskatchewan était tel que l'on pouvait considérer qu'il y résidait ordinairement.

Dans la décision *Fells c. Spence*, [1984] N.W.T.R. 123 (C.S.), on a de nouveau examiné l'expression «réside ordinairement» aux fins électorales. Une demande avait été présentée pour que Spence retire sa candidature au motif qu'il ne satisfaisait pas aux exigences en matière de résidence. Spence avait déménagé dans les Territoires du Nord-Ouest avec sa famille à l'âge de dix ans. Toutefois, il en était parti pour aller à l'université, voyager et travailler. En 1976, il avait déclaré être résident de Kingston (Ontario) afin de pouvoir poser sa candidature comme maire. Il avait ensuite travaillé comme adjoint d'un ministre à Ottawa, pendant trois ans. Toutefois, il se rendait fréquemment à Yellowknife où il demeurait alors avec ses parents. Il a exprimé l'intention de retourner vivre en permanence à Yellowknife. Il possédait un permis de conduire et une carte santé délivrés par les Territoires. Dans ces circonstances, on a statué qu'il satisfaisait à l'exigence en matière de résidence. Le juge Marshall a eu raison d'affirmer, à la p. 130:

[TRADUCTION] À mon avis, l'expression «*ordinarily resident*» dans l'Elections Ordinance des Territoires du Nord-Ouest devrait être interprétée d'une façon libérale . . .

If a man or woman can reasonably, on all the facts, fit within the statute, then let that person run. Democracy wants candidates.

These cases demonstrate the appropriate approach that courts should take to the concept of residence as a requirement of exercising the right to vote.

I note as well that it has been very sagely written that any scheme of enumerating voters should be drawn up with a view to insuring that the right to vote is given to the greatest possible number of eligible voters. T. H. Qualter in *The Election Process in Canada* (1970), at p. 21, observed that an ideal enumeration scheme is one administered so as to maximize eligibility. In Canada, the Chief Electoral Officer has been remarkably successful in this regard. In parliamentary elections approximately 98 percent of the eligible voters are registered and there would appear to be very little if any administrative disenfranchisement (Boyer, *supra*, at p. 426). I can see no reason for departing from this approach and practice under the *Referendum Act*.

The very nature of the *Referendum Act* encourages a very broad view of residence. In a parliamentary election, the location of votes can make a substantial difference in the election of a candidate in each riding. That is not true of a federal referendum where the exact location of any ballot is much less important. Further, the argument made in favour of residential requirements as providing an indication that the voter is reasonably acquainted with local issues and candidates is obviously not present in a referendum where all Canadians are called upon to vote on a question that transcends riding boundaries.

Si l'on peut raisonnablement dire, à partir de tous les faits, qu'une personne satisfait aux exigences de la loi, alors elle peut poser sa candidature. La démocratie veut des candidats.

Ces décisions montrent la méthode que les tribunaux devraient adopter en ce qui concerne le concept de résidence comme condition d'exercice du droit de vote.

Je constate également que l'on a, avec sagesse, écrit que tout système de recensement des électeurs devrait être conçu de façon que le droit de vote soit accordé au plus grand nombre possible de personnes ayant qualité d'électeur. T. H. Qualter fait remarquer dans *The Election Process in Canada* (1970), à la p. 21, que le système idéal de recensement est celui qui est administré de façon à maximiser le nombre d'électeurs. Au Canada, le directeur général des élections a eu un succès remarquable à cet égard. Lors d'élections parlementaires, approximativement 98 pour 100 des électeurs habiles à voter sont inscrits et il paraît y avoir très peu de personnes qui, pour des raisons administratives, sont inhabiles à voter (Boyer, *op. cit.*, à la p. 426). Je ne vois aucune raison d'abandonner cette méthode et cette pratique en vertu de la *Loi référendaire*.

La nature même de la *Loi référendaire* favorise une perception très large du concept de résidence. Dans une élection parlementaire, l'endroit où le vote est exprimé peut faire une différence importante relativement à l'élection d'un candidat dans chaque circonscription. Cela n'est pas vrai d'un référendum fédéral pour lequel l'endroit exact du vote exprimé revêt beaucoup moins d'importance. Par ailleurs, à l'appui des exigences en matière de résidence, on soutient qu'elles indiquent si l'électeur connaît raisonnablement les questions et les candidats à l'échelon local; de toute évidence, cet argument ne saurait s'appliquer à un référendum au cours duquel tous les Canadiens doivent voter sur une question qui transcende les limites des circonscriptions.

In my view, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling division outside Quebec. They could still properly exercise this franchise if it could possibly be said that they retained a substantial connection to a polling division within the federal referendum area. They could well be found to be "ordinarily resident" for the purpose of voting depending on the factual evidence placed before electoral officials. It can never be forgotten that the term "ordinarily resident" must be given a broad and liberal interpretation with a view to enfranchising the voter. It would be completely contrary to the objects of the *Canada Elections Act* and our concept of democratic government if rigid rules were applied too quickly and disenfranchised Canadians desirous of voting in a referendum without real justification. The connections of Haig to an Ottawa riding or any other riding within the federal referendum area should have been explored in this case. His move to Hull should not have had the automatic result of depriving him of his right to vote. However, it is impossible to determine the exact policy of the Chief Electoral Officer on this issue. The appellant chose to move directly before the courts without first seeking to be enumerated in a polling division within the federal referendum area where it could well have been found that he retained sufficient ties to enable him to vote.

À mon avis, il serait erroné de conclure automatiquement que les personnes déménagées au Québec avant la date du recensement référendaire pouvaient, pour ce seul motif, être privées du droit de vote dans une section de vote fédérale à l'extérieur du Québec. Ces personnes pouvaient exercer leur droit de vote si l'on pouvait établir qu'elles avaient conservé un lien important avec une section de vote au sein du territoire référendaire fédéral. On aurait fort bien pu conclure qu'elles résidaient ordinairement dans ce territoire aux fins du vote, selon les faits présentés aux responsables des élections. Il ne faut jamais oublier que l'expression «réside ordinairement» doit être interprétée d'une façon large et libérale dans le but d'habiliter la personne à voter. Ce serait aller carrément à l'encontre de l'objet de la *Loi électorale du Canada* et de notre concept de gouvernement démocratique si des règles rigides étaient appliquées trop rapidement et avaient pour effet de priver du droit de vote, sans véritable justification, des Canadiens désireux de voter à un référendum. En l'espèce, il aurait fallu examiner les liens entre M. Haig et une circonscription d'Ottawa ou toute autre circonscription au sein du territoire référendaire fédéral. Son déménagement à Hull ne devrait pas avoir eu pour effet de priver automatiquement M. Haig de son droit de vote. Toutefois, il est impossible de déterminer quelle est la politique exacte du directeur général des élections sur cette question. L'appelant a choisi de se présenter directement devant les tribunaux sans d'abord chercher à se faire recenser dans une section de vote au sein du territoire référendaire fédéral avec laquelle on aurait pu conclure qu'il avait des liens suffisants pour l'habiliter à voter.

The *Referendum Act*, through its incorporation of the provisions of the *Canada Elections Act*, provides that once an initial voter's list is drawn up citizens can then seek to have their names added to it. It is significant that this first list is referred to as "preliminary" (see s. 65(1)). The revision of the list takes place before a "revising officer" acting as a justice of the peace (s. 68 and Sch. IV, rules 42 *et seq.*). At this stage a person may apply to be

La *Loi référendaire*, qui incorpore par renvoi les dispositions de la *Loi électorale du Canada*, prévoit qu'une fois la liste électorale dressée, les citoyens peuvent demander d'y faire ajouter leur nom. Il est intéressant de constater que cette première liste est dite «préliminaire» (voir le par. 65(1)). La révision de cette liste se déroule devant un «réviseur» agissant à titre de juge de paix (voir l'art. 68 et l'Annexe IV, règles 42 et

included. The appellant did not avail himself of this procedure.

He undoubtedly took this course because of his intention to seek a ruling that would treat all persons who had moved to Quebec within six months of the referendum voting date as a class of voters entitled to enfranchisement. Unfortunately, this makes it impossible for the Court to determine whether, under the requisite flexible test of residency, the appellant was qualified to cast his vote in the federal referendum area. There is simply no evidence upon which a finding could be made that he retained the necessary connection to a federal polling division to enable him to vote. Had the referendum not been held it might have been appropriate to remit the matter to a revising officer for an examination of the facts. This no longer can be done.

Nor should declaratory relief be granted. It is true that often the judicial interpretation of a statute can lead to the granting of a declaratory order by the Court. Nonetheless, declaratory relief is a matter of discretion which should only be exercised in a clear case. The referendum is now long past and in the circumstances presented in this case declaratory relief should not be granted.

Summary

The following principles emerge from a consideration of the right to vote and the interpretation of the statutes providing that right, here the *Canada Elections Act* and the *Referendum Act*.

The right to vote is of fundamental importance to Canadians and to our Canadian democracy.

In the interpretation of all enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter.

suiv.). À cette étape, une personne peut demander de faire ajouter son nom sur la liste. L'appelant ne s'est pas prévalu de cette procédure.

Il ne l'a pas fait sans doute parce qu'il avait l'intention d'obtenir un jugement qui aurait eu pour effet de considérer toutes les personnes déménagées au Québec dans les six mois avant la date du référendum comme une catégorie de citoyens habilités à voter. Malheureusement, il est de ce fait impossible pour notre Cour de déterminer si, selon le critère souple de résidence, l'appelant avait qualité pour voter dans le territoire référendaire fédéral. Il n'existe tout simplement pas d'élément de preuve qui permettrait de conclure que l'appelant a conservé avec une section de vote fédérale le lien nécessaire pour qu'il soit habilité à voter. Si le référendum n'avait pas encore eu lieu, peut-être aurait-il été approprié de renvoyer la question à un réviseur pour qu'il examine les faits. Cela ne peut plus être fait.

Il n'y a pas lieu non plus de rendre un jugement déclaratoire. Il est vrai que souvent l'interprétation judiciaire d'une loi peut entraîner le prononcé d'un jugement déclaratoire par le tribunal. Néanmoins, le jugement déclaratoire est un redressement qui relève du pouvoir discrétionnaire, qui ne devrait être exercé que dans un cas clair. Le référendum est maintenant chose du passé et, dans les circonstances de l'espèce, il n'y a pas lieu de rendre un jugement déclaratoire.

Sommaire

Les principes suivants se dégagent de l'examen de la question du droit de vote et de l'interprétation des lois conférant ce droit, en l'espèce la *Loi électorale du Canada* et la *Loi référendaire*.

Le droit de vote revêt une importance fondamentale pour les Canadiens et pour la démocratie canadienne.

Toutes les lois conférant un droit de vote doivent recevoir une interprétation large et libérale. Il faut prendre tous les moyens possibles pour interpréter la loi de façon à permettre aux citoyens de voter.

Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

The concept of residency must be interpreted broadly in our mobile society. The term must be given a particularly broad and flexible meaning in statutes granting the right to vote. These statutes must be interpreted with the aim of enfranchising as many voters as possible. Further support for this approach can be derived from the historical purpose of enacting residency requirements which was to prohibit land owners from voting in each riding where they owned property. They were not enacted to completely deprive a person of the right to vote.

It follows that the specific term "ordinarily resident" should be interpreted broadly with a view to enfranchising as many voters as possible and to disenfranchising as few as possible.

There is still a further basis for giving the words "ordinarily resident" a very wide meaning in a referendum. Voting on a national question diminishes the strength of any argument that establishing the residence of a voter will give some indication of a voter's knowledge of local issues and candidates. As well, the exact location of each vote is less important than in a riding-by-riding parliamentary election.

A consideration of these principles could very well have led and perhaps should have led to his enfranchisement had Haig applied to be added to the list of voters in his former riding. Unfortunately, he did not seek to make such an application and it is impossible to determine on the facts presented if there was a sufficient connection to a riding to warrant his addition to the voter's list.

This is not a proper situation in which to grant declaratory relief.

De même, il faut veiller à restreindre la portée des dispositions qui tendent à priver une personne du droit de vote.

Compte tenu de la mobilité de la société, il faut donner une interprétation large au concept de la résidence. Ce terme doit recevoir une interprétation particulièrement large et souple dans les lois conférant le droit de vote. Ces lois doivent être interprétées dans le but d'habiliter à voter le plus grand nombre de personnes possible. Cette démarche trouve également un appui dans l'objet historique de l'adoption des exigences en matière de résidence, qui était d'empêcher les propriétaires terriens de voter dans toutes les circonscriptions dans lesquelles ils possédaient des biens-fonds. Ces exigences ne visaient pas à priver complètement une personne du droit de vote.

Il s'ensuit que l'on devrait donner une interprétation large à l'expression «réside ordinairement» de façon à habiliter à voter le plus grand nombre de personnes possible et à en priver le moins grand nombre possible.

Il y a une autre raison pour laquelle l'expression «réside ordinairement» doit recevoir une interprétation très large dans un référendum. Le fait de voter sur une question nationale enlève du poids à l'argument selon lequel l'exigence en matière de résidence d'un électeur donne une certaine indication de la connaissance qu'il a des questions et des candidats à l'échelon local. Par ailleurs, l'endroit exact où le vote est exprimé est moins important que dans une élection parlementaire, circonscription par circonscription.

L'examen de ces principes aurait fort bien pu et aurait peut-être dû entraîner l'habilitation à voter pour M. Haig s'il avait demandé que son nom soit ajouté à la liste des électeurs dans son ancienne circonscription. Malheureusement, il ne l'a pas fait et il est impossible de déterminer à partir des faits présentés s'il avait un lien suffisant avec une circonscription pour justifier l'ajout de son nom à la liste électorale.

Ce n'est pas un cas où il est opportun de rendre un jugement déclaratoire.

Disposition

On the evidence presented, I find that I must come to the same result as Justice L'Heureux-Dubé but for different reasons. I would therefore dismiss the appeal and answer the constitutional questions in the manner suggested by my colleague.

The following are the reasons delivered by

MCLACHLIN J.—I have had the benefit of reading the reasons of L'Heureux-Dubé J., Cory J. and Iacobucci J. While I am in general agreement with L'Heureux-Dubé J.'s disposition of this appeal, I wish to add the following comments.

I agree with Iacobucci J. that the debates of the House of Commons evince an intent that the referendum include all eligible Canadian voters. The problem, as I see it, is that the proclamation which resulted did not provide for a referendum including all Canadian voters. It provided a referendum for nine provinces and two territories, excluding Quebec. The province of Quebec was already committed to a provincial referendum on the same day, posing the same question. Doubtless it would have seemed overzealous, for lack of a better word, for Parliament to overlap the federal referendum with the previously set Quebec referendum.

The appellants' case is that it is the legislative acts of Parliament which violated their rights under the *Canadian Charter of Rights and Freedoms*. Accordingly, it is to the acts of Parliament and not to the expressed intention of its members that we must look. The act impugned is the act of providing for a referendum in areas of Canada other than Quebec, without providing a means for persons recently resident in Quebec to vote in their referendum. It is not contrary to the *Charter* that Parliament should decide to hold a referendum in only some areas of Canada. Having chosen to do so, it is not contrary to the *Charter* that voters outside

Dispositif

À partir de la preuve présentée, j'en arrive à la même conclusion que ma collègue le juge L'Heureux-Dubé, mais pour des motifs différents. En conséquence, je suis d'avis de rejeter le présent pourvoi et de répondre aux questions constitutionnelles de la façon proposée par ma collègue.

Version française des motifs rendus par

LE JUGE MCLACHLIN—J'ai pris connaissance des motifs des juges L'Heureux-Dubé, Cory et Iacobucci. Même si je suis généralement d'accord avec la façon dont le juge L'Heureux-Dubé tranche le présent pourvoi, je tiens à ajouter les commentaires suivants.

Je suis d'accord avec le juge Iacobucci pour dire que les débats de la Chambre des communes révèlent l'intention que l'ensemble des Canadiens ayant qualité d'électeur puissent participer au référendum. Le problème, à mon avis, c'est que la proclamation qui s'est ensuivie ne prévoyait pas la tenue d'un référendum s'adressant à l'ensemble du corps électoral canadien. Elle prévoyait la tenue d'un référendum dans neuf provinces et deux territoires, à l'exception du Québec. La province de Québec était déjà engagée dans un référendum provincial, tenu le même jour et posant la même question. Il ne fait aucun doute que le Parlement aurait semblé commettre un «excès de zèle», à défaut d'une meilleure expression, s'il avait fait chevaucher le référendum fédéral et le référendum déjà organisé au Québec.

Les appelants font valoir que ce sont les lois du Parlement qui ont violé les droits que leur reconnaît la *Charte canadienne des droits et libertés*. Par conséquent, ce sont les lois du Parlement que nous devons examiner et non pas l'intention exprimée par les députés qui y siègent. La loi contestée est celle qui prévoit la tenue d'un référendum dans les régions du Canada autres que le Québec, sans donner aux personnes qui résident depuis peu au Québec le moyen de voter à leur propre référendum. Il n'est pas contraire à la *Charte* que le Parlement décide de tenir un référendum dans certaines régions du Canada seulement. Le cas échéant, il

those areas be excluded. So the legal breach is not made out.

n'est pas contraire à la *Charte* que les électeurs qui se trouvent à l'extérieur de ces régions soient exclus. Le manquement à la loi n'est donc pas démontré.

In order to carry though its expressed intention of holding a national referendum, Parliament should have made provision for persons such as Mr. Haig who, although Quebec residents, were ineligible to vote in Quebec because they had recently moved there. While, as discussed by L'Heureux-Dubé J., an enumeration of all such persons might have been difficult and costly, alternatives such as advertisements requesting such persons to step forward might have been attempted. But Parliament made no such provision. Instead it confined the right to vote in the federal referendum to the residents of provinces and territories other than Quebec, and failed to provide for the registration in its referendum of recently arrived Quebec residents. Had the law, as opposed to the speeches in Parliament, enacted a truly national referendum, then I would agree with Iacobucci J. that the result here violated the appellants' freedom of expression. The problem is that the law did not do this. Even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible "in every situation where that result could be attained without infringing the law" (*per* Cory J., at p. 1050), there was simply no legal basis upon which the Chief Electoral Officer could have registered Mr. Haig, a Quebec resident, in a referendum which by its terms excluded Quebec.

Afin de mener à terme son intention exprimée de tenir un référendum national, le Parlement aurait dû formuler des dispositions applicables aux personnes comme M. Haig qui, bien que résidant au Québec, n'étaient pas habiles à voter dans cette province parce qu'elles y avaient déménagé récemment. Bien que, comme l'a dit le juge L'Heureux-Dubé, le recensement de toutes ces personnes aurait pu se révéler difficile et coûteux, on aurait pu tenter de recourir à d'autres solutions, comme des annonces publicitaires invitant les personnes dans ladite situation à se manifester. Or, le Parlement n'a formulé aucune disposition semblable. Au contraire, il a limité le droit de voter, lors du référendum fédéral, aux résidents des provinces et territoires autres que le Québec et a omis de prévoir l'inscription, aux fins de son référendum, des résidents établis depuis peu au Québec. Si la loi, par opposition aux allocutions prononcées au Parlement, avait prévu la tenue d'un référendum véritablement national, j'aurais alors été d'accord avec le juge Iacobucci pour dire que le résultat auquel on en est arrivé en l'espèce viole la liberté d'expression des appelants. Le problème, c'est que la loi ne l'a pas fait. Même si on interprète de façon large et libérale les exigences en matière de résidence qui visaient à accorder le droit de vote au plus grand nombre de Canadiens possible «dans tous les cas où cela était possible sans contrevenir à la loi» (le juge Cory, à la p. 1050), il n'y avait tout simplement pas de fondement légal qui aurait permis au directeur général des élections d'inscrire M. Haig, résident du Québec, à un référendum qui, de par ses termes, excluait le Québec.

In the result, while I see much force in the contentions of my colleagues Iacobucci J. and Cory J., I would dismiss the appeal for essentially the reasons given by L'Heureux-Dubé J.

En définitive, bien que je voie beaucoup de force dans les assertions de mes collègues les juges Iacobucci et Cory, je suis d'avis de rejeter le pourvoi pour essentiellement les mêmes motifs que ceux exposés par le juge L'Heureux-Dubé.

The following are the reasons delivered by

IACOBUCCI J. (dissenting)—I have read the reasons of my colleagues, L'Heureux-Dubé J. and Cory J., and find myself in respectful disagreement with them, although my colleagues make many points with which I fully agree. My principal disagreement is that, in my view, the appellant's rights under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* were violated by the effect of the *Referendum Act*, S.C. 1992, c. 30 ("*Referendum Act*"), and such violation cannot, in the absence of evidence on the point, be saved under s. 1 of the *Charter*. In the result, I would allow the appeal.

In a technical or formal sense, it is correct to observe, as L'Heureux-Dubé J. does, that two referenda were held in the circumstances of this case: one by the province of Quebec and one by the federal government in the rest of Canada. Moreover, both British Columbia and Alberta require, under their legislation, that referenda be held in their respective provinces prior to the authorization of amendments to the Constitution of Canada. See the *Referendum Act*, S.B.C. 1990, c. 68, and the *Constitutional Amendment Approval Act*, S.B.C. 1991, c. 2; and the *Constitutional Referendum Act*, S.A. 1992, c. C-22.25 (as amended by S.A. 1992, c. 36). It appears that the federal referendum was to serve the purpose of a provincial referendum in those provinces. See the *Constitutional Referendum Amendment Act, 1992*, S.A. 1992, c. 36, s. 2. Technically, therefore, there were some four referenda being conducted: the federal referendum in nine provinces and two territories, the Quebec referendum, the federal referendum as applied to British Columbia, and the federal referendum as applied to Alberta.

In my opinion, focusing on the technicalities of separate referenda obscures the national character of the referendum. I agree with Décary J.A. that the reality was that Parliament intended the country to have a national referendum which would be conducted by the holding of a federal referendum

Version française des motifs rendus par

LE JUGE IACOBUCCI (dissident)—Après avoir pris connaissance de leurs motifs, je dois, en toute déférence, exprimer mon désaccord avec mes collègues les juges L'Heureux-Dubé et Cory, même si je souscris entièrement à nombre de leurs remarques. Le principal point sur lequel je suis en désaccord réside dans le fait qu'à mon avis les droits garantis à l'appelant par l'al. 2*b*) de la *Charte canadienne des droits et libertés* ont été violés en raison de l'effet de la *Loi référendaire*, L.C. 1992, ch. 30 («*Loi référendaire*»), et cette violation ne saurait, en l'absence de preuve sur ce point, être justifiée en vertu de l'article premier de la *Charte*. En définitive, je suis d'avis d'accueillir le pourvoi.

D'un point de vue technique ou formel, il est juste de faire observer, à l'instar du juge L'Heureux-Dubé, que deux référendums ont été tenus dans les circonstances de la présente affaire: l'un par la province de Québec, l'autre par le gouvernement fédéral dans le reste du Canada. En outre, tant la Colombie-Britannique que l'Alberta exigent, en vertu de leur législation respective, que des référendums soient tenus dans chacune de ces provinces avant d'autoriser des modifications de la Constitution du Canada. Voir la *Referendum Act*, S.B.C. 1990, ch. 68, et la *Constitutional Amendment Approval Act*, S.B.C. 1991, ch. 2, ainsi que la *Constitutional Referendum Act*, S.A. 1992, ch. C-22.25 (modifiée par S.A. 1992, ch. 36). Il appert que le référendum fédéral devait faire office de référendum provincial dans ces provinces. Voir la *Constitutional Referendum Amendment Act, 1992*, S.A. 1992, ch. 36, art. 2. Donc, techniquement, quelque quatre référendums devaient avoir lieu: le référendum fédéral dans neuf provinces et deux territoires, le référendum québécois, le référendum fédéral appliqué à la Colombie-Britannique et le référendum fédéral appliqué à l'Alberta.

À mon avis, mettre l'accent sur les formalités de référendums distincts masque le caractère national du référendum. Je suis d'accord avec le juge Décary de la Cour d'appel pour dire qu'en réalité le Parlement voulait pour le pays un référendum national qui prendrait la forme d'un référendum

in conjunction with one or more provincial referenda, and in which the federal referendum could be treated as a provincial referendum in certain provinces, as apparently was the case in British Columbia and Alberta.

That a national referendum involving all Canadians was intended is shown by the statement of Mr. Jim Edwards, then Parliamentary Secretary to the Minister of State and Leader of the Government in the House of Commons, speaking on the second reading of Bill C-81 (the *Referendum Act* (Canada)):

> We would consult all Canadians in a national referendum. This referendum would be fair and give everyone an opportunity to express their opinion. It would be the culmination of the most extensive consultation exercise ever undertaken by a Canadian government.

(*House of Commons Debates*, vol. 132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10889.)

In addition, then Prime Minister, the Right Honourable Brian Mulroney, P.C., in moving receipt of the *Consensus Report on the Constitution, Charlottetown, August 28, 1992*, stated:

> This constitutional package provides a framework within which we are able to move ahead as a united nation, diverse and different it is true, yet one nation. And now the referendum ensures that every person of voting age in Canada will have an opportunity to express his or her preference.

(*House of Commons Debates*, vol. 132, No. 165, 3rd sess., 34th Parl., September 8, 1992, at p. 12732.)

It is also interesting to note that the Honourable Marcel Danis, then Minister of Labour, in describing the referendum emphasized the importance of adopting a process that was fair, democratic and consonant with the *Charter*:

> The government's purpose in tabling this bill is also to ensure that the rules of the game for any consultation that takes place will be fair, open and transparent, in

fédéral tenu conjointement avec un ou plusieurs référendums provinciaux, et dans lequel le référendum fédéral pourrait être considéré comme un référendum provincial dans certaines provinces, comme ce semble avoir été le cas en Colombie-Britannique et en Alberta.

La déclaration qu'a faite M. Jim Edwards, alors secrétaire parlementaire du ministre d'État et chef du gouvernement à la Chambre des communes, lors de la deuxième lecture du projet de loi C-81 (la *Loi référendaire* (Canada)), montre que l'on voulait tenir un référendum national s'adressant à tous les Canadiens:

> Nous consulterions tous les Canadiens et Canadiennes par le biais d'un référendum national. Ce référendum serait juste, permettant à tous de faire entendre leur point de vue. Il représenterait le point culminant des efforts de consultation les plus complets jamais entrepris par un gouvernement canadien.

(*Débats de la Chambre des communes*, vol. 132, nº 144, 3e sess., 34e lég., le 19 mai 1992, à la p. 10889.)

En outre, le premier ministre, le très honorable Brian Mulroney, c.p., en accusant réception du *Rapport du consensus sur la Constitution, Charlottetown, le 28 août 1992*, déclarait:

> Les propositions constitutionnelles offrent un cadre qui nous permettra de poursuivre notre chemin dans l'unité comme pays diversifié mais par-dessus tout, solidaire. Et maintenant, le référendum fournit à tout citoyen en âge de voter l'occasion d'exprimer sa préférence.

(*Débats de la Chambre des communes*, vol. 132, nº 165, 3e sess., 34e lég., le 8 septembre 1992, à la p. 12732.)

Il est également intéressant de noter que l'honorable Marcel Danis, alors ministre du Travail, a insisté, en décrivant le référendum, sur l'importance d'adopter un processus qui soit juste, démocratique et en accord avec la *Charte*:

> En proposant ce projet de loi, monsieur le Président, le gouvernement s'assure également que les règles du jeu d'une éventuelle consultation seront claires, justes,

accordance with our democratic traditions and the Canadian Charter of Rights and Freedoms.

What are those rules, Mr. Speaker? Basically, they would be the same as for a general election. The referendum would be supervised by the Chief Electoral Officer and be subject to the provisions of the Canada Elections Act, already a guarantee of a fair process. Furthermore, the "yes" and "no" sides would have equal access to free air time, as determined by the arbitrator. The CRTC would also supervise the purchase of air time on radio and television networks for advertising purposes.

However, there are some differences because of the very nature of this kind of consultation and the implications of the Charter. First of all, the bill does not make so-called umbrella committees mandatory. Any obligation to take part in the referendum campaign under the aegis of such committees would be contrary to the Charter of Rights, according to the legal opinions we have received so far. In fact, such an obligation would not only be likely to violate freedom of expression, it would also force groups that may be for or against the question for entirely different reasons to operate under the same umbrella.

(*House of Commons Debates*, vol. 132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10854.)

I would therefore conclude that the federal referendum contemplated by the *Referendum Act* was aimed at all Canadians entitled to vote in a federal election.

The majority of the Federal Court of Appeal, [1992] 3 F.C. 611, was of the view that, when the appellant Haig moved from Ottawa to Hull, he exempted himself from the scope of the *Referendum Act* by virtue of being a non-resident of every province and territory to which the *Referendum Act* applied. Therefore, Haig could not challenge the *Referendum Act* because it did not apply to him. Consequently, the only legislation that Haig could attack was the Quebec legislation which lies outside the jurisdiction of the Federal Court of Canada.

conformes à nos traditions démocratiques ainsi qu'à la Charte canadienne des droits et libertés.

Quelles sont les règles du jeu, monsieur le Président? Essentiellement, elles seraient les mêmes que lors d'une consultation électorale. Et d'ailleurs, le référendum serait supervisé par le directeur général des élections et soumis à la Loi électorale canadienne, ce qui est déjà une assurance quant à l'équité qui marquerait son déroulement. Par ailleurs, les tenants du «oui» et du «non» auraient un accès égal à du temps d'antenne gratuit, tel que déterminé par l'arbitre. C'est également le CRTC qui régirait l'achat du temps d'antenne aux réseaux de radio et de télévision pour la diffusion de messages.

Toutefois, il y a aussi certaines différences qui tiennent à la nature d'une telle consultation ainsi qu'aux exigences de la Charte. D'abord, le projet de loi ne soumet pas le référendum à la formation de ce qu'on appelle «les comités-parapluies». L'obligation de participer au débat à l'intérieur de tels comités serait contraire à la Charte des droits selon les avis légaux dont nous disposons présentement. En effet, non seulement s'agirait-il d'une démarche susceptible de brimer la liberté d'expression, mais en plus, elle forcerait à se regrouper sous une même direction des groupes qui adhèrent ou s'opposent à la question posée pour des raisons tout à fait différentes.

(*Débats de la Chambre des communes*, vol. 132, nº 144, 3e sess., 34e lég., le 19 mai 1992, à la p. 10854.)

Je conclus donc que le référendum fédéral prévu par la *Loi référendaire* s'adressait à tous les Canadiens ayant le droit de voter lors d'une élection fédérale.

La Cour d'appel fédérale à la majorité, [1992] 3 C.F. 611, a estimé que, lorsqu'il a déménagé d'Ottawa à Hull, l'appelant Haig s'est soustrait à l'application de la *Loi référendaire* du fait qu'il ne résidait pas dans une province ou un territoire auxquels cette loi s'appliquait. Haig ne pouvait donc pas contester la *Loi référendaire* puisqu'elle ne s'appliquait pas à lui. En conséquence, le seul texte législatif que Haig pouvait attaquer était la loi québécoise, laquelle ne relève pas de la compétence de la Cour fédérale du Canada.

The trouble with this approach is that it ignores the very purpose of the *Referendum Act* as stated above: to permit those Canadians entitled to vote in a federal election to accept or reject the Charlottetown Accord. The *Referendum Act* sought to coordinate a national referendum with the Quebec referendum, for which the underlying legislation had already been enacted. The aim of the *Referendum Act* was to include all Canadian citizens. If as a result of the requirements of the Quebec legislation, someone in the position of the appellant Haig was left out of the process he could, for the sake of argument, have launched a claim against two possible defendants: the province of Quebec and the federal government. I say no more about whatever rights he may have had against the province of Quebec because they are irrelevant to this appeal.

I agree with the appellant's submission that the federal legislation was aimed at a national referendum; to accomplish that end, it was coordinated with the Quebec referendum. As my colleague L'Heureux-Dubé J. observes, the appellant unfortunately fell between the legislative cracks and was neither able to participate in the national referendum directly, nor was he able to participate indirectly through the Quebec referendum.

The question which then arises is whether his inability to participate in the referendum process amounts to a violation of his rights under the *Charter*, and it is to that question I now turn.

I agree with the view that the federal government is not legally obligated to hold referenda, nor is it legally bound by the results of any referenda it conducts. However, if the government chooses to conduct a referendum, it must do so in compliance with the *Charter*. The *Referendum Act* provided a legislative framework to allow Canadian citizens to express their political opinions. The referendum was an important expressive activity relating to constitutional change in this country.

Le problème avec ce point de vue, c'est qu'il ignore l'objet même de la *Loi référendaire* tel qu'il a été énoncé ci-dessus, à savoir: permettre aux Canadiens ayant le droit de voter lors d'une élection fédérale d'accepter ou de rejeter l'Accord de Charlottetown. La *Loi référendaire* cherchait à coordonner un référendum national avec le référendum québécois dont la loi sous-jacente avait déjà été adoptée. Le but de la *Loi référendaire* était de viser tous les citoyens canadiens. Si, en raison des exigences de la loi québécoise, quelqu'un dans la situation de Haig avait été écarté du processus, il aurait pu, par exemple, porter plainte contre deux défendeurs possibles: la province de Québec et le gouvernement fédéral. Je n'ajoute rien au sujet des droits qu'il aurait pu opposer à la province de Québec puisque ces droits ne sont pas pertinents en l'espèce.

Je suis d'accord avec l'argument de l'appelant selon lequel la loi fédérale visait la tenue d'un référendum national; à cette fin, elle était coordonnée avec le référendum québécois. Comme le fait remarquer mon collègue le juge L'Heureux-Dubé, l'appelant, qui s'est malheureusement trouvé entre deux chaises sur le plan législatif, n'a pu participer au référendum national ni de façon directe ni de façon indirecte par le biais du référendum québécois.

La question qui se pose alors est de savoir si cette incapacité de participer au processus référendaire équivaut à une violation des droits que lui reconnaît la *Charte*, et c'est à cette question que je vais essayer de répondre maintenant.

Je souscris au point de vue voulant que le gouvernement fédéral ne soit pas légalement obligé de tenir des référendums et qu'il ne soit pas lié non plus par les résultats des référendums qu'il tient. Toutefois, si le gouvernement choisit de tenir un référendum, il doit le faire en conformité avec la *Charte*. La *Loi référendaire* prévoyait un cadre législatif devant permettre aux citoyens canadiens d'exprimer leurs opinions politiques. Le référendum a été une importante activité d'expression relative aux changements constitutionnels dans notre pays.

The importance of the expressive activity in question was clearly evidenced by the statement of the Right Honourable Joe Clark, P.C., in moving the constitutional question to be put to Canadians in the referendum:

> Three major steps remain. The first is to invite the judgement of the Canadian people in a national referendum on October 26. If Canadians vote yes, Parliament and legislatures would then act immediately to debate and, I expect, adopt the specific resolutions. Then we would seek the unanimous agreement of the provinces to shorten the period of final ratification, in a way that could have these major constitutional changes approved and ratified and effective in law within a matter of months. [Emphasis added.]

(*House of Commons Debates*, vol. 132, No. 166A, 3rd sess., 34th Parl., September 9, 1992, at p. 12786.)

Although Parliament was under no legal obligation to follow the results of the referendum, apparently a political obligation to do so had been assumed. Despite the absence of such a legal obligation, nevertheless, the referendum was exceedingly important expressive activity that is worthy of *Charter* protection, as was acknowledged by Minister Danis in his comments quoted above.

The right to express opinions in social and political decision-making clearly attracts the protection of s. 2(*b*) (*R. v. Zundel*, [1992] 2 S.C.R. 731, and *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976). In *Native Women's Assn. v. Canada*, [1992] 3 F.C. 192, Mahoney J.A. succinctly stated: "[c]ommunicating one's constitutional views to the public and to governments is unquestionably an expressive activity protected by paragraph 2(*b*)" (p. 211). I would agree. Casting a referendum ballot is an important form of expression which is worthy of constitutional protection. In my view, the appellant Haig's right to express his political views by participating in the referendum was guaranteed by s. 2(*b*) of the *Charter*. He

L'importance de cette activité d'expression ressort clairement de la déclaration faite par le très honorable Joe Clark, c.p., lorsqu'il a proposé que la question constitutionnelle soit soumise aux Canadiens par référendum:

> Il reste trois grandes étapes à franchir. Premièrement, il faut inviter le peuple canadien à se prononcer lors d'un référendum national le 26 octobre prochain. Si la réponse des Canadiens est «oui», le Parlement et les assemblées entameront leurs propres débats et, je le crois bien, adopteront les résolutions précises. Après cela, nous solliciterons l'accord unanime des provinces afin de raccourcir le délai menant à la ratification définitive, de sorte qu'il soit possible d'adopter, de ratifier et de donner force de loi aux principales réformes constitutionnelles dans quelques mois. [Je souligne.]

(*Débats de la Chambre des communes*, vol. 132, nº 166A, 3e sess., 34e lég., le 9 septembre 1992, à la p. 12786.)

Même si le Parlement n'avait aucune obligation légale de suivre les résultats du référendum, il semble qu'une obligation politique de le faire avait été assumée. En dépit de l'absence d'une telle obligation légale, le référendum constituait néanmoins une activité d'expression extrêmement importante qui méritait la protection de la *Charte*, comme l'a reconnu le ministre Danis dans les commentaires précités.

L'alinéa 2*b*) protège clairement le droit d'exprimer des opinions lors de la prise de décisions d'intérêt social et politique (*R. c. Zundel*, [1992] 2 R.C.S. 731, et *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 R.C.S. 927, à la p. 976.) Dans *Native Women's Assn. c. Canada*, [1992] 3 C.F. 192, à la p. 211, le juge Mahoney affirme brièvement: «[f]aire connaître ses opinions en matière constitutionnelle au public et aux gouvernements est incontestablement une activité relevant de l'expression, protégée à l'alinéa 2*b*)». Je suis de cet avis. Voter à l'occasion d'un référendum est une forme importante d'expression digne de la protection constitutionnelle. À mon avis, le droit de l'appelant Haig d'exprimer ses opinions politiques en participant au référendum était garanti par l'al. 2*b*) de la *Charte*. Il s'est vu privé de ce droit de partici-

was denied the right to participate and thus his s. 2(*b*) rights were violated.

Although the appellant Haig was free to express his views as he wished on the Charlottetown Accord prior to the vote, he was denied the ability to participate in the most important expressive activity, that of voting in the referendum. While the purpose of the *Referendum Act* was to include all voters, the effect was to deprive those residents of Quebec who were ordinarily resident in another province in the six-month period prior to the referendum of the ability to participate in expressive activity which is clearly protected under the *Charter*.

As the respondent Attorney General of Canada did not introduce any evidence on s. 1, the violation of the appellant's s. 2(*b*) rights has not been justified under s. 1.

Under the circumstances, as the referendum has already taken place, any remedy is more theoretical than real. However, like Décary J.A., I would have sought to expand the definition of "elector" in s. 3(1) of the *Referendum Act*. Relying on s. 7(3) of the *Referendum Act*, which states that the *Canada Elections Act*, R.S.C., 1985, c. E-2, may be adapted "in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum", the Chief Electoral Officer could have used s. 9(1) of the *Canada Elections Act* to permit the appellant Haig to vote as Décary J.A. outlined. Hopefully, the *Canada Elections Act* or the *Referendum Act* provisions will be clarified if Parliament decides to hold a referendum in the future.

In sum, I would allow the appeal with costs here and in the courts below, set aside the order of the Federal Court of Appeal, and substitute therefor an order declaring that the appellant was entitled to vote in the October 26, 1992 federal referendum as outlined by Décary J.A. in the court below.

per et il y a donc eu violation des droits que lui garantit l'al. 2*b*).

Bien que l'appelant Haig fût libre d'exprimer ses opinions à sa guise sur l'Accord de Charlottetown avant le vote, on lui a refusé la possibilité de participer à l'activité d'expression la plus importante, soit celle de voter au référendum. Bien que l'objet de la *Loi référendaire* soit d'inclure tous les électeurs, elle a eu pour effet de priver les résidents du Québec, qui résidaient ordinairement dans une autre province durant les six mois ayant précédé le référendum, de la possibilité de participer à une activité d'expression nettement protégée par la *Charte*.

Comme l'intimé le procureur général du Canada n'a présenté aucune preuve quant à l'article premier, la violation des droits garantis à l'appelant par l'al. 2*b*) n'a pas été justifiée au sens de cet article.

Dans ces circonstances, comme le référendum a déjà eu lieu, toute réparation est plus théorique que réelle. Toutefois, à l'instar du juge Décary, j'aurais cherché à élargir la définition de l'expression «corps électoral» qui figure au par. 3(1) de la *Loi référendaire*. En s'appuyant sur le par. 7(3) de la *Loi référendaire*, qui précise que la *Loi électorale du Canada*, L.R.C. (1985), ch. E-2, peut être adaptée «de la façon [que le directeur général des élections] estime nécessaire à son application au référendum», ce dernier aurait pu, comme l'a souligné le juge Décary, utiliser le par. 9(1) de la *Loi électorale du Canada* pour permettre à l'appelant Haig de voter. Il est à souhaiter que les dispositions de la *Loi électorale du Canada* ou de la *Loi référendaire* seront clarifiées si le Parlement décide de tenir un référendum à l'avenir.

Somme toute, je suis d'avis d'accueillir le pourvoi avec dépens dans toutes les cours, d'annuler l'ordonnance de la Cour d'appel fédérale et d'y substituer une ordonnance déclarant que l'appelant avait le droit de voter lors du référendum fédéral du 26 octobre 1992, comme l'a souligné le juge Décary en Cour d'appel fédérale.

Appeal dismissed, LAMER C.J. *and* IACOBUCCI J. *dissenting.*

Solicitor for the appellants: Philippa Lawson, Ottawa.

Solicitors for the respondent the Chief Electoral Officer: Fraser & Beatty, Ottawa; Jacques Girard, Ottawa.

Solicitor for the respondent the Attorney General of Canada: John C. Tait, Ottawa.

Solicitor for the intervener: The Department of Justice, Ste-Foy.

Pourvoi rejeté, le juge en chef LAMER *et le juge* IACOBUCCI *sont dissidents.*

Procureur des appelants: Philippa Lawson, Ottawa.

Procureurs de l'intimé le directeur général des élections: Fraser & Beatty, Ottawa; Jacques Girard, Ottawa.

Procureur de l'intimé le procureur général du Canada: John C. Tait, Ottawa.

Procureur de l'intervenant: Le ministère de la Justice, Ste-Foy.

TAB 11

2000 SCC 57
Supreme Court of Canada

Harper v. Canada (Attorney General)

2000 CarswellAlta 1158, 2000 CarswellAlta 1159, 2000 SCC 57, [2000] 2 S.C.R. 764, [2000] S.C.J. No. 58, [2001] 9 W.W.R. 201, [2001] A.W.L.D. 147, 193 D.L.R. (4th) 38, 234 W.A.C. 201, 271 A.R. 201, 92 Alta. L.R. (3d) 1, J.E. 2000-2262, REJB 2000-20913

Attorney General of Canada v. Stephen Joseph Harper

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

Judgment: November 10, 2000 *
Docket: 28210

Counsel: Written submissions by *Graham Garton, Q.C.*, and *Thomas W. Wakeling*, for Applicant.
Written submissions by *Alan D. Hunter, Q.C.*, and *Eric Groody*, for Respondent.

Headnote

Elections --- Legislation — Election Acts

Plaintiff brought action for declaration that provisions in Canada Elections Act imposing limits on third-party spending on advertising during federal election campaigns were unconstitutional as they infringed freedom of expression contrary to s. 2(b) of Canadian Charter of Rights and Freedoms — Plaintiff brought motion for interlocutory injunction restraining enforcement of limits pending decision in his action — Injunction granted — Attorney General's appeal was dismissed — Attorney General appealed and brought application for stay of injunction pending resolution of appeal — Application granted — Provisions in question might occasion irreparable harm to capacity of third parties to participate as they wish in election campaign — Equivalent of final relief in interlocutory challenges to electoral statutes should not be granted even in course of elections governed by those statutes — Public interest in maintaining in place duly enacted legislation on spending limits pending complete constitutional review outweighed detriment to freedom of expression caused by those limits — Canada Elections Act, S.C. 2000, c. 9 — Canadian Charter of Rights and Freedoms, s. 2(b).

Injunctions --- Availability of injunctions — General principles — Public interest — Injunction to protect public interest

Plaintiff brought action for declaration that provisions in Canada Elections Act imposing limits on third-party spending on advertising during federal election campaigns were unconstitutional as they infringed freedom of expression contrary to s. 2(b) of Canadian Charter of Rights and Freedoms — Plaintiff brought motion for interlocutory injunction restraining enforcement of limits pending decision in his action — Injunction granted — Attorney General's appeal was dismissed — Attorney General appealed and brought application for stay of injunction pending resolution of appeal — Application granted — Balance of convenience favoured granting stay of injunction — Motions judge assessing balance of convenience must proceed on assumption that challenged law is directed to public good and serves valid legal purpose — Public interest in maintaining in place duly enacted legislation on spending limits pending complete constitutional review outweighed detriment to freedom of expression caused by those limits — Canada Elections Act, S.C. 2000, c. 9 — Canadian Charter of Rights and Freedoms, s. 2(b).

Injunctions --- Availability of injunctions — Injunction in specific contexts — Restraint of government acts — General

Plaintiff brought action for declaration that provisions in Canada Elections Act imposing limits on third-party spending on advertising during federal election campaigns were unconstitutional as they infringed freedom of expression contrary to s. 2(b) of Canadian Charter of Rights and Freedoms — Plaintiff brought motion for interlocutory injunction restraining enforcement of limits pending decision in his action — Injunction granted — Attorney General's appeal was dismissed — Attorney General appealed and brought application for stay of injunction pending resolution of appeal — Application granted — Balance of convenience favoured granting stay of injunction — Motions judge assessing balance

of convenience must proceed on assumption that challenged law is directed to public good and serves valid legal purpose — Public interest in maintaining in place duly enacted legislation on spending limits pending complete constitutional review outweighed detriment to freedom of expression caused by those limits — Canada Elections Act, S.C. 2000, c. 9 — Canadian Charter of Rights and Freedoms, s. 2(b).

Injunctions --- Form and operation of order — Stay of injunction — Pending appeal — Irreparable damage

Plaintiff brought action for declaration that provisions in Canada Elections Act imposing limits on third-party spending on advertising during federal election campaigns were unconstitutional as they infringed freedom of expression contrary to s. 2(b) of Canadian Charter of Rights and Freedoms — Plaintiff brought motion for interlocutory injunction restraining enforcement of limits pending decision in his action — Injunction granted — Attorney General's appeal was dismissed — Attorney General appealed and brought application for stay of injunction pending resolution of appeal — Application granted — Provisions in question might occasion irreparable harm to capacity of third parties to participate as they wish in election campaign — Motions judge assessing balance of convenience must proceed on assumption that challenged law is directed to public good and serves valid legal purpose — Public interest in maintaining in place duly enacted legislation on spending limits pending complete constitutional review outweighed detriment to freedom of expression caused by those limits — Canada Elections Act, S.C. 2000, c. 9 — Canadian Charter of Rights and Freedoms, s. 2(b).

Élections --- Législation — Lois électorales

Demandeur a intenté une action demandant que les dispositions de la Loi électorale du Canada plafonnant les dépenses de publicité, que peut engager un tiers durant la campagne électorale fédérale, soient déclarées inconstitutionnelles parce qu'elles portaient atteinte à la liberté d'expression, contrairement à l'art. 2b) de la Charte canadienne des droits et libertés — Demandeur a présenté une requête en injonction interlocutoire interdisant le plafonnement jusqu'à ce qu'une décision soit rendue sur son action — Injonction accordée — Pourvoi du procureur général a été rejeté — Procureur général a interjeté appel et a présenté une demande de sursis de l'injonction jusqu'à ce que le pourvoi soit décidé — Requête accordée — Dispositions visées pourraient causer un dommage irréparable à la capacité des tiers de participer comme ils le veulent à la campagne électorale — Équivalent d'une réparation ultime dans le cadre de contestations interlocutoires de lois électorales ne devrait pas être accordé au cours d'élections régies par ces mêmes lois — Intérêt qu'a le public à ce que la mesure législative dûment adoptée en matière de plafonnement des dépenses soit maintenue en attendant qu'elle fasse l'objet d'un examen constitutionnel complet l'emportait sur le préjudice causé à la liberté d'expression par le plafonnement — Loi électorale du Canada, L.C. 2000, c. 9 — Charte canadienne des droits et libertés, art. 2b).

Injonctions --- Possibilité d'obtenir des injonctions — Principes généraux — Intérêt public — Injonction pour protéger l'intérêt public

Demandeur a intenté une action demandant que les dispositions de la Loi électorale du Canada plafonnant les dépenses de publicité, que peut engager un tiers durant la campagne électorale fédérale, soient déclarées inconstitutionnelles parce qu'elles portaient atteinte à la liberté d'expression, contrairement à l'art. 2b) de la Charte canadienne des droits et libertés — Demandeur a présenté une requête en injonction interlocutoire interdisant le plafonnement jusqu'à ce qu'une décision soit rendue sur son action — Injonction accordée — Pourvoi du procureur général a été rejeté — Procureur général a interjeté appel et a présenté une demande de sursis de l'injonction jusqu'à ce que le pourvoi soit décidé — Requête accordée — Prépondérance des inconvénients militait en faveur de la délivrance d'une injonction — Juge saisi de la requête qui évalue la prépondérance des inconvénients doit tenir pour acquis que la mesure législative contestée a été adoptée pour le bien public et qu'elle sert un objectif législatif valable — Intérêt qu'a le public à ce que la mesure législative dûment adoptée en matière de plafonnement des dépenses soit maintenue en attendant qu'elle fasse l'objet d'un examen constitutionnel complet l'emportait sur le préjudice causé à la liberté d'expression par le plafonnement — Loi électorale du Canada, L.C. 2000, c. 9 — Charte canadienne des droits et libertés, art. 2b).

Injonctions --- Possibilité d'obtenir des injonctions — Injonction dans des contextes spécifiques — Interdiction d'actes du gouvernement — En général

Demandeur a intenté une action demandant que les dispositions de la Loi électorale du Canada plafonnant les dépenses de publicité, que peut engager un tiers durant la campagne électorale fédérale, soient déclarées inconstitutionnelles parce qu'elles portaient atteinte à la liberté d'expression, contrairement à l'art. 2b) de la Charte canadienne des droits et libertés — Demandeur a présenté une requête en injonction interlocutoire interdisant le plafonnement jusqu'à ce qu'une décision

soit rendue sur son action — Injonction accordée — Pourvoi du procureur général a été rejeté — Procureur général a interjeté appel et a présenté une demande de sursis de l'injonction jusqu'à ce que le pourvoi soit décidé — Requête accordée — Prépondérance des inconvénients militait en faveur de la délivrance d'une injonction — Juge saisi de la requête qui évalue la prépondérance des inconvénients doit tenir pour acquis que la mesure législative contestée a été adoptée pour le bien public et qu'elle sert un objectif législatif valable — Intérêt qu'a le public à ce que la mesure législative dûment adoptée en matière de plafonnement des dépenses soit maintenue en attendant qu'elle fasse l'objet d'un examen constitutionnel complet l'emportait sur le préjudice causé à la liberté d'expression par le plafonnement — Loi électorale du Canada, L.C. 2000, c. 9 — Charte canadienne des droits et libertés, art. 2b).

Injonctions --- Forme et application de l'ordonnance — Sursis de l'injonction — En attendant l'issue du pourvoi — Préjudice irréparable

Demandeur a intenté une action demandant que les dispositions de la Loi électorale du Canada plafonnant les dépenses de publicité que peut engager un tiers durant la campagne électorale fédérale soient déclarées inconstitutionnelles parce qu'elles portaient atteinte à la liberté d'expression, contrairement à l'art. 2b) de la Charte canadienne des droits et libertés — Demandeur a présenté une requête en injonction interlocutoire interdisant le plafonnement jusqu'à ce qu'une décision soit rendue quant à son action — Injonction accordée — Pourvoi du procureur général a été rejeté — Procureur général a interjeté appel et a présenté une demande de sursis de l'injonction jusqu'à ce que le pourvoi soit décidé — Requête accordée — Dispositions visées pourraient causer un préjudice irréparable à la capacité des tiers de participer comme ils le veulent à la campagne électorale — Juge saisi de la requête qui évalue la prépondérance des inconvénients doit tenir pour acquis que la mesure législative contestée a été adoptée pour le bien public et qu'elle sert un objectif législatif valable — Intérêt qu'a le public à ce que la mesure législative dûment adoptée en matière de plafonnement des dépenses soit maintenue en attendant qu'elle fasse l'objet d'un examen constitutionnel complet l'emportait sur le préjudice causé à la liberté d'expression par le plafonnement — Loi électorale du Canada, L.C. 2000, c. 9 — Charte canadienne des droits et libertés, art. 2b).

Parliament passed the *Canada Elections Act* on May 31, 2000, imposing limits on third-party spending on advertising in the course of a federal election campaign. The plaintiff immediately brought an action seeking a declaration that the spending limits were unconstitutional on the grounds that they unjustifiably limited the right of free expression guaranteed by s. 2(b) of the *Canadian Charter of Rights and Freedoms*. The trial was adjourned on October 13, 2000 after nine days of evidence, and an election date of November 27, 2000 was set shortly afterwards. The plaintiff applied to the trial judge for an interlocutory injunction restraining the enforcement of the third-party spending limits pending the decision in the action. The injunction was granted. The Attorney General was granted leave to appeal from the interlocutory injunction, and applied for an interim stay of the injunction pending the appeal.

Held: The application was granted.

Per McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ.: There was a serious issue to be tried; the determination of the constitutionality of provisions of the electoral law passed by the Parliament of Canada. The provisions in issue could also occasion irreparable harm to the capacity of third parties to participate as they wish in the election campaign to the extent of the spending limits on advertising imposed on them.

The balance of convenience favoured granting the stay of the injunction. Allowing the injunction to stay in place would give the plaintiff the ultimate relief sought in his action with respect to the current election. This would violate the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes. There was a presumption at this stage of the proceeding that a validly enacted but challenged law would produce a public good. The motions judge must proceed on this assumption in assessing the balance of convenience, and only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed. The public interest in maintaining in place the duly enacted legislation on spending limits outweighed the detriment to freedom of expression caused by those limits.

Per Major J. (dissenting): The trial judge who granted the interim injunction did not intend it to reflect on the validity of the new elections legislation. The balance of convenience was sharply in favour of the plaintiff. The trial judge had the discretion to determine that the interim injunction would safeguard important constitutional rights guaranteed by the *Charter*, and would protect the freedom of political speech during the federal election. The Attorney General had not shown that any harm would result from granting the injunctive relief. In this case, the injunction itself served the

public interest. The appellate court should not interfere with the trial judge's exercise of discretion where there is no clear mistake on the law or the evidence, and especially where the same judge heard both the trial and the application for the injunction. The automatic presumption of the constitutionality of the legislation is not compatible with the spirit of the *Charter*. The application for a stay of the injunction should be denied.

Le Parlement a adopté la *Loi électorale du Canada* le 31 mai 2000. Celle-ci plafonnait les dépenses de publicité que pouvait engager un tiers au cours d'une campagne électorale fédérale. Le demandeur a intenté immédiatement une action demandant qu'il soit déclaré que le plafonnement des dépenses était inconstitutionnel sous prétexte qu'il s'agissait d'une limite injustifiable à la liberté d'expression garantie par l'art. 2b) de la *Charte canadienne des droits et libertés*. Le procès a été ajourné le 13 octobre 2000, après neuf jours de témoignages. La date d'élection du 27 novembre 2000 a été choisie peu après. Le demandeur a demandé au juge de première instance de lui accorder une injonction interlocutoire interdisant le plafonnement des dépenses des tiers jusqu'à ce qu'une décision soit rendue dans le cadre de l'action. L'injonction a été accordée. Le procureur général a obtenu l'autorisation d'interjeter appel de l'injonction interlocutoire et a demandé un sursis provisoire de l'injonction jusqu'à ce que l'appel fasse l'objet d'une décision.

Arrêt: La requête a été accordée.

McLachlin, J.C.C., L'Heureux-Dubé, Gonthier, Iacobucci, Bastarache, Binnie, Arbour et LeBel, JJ.: Il y avait une question sérieuse à juger: la détermination de la constitutionnalité des dispositions de la loi électorale adoptée par le Parlement du Canada. En imposant un plafonnement des dépenses de publicité, ces dispositions pouvaient aussi causer un préjudice irréparable à la capacité des tiers de participer comme ils le voulaient dans le cadre de la campagne électorale. La prépondérance des inconvénients militait en faveur de la délivrance du sursis de l'injonction. Maintenir l'injonction accorderait au demandeur la réparation ultime qu'il recherchait par son action eu égard à l'élection actuelle. Cela porterait atteinte à la règle interdisant d'accorder l'équivalent de la réparation ultime visée par les contestations interlocutoires des lois électorales, même au cours des élections régies par ces même lois. À ce stade des procédures, il était présumé qu'une loi adoptée validement, mais contestée, produirait un bien public. Le juge saisi de la requête doit tenir cela pour acquis lorsqu'il évalue la prépondérance des inconvénients, et ce n'est que dans le cadre d'affaires claires que peuvent réussir des injonctions interlocutoires à l'encontre de l'application d'une loi sous prétexte d'une inconstitutionnalité alléguée. L'intérêt qu'a le public à ce que la loi dûment adoptée sur le plafonnement des dépenses soit maintenue l'emportait sur le préjudice causé à la liberté d'expression par le plafonnement.

Major, J. (dissident): Le juge de première instance qui a délivré l'injonction provisoire n'avait pas l'intention qu'elle préjuge de la validité de la nouvelle loi électorale. La prépondérance des inconvénients penchait nettement en faveur du demandeur. Le juge de première instance avait le pouvoir discrétionnaire de déterminer si l'injonction provisoire préserverait d'importants droits constitutionnels garantis par la *Charte*, et protégerait la liberté d'expression politique durant l'élection fédérale. Le procureur général n'a pas démontré qu'il résulterait un préjudice de la délivrance de l'injonction demandée. En l'espèce, l'injonction elle-même servait l'intérêt public. Une cour d'appel ne doit pas modifier la décision prise par le juge de première instance dans l'exercice de son pouvoir discrétionnaire lorsqu'il n'existe aucune erreur claire quant au droit ou à la preuve, surtout lorsque le procès et la requête demandant l'injonction ont été entendus par le même juge. La présomption automatique de la constitutionnalité de la loi n'est pas compatible avec l'esprit de la *Charte*. La requête pour obtenir un sursis de l'injonction devrait être refusée.

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s. 350 — considered

s. 350(1) — considered

s. 350(2) — considered

s. 350(3) — considered

s. 350(4) — considered

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Generally — considered

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Generally — considered

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

1 On May 31, 2000, Parliament passed the *Canada Elections Act*, S.C. 2000, c. 9 ("the Act"), imposing limits on third-party spending on advertising in the course of a federal election campaign. The law came into force on September 1, 2000. Our reasons in this application relate solely to the issue of whether an injunction which suspended the enforcement of certain provisions pertaining to third-party spending limits should be stayed. They do not deal with the granting of leave to appeal the injunction order nor any ensuing appeal. They also do not deal with the question of whether the Act is unconstitutional.

2 The respondent Stephen Joseph Harper commenced an action on June 7, 2000 before the Alberta Court of Queen's Bench, seeking a declaration that the spending limits are unconstitutional because they unjustifiably limit the right of free expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The trial commenced on October 2 and adjourned on October 13, after nine days of evidence.

3 On October 22, an election writ was issued, with a polling date of November 27, 2000. Mr. Harper applied to the same trial judge (Cairns J.), who heard the action seeking a declaration that the spending limits are unconstitutional, for an interlocutory injunction restraining the Chief Electoral Officer of Canada and the Commissioner of Canada Elections from enforcing the third-party spending limits, pending the decision in the action. The trial judge granted the injunction ((October 23, 2000), Doc. 0001-09477 (Alta. Q.B.)), and the Alberta Court of Appeal upheld it (2000 ABCA 288 (Alta. C.A.)). The Attorney General of Canada now applies to this Court, seeking leave to appeal from the interlocutory injunction and, in the interim, a stay of the injunction. The application for leave to appeal is granted, by separate order, released concurrently. This leaves the question of whether the injunction restraining the enforcement of the law imposing spending limits should be stayed.

4 In considering whether an injunction should be granted, and by extension whether an injunction should be stayed pending appeal, the Court considers: (i) whether there is a serious issue to be tried; (ii) whether absent an injunction there will be irreparable harm to the individual seeking the injunction; and (iii) the balance of (in)convenience. Without prejudging the appeal, we are satisfied there is a serious issue to be tried. The issue is no less than the constitutionality of provisions of the electoral law passed by the Parliament of Canada which no court has held to be invalid. This is a serious issue not only because the constitutionality of the provisions is challenged, but because it is common ground that the determination of the constitutionality will turn on the application of s. 1 of the *Charter*, which is always a complex factual and legal analysis. We also assume that the provisions in issue may occasion "irreparable harm" to the capacity of third parties to participate as they wish in the election campaign to the extent of the spending limits on advertising imposed on them. This leaves the third ground, the balance of convenience.

5 Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose leaf ed.), at para. 3.1220.

6 The trial judge found that the freedom of speech interest raised by the applicant Harper to be of great importance. On the other side of the balance, he found that the Attorney General of Canada had called no evidence on the harm that would result from suspending the operation of the law. In the absence of evidence, he characterized this harm as "notional and unproven unfairness" (para. 35). Accordingly, he found that the balance of convenience favoured the grant of an injunction.

7 We cannot, with respect, agree. This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124 (S.C.C.); see also *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), *per* Beetz J. at p. 144; *Haig v. R.*, [1993] 2 S.C.R. 995 (S.C.C.). In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.

8 It may also be noted that, in *Thomson Newspapers Co. v. Canada (Attorney General)*, S.C.C., No. 25593, May 7, 1997 (published in the *Bulletin of Proceedings of the Supreme Court of Canada*, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the *Canada Elections Act*, R.S.C. 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in *Gould*, *supra*. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.

9 Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and Cory JJ. stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(*b*) right of freedom of expression; indeed, the violation at issue in *RJR-MacDonald Inc.* was of s. 2(*b*). The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

10 Again, the trial judge appears not to have applied this principle in weighing the benefits of the law against its impact on free expression. Instead of assuming that the legislation has the effect of promoting the public interest as *RJR-MacDonald Inc.* directs, the trial judge based his conclusion on the fact that the Government " has not adduced any evidence to illustrate unfairness in any of these elections in Canada caused by third-party spending limits" (para. 33). He went on to repeat that the "Government simply asserts that third-party spending limits, if not controlled, may (and that is notional only) impact adversely on the fairness of elections" (para. 34), and moved directly from this to the conclusion that leaving the spending limits in place " would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government" (para. 35). Moreover, the trial judge made no mention of the fact that the law may be seen not only as limiting free expression but as regulating it in order to permit all voices during an election to be heard fairly.

11 Applying the principles enunciated in previous decisions of this Court, and without prejudging the outcome of any appeal from the injunction, we are satisfied that the public interest in maintaining in place the duly enacted legislation on spending limits pending complete constitutional review outweighs the detriment to freedom of expression caused by those limits. To leave the injunction in place is to grant substantial success to the applicant Harper even though the trial

has not been completed. Moreover, applying *RJR-MacDonald Inc.*, we must take as given at this stage that the legislation imposing spending limits on third parties will serve a valid public purpose. Weighing these factors against the partial limitation on freedom of expression imposed by the restrictions, we conclude that the balance of convenience favours staying the injunction granted by the trial judge.

Conclusion

12 We therefore conclude that a stay of the order enjoining the enforcement of s. 350(1), (2), (3) and (4) of the *Canada Elections Act* should be granted.

***Major J.* (dissenting):**

13 The facts that accompany this application by the Attorney General of Canada for a stay of the injunction obtained in Alberta are not in dispute. The chambers judge, relying on the pleadings and the evidence at the trial, faced the concession that the plaintiff Mr. Harper's freedom of expression was restricted by the legislation. Weighed against this was the inability of the Attorney General to demonstrate that the injunction would cause any inconvenience (see (October 23, 2000), Doc. 0001-09477 (Alta. Q.B.), at paras. 34-35 *per* Cairns J.):

> The Government simply asserts that third-party spending limits, if not controlled, may (and this is notional only) impact adversely on the fairness of elections. Yet, it can point to no evidence to illustrate unfairness in the Canadian elections caused by third-party spending.
>
> In my judgment, the spending limits having the deleterious effect of fettering the core freedom of expression and speech as enshrined in the Charter, as they do and as admitted by the Attorney General of Canada, would clearly cause more harm in the public interest than the notional unproven unfairness suggested by the Government.

14 As described in the reasons of the majority, an injunction should be granted where: (1) there is a serious question to be tried, (2) there is irreparable harm to the person seeking the injunction if no injunction is issued, and (3) the balance of convenience favours an injunction.

15 It is on the determination of the balance of convenience that I disagree with the majority. The chambers judge, who was also the trial judge in the recently concluded trial, was in a unique position to weigh the balance of convenience.

16 The trial judge did not, nor do I, intend the interim injunction to reflect on the validity of the new elections legislation. The question of whether the limits on election spending are constitutional will only be decided once there is a determination on the merits.

17 It is inescapable to me that the balance of convenience tips sharply in favour of the plaintiff. The proposition advanced to counter the obvious inconvenience to Mr. Harper is that legislation generally identified as serving a public interest carries a *prima facie* assumption of validity. But that presumption should not be conclusive where, as here, it competes against the acknowledged impediment to the plaintiff's free speech unless there is some evidence demonstrating an impediment of a public interest. Here there is none.

18 The chambers judge was careful to note that the interim injunction was just that. He stated that his ultimate disposition may be that the legislation is constitutional. But he could not ignore the evidence produced during the two-week trial to the extent it bore on granting an interim injunction.

19 The interim injunction would safeguard important constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms* and protect the freedom of political speech during a federal election. The law is clear that — in the absence of an error in principle — the trial judge has the discretion, and is entitled to appellate deference.

20 In this application, we are dealing with one of the most valuable forms of speech: political speech. Canadians cherish the unimpeded diffusion of political ideas and opinions, and this Court has long recognized that freedom of expression

is "essential to the working of a parliamentary democracy such as ours" (*Switzman v. Elbling*, [1957] S.C.R. 285 (S.C.C.), *per* Abbott J., at p. 326). Hence we must tread carefully in limiting political speech. It is speech that we recognize as invaluable, given its significance in our democratic process. We should be loathe to interfere with it, especially in the midst of a federal election.

21 I am of the view that the trial judge did not err in applying the three-part test for an injunction in a constitutional context, as set out in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), both cases that the trial judge referred to and relied upon. As stated, I agree with the majority that the first two requirements are met.

22 The third requirement is that the balance of convenience favours granting the injunction. This requirement subsumes the question of what irreparable harm the *defendant* faces. After nine days of trial, there was no evidence before the Alberta Court of Queen's Bench that the injunction would cause any " inconvenience" or "irreparable harm". Nor has the Attorney General in this application referred this Court to any evidence showing what harm would result from the injunction. Instead, the Attorney General states as a conclusion that suspending the spending limits would result in unfairness, and so the legislation must be applied "in the interests of fairness for all".

23 The Attorney General admitted that there was a violation of s. 2(*b*), and offered not a scintilla of evidence showing that the injunction would cause some harm. In this light, the trial judge concluded that the balance of convenience favoured injunctive relief. Given the restriction upon a cherished constitutional freedom and the absence of anything tilting the other way, Cairns J. was entitled to reach this conclusion.

24 I acknowledge that in the majority of cases, it may be acceptable to assume that there is irreparable harm to the public interest when an injunction stops an authority from protecting the public good: *RJR-MacDonald Inc.*, *supra*, at p. 346. But that is an assumption only (as Sopinka and Cory JJ. suggest at p. 349), and it can be overcome when an applicant demonstrates that the injunction itself serves the public interest. In this case, the injunction furthers the *Charter*'s guarantee of freedom of expression, and Mr. Harper has displaced the assumption that the government suffers a greater harm than he does.

25 I find that the suggestion of "irreparable harm" to the government or the public interest is strained and unpersuasive. To date, Canadian federal elections have not been governed by limits on third-party spending. It is difficult to see how the consequences of undergoing one more election without these limits would somehow cause "irreparable harm" to our democratic institutions, particularly since no such harm occurred in past elections. In my view, the public interest favours granting, rather than refusing, the injunction. Dean Cassels is right to suggest that the "public interest" does not belong exclusively to the Attorney General, and I agree with his rejection of the "assumption that only one party speaks for the public interest" (J. Cassels, "An Inconvenient Balance: The Injunction as Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* (1991), at pp. 303-5). The question is: will the injunction serve the public good by protecting constitutional rights? Given the need to protect free speech, particularly during an election, it seems reasonable to require the Attorney General to provide something more than a *pro forma* statement about unfairness. In the absence of anything beyond speculation, and in the face of a serious denial of *Charter*-protected freedoms, the balance of convenience clearly favours the injunction. I would add that while the Attorney General argues that the public interest is served by seeing the legislation enforced, that argument is countered by the compelling public interest in seeing fundamental *Charter-protected freedoms* upheld: J. Berryman, *The Law of Equitable Remedies* (2000), at p. 51.

26 "Because the granting of an interlocutory injunction is a discretionary matter appellate courts have limited the role of review": Berryman, *The Law of Equitable Remedies, supra*, at p. 37. This Court endorsed the deferential approach in *Metropolitan Stores (MTS) Ltd.*, *supra*, at pp. 154-56. The standard is high; the reviewing court "must not interfere with [the trial judge's exercise of discretion] merely on the ground that the members of the appellate court would have exercised the discretion differently": *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042 (U.K. H.L.), *per* Lord Diplock, at p. 1046. To interfere, there must be a clear mistake on the law or the evidence, or some other glaring error. There is no such mistake here.

27 Cairns J. is entitled to appellate deference. He was, in fact, unusually well-placed to grant the injunction. The typical judge faced with this sort of injunction would not have the benefit of having presided over the trial on the merits of the constitutional challenge.

28 It is true, as the majority suggests, that in all but exceptional cases, the effect of democratically enacted legislation should not be suspended before a finding of unconstitutionality or invalidity. *Gould v. Canada (Attorney General)*, [1984] 1 F.C. 1133 (Fed. C.A.), aff'd [1984] 2 S.C.R. 124 (S.C.C.). But this case falls in the narrow category of exceptions. I reach that conclusion for three reasons.

29 First, there is the timing of the challenge. The new *Canada Elections Act*, S.C. 2000, c. 9, was given royal assent on May 31, 2000. The plaintiff's statement of claim was issued within seven days. The legislation would ordinarily have come into force after the November 27 general election, but it was activated, so to speak, by publication of notice in the *Canada Gazette* on September 1, 2000. The Attorney General of Canada introduced this legislation in a manner that virtually sealed it from meaningful constitutional scrutiny before the election. These circumstances demand scrutiny. The prospect arises that governments could pass unconstitutional laws immediately prior to an election and leave affected citizens with no remedy. The state could effectively place its election legislation beyond constitutional scrutiny by virtue of *when* that legislation is enacted. I note that the situation here is unlike that in *Gould*, *supra*, where the impugned provision had been in force for years but was challenged only on the eve of an election.

30 Another compelling factor is that the judge who handled the application for an interlocutory injunction knew the case; he had recently presided over a two-week trial in which the constitutionality of the legislation was debated in great detail. That fact distinguishes this case from *Gould*, *supra*, where the judge who granted the injunction had not heard arguments on the constitutionality of the provisions governing prisoners' voting rights. The fact that the same judge heard both the trial and the application for an injunction here argues in favour of considerable deference to his decision.

31 Finally, there is the nature of the constitutional challenge at issue. The speech that is limited here is political expression. It is the epitome of speech that furthers the aspirations of a democratic society. That expression would be limited at its most important moment, during an election, while the Attorney General offers no evidence that the injunction would cause harm.

32 The majority, at para. 7, accepts the Attorney General's submission that an injunction "effectively grants [Mr. Harper] the final relief that he seeks in the trial still under way." I do not, because the "final" question is the constitutionality of the legislation, and that question cannot be answered in these interlocutory proceedings. In any event, it could equally be said that staying the injunction gives the *government* the final relief it is most concerned about. That argument cuts both ways and does not get us far.

33 This Court, as Professor Roach points out in *Constitutional Remedies in Canada* (loose-leaf ed.), at p. 7 7, has "clearly rejected reliance on a presumption that legislation is constitutional in deciding interlocutory applications". In *Metropolitan Stores (MTS) Ltd.*, *supra*, at p. 124, Beetz J. held that "the presumption of constitutional validity ... is not compatible with the innovative and evolutive character of [the *Charter*]". It could be said that the majority improperly veers toward an automatic presumption of constitutionality.

34 In *RJR-MacDonald Inc.*, at pp. 333-34, Sopinka and Cory JJ. considered the factors that must govern the balancing process:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice

> would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

I find those words apt. I would deny the application for a stay.

Application granted.

Requête accordée.

Footnotes

* Changes in a corrigendum issued by the court on November 11, 2000 have been incorporated herein.

Cited Paragraph: 9-11

TAB 12

2006 CarswellOnt 5133
Ontario Court of Appeal

Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council

2006 CarswellOnt 5133, [2006] O.J. No. 3411, 273 D.L.R. (4th) 284, 31 C.P.C. (6th) 11, 82 O.R. (3d) 338

HENCO INDUSTRIES LIMITED (Applicant) and HAUDENOSAUNEE SIX NATIONS CONFEDERACY COUNCIL, JANIE JAMIESON, DAWN SMITH, OR ANY AGENT OR PERSON acting under their instructions, JOHN DOE, JANE DOE and other Persons unknown, and THE CORPORATION OF HALDIMAND COUNTY (Respondents)

RAILINK CANADA LTD., carrying on business as the SOUTHERN ONTARIO RAILWAY (Plaintiff) and HAUDENOSAUNEE CONFEDERACY OF MOHAWK, SENECA, CAYUGA, ONONDAGA, ONEIDA, TUSCARORA NATIONS, SIX NATIONS OF THE GRAND RIVER BAND OF INDIANS, CLYDE POWLESS, JAQUELINE HOUSE, HAZEL HILL, DAWN SMITH, SEAN MT. PLEASANT, WES HILL, JANE DOE, JOHN DOE and PERSONS UNKNOWN (Respondents)

D. O'Connor A.C.J.O., J. Laskin, K. Feldman JJ.A.

Heard: August 22, 2006
Judgment: August 25, 2006 *
Docket: CA M34121

Proceedings: additional reasons to *Henco Industries Ltd. v. Haudenosaunee Six Nations Confederacy Council* ((August 22, 2006)), Doc. CA M34121 ((Ont. C.A.))

Counsel: Dennis Brown, Q.C., Malliha Wilson, Ria Tzimas for Attorney General of Ontario
Mark J. Sandler, Denise Dwyer for Ontario Provincial Police
W. McKaig for Haldimand County
M.C. Bruder for Henco Industries Limited
Kenneth R. Peel for Railink Canada Ltd.
Darrell Doxtdator for Six Nations Council
David Brown, Manizeh Fancy, amicus curiae for perspectives of the Town of Caledonia and Haldimand County
James A. O'Reilly for amicus curiae for Aboriginal perspectives

Headnote
Public law --- Crown — Practice and procedure involving Crown in right of province — Judgments and orders regarding Crown
Members of first nation occupied land owned by private developer on grounds of aboriginal title — Developer obtained injunction to stop occupation — Some members of first nation did not vacate land and were found in criminal contempt of injunction — Crown purchased land from developer and initiated negotiations with first nation regarding land claim — First nation applied to dissolve existing injunction — Motions judge refused to dissolve injunction until criminal contempt proceedings against members violating injunction had been disposed of — Crown launched appeal of order — Crown brought application for stay of order pending appeal — Application granted — Crown's appeal raised several serious issues — As owner of land, Crown had right to choose whether it wished to have benefit of injunction to continue — Principle that injunction ran with land was not well settled law — Crown had showed existence of possible irreparable harm — Maintaining order might invite finding of ongoing contempt of court against members who remained on land

— Unchallenged evidence was presented that order would only escalate tensions in community, put public safety at increased risk, and adversely affect land claim negotiations.

Table of Authorities

Cases considered:

Attorney General v. Birmingham Tame & Rea District Drainage Board (1881), 17 Ch. D. 685 (Eng. C.A.) — referred to

Canada Post Corp. v. C.U.P.W. (1991), 1991 CarswellOnt 2130 (Ont. Gen. Div.) — referred to

Canadian Transport (U.K.) Ltd. v. Alsbury (1953), (sub nom. *Poje v. British Columbia (Attorney General)*) 17 C.R. 176, [1953] 1 S.C.R. 516, 105 C.C.C. 311, [1953] 2 D.L.R. 785, 53 C.L.L.C. 15,055, 1953 CarswellBC 3 (S.C.C.) — referred to

Iveson v. Harris (1802), 32 E.R. 102, 7 Ves. Jun. 251 (Eng. Ch. Div.) — referred to

R. v. Peel Regional Police Service (2000), 2000 CarswellOnt 4406, (sub nom. *R. v. Peel Regional Police Service, Chief of Police*) 149 C.C.C. (3d) 356 (Ont. S.C.J.) — referred to

Reference re Amendment to the Constitution of Canada (1981), (sub nom. *Reference re Amendment of the Constitution of Canada (Nos. 1, 2 and 3)*) 125 D.L.R. (3d) 1, (sub nom. *Constitutional Amendment References 1981, Re*) 11 Man. R. (2d) 1, (sub nom. *Manitoba (Attorney General) v. Canada (Attorney General)*) [1981] 6 W.W.R. 1, (sub nom. *Resolution to amend the Constitution, Re*) [1981] 1 S.C.R. 753, 1981 CarswellMan 110, 1981 CarswellMan 360, (sub nom. *Constitutional Amendment References 1981, Re*) 39 N.R. 1, (sub nom. *Constitutional Amendment References 1981, Re*) 34 Nfld. & P.E.I.R. 1, (sub nom. *Constitutional Amendment References 1981, Re*) 95 A.P.R. 1, (sub nom. *Resolution to Amend the Constitution of Canada, Re*) 1 C.R.R. 59 (S.C.C.) — referred to

Reference re Secession of Quebec (1998), 161 D.L.R. (4th) 385, 1998 CarswellNat 1299, 228 N.R. 203, 55 C.R.R. (2d) 1, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300 (S.C.C.) — referred to

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Preamble — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 63.02(1)(b) — considered

***Per curiam*:**

1 The Attorney General of Ontario brought this motion to stay the order of Marshall J. dated August 8, 2006 until hearing of the appeal.

2 The motion judge's order was made during a lengthy dispute over the ownership of Douglas Creek Estates in Caledonia. Members of the Haudenosaunee Six Nations community, asserting Aboriginal title, occupied land owned by a private developer, Henco. Henco obtained an injunction to stop the occupation. Some of those protestors who did not vacate the land were found in criminal contempt of court. The Province of Ontario purchased the Henco lands on July 5, 2006 and continued its negotiations with the Six Nations community.

3 In his order, the motion judge refused to dissolve an injunction prohibiting protestors from occupying land owned by the Province of Ontario until criminal contempt proceedings against individuals violating the injunction had been disposed of. Further, he required the Attorney General to apprise the court of the progress of the contempt proceedings.

4 At the hearing of the motion on August 22, 2006, this Court had the benefit of the submissions or perspectives of the various constituencies that are directly affected by the underlying dispute. Before the hearing, the Court appointed an

amicus curiae to present the perspectives of the residents of the Town of Caledonia and Haldimand County, and another *amicus curiae* to present the Aboriginal perspectives.

5 We turn then to the Attorney General's request to stay the two provisions that are contained in the formal order. In order to make these reasons easier to understand, we deal with the second provision first.

1. Should paragraph 2 of the order of August 8, 2006 be stayed pending the appeal?

6 The Attorney General of Ontario requests a stay of paragraph 2 of the order. Paragraph 2 states:

> This court orders that the injunction issued in favour of Henco Industries Limited binds the (new) property owner, Her Majesty the Queen in right of Ontario, and is hereby dissolved, but that dissolution is not to take place until the criminal contempt has been disposed of.

7 A stay would suspend, until the hearing of the appeal, the motion judge's order that the injunction obtained by Henco binds the Province as the new owner of Douglas Creek Estates. In other words, once the order is stayed, no steps may be taken under it or for its enforcement. In practical terms a stay of paragraph 2 would mean that the mere occupation of Douglas Creek Estates would not be a breach of any court order.

8 Rule 63.02(1)(b) of the *Rules of Civil Procedure* gives this court the authority to grant a stay pending an appeal. The test for obtaining a stay is now well established. The party seeking a stay — in this case, the Attorney General — must meet three criteria. It must show:

- Its appeal raises serious issues;
- It will suffer irreparable harm if a stay is not granted; and
- The balance of convenience favours a stay.

See *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at 332-3.

9 In our view, the Attorney General has satisfied these three criteria, and is entitled to a stay of paragraph 2 of the order until the appeal is heard.

a) Serious issue

10 The question whether the motion judge was entitled to order that the Henco injunction binds the Province, and therefore continues in force after July 5, 2006, raises, at the very least, a serious issue. Indeed, it seems to us that the validity of this order is doubtful.

11 At the hearing before the motion judge, Henco, which had obtained the injunction, asked that it be dissolved. The Province supported Henco's request. The motion judge succinctly captured the Province's position in these words: "The government says we have bought the land and we are allowing the protesters to remain."

12 Although neither the previous owner (Henco) nor the current owner (the Province) sought a continuation of the injunction, the motion judge ordered that it would remain in force and would bind the Province until "the criminal contempt has been disposed of."

13 The motion judge gave these reasons for his order:

> [T]he sale of the property to the crown or the Government of Ontario ... should have no effect on the court continuing with the criminal contempt. Surely the injunction continues with the property till the court dissolves it — if the law were otherwise — an injunction could be defeated by transferring ownership. In my view, the injunction here will bind the new owner with notice — as here until it is finally dissolved.

14 We doubt that this reasoning is correct in law for at least three related reasons. First, Henco obtained the injunction for its own benefit. Having bought the property, the Province now stands in Henco's shoes. As a landowner the Province has the right to say whether it wishes the benefit of that injunction to continue. It does not. It owns the land. It has the same right as any other landowner: to permit the peaceful occupation of its property.

15 Second, the motion judge's reasons assume that an injunction runs with the land — in his words: "surely the injunction continues with the property." However, that principle is not well settled, and there is a body of case law stating that injunctions are personal orders that do not run with the land. See, for example, *Attorney General v. Birmingham Tame & Rea District Drainage Board* (1881), 17 Ch. D. 685 (Eng. C.A.), at 692 and *Iveson v. Harris* (1802), 7 Ves. Jun. 251 (Eng. Ch. Div.), at 257 . At the very least, whether the Crown, or any subsequent purchaser, is bound by an injunction sought by a previous landowner is a serious question to be tried.

16 Third, the motion judge's reasons seem to assume that the Province is somehow bound as if it were a defendant in this litigation. The motion judge says "... if the law were otherwise — an injunction could be defeated by transferring ownership ..." However, the injunction did not require Henco to evict the protestors or do anything else. Henco was the beneficiary, not the target, of the injunction. Therefore, nothing was defeated by the transfer of ownership to the Province. As Henco was not required to remove the protestors, the Province, on buying the property, could not be required to do so either.

17 The Province has two roles in this dispute: prosecutor (through the Attorney General), and landowner. As landowner, it seems to us that, subject to local municipal requirements and matters of nuisance and public safety, it should be free to use its property as it sees fit.

18 Throughout his reasons, the motion judge stressed the importance of the rule of law. No one can deny its importance. The preamble to our Constitution states that Canada is founded on principles that recognize the rule of law. The Supreme Court of Canada has repeatedly affirmed its importance. (See for example, *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), and *Reference re Amendment to the Constitution of Canada*, [1981] 1 S.C.R. 753 (S.C.C.).) The rule of law, however, has many components.

19 The Province owns Douglas Creek Estates. It does not claim that the protesters are on its property unlawfully. It does not seek a court order removing them. It is content to let them remain. We see no reason why it should not be permitted to do so. If the protesters cause a nuisance or other disturbance affecting neighbouring lands or residents of Caledonia, then action may be required. But no evidence was presented to us of any current incident requiring the intervention of the Attorney General, the Ontario Provincial Police (O.P.P.) or the courts.

20 Thus, there is a serious question about the validity of paragraph 2 of the order of the motion judge.

b) Irreparable harm

21 In general terms, irreparable harm is harm that cannot be quantified by a monetary award. A public authority can almost always show irreparable harm if the stay is not granted by demonstrating that its actions have been taken to promote the public interest. The Supreme Court explained this principle in *RJR MacDonald* at para. 71:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting and protecting the public interest and upon some indication that the impugned legislation, regulation or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

22 Here the Province's actions have obviously been taken to promote the public interest. In discharging its public duty to address the conflict in Caledonia, the Province has been required to make some difficult decisions. These decisions included purchasing the disputed property, allowing the protesters to remain on the property, and trying to resolve the ongoing dispute through peaceful negotiations. These decisions were taken in the public interest. Some may disagree with the Province's stance. We do not think, however, that it is the court's role to question the wisdom of the Government's actions. The motion judge's order continuing the injunction by making it binding on the Province, thus leaving the protesters to face the spectre of ongoing contempt proceedings if they do not vacate the property, threatens to undermine the Government's attempts to resolve this dispute.

23 If not stayed, paragraph 2 might invite a finding of ongoing contempt of court against the protesters who remain on Douglas Creek Estates. The unchallenged evidence before us is that a court order that makes the current limited occupation of Douglas Creek Estates a contempt of court, will only escalate tensions in the community, put public safety at increased risk, and adversely affect the land claim negotiations. The Province has demonstrated that the order will cause irreparable harm.

c) The balance of convenience

24 In our view, the balance of convenience favours staying paragraph 2 of the motion judge's order until the appeal is heard. The public interest considerations relevant to the question of irreparable harm are also relevant to the question of the balance of convenience.

25 The uncontradicted evidence of the O.P.P. is that a stay of the injunction order will reduce the risk of harm to the community. The Province should be permitted to determine what level of occupation and what use of its own property best promote the public interest in these difficult circumstances.

26 On the other hand, no substantial inconvenience will result from a stay of paragraph 2. A stay will mean simply that the protesters may remain on the property until the appeal is heard without fear of contempt proceedings being brought against them.

27 We understand that this dispute has been difficult and frustrating for the residents of Caledonia. It has been disruptive and has profoundly affected the relationship between the residents and the Aboriginal community. However, the current occupation of Douglas Creek Estates does not obstruct public road access. Importantly, the hearing of the appeal has been expedited and set for September 25, 2006.

28 Moreover, in our view, the maintenance of the rule of law favours a stay. Because of the dubious validity of paragraph 2, it is not appropriate to expose individuals to the threat of contempt proceedings for breach of that paragraph. Finally we note that no party to the motion — even those opposed to the Province's position — argued that the balance of convenience weighed against a stay of paragraph 2 of the order.

29 The Attorney General has satisfied the three criteria for a stay. Paragraph 2 of the order is stayed until the hearing of the appeal.

2. Should paragraph 1 of the motion judge's order of August 8, 2006 be stayed pending the appeal?

30 The Attorney General also seeks a stay of paragraph 1 of the order of August 8, 2006, which provides:

> 1. This court orders that the matter of contempt is referred to the Attorney General of Ontario for carriage and at a time to be fixed in the course of a case management meeting, a time will be set so that the Court and the public may be apprised of the Crown's progress or lack thereof in regard to the criminal contempt. The Court will remain seized of this matter until it is resolved.

31 As paragraph 2 of the order has been stayed by these reasons, it would make sense that the only matters of contempt that should now be included within paragraph 1 are those that may have occurred prior to July 5, 2006, the date the Henco lands were transferred to the Crown.

32 The Attorney General agrees that he is responsible for taking and maintaining carriage of contempt matters. In appropriate circumstances, where it appears that there may have been contempt of a court order that occurred out of the face of the court, a judge may refer the matter to the Attorney General for carriage. See, for example, *Canadian Transport (U.K.) Ltd. v. Alsbury*, [1953] 1 S.C.R. 516 (S.C.C.), *Canada Post Corp. v. C.U.P.W.*, [1991] O.J. No. 2472 (Ont. Gen. Div.), *R. v. Peel Regional Police Service* (2000), 149 C.C.C. (3d) 356 (Ont. S.C.J.).

33 However, the Attorney General objects to paragraph 1 of the order because he says it contemplates ongoing supervision of the process by the motion judge. His concern is that the intent and effect of this paragraph is not only to require the Attorney General to report on his Ministry's progress in any contempt proceedings, but also to allow the motion judge to interfere with the Ministry's investigative and prosecutorial discretion by directing the steps to be taken.

34 We do not read paragraph 1 in that way. In our view, that paragraph contemplates only that the motion judge will remain seized of the contempt proceedings so that there will be a public forum where the Attorney General may report on what steps, if any, have been taken in respect of the contempt of court orders regarding the Henco lands. In the light of our stay of paragraph 2, that report will be limited to contempt of the court order up to July 5, 2006. As paragraph 1 states, the purpose of the report is to apprise the court and the public of the status of any such proceedings. There is no language that extends the role of the motion judge beyond maintaining ongoing proceedings for the purpose of receiving status reports.

35 Even if there is a serious question whether paragraph 1 reaches beyond the proper role of the court in enforcing its orders, in our view, there will be no irreparable harm if this paragraph is not stayed. We have set an early date of September 25, 2006 for the argument of the appeal. It seems most unlikely that there will be a need for any further attendances before the court prior to the hearing.

36 Indeed, the Attorney General submits that the court has already been fully advised about all contempt proceedings arising out of the injunction orders during the several hearings that were convened by the motion judge to inquire into the status of enforcement activity by the Crown. For example, in the hearing held on June 1, 2006, counsel for the O.P.P. outlined in open court and in some detail the history of the O.P.P. enforcement activity since the first incident began in February 2006. The Attorney General contends that there is nothing further to report. That may be so. However, if it becomes necessary to call upon the Crown to provide a more formal report to the court summarizing its enforcement efforts, such a report may well assist the public in understanding how the authorities are attempting to ensure that the rule of law is upheld in a complex inter-community situation.

37 The balance of convenience does not favour a stay, as it is unlikely that there will be any attendances before the appeal is argued and thus likely no inconvenience will be caused if a stay is not granted. However, if there is a further attendance, any reporting that is done should not be particularly burdensome for the Crown.

38 For these reasons, we are not prepared to issue a stay of paragraph 1 of the order pending the hearing of the appeal.

3. Does the order prohibit further negotiation by the parties?

39 As part of the government response to the occupation of the Henco lands, the governments of Canada and Ontario, affected First Nations interests, and others began a process of negotiations to address the claims of the Haudenosaunee Six Nations Confederacy Council to the Haldimand land tract. This process was ongoing on August 8, 2006.

40 When this stay motion was first brought, the formal order arising out of the August 8, 2006 decision of the motion judge had not yet been signed by him. In his judgment delivered orally on August 8, the motion judge stated

that government agents should withdraw from the negotiations until the court orders are respected and concluded that "[I]n the Court's view, after much deliberation, there should be no further negotiations till the blockades are lifted and the occupation is ended." However, the formal order that the motion judge signed on August 18, 2006 did not include any order restraining the negotiations.

41 In the submissions made to us, the parties involved in the negotiations described them as very productive, and in fact, precedent setting in the progress that has been made toward the potential resolution of a previously intractable, centuries-old dispute. In that context, counsel representing many of the affected constituencies urged the court to allow those negotiations, scheduled to resume the following day, to proceed.

42 The *amicus curiae* for the residents' perspectives informed us that many of the residents believed that it would be more appropriate that the occupation end before the negotiations continued. The Court was also informed that a volunteer group of local business owners, professional persons and residents known as the Caledonia Citizens Alliance supported the position that the negotiations should proceed and advised that the Alliance would like a role in those negotiations.

43 Because the formal order that is the subject of the appeal does not prohibit the immediate resumption of negotiations, we were satisfied that there was no order to be stayed. However, several counsel informed the Court that although the formal order does not prohibit negotiations, many of the parties felt constrained by the oral judgment from proceeding with the negotiations. Because in our view it was important that these negotiations be allowed to proceed as previously scheduled, we issued the following endorsement at the end of the oral hearing:

> Despite what Justice Marshall said in his reasons of August 8, 2006, he did not include in his final order a direction that the parties cease negotiations. Thus in our view the parties should be free to continue to negotiate if they choose to do so without fear of being in breach or contempt of a court order. To be clear the order of Justice Marshall does not preclude continued negotiations.

44 This endorsement left all parties free to continue with the negotiations. We reserved our decision on the balance of the motion to today in order to give these reasons.

4. Conclusion

45 For the reasons above, paragraph 2 of the August 8, 2006 order is stayed pending hearing of the appeal. Paragraph 1 will remain in force. The costs of the motion are reserved to the panel hearing the appeal.

Application granted.

Footnotes

* Motion to stay order of Marshall J. dated August 8, 2006.

TAB 13

Cited pages 605-607

Legislative Assembly of Ontario

Assemblée législative de l'Ontario

Official Report of Debates (Hansard)

No. 14

Journal des débats (Hansard)

N° 14

1st Session
42nd Parliament

Thursday
2 August 2018

1re session
42e législature

Jeudi
2 août 2018

Speaker: Honourable Ted Arnott
Clerk: Todd Decker

Président : L'honorable Ted Arnott
Greffier : Todd Decker

Is it the pleasure of the House that the motion carry? I declare the motion carried.

Second reading agreed to.

The Acting Speaker (Mrs. Lisa Gretzky): I'll go to the member to find out what committee he would like it to go to.

Mr. Will Bouma: The Standing Committee on the Legislative Assembly.

The Acting Speaker (Mrs. Lisa Gretzky): Is that agreed? Carried.

GARRETT'S LEGACY ACT (REQUIREMENTS FOR MOVABLE SOCCER GOALS), 2018

LOI DE 2018 SUR LE LEGS DE GARRETT (EXIGENCES RELATIVES AUX BUTS DE SOCCER MOBILES)

The Acting Speaker (Mrs. Lisa Gretzky): Mr. Cho, Willowdale, has moved second reading of Bill 11, An Act to provide for safety measures respecting movable soccer goals.

Is it the pleasure of the House that the motion carry? I declare the motion carried.

Second reading agreed to.

The Acting Speaker (Mrs. Lisa Gretzky): I go to the member for Willowdale: which committee?

Mr. Stan Cho: I would like to refer it to the Standing Committee on the Legislative Assembly, please.

The Acting Speaker (Mrs. Lisa Gretzky): Agreed? Carried.

Call in the members. This will be a five-minute bell.

The division bells rang from 1608 to 1613.

MUNICIPAL ELECTIONS

The Acting Speaker (Mrs. Lisa Gretzky): Members, please take your seats.

Ms. Horwath has moved private member's notice of motion number 7. All those in favour, please rise and remain standing until recognized by the Clerk.

Ayes

Andrew, Jill	Harden, Joel	Natyshak, Taras
Armstrong, Teresa J.	Hassan, Faisal	Rakocevic, Tom
Arthur, Ian	Hatfield, Percy	Schreiner, Mike
Begum, Doly	Horwath, Andrea	Shaw, Sandy
Bell, Jessica	Hunter, Mitzie	Singh, Sara
Berns-McGown, Rima	Kernaghan, Terence	Stevens, Jennifer (Jennie)
Bisson, Gilles	Lindo, Laura Mae	Stiles, Marit
Bourgouin, Guy	Mamakwa, Sol	Tabuns, Peter
Burch, Jeff	Mantha, Michael	Taylor, Monique
French, Jennifer K.	Miller, Paul	West, Jamie
Gates, Wayne	Monteith-Farrell, Judith	Yarde, Kevin
Glover, Chris	Morrison, Suze	

The Acting Speaker (Mrs. Lisa Gretzky): All those opposed, please rise and remain standing until recognized by the Clerk.

Nays

Anand, Deepak	Hogarth, Christine	Piccini, David
Baber, Roman	Kanapathi, Logan	Rasheed, Kaleed
Babikian, Aris	Karahalios, Belinda	Roberts, Jeremy
Bailey, Robert	Ke, Vincent	Romano, Ross
Barrett, Toby	Khanjin, Andrea	Sabawy, Sheref
Bethlenfalvy, Peter	Kramp, Daryl	Sandhu, Amarjot
Bouma, Will	Kusendova, Natalia	Scott, Laurie
Calandra, Paul	Lecce, Stephen	Simard, Amanda
Cho, Raymond Sung Joon	Martin, Robin	Singh Sarkaria, Prabmeet
Cho, Stan	Martow, Gila	Skelly, Donna
Clark, Steve	McDonell, Jim	Smith, Dave
Coe, Lorne	McKenna, Jane	Smith, Todd
Crawford, Stephen	McNaughton, Monte	Surma, Kinga
Cuzzetto, Rudy	Miller, Norman	Tangri, Nina
Downey, Doug	Mitas, Christina Maria	Thanigasalam, Vijay
Dunlop, Jill	Mulroney, Caroline	Thompson, Lisa M.
Elliott, Christine	Nicholls, Rick	Triantafilopoulos, Effie J.
Fedeli, Victor	Oosterhoff, Sam	Wai, Daisy
Fee, Amy	Pang, Billy	Walker, Bill
Fullerton, Merrilee	Park, Lindsey	Wilson, Jim
Ghamari, Goldie	Parsa, Michael	Yakabuski, John
Gill, Parm	Pettapiece, Randy	Yurek, Jeff
Harris, Mike	Phillips, Rod	

The Clerk of the Assembly (Mr. Todd Decker): The ayes are 35; the nays are 68.

The Acting Speaker (Mrs. Lisa Gretzky): I declare the motion lost.

Motion negatived.

ORDERS OF THE DAY

BETTER LOCAL GOVERNMENT ACT, 2018

LOI DE 2018 SUR L'AMÉLIORATION DES ADMINISTRATIONS LOCALES

Mr. Clark moved second reading of the following bill:

Bill 5, An Act to amend the City of Toronto Act, 2006, the Municipal Act, 2001 and the Municipal Elections Act, 1996 / Projet de loi 5, Loi modifiant la Loi de 2006 sur la cité de Toronto, la Loi de 2001 sur les municipalités et la Loi de 1996 sur les élections municipales.

The Acting Speaker (Mrs. Lisa Gretzky): Minister.

Hon. Steve Clark: I want to let the House know I'll be sharing my time with my two parliamentary assistants, the member for Stormont–Dundas–South Glengarry and the member for Etobicoke–Lakeshore.

On Monday, July 30, I had the honour of introducing the proposed Better Local Government Act, 2018. This is another example of our government moving swiftly to fulfill our commitment to the people of Ontario. Our commitment is to restoring accountability and trust and reducing the size and cost of government. The people of Ontario expect and deserve an accountable provincial government. We are showing the people of Ontario that their trust in our government is well placed.

When it comes to their local and regional level governments, people expect and deserve that same level of responsibility and accountability. That includes how

their tax dollars are spent. They expect their local governments to run efficiently. This government believes the hard-working people of Ontario have every right to expect that. That is why we are committed to finding efficiencies in local government and to listening to concerns raised by the people of Ontario.

What's more, we are acting on these concerns. We are taking action to address issues that have been ignored far too long. This is a timely piece of legislation. The 2018 municipal elections will be held across Ontario on Monday, October 22. The Better Local Government Act, 2018, is the action we are taking to address two of the issues that involve elected municipal positions. It is intended to institute a series of reforms to municipal government in the city of Toronto, as well as regional governments of York, Peel, Niagara and the district of Muskoka.

Our plan is to have these changes in effect for the upcoming October 22 municipal election. The election date would remain unchanged. I want to repeat: Our proposed legislation, if passed, would not change any municipal election date in Ontario.

Before I get into the details of our proposed legislation, I want to tell you a bit about my background and why this bill is so important to me.

1620

In 1982, I had just graduated from the University of Waterloo and I had decided to run for political office. I thought it was important to be part of the political process and to further policies that would benefit my local community. That is still my belief. It's our government's belief. This is what drives our government commitment to remove red tape, to find efficiencies and to respect the taxpayer.

In 1982, Speaker, I campaigned for the office of mayor of Brockville. I knocked on countless doors and I had hundreds and hundreds of meaningful conversations with the aim to improve my hometown. Why did I do this? I did it because of my drive and commitment to improve my community. Plain and simple, Speaker, I wanted to make changes for the betterment of my community.

Now, as Minister of Municipal Affairs and Housing, I have the tremendous opportunity to create change for the betterment of communities across Ontario.

As a first step, on Monday, I introduced this important piece of proposed legislation. Speaker, anyone—anyone—who runs for public office must remember who the boss is, and the boss is the people you represent. It's the people you must respect. You must respect the taxpayers. It's for the people of Ontario. Those are the people that we all work for, and that is exactly what we are doing in this government. We are respecting the people we represent and we are respecting their hard-earned taxpayers' dollars.

I followed those principles from the beginning, when I began as mayor of the city of Brockville. I always kept in mind that an elected representative needs to respect and work for the people that brought them into office in the first place.

And now, Speaker, I'm so very fortunate to be part of a government that is working hard to deliver the benefits of those same principles to people in communities large and small and in every corner of this great province.

Given my experience as a former mayor, I think I get it, Speaker. I understand the nuts and bolts of working with a municipal council and the process that can serve the taxpayer, a process that I think we could always make better.

When I consider the demands placed on me first as a mayor, then as an MPP, and now as the Minister of Municipal Affairs and Housing, some things become very clear. Fundamentally, Speaker—and this is a very important point—the rules that I learned when I first took office so many years ago are the same principles that apply today. The taxpayer is the boss. It's their hard-earned dollars the government is spending, and it's up to the government, at every level, to make sure they are spent as wisely, as efficiently and as effectively as possible. Those important rules—

Interjections.

Hon. Steve Clark: Thank you to my colleagues.

The same rules that applied then I think are even more powerful today.

During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.

So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first. This action is long overdue. Local governments deliver many critical services to residents, and it's in everyone's interest that local governments work quickly, they work efficiently and they respect the taxpayers' hard-earned dollars.

Les administrations locales fournissent quantité de services indispensables aux résidents. Il est donc dans l'intérêt de tout le monde que leur fonctionnement soit rapide, efficace et respectueux de l'argent rudement gagné des contribuables.

The Premier and I both have experience as elected officials at the municipal government level. The Premier served four years as a councillor at Toronto city hall, and I was mayor of Brockville for nine years. I was also a former CAO. Both of us know first-hand that municipal government is the level that's closest to the people, providing services that residents need and they depend on for their everyday lives.

Les administrations municipales, qui sont le palier de gouvernement le plus proche de la population, assurent

les services dont leurs résidents ont besoin et sur lesquels ils comptent au jour le jour.

The more efficiently municipalities are run, the better it is for their residents. Towards that goal, our proposed legislation would reduce the size of Toronto city council by aligning the city's municipal ward boundaries with provincial and federal electoral districts: 25 areas that provide fair and equitable representation and that are familiar to voters. Candidates for council would now have until September 14 to decide in which of the new wards they wish to run. This would be done in time for the October 22 municipal election.

Our proposed reforms would also allow for the redistribution of Toronto-area school board trustee seats. I want to emphasize that the number of trustees would remain the same. As this is governed by a regulation under the Education Act, I have engaged my cabinet colleague the Honourable Lisa Thompson, the Minister of Education, on this item. Her ministry will work with the four district school boards that would be affected by this legislation to undertake the redistribution of school board trustee electoral areas to align with the 25 new wards. Those four boards are as follows: the English public school board with 22 trustees, the English Catholic school board with 12 trustees, the French public school board with three trustees and the French Catholic school board with two trustees.

The new nomination deadline of September 14 would also apply to candidates for these Toronto-area school board trustee seats. I want to emphasize that these timetable changes would only apply to the Toronto city council and school board trustee elections. Furthermore, they would apply to the current election cycle only.

We recognize that some candidates have already filed their nominations to run in the current ward system. If our legislation is passed, to help those candidates transition to the new wards, we would make regulations for that purpose. The regulations would address how their campaign contributions are transferred to their new campaigns, if they choose to run in the new wards or school board electoral areas. There are no changes to nomination dates for the role of head of council, the mayor of Toronto. That date was July 27, and nominations closed, as most people know, last Friday.

Our ministries will work with the city and with the school board staff to ensure that they have the help and support that we can offer to run a successful municipal election this year. There will be savings for the city as well. We estimate that the reduction in the size of Toronto city council would save the taxpayers approximately $25.5 million over four years. That's $25.5 million taken out of administration that could be put forward directly helping the residents and businesses of the city of Toronto.

The current size of Toronto city council hinders decision-making. Debates are time-consuming, inefficient and costly. Forty-four independent councillors, each with their own agenda and outlook, hamstring the city's decision-making on so many, many issues the city is facing. Allowing Toronto city council to then grow to 47 councillors, I think, would make that even worse. The residents and businesses of Toronto deserve better than that, and our government is acting quickly to deliver on our promise and to deliver to the taxpayers.

Some may wonder if reducing the size of Toronto city council will negatively affect the representation of residents at city council. We looked into that, Speaker. We compared the average population per ward under our proposed legislation to the population per ward of comparatively important cities in other jurisdictions. Under our proposed legislation, the average ward size would be 109,263 people, based on the latest census figures. Speaker, I believe this is a very reasonable number.

The current size of council is unwieldy and a hindrance to decision-making and getting things done at city hall. The opinion was stated on Friday, July 27, by many, many Toronto councillors. A press conference was held with Councillor Vincent Crisanti, Councillor Michael Ford, Councillor Stephen Holyday, Councillor Justin Di Ciano, Councillor Giorgio Mammoliti, Councillor and Speaker Frances Nunziata, Councillor Cesar Palacio, Councillor David Shiner, Councillor Michael Thompson and Councillor and Deputy Mayor, East, Glenn De Baeremaeker. It's important to note that these councillors span a wide range of opinions, and they have different political affiliations. Among them are first-time councillors along with some very-long-term elected members. There is a pre-amalgamation mayor among the group, and three members of the mayor's executive committee—in short, Speaker, a varied and well-respected group of councillors.

1630

What they all share in common is that they voiced strong support for our reduced council size. They had three main reasons why they say that a smaller council is needed.

First, they agree that a smaller council will lead to better decision-making at Toronto city hall, which would benefit Torontonians as a whole. They gave an example of the current 44-member council having 10-hour debates on issues that would end with the vast majority of councillors voting the same as they would have at the beginning of the debate. Time is wasted, Speaker. They said that their Speaker often had to ask for quiet in the council chambers because no one was listening during these debates. It takes too long to make the right decisions.

Second, they point out that it will save money, and those savings go beyond just the savings of those councillors' salaries. The current 44-member council also creates a huge challenge for the Toronto bureaucracy, which has to respond to motion upon motion, to reports, reports and more reports, and then to deferrals and then more deferrals. Let's use the most recent city council meeting, where there were 128 members' motions presented. If we allowed council to grow to 47 and hadn't acted quickly, many believe the situation would have become worse. Toronto city staff would have to work on

all those reports instead of working on the issues that are important to the people of Toronto, important issues like transit, infrastructure and housing.

Third, it would result in a fair vote for residents, which was the very reason Toronto itself undertook a review of its ward boundaries. The Toronto councillors I referred to earlier reminded everyone that the Supreme Court of Canada said that voter parity is a prime condition of effective representation. They gave examples of the current ward system, where there are more than 80,000 residents in one ward and 35,000 in another. They acknowledge that this voter disparity is the result of self-interest, and that the federal and provincial electoral district process is better because it is an independent process which should apply to Toronto as well. I want to repeat that, Madam Speaker: The wards we are proposing are arrived at through an independent process.

The councillors that I mentioned agree that our proposed solution is fair. They point out that it has worked for both provincial and federal elections. The councillors point out that Toronto's process for achieving voter parity is an ongoing process. If allowed to continue, it would not reach voter parity and fairness until 2026. That's eight years from now. Toronto voters would have to wait another eight years of wasting taxpayers' money and endless debates for a fair election process in the city. However, our proposed legislation, if passed, gives Toronto residents voter fairness this year, in time for the upcoming 2018 municipal election.

How can anyone argue against giving the residents of Toronto a fair vote as soon as possible? Toronto voters will benefit from voter parity if our legislation is passed. Can people who are against our proposed legislation really believe that denying a fair vote for Torontonians is equitable? Is this really what you want to be known for?

After our announcement, many community and business leaders voiced their support to these changes. Our legislation, if passed, will meet the wishes of a majority of Toronto residents. Just as ward 5 Councillor Justin Di Ciano said, "People are in favour of smaller governments, less politicians."

At the current 44 seats and growing to 47 seats, Toronto city council will become increasingly dysfunctional and inefficient. A combination of entrenched incumbency and established special interests hobbles the efficient functioning at city hall.

As ward 7 Councillor Giorgio Mammoliti said at the councillors' news conference, "I think it's quite clear that most of us up here have either made speeches or have moved motions in the past that very clearly pointed to cutting ourselves in half because we are so frustrated with the system." That was his quote.

Let's remember, Mr. Speaker, that as Councillor Di Ciano said, "Going to 25 wards works for the federal level and works for the provincial level and will work for the city of Toronto." Councillor Di Ciano is absolutely right. I don't for one minute think that having the same electoral district for an MP, an MPP and a local city councillor is a bad thing. As I've said in this House over and over again in question period, I think it's a good thing, and there are many, many others who support our proposed legislation and see the need for this bill.

Ward 24 councillor David Shiner said of last week's Toronto council meeting—let me read his quote; it's a great quote: "I will tell you to look at what has happened in the past week as the fact that we are dysfunctional. We started on Monday. This is the longest meeting we have ever had. It's Friday afternoon and we still have not come close to finishing." He further added, "The fact that our Premier, who has experienced all that frustration here, decided to move quickly and make the decision on that I think is absolutely right and I am 110% supportive of it."

Speaker, these are people who experience the dysfunction at Toronto city council every day and I think their comments carry a bit of weight.

Hamilton mayor Fred Eisenberger reflected on his own experiences at Hamilton city council, where they have 16 councillors. He said, "Sixteen is difficult enough; working with 47 would be virtually impossible." That's his quote.

Sensible solutions to this dysfunction are not new. Here's a quote from ward 11 councillor Frances Nunziata, who said, "When Mel Lastman was mayor ... we had 57 councillors. And at that time, there was a motion to reduce the councillors and we reduced it down to 44. And then when David Miller was mayor, we moved a motion to cut the council to 22."

Ward 3 councillor Stephen Holyday made a very convincing observation about our proposal for 25 wards for Toronto. He said in his quote, "At the federal and provincial level, we have a single representative in an area of that size. They seem to get it done."

Madam Speaker, how can people argue against these comments? How can they argue against people who live with this every day at Toronto council? It works for the federal level. It works for us at the provincial level. Why would it not work at the municipal level?

This is not a new position for our Premier. As ward 37 councillor Michael Thompson said, "[The Premier] is being, basically, steadfast with respect to his position that he has always maintained, that the size of council needed to be addressed in order to be more efficient, more effective, and address the issue around cost."

Overall, I think this was an opportunity to streamline, an opportunity to make decisions faster. We need to make sure that this council can work fast, that it can move quickly after the October 22 election and work on those important issues like infrastructure, like housing, like transit. The people of Toronto should have the opportunity to say they know who their member of Parliament is, to make sure it's the same jurisdiction as their member of provincial Parliament, and then to have the same jurisdiction for their municipal councillor.

I want to talk about the nomination deadline. Our proposed legislation does something else. As I mentioned, if passed, it would change the nomination date in the city of Toronto to September 14. I want to point out, Speaker, that the second Friday in September, September

14, is the exact same day as the previous nomination deadline in the 2014 election. It's a date that is not new for people in the municipal sector. It's the same one, so candidates who ran in the last municipal election in Toronto would be very familiar and comfortable with the deadline. It's one of the steps our proposed legislation includes to be fair to candidates running for Toronto city council and for Toronto school board trustee elections. This gives candidates the time to consider what ward they want to run in and it gives them the time to work out the reporting and the expense side of it. Our government would work with the Toronto city clerk's office to ensure that candidates for municipal council or school board trustee are able to continue their campaign and ensure the contributions they collect are treated fairly. Working with the clerk's office, we would assist the city's efforts to provide clear guidance and rules with regard to spending limits and reporting requirements.

Overall, our goal is to make it straightforward and simple for candidates to determine which, if any, of the new wards they want to run in. And I want to emphasize that this new nomination date would apply to the city of Toronto only. No other municipal election process in Ontario would be affected.

1640

Now, Speaker, our government is committed to providing a better future for the everyday people of Ontario. Municipal governments are the level, as I said earlier, closest to the people. They play a large and important role in delivering services, and we want to ensure that we get those services to people in the most effective and most efficient way possible.

This bill strengthens the ability of local governments to meet the expectations of ratepayers and residents. That's why, this fall, our government will be building and launching a consultation on a very important level, the regional level of government. What we are going to do is take a long look at regional government across this province. We're going to look at what has been very effective and what hasn't. Since regional governments were created in the 1970s, not much has been done to continue to support them. Many of them have grown large and have to deal with very, very complex issues, like providing infrastructure and services to rapidly growing communities.

Speaker, we want to know what works and what doesn't. We want to figure out what we can do better for the people of Ontario. We also want to engage municipalities in finding solutions and ensuring that these communities have the right form of government to support the needs of their residents and their businesses.

A few weeks from now, the largest municipal conference in Canada will be taking place. This year, the Association of Municipalities of Ontario, which many of us fondly call AMO, will hold its annual conference, a conference with more than 1,500 municipal representatives from almost every municipality in Ontario. They're going to gather in the city of Ottawa.

I think the AMO conference is a great opportunity for our government to informally engage in conversations that will inform us on some of those future decisions. We want to hear from municipalities. If they have other ideas to make government more efficient, if they have ideas on streamlining their operations, getting business done more quickly to ensure that Ontarians are open for business, then our government is all ears. This is an exciting time for municipal government in Ontario.

As I said—and it's worth repeating, Speaker—our government ran on a commitment to restore accountability and trust. We ran on a commitment to reducing the size and the cost of government, including an end of the culture of waste and mismanagement.

In closing, Madam Speaker, I want to reiterate that this bill is all about accountability and respect for the people of Ontario. Our proposal for Toronto ward boundaries to match federal and provincial electoral districts is an example. The electoral districts were established by an unbiased third party.

As the Premier has said, our government is restoring accountability so that everyday people can feel confident that government works for them, not for the insiders, not for the elites. We are focused on putting everyday workers and their families first, lowering taxes and reducing regulatory burdens.

Nos efforts sont principalement axés sur les travailleurs ordinaires et leurs familles, et ce, en réduisant les impôts et en allégeant les fardeaux réglementaires.

I think the people of Ontario sent a clear message on June 7: They want a government that gets things done, and that's exactly what we're doing. Since our swearing-in, our government has already passed our Urgent Priorities Act. Through that act, we ended the strike at York University and ensured that York students can begin their school year next month.

That act also ensures that hydro ratepayers, through our government, will have a say on salaries at Hydro One, and that act cancelled a wind farm in Prince Edward county that local residents didn't want.

We've also tabled our Cap and Trade Cancellation Act, 2018, which is our government's first step towards lowering the price of gasoline in Ontario.

Now we're working to deliver the Better Local Government Act, and it's just a start, Madam Speaker. Our government will continue to make the provincial government and local governments work harder, work smarter and more efficiently to make life better for all Ontarians.

The Acting Speaker (Mrs. Lisa Gretzky): Further debate?

Mr. Jim McDonell: I'd like to thank the Minister of Municipal Affairs and Housing for introducing the Better Local Government Act, which highlights the importance of local government and emphasizes that all levels of government must work effectively and efficiently for the people of this great province.

As the minister mentioned, the proposed legislation has two parts. He has explained the proposed changes for the city of Toronto for the members of this House. He has also provided an introduction to the vision, and we

have to review the functioning of regional governments to ensure they better service the needs of their communities.

I'm honoured to be given the opportunity to stand in the Legislature to speak about how this bill, if passed, will improve those regional governments, because our government for the people believes the regional municipalities of Ontario should be the ones to make important decisions about how they serve their residents. That includes how they select regional chairs.

Two years ago, in 2016, the previous government changed the Municipal Act to require that regional municipalities select their chairs by election. Municipalities that used to choose to appoint their regional chairs were no longer allowed to choose. The exception was Oxford county, which was allowed to continue to appoint one of their elected officials to also serve as regional chair.

We are proposing to reverse the changes that were introduced two years ago, changes that were unfair to regions that already had processes in place that work for their local communities. Four regional councils had to change their processes. They were York region, Peel region, Niagara region and the district of Muskoka. As I mentioned earlier, these regional governments had all previously appointed their chairs. We have proposed a return to the system that they used in the 2014 election, a system they designed and delivered before the previous government's legislation was forced upon them. The previous system is one that they are familiar with. It's a system they had decided had worked best for them.

We're reversing the 2016 changes for this election. In the future, regional councils will decide for themselves how to select their chairs. Going forward, we want to give that decision-making power back to the regional municipalities because they understand better than anyone how this intricate two-tiered municipal system works.

In Ontario's regional government model, voters are represented at two levels: at a local municipal level and regionally, where municipalities come together to address issues that affect a larger regional area. Regional governments, working with their member municipalities, decide which is best for their individual communities and the region as a whole.

Some regional governments had already decided to elect their chairs. People in the regions of Waterloo, Durham and Halton have been doing that for years. It was their choice; nothing was imposed on them, and with this bill, nothing would change for them either. But the regions of York, Peel, Niagara and the district of Muskoka didn't have a choice. The previous government imposed legislation on them, forcing them to elect their chair. We want to hit the pause button, allowing them to return to appointing their chairs, the same way they did in the 2014 election.

Regional government is a level of government that is closer to the people than you or I, Madam Speaker. They deal with everything from garbage pickup to waste water, from policing to paramedics and from daycare to retirement homes. They know what their local communities need and they are more than capable of deciding how their regional government should operate. This is something they did on their own for years, and we are very confident they can do so again.

Because every region is different, they deal with the different priorities and different issues. Take Peel region, Madam Speaker. The region has laid out 11 priorities for their regional council: priorities such as increasing affordable housing, planning and managing growth, and increasing waste diversion; priorities such as modernizing service delivery, attracting top talent to the region and making the movement of goods more efficient. These are all things that they deem important to their region and to their municipalities. When you scan this plan, you notice one thing: the majority of the municipalities in this region are focused on urban growth. That means they're dealing with urban issues. They know about the demand for real estate in the 905 and the increased cost to living.

Downtown Mississauga is not a farming community. However, you can bet that agriculture is the number one priority in Niagara region. Niagara boasts some of this province's finest wineries and most bountiful farms. Many of you probably enjoyed Niagara cherries or peaches this past weekend.

1650

The region attracts tourists who contribute to the economic prosperity of their communities. They need a regional council that stands up for growers and for the tourism that this industry brings to the region and local economy.

While these two regions may share some of the same needs, Peel and Niagara are very different. They rely on very different things to survive and to thrive.

York region is another example. Their strategic plan focuses on urban growth and transportation. They have also put affordable housing high on their priority list. They are feeling the same pressures that most of the municipalities in the greater Toronto and Hamilton area are feeling right now, with an increasing population and a high demand for homes.

However, the same cannot be said about the district of Muskoka. Drive three hours north of where we are right now, and there's a different story. Most of us know Muskoka as cottage country, a place where people from the urban centres of southern Ontario often go to escape and relax. While many people do in fact call Muskoka home, others call it a second home. It's a favourite vacation spot for many in the province and those visiting from other provinces and abroad. That is why the district of Muskoka's official plan has a section that focuses specifically on tourism and resorts—places many families in Ontario have gone to swim, hike or just relax for a weekend. Many of these resorts pride themselves on offering a serene experience in nature, many highlighting outdoor adventures in canoes and kayaks. You don't see much of that being offered in Vaughan, which we all know as a growing part of York region.

Madam Speaker, I say this to underline the strengths and priorities of each area. Not all regions are the same.

That is why we cannot have a one-size-fits-all approach to regional governments. We want them to be able to choose how they select their heads of council—what works best for them.

Last week, when our government for the people announced our intention to propose these changes, the Minister of Municipal Affairs and Housing said during the press conference, "It doesn't matter if you're in a rural or urban municipality, what you see time and time again is that the municipal level of government is the closest to the day-to-day lives of most people." He said, "This is another example of the province getting out of the way and making local government work harder, smarter and more effectively to make life better for everyone."

I think most people sitting in this room can agree. Many of the members here today got their start in municipal government. They understand the differences that make municipalities unique, and it's exactly these differences that make our province so great.

Premier Doug Ford was a Toronto city councillor for four years. The Minister of Municipal Affairs and Housing, who introduced this bill, was the mayor of Brockville for 10 years.

I've also been fortunate to serve at the municipal level. I served three terms as a municipal councillor in Charlottenburgh and South Glengarry townships, and was elected mayor of South Glengarry three times. I've been honoured to sit on many committees and boards in eastern Ontario, and served as the warden of the United Counties of Stormont, Dundas and Glengarry in 2006. I understand two-tiered municipalities. County and regional governments are two-tier levels of government, and I understand that they are governments filled with experienced, elected representatives who are more than capable of choosing what's right for their own communities. I understand the important relationships these counties and regions establish with their member lower-tier municipalities to ensure that they collaborate and cooperate to deliver important services to their residents. And I understand why it's important for them to be able to choose how they select their heads of council of these counties and regions. Be it an elected chair or an appointed one, they can decide, and they should decide.

From day one, some communities opposed the previous government's decision to force municipalities to elect their regional chairs. Bonnie Crombie, the mayor of Mississauga, has been quoted multiple times in the media as being against it, calling it "a solution to a problem we do not have." In fact, upon hearing about the changes that our government for the people is proposing here today, she is quoted as saying that this change "will signal that mayors and local councils are being heard on this matter." In fact, she made Mississauga's feelings plain, saying to the media that "Mississauga is the third-largest city in Ontario, and our council is perfectly capable of controlling our own destiny and working with the appointed regional chair to do so. In fact, in Peel, we voted 22-1 in 2017 against electing a regional chair."

This reinforces what we have been hearing all along. Regional governments need to be able to choose what is best for regional governments. They need to be able to take this to their councils and have a full discussion on the matter to debate what is right for their communities.

We propose to revert back to the same processes that these four affected regional municipalities used in the 2014 municipal election for the upcoming October election. We are directing municipalities to do what they have done before. York, Peel, Niagara and Muskoka would appoint their own chairs in October. Waterloo, Durham and Halton would elect them. Oxford county would appoint one of their elected councillors. This is not new to them. It's the way it was prior to 2016, when these sweeping changes were foisted upon them.

If regional municipalities want to revisit the issue after this election, they would be more than welcome to do so. The Better Local Government Act would, if passed, effectively give regional municipalities back the power to determine how their regional chair is selected in 2022 and thereafter. The imposed decision to add a fourth level of elected government in some of these regions invited dysfunction and discord. We would give the power of choice back to these regional governments. We want all levels of government to work in the best interests of their people.

I'm honoured to stand here before you as a representative of the residents of Stormont–Dundas–South Glengarry. I'm privileged to have served my community in various capacities, including as municipal representative. As a former municipal politician in a two-tiered municipality, I can safely say that they know what's best for their own communities. I'm looking forward to going to the annual Association of Municipalities of Ontario conference in August. It's a place where we can continue the conversation about how different levels of government can work together to provide prosperous, efficient service for the people. We can hear what works and what doesn't work.

I always found it helpful for municipal politicians to have open lines of communication with other levels of government, and we want our government for the people to continue that tradition. We are taking a first step here today by proposing the return of decision-making powers on selecting the heads of council for future elections back to regional governments. Regional governments have other important issues that they need to focus on, and we, as the province, need to get out of the way to make life better for the people whom we serve.

Thank you, Speaker. Now I turn it back to the member from Etobicoke–Lakeshore.

The Acting Speaker (Mrs. Lisa Gretzky): The member for Etobicoke–Lakeshore.

Ms. Christine Hogarth: Thank you, Madam Speaker. I just want to thank the minister and the member, my colleague from Stormont–Dundas–South Glengarry, for sharing their time with me today. The reason I wanted to speak is that this act actually affects my riding and will help the people of Etobicoke–Lakeshore, so I just wanted to add some comments to the dialogue today.

Premier Ford and Minister Clark showed great leadership when implementing the Better Local Government Act. During the campaign, Premier Ford was very clear about his desire to find efficiencies and reduce the size and cost of government that will work for the people.

This shouldn't come as any surprise. During his time as city councillor, then-Councillor Doug Ford often spoke about the fact that the city of Toronto was too large, inefficient and simply did not work well for the residents of Toronto. Time and time again, Doug Ford has said that it makes perfect sense for the city of Toronto ward boundaries to mirror the federal and provincial jurisdictions: 25 MPs, 25 MPPs and 25 city councillors.

1700

Madam Speaker, this issue isn't new. In fact, this issue has been discussed for nearly 20 years, and since amalgamation there have been several ward boundary changes. Former Toronto city councillor Doug Holyday brought this up time and time again, even writing the Minister of Municipal Affairs back in 1999, urging him to reduce the size of council to match their federal and provincial counterparts. Councillor Holyday said it's simple: one MPP per riding, one MP per riding and one city councillor per ward.

Holyday, who served as the last mayor of Etobicoke, deputy mayor of Toronto and an MPP in this Legislature, always knew that inflated council sizes and government waste never served residents well; in fact, it did the opposite.

Today I spoke with Doug Holyday, and he took me on a trip down memory lane and reminded me that it's a very difficult task to get politicians to reduce their role in people's lives and rein in spending. Thankfully, we have a Premier, a minister and Toronto city councillors, including Doug's son Councillor Stephen Holyday, who are taking on the badly needed leadership to get this done and serve the people better.

On August 9, 1999, Doug Holyday was quoted in the National Post: "This council is too large. We have completed our agenda only twice since the new city of Toronto was formed, even though council sometimes meets late into the night, and unfortunately, hurried decisions are often made to finish off as much of the agenda as possible."

He was also quoted in the Toronto Star that same year: "Council, because of its nature, is unlikely to ever downsize itself, so if this required reduction is to take place, it will have to be instigated by the province."

Twenty years later, Holyday's words have proven truthful. We know that city council needs to be reduced, and we know that the province would have to be involved, which is exactly what is taking place right now, with the leadership of Premier Doug Ford.

It has been brought up at city council twice in recent years. In 2013, then-Mayor Rob Ford tried to get council colleagues to vote in favour of reducing the size of council, but to no avail. Again, in 2016, council revisited this issue, to no avail.

Work is not getting done at city hall. Council has become inefficient and ineffective. Transit projects are never on time, if built at all, and never on budget. Who is losing out? The people of Toronto are losing out, the taxpayers.

I know first-hand of the bloated bureaucracy at city hall. I worked in a councillor's office for several years and saw the endless debate, non-stop roadblocks on transit, and infrastructure projects that should be taking place that are years behind schedule, because all they're doing is talking and talking and nothing is getting done. The system is simply not working.

I stand by and support the city councillors who are in favour of reducing council to 25 seats. Many of them are putting their own re-elections at risk by doing so. I particularly want to recognize the leadership of Councillor Justin Di Ciano, who happens to be my councillor in ward 5, Etobicoke–Lakeshore. Councillor Di Ciano has supported the Premier and the minister in the Better Local Government Act, and he has communicated his message very effectively to the people and to the public on how this act will only improve government services in order for a more efficient government.

Over and above Councillor Di Ciano, I'd also like to recognize other councillors who have joined in to endorse our plan: Councillor Holyday, Councillor Mammoliti, Councillor Ford, Councillor Crisanti, Councillor Nunziata, Councillor Thompson, Councillor Shiner, Councillor Palacio, Councillor Karygiannis, Councillor De Baeremaeker, Councillor Kelly, Councillor Holland, Councillor Crawford and Councillor Di Giorgio, all councillors across party lines.

Hon. Steve Clark: That's a lot of support.

Ms. Christine Hogarth: That is a lot of support; I agree.

These councillors are experienced. They have been councillors for some time now and they know all too well that more politicians is not the answer. As Premier Ford said, when you ask people if they want more politicians, what's the answer? No—no more politicians; less politicians.

In closing, I fully support this initiative and I thank the Premier and the minister for their leadership because I know this will help move my community forward. We need better access to our councillors and this will help streamline the process to get better access, to create more transit and more infrastructure for the city of Toronto and for Etobicoke, and it will finally get Toronto moving.

The Acting Speaker (Mrs. Lisa Gretzky): Questions and comments?

Ms. Jessica Bell: The Conservatives are talking about the need for better representation, and one thing that really concerns me is, why is it only Toronto that is being required to match provincial and federal boundaries? That seems utterly undemocratic to me.

Let me give you some examples. If we applied this rule of matching the federal and provincial boundaries to some other areas in Ontario, let's see how many councillors they would have: Waterloo, one councillor; Guelph,

one councillor; Milton, one councillor; Newmarket, one councillor; Oshawa, one councillor; Ottawa, eight councillors, down from 23; Hamilton, five councillors, down from 15; and Muskoka–Parry Sound, half a councillor each.

And then check this out: The 38 municipalities in Algoma–Manitoulin region would have one councillor for 38 municipalities.

This is not fair. Let's call this for what it is: It's an attack on Toronto and it's an attack on democracy.

The Acting Speaker (Mrs. Lisa Gretzky): Questions and comments?

Mr. Dave Smith: I'd like to just touch briefly on the last comment, that it was an attack on democracy. Elections Canada, in their piece about enhancing the values of redistribution, "Making Representation More Effective," actually has this statement: "A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing an inadequate representation to the citizen whose vote is diluted."

This act will provide parity, or very close to parity, for all of the wards in Toronto. That's completely in line with what Elections Canada has said, and it's a key component of democracy. We're not diluting anyone's vote. This bill, when passed, will give parity, or very close to parity, across Toronto: 25 MPs, 25 MPPs and 25 councillors.

Now, there's been some talk about sizes. None of these wards are actually going to be as big as what my own riding is and I'm able to represent the people in my riding. I'm not sure why it's not possible, then, for other councillors to be able to represent that many people. It's less than what I'm representing.

We made a promise to the people of Ontario that we were going to bring transparency and accountability to government. We know that the current Toronto council is dysfunctional, that they're not able to do the things that they want to do, that they should be doing, to represent their people. By making Toronto council smaller, we're giving better government to them. We're giving better representation to them.

1710

The Acting Speaker (Mrs. Lisa Gretzky): Questions and comments?

Ms. Jill Andrew: I'm just going to read some words from my community members: "It feels like we are screaming into the void right now. Many of us, especially those of us who are not wealthy, who are disabled, are genuinely fearful for what is to come." The initials of that person are L.M.

This person gave permission to give their name: Janet Conway calls this Ford government agenda "an assault of our most basic democratic right." I say it again: She calls it an assault of our democratic right.

I've heard from our friends on the other side that the boss is the people that you represent: fair and equitable representation. Well, listen to your boss, because Toronto–St. Paul's residents were not consulted. That's the piece we're missing here: consult, consult, consult.

You might have asked people a misleading question, like "Well, do you want more politicians?" But did you actually say, "Do you want us to cut city council, nearly by half, cut representation, keep it looking the same way it has forever, predominantly white, predominantly male"—

Interjection: That has nothing to do with it.

Ms. Jill Andrew: Actually, it does. Representation matters, and there's a member across who really shouldn't be laughing when I say that representation matters. It's pathetic.

Equity means that we look at communities and we look at their needs, and we respond to their unique needs. That's the difference from equity and equality. You can't paint every community the same, and that's what Bill 5 is doing.

The Acting Speaker (Mrs. Lisa Gretzky): Questions and comments?

Mr. Vijay Thanigasalam: As someone who grew up in Scarborough, as someone who went to school in Scarborough, who worked in Scarborough, and as I represent the great riding of Scarborough–Rouge Park—it is the east end of Toronto—what Toronto does not need is more politicians, Madam Speaker.

Transportation is the most important issue for the people of Scarborough. We need a transit system that is more dependable. An oversized council makes it almost impossible to build a meaningful consensus and get their job done. As a result, Madam Speaker, infrastructure crumbles, the housing backlog grows and transit isn't built.

We believe in better local government. We are going to reduce the size and cost of Toronto city hall so that decisions can be made quicker, while services can be delivered more efficiently and effectively. We are committed to restoring accountability and trust in government. We also promised to reduce the cost and size of government and end the culture of waste and mismanagement.

The Toronto Star poll shows that 68% of the people are in favour of reducing the councillors to 25. People made their decision loud and clear on June 7 to deliver our mandate. They elected us to serve them, to serve the taxpayers, Madam Speaker. We are not spending $25 million for more politicians. We need a small government to function effectively and efficiently.

The Acting Speaker (Mrs. Lisa Gretzky): Back to the Minister of Municipal Affairs and Housing.

Hon. Steve Clark: I want to take this opportunity not just to thank my parliamentary assistants, the member for Stormont–Dundas–South Glengarry and the member for Etobicoke–Lakeshore—

Interjection.

Hon. Steve Clark: I would also like to, despite the heckling from the member from Timmins, thank the members from University–Rosedale, Peterborough–Kawartha, Toronto–St. Paul's and Scarborough–Rouge Park for their comments.

As I said in my address, Speaker, we believe in better local government. We believe in more streamlined

decision-making. We want the council in the city of Toronto, after the election on October 22, to be streamlined and have the opportunity to make those quick and important decisions that will help people's everyday lives.

We also want to hit the pause button on those four regional chair elections that the previous government imposed on them in a bill in 2016. But we're doing in a way that we want to be open and consult. We think that the best opportunity to do that is at the Association of Municipalities of Ontario conference in a couple of weeks in Ottawa, which—we make no apology for it—is the largest conference of its type in the municipal sector. We want to work with our municipalities and we want to listen to what they have to say.

But clearly, in Toronto, for decades, it's been a problem. Decisions have been slow. Councils have been dysfunctional. We've got an opportunity with Bill 5 to put a new direction in Toronto politics, with the election of a smaller council. We listed many, many councillors who supported us, many councillors who I think need their voices heard.

To address something that one of the members opposite said, this is not a laughing matter for me. I know that the member talked about laughing—that's not true. It's a very, very important issue, one that we're listening to—

The Acting Speaker (Mrs. Lisa Gretzky): Thank you.

Further debate?

Ms. Andrea Horwath: I appreciate the opportunity to say a few words on the Bill 5 debate. I will be sharing my time with the MPP for Toronto–Danforth, who will be responding on behalf of the NDP with leadership on this file.

It's incredibly disappointing to all of us and to millions of Ontarians to watch the government, having defeated my motion this afternoon, barge ahead with the most anti-democratic action that this province has seen in years—anti-democratic. The government members are going to couch this as a debate about functionality of a council. What this debate is about is the fundamental premise of our democracy, which is that people should decide how their local councils look and what shape they take.

So I am very proud to be on this side of the argument, because history will show that this caucus, this official opposition, is on the right side of this argument. What this government is doing is wrong. It is an assault on local democracy. And in this day and age, in a country like Canada, in a province like Ontario, this kind of ham-fisted, heavy-handed, anti-democratic approach should not be happening.

The people of Ontario actually care about democracy. The people of our province actually respect each other and respect each other as voters. Every single Ontarian believes that the fundamentals of democracy need to be respected and need to be in place for us to be able to function as an appropriate place where decisions are made and debates occur in the best interests of the people—not in the best interests of Mr. Ford; not in the best interests of his attempts to kneecap his former political opponents; not in the best interests of Mr. Ford's desire to control a city that rejected him over and over again.

Regardless of political stripe, the process here is the issue. They're going to make a lot of noise as a government, trying to say that this is about functionality, this is about money-saving—a government that's wasting so much money already in lawsuits with the federal government, which are useless, in the tearing up of contracts that are going to cost untold millions and likely billions, just like what the Liberals did, as a matter of fact.

Mr. Gilles Bisson: They learned nothing.

Ms. Andrea Horwath: This government learned nothing from the wails that they made against the Liberals with their tearing up of contracts. They're now doing the same and, at the same time, scaring the heck out of the business community. Oh, my goodness: A Conservative government in Ontario, and they're scaring the business community because of their reckless and partisan and ideological behaviour. It's unbelievable, Speaker.

1720

The thing that's most worrisome of all is the fact that this government caucus is following behind a Premier who is behaving in a very vindictive and inappropriate way, a very personalized way, whose only purpose is to expunge progressives from city council, the very progressives who wouldn't vote for Mr. Ford. Really, that is what is our democracy has been reduced to? Shame on him.

That is not leadership, Speaker. That is not leadership at all. That is something completely different. In fact, leadership is actually embracing the voices of people, of our constituents, listening to what they have to say, giving them an opportunity to have a say not only on how their democracy operates and how their local councils operate but even here at Queen's Park. This government is about to ram this legislation through without even public hearings, just like they've done with everything thus far. It really is worrisome, Speaker, to see a government come into office and behave so badly so quickly.

This Premier's actions are outrageous; they are undemocratic. They're shocking to millions of people. Toronto and Torontonians are the ones who should have a say about their future, their council and their ward makeup. If that's going to change, then so be it. Change it, but do it in a democratic way. Do it with a process that actually engages people in their democracy, not with a knife, not with a machete slashing their rights, slashing their democracy, cutting it off at the knees—absolutely unacceptable, Speaker.

It strikes at the very values that we hold as Canadians, which is why my motion earlier said today very clearly that this is an undemocratic move. It is an un-Ontario move. It's an un-Canadian move, Speaker, and shame on the Premier for undertaking this particular action.

What we have in front of us is a debate and a bill that speaks to the nature of this Premier—his vindictive behaviour, his difficulty with being rejected. I think our member from Toronto–Danforth talked about that a little bit earlier. That's not leadership, Speaker. That's not Premierial behaviour.

Interjections.

The Acting Speaker (Mrs. Lisa Gretzky): I'd just like to mention to this side of the House that I am trying to listen to the speaker on this side of the House. During the hour time that this side of the House had to speak, this side of the House sat quietly. I'm sure they would appreciate it if you would give them the same courtesy.

Ms. Andrea Horwath: Thank you, Speaker.

Look, what's very, very clear here is that this initiative was not discussed at all during the election campaign. In fact, people were blindsided by this announcement, which makes it that more disgusting, frankly, Speaker. It makes it that more wrong that out of nowhere, after an election campaign where this was not raised at all, suddenly this move is robbing people of their democratic rights, robbing people of their ability to have a say on how their democracy functions. It is absolutely wrong, Speaker.

Again, it's something that the Conservative Party should have learned from the Liberal Party. People don't like it when you're not upfront about what your intentions are during an election campaign. Here we are, just a month and a half after the election took place, maybe a little bit more than that, a month and maybe two or three weeks. The bottom line is this: The government that we now have is no better than the government we got rid of because they're doing exactly the same things. They did not tell the truth in the election about what they were going to do to the city of Toronto, and now they're doing it. They said they were all about not wasting money, but they're wasting money like crazy. To top it all off, they are cutting off the democratic rights of the people of Toronto and they're dragging our province backwards. It's 2018. People should be electing their representatives. The regional chairs in Peel, in York region, in Niagara region and in Muskoka should not be chosen in the backrooms by other elected officials. They should be voted on by the people, the very people that this party pretended to respect and care about during the election, and six weeks later we find out: Oh, they don't care about the people. They care about their own vindictive agenda. They care about consolidating power, in particular the power for the responsibilities for the city of Toronto, into the Premier's office. This is what this is all about, right? The Premier couldn't get elected as mayor—

Mrs. Robin Martin: Point of order.

The Acting Speaker (Mrs. Lisa Gretzky): I recognize the member from Eglinton–Lawrence on a point of order.

Mrs. Robin Martin: Madam Speaker, on a point of order, the language being used by the Leader of the Opposition is unparliamentary in my view. The word "vindictive," under standing order 23(i)—she has been using the word "vindictive," which imputes motive. She has used it several times now. I do believe that it is inappropriate and that she is debasing the conduct in this House and causing people to create disorder within the House. That's why we're reacting the way—

The Acting Speaker (Mrs. Lisa Gretzky): When I stand, please sit.

I would caution the member to please be careful with the language that you were using.

Ms. Andrea Horwath: Thank you, Speaker.

The bottom line is what this Premier is doing is basically trying to consolidate—

Interjections.

The Acting Speaker (Mrs. Lisa Gretzky): Thank you. I don't need an interaction from the government side of the House when I make a ruling.

Ms. Andrea Horwath: What this Premier is doing is he's trying to consolidate the power for himself in the Premier's chair and trying to take over the city of Toronto, a municipality that has rejected him time and time again. How disgraceful is that? It's like being the worst sport in the world. The worst sport in the world can't win so they change the game, right? They change the rules of the game to rig it so that they can win. That's what a poor sport does. How sad is it for the people of Ontario, the 60% who didn't vote for Doug Ford and even the 40% who did, to see that this is the nature of the Premier elected to this chamber? It's a shameful thing, I think, all the way around.

But one of the things that I think people understand and recognize is that the Premier, no matter how hard he tries, is not the king. He's not the king of Ontario. He's the Premier of Ontario. He should show some respect for the people of Ontario and protect their democratic rights, not tear them up.

In discussing this issue today with the hundreds of people who were on the lawn, hearing what people are staying from Toronto and Niagara and Peel and York and Muskoka, the bottom line is that it's very, very clear that this move is a move that the government should reconsider. The government should withdraw this bill, and we urge them to do exactly that, because it sets a precedent in this place that says that government can behave with a complete lack of interest for the public's interest. That should never be the case. The government should always be for the people, which is what Mr. Ford pretended he was all about during the campaign. But, in fact, we find out afterwards that he's not.

What he's for are his backroom developer friends who are now going to have free rein in Toronto because that's what this is all about for Mr. Ford. It's about making sure his well-connected, rich cronies are able to buy up the TTC because he's going to privatize that after this move takes place. I would expect we'll see developers wanting to buy up some social housing units because that's probably another thing that's going to happen. Social housing will be sold off to his developer friends. It's going to mean the privatization of more public utilities,

like Toronto Hydro, because that's what the conservatives on city council want to see happening.

Really, what is the agenda here? It's not about the democratic rights of Torontonians. It's not about the rights of people to actually elect their representatives in the year of 2018. It's all about the Premier wanting to rule the city of Toronto from the Premier's office and, at the same time, provide his friends and his developer friends and his other friends with the spoils that they couldn't get in a democratic way.

1730

Speaker, I want to say thank you very much for the opportunity to speak on this disgraceful piece of legislation and leave—

Interjections.

The Acting Speaker (Mrs. Lisa Gretzky): Be seated, please.

The member for Eglinton–Lawrence on a point of order.

Mrs. Robin Martin: Madam Speaker, on the same point of order: The member is imputing motive by saying the Premier is trying to rig the elections and other such things. She said it several times and I think she should be sanctioned for it.

The Acting Speaker (Mrs. Lisa Gretzky): Thank you for the point of order.

Further debate?

Mr. Peter Tabuns: It's a pleasure to be able to rise and speak about this bill and the light it throws on the Premier and the way he's going to run this province in the next four years. It's very clear to me, and I think it's very clear to the people of this province, that he's abusing his very vast political power in the way he is dealing with the city of Toronto and with the regions of Niagara, York, Peel and Muskoka.

He's acting like a dictator. This is an extraordinary approach to the way one exercises power in a democracy. He cooked this up in a backroom. He consulted no one and, frankly, he—

Mrs. Robin Martin: Point of order.

The Acting Speaker (Mrs. Lisa Gretzky): I recognize the member for Eglinton–Lawrence on a point of order.

Mrs. Robin Martin: Madam Speaker, the member opposite used the word "dictator," which is abusive and insulting language. Earlier today, that same word was—

The Acting Speaker (Mrs. Lisa Gretzky): I'd ask the member to withdraw.

Mr. Peter Tabuns: Withdraw.

So what do we have before us? A bill that I think would be more appropriately titled the "roll back democracy in Toronto, Peel, Niagara, York, Muskoka, and throw your weight around act, 2018." That's what we've got on the table.

There are a variety of things I want to touch on, but I'm going to talk about the content of the bill first. When I do that, I need to acknowledge the researchers who did this work. Bilbo Poynter did great work in a very short time, and I have to say that when things go well, we have to recognize that researchers make us look good. When things go badly, we have to acknowledge it is our fault because they tried to correct us in the first place. So my thanks to them.

Again, this is a caution: When I was new here, I used to go into the details of bills, going clause-by-clause. Frankly, Speaker, you have to caution people to not operate heavy machinery after I do that. It's simply dangerous. Those of you who are driving home tonight, take a little coffee after you hear my speech.

I'm not going to go into every segment of the bill. I think the minister and the parliamentary assistant touched on it. I might have done a bit more, but I'm not going to go into every section. I do want to speak about some elements.

Bill 5 amends the City of Toronto Act, 2006, the Municipal Act, 2001—I know you remember that one—and the Municipal Elections Act, 1996, as well as providing—and this is important—the minister of housing and urban affairs the ability to further amend this act through regulation. That's really unusual. Those of you who understand the way we write laws here know we write the legislation that sets the framework within which regulations are written. Often, when a government acts in a way that's outside of the law that has been written—ultra vires is the term. When it's outside the law that has been written, the regulations are struck down. But in this, we have an inversion. In fact, the minister will be able to write regulations that will supersede any act that we put forward in this House.

The debate you're having today—frankly, you can debate it. We can go into committee, we can try to amend it, but the minister will be able to rewrite this act much as he wants. This is quite an extraordinary thing. I actually had a chance to talk to our House leader about that, a parliamentarian. I don't think we've seen this before. Maybe I'm wrong. It's highly unusual.

I want to say to you that not only is this a bill that rolls back democracy in the jurisdictions I listed, but it also undermines your power—our power as legislators—to determine what goes out and what exists on the ground. It's an extraordinary piece.

I know that when the minister can do this, it opens a door to those famous overnight regulation-writing binges where you see crates of Scotch and coffee going into the minister's office, where they're going to go overnight and rewrite the legislation because, you know, they feel like it. That's a real problem. I don't think one-man rule is a good idea. I think having debate out in the open amongst legislators, where the public can hear the arguments that are made and, assuming you have consultation, can come and speak about what's there—when you close the door to that, you open a very, very dangerous precedent. A very dangerous precedent.

Now, there's one generous interpretation to this: When the Attorney General's lawyers got the grease-stained napkin from the Tom Jones Steakhouse with all this written on it, they couldn't make it all out. They knew there might be problems when they wrote it up, so they

took down what they could and realized, "We've got to throw this in, in case there's stuff we don't understand, in case there's a snag that can be corrected by the minister." That is the most generous interpretation I can give.

There's another interpretation in that a lot of games can be played when vague legislation gives a lot of power into the hands of one man. That is a problem. That is a problem.

Schedule 1 of this brief bill amends the City of Toronto Act and strips the city of Toronto's ability to determine composition of city council and the division of the city into wards. No surprise. That's his direction. But beyond that, he's saying not just this election but in future, the city of Toronto won't have the power to set its wards. It's gone. One of the largest governments in Canada, bigger than a number of provinces—not exactly amateur hour—and a government that was given the power to determine its structure is being told not only not this time but not in future; forget it.

It's interesting to me because I hear regularly from the other side these complaints about the nanny state. The nanny state: Higher levels of government are trying to tell us how to live our lives. Well, the nanny has spoken, and when it comes to Toronto, "You naughty kids. God, how is it that you divided up those toys and didn't talk to us first? From now on, we're going to tell you how to divide up those toys. Be sure of it; you're not going to be heard from again, because we get to call the shots." Not, not, not a democratic approach.

Now, even then, a nanny does have some limits—some limits, Speaker—and those limits express themselves in schedule 2. I know you've all read schedule 2: the racy parts, the fascinating parts.

Mr. Gilles Bisson: Is this about accommodation of the voter?

Mr. Peter Tabuns: No, no. Schedule 2 is a whole other thing. You've got to read it to appreciate it and let it soak into you.

It provides that for the 2018 regular election, the head of council of certain regional municipalities shall be elected by a general vote. You understand that, Speaker. That section is re-enacted except for a number of municipalities: Niagara, Peel, Muskoka and York. No, let's not re-enact it. They are going to go back to appointments. I'm going to speak about Niagara shortly.

But, interestingly, that section lapses. After 2018—even though this time the Premier is acting towards those who are running in those races in a way that I will describe later—those regions can write their own rules and say, "Ah, we're going to have an elected regional chair in the future."

The nanny, when it comes to Toronto—you know, it's an unruly place. What are you going to do? You've got to take it over. But for these regions, this is a one-time-only offer.

So we're going to have this sort of drive-by beating-up of Patrick Brown in Peel—not that I'm a fan of Patrick Brown. I would have worked very hard to defeat him in the last election, if he had been the leader. But, frankly, going in and changing the regional government to get at the guy is an extraordinary thing to do with provincial power—and then Steve Del Duca in York. Steve and I fought regularly. He's not here, so I don't have to call him by his riding name. Steve and I fought all the time. But using the power of the province to do in those two politicians is an extraordinary abuse of that power; an extraordinary abuse. Now—

Interjection.

The Acting Speaker (Mrs. Lisa Gretzky): I recognize the member from Eglinton–Lawrence on a point of order.

1740

Mrs. Robin Martin: On a point of order, Madam Speaker: Again, the member opposite is using his opportunity to speak to impute motive, which is under—

The Acting Speaker (Mrs. Lisa Gretzky): Thank you. I appreciate the point of order. I will caution the member to choose his words wisely.

Back to the member.

Mr. Peter Tabuns: I want to speak a bit about Niagara region. I'm from Toronto; I know a bit more about Toronto, but my colleagues from Welland, St. Catharines and Niagara are dealing with a very big issue as well.

Niagara region was slated to directly elect their regional chair for the first time. This government stripped the people of Niagara of their democratic choice, of their democratic voice. Many in Niagara were looking forward to the election of the regional chair. Members in Niagara have brought to my attention that there has been an ongoing problem and disagreement at the regional level, a real divergence of opinions on the direction of the region. How do you solve that? Typically, in a democracy, elections seem to be a good idea. I don't know what everyone who is elected in this room thinks, but I actually think elections are a good idea, and so do the people of Niagara. The people of Niagara had a diverse choice of candidates; I'm sure it was all over the political map. They were going to make a choice on what direction they felt was best for their community—but not anymore. With no notice, the government has stripped them of this election. Beyond not notifying the province, they made the announcement the morning of the deadline for nominations. How do you run elections when you're changing things so late? This is an extraordinary thing. Those candidates had a very tough time deciding where they were going to go. I don't think people's main concern is what happens to candidates—frankly, it's just not on their radar—but in terms of democratic choice and direction in Niagara, this was a really, really bad decision. It's a major step backward for the Niagara region. There are about a half million people who live in Niagara. They deserve to be able to make a choice. That is being taken away by this Premier.

I stand with the people of Niagara, and I encourage them to fight, and I encourage this government to withdraw this antidemocratic bill and respect the people of the region.

I note that the point I made right at the beginning about the minister having power to write regulations to

overturn what we will debate here in the Legislature applies to Niagara and these regional races as well. It's quite an extraordinary piece of legislation—very noteworthy.

You have to say, Speaker, when you look at this kind of action taken against these regions, that this is a directed political measure. It is not a measured, thoughtful way of dealing with a problem in a democracy; it's a way of getting at people you don't like and making sure that they're out of the picture.

The Acting Speaker (Mrs. Lisa Gretzky): I'm going to ask the member to withdraw.

Mr. Peter Tabuns: Withdraw.

In Toronto, the Premier has announced that he intends to slash the number of councillors on Toronto city council from 47 to 25, as well as cancel those other races. That race is already well under way. People in Toronto went through a four-year process of consultation—and I'll touch on that later. In fact, the former mayor of Toronto, Rob Ford, initiated that project of consultation. He thought it was a good idea that we decide how many people are needed to run this city.

Interjection.

Mr. Peter Tabuns: Amazing, eh?

The news broke last Thursday evening, and the reason the Premier gave was, to reduce the size of government and end a culture of misuse and waste—from someone who wants to spend 30 million bucks on a legal action against the federal government, when his Attorney General in a press conference today could not say "Yes" to the question, "Do you think you can win?" She didn't even say, "Maybe." That was too strong. She would not answer the question. So 30 million bucks, folks, is being blown on this legal action that is going to wind up in the ditch. That is waste and abuse. So we have a small group on the right flank of Toronto council holding press events on Friday and again on Monday where they supported the Premier's decision. It was pretty clear that at least Michael Thompson knew on the Thursday that this was going ahead—not the rest of us. We don't really count because we're just elected representatives of the people, but Michael Thompson knew that. Intriguing; fascinating.

Two of the councillors appearing with Thompson, Justin Di Ciano and Giorgio Mammoliti, appealed an Ontario Municipal Board decision that upheld a city of Toronto decision to increase the council's seat count to 47 from 44. They appealed it to the OMB and they were rejected. The OMB wrote, "The board rejects that public consultation was inadequate." The OMB is a pretty conservative body. Those of you who have dealt with it may know they're cautious in their language. They're not generally considered friends of local government and tend to be an obstacle. But in this case they said that "the evidence was clear that the 47-ward structure initially recommended was in fact adjusted to reflect input from stakeholders in respect of communities of interest."

In a particular rebuke of Mammoliti's "do nothing" proposal, the OMB wrote the following: "Ultimately, the decision to re-examine the city's ward boundaries is one that lies with council." The OMB was right. "It has the ability to review its ward structure as often (or as little) as it chooses. The city undertook a lengthy detailed process, incorporating public comment and considered (and reconsidered) various options. Public and stakeholder inputs were incorporated throughout the process."

There was in fact a multi-year consultation process—something not happening here. Some people liked it; some people didn't like it. That's the nature of an open society. In the end, council adopted a position based on consultation with the people of this city that was upheld by the Ontario Municipal Board against the interests of those who don't like the idea of representation. The OMB ruled to dismiss the appellants' appeal of the council decision and to uphold the council decision.

Now, who would do something like this? Who would ask for a review of council structure so it was better reflective of the people of this city? Was it David Miller? No. Did David Miller do this?

Interjections: No.

Mr. Peter Tabuns: No, no, not him. Was it Mel Lastman?

Interjections: No.

Mr. Peter Tabuns: No. But, who could it be? The mystery deepens. It deepens.

Hon. Rod Phillips: Tell us; tell us.

Mr. Peter Tabuns: Mr. Phillips may know that Mr. Lastman wasn't involved; he would have advised him on this matter.

No, it came later. It was 2013. It was the Ford administration. Amazing. How about that? Who would have thought it? Who would have thought it?

Interjections.

The Acting Speaker (Mrs. Lisa Gretzky): Order, please.

Mr. Peter Tabuns: I actually went and looked at the city council record and the motion of the executive committee, which was intriguing. The motion was to set up this broad consultation and assessment. In fact, it set out responsibilities for those who were going to do the study. The consultant was to "undertake a ward boundary review for Toronto that is legally robust and will withstand legal scrutiny and possible appeals to the OMB." Well, apparently, they did that. And to "implement a two-stage broad engagement and consultation strategy with the Toronto public, communities, key stakeholders, the mayor and councillors to elicit input on Toronto's current ward boundaries and input on ward boundary options." Apparently, they did that, because it held up at the OMB. They actually delivered on the instructions given by Mayor Ford's executive committee.

"The consultant will be responsible to undertake a Toronto ward boundary review within the following parameters:

"Develop a ward boundary review process, work plan and engagement and consultation strategy that does not assume a predetermined number of wards or specific boundaries of wards for Toronto."

They didn't say, "You've got to take it up," or, "You've got to take it down." They said to come back with ward boundaries that reflect the needs of the city of Toronto and to apply "the principle of 'effective representation' as outlined by the Supreme Court of Canada and applied by the courts and the OMB in developing ward boundary options."

1750

Well, I think they did that. They were given instructions to look at what would work for the city of Toronto and they were told to go out and consult and make sure this is something that reflects the will of the people of Toronto—the will of the people of Toronto. And they did that.

So, in the winter of 2013-14, consultants brought in a report, a work plan. Then, in 2014-15, the ward boundary review process started, with the two-stage consultation going on. Then, in the spring of 2016, council considered the final report. So we're talking 2013 to 2016-17, roughly four years.

Tell me if I'm wrong, members of the government side, but I expect you're going to wrap this up in a few weeks. So four years of consultation with the people of Toronto, in an open process meant to elicit from them what they wanted in the way of representation, one that was challenged by those who were unhappy with it—they were rejected by the OMB. We have a decision, which most people would consider democratically arrived at and democratically representative, being thrown in the trash. That's an extraordinary thing. It was not a job creation plan. It was meant to deal with adequate representation of the people of Toronto by their elected representatives, and that's what we have here.

That's an extraordinary thing: being thrown out on a whim—actually, more than a whim, Speaker. I will go into my assessment of why this is happening as I get further into my speech.

The rules and legislation governing this: The city of Toronto is legislated primarily by the City of Toronto Act. Most other municipalities are primarily governed by the Municipal Act, 2001. Those bills are going to be amended.

Now, we know, notwithstanding the OMB ruling, that ultimately the province has jurisdiction, it has power over the city of Toronto. One should always exercise power carefully. You never know what's going to blow up when you exercise it badly. But it's pretty clear the province has power.

I'll note, though, that the City of Toronto Act, 2006, contains a set of governing principles committing the government to maintaining a co-operative relationship with the city and provides that this relationship be formalized in a written agreement. I'll just read from that agreement:

"The province of Ontario endorses the principle that it is in the best interests of the province and the city to work together in a relationship based on mutual respect, consultation and co-operation."

Who would argue with that? Put up your hands if you don't think there should be a system of consultation and co-operation. Come on. I look forward to people saying that that's bad news. I generally think that in dealing with municipalities, provincial government should work with them in a consultative and co-operative way—

Interjection.

Mr. Peter Tabuns: Yes, Parry Sound. Take your—

Mr. Bill Walker: Owen Sound.

Mr. Peter Tabuns: Owen Sound is a great place, a wonderful place, I have to say. But you would want consultation and co-operation in dealing—

Interjection.

Mr. Peter Tabuns: Yes.

"For the purposes of maintaining such a relationship, it is in the best interests of the province and the city to engage in ongoing consultations with each other about matters of mutual interest and to do so in accordance with an agreement between the province and the city."

So we actually have in the act not a requirement to consultation but an agreement between the province and the city that there will be consultation and co-operation—thrown out the window, irrelevant to this government.

Mr. Taras Natyshak: Aren't they big on consultation?

Mr. Peter Tabuns: Oh, I'm going to speak about consultation further; I appreciate that.

Not only was there an extensive process with the citizenry, there was an agreement between the province and the city for ongoing coordination, consultation and co-operation—not happening. There was no consultation on the bill before us, and there may be none. I look forward to seeing whether time allocation is brought in. Some of us will not be shocked if it is. I think you're wrong to do it. But I don't think you're going to consult. I don't think you're going to go anywhere near what the city of Toronto did with its citizens, because you don't have an interest in it. You've shown no evidence of such interest.

Speaker, we in the last few weeks have been seized with the debate about the sex ed curriculum. I've listened to the Premier, the Minister of Health and the Minister of Education speak at length about the reason we're throwing out a sex ed curriculum meant to keep children from being sexually abused and meant to ensure that we could prevent depression amongst LGBTQ youth. We've been told, "No, you can't go there because there was a bad consultation and we're going to throw it out and we're going to go on a consultation for an unspecified period of time"—

Interjection: "Biggest ever."

Mr. Peter Tabuns: "Biggest ever," yes. Sorry. Thank you. "Biggest ever."

But when there actually is a lengthy consultation by a city government with its citizens, that gets thrown out in a heartbeat; no problem. The cover being used for sex ed is a very thin cover; in fact, it's saran wrap. One can see through it.

I would oppose this bill even if it was being set in place so that it would have effect on the elections four years from now. I would oppose it because I don't think

it makes sense. But that's not what is happening. In fact, what's happening is a disruption of an election process that is already under way, because I have been canvassed at my door by candidates already. I think that's a good thing. I'm very appreciative of the fact that they are out on the street and talking to people now. You've got to do it.

So it's an extraordinary thing, and it would be extraordinary in Ontario if the federal government stepped in when we were in the middle of an election and said, "Oh, you know, we're going to change it all today." It shows utter, total lack of respect for the people of Toronto.

Speaker, I know my time is short, but I know I get more time next week and I'm looking forward to that. I had an opportunity earlier today when we were debating our leader's motion on rejecting this bill to talk a bit about what are the motives here. I gather there's some sensitivity in my talking about the motives, so I will just note that there are two books that I urge every member of this Legislature to read. And I urge that those who are watching today read Crazy Town by Robyn Doolittle and Mayor Rob Ford: Uncontrollable by Mark Towhey.

Now, Robyn Doolittle is not as sympathetic to Mayor Ford as one might want if one was in favour of Mayor Ford, but it's still a fairly good journalistic piece. Uncontrollable by Mark Towhey—let's be gentle. Mark is no leftie. He's a bright guy and, frankly, after I read the book I thought, "This is a guy I'd like to talk to someday." But he has a very clear-eyed assessment of what went well and what went wrong in that administration. Frankly, those who want to understand how this Premier is dealing with the city of Toronto would be well advised to read those books to see how power is used and abused. Because one can only think that the ego of this Premier was deeply damaged by his experience with Toronto city council. Why else would you do this? Why is this a priority, frankly? Why would this be a priority?

When the city of Toronto was dealing with the chaos of the Ford administration, the mayor of the time and his brother, who, when you read those books, you can see was deeply integrated into the decision-making—and "deeply integrated" may be an understatement—were, those two men, isolated and pushed out by the rest of council, a council composed of people on the right, on the left and in the middle, because they couldn't stand the chaos. We were getting a reputation globally for chaos. I had friends who were in Uruguay on holiday. A guy came up and said, "Where are you from?" They said, "Toronto." "Oh, Toronto, yes. We've heard about that." Michael Prue, formerly from Beaches–East York, was in Taiwan. He picked up the newspaper and there was a big picture of Doug and Rob on the front cover—Taiwan. Oh, no, we hit the big time. So you have a Premier who got locked out by the rest of council who were trying to protect the city.

You look like you want to say something, Speaker.

Second reading debate deemed adjourned.

The Acting Speaker (Mrs. Lisa Gretzky): Seeing the time on the clock, this House stands adjourned until 9 a.m. on Tuesday, August 7, 2018.

The House adjourned at 1759.

TAB 14

Cited paragraphs: 109-110

Longley et al. v. The Attorney General of Canada[Indexed as: Longley v. Canada (Attorney General)], 88 O.R. (3d) 408

Ontario Reports

Court of Appeal for Ontario,

O'Connor A.C.J.O., Armstrong and Blair JJ.A.

December 6, 2007

88 O.R. (3d) 408

Case Summary

Charter of Rights and Freedoms — Democratic rights — Political parties — Restrictions on entitlement of political parties to direct public financing imposed by s. 435.01(1) of Canada Elections Act violating s. 3 of Charter — Violation being justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, s. 3 — Canada Elections Act, S.C. 2000, c. 9, s. 435.01(1).

Charter of Rights and Freedoms — Equality rights — Political parties — Restrictions on entitlement of political parties to direct public financing imposed by s. 435.01(1) of Canada Elections Act not violating s. 15 of Charter — Canadian Charter of Rights and Freedoms, s. 15 — Canada Elections Act, S.C. 2000, c. 9, s. 435.01(1).

Charter of Rights and Freedoms — Freedom of association — Political parties — Restrictions on entitlement of political parties to direct public financing imposed by s. 435.01(1) of Canada Elections Act not [page409] violating s. 2(d) of Charter — Canadian Charter of Rights and Freedoms, s. 2(d) — Canada Elections Act, S.C. 2000, c. 9, s. 435.01(1).

Charter of Rights and Freedoms — Freedom of expression — Political parties — Restrictions on entitlement of political parties to direct public financing imposed by s. 435.01(1) of Canada Elections Act not violating s. 2(b) of Charter — Canadian Charter of Rights and Freedoms, s. 2(b) — Canada Elections Act, S.C. 2000, c. 9, s. 435.01(1).

Civil procedure — Parties — Legal capacity — "Deemed person" provisions in s. 504(a) of the Canada Elections Act not infusing political parties with status of legal entitles entitled to sue or to be sued for all purposes — Section 504(a) clothing political parties with that status only for purposes of proceedings under Act — Canada Elections Act, S.C. 2000, c. 9, s. 504(a).

Section 435.01(1) of the Canada Elections Act restricts entitlement to direct public financing, in the form of quarterly allowances, to political parties which obtain more than 2 per cent of the vote nationally in a general election, or 5 per cent of the total votes cast in the constituencies where they run candidates. On an application by the individual and political party respondents attacking the constitutionality of the 2 per cent and 5 per cent thresholds in s. 435.01(1), the application judge found that s. 435.01(1) violates ss. 3 and 15 of the Canadian Charter of Rights and Freedoms, that the infringement is not justified under s. 1 of the Charter, and that the language of s. 435.01(1) should, by operation of the remedies of severance and reading in, be read to provide a minimum threshold of "one vote" for qualification for receipt of the quarterly allowances. Canada appealed.

Held, the appeal should be allowed.

The thresholds in s. 435.01(1) of the Canada Elections Act violate s. 3 of the Charter by exacerbating a pre-

existing disparity in the capacity of the various political parties to communicate their positions to the general public, which in turn diminishes the capacity of the individual members and supporters of smaller parties to play a meaningful role in the electoral process. The thresholds violate Parliament's obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process.

The violation of s. 3 is justified under s. 1 of the Charter. The objective of the impugned provision -- preserving the integrity of the Canadian electoral process and its public funding mechanisms by guarding against the misuse of public funds -- is pressing and substantial. There is a rational connection between that objective and the 2 per cent and 5 per cent thresholds because the thresholds help to ensure that groups which choose to register as political parties, but which have little intention of engaging in true electoral competition or in the political discourse of the day, are not able to access public funds to do so. The thresholds meet the minimum impairment test. They do not impede the right of political parties to be registered and thereby to become entitled to key public funding and informational benefits. Meeting the s. 435.01(1) thresholds merely entitles a political party to additional public funding benefits in the form of (a) reimbursement of 50 per cent of its electoral expenses following an election, and (b) an annual allowance of $1.75 for every valid vote received in the most recent general election. Parliament was constitutionally permitted to select the relatively modest voting threshold approach over the option of an audit regime designed to thwart the misuse of public funding by political parties. There was a reasonable apprehension [page410] that the audit option could have a significant deleterious effect on other values fundamental to the political process, namely, the need to preserve the independence and internal autonomy of political parties and the need to preserve the actual or perceived impartiality and integrity of the office of the Chief Electoral Officer. The salutary effects of the impugned thresholds outweighed their deleterious effects.

The application judge erred in finding that the thresholds violate s. 15 of the Charter. Only individuals may claim the protection of s. 15. Thus, the respondent political parties were not entitled to assert a claim that they had been subject to differential treatment vis-à-vis larger parties. Even if the s. 435.01(1) thresholds treat members or supporters of non-threshold achieving parties differently, they do not distinguish between smaller and larger parties, or their members or supporters, on the basis of personal characteristics. The differential treatment is based upon the number of votes a party obtains in a general election.

The thresholds do not infringe s. 2(b) or s. 2(d) of the Charter. They do not lead to any substantial interference with the ability of members or supporters of political parties to exercise their freedom of expression or their freedom of association. Diminished effectiveness in the ability to convey a message, or in the ability to associate, is not sufficient; there must be substantial interference with a fundamental freedom.

The "deemed person" provisions in s. 504(a) of the Act do not infuse political parties with the status of legal entities entitled to sue or to be sued for all purposes; rather, s. 504(a) clothes them with that status only for purposes of proceedings under the Act.

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(3d) 1*; Gosselin v. Québec (Attorney General), *[2002] 4 S.C.R. 429*, *[2002] S.C.J. No. 85*, *221 D.L.R. (4th) 257*, *100 C.R.R. (2d) 1*, *2002 SCC 84*; Haig v. Canada, *[1993] 2 S.C.R. 995*, *[1993] S.C.J. No. 84*, *105 D.L.R. (4th) 577*, *156 N.R. 81*, *16 C.R.R. (2d) 193* (sub nom. Haig v. Canada (Chief Electoral Officer), Haig v. Kingsley); Harper v. Canada (Attorney General), *[2004] 1 S.C.R. 827*, *[2004] S.C.J. No. 28*, *348 A.R. 201*, *239 D.L.R. (4th) 193*, *320 N.R. 49*, 321 W.A.C. 201, *[2004] 8 W.W.R. 1*, *119 C.R.R. (2d) 84*, *2004 SCC 33*, *27 Alta. L.R. (4th) 1*; [page411] Harvey v. New Brunswick (Attorney General), *[1996] 2 S.C.R. 876*, *[1996] S.C.J. No. 82*, 178 N.B.R. (2d) 161, *137 D.L.R. (4th) 142*, *201 N.R. 1*, 454 A.P.R. 161, *37 C.R.R. (2d) 189*; Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, *[2007] 2 S.C.R. 391*, *[2007] S.C.J. No. 27*, *283 D.L.R. (4th) 40*; Jazairi v. Ontario (Human Rights Commission), *[1999] O.J. No. 2474*, *175 D.L.R. (4th) 302*, *68 C.R.R. (2d) 32*, 99 C.L.L.C. Â230-024 (C.A.), supp. reasons *[1999] O.J. No. 3896*, *68 C.R.R. (2d) 47* (C.A.) [Leave to appeal to S.C.C. refused *[1999] S.C.C.A. No. 448*, 256 N.R. 197n]; Libman v. Québec (Attorney General), *[1997] 3 S.C.R. 569*, *[1997] S.C.J. No. 85*, *151 D.L.R. (4th) 385*, *218 N.R. 241*, *46 C.R.R. (2d) 234*; Little Sisters Book and Art Emporium v. Canada (Minister of Justice), *[2000] 2 S.C.R. 1120*, *[2000] S.C.J. No. 66*, *83 B.C.L.R. (3d) 1*, *193 D.L.R. (4th) 193*, *263 N.R. 203*, *[2001] 2 W.W.R. 1*, *79 C.R.R. (2d) 189*, *150 C.C.C. (3d) 1*, *38 C.R. (5th) 209*, *2000 SCC 69*; Lovelace v. Ontario, *[2000] 1 S.C.R. 950*, *[2000] S.C.J. No. 36*, *48 O.R. (3d) 735*n, *188 D.L.R. (4th) 193*, *255 N.R. 1*, *75 C.R.R. (2d) 189* (sub nom. Ardoch Algonquin First Nation v. Ontario); M. v. H., *[1999] 2 S.C.R. 3*, *[1999] S.C.J. No. 23*, *43 O.R. (3d) 254*n, *171 D.L.R. (4th) 577*, *238 N.R. 179*, *62 C.R.R. (2d) 1*, *46 R.F.L. (4th) 32*; Newfoundland (Treasury Board) v. Newfoundland Assn. of Public Employees, *[2004] 3 S.C.R. 381*, *[2004] S.C.J. No. 61*, *242 Nfld. & P.E.I.R. 113*, *244 D.L.R. (4th) 294*, *326 N.R. 25*, 719 A.P.R. 113, *125 C.R.R. (2d) 4*, *2004 SCC 66*, *24 Admin. L.R. (4th) 201*; R. v. Daoust, *[2004] 1 S.C.R. 217*, *[2004] S.C.J. No. 7*, *235 D.L.R. (4th) 216*, *316 N.R. 203*, *180 C.C.C. (3d) 449*, *2004 SCC 6*, *18 C.R. (6th) 57*; R. v. Mac, *[2002] 1 S.C.R. 856*, *[2002] S.C.J. No. 26*, *163 C.C.C. (3d) 1*, *50 C.R. (5th) 50*, *287 N.R. 75*, *159 O.A.C. 33*, *2002 SCC 24*; Reference re Provincial Electoral Boundaries (Sask.), *[1991] 2 S.C.R. 158*, *[1991] S.C.J. No. 46*, *94 Sask. R. 161*, *81 D.L.R. (4th) 16*, *127 N.R. 1*, *[1991] 5 W.W.R. 1*, *5 C.R.R. (2d) 1* (sub nom. Provincial Electoral Boundaries (Re), Carter v. Saskatchewan (Attorney General), Provincial Electoral Boundaries (Sask.) (Re)); Rizzo & Rizzo Shoes Ltd. (Re), *[1998] 1 S.C.R. 27*, *[1998] S.C.J. No. 2*, *36 O.R. (3d) 418*n, *154 D.L.R. (4th) 193*, *221 N.R. 241*, *50 C.B.R. (3d) 163*, *33 C.C.E.L. (2d) 173*, 98 C.L.L.C. Â210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); RJR - MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*, *[1995] S.C.J. No. 68*, *127 D.L.R. (4th) 1*, *187 N.R. 1*, *31 C.R.R. (2d) 189*, *100 C.C.C. (3d) 449*, *62 C.P.R. (3d) 417*; Sauvé v. Canada (Chief Electoral Officer), *[2002] 3 S.C.R. 519*, *[2002] S.C.J. No. 66*, *218 D.L.R. (4th) 577*, *294 N.R. 1*, *98 C.R.R. (2d) 1*, *168 C.C.C. (3d) 449*, *2002 SCC 68*, *5 C.R. (6th) 203*; Stevens v. Conservative Party of Canada, *[2005] F.C.J. No. 1890*, *262 D.L.R. (4th) 532* (C.A.); Thomson Newspapers Co. v. Canada (Attorney General), *[1998] 1 S.C.R. 877*, *[1998] S.C.J. No. 44*, *38 O.R. (3d) 735*n, *159 D.L.R. (4th) 385*, *226 N.R. 1*, *51 C.R.R. (2d) 189*; Trociuk v. 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Canadian Charter of Rights and Freedoms, ss. 1, 2, 3, 15, 24(1) [page412]
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House of Commons Debates, No. 057 (11 February 2003) at 1535 (Rt. Hon. Jean Chrétien)

APPEAL from the judgment of Matlow J. (2006), 82 O.R. (3d) 481, [2006] O.J. No. 4316 (S.C.J.), allowing an application attacking the constitutionality of s. 435.01(1) of the Canada Elections Act.

Gail Sinclair and Peter Hajecek, for appellant.

Peter Rosenthal and Larissa Ruderman, for respondents.

The judgment of the court was delivered by
BLAIR J.A.: —

Part I -- Background and Facts

Introduction

[1] "Money is the mother's milk of politics", says the respondent Blair Longley, leader of the Marijuana Party of Canada. The individual and political party respondents want more of it from the public purse. They say that the current regime for the regulation and public support of registered political parties [page413] under the Canada Elections Act, S.C. 2000, c. 9 unconstitutionally deprives them of financial benefits available to larger political parties.

[2] Amongst the array of benefits available to registered political parties is the right of those that obtain more than 2 per cent of the vote nationally in a general election, or 5 per cent of the total votes cast in the constituencies where they run candidates, to receive direct public financing in the amount of $1.75 for every vote cast, indexed, and payable quarterly. The constitutionality of those thresholds -- found in s. 435.01(1) of the Act[1] -- is the primary issue on this appeal. Additional issues involve the remedies imposed and rejected by the application judge (who found that the thresholds violated ss. 3 and 15 of the Canadian Charter of Rights and Freedoms), and his interpretation of s. 504 of the Act (which deems a political party or association, in certain circumstances, to be a "person").

[3] The Attorney General of Canada seeks to set aside the judgment of Matlow J., dated October 12, 2006. In that judgment Justice Matlow ruled that the provisions of s. 435.01(1) infringed ss. 3 and 15 of the Charter, that those infringements could not be saved by s. 1 of the Charter, and that the language of s. 435.01(1) should, by operation of the remedies of severance and reading in, be read to provide a minimum threshold of "one vote" for qualification for receipt of the quarterly allowances. He ordered the Receiver General for Canada to pay quarterly allowances to the six party respondents retroactively to January 1, 2004, plus prejudgment interest, in the total amount of $567,435.60. He also ruled that s. 504(a) of the Act gave political parties standing to sue in their own name and to claim s. 3 and s. 15 Charter rights on behalf of their individual members.

[4] Justice Matlow rejected the respondents' claims for (a) damages in the amount of $100,000 for each claimant for loss of political opportunities suffered as a consequence of the respondent political parties not receiving quarterly allowances, and (b) punitive damages in the amount of $500,000 for each claimant. The respondents cross-appeal from the dismissal of those claims.

[5] For the reasons that follow, I would allow the appeal and dismiss the cross-appeal. [page414]

Facts[2]

Current public funding for registered political parties under the Act

[6] At the present time, the Act provides a measure of public funding to registered political parties on a two-tiered basis.[3]

[7] First, once a party has been registered, it becomes entitled to an initial set of benefits of both an informational and financial nature. The party is recognized as a registered political party under the Act and its name and logo are protected. Its party affiliation is placed on the ballot beside the name of each candidate running for the party. The party is entitled to an allocation of free broadcasting time, and to an allocation of guaranteed broadcasting time at the lowest commercial rate. Importantly, it is able to raise funds through the political contribution tax credit regime by issuing receipts for contributions received throughout the year, and it is able to receive any surplus funds from election campaigns of its individual candidates following an election.

[8] Secondly, once a registered political party meets one of two measures of electoral success -- obtaining two per cent of the national vote or five per cent of the total of all votes cast in the constituencies in which it runs candidates -- it is entitled to an additional set of measures of public funding:

(a) reimbursement of 50 per cent of its electoral expenses following an election; and

(b) an annual allowance of $1.75, as indexed, for every valid vote received in the most recent general election, paid on a quarterly basis.

[9] The four principal requirements for status as a registered political party under the Act are modest. A political party must:

(a) provide the names of 250 electors who are members of the party and who support its application for registration; [page415]

(b) provide the names of its leader, chief agent, auditor and one other officer;

(c) provide a declaration by its leader that "one of the party's fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election"; and

(d) run at least one candidate.

Legislative history

[10] In 1974, the Election Expenses Act, S.C. 1974, c. 51, introduced unique measures of public funding for political parties, chiefly by amending the Act and the Income Tax Act. In exchange, parties and candidates were required to accept certain spending limits and new reporting obligations. At the time, measures of public funding for political parties were not provided on a tiered basis. Rather, once registered, a party was generally entitled to all measures of public funding then available. The threshold for becoming and remaining a registered political party was high, however, as, among other things, a party had to run at least 50 candidates in a general election unless it was represented in the House of Commons by 12 or more members.[4]

[11] Once registered at that time, a political party was entitled to the following measures of public support:

(a) party recognition as a registered political party under the Act, with protection of its name and logo;

(b) party affiliation on the ballot adjacent to the name of each candidate running for the party;

(c) an allocation of free and paid broadcasting time;

(d) the ability to raise funds through the political contribution tax credit regime by issuing receipts for contributors provided during the year;

(e) reimbursement of one-half of their television and radio advertising expenses. [page416]

[12] These provisions remained in place, essentially, until the mid-1990s. Following the 1993 General Election, however, there was agitation for a change in the requirements relating to the reimbursement of election expenses. The primary catalyst for this development was the Natural Law Party.

[13] The Natural Law Party was part of an international transcendental meditation movement. It promoted, amongst other things, the benefits of transcendental meditation (or "yogic flying", as it was called). In the 1993 election, it fielded over 200 candidates, received approximately 85,000 votes (or, 0.6 per cent of the national vote), and was rewarded with a total of $717,000 in public funds as reimbursement for its election expenses. Parliamentarians and members of the public were dismayed. The perception was that the Natural Law Party had not participated in the election for the purpose of engaging in political discourse and enhancing the political process; rather, its purpose was to advertise its contemplative lifestyle, promote its fee-based meditation courses and enhance its commercial aims. It hired people to "run" on its behalf. People were naturally concerned about the use of public funds to support such a campaign.

[14] In response, Mr. Ian McClelland, MP (Reform Party of Canada) introduced a private members bill in the House of Commons with a view to establishing an eligibility threshold for partial reimbursement of a party's election expenses. It proposed that a registered party would have to receive two per cent of the national vote before it would be entitled to such a reimbursement. After consideration by the House of Commons Standing Committee on Procedure and House Affairs, the Bill was enacted in October 1996, with its threshold of two per cent of the national vote or five per cent of the votes cast in electoral districts in which the party ran candidates (the threshold that now applies, as well, to the payment of quarterly allowances). At the time, a party still had to run at least 50 candidates in an election to be registered.

[15] Some of the concerns underlying the push to introduce the threshold are illustrated by the following statements by Members of Parliament during the debates:

(a) "If a party deserves to be reimbursed because it has support among the people, it will be. If, however, a party is using the electoral system in this country as a soapbox for personal or

questionable exposure and the people ignore it, then it should pay its own bills."[5] (emphasis added); [page417]

(b) "If the Natural Law Party wants to run for election, that is fine. If it wants to field candidates, that is fine. If it wants to use an election as a platform for promoting its particular agenda of metaphysicalism or whatever it is, that is fine too. It becomes a problem when the public perceives it is funding that type of group. That is the difficulty.

It is the same with all of the other parties as well. If the public perceives a group as out promoting itself in a national election and does not have much support or trivial support, and the government funds its election expenses because it can afford to put the money out there, then we erode our political system and the faith people have in the process."[6] (emphasis added);

(c) "Bill C-243 is a short bill which proposes amendments to only one subsection of the Canada Elections Act. However, it touches upon the important issue of financial controls for the electoral process. I believe that this is fundamental to representative democracy . . . We are familiar with the abuses of the last general election . . . Canadians wanted to know why their government handed out such sums to subsidize organizations whose objectives did not appear to be one of a political party."[7] (emphasis added);

(d) "The Rhinoceros Party and some other regional parties form for the sole intention of trying to make some fun out of the very serious business of politics. It is difficult as a candidate when that happens."[8]

[16] Further significant changes were made to the regime for public funding of political parties in 2003 with the enactment of Bill C-24. The modifications were in response to public concerns over the possible undue influence on elected officials stemming from large contributions from corporations, unions and wealthy individual donors. The new legislation imposed sweeping limits on all private financial contributions to political parties; it also introduced three measures of public funding: [page418]

(a) it doubled the amount of an individual's political contribution eligible for a 75 per cent tax credit at the lower end from $200 to $400, and increased the maximum tax credit at the higher end from $500 to $650 for a contribution up to $1,275, and allowed electoral district associations to issue tax receipts for the first time;

(b) it increased the potential reimbursement of a party's election expenses from 22.5 per cent to 50 per cent, with a temporary transitional boost of 60 per cent, and broadened the definition of "election expenses"; and

(c) it introduced annual allowances whereby parties can receive, on a quarterly basis, $1.75 (indexed) for every vote received in the preceding general election.

[17] This last measure -- the benefit at issue in this appeal -- was premised on the party meeting the same threshold that had previously been implemented in respect of the partial reimbursement of election expenses, namely that the party obtain two per cent of the national vote or five per cent of the total votes cast in the constituencies in which it runs candidates. It appears from the legislative history that Parliament, in employing the same threshold, adopted its previous rationale as applicable to the thresholds for partial reimbursement of election expenses in 1996. This is indicated by the statements of the Minister responsible for the introduction of Bill C-24 (Don Boudria) and the statements of the Chief Electoral Officer (Jean-Pierre Kingsley) before the House Standing Committee and the Senate Standing Committee dealing with the Bill. For example, Mr. Boudria told the Senate Standing Committee on Legal and Constitutional Affairs:

If taxpayers' dollars are dispensed for the purpose of giving a reimbursement after an election based on the 2 per cent and 5 per cent criteria, it stands to reason that the same criteria for dispensing of public dollars on the annual system of $1.75 should be based on the identical threshold. [. . .]

> We had to establish a cut-off at some point. We made our choice based on the case we have currently before the Supreme Court[9] and on the decisions of lower courts. The 2 per cent and 5 per cent is reasonable and proper in terms of getting the funding back after an election [in the context of expense reimbursement]. Therefore, it is equally reasonable and proper to get the funding back during, generally, non-election years when [page419] you use $1.75 for the continued sustenance of political parties. That is the logic under which we have operated for this.[10]

The Chief Electoral Officer testified as follows before the two Committees:[11]

> The new allowances to political parties would be tied directly to the level of popular support they received in the most recent general election. At the same time, minimum thresholds for receiving public funding are required to help ensure that the system does not create incentives for groups to establish themselves as parties for the purpose of collecting the quarterly allowances. There will still be the thresholds to be met.[12]
>
> This is the same threshold as is currently used for reimbursement of registered parties' election expenses. There is no change. This is the way it has been for a while.[13]

[18] Eight days after Bill C-24 received royal assent, the Supreme Court of Canada released its decision in Figueroa, supra, striking down, as an unjustified violation of s. 3 of the Charter, the 50-candidate threshold that had been a requirement for registered party status. It did so on the basis that the 50-candidate threshold unjustifiably infringed s. 3 of the Charter (the right to vote) by limiting the rights of Canadians to engage in meaningful participation in the electoral process through parties that did not meet the threshold. The declaration of invalidity was suspended to give Parliament one year to fix the problem.

[19] Parliament did so through An Act to Amend the Canada Elections Act and Income Tax Act, S.C. 2004, c. 24. The new law decreased the number of candidates that a party needs to run to be a registered party from 50 to one and increased the number of supporter signatures required from 100 to 250. It introduced for the first time a purpose-based definition of "political party", and required, as a condition of registration, that the party leader [page420] make a declaration that "one of the party's fundamental purposes is to participate in public affairs by endorsing one or more of its members as candidates and supporting their election".

[20] The foregoing provisions remain in effect today. They were made subject to a mandatory review provision in 2006,[14] but no such review has ever taken place.

Other jurisdictions

[21] In Canada, three provinces support registered parties with public funding. The allowances are allocated based on the number of votes received. Prince Edward Island requires a party to have at least one representative in the Legislature before it will be eligible for the allowances. New Brunswick requires a party to either run at least 10 candidates (out of 55 electoral districts) or to have one representative elected to the Legislature. While Québec had a requirement that a party field at least 20 candidates, it eliminated that requirement following the decision in Figueroa. Québec now requires only that a party be registered.

[22] Many other jurisdictions around the world impose thresholds as a requirement for the receipt of public funding by political parties. Some do so on the basis of votes, or a combination of votes and candidates or party members. Others do so on the basis of number of seats attained in the Legislature. Australia, Austria, France, Germany, Hungary, Ireland, Norway and Sweden fall into the former category. The United Kingdom, Spain, Portugal and South Africa fall into the latter.

[23] The history in France is of some interest. Major amendments to France's public funding regime for political parties occurred in 1990. The 1990 regime called for a threshold requiring a party to run at least 75 candidates (out of 577 constituencies) and obtain at least five per cent of the vote in each. Before the provisions became operational, however, France's Constitutional Council ruled the latter threshold unconstitutional. Public funding became available with no vote-based threshold in place, and from 1990 to 2003 the number of registered political parties increased from 29 in 1990 to 244 in 2003. The number peaked at 316 in 1999. There was some concern that groups were being formed solely for the purpose of accessing public funding. Interestingly, the Natural Law

Party was amongst the [page421] newly registered parties. Thresholds were re-introduced in 2003 to take effect in 2007. It requires parties to run a minimum of 50 candidates and to obtain at least one per cent of the vote in the constituencies in which candidates are run. France's Constitutional Council apparently took a different view of the new thresholds, raising no concern about them in a decision released in 2003.

Part II -- Issues

[24] The following issues arise on the appeal and cross-appeal:

(1) The Constitutionality of ss. 435.01(1)(a) and 435.01(1)(b) of the Act

(a) Do the impugned thresholds set out in s. 435.01(1) infringe ss. 2(b), 2(d), 3 and/or 15(1) of the Charter?

(b) To the extent that there are any infringements, can the impugned thresholds be saved under s. 1 of the Charter?

(2) Remedies

(a) Did the application judge err in issuing a declaration of invalidity, pursuant to s. 52 of the Constitution Act, 1982, combined with individual retroactive remedies pursuant to s. 24(1) of the Charter?

(b) Did he err in failing to suspend the s. 52 declaration?

(c) Are compensatory damages, on account of lost opportunities, an appropriate remedy pursuant to s. 24(1) in the circumstances of this case, and, if so, in what amount?

(d) Are punitive damages appropriate, and, if so, in what amount?

(3) Interpretation of s. 504 of the Act

(a) Did the application judge err in his interpretation of s. 504 in ruling that it (i) infuses political parties with legal personhood for all purposes; and (ii) confers on political parties the ability to invoke the individual Charter rights of their members without seeking public interest standing? [page422]

Part III -- Analysis

Section 3 of the Charter (the right to vote)

[25] Paragraphs 435.01(1)(A) and 435.01(1)(B) of the Act provide as follows:

435.01(1) The Chief Electoral Officer shall determine, for each quarter of a calendar year, an allowance payable to a registered party whose candidates for the most recent election preceding that quarter received at that election at least

(a) 2% of the number of valid votes cast; or

(b) 5% of the number of valid votes cast in the electoral districts in which the registered party endorsed a candidate.

[26] The respondents argue that these vote-based thresholds infringe s. 3 of the Charter and cannot be saved by s. 1.

[27] Section 3 of the Charter states:

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

[28] The Supreme Court of Canada has attributed to this right much more than simply the right to mark a ballot in an election or to run for office. In Figueroa v. Canada (Attorney General), *[2003] 1 S.C.R. 912*, *[2003] S.C.J. No. 37* -- a decision that casts a long shadow over the disposition of this case -- the Supreme Court of Canada (at para. 19) adopted the statement of McLachlin C.J.B.C.S.C. (as she then was) that "[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box": Dixon v. British Columbia (Attorney General), *[1989] B.C.J. No. 583*, *[1989] 4 W.W.R. 393* (S.C.), at p. 403 W.W.R. The purpose of s. 3 is "effective representation", but the right includes more than simply the right to be represented effectively in Parliament and the Legislatures; it encompasses as well the very broad right to play a "meaningful role", and to participate meaningfully, in the electoral process. See generally Reference re Provincial Electoral Boundaries (Sask.), *[1991] 2 S.C.R. 158*, *[1991] S.C.J. No. 46* (the "Saskatchewan Reference"); Haig v. Canada, *[1993] 2 S.C.R. 995*, *[1993] S.C.J. No. 84*; Harvey v. New Brunswick (Attorney General), *[1996] 2 S.C.R. 876*, *[1996] S.C.J. No. 82*; Thomson Newspapers Co. v. Canada (Attorney General), *[1998] 1 S.C.R. 877*, *[1998] S.C.J. No. 44*; Figueroa, supra; Harper v. Canada (Attorney General), *[2004] 1 S.C.R. 827*, *[2004] S.C.J. No. 28*.

[29] The application judge concluded that the Supreme Court of Canada's decision in Figueroa was dispositive of the issues before him and that the impugned thresholds violated s. 3. He [page423] declined, on that basis, "to approach the issues raised with a new analysis" and ruled that "[i]ndeed, it would be improper for [him] to do so" (para. 18). The Attorney General of Canada argues that the application judge erred in failing to conduct his own fresh analysis of the s. 3 issue because the thresholds here are different -- "are based on a different measure, serve a different purpose, and are set at different levels" -- and because, in delivering the court's decision in Figueroa, Iacobucci J. said, at para. 91:

> However, before I dispose of this appeal I think it important to stress that this decision does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s. 3. Nor does it stand for the proposition that an infringement of s. 3 arising from the differential treatment of political parties could never be justified.

[30] I agree that the thresholds at issue here are somewhat different than the 50-candidate threshold for political party registration at issue in Figueroa. I also agree that the application judge erred in not conducting a fresh analysis based on the circumstances before him. However, he did consider the implications and effect of Figueroa and, in any event, my own analysis leads me to the conclusion that Figueroa and the Supreme Court of Canada's subsequent decision in Harper, supra, leave little doubt that the s. 435.01(1) thresholds contravene s. 3 of the Charter.

[31] The Attorney General submits that the vote-based thresholds at issue here are different than those that were considered in Figueroa for a number of reasons.

[32] First, the Act, unlike before, now provides public support and financing to political parties on a tiered basis. The candidate threshold for party registration has been reduced from 50 to one. All parties receive significant initial measures of public support. Meeting the thresholds simply opens the door to additional measures of support such as quarterly allowances.

[33] At the time of the Figueroa decision, the 50-candidate threshold determined whether an organization would have access to registered political party status, and to the benefits attending that status, on an all or nothing basis. Those benefits included the right to issue tax receipts for contributions made between election campaigns, the right to transfer unspent election funds from the candidate to the party, and the right to list party affiliation next to a candidate's name on the ballot paper. Here, on the other hand, under the new registration regime that has been established, there are very limited requirements for attaining registered party status -- principally, one candidate, 250 supporters, and a simple declaration from the party leader to the effect that one of the party's purposes is to participate in [page424] public affairs -- and the impugned thresholds screen only for the additional public funding benefits.

[34] Secondly, counsel for the Attorney General argue that the s. 435.01(1) thresholds are very low (two per cent and five per cent of voter support) as compared to the 50-candidate threshold (which required the party to run candidates in at least 50, or 16.6 per cent, of the 301 constituencies).

[35] Thirdly, the current thresholds are based upon an external measure of votes obtained, as opposed to an internal measure of party effort to run candidates.

[36] Finally, there was only one threshold at issue in Figueroa, whereas here there are two, rendering the funding regime sensitive to a party's national or regional characteristics.

[37] As noted, I agree that there are differences between the impugned thresholds in this case and the threshold at issue in Figueroa. However, in my opinion, given the present state of the jurisprudence, these differences are insufficient to warrant a different s. 3 outcome in this case.

[38] Iacobucci J. posed two questions for determination in Figueroa, at para. 38 (modified within the square brackets to reflect the circumstances of this case):[15]

> Consequently, the essential question to be determined is whether the [s. 435.01(1) thresholds] interfere[] with the capacity of individual citizens to play a meaningful role in the electoral process. In order to answer this question, the Court must answer two prior questions. First, do the members and supporters of political parties [that fail to meet the s. 435.01(1) thresholds] play a meaningful role in the electoral process? And if so, does the [legislative restriction on their receipt of quarterly allowances] interfere with the capacity of the members and supporters of political parties that [fail to meet the threshold] to play a meaningful role in the electoral process?

[39] No matter how it is assessed, the requirement that a party obtain two per cent of the national vote or five per cent of the total vote in constituencies in which it runs candidates, translates into fewer public resources being provided for smaller parties and [page425] comparatively more public resources for larger parties. This inevitably tilts the political playing field in favour of those who meet the thresholds to some extent, at least.

[40] Political parties are a central feature of the political life of this country. They provide the means by which individuals may make their voices heard in a collective way. Thus, public measures that disadvantage a political party similarly disadvantage those citizens who choose to express their political and social views through the medium of that party. This is an important characteristic of the Canadian polity, and is true whether parties are large or small. As Iacobucci J. observed in Figueroa, at paras. 40-41:

> . . . [I]t is important to note that political parties have a much greater capacity than any one citizen to participate in the open debate that the electoral process engenders. By doing so in a representative capacity, on behalf of individual citizens and supporters, political parties act as a vehicle for the participation of individual citizens in the political life of the country. Political parties ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral process and presented to the electorate as a viable option. ...
> Importantly, it is not only large political parties that are able to fulfil this function. . . . Large or small, all political parties are capable of introducing unique interests and concerns into the political discourse. Consequently, all political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy.

[41] Resources are essential to the ability of a party and its supporters to communicate their message and views to the public, an area in which smaller parties are already disadvantaged in comparison to larger parties. Although their impact may be lesser than that of the 50-candidate requirement for registration as a political party, the vote-based thresholds for eligibility to receive quarterly allowances have a similar effect: they enhance the imbalance on an already tilted playing field as between larger and smaller parties and exacerbate the differences in the respective parties' ability to communicate their message. On the Figueroa analysis, this, in turn, has an effect on the ability of their supporters to participate meaningfully in the electoral process.

[42] I see no other tenable conclusion in light of the following observations by Iacobucci J. in Figueroa, at paras. 48-54:

. . . Section 3 prevents Parliament from interfering with the right of each citizen to play a meaningful role in the electoral process; it does not impose upon Parliament an obligation to enact legislation that enhances the capacity of political parties to raise funds for the purpose of communicating the ideas and opinions of its members and supporters to the general public. However, legislation that bestows a benefit upon some political parties, but [page426] not others, requires scrutiny. In this instance, it is only because Parliament has extended these benefits to political parties that satisfy the 50-candidate threshold that its consequent failure to extend these benefits to political parties that do not satisfy the threshold constitutes an infringement of s. 3.

The premise underlying this conclusion is a fairly simple one. Owing to the competitive nature of the electoral process, the capacity of one citizen to participate in the electoral process is closely connected to the capacity of other citizens to participate in the electoral process. The reason for this is that there is only so much space for political discourse; if one person "yells" or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse. ...

It is thus my conclusion that s. 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process. Where legislation extends a benefit to some citizens, but not to others, it is necessary to consider carefully the impact of that legislation on the citizens who have not received the benefit. If the legislation interferes with the right of certain citizens to play a meaningful role in the social discourse and dialogue that the electoral process engenders, it is inconsistent with s. 3 of the Charter.

Put differently, one might say that s. 3 imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election. As the Court observed in Libman[16] . . . at para. 47, electoral fairness is a fundamental value of democracy: The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens . . . Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions . . .

Importantly, this requirement of fairness is not synonymous with formal equality: see the Saskatchewan Reference, supra, in which the Court determined that s. 3 does not require absolute voter parity. It is not enough to offend s. 3 that the legislation differentiates between one citizen and another, or one political party or another. It also is necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.

The effect of the restriction on the right to issue tax receipts for donations received outside the election period is that parties that have satisfied the 50-candidate threshold are able to raise more funds than they would otherwise be able to raise. Similarly, the effect of the restriction on the right to transfer unspent election funds to the party rather than the Receiver General is that only parties that have satisfied the 50-candidate threshold are able to retain unspent election funds. In each instance, the effect of the threshold is that political parties that have satisfied the threshold requirement have more resources at their disposal for the purpose of communicating their ideas and opinions to the general public. The flip side of the coin is that it is even more difficult for a party that has not satisfied the 50-candidate threshold to publicize its own ideas and views. As the Court observed in Libman, supra, at para. 47, there already is reason to be concerned that the most affluent parties will [page427] dominate the public discourse and deprive their opponents of a reasonable opportunity to speak and to be heard. Legislation that augments this disparity increases the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties with an increased ability to both raise and retain election funds.

This, in turn, diminishes the capacity of the individual members and supporters of such parties to play a meaningful role in the electoral process. As discussed above, political parties act as a vehicle for the participation of individual citizens in the electoral process; they are the primary mechanism by which

> individual citizens introduce their own ideas and opinions into the public dialogue that elections spawn. Legislation that contributes to a disparity in the capacity of the various political parties to participate in that dialogue ensures that some persons have a more effective vehicle for their ideas and opinions than others. The 50-candidate threshold thus infringes s. 3 of the Charter by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders.
>
> The restriction on these benefits has a more general adverse effect as well. The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party's platform -- and in order to assess the relative strengths and weaknesses of each party, voters must have access to information about each candidate. As a consequence, legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3. This, however, is precisely the effect of withholding from political parties that have not satisfied the 50-candidate threshold the right to issue tax receipts for donations received outside the election period and the right to retain unspent election funds. By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.

(Italics and underlining added)

[43] Returning to the present case -- although they may do so to a lesser extent than the 50-candidate threshold that was under consideration in Figueroa -- the two per cent and five per cent thresholds of s. 435.01(1) result in different levels of public resources being made available to smaller political parties than to larger ones. Thus, they "exacerbate[] a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public". This, in turn, "diminishes the capacity of the individual members and supporters of [smaller parties] to play a meaningful role in the electoral process". As a result, the thresholds violate Parliament's obligation "not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process". [page428]

[44] The thresholds violate s. 3 of the Charter.

Justification: The section 1 analysis

[45] Whether that violation may be justified under s. 1 is a thornier question. The application judge found that it could not be. Respectfully, I disagree.

[46] Section 1 provides:

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

[47] To justify an infringement of a Charter right under s. 1, the Government must demonstrate that the limitation is reasonable and that it can be demonstrably justified in a free and democratic society. This involves the application of the test formulated by the Supreme Court of Canada in R. v. Oakes, *[1986] 1 S.C.R. 103*, *[1986] S.C.J. No. 7*, at pp. 138-40 S.C.R.[17] To meet this test the Government is required to establish (a) that the objective of the impugned legislation is sufficiently "pressing and substantial" to warrant overriding a Charter right and, if so, (b) that the infringement is "proportionate", i.e., (i) that the impugned legislation is "rationally connected" to the objective, (ii) that it "minimally impairs" the Charter right in question, and (iii) that there is "proportionality" between its salutary benefits and its deleterious effects.

Pressing and substantial objective

[48] The "pressing and substantial" analysis requires at the outset a search for the precise objective of the impugned legislation. Here, the Attorney General for Canada argues that the objective is two-fold, namely, (a) to

preserve the integrity of the electoral process and (b) to preserve the integrity of the electoral process's public financing regime. The respondents reply that these objectives are too general to meet the s. 1 test. Secondly, and in any event, they say that Parliament simply applied to the quarterly allowances regime in 2003 the thresholds that were already in place since 1996 with respect to the reimbursement of election expenses, with little thought or consideration, and that the rationale for the latter does not apply to the former.

[49] Based on the legislative history of s. 435.01(1), however, I accept the Attorney General's argument, although with one [page429] refinement. I would describe the objectives of the s. 435.01(1) thresholds more precisely as preserving the integrity of the Canadian electoral process and its public funding mechanisms by guarding against the misuse of public funds. Misuse of public funds in this context is not a budgetary measure -- a rationale that would be suspect as a benchmark for justification[18] -- but, rather, an integrity measure. Parliament is not saying it cannot afford to pay the quarterly allowances to smaller parties. It is saying that steps must be taken to ensure that political party funding is preserved for legitimate public discourse in order to safeguard the electoral process and its public funding regime. One of Parliament's most sacrosanct roles is to preside over and govern resort to the public purse. Maintaining public confidence in the integrity of the electoral process, including its public financing scheme, has already been determined to be a pressing and substantial objective in a free and democratic society: Harper, at paras. 102-03; Figueroa, at para. 72. Parliament has a legitimate interest in seeing that public funds are used to uphold those values and to ensure that funds are used in a manner consistent with the integrity of the electoral process and its financing regime.

Rational connection

[50] Nor can I accept -- as the application judge found -- that there is no rational connection between the objectives of the legislation and the two per cent and five per cent thresholds. In my view, there is.

[51] The rational connection test has been described as one that is "not particularly onerous": Little Sisters Book and Art Emporium v. Canada (Minister of Justice), *[2000] 2 S.C.R. 1120*, *[2000] S.C.J. No. 66*, at para. 228, cited in Trociuk v. British Columbia (Attorney General), *[2003] 1 S.C.R. 835*, *[2003] S.C.J. No. 32*, at para. 34; Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, supra, at para. 148. The Attorney General must show that there is "a causal connection between the infringement and the benefit sought on the basis of reason or logic": RJR-MacDonald Inc. v. Canada (Attorney General), *[1995] 3 S.C.R. 199*, *[1995] S.C.J. No. 68*, at para. 153; Harper, supra, at para. 104. However, government is not required to show a scientific or empirical connection between [page430] the impugned thresholds and the objectives of the legislation: Harper, at para. 104. Here, as I will explain, there is sufficient evidence on the record to demonstrate a rational connection between the s. 435.01(1) thresholds and the legislative objectives of safeguarding against the misuse of public funds and thus preserving the integrity of the electoral process and of its public funding regime.

[52] The application judge's sole treatment of the rational connection issue is contained in the following passage, at para. 20 of his reasons (substituting, as he said in para. 22, the quarterly allowance for the tax credit scheme referred to):

> Just as in Figueroa at paragraph 68, I am not persuaded that the respondent has provided any persuasive evidence "to substantiate its claim that the threshold actually improves the cost-efficiency of the tax credit scheme. It is thus my conclusion that the rational connection test has not been met."

[53] Here, however, there is no argument that the two per cent and five per cent thresholds somehow improve the "cost-efficiency" of the quarterly allowance scheme or the electoral process's public financing scheme. The objective is to safeguard against the misuse of public funds, thus preserving the integrity of the process and its public financing mechanism.

[54] This objective is rationally connected with the s. 435.01(1) thresholds because the thresholds help to ensure that groups who choose to register as political parties, but who have little intention of engaging in true electoral competition or in the political discourse of the day -- for example, parties interested only in satirizing the political process (the Rhinoceros Party), or in using the process to promote their commercial interests (the Natural Law

Party) -- are not able to access public funds to do so. As one of Canada's experts noted:

> It doesn't interfere with democracy to have a lot of parties. My opinion is that it may not interfere with democracy, but reduce public confidence in the democratic process if there are parties making a mockery of the democratic process.

[55] That the Government of the day intended to link the rationale in support of the impugned thresholds to the rationale underlying the introduction of the same thresholds for reimbursement of election expenses is beyond doubt. As noted above, both the Minister responsible for the introduction of the Bill and the Chief Electoral Officer made that clear in their statements to the House and Senate Standing Committees considering the legislation. Contrary to the submissions of the respondents, the adoption of an already existing rationale for new legislation is not the equivalent of having no rationale for the new legislation. [page431]

[56] For the reasons I have articulated above, I am satisfied that there is a rational connection between the thresholds in question and the objectives of the legislation.

Minimal impairment

[57] The more difficult question is whether the thresholds meet the minimal impairment test. In my opinion, they do.

[58] Legislation that violates a Charter right will not be saved under s. 1 unless it "minimally impairs" that right. The following statement by McLachlin J. (as she then was) in RJR-MacDonald, supra, at para. 160, has been adopted on numerous occasions as setting the appropriate standard for assessing minimal impairment:

> As the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement: see Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), *[1990] 1 S.C.R. 1123*, at pp. 1196-97; R. v. Chaulk, *[1990] 3 S.C.R. 1303*, at pp. 1340-41; Ramsden v. Peterborough (City), *[1993] 2 S.C.R. 1084*, at pp. 1105-06. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

(Emphasis added)

[59] RJR MacDonald and other authorities lead to the conclusion that to be reasonable and demonstrably justified in a free and democratic society, legislation that violates a Charter right or freedom must impair the infringed right or freedom as little as reasonably possible, but "need not be the least impairing option": Harper, at para. 110. Courts are to afford deference "to the balance Parliament has struck between [the right or freedom in question] and meaningful participation in the electoral process": Harper, at para. 111. See also Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, supra, at para. 150.

[60] Given this framework, I am satisfied that the s. 435.01(1) thresholds meet the minimal impairment test.

[61] In introducing the thresholds Parliament was endeavouring to strike a delicate balance between, on the one hand, the right of Canadians to participate meaningfully in the electoral process (the s. 3 right), and, on the other hand, the need to safeguard against the abuse of public funding with a view to promoting the larger objectives of preserving the integrity of the [page432] electoral process and of its public financing system (the objectives of the legislation). In addressing whether it has done so in a fashion that minimally impairs the s. 3 right, it is useful to recall the overall public financing and support regime that Parliament has put in place, and the objectives of that regime, as described earlier in these reasons (see, in particular, paras. 6-20, supra).

[62] Unlike the situation under consideration in Figueroa, the s. 435.01(1) thresholds do not impede the right of political parties to be registered and thereby to become entitled to key public funding and informational benefits, including (i) the protection of its name and logo, (ii) the right to an allocation of free broadcasting time and to an allocation of guaranteed paid broadcasting time at the lowest commercial rate, (iii) the right to provide tax receipts to donors between election campaigns, (iv) the right to transfer surplus campaign funds from individual candidates to the party, and (v) the right to be named on the ballot. Parties are now entitled to those benefits upon satisfying the relatively modest requirements for registration provided for in s. 366(2) of the Canada Elections Act (see supra, at para. 33). Meeting the s. 435.01(1) thresholds merely entitles a political party to additional public funding benefits in the form of (a) reimbursement of 50 per cent of its electoral expenses following an election, and (b) the annual allowance of $1.75 (indexed) for every valid vote received in the most recent general election, paid quarterly. The two per cent and five per cent thresholds must be measured in the context of this regime, having regard to the fact that I have already determined the objectives of the thresholds to be pressing and substantial and the connection between those objectives and the thresholds themselves to be rational.

[63] The application judge concluded that the thresholds produce "no benefit to anyone except the parties [that] do meet the threshold[s] and do receive the statutory financial benefit that is not given to those [that] do not" (para. 23). This misapprehends the nature of the legislation, however: a party meeting the thresholds and receiving the quarterly allowances, receives those allowances not because of the thresholds but because of the legislation providing for the quarterly allowances. Moreover, it is not accurate to say that the thresholds benefit no one. The thresholds benefit the members of the public as a whole by advancing the objectives of the legislation, as outlined above. The application judge rejected the Attorney General's argument that the impugned provisions were justified on the basis that their overall objectives were to maintain public confidence in the integrity of the electoral process. He considered this argument to be "without merit" and concluded, instead, that the thresholds "diminish[][page433] public confidence in the electoral process and encourage[] a public perception that the threshold[s] exist[] only to benefit the major political parties who alternate, from time to time, in forming the government and are in a position to maintain it". Again, I respectfully disagree.

[64] First, as noted above, the Supreme Court of Canada has already acknowledged -- in the context of a threshold case in one instance, at least -- that preserving and maintaining public confidence in the integrity of the electoral process and its public financing regime is an important public value in Canada: Figueroa, at para. 72; Harper, at paras. 102-103. Secondly, the evidentiary record does not support the finding that the thresholds diminish public confidence in the electoral process. Indeed, the record, as well as reason and logic, suggest that the contrary is the case: the thresholds enhance public confidence by helping to ensure that frivolous parties with no interest in making a genuine contribution to the political discourse of the nation do not have access to direct public funding. Professor Lisa Young testified to this point on cross-examination:

> My opinion is that it may not interfere with democracy, but reduce public confidence in the democratic process if there are parties making a mockery of the democratic process . . . We've seen the Canadian public become outraged that a public official wanted to be reimbursed for gum. This is less than a dollar, but it was the symbolic use of it . . . I think that point is that my concern about misuse is that any report that a political party is using its funds for something other than the intended public policy purposes throws public confidence in the system into question.

[65] Moreover, since the thresholds are designed to ensure that direct public funding is linked to true electoral endeavours, it follows logically that they enhance public confidence in the electoral process's financing regime. The Supreme Court has repeatedly held that courts are permitted to rely on "logic, reason and some social science evidence in the course of the justification analysis" where scientific proof is lacking: see Harper, supra, at paras. 77-78; Sauvé v. Canada (Chief Electoral Officer), *[2002] 3 S.C.R. 519*, *[2002] S.C.J. No. 66*, at para. 18.

[66] The application judge concluded, as well, that the s. 435.01(1) thresholds could not be saved under s. 1, in any event, because there were "more effective and less damaging means of achieving [the purpose of maintaining public confidence in the electoral process] such as required reporting and audits were [such] genuinely sought" (para. 28). The possibility of implementing an audit scheme to control access to the quarterly allowances was advanced as the major alternative for consideration in the minimal impairment analysis. The respondents submit the

Attorney [page434] General has failed to demonstrate that such an alternative does not provide an equally adequate, but less infringing, mechanism for achieving the government's stated objectives such that the thresholds fail the minimal impairment test. I disagree.

[67] The notion of an audit mechanism as an alternative to a threshold approach to screening for genuine political parties draws some support from the comments of Justice Iacobucci in Figueroa. At para. 78 he said:

> . . . [T]he government has failed to demonstrate that it could not achieve the same results without violating s. 3 of the Charter. Consider, for example, the auditors and other investigators that the government already has at its disposal. There is no reason to think that auditors would not be equally capable, if not more so, of detecting and thereby preventing, the misuse of funds raised pursuant to the electoral financing regime. The misuse of funds, after all, is precisely the sort of mischief that auditors are trained to uncover, and which the state can properly criminalize in order to preserve the integrity of the electoral financing regime. The logical inference is that precisely the same result could be achieved through strict spending rules and the use of auditors.

[68] I do not read this passage as determining that an audit regime will in all cases provide a less intrusive and equally effective alternative to a threshold system for screening public support, however. Justice Iacobucci cites it as an example only. In any event, there are at least two important concerns, from a public policy perspective, that the government is entitled to balance when deciding amongst these options. First, an audit regime creates serious potential for unwarranted interference in the internal affairs and policies of a political party. Secondly, such a scheme raises concerns in relation to the independence of the Chief Electoral Officer who is charged with the impartial and non-partisan task of maintaining the integrity of the electoral process.

[69] As the Attorney General submits, the introduction of an audit regime would require Parliament to put in place a set of statutory or regulatory provisions on how registered political parties can and cannot spend their public funds, thereby potentially constraining the political activities of those parties. Auditors would be required to monitor how parties spend their money to ensure they are used in accordance with the statutory or regulatory prescriptions. The office of the Chief Electoral Officer would, in turn, have to conduct compliance audits to verify these uses. In doing so, it would invariably be called upon to make judgment calls on how the parties are using their public funds, thus potentially jeopardizing the role of the Chief Electoral Officer as the impartial administrator of the Act. [page435]

[70] There is support in the record for Parliament's choice of this alternative. For example, in commenting on a regulatory alternative to thresholds, Prof. Peter Aucoin testified as follows:

> If election administrators acted aggressively against perceived or alleged misuses of the public funding scheme, charges of partisanship, or at least of bureaucratic arbitrariness, would be bound to arise and thereby diminish public confidence in the integrity of the public funding scheme . . . If, on the other hand, officials were unwilling to intervene, . . . then the capacity to ensure that the Act's intended public policy purposes are being realized would be undermined. Both of these undesired outcomes are avoided by the vote-based threshold, which is clearly the better mechanism for limiting any restrictions on rights in defining political parties and their functions and for removing the need to oblige officials to exercise discretion.
> . . . The . . . allowance schemes help political parties to perform their critical functions within the electoral and governance processes. However, these schemes do not intrude on the autonomy of political parties by defining, in the law itself . . ., the functions that are eligible to be publicly funded . . .

[71] Although political parties play a critical role in the democratic process, they remain independent, private organizations and their continued separation from the state is important to the proper functioning of that process. Their independence is fundamental. One constitutional scholar put it this way:[19]

> Political parties are something of an anomaly. They occupy a unique space in the governmental structure of constitutional democracies. On the one hand, they perform a variety of representative, participative, integrative etc. functions that are absolutely essential to the operation of systems of government which are grounded in the principles of democracy (popular sovereignty) and constitutionalism (rule of law). On the other, unlike all of the

> other major institutions that form part of the framework of government, political parties stand apart and quite separate from the state. Political parties live in a kind of "never never" land; betwixt and between; neither fish nor fowl.
>
> Political parties provide a linkage between the state and civil society. . . .
> However, although political parties perform a vital role operationalizing the legal structure of the state, they do so only by remaining at arm's length from the institutions of government. Their independence from the state is essential to their integrity and their effectiveness in promoting the ideals and values on which constitutional democracies are based. Though all of their energy (their raison d'être) is directed and is given over to the state, they remain unambiguously part of civil society.

(Emphasis added)

[72] It follows from this confluence of factors that any regulatory regime governing political parties must interfere as little as [page436] possible with the autonomy and internal affairs of political parties. For the reasons outlined above, an audit regime designed to thwart the misuse of public funding by political parties would run the risk of impinging on their autonomy and internal affairs. It would require the enactment of intrusive statutory and/or regulatory provisions prescribing the types of activities and expenditures in which political parties are permitted to engage. This is a valid consideration to be weighed when assessing Parliament's choice of options in the minimal impairment analysis.

[73] So, too, is the second consideration mentioned above, namely, the potential impact of an audit regime on the impartiality -- real or perceived -- of the Chief Electoral Officer and other electoral officials and administrators.

[74] The Chief Electoral Officer is the independent and neutral steward of the integrity of the electoral process. In the words of the Federal Court of Appeal, "the Chief Electoral Officer is, in a sense, the guardian of democracy in Canada and this democracy could be compromised by granting the person on the front line in charge of protecting it powers that are even slightly arbitrary": Stevens v. Conservative Party of Canada, *[2005] F.C.J. No. 1890*, *262 D.L.R. (4th) 532* (C.A.), per Décary J.A., at para. 19. Care should be taken to ensure that the impartiality of this critical public role is not unnecessarily compromised -- actually or potentially, in the eyes of the public -- by enacting a regime that would call upon the Chief Electoral Officer to make judgment calls on how a political party is conducting its internal affairs or spending its funds. This, too, is a valid consideration when addressing Parliament's choice of options.

[75] It may well be, as Iacobucci J. observed in Figueroa, that an audit regime would effectively safeguard the misuse of public funds and thereby address the objectives of the Act to preserve the integrity of the electoral process and its public financing system. It may or may not do so in a manner that is less intrusive than the s. 435.01(1) thresholds. However, that would not be the end of the matter in any event. Impugned legislation that violates the Charter may still meet the minimal impairment test, in my view -- even if it is possible to conceive of an effective alternative that may be less intrusive -- if both the impugned provision and the alternative measure form part of a reasonable range of policy options open to Parliament to choose from. The purpose of the minimal impairment analysis is not to encourage courts or litigants to create alternative measures that in their view are preferable and less intrusive; the purpose is to determine whether the impugned measure "falls within a range of reasonable alternatives": [page437] RJR-MacDonald, supra, at para. 160.[20] To repeat what was said in that case, again at para. 160:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

(Emphasis added)

[76] In my view, therefore, Parliament was constitutionally permitted to select the relatively modest voting threshold approach over the option of an auditing regime, here, in order to achieve the objectives of the legislation.

Why? Because there is a reasonable apprehension that the audit option could have a significant deleterious effect on other values fundamental to the electoral process -- namely, the need to preserve the independence and internal autonomy of political parties and the need to preserve the actual or perceived impartiality and integrity of the office of the Chief Electoral Officer.

[77] Nor do the thresholds fail on the ground that they are overly broad, in my view. In some cases the thresholds may disqualify small political parties with genuine political goals from receiving the quarterly payments. They may therefore catch some political parties that do not fall within the scope of the mischief the thresholds are designed to address, i.e., the misuse of public funds in a way that reflects adversely on the integrity of the electoral system and its financing regime. However, given the level of electoral support for most of these parties, almost any threshold would have that impugned frailty.

[78] Legislation may be found to be overly broad if it goes too far and, on its face, catches more of the constitutionally protected activity or interest than is necessary to meet Parliament's objectives: Canada (Attorney General) v. JTI-Macdonald Corp., [2007] S.C.R. 610, *[2007] S.C.J. No. 30*, at para. 78. As McLachlin J. noted in RJR-MacDonald, supra, at para. 160, however, "[i]f the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement." That is the case here. I have already concluded that the objectives of the thresholds are pressing and substantial, and that there is a rational connection between the thresholds and those objectives. [page438] In spite of the foregoing concerns, and given Parliament's reasoned apprehension of the harm addressed, I am satisfied that it would not be appropriate for us to interfere with its choice of means in these circumstances, even though another reasonable alternative, not invoking a threshold, might be conceivable.

[79] The s. 435.01(1) thresholds meet the minimal impairment test.

Proportionality: Salutary benefits vs. Deleterious effects

[80] The final element of the Oakes test is to determine whether the impugned legislation is "proportionate" in the sense that its salutary benefits outweigh its deleterious effects. This element may appear to blend with the minimal impairment analysis just completed. However, as Chief Justice McLachlin has most recently pointed out, in Canada (Attorney General) v. JTI-Macdonald, supra, at para. 46:

> Although cases are most often resolved on the issue of minimal impairment, the final inquiry into proportionality of effects is essential. It is the only place where the attainment of the objective may be weighed against the impact on the right. If rational connection and minimal impairment were to be met, and the analysis were to end there, the result might be to uphold a severe impairment on a right in the face of a less important objective.

[81] Here, there are two primary salutary effects of the impugned thresholds. First, they guard against the subversion of the electoral process by groups that register as political parties for commercial, satirical or other non-political purposes. The integrity of the electoral process and of its electoral financing regime is enhanced because public money is directed towards genuine electoral and political endeavours. Secondly, as the expert evidence suggests, public confidence in the electoral process is increased when these objectives are attained. In short, the two main salutary effects of the s. 435.01(1) thresholds serve to strengthen a core component of Canada's democratic process: free elections.

[82] The deleterious effects of the thresholds, on the other hand, are less compelling, in my view. The thresholds somewhat exacerbate a pre-existing disparity in the capacity of smaller political parties to communicate their messages in competition with larger parties, as I have concluded above. This impacts upon the ability of the individual respondents, and others who are also members of such smaller parties, to participate meaningfully in the electoral process. These party respondents, moreover, have been deprived of public funding in the form of the quarterly allowances, despite the fact that they genuinely seek to participate in the electoral process and have something to contribute to that process. [page439]

[83] The electoral regime, as I have noted, is a foundational aspect of Canada's democratic process. In my view, the goal of upholding the integrity of that regime overshadows the value of absolute equality in the treatment of all political parties in terms of access to public funding. I conclude that the salutary effects of the s. 435.01(1)

thresholds outweigh their deleterious effects.

Conclusion with respect to section 3

[84] Accordingly, for all of the foregoing reasons, I conclude that the two per cent and five per cent thresholds found in s. 435.01(1) of the Act violate s. 3 of the Charter. Their constitutional validity is saved by s. 1, however, because they constitute "reasonable limits prescribed by law" that are "demonstrably justified in a free and democratic society".

Section 15 of the Charter

[85] The respondents seek to rest their case of infringement on s. 15 of the Charter as well. Section 15 states:

> 15. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[86] The application judge concluded that the s. 435.01(1) thresholds violated s. 15 of the Charter as well as s. 3. He did so, essentially, because in his view, "[t]he impugned provisions place smaller and weaker parties at a disadvantage in comparison with the major parties" and he could "find no rationale that would justify this approach" (para. 32). He conducted no further analysis. For the following reasons, I respectfully disagree.

[87] I begin with an observation that there is little need for a s. 15 analysis in this case. Even if I were to conclude -- as I do not -- that the thresholds violate the Charter on s. 15 grounds, I would conclude that the violation is saved under s. 1 for the same reasons already outlined in the course of the s. 3 analysis. I see no material differences here between the s. 1 exercise under s. 3 or s. 15. The objectives of the threshold provisions remain the same and are pressing and substantial. There continues to be a rational connection between the thresholds and those objectives. The minimal impairment considerations are identical and, although the right against which the infringement is weighed is different (the right to be free from discrimination, as opposed to the right to participate meaningfully in the electoral process), the balancing exercise as between salutary and deleterious effects remains in favour of upholding the thresholds.

[88] In any event, there is no s. 15 violation here. [page440]

[89] To the extent that he considered the question, the application judge appears to have based his analysis on the proposed analogous ground of "smaller and weaker parties" versus larger or "major" ones. The respondents seek to support this conclusion by arguing that a person's political beliefs can be fundamental to his or her personal dignity (which is undoubtedly true) and that membership in a political party signifies an individual's adherence to a certain system of beliefs and principles (also possibly true). They submit that a law providing a benefit to large parties while denying the same benefit to smaller parties discriminates against the members of the smaller parties and creates the impression that their belief system is less important and less worthy. Such a law therefore contravenes s. 15, they say.

[90] I would not give effect to this argument.

[91] Not every case of differential treatment between individuals or groups constitutes discrimination within the meaning of s. 15. A claimant must establish, on the basis of the civil standard of proof, that the impugned treatment falls within the analytical construct set out by the Supreme Court of Canada in Law v. Canada (Minister of Employment and Immigration), *[1999] 1 S.C.R. 497*, *[1999] S.C.J. No. 12*. There, at para. 88, Iacobucci J. described the approach that courts are to take to the s. 15(1) analysis:

> The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues:
>
> (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;

(B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and

(C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee.

The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1).

Accordingly, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:

(A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics:

(B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

and [page441]

(C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

See also Gosselin v. Québec (Attorney General), *[2002] 4 S.C.R. 429*, *[2002] S.C.J. No. 85*, at para. 17.

[92] The s. 435.01(1) thresholds do not violate s. 15(1) of the Charter, in my view, because they do not engage either the first or the third Law inquiry. Before addressing those inquiries, however, I turn to the question of "comparators".

[93] When applying the three-pronged Law test, the courts are to identify and utilize a "comparator group" concept. In Lovelace v. Ontario, *[2000] 1 S.C.R. 950*, *[2000] S.C.J. No. 36*, at para. 62, Iacobucci J. said:

> Each of these inquiries proceeds on the basis of a comparison with another relevant group or groups, and locating the relevant comparison groups requires an examination of the subject-matter of the law, program or activity and its effects, as well as a full appreciation of the context.

[94] Taking those factors into account, there are two possible comparator groups here: (i) smaller political parties that do not achieve the two per cent or five per cent thresholds ("non-threshold achieving parties"), and larger political parties that do ("threshold achieving parties"); or, (ii) individuals who are members or supporters of such smaller or larger parties. Only the latter are entitled to claim that the thresholds infringe s. 15, however. Thus, the identification of the appropriate comparator groups helps to clarify the s. 15 analysis in this case.

[95] Quarterly allowances are paid to political parties. They are not paid to individuals. On the other hand, only individuals may claim the protection of s. 15. Thus the respondent political parties are not entitled to assert a claim under s. 15 that they, themselves, have been subject to differential treatment from larger parties. "Non-threshold achieving parties" versus "threshold achieving parties" is therefore not the appropriate comparator. The comparator must be "individuals who are members or supporters of non-threshold achieving parties" versus "individuals who are members or supporters of threshold achieving parties". Where, then, does that comparator take us in the Law analysis?

[96] The short answer is that the respondent's s. 15(1) claim fails on the first prong of the inquiry. Assuming it can be argued that the s. 435.01(1) thresholds treat members or supporters of non-threshold achieving parties

differently than those of threshold achieving parties, they do not distinguish between smaller and [page442] larger parties, or their members or supporters, on the basis of personal characteristics. The differential treatment is based upon the number of votes a party obtains in a general election. Indeed, in substance the impugned thresholds treat the parties differently. Parties are not entitled to seek s. 15 relief.

[97] Some might argue that there is an indirect differential treatment between the comparator groups of individuals because -- as I have acknowledged in the s. 3 portion of these reasons -- "political parties act as a vehicle for the participation of individual citizens in the political life of the country . . . [and] . . . ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral process": Figueroa, para. 40. From this, it may be said, the indirect differential treatment is based on personal characteristics in the form of the political beliefs or party affiliation of members and supporters.

[98] I reject this notion, however. The s. 435.01(1) thresholds treat political parties differently by disqualifying those who do not meet them from receiving the quarterly allowances. The differential treatment is vote-based only, depending upon the amount of electoral support a party receives during an election. It has nothing to do with the personal beliefs or political affiliation of the individual members or supporters of those parties. There is simply no basis in the record for concluding that the purpose or effect of the thresholds is to control or affect in any way a person's political beliefs or affiliation or that quarterly relief funding is related to any such characteristics. Anyone is free to join or support whatever political party he or she wishes. Anyone is free to hold and espouse whatever political beliefs he or she chooses. Whether their preferred political party does, or does not, receive the quarterly allowance is an entirely separate matter, in my view. I conclude, then, that it is not necessary or appropriate to resort to s. 15 in the circumstances of this case. To the extent that a s. 15 analysis may be in order, however, I am satisfied that there has been no breach.

[99] This conclusion is sufficient to dispose of the respondents' s. 15 claim. The first prong of the Law test is not met.

[100] I would add, however, that in my view the respondents fail on the third prong as well. The human dignity of the individual respondents is not affected.

[101] In Jazairi v. Ontario (Human Rights Commission), *[1999] O.J. No. 2474*, *175 D.L.R. (4th) 302* (C.A.), a university professor alleged that he was denied a promotion because of his political beliefs about the relationship between the State of Israel and the Palestinians. His claim under s. 15(1) was dismissed on the basis that his human dignity had not been engaged. For similar reasons to those I have just articulated with respect to the first [page443] Law inquiry, the s. 435.01(1) thresholds do not deny or affect the human dignity of the members or supporters of the non-threshold achieving parties or treat them as people who are less worthy of recognition as human beings.

[102] In arriving at these conclusions I need not consider the yet-undetermined question of whether membership in a political party or political affiliation or political beliefs may constitute an "analogous ground" within the meaning of s. 15(1) and the second prong of the Law analysis.

[103] I would not give effect to the respondents' s. 15 ground of appeal.

Sections 2(b) and 2(d) of the Charter

[104] The respondents also assert that the s. 435.01(1) thresholds violate their right to freedom of expression, under s. 2(b) of the Charter, and their right to freedom of association, under s. 2(d). Although these issues were raised before the application judge, he did not deal with them in view of his determination that the thresholds infringed ss. 3 and 15. The respondents renew their arguments on appeal.

[105] I would not give effect to them, however.

[106] I begin with the same observation that I made in connection with the s. 15 claim: even if I were to conclude that the thresholds violated either s. 2(b) or 2(d) -- which I do not -- the violations would be saved by s. 1 of the Charter, for the same reasons articulated in the s. 1 analysis above.

[107] Nevertheless, I am satisfied that the thresholds do not infringe either s. 2(b) or 2(d). Although neither respondents' counsel nor appellant's counsel framed their arguments in terms of "under-inclusiveness", the essence of the respondents' position is that the s. 435.01(1) threshold regime is under-inclusive because it deprives non-threshold achieving parties of the positive right to public funding in the form of the quarterly allowances available to threshold achieving parties. The requirements for asserting any s. 2 claim are the same in such circumstances: Dunmore v. Ontario (Attorney General), *[2001] 3 S.C.R. 1016*, *[2001] S.C.J. No. 87*.

[108] The Supreme Court of Canada has recently summarized the approach that is to be taken in cases of this nature in Baier v. Alberta, *[2007] 2 S.C.R. 673*, *[2007] S.C.J. No. 31*, at para. 30:[21] [page444]

> In cases where a government defending a Charter challenge alleges, or the Charter complainant concedes, that a positive rights claim is being made under s. 2(b), a court must proceed in the following way. First it must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three Dunmore factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom ... If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1.

(Emphasis added)

[109] Here, the respondents' ss. 2(b) and 2(d) claims fail for a simple reason: the s. 435.01(1) thresholds do not lead to any substantial interference with the ability of members or supporters of political parties to exercise their freedom of expression or their freedom of association. Diminished effectiveness in the ability to convey a message, or in the ability to associate, is not sufficient; there must be substantial interference with a fundamental freedom: Baier, supra, at para. 48; Delisle v. Canada (Deputy Attorney General), *[1999] 2 S.C.R. 989*, *[1999] S.C.J. No. 43*, at para. 41; Dunmore, supra, at para. 25.

[110] I can find nothing in the record to indicate that the thresholds interfere with the ability of anyone to associate with anyone else or with their ability to form any political party or group or pursue a collective goal: Dunmore, supra; Harper, supra, at paras. 125-26. Nor do I see anything to indicate that the exclusion of the respondent political parties from the receipt of quarterly allowances interferes with the ability of the individual respondents, or of other members and supporters of non-threshold achieving parties, to express themselves effectively in any substantial way. The respondents' argument confuses "freedom of expression" with "equal persuasiveness of that expression". There is no free-standing constitutional right to equal persuasiveness of expression.

[111] I reject the s. 2(b) and s. 2(d) grounds of appeal.

Part IV -- Remedies

[112] Having concluded that the thresholds established in s. 435.01(1) of the Act are constitutionally valid, it is not necessary to deal with the issues of remedies raised by Canada in the appeal and by the respondents in the cross-appeal. I do not propose to do so. [page445]

[113] In not addressing these issues, however, I would not want to be taken as commenting upon the application judge's decision to combine the s. 52 declaration of invalidity with individual retroactive remedies under s. 24 of the Charter or his decision not to suspend the operation of the declaration for a period of time to enable Parliament to respond in circumstances such as these. I leave an examination of the considerations arising out of those remedies for another day.

Part V -- Section 504 of the Canada Elections Act

[114] The final issue concerns the scope of the "deemed person" provisions in s. 504(a) of the Act, which state:

> 504. In the case of judicial proceedings or a compliance agreement involving an eligible party, a registered party, a deregistered political party or an electoral district association,
>
> (a) the party or association is deemed to be a person.

[115] Canada raised this issue early in the proceedings, as the original application was commenced in the name of the political parties only. Since all parties wished to have the issues determined on the merits -- although Canada was not willing to abandon its claim that the political parties lacked status -- it was agreed that the individual applicants would be added as party claimants, and that the s. 504(a) issue would be determined at the time of the hearing, along with the merits. The application judge determined it in favour of the political parties. Canada seeks to set aside that decision as well.

[116] The political parties here are unincorporated associations, and it is not disputed that at common law they do not have the status to sue or to be sued in their own name. Nor is it alleged that there is any federal or provincial statute providing such authority, other than s. 504(a) of the Act.

[117] The respondents argue that the language of the statute is clear and unambiguous on its face: in the case of judicial proceedings involving a political party, the party "is deemed to be a person". Canada submits, on the other hand, that the provisions of s. 504(a) do not infuse political parties with the status of legal entities entitled to sue or to be sued for all purposes; rather, s. 504(a) clothes them with that status only for purposes of proceedings under the Act, for example, those relating to enforcement, compliance or prosecution. It follows, according to the appellant, that the political party respondents do not have the status to bring the proceedings.

[118] Although this issue is not free from doubt, I would determine it in favour of the appellant and give effect to this ground of appeal. I say this for the following reasons. [page446]

[119] The governing principle regarding statutory interpretation is set out by Iacobucci J. in Rizzo & Rizzo Shoes Ltd. (Re), *[1998] 1 S.C.R. 27*, *[1998] S.C.J. No. 2*, at para. 21. There he adopted the following statement by Elmer Driedger in Construction of Statutes, 2d ed. (Toronto: Butterworths, 1983), recognizing that "statutory interpretation cannot be founded on the wording of the legislation alone":

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Bell ExpressVu Ltd. Partnership v. Rex, *[2002] 2 S.C.R. 559*, *[2002] S.C.J. No. 43*, at para. 26, and cases cited therein.

[120] In the Act, Parliament has enacted a broad and detailed legislative scheme dealing with all manner of issues touching elections in Canada. These include, for example, electoral rights, the conduct of elections, the establishment of the office of the Chief Electoral Officer to oversee the process, election finances, the regulation and financing of political parties, a regime of offences relating to breaches of the Act, and a mechanism for enforcement and compliance. Section 504 is contained in Part 19 of the Act, dealing with "Enforcement".

[121] I would be more persuaded by the respondents' position if the "deemed person" provision had been placed in the portion of the Act regulating the registration and activities of political parties. Were that the case, it might suggest more strongly that Parliament intended to create a free-standing right on the part of political parties to sue and to be sued, thus abrogating the common law disability of a political party, as an unincorporated association, to do so. Placing the provision in Part 19 of the Act -- dealing with enforcement, offences and compliance -- signals a more limited intention on the part of Parliament, in my opinion, and bolsters the argument that the "deemed person" provisions of s. 504(a) are designed to give political parties the status of legal entities for purposes of proceedings under the Act only.

[122] This interpretation is also buttressed by the French language version of s. 504(a), in my view. The French and English versions of bilingual statutes are equally authoritative sources in terms of statutory interpretation. Moreover, where one of the two versions is broader than the other, their common meaning favours the more restricted or limited meaning. See R. v. Daoust, *[2004] 1 S.C.R. 217*, *[2004] S.C.J. No. 7*, at para. 26; R. v. Mac, *[2002] 1 S.C.R. 856*, *[2002] S.C.J. No. 26*, at para. 5. [page447]

[123] The French version of s. 504(a) states:

> Dans le cas où . . . un parti enregistré . . . est partie à des procédures judiciaires . . . dans le cadre de la présente loi :
>
> a) le parti . . . est reputé être une personne.

(Emphasis added)

[124] The words "dans le cadre de la présente loi" suggest that the text is intended to restrict the application of the phrase "judicial proceedings" to those that take place within the context or framework of the Act. Here, the respondent political parties are not engaged in a proceeding within the context or framework of the Canada Elections Act; they are mounting a constitutional and Charter-based challenge to certain provisions of the Act in a stand-alone proceeding. In my view, they do not have the capacity to do so in their own names.

[125] I would therefore give effect to this ground of appeal.

Part VI -- Disposition

[126] I would allow the appeal and set aside the order of the application judge,

(a) retroactively declaring that the provisions of ss. 435.01(1)(a) and (b) of the Canada Elections Act are null and void and of no force and effect; and

(b) declaring that the political party applicants are entitled to recover from the Receiver General the quarterly allowances provided by the Canada Elections Act from January 1, 2004.

[127] For the reasons outlined above, I am satisfied that the s. 435.01(1) thresholds are constitutional. Moreover, the political party respondents do not have the standing to bring this application.

[128] I would also dismiss the cross-appeal. In my view, the application judge was correct in dismissing the claims for compensatory and punitive damages.

Appeal allowed. [page448]

Notes

1 Canada Elections Act, *S.C. 2000, c. 9*.

2 A large part of the factual summary that follows was taken from the portions of the appellant's factum that were not in contention.

3 Generally, the public funding regime for registered political parties is provided for under both the Act and the Income Tax Act, *R.S.C. 1985, c. 1 (5th Supp.), s. 127*(3). The provisions of the Act discussed below include ss. 117(2), 335, 338, 348, 345, 368(a), 435 and 473(2).

4 Canada Elections Act, R.S.C. 1970, c. 49, s. 13(8)(b). In Figueroa v. Canada (Attorney General), *[2003] 1 S.C.R. 912*, *[2003] S.C.J. No. 37*, the Supreme Court of Canada declared unconstitutional a similar 50-candidate registration threshold.

5 House of Commons Debates (16 May 1995) at 12703 (Werner Schmidt, MP, Reform), online: <http://www.parl.gc.ca>.

6 House of Commons Debates (16 May 1995) at 12708 (John Bryden, MP, Liberal), online: <http://www.parl.gc.ca>.>

7 House of Commons Debates (15 May 1996) at 2836 (Paul Zed, MP, Liberal), online: <http://www.parl.gc.ca>.

8 House of Commons Debates (16 May 1995) at 12706 (Ron MacDonald, MP, Liberal), online: <http://www.parl.gc.ca>.

9 He was referring to Figueroa, supra, which at that point had not yet been released.

10 Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 13, Evidence (17 June 2003) at 3354, online: <http://www.parl.gc.ca>.

11 The comments of the Chief Electoral Officer are of particular import in light of the fact that, upon introducing the Bill into the House of Commons for its second reading, the Rt. Hon. Jean Chrétien was clear that the government "was acting on the recommendations of the Chief Electoral Officer, Mr. Kingsley . . .": House of Commons Debates, No. 057 (11 February 2003) at 1535 (Rt. Hon. Jean Chrétien).

12 Canada, Proceedings of the House Standing Committee on Procedure and House Affairs, No. 32 (8 April 2003) at 1901, online: <http://www.parl.gc.ca>.>

13 Canada, Proceedings of the Standing Senate Committee on Legal and Constitutional Affairs, Issue 13, Evidence (17 June 2003) at 3372 online: <http://www.parl.gc.ca>.

14 An Act to amend An Act to amend the Canada Elections Act and the Income Tax Act, S.C. 2006, c. 1, s. 1. This statute repealed the sunset clause that was in place under the 2004 amendments and replaced it with a mandatory review provision.

15 Where the first and second square brackets are inserted, the Figueroa text sets out, as follows, the threshold in question in that case: "the 50-candidate threshold" (first square brackets); "that nominate fewer than 50 candidates" (second square brackets). Where the third square brackets are inserted the text refers to the particular benefits available in that case upon registration as a political party: "the right to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers". I have substituted reference to the thresholds and benefits at issue in this case for purposes of demonstrating the parallels between Figueroa and the instant case.

16 Libman v. Québec (Attorney General), *[1997] 3 S.C.R. 569*, *[1997] S.C.J. No. 85*.

17 See also Vriend v. Alberta, *[1998] 1 S.C.R. 493*, *[1998] S.C.J. No. 29*; Thomson Newspapers Co. v. Canada (Attorney General), *[1998] 1 S.C.R. 877*, *[1998] S.C.J. No. 44*; and M. v. H., *[1999] 2 S.C.R. 3*, *[1999] S.C.J. No. 23*.

18 See Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, *[2007] 2 S.C.R. 391*, *[2007] S.C.J. 27*, at para. 147; Newfoundland (Treasury Board) v. Newfoundland Assn. of Public Emloyees, *[2004] 3 S.C.R. 381*, *[2004] S.C.J. No. 61*, at para. 72.

19 David Beatty, "Political Parties and Constitutional Reform" in T. Fleiner, ed., Five Decades of Constitutional Law: Reality and Perspectives (1945-1995) (Tokyo: International Association of Constitutional Law Fourth World Congress) at 292-294.

20 See also Harper, at para. 110; Health Services and Support -- Facilities Subsector Bargaining Assn. v. British Columbia, supra, at para. 150.

21 In Baier, school teachers attacked the constitutional validity of amendments to the Local Authorities Election Act, *R.S.A. 2000, c. L-21*, which restricted school employees from seeking election as school trustees, unless they took a leave of

absence and then resigned from their positions if elected. The challenge was mounted on s. 2(b) and s. 15 grounds. It was unsuccessful.

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TAB 15

1987 CarswellMan 176
Supreme Court of Canada

Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832

1987 CarswellMan 176, 1987 CarswellMan 272, [1987] 1 S.C.R. 110, [1987] 3 W.W.R. 1, [1987] D.L.Q. 235, [1987] S.C.J. No. 6, 18 C.P.C. (2d) 273, 25 Admin. L.R. 20, 38 D.L.R. (4th) 321, 3 A.C.W.S. (3d) 390, 46 Man. R. (2d) 241, 73 N.R. 341, 87 C.L.L.C. 14,015, J.E. 87-396, EYB 1987-67148

ATTORNEY GENERAL OF MANITOBA v. METROPOLITAN STORES (MTS) LTD., MANITOBA FOOD AND COMMERCIAL WORKERS, LOCAL 823 and MANITOBA LABOUR BOARD

Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

Heard: June 20, 1986
Judgment: March 5, 1987
Docket: No. 19609

Counsel: *S. Whitley* and *V.J. Matthews-Lemieux*, for appellant.
W.L. Ritchie, Q.C., and *R. Kersey*, for respondent Metropolitan Stores (MTS) Limited.
A.R. McGregor, Q.C., and *D.M. Shrom*, for respondent the Manitoba Food and Commercial Workers, Local 832.
D. Gisser, for respondent the Manitoba Labour Board.

The judgment of the court was delivered by *Beetz J.*:

I The Facts, the Proceedings and the Judgment of the Courts Below

1 The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 86 C.L.L.C. 14,014, 37 Man. R. (2d) 181, described them at p. 181:

> Under the terms of the *Labour Relations Act*, C.C.S.M., c. L-10, there is provision allowing the Manitoba Labour Board to impose a first collective agreement upon the employer and the union, in circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.
>
> The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the *Labour Relations Act* under which a first collective agreement might be imposed, declared invalid, as contravening the *Charter of Rights and Freedoms*. Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle J. [see 36 Man. R. (2d) 152]. The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

2 The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

3 The reasons of Krindle J. (1985), 22 C.R.R. 156, 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

> The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of the 22. Nine employees wrote in letters opposing the certification of the union.
>
> We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compel decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.
>
> The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation ...
>
> Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms ...
>
> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.
>
> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

4 In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge (pp. 181-83):

> The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside

for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date ...

It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J., was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.

Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.

At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation, it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the *Labour Relations Act* are under attack as violating the *Charter*, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board "... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the *Labour Relations Act*" ...

By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.

There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.

In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.

A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

5 In allowing the appeal, the Manitoba Court of Appeal ordered that:

... all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of *The Labour Relations Act* (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

6 It is from this interlocutory order that the Attorney General is appealing by leave of this court. He is supported by Manitoba Food and Commercial Workers, Local 832 ("the union") and by the Manitoba Labour Board ("the board").

II The Issues

7 The points in issue, according to appellant's factum, are as follows:

> 1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*?
>
> 2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of *The Labour Relations Act*, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?
>
> 3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings?
>
> 4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

8 The first issue stated by the appellant is related to the existence of a so-called presumption of constitutional validity of a law when challenged under the Canadian Charter of Rights and Freedoms and will be dealt with first.

9 The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a superior court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in Charter cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the vires of delegated legislation: as I read those cases, there is no essential difference between this type of case and the Charter cases insofar as the principles governing the grant of interlocutory injunctive relief are concerned.

10 Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The Canadian Charter of Rights and Freedoms and the So-called Presumption of Constitutional Validity

11 According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recog nize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*".

12 I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

13 We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the Charter must be presumed to be consistent with the Charter and of full force and effect.

14 Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

15 A reason of principle related to the character of the Charter also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the Canadian Charter of Rights and Freedoms conflicts with the idea that a legislative provision can be presumed to be consistent with the Charter.

16 As was said by Lamer J., speaking for himself and five other members of the court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 496, *(*sub nom. *Ref. re S. 94(2) of Motor Vehicle Act)* [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 48 C.R. (3d) 289, 36 M.V.R. 240, 23 C.C.C. (3d) 289, 24 D.L.R. (4th) 536, 18 C.R.R. 30, 63 N.R. 266:

> The truly novel features of the *Constitution Act*, 1982 are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

17 The Charter extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed, pursuant to s. 32(2) of the Charter, by three years, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

18 Furthermore, the innovative character of the Charter affects even traditional rights already recognized before the coming into force of the Charter and which must now be viewed in a new light. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 18 C.C.C. (3d) 385, 85 C.L.L.C. 14,023, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81, this court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the Charter to such interpretation of this freedom as had prevailed before the Charter. At pp. 343-44 of the *Big M* case, Dickson J., as he then was, speaking for himself and four other members of the court, wrote as follows:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> > 2. Everyone has the following fundamental freedoms:
> >
> > (*a*) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.

19 Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the Charter than it has received prior to the Charter: *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 19 C.R.R. 308, 14 O.A.C. 335, 65 N.R. 87.

20 Thus, the setting out of certain rights and freedoms in the Charter has not frozen their content. The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the Charter, must remain susceptible to evolve in the future:

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

(Per Le Dain J., dissenting, although not on this point, in *R. v. Therens*, [1985] 1 S.C.R. 613 at 638, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97, 32 M.V.R. 153, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 122.)

21 The views of Le Dain J. reflect those of Dickson J., as he then was, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

22 In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the Charter or after the Charter, is not compatible with the innovative and evolutive character of this constitutional instrument.

23 This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

24 One such meaning refers to the elementary rule of legal procedure according to which "the one who asserts must prove" and "The onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": Dale Gibson, The Law of the Charter: General Principles (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

25 Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: *McKay v. R.*, [1965] S.C.R. 798, 53 D.L.R. (2d) 532 [Ont.]. In the *Southam* case, supra, a Charter case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional." But that was a question of "reading in", not "reading down". The extent to which this rule of construction other wise applies, if at all, in the field of the Charter is a matter of controversy: *Fed. Republic of Germany v. Rauca* (1983), 41 O.R. (2d) 225, *(*sub nom. *R. v. Rauca)* 43 C.R. (3d) 97, 4 C.C.C. (3d) 385, 145 D.L.R. (3d) 638 at 658, 4 C.R.R. 42 (C.A.); *Black v. Law Soc. of Alta.*, [1986] 3 W.W.R. 590 at 628, 44 Alta. L.R. (2d) 1, 20 Admin. L.R. 140, 27 D.L.R. (4th) 527, 20 C.R.R. 117, *(*sub nom. *Black & Co. v. Law Soc. of Alta.)* 68 A.R. 259 (C.A.); leave to appeal has been granted, [1986] 1 S.C.R. x, 22 C.R.R. 192n, 72 A.R. 240, 69 N.R. 319; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés" in La Charte canadienne des droits et libertés: Concepts et impacts (1984), pp. 124-26; R. McLeod et al., eds., The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences, vol. 1, pp. 2-198-2-209; P. Hogg, Constitutional Law of Canada, 2nd ed. (1985), p. 327; D. Gibson, The Law of the Charter: General Principles, pp. 57, 58 and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceeding Pending the Constitutional Challenge of a Legislative Provision

26 The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

27 It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see *A.G. Can. v. Law Soc. of B.C.; Jabour v. Law Soc. of B.C.*, [1982] 2 S.C.R. 307 at 330, [1982] 5 W.W.R. 289, 37 B.C.L.R. 145, 19 B.L.R. 234, 137 D.L.R. (3d) 1, 66 C.P.R. (2d) 1, 43 N.R. 451.

(1) The Usual Conditions for the Granting of a Stay

28 Prior to the Supreme Court of Judicature Act, 1873 (36 & 37 Vict., c. 66), no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law: Halsbury's Laws of England, 4th ed., vol. 24, para. 1033, p. 577. The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec, where the distinction between equity and law is unknown. The distinction the English Judicature Act created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof ... shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to the court to be "just and convenient" that such order should be made. See also *Boeckh v. Gowganda-Queen Mines Ltd.* (1912), 4 O.W.N. 27, 6 D.L.R. 292 (H.C.).

29 A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 at 132 (C.A.); *Haldimand-Norfolk Regional Health Unit v. Ont. Nurses' Assn.*, Ont. Div. Ct., Galligan, Van Camp and Henry JJ., 17th January 1979 (unreported); *Daciuk v. Man. Lab. Bd.*, Man. Q.B., Dureault J., 25th June 1985 (unreported); *Metro. Toronto Sch. Bd. v. Ont. Min. of Educ.* (1985), 53 O.R. (2d) 70, 6 C.P.C. (2d) 281 at 292, 23 D.L.R. (4th) 303, 13 O.A.C. 113 (Div. Ct.), leave to appeal to the Court of Appeal refused.

30 The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

31 The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a prima facie case. The injunction will be refused unless he can: *Chesapeake & Ohio Ry. Co. v. Ball*, [1953] O.R. 843 at 854-55, [1953] O.W.N. 801, per McRuer C.J.H.C. The House of Lords has somewhat relaxed this first test in *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the court that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J., speaking for himself and five other members of the court in a unanimous judgment, referred to but did not comment upon this difference in *Aetna Fin. Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2 at 9 and 10, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 29 B.L.R. 5, 15 D.L.R. (4th) 161, 4 C.P.R. (3d) 145, 32 Man. R. (2d) 241, 56 N.R. 241.

32 *Amer. Cyanamid* has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 Man. L.J. 109; B.M. Rogers and

G.W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 Can. Bar Rev. 1, at pp. 9-19; R.J. Sharpe, Injunctions and Specific Performance, Toronto (1983), at pp. 66-77.

33 In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *Amer. Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured: see Hanbury and Maudsley, Modern Equity, 12th ed., pp. 736-43. In my view, however, the *Amer. Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

34 The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

35 The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

36 I now propose to consider the particular application of the test of the balance of convenience in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in *Amer. Cyanamid*, at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

37 It will be seen in what follows that the consequences for the public, as well as for the parties, of granting a stay in a constitutional case do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

38 A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

39 The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage

40 The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *Amer. Cyanamid* case, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

41 The *Amer. Cyanamid* case was a complicated civil case but Lord Diplock's dictum, just quoted, should a fortiori be followed for several reasons in a Charter case and in other constitutional cases when the validity of a law is challenged.

42 First, the extent and exact meaning of the rights guaranteed by the Charter are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the province may not yet have been notified as is usually required by law: see *Home Oil Distributors Ltd. v. A.G.B.C.*, 53 B.C.R. 355, [1939] 1 W.W.R. 49, [1939] 1 D.L.R. 573 at 577 (C.A.); *Weisfeld v. R.* (1985), 16 C.R.R. 24 (Fed. T.D.); and, for an extreme example, *Turmel v. C.R.T.C.* (1985), 16 C.R.R. 9 (Fed. T.D.).

43 Still, in Charter cases such as those which may arise under s. 23 relating to minority language educational rights, the factual situation as well as the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff: *Marchand v. Simcoe County Bd. of Educ.* (1984), 10 C.R.R. 169 at 174 (Ont. H.C.).

44 Furthermore, in many Charter cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although prima facie in violation of a guaranteed right or freedom, can be saved under s. 1 of the Charter. But evidence adduced pursuant to s. 1 of the Charter essentially addresses the merits of the case.

45 This latter rule was clearly stated in *Gould v. A.G. Can.*, [1984] 2 S.C.R. 124, 42 C.R. (3d) 88n, 13 D.L.R. (4th) at 491, 53 N.R. 394, affirming [1984] 1 F.C. 1133, 42 C.R. (3d) 88, 13 D.L.R. (4th) 485, 54 N.R. 232, which set aside [1984] 1 F.C. 1119, 42 C.R. (3d) 78. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J.F.C., dissenting, held that a court is sometimes entitled to examine the merits of the case and anticipate the result of the action (pp. 1137-38):

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(*e*) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court so show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.
>
> In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

46 Mahoney J., whose opinion was generally approved by this court, took the opposite view (p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(*e*) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

47 Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in *Cayne v. Global Natural Resources*, [1984] 1 All E.R. 225 at 238 (C.A.). Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the Charter after all and thus will not need to be saved under s. 1: see *R. v. Jones*, [1986] 2 S.C.R. 284, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 28 C.C.C. (3d) 513, 31 D.L.R. (4th) 569, 73 A.R. 133, 69 N.R. 241.

48 In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J.E. Magnet (J.E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 Man. L.J. 21, at p. 29):

> Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.

49 However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away: see *A.G. Que. v. Que. Assn. of Protestant Sch. Bd.*, [1984] 2 S.C.R. 66 at 88, 10 D.L.R. (4th) 321, 9 C.R.R. 133, 54 N.R. 196. It is trite to say that these cases are exceptional.

50 Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in Charter cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor Robert J. Sharpe wrote in Injunctions and Specific Performance, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

(ii) The Consequences of Granting a Stay in Constitutional Cases

51 Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to Charter instances. I also propose to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the Code of Civil Procedure:

> 751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.
>
> 752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.
>
> An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

52 While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

53 Although constitutional cases are often the result of a lis between private litigants, they sometimes involve some public authority interposed between the litigants, such as the board in the case at bar. In other constitutional cases, the controversy or the lis, if it can be called a lis, will arise directly between a private litigant and the state represented by some public authority: *Morgentaler v. Ackroyd* (1983), 42 O.R. (2d) 659, 150 D.L.R. (3d) 59 (H.C.).

54 In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the

implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type I will call exemption cases.

55 Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases is susceptible temporarily to frustrate the pursuit of the common good.

56 While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest dis tinct from that of the public to which they owe the duties imposed upon them by statute.

57 The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

58 *Société de développement de la Baie James c. Kanatewat*, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the James Bay Region Development Act, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

59 ... je n'ai pu me convaincre que les inconvénients subis ou appréhendés par les intimés étaient de la même échelle de grandeur que les besoins croissants d'énergie pour tout le Québec.

60 Turgeon J.A. reached the same conclusions at p. 177:

> Il est important de noter au départ que l'hydroélectricité est la seule ressource d'énergie primaire possédée par la province de Québec. Avec la crise du pétrole qui sévit actuellement dans le monde, cette ressource est devenue d'une importance capitale pour assurer l'avenir économique et le bien — être des citoyens. *L'intérêt de la population québécoise est représenté dans cette cause par les principales sociétés appelantes*.
>
> La preuve démontre qu'il est impérieux pour l'Hydro-Québec de réaliser son programme pour faire face à la demande croissante d'éléctricité jusq'en 1985 ... Un arrêt des travaux aurait des conséquences désastreuses car il faudrait mettre sur pied un programme de substitution pour produire l'électricité par des centrales thermiques ou nucléaires. (emphasis added)

(Leave to appeal was granted by this court on 13th February 1975, but a declaration of settlement out of court was filed on 28th January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

61 In *P.G. Qué. c. Lavigne*, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the Act respecting municipal taxation and providing amendments to certain legislation, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the Constitution Act, 1867, an allegation which was later sustained by this court in *A.G. Que. v. Greater Hull Sch. Bd.*, [1984] 2 S.C.R. 575, 28 M.P.L.R. 146, 15 D.L.R. (4th) 651, 56 N.R. 99.

The Superior Court had granted an interlocutory injunction for the following reasons, inter alia, at pp. 323 and 324:

Au départ, précisons que le cas d'espèce soumis n'est pas une question constitutionnelle *ordinaire*: il ne s'agit pas ici du conflit habituel entre la juridiction de l'Etat fédéral et l'une des provinces, du conflit juridictionel entre deux provinces, d'une province qui légiférerait hors des cadres des pouvoirs accordés par l'article 92 *A.A.N.B.*

Il s'agit ici plutôt du *cas très spécial* (comme celui de l'article 133 *A.A.N.B.*) où l'on attaque une législation que l'on prétend à l'encontre *d'une garantie constitutionnelle*.

En conséquence, il ne s'agit pas d'une simple question constitutionnelle, mais d'un droit garanti, comme le droit à la langue (133).

Il suffit, dans le cas d'une garantie constitutionnelle, comme la langue ou la religion, qu'il appert à sa face même qu'on enlève un droit pour que, d'une façon absolue, le justiciable ait droit à son recours en injonction. Cela découle de la nature même de la garantie constitutionnelle. *Quand un droit est garanti constitutionnellement, peu importe l'énonnité des conséquences, son aspect immuable demeure* ... (emphasis added)

62 The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

Le juge de la Cour supérieure, pour motiver l'émission des injonctions, décide que les dispositions attaquées, à leur face même, violent des garanties constitutionnelles contenues à l'article 93 de *l'Acte de l'Amérique du Nord Britannique*, qu'il suffit dans ce cas qu'on enlève un droit pour que d'une façon absolue, le recours en injonction soit fondé sans que soit requise une preuve de préjudice ou de la balance des inconvénients.

Après études du dossier et considération des arguments que nous soumettent les procureurs des parties en regard des jugements de la Cour supérieure, nous sommes d'avis que le droit sur lequel se fondent les demandeurs, requérants en injonction interlocutoire, n'est pas clair, que les questions en litige sont fort complexes. L'étendue des garanties constitutionnelles invoquées n'est pas sans susciter des doutes et *l'effet des injonctions est de suspendre la mise en opération d'une partie importante de la loi, dans toute la province de Québec*. Dans les circonstances, à ce stade des procédures, la présomption de validité de la loi doit prévaloir sur l'apparence d'un droit incertain. (emphasis added)

63 It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the province.

64 A somewhat similar situation arose in *Metro. Toronto Sch. Bd. v. Min. of Educ.*, supra. Interim measure regulations which provided for the funding of separate schools were challenged as being ultra vires by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the main

application. The following words reflect the interest shown by the court in the preservation of the educational system (pp. 293-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other, the balance of convenience overwhelmingly is in the latter's favour. *The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs*. (emphasis added)

65 Reference can also be made to *Pac. Trollers Assn. v. A.G. Can.*, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain fisheries officers from enforcing amendments made to the Pacific Commercial Salmon Fishery Regulations, the validity of which had been attacked. And see *A.G. Can. v. Fishing Vessel Owners' Assn. of B.C.*, [1985] 1 F.C. 791, 61 N.R. 128, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining fisheries officers from implementing the fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, and the Pacific Commercial Salmon Fishery Regulations, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the Fisheries Act. The court noted at p. 795:

> ... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm ...

66 These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by Browne L.J. in *Smith v. Inner London Educ. Authority*, [1978] 1 All E.R. 411 at 422 (C.A.):

> He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the "special factors" affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co v Ethicon Ltd.*

67 Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

68 *Ont. Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and ultra vires of the province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into court from time to time the amount payable in respect of the taxes claimed.

69 In *Campbell Motors Ltd. v. Gordon*, [1946] 3 W.W.R. 177, [1946] 4 D.L.R. 36 (B.C.C.A.), the appellant company sought a declaration that the National Emergency Transitional Powers Act, 1945, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(*c*)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were ultra vires on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an ex parte interim injunction restraining members of the board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

70 Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (*c*) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

71 A more recent example can be found in *Black v. Law Soc. of Alta.*, [1983] 3 W.W.R. 7, 24 Alta. L.R. (2d) 106, 144 D.L.R. (3d) 439, 5 C.R.R. 305, 42 A.R. 118 (Q.B.), and *Law Soc. of Alta. v. Black*, [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 346, 69 A.R. 322 (C.A.). The law society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the Charter. The Alberta Court of Queen's Bench granted an interlocutory injunction restraining the law society from enforcing the two rules against the plaintiff solicitors pending the trial of the action. The law society only appealed the order granting the interlocutory injunction with respect to the first rule. In allowing the appeal, Kerans J.A., who delivered the reasons of the court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the *Cyanamid* test simply disappears in such a case.

72 The *Morgentaler* case, supra, is an exemption case involving the Charter which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the Criminal Code, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the Canadian Charter of Rights and Freedoms and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the Criminal Code. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed — that is, what may law enforcement agencies do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?
>
> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.

> For example, let us assume that someone challenged the constitutional validity of the *Narcotic Control Act*, R.S.C. 1970, c. N-1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid ...
>
> In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

73 The principles followed in the above quoted cases have been summarized and confirmed for the greater part by this court in *Gould*, supra. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(*e*) of the Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.), had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the Canadian Charter of Rights and Freedoms, which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(*e*) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

74 That the respondent inmate had thus a prima facie case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, inter alia, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(*e*) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

75 And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

76 The same principles have been followed recently in *Bregzis v. Univ. of Toronto* (1986), 53 O.R. (2d) 348, 9 C.C.E.L. 282 (H.C.), where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of 65, in accordance with the university's mandatory retirement policy. He challenged the legality of the retirement policy as well as s. 9(*a*) of the Human Rights Code, 1981, S.O. 1981, c. 53, on the ground that they offended s. 15 of the Canadian Charter of Rights and Freedoms. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both *Morgentaler*, supra, and *Gould*, supra, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

77 Another case involving facts somewhat similar to *Bregzis* is *Vancouver Gen. Hosp. v. Stoffman* (1985), 68 B.C.L.R. 230, 23 D.L.R. (4th) 146 (C.A.), where the plaintiffs, 15 doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the Hospital Act, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of 65. The

regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the Canadian Charter of Rights and Freedoms. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia, which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the 15 respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

78 Finally, in *Rio Hotel Ltd. v. Liquor Licensing Bd. (N.B.)*, S.C.C., 31st July 1986, granting leave to appeal and staying proceed ings before the Liquor Licensing Board, Dickson C.J.C. and Beetz, McIntyre, Chouinard and Lamer JJ. [now reported at 29 D.L.R. (4th) 662n, 72 N.B.R. (2d) 180, *(*sub nom. *Rio Hotel Ltd. v. Comm. des Licenses et Permis d'Alcool)* 183 A.P.R. 180], Rio Hotel Ltd., which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the Charter as well as of ss. 91 and 92 of the Constitution Act, 1867. It had lost in the New Brunswick Court of Appeal [reported at 29 D.L.R. (4th) 662, 69 N.B.R. (2d) 20, 177 A.P.R. 20] and was threatened with the cancellation of its permit when, in a judgment dated 31st July 1986, this court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and for hearing the appeal. No reasons were given by this court but those who were present at the oral argument of the application for leave to appeal and for a stay could easily infer from exchanges between members of the court and counsel that the court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) Conclusion

79 It has been seen from what precedes that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

80 The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

81 The problem had already been raised in the *Campbell Motors* case, supra, where Robertson J.A. wrote at p. 47 in the above quoted passage:

> If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish ...

82 In a case like the *Morgentaler* case, supra, for instance, to grant a temporary exemption from the provisions of the Criminal Code to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

> It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences ... Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

83 This being said, I respectfully take the view that Linden J. has set the test too high in writing in *Morgentaler* that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations

applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of *Law Soc. of Alta. v. Black* and *Vancouver Gen. Hosp. v. Stoffman*, both supra, can be considered as exceptional or rare. Even the *Rio Hotel* case, supra, where the impugned provisions were broader, cannot, in my view, be labelled as an exceptional or rare case.

84 On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in *Morgentaler* is closer to the mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

85 One of these instances is *Home Oil Distributors Ltd. v. A.G.B.C.*, supra, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the enforcement of the Coal and Petroleum Products Control Board Act, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was intra vires on its face. The sole ground invoked against it was that it constituted a colourable attempt to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In *Home Oil Distributors Ltd. v. A.G.B.C.*, [1940] S.C.R. 444, [1940] 2 D.L.R. 609, this court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the *Campbell Motors* case, supra, at p. 48, in a passage that may amount to a veiled criticism. In my view, the *Home Oil Distributors* decision of the British Columbia Court of Appeal constitutes a weak precedent.

86 The other instance is *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other person, physical or corporate, from enforcing any right conferred upon them by Bill 70, la Loi constituant la Société nationale de l'amiante, and by Bill 121, la Loi modifiant la Loi constituant la Société nationale de l'amiante, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the Constitution Act, 1867, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

87 In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a prima facie case against the enforcement agency, such as one which would require the coming into play of s. 1 of the Canadian Charter of Rights and Freedoms.

88 I should point out that I would have reached the same conclusion had s. 24 of the Charter been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the Charter clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

89 On the whole, I thus find myself in agreement with the following excerpt from Sharpe, above, at pp. 176 and 177:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

90 I would finally add that in cases where an interlocutory injunction issues in accordance with the above stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part: see in this respect *Black v. Law Soc. of Alta.*, p. 453 [Q.B.], and the *Rio Hotel* case, both supra.

V Review of the Judgments of the Courts Below

91 Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

92 The main legislative provision under attack is s. 75.1 of the Labour Relations Act of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(*b*) and (*d*) and 7 of the Canadian Charter of Rights and Freedoms relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

93 The "irreparable harm" test also clearly appears to have been satisfied.

94 As I read her reasons, Krindle J., at p. 153, implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

95 It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

96 The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

97 Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this court to review these findings.

98 Krindle J. then considered the balance of convenience and I refer in this respect to the above quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.

> In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

99 While this is an exemption case, not a suspension case, and each case, including a fortiori an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the board. I have not been persuaded that she committed reversible error in concluding that "the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

100 I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

101 Thus, the Court of Appeal observed that it was open to the board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" [p. 182] and it noted that the board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

102 According to the reasons of the Court of Appeal (p. 182), the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> ... wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

103 The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the board's authority and upon the public in general. To repeat what was said by Browne L.J. in *Smith v. Inner London Educ. Authority*, supra, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

104 The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.
>
> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.

> In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.
>
> A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

105 With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

106 In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

107 The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above quoted reasons, had been considered and taken into account by Krindle J.

108 The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: *Hadmor Productions Ltd. v. Hamilton*, [1983] 1 A.C. 191, [1982] 2 W.L.R. 322, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock (p. 1046):

> Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think ap propriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.
>
> In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence "so virtually we have to consider it all afresh".

> My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions.

(See, also to the same effect, *Garden Cottage Foods Ltd. v. Milk Marketing Bd.*, [1984] A.C. 130, [1983] 3 W.L.R. 143, [1983] 2 All E.R. 770 (H.L.).)

109 I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

110 But there is more.

111 The Court of Appeal did not exercise its fresh discretion in accordance with the above stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

112 The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a prima facie case of violation of the Canadian Charter of Rights and Freedoms will normally trigger a recourse to the saving effect of s. 1 of the Charter. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with *Gould*, supra, and is inconsistent with the principles set out herein.

VI Conclusions

113 I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

114 There should be no order as to costs.

Appeal allowed.

TAB 16

Natale v. Toronto (City), [2018] O.J. No. 1180

Ontario Judgments

Ontario Superior Court of Justice

Divisional Court - Toronto, Ontario

K.E. Swinton J.

Heard: March 2, 2018.

Judgment: March 6, 2018.

Divisional Court File No.: 41/18

[2018] O.J. No. 1180 | ***2018 ONSC 1475*** | 289 A.C.W.S. (3d) 843 | ***71 M.P.L.R. (5th) 265*** | ***2018 CarswellOnt 3319***

RE: Anthony Natale and Justin Di Ciano, Moving Parties, and City of Toronto, Kevin Wiener, Brian Graff, Giorgio Mammoliti, James Gordon Smith and Lakeshore Planning Council Corporation, Responding Parties

(15 paras.)

Counsel

Bruce Engell and Sylvain Rouleau, for the Moving Parties.

Glenn K.L. Chu, Diana Dimmer, Brendan O'Callaghan and Matt Schuman, for the City of Toronto, Responding Party.

Kevin Wiener, self-represented, Responding Party.

ENDORSEMENT

K.E. SWINTON J.

1 The moving parties Anthony Natale and Justin Di Ciano seek leave to appeal the decision of the Ontario Municipal Board (the "Board") dated December 15, 2017 that approved By-laws 267-2017 and 464-2017 of the City of Toronto with one slight change. These by-laws approved a 47 ward system for municipal elections and are intended by the City for use in the October 22, 2018 election and elections in 2022, 2026 and possibly 2030.

2 For the reasons that follow, I would dismiss the motion for leave to appeal. Accordingly, I need not address the City's alternative argument that no appeal lies to the Divisional Court pursuant to s. 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 ("*OMB Act*") with respect to a decision relating to ward boundaries.

3 This motion for leave to appeal was heard at the same time as an application brought by the City for certain declarations. That application is a separate proceeding, in which I am sitting as a Superior Court judge rather than as a judge of the Divisional Court. The reasons in that application will be issued separately and at a later date.

4 An appeal lies to the Divisional Court from a decision of the Board only with leave and only on a question of law (s. 96(1), *OMB Act*). In determining whether to grant leave, the first question to be asked is whether there is some reason to doubt the correctness of the Board's decision on a question of law -- in other words, is the decision open to serious debate (*Vaughan (City) v. Rizmi Holdings Ltd.*, *2003 CarswellOnt 2907* at para. 8)? While some leave decisions consider the impact of the standard of reasonableness in answering that question, I need not enter into a consideration of whether the Board's decision would ultimately be reviewed on a reasonableness or correctness standard. In my view, there is no good reason to doubt the correctness of the Board's decision on what the moving parties described as the "conventional legal issues".

5 The moving parties concede that the Board enunciated the correct legal test to be applied in determining ward boundaries. The Board set out the principles from the Supreme Court of Canada's decision in *Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158* (referred to as *Carter*). The primary consideration in drawing electoral boundaries is "effective representation", which requires consideration of relative parity of voting power as well as other factors, such as geography, communities of interest, and capacity to represent (*Carter*, pp. 183-85).

6 The Board also cited its past jurisprudence holding that there should be deference to the decision of a City Council on ward boundaries, and the Board should intervene only if there are clear and compelling reasons to do so -- for example, because the City Council acted unfairly or unreasonably. While the moving parties suggested in oral argument that there should be no deference, the Board's approach is consistent with that of the Supreme Court in *Carter*, where the majority stated that there should not be intervention with respect to an electoral map adopted by the legislature unless the boundaries are unreasonable (at p. 189).

7 The moving parties argue that the Board erred in the application of these legal principles. They submit that voter parity is the primary consideration in drawing ward boundaries, and the Board should depart from voter parity only if it can point to another factor, such as preservation of communities. They argue that the Board did not justify departing from voter parity in its reasons, and it therefore erred when it approved the new 47 ward by-law rather than their preferred option, using the 25 federal electoral ridings.

8 In this case, the City adopted their consultants' proposed ward size of 61,000, with a variance of +/- 15% deemed acceptable. The moving parties take the position that the ward boundaries should reflect the 25 federal riding boundaries, because this provides better voter parity for the 2018 election than the 47 wards that were approved. The 47 ward proposal, they submit, does not achieve voter parity until 2026.

9 I see no reason to doubt the correctness of the Board's application of the governing legal principles. The moving parties and the dissenting opinion in the Board decision see voter parity as the primary factor in setting ward boundaries. However, the Supreme Court of Canada in *Carter* emphasized that primary concern is "effective representation" (at p. 183). Relative parity is important, but so, too, are factors such as "geography, community history, community interests and minority representation", as well as other factors (at p. 184). The Supreme Court also held that growth projection can be a relevant factor, and boundaries may be drawn with a view to population growth in the future, even if that results in a departure from parity at the outset (at p. 195).

10 Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure (at para. 36). It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent" (at para. 36). The Board considered the evidence respecting voter parity and "finds that the difference between the FEDS and the 47-ward structure is not significant and will not result in an unfair election in 2018", particularly taking into account all the *Carter* criteria, including the protection of communities of interest (at para. 39). The Board found that the 47 ward structure achieves the goal of effective representation (at para. 40). It also found that the City's consultants engaged in adequate public consultation.

11 The moving parties have failed to show any arguable legal error by the Board. The moving parties are really taking issue with the Board's findings of fact, its preference for certain evidence and its weighing of the various factors that go into a finding with respect to "effective representation." There is no basis for intervention by the Divisional Court with respect to the Board's decision to approve the by-laws.

12 The moving parties also asked for leave to appeal a "novel" question. They submit that the Board erred in law in putting in place a 47 ward structure in time to take effect in the 2018 election without ensuring that City Council passed a corresponding by-law to change the composition of Council from the present 44 councillors to 47.

13 No party asked the Board to deal with this issue. Indeed, in an appeal pursuant to s. 128 of the *City of Toronto Act*, S.O. 2006, c. 11, Sch. A ("*COTA*"), the Board's task is to determine the acceptability of ward boundaries. It does not have jurisdiction to determine the composition of council. That is the task of council itself in accordance with s. 135 of *COTA*.

14 My task, on this leave motion, is to determine whether there is reason to doubt the correctness of the Board's decision on a question of law. There is no basis to intervene on the "novel" issue, where the Board was not asked to deal with this question.

15 Accordingly, the motion for leave to appeal is dismissed. The parties have agreed that there will be no order as to costs.

K.E. SWINTON J.

End of Document

TAB 17

1998 CarswellOnt 1787
Ontario Court of Appeal

Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector, U.S.W.A., Local 440

1998 CarswellOnt 1787, [1998] O.J. No. 1824, 110 O.A.C. 297, 38 O.R. (3d) 448, 43 C.L.R.B.R. (2d) 48, 79 A.C.W.S. (3d) 301, 98 C.L.L.C. 220-046

Ogden Entertainment Services, Plaintiff/Respondent Moving Party and Al Kay, in his representative capacity as Area Representative of Retail, Wholesale/Canada Canadian Service Sector Division of The United Steel Workers of America, Local 440, Jack Davis, in his capacity as Picket Captain and on behalf of all members of the aforementioned Union, Defendants/Appellants Responding Parties

Robins, McKinlay, Weiler JJ.A.

Heard: April 24, 1998
Oral reasons: April 24, 1998
Docket: CA M22334, C29462

Counsel: *F. Paul Morrison* and *Steven G. Mason*, for the moving party.
Dougald Brown, for the responding parties.
Anita Lyon, for Her Majesty The Queen In Right of Ontario as represented by the Ontario Provincial Police.

Headnote

Injunctions --- Form and operation of order — Suspension of operation — Pending appeal — General

Plaintiff stadium operator moved to set aside order of appeal judge staying injunction granted in favour of plaintiff pending appeal — Injunction restrained defendant union picketers during lawful strike from obstructing vehicles or people entering or leaving stadium — Trial judge's findings must be prima facie accepted and strong case in favour of stay made out in determiing whether stay granted pending appeal — Actions of picketing union members unsafe and caused incidents of dangerous driving and assault — Injunction did not constitute ban on lawful picketing but restricted it to certain areas — No valid reason to stay injunction except with respect to police enforcement of order — No basis for directing police to enforce order arising out of civil proceeding — Stay of injunction vacated except with respect to enforcement provision.

Table of Authorities

Cases considered by *Robins J.A.*:

RJR-Macdonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, *(*sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — applied

Statutes considered by *Robins, J.A.*:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 7(5) — pursuant to

s. 102(3) — referred to

s. 141 — referred to

***Robins J.A.* (*Orally*):**

1 This is a motion by the plaintiff Ogden Entertainment Services (the respondent in the appeal) under s. 7(5) of the *Courts of Justice Act* to set aside the order of Abella J.A. staying the order of McKinnon J. dated April 2, 1998 granting an injunction restraining the defendants and others from:

> ...intimidating, molesting or interfering with or blocking or physically obstructing or delaying whatsoever any person or vehicle from entering or exiting the property administered by Ogden Entertainment Services located at 1,000 Palladium Drive in the City of Kanata, including but not limited to all parking areas and parking lots where Ogden Entertainment Services carry on its operations.

2 The defendants (the appellants in the appeal), who shall be referred to as "Local 440", hold bargaining rights for approximately 90 cleaners employed by the plaintiff at the Corel Centre in Ottawa. On February 5, 1998 the union commenced a lawful strike. On March 20, 1998 the plaintiff brought this application contending that picketers were improperly impeding and obstructing traffic to and from the Corel Centre, which is a multiple-purpose arena located to the west of Ottawa. It appears that on the days when the events were scheduled anywhere from 40 to 120 picketers were present at 11 different locations in the area.

3 It is uncontroverted that union members and their supporters impeded the access of passenger vehicles, transport buses carrying event spectators, passenger vehicles carrying employees, commercial vehicles, team buses and vehicles carrying performers to the centre. During these events, and particularly events involving the Ottawa Senators Hockey Club, between 17,500 and 18,500 members of the public have attended the Corel Centre. Approximately 7,500 passenger vehicles entered the Centre over a 90 minute period prior to each game.

4 In determining whether a stay should be granted pending appeal, the appropriate test to be applied is that set out in *RJR-Macdonald Inc. v. Canada (Attorney General)* (1994), 111 D.L.R. (4th) 385 (S.C.C.). This test is the same as the test for an interlocutory injunction. Generally, the court must decide whether the interests of justice call for a stay.

5 In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

6 In this case, there are factual disputes that will have to be dealt with on the appeal. However, there is no basis at this stage for rejecting the findings of the motions judge. He stated in granting the injunction in question, that:

> During the normal course of events, the OPP have nine officers monitoring the Corel Centre. Since the protocol was developed the OPP have had to send as many as 43 officers in an attempt to maintain order. Numerous troubling incidents have occurred, particularly during hockey events. Because the picketers have stood on public roadways leading to the Corel Centre and stopped vehicles for two minutes per vehicle, traffic on Highway 417 has been backed up for many miles. Some patrons have parked their cars on the side of the Highway 417 and walked to the Corel Centre. OC Transpo buses have not been permitted entry, requiring passengers to be let off at some distance from the Corel Centre and having people walk to the arena. Predictably and inevitably, this situation has led to numerous incidents of "road rage" on the part of patrons, who have on numerous occasions nudged picketers with their cars, become involved in emotionally charged verbal exchanges with picketers and on a number of occasions have caused minor injury to picketers. To date, five members of the public have been charged with dangerous driving, and one other person has been charged with assault. Luckily, no serious injuries have occurred.
>
> . . . . .
>
> All the picketers have placards. Vehicle traffic is backed up; various vehicles have tried to circumvent the picketers; squealing tires can be heard; shouts can be heard; and, during the video, Inspector Beechey can be heard to say, "We have a real unsafe situation here".
>
> . . . . .

> Inspector Beechey of the OPP is the officer in charge of maintaining order relating to the strike. If his examination for discovery, he stated that in his opinion there was an unsafe situation he was concerned about the picketers; about his own officers, one of whom had had a flashlight ripped out of his hand; about the pedestrians entering the Corel Centre, trying to run through the line of cars, some of which were gunning their engines....
>
> . . . . .
>
> He was asked whether or not he could prevent similar incidents at future events. His answer was this,
>
> > Gauging from the history of what has gone on, I would say that no way can we prevent incidents from happening. They are going to happen. You have, as you heard before, in the neighbourhood of 7,500 vehicles for any events. And any place where there are picketers, we have always had nudging. We have had people hit. We have had cars running through and those type of things. They are really unforeseeable and uncontrollable. Our presence out there should deter most of this, but it seems that the people getting held up for long periods of time don't even consider that.

7 The defendants' argument in favour of a stay appears to be based primarily on two grounds. First, it is contended that the plaintiff has not satisfied the requirements of s. 102(3) of the *Courts of Justice Act* in that it has not established that reasonable efforts to obtain police assistance, protection and action to prevent or remove any obstruction of or interference with lawful entry or exit from the plaintiffs premises have been unsuccessful. While this will properly be a matter of argument on the hearing of the appeal, at this stage, the judge's finding must *prima facie* be accepted. The evidence of the police, as the motions judge interpreted that evidence, appears sufficient to satisfy the requirements of s. 102(3). It is not for this panel on a stay application to place a contrary interpretation on this evidence of the police action and the safety factors that came under consideration.

8 The second ground advance in support of the stay is to the effect that the defendants are entitled to impede or delay traffic by stopping cars for short periods in furtherance of their acknowledged right to picket in the course of their lawful strike. We have set out the terms of the order. It is clear that this order does not, as suggested, constitute a ban on picketing. Nor can the order be said to be analogous to a ban. The striking employees remain fully entitled to peacefully picket the plaintiffs premises in the locations where they have been doing so. They are restrained only from engaging in the type of conduct specified in the order, in particular, from interfering with or blocking or physically obstructing or delaying any person or vehicle from entering or exiting the property. The prohibition is against engaging in conduct of that nature.

9 A question arose during argument today as to the interpretation of the order as a result of comments which were apparently made during the hearing before the motions judge. The question is whether picketers are entitled to offer leaflets or pamphlets to motorists who may be stopped while waiting to enter the parking lots or who may of their own free will stop in order to accept information of this nature. The injunction does not appear to restrain this type of activity and Mr. Morrison, counsel for the plaintiff, agrees that such conduct would not, in and of itself, constitute a violation of the order. We make this comment in the hope of avoiding any misunderstanding as to what is covered by the order.

10 Applying the test in *R.J.R. v. MacDonald* to the facts as found by the motions judge, we have concluded that there is no valid reason to stay his order, save in one respect. Counsel has appeared here today, with our leave, representing the Ontario Provincial Police. She takes the position that there was no jurisdiction on the part of the motions judge to direct, quoting the order, that "the Ontario Provincial Police enforce the Order of this Honourable Court". Counsel for the parties do not argue against the position advanced on behalf of the OPP. We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the *Courts of Justice Act*.

11 Accordingly, in so far as paragraph 4 of the order of McKinnon J. is concerned, the stay previously granted will be continued. Otherwise, the stay is vacated. Costs of this application will be reserved to the panel hearing the appeal.

Cited paragraph: 4

Motion granted in part.

TAB 18

Cited Paragraphs: 43-44, 57-59, 64, 66 71-74, 77-81

RJR-MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

Supreme Court Reports

Supreme Court of Canada

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

1993: October 4 / 1994: March 3.

File Nos.: 23460, 23490.

[1994] 1 S.C.R. 311 | *[1994] 1 R.C.S. 311* | *[1994] S.C.J. No. 17* | *[1994] A.C.S. no 17* | *1994 CanLII 117*

RJR-MacDonald Inc., Applicant; v. The Attorney General of Canada, Respondent, and The Attorney General of Quebec, Mis-en-cause, and The Heart and Stroke Foundation of Canada, Interveners on the the Canadian Cancer Society, application for the Canadian Council on Smoking and Health, and interlocutory relief Physicians for a Smoke-Free Canada And between Imperial Tobacco Ltd., Applicant; v. The Attorney General of Canada, Respondent, and The Attorney General of Quebec, Mis-en-cause, and The Heart and Stroke Foundation of Canada, Interveners on the the Canadian Cancer Society, application for the Canadian Council on Smoking and Health, and interlocutory relief Physicians for a Smoke-Free Canada

Case Summary

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18. — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) - - Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The Tobacco Products Control Act regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was ultra vires Parliament and that it violates the right to freedom of expression in s. 2(b) of the Canadian Charter of Rights and Freedoms. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The Tobacco Products Control Regulations, amendment, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the Supreme Court Act, or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the Tobacco Products Control Regulations, amendment should be granted. A preliminary question was raised as to this Court's jurisdiction to

grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court of Canada Act and r. 27 of the Rules of the Supreme Court of Canada.

The words "other relief" in r. 27 of the Supreme Court Rules are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the Supreme Court Act was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd. which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the Canadian Charter of Rights and Freedoms. A Charter remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part American Cyanamid test (adopted in Canada in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.) should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally

determine the result in applications involving Charter rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

Cases Cited

Applied: Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., *[1987] 1 S.C.R. 110*; considered: Labatt Breweries of Canada Ltd. v. Attorney General of Canada, *[1980] 1 S.C.R. 594*; American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396; referred to: R. v. Crown Zellerbach Canada Ltd., *[1988] 1 S.C.R. 401*; Keable v. Attorney General (Can.), *[1978] 2 S.C.R. 135*; Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127; Laboratoire Pentagone Ltée v. Parke, Davis & Co., *[1968] S.C.R. 269*; Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) *(1972), 2 O.R. 619*; Bear Island Foundation v. Ontario *(1989), 70 O.R. (2d) 574*; N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294; Trieger v. Canadian Broadcasting Corp. *(1988), 54 D.L.R. (4th) 143*; Tremblay v. Daigle, *[1989] 2 S.C.R. 530*; Dialadex Communications Inc. v. Crammond *(1987), 34 D.L.R. (4th) 392*; R.L. Crain Inc. v. Hendry *(1988), 48 D.L.R. (4th) 228*; MacMillan Bloedel Ltd. v. Mullin, *[1985] 3 W.W.R. 577*; Hubbard v. Pitt, [1976] Q.B. 142; Mills v. The Queen, *[1986] 1 S.C.R. 863*; Nelles v. Ontario, *[1989] 2 S.C.R. 170*; Ainsley Financial Corp. v. Ontario Securities Commission *(1993), 14 O.R. (3d) 280*; Morgentaler v. Ackroyd *(1983), 150 D.L.R. (3d) 59*; Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., *[1985] 1 F.C. 791*; Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) *(1988), 21 F.T.R. 304*; Island Telephone Co., Re *(1987), 67 Nfld. & P.E.I.R. 158*; Black v. Law Society of Alberta *(1983), 144 D.L.R. (3d) 439*; Vancouver General Hospital v. Stoffman *(1985), 23 D.L.R. (4th) 146*; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix; Ontario Jockey Club v. Smith *(1922), 22 O.W.N. 373*; R. v. Oakes, *[1986] 1 S.C.R. 103*.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1).
Code of Civil Procedure of Québec, art. 523.
Constitution Act, 1867, s. 91.
Fisheries Act, R.S.C. 1970 c. F-14.
Rules of the Supreme Court of Canada, 1888, General Order No. 85(17).
Rules of the Supreme Court of Canada, SOR/83-74, s. 27.
Supreme Court Act, R.S.C., 1985, c. S-26, ss. 65.1 [ad. S.C. 1990, c. 8, s. 40], 97(1)(a).
Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18.
Tobacco Products Control Regulations, amendment, SOR/93-389.

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Canada. Minister of National Health and Welfare. Regulatory Impact Analysis Statement. (Statement following Tobacco Products Control Regulations, amendment, SOR/93-389.) In Canada Gazette, Part II, Vol. 127, No. 16, p. 3284.
Cassels, Jamie. "An Inconvenient Balance: The Injunction as a Charter Remedy". In Jeffrey Berryman, ed. Remedies: Issues and Perspectives. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. Injunctions and Specific Performance, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (loose-leaf).

APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, *[1993] R.J.Q. 375*, *53 Q.A.C. 79*, *102 D.L.R. (4th) 289*, *48 C.P.R. (3d) 417*, allowing an appeal from a judgment of Chabot J., *[1991] R.J.Q. 2260*, *82 D.L.R. (4th) 449*, *37 C.P.R. (3d) 193*, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR-MacDonald Inc. Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and Yves Leboeuf, for the respondent. W. Ian C. Binnie, Q.C., and Colin Baxter, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

Solicitors for the applicant RJR-MacDonald Inc.: Mackenzie, Gervais, Montreal. Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal. Solicitors for the respondent: Côté & Ouellet, Montreal. Solicitors for the interveners on the application for interlocutory relief Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

The judgment of the Court on the applications for interlocutory relief was delivered by

SOPINKA AND CORY JJ.

I. Factual Background

1 These applications for relief from compliance with certain Tobacco Products Control Regulations, amendment, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the Tobacco Products Control Act, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(f) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(b) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the Tobacco Products Control Act on the grounds that it is ultra vires the Parliament of Canada and invalid as it violates s. 2(b) of the Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, *[1991] R.J.Q. 2260*, *82 D.L.R. (4th) 449*, finding that the Act was ultra vires the Parliament of Canada and that it contravened the Charter. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the Tobacco Products Control Act. However,

under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, *[1993] R.J.Q. 375*, *102 D.L.R. (4th) 289*, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not ultra vires the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(b) of the Charter but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the Charter. Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the Charter. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: Tobacco Products Control Regulations, amendment, SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the Supreme Court Act, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the Rules of the Supreme Court of Canada, *SOR/83-74*. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of Tobacco Products Control Act.

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

14 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, *[1991] R.J.Q. 2260*, *82 D.L.R. (4th) 449*

15 Chabot J. concluded that the dominant characteristic of the Tobacco Products Control Act was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the Tobacco Products Control Act as a law regulating advertising of a particular product, a matter within provincial legislative competence.

16 Chabot J. found that, with respect to s. 2(b) of the Charter, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that Charter guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

17 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that advertising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

18 In deciding whether or not to exercise its broad power under art. 523 of the Code of Civil Procedure of Québec to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> ...
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd. *[1987] 1 S.C.R. 110*, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), *[1993] R.J.Q. 375*, *102 D.L.R. (4th) 289*

1. LeBel J.A. (for the majority)

19 LeBel J.A. characterized the Tobacco Products Control Act as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

20 LeBel J.A. applied the criteria set out in R. v. Crown Zellerbach Canada Ltd., *[1988] 1 S.C.R. 401*, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

21 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(b) of the Charter but found that it was justified under s. 1 of the Charter. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the Oakes test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

22 Brossard J.A. agreed with LeBel J.A. that the Tobacco Products Control Act should be characterized as public

health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

23 However, he did not think that the violation of s. 2(b) of the Charter could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

24 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

25 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was intra vires s. 91 of the Constitution Act, 1867 and justified under s. 1 of the Charter. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

26 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

27 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the Supreme Court Act and r. 27 of the Rules of the Supreme Court of Canada.

Supreme Court Act

> 65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

28 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see Rules of the Supreme Court of Canada, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of

the Act whence the Court derives its rule-making power. Subsection (1)(a) of that section provides that the rules may be enacted:

> 97. ... (a) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See Keable v. Attorney General (Can.), *[1978] 2 S.C.R. 135*. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

29 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

30 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

31 This, in our opinion, is the view taken by this Court in Labatt Breweries of Canada Ltd. v. Attorney General of Canada, *[1980] 1 S.C.R. 594*. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of

Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

32 While the above passage appears to answer the submission of the respondents on this motion that Labatt was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in Labatt reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

33 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., *[1987] 1 S.C.R. 110*. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

34 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the Charter. A Charter remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

35 The applicants rely upon the following grounds:

1. The challenged Tobacco Products Control Regulations, amendment were promulgated pursuant to ss. 9 and 17 of the Tobacco Products Control Act, S.C. 1988, c. 20.
2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior

Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the Canadian Charter of Rights and Freedoms.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

   (iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

36 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra. If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

37 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

38 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

39 On the other hand, the Charter charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of Charter rights. Such a practice would undermine the spirit and purpose of the Charter and might encourage a government to prolong unduly final resolution of the dispute.

40 Are there, then, special considerations or tests which must be applied by the courts when Charter violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

41 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In Metropolitan Stores, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

42 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

43 Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

44 Prior to the decision of the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong prima facie case" on the merits in order to satisfy the first test. In American Cyanamid, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The American Cyanamid standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, Injunctions and Specific Performance (2nd ed. 1992), at pp. 2-13 to 2-20.

45 In Metropolitan Stores, Beetz J. advanced several reasons why the American Cyanamid test rather than any more stringent review of the merits is appropriate in Charter cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

46 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following dicta of this Court in Laboratoire Pentagone Ltée v. Parke, Davis & Co., *[1968] S.C.R. 269*, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in Adrian Messenger Services v. The Jockey Club Ltd. (No. 2) *(1972), 2 O.R. 619* (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in Bear Island Foundation v. Ontario *(1989), 70 O.R. (2d) 574* (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

47 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in Charter cases.

48 The Charter protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged Charter violation to review the matter carefully. This is so even when other courts have concluded that no Charter breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in Metropolitan Stores, at p. 128, that "the American Cyanamid 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

49 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the Charter claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see Metropolitan Stores, supra, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

50 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

51 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the American Cyanamid principle in such a situation in N.W.L. Ltd. v. Woods, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

52 In Trieger v. Canadian Broadcasting Corp. *(1988), 54 D.L.R. (4th) 143* (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

53 In Tremblay v. Daigle, *[1989] 2 S.C.R. 530*, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

54 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

55 The second exception to the American Cyanamid prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in Metropolitan Stores, at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the Canadian Charter of Rights and Freedoms, could not possibly be saved under s. 1 of the Charter and might perhaps be struck down right away; see Attorney General of Quebec v. Quebec Association of Protestant School Boards, *[1984] 2 S.C.R. 66*, at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

56 The suggestion has been made in the private law context that a third exception to the American Cyanamid "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in Dialadex Communications Inc. v. Crammond *(1987), 34 D.L.R. (4th) 392* (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong prima facie case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in Charter cases. Even if the facts upon which the Charter breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

57 Beetz J. determined in Metropolitan Stores, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by

some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

58 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

59 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (R.L. Crain Inc. v. Hendry *(1988), 48 D.L.R. (4th) 228* (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (American Cyanamid, supra); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, *[1985] 3 W.W.R. 577* (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

60 The assessment of irreparable harm in interlocutory applications involving Charter rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in Charter cases.

61 This Court has on several occasions accepted the principle that damages may be awarded for a breach of Charter rights: (see, for example, Mills v. The Queen, *[1986] 1 S.C.R. 863*, at pp. 883, 886, 943 and 971; Nelles v. Ontario, *[1989] 2 S.C.R. 170*, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the Charter. In light of the uncertain state of the law regarding the award of damages for a Charter breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

62 The third test to be applied in an application for interlocutory relief was described by Beetz J. in Metropolitan Stores at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in Charter cases, many interlocutory proceedings will be determined at this stage.

63 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In American Cyanamid, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

64 The decision in Metropolitan Stores, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be

"given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in Ainsley Financial Corp. v. Ontario Securities Commission *(1993), 14 O.R. (3d) 280*, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.
>
> 1. The Public Interest

65 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in Metropolitan Stores. A few additional points may be made. It is the "polycentric" nature of the Charter which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., Remedies: Issues and Perspectives, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in Charter litigation is not unequivocal or asymmetrical in the way suggested in Metropolitan Stores. The Attorney General is not the exclusive representative of a monolithic "public" in Charter disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

66 It is, we think, appropriate that it be open to both parties in an interlocutory Charter proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

67 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in Morgentaler v. Ackroyd *(1983), 150 D.L.R. (3d) 59* (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that these women would suffer irreparable harm, such evidence would not indicate any irreparable harm to these applicants, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

68 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

69 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in Attorney General of Canada v. Fishing Vessel Owners' Association of B.C., *[1985] 1 F.C. 791*, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the Fisheries Act, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in Metropolitan Stores at p. 139. It was applied by the Trial Division of the Federal Court in Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans) *(1988), 21 F.T.R. 304*.

70 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in Island Telephone Co. Re, *(1987), 67 Nfld. & P.E.I.R. 158*, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The public interest is equally well served, in the same sense, by any appeal. . . .

71 In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

72 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

73 Consideration of the public interest may also be influenced by other factors. In Metropolitan Stores, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See Black v. Law Society of Alberta *(1983), 144 D.L.R. (3d) 439*; Vancouver General Hospital v. Stoffman *(1985), 23 D.L.R. (4th) 146*; Rio Hotel Ltd. v. Commission des licences et permis d'alcool, [1986] 2 S.C.R. ix.

74 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in Ontario Jockey Club v. Smith *(1922), 22 O.W.N. 373* (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

75 In the course of discussing the balance of convenience in American Cyanamid, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would

seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the Charter is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

76 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a Charter case.

77 As indicated in Metropolitan Stores, the three-part American Cyanamid test should be applied to applications for interlocutory injunctions and as well for stays in both private law and Charter cases.

78 At the first stage, an applicant for interlocutory relief in a Charter case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the Metropolitan Stores test.

79 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In Charter cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

80 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

81 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

82 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these

tests and that the ban could not be justified under s. 1 of the Charter. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in R. v. Oakes, *[1986] 1 S.C.R. 103*, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

83 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

84 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

85 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

86 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

87 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the Tobacco Products Control Act. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in Metropolitan Stores. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation".

88 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in Metropolitan Stores:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: ... the protection of public health ... . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

89 The regulations under attack were adopted pursuant to s. 3 of the Tobacco Products Control Act which states:

> 3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (a) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (b) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (c) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

90 The Regulatory Impact Analysis Statement, in the Canada Gazette, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

91 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

92 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

93 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the prevention of the widespread and serious medical problems directly attributable to smoking.

94 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance

that the applications for a stay must be dismissed with costs to the successful party on the appeal.

End of Document

TAB 19

1992 CarswellNat 1006
Supreme Court of Canada

Schachter v. Canada

1992 CarswellNat 1006, 1992 CarswellNat 658, [1992] 2 S.C.R. 679, [1992] S.C.J. No. 68, 10 C.R.R. (2d) 1, 139 N.R. 1, 34 A.C.W.S. (3d) 1090, 53 F.T.R. 240 (note), 92 C.L.L.C. 14,036, 93 D.L.R. (4th) 1, J.E. 92-1054, EYB 1992-67220

Her Majesty The Queen and Canada Employment and Immigration Commission, Appellants v. Shalom Schachter, Respondent and Women's Legal Education and Action Fund, Respondent and The Attorney General for Ontario, the Attorney General of Quebec, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, the Attorney General for Alberta, the Attorney General of Newfoundland and Minority Advocacy Rights Council, Interveners

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

Judgment: December 12, 1991
Judgment: July 9, 1992
Docket: 21889

Proceedings: On Appeal from the Federal Court of Appeal

Counsel: *David Sgayias, Q.C.*, and *Roslyn J. Levine*, for the appellants.
Brian G. Morgan and *Lawrence E. Ritchie*, for the respondent Shalom Schachter.
Mary A. Eberts and *Jenifer Aitken*, for the respondent Women's Legal Education and Action Fund.
Elizabeth Goldberg and *Lori Sterling*, for the intervener the Attorney General for Ontario.
Jean-Yves Bernard and *Madeleine Aubé*, for the intervener the Attorney General of Quebec.
Gabriel Bourgeois, for the intervener the Attorney General for New Brunswick.
George H. Copley, for the intervener the Attorney General of British Columbia.
Ross Macnab, for the intervener the Attorney General for Saskatchewan.
Stanley H. Rutwind, for the intervener the Attorney General for Alberta.
B. Gale Welsh, for the intervener the Attorney General of Newfoundland.
Emilio S. Binavince, for the intervener Minority Advocacy and Rights Council.

Headnote

Constitutional Law --- Charter of Rights and Freedoms — Nature of remedies under Charter
Human Rights --- What constitutes discrimination — Sex — Employment — Pregnancy and maternity leave
Social Assistance --- Unemployment insurance — Constitutional issues — Charter of Rights and Freedoms
Section excluding natural parents violating equality rights — Court erring by reading excluded group into section — Canadian Charter of Rights and Freedoms, s. 15(1) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30, 32.

S. 30 of the Act provided for benefits for a claimant who proved her pregnancy. The section clearly excluded the payment of benefits to natural fathers. S. 32 provided for the payment of benefits to a claimant of either sex upon the placing with that claimant of an adopted child. On a challenge to the constitutionality of s. 32, the Court of Appeal upheld the decision of the Trial Division that s. 32 was to be extended by judicial amendment to include natural parents. Minister appealed. Held, the appeal was allowed. Although s. 32 did violate s. 15(1) of the Charter, there was no need to declare s. 32 invalid given that it had been repealed in 1990 and replaced, with the result that Parliament equalized the benefits given

to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. Without a mandate based on a clear legislative objective, it was not prudent for the Court to read the excluded group, namely, natural parents, into s. 32. A consideration of the budgetary considerations of such an action underlined that conclusion.
Section favouring adopting parents violating equality rights — Court erring by reading excluded group into section — Canadian Charter of Rights and Freedoms, s. 15(1) — Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30, 32.
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The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ. was delivered by *Lamer C.J.*:

Facts

1 The respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1985. The respondent intended to stay home with the newborn as soon after the birth as his wife was able to return to work. Ultimately, he took three weeks off work without pay.

2 Marcia Gilbert received fifteen weeks of maternity benefits under s. 30 of the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, as am. by S.C. 1980-81-82-83, c. 150, s. 4. The respondent first applied for benefits under s. 30 in respect of the time he had to take off work, but ultimately modified an application under s. 32, as am. by S.C. 1980-81-82-83, c. 150, s. 5, for "paternity benefits". This is a section which provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

3 The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues.

4 The matter proceeded before Strayer J. in the Federal Court, Trial Division. In written reasons, [1988] 3 F.C. 515, Strayer J. found a violation of s. 15 of the *Canadian Charter of Rights and Freedoms* in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s. 32.

5 The appellants appealed to the Federal Court of Appeal. In written reasons dated February 16, 1990, [1990] 2 F.C. 129, the Court upheld the Trial Division's decision, Mahoney J.A. dissenting. The appeal was dismissed.

6 On November 15, 1990, the appellants were granted leave to appeal to this Court.

7 It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

Relevant Statutory and Constitutional Provisions

8 The relevant provision of the *Unemployment Insurance Act, 1971*, reads as follows:

> *32.*(1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

9 The relevant provisions of the *Canadian Charter of Rights and Freedoms* read as follows:

> *1.* The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> *15.*(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> *24.*(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

10 The relevant provision of the *Constitution Act, 1982* reads as follows:

> *52.*(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Judgments Below

Federal Court, Trial Division (Strayer J.)

11 Strayer J. held that s. 32 denied equal benefit of the law with discrimination on the basis of parental status, thereby infringing the s. 15 rights of the respondent. No s. 1 analysis was undertaken. Having decided that there was an infringement, Strayer J. went on to consider the appropriate remedy. In his view, at p. 543, two options were available:

> I could either declare section 32 to be invalid in its present form, thus denying benefits to those already within it, or I could simply declare the entitlement of natural parents to benefits equal to those now provided to adoptive parents under section 32. Counsel for the plaintiff [respondent] and for the intervenor [LEAF] argued for the latter approach, while counsel for the defendants [appellants] argued that I must, if I concluded there was unequal benefit of the law, strike down the existing benefits in section 32.

12 Given that Strayer J. found s. 32 to be defective, not because it provided prohibited benefits but because it was "underinclusive", he did not consider it appropriate to deprive those persons already qualified under s. 32 of their benefits. Rather, he decided to make a declaration that other persons in similar circumstances were entitled to the same benefits, until such time as Parliament amended the legislation in a way which met the requirements of s. 15. Further, he ordered that the respondent's application for benefits be reconsidered on the basis that if, apart from his status as a natural parent, he met the requirements of the section, he was entitled to benefits. Pursuant to Rule 341A (*Federal Court Rules*, C.R.C., c. 663, ad. SOR/79-57, s. 8), Strayer J. suspended the operation of his judgment pending appeal.

Court of Appeal (Heald J.A. for the majority)

13 Since the parties conceded at the outset that s. 15(1) of the *Charter* had been violated, the Court of Appeal dealt only with the jurisdiction of the trial judge to accord the remedy sought by the respondent.

14 Heald J.A. noted at the outset that the appellants had conceded that, had the Trial Division had the jurisdiction to grant the remedy it did, the order was "just and appropriate in the circumstances". Heald J.A. determined that the trial judge did have the jurisdiction to grant a remedy under s. 24(1) of the *Charter*. He did not accept the appellants' argument that the only option which was open to the trial judge in the circumstances was to strike down the impugned provision pursuant to s. 52 of the *Constitution Act, 1982*. He found, at p. 137, the distinction made by the trial judge between legislation which "is unconstitutional because of what it provides and legislation which is unconstitutional because of what it omits" to be an apt one. He held that here it was permissible to have recourse to s. 24 because the impugned provision was unconstitutional solely because it was not sufficiently broad in scope. "It is the omission in this case that is unconstitutional, not the legislation itself." Therefore, in his opinion, s. 52 was not engaged.

15 Heald J.A. further considered the "interface" between ss. 24 and 52 when a violation of s. 15 has been found. He held, at p. 142, that:

> A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to subsection 15(1). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the learned Trial Judge attempted to do in the decision *a quo*.

16 Heald J.A. was of the view that, as the consequences of a declaration that the legislation was inoperative would be to deprive adoptive parents of the benefits granted to them by s. 32 of the *Unemployment Insurance Act, 1971*, this would be as much an amendment of legislation as the remedy granted by the trial judge. Heald J.A. concluded that where legislation is "underinclusive", positive relief is both warranted and constitutionally permitted through the vehicle of s. 24.

17 Heald J.A. was not persuaded that the jurisprudence supported the appellants' contention that the order was an appropriation of public funds for a purpose not authorized by Parliament.

18 Heald J.A. dismissed the appeal, upholding the judgment of the trial judge. He suspended the operation of that judgment pending appeal.

Mahoney J.A. (dissenting)

19 Mahoney J.A. held that the remedy granted by the trial judge was outside his jurisdiction because he had in effect amended the legislation where, by virtue of the Constitution, the sole power to legislate is reserved to Parliament.

20 With regard to the issue of the appropriation of funds, Mahoney J.A. was of the view that the remedy fashioned by the trial judge amounted to an appropriation of money by a court which is not permitted by the provisions of the preamble to the *Constitution Act, 1867*. He concluded, at p. 164:

> Even if the power of a court to legislate by way of a subsection 24(1) remedy were found to exist in circumstances which do not entail the appropriation of public monies, no such power can be found to exist where the remedy appropriates monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. A purposive approach to remedies under subsection 24(1) cannot take a court that far.
>
> In my opinion, the appellants are correct: the Constitution of Canada does not permit the remedy crafted by the learned Trial Judge. Having found that section 32 of the *Unemployment Insurance Act, 1971* was inconsistent with a provision of the Constitution of Canada, the learned Trial Judge was bound to find it to be of no force and effect. Had that finding been made, the absence of any conflict between subsections 24(1) and 52(1) would be apparent. There is no offending legislation and, therefore, no subsection 24(1) remedy called for.
>
> In my opinion, subsection 52(1) does not provide a "remedy" in any real sense of that word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.

21 Mahoney J.A. would have allowed the appeal and issued a declaration pursuant to s. 52(1) that s. 32 of the *Unemployment Insurance Act, 1971*, was of no force or effect by reason of its inconsistency with the *Charter*. He could see no compelling reason to order a stay of execution of that judgment to permit remedial legislative action.

Issues

22 By order dated March 14, 1991 the following constitutional questions were stated by the Chief Justice:

> 1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?
>
> 2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

Analysis

23 I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

24 All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

1. Reading in as a Remedial Option under Section 52

25 A court has flexibility in determining what course of action to take following a violation of the *Charter* which does not survive s. 1 scrutiny. Section 52 of the *Constitution Act, 1982* mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the *Charter* extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [*Charter*] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

A. The Doctrine of Severance

26 The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

27 Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest

of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.

28 Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., *Charter Litigation* (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the *Charter* than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is not so of violations of the *Charter* where the offending portion tends to be more limited.

29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503, at p. 518:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

30 This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

31 Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

B. Reading In as Akin to Severance

32 This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly *excludes* rather than what it wrongly *includes*. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

33 A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in *Knodel v. British Columbia (Medical Services Commission)* (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at p. 388:

> As stated previously, once a person has demonstrated that a particular law infringes his or her *Charter* rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's *Charter* right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states: (1) A benefits; or (2) Everyone benefits except B.
>
> The first example would require the court to "read in" the words "and B," while the second example would require the court to "strike out" the words "except B." In each case, the result would be identical.
>
> Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

34 There is nothing in s. 52 of the *Constitution Act, 1982* to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the *words* expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a *law* is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

35 This Court implicitly recognized that the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms in *Andrews v. Law Society of British Columbia, supra*. In *Andrews* the statute (*Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26, s. 42) dictated that only Canadian citizens could become lawyers in the following words:

> *42.* The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court
>
> (a) a Canadian citizen with respect to whom they are satisfied that he ....

36 The Court found that the exclusion of non-citizens violated the right to equality. Instead of striking down the entire section so that everyone would be equally prevented from becoming a lawyer, only the requirement of Canadian citizenship was declared inoperative. However, the section does not make any sense if the words "a Canadian citizen" are deleted and there is, in fact, no way of simply deleting words that would make the section conform to the requirements of the *Charter*. Instead of focusing on these verbal formulae, the Court nullified the substantive citizenship requirement which could be said to amount to extending the statute to cover non-Canadians. Thus, *Andrews* is already an example of a case in which the extent of the inconsistency was defined conceptually without being limited to the manner in which the statute was drafted.

C. The Purposes of Reading In and Severance

37

> (i) Respect for the Role of the Legislature

38 The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

> Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

39 Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

(ii) Respect for the Purposes of the *Charter*

40 Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the *Charter*. The absolute unavailability of reading in would mean that the standards developed under the *Charter* would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the *Charter*. This point has been made well by Duclos' and Roach's article "Constitutional Remedies as 'Constitutional Hints': A Comment on *R. v. Schachter*" (1991), 36 *McGill L.J.* 1, and by Caminker's article "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 *Yale L.J.* 1185. Their argument is that even in situations where the standards of the *Charter* allow for more than one remedial response, the purposes of the *Charter* may encourage one kind of response more strongly than another.

41 This is best illustrated by the case of *Attorney-General of Nova Scotia v. Phillips* (1986), 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of the *Charter* since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that the *Charter* would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

42 Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see Caminker, at p. 1186). Yet the nulli fication of benefits to single mothers does not sit well with the overall purpose of s. 15 of the *Charter* and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the *Charter*.

43 Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*.

II. Choice of Remedial Options under Section 52

A. Defining the Extent of the Inconsistency

44 The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the *Charter* and the manner in which it fails to be justified under s. 1 will be critical to this determination. In this case, as noted earlier, this Court is hampered by the lack of an opportunity to assess the nature of the violation and the absence of s. 1 evidence.

45 It is useful at this point to set out the two stage s. 1 test developed by this Court in *R. v. Oakes*, [1986] 1 S.C.R. 103:

(1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?

(2) Are the measures chosen to serve that objective proportional to it, that is:

(a) Are the measures rationally connected to the objective?

(b) Do the measures impair as little as possible the right and freedom in question? and,

(c) Are the effects of the measures proportional to the objective identified above?

(i) The Purpose Test

46 In some circumstanccs, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the *Oakes* test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a *Charter* right. Although it predates *Oakes, supra, R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, provides a clear example. There Dickson C.J. found that the purpose of the *Lord's Day Act*, R.S.C. 1970, c. L-13, was itself inimical to the values of a free and democratic society. The case stands as authority for the proposition that, where the purpose of the legislation is itself unconstitutional, the legislation should be struck down in its entirety. Indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely.

(ii) The Rational Connection Test

47 Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test.

48 This Court's decision in *Andrews, supra*, can be taken to support this position. Again, this Court held there that the citizenship requirement for admission to the British Columbia bar violated the equality guarantee enshrined in s. 15 of the *Charter*. While the citizenship requirement was held to have a valid purpose (the objectives argued were that lawyers be familiar with Canadian institutions and customs and that they display a commitment to them), the Court determined that the requirement did not meet the proportionality test. The majority on this issue concluded that the means were probably not rationally connected to the objectives put forward, in that citizenship does not ensure familiarity with or commitment to Canadian society and, conversely, non-citizenship does not necessarily point to a lack of familiarity or commitment. The requirement was struck down.

49 It is logical that in most such cases the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, then the objective will not be furthered by somehow upholding the legislation as it stands.

(iii) The Minimal Impairment/Effects Test

50 Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect. According to the logic outlined above, such an inconsistency could be declared inoperative with the result that the statute was extended by way of reading in.

51 Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met. The choice of remedy will be guided by the following considerations.

B. Deciding whether Severance or Reading In is Appropriate

52 Having determined what the extent of the inconsistency is, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

(i) Remedial Precision

53 While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 169:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

54 In *Hunter*, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand *Charter* scrutiny. In such a circumstance, it would theoretically be possible to characterize the "extent of the inconsistency" as the *absence* of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because this would have required establishing a new scheme, the details of which would have been up to the Court to determine.

55 *Hunter* has been applied recently by Justice McLachlin in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. The issue in that case was the prohibition of advertising by the members of a professional association, with certain exceptions. McLachlin J. found that the regulation of advertising violated the *Charter* and extended too far to be justified under s. 1. However, some prohibition of advertising would be justifiable if additional exceptions were added. The question then arose whether the Court ought to supply those additional exemptions itself, or simply strike down the prohibition.

56 McLachlin J. noted, at p. 253, that the drafting of rules which would allow only legitimate advertising would be a difficult and complex endeavour that did not flow with precision from the requirements of the *Charter*:

> I am conscious of the difficulties involved in drafting prohibitions on advertising which will catch misleading, deceptive and unprofessional advertising while permitting legitimate advertising.

Since the exemptions could not be defined with sufficient precision, the section itself had to be struck down (at p. 252):

> Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.

57 These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

(ii) Interference with the Legislative Objective

58 The primary importance of legislative objective quickly emerges from decisions of this Court wherein the possibility of reading down or in has been considered and determined inappropriate.

59 In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, at p. 104, Justice Sopinka emphasized that it is necessary in fashioning a remedy for a *Charter* violation to both "apply the measures which will best vindicate the values expressed in the *Charter*" and "refrain from intruding into the legislative sphere beyond what is necessary". He determined that reading down was not appropriate in that case but concluded, at p. 104: "Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature."

60 The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. This objective may, as suggested above, be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s. 1 analysis, the fail ure of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.

61 In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, this Court struck down s. 276, the rape shield provision, of the *Criminal Code*, R.S.C., 1985, c. C-46. The majority of the Court held that it violated the accused's *Charter* right to a fair trial. The provision failed the *Oakes* test because of its overbreadth. It could not meet the minimal impairment element of the proportionality test. In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption, but concluded that neither technique was appropriate in the case before her. McLachlin J. arrived at this conclusion because to take either approach would necessitate importing an element into the provision — judicial discretion — that the legislature specifically chose to exclude. She stated, at p. 628: "Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption". Without question, the same is true of extension by way of reading in.

62 This Court's decision in *R. v. Swain*, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the *Criminal Code*, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the *Charter* in that it deprived the appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivo cal, to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

63 Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

64 Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. The respondent in this case pointed out that this Court's decision in *Tétrault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, wherein an exclusion under the *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, based on age was found to contravene the *Charter*, necessarily led to an expenditure of government funds in that persons previously not entitled to benefits were thereafter free to apply for them. It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures (see Lajoie, "De l'interventionnisme judiciaire comme apport à l'émergence

des droits sociaux" (1991), 36 *McGill L.J.* 1338, at pp. 1344-45). In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate.

(iii) The Change in Significance of the Remaining Portion

65 Another way of asking whether to read in or sever would be an illegitimate intrusion into the legislative sphere is to ask whether the significance of the part which would remain is substantially changed when the offending part is excised. For instance, in *Devine v. Quebec (Attorney General)*, [1988] 2 S.C.R. 790, this Court found that certain statutory requirements respecting the use of the French language were unconstitutional because they were more stringent than necessary. By way of exception, the statute provided for less stringent requirements in certain circumstances. These less stringent requirements were not in themselves unconstitutional, and it would therefore have been possible to sever them and in that way to implement as much of the legislative intent as possible. However, the Court noted that to do so would really turn the legislative scheme on its head. The exceptions were meant to allow more lenient treatment of persons in certain situations, but if they were upheld while the main provisions were struck down, they would have precisely the opposite effect of dealing more stringently with those persons. This led to the conclusion, at p. 816, that the exceptions were "necessarily connected" to the offending provision, so that even though the exceptions were not themselves impermissible, they must be struck down as well:

> A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

66 This built on the comments of Dickson C.J. in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 80, where he observed that the prohibition of abortions must fall with the procedural exceptions which violated the *Charter*, since merely to eliminate the exceptions would be to re-draft a comprehensive code:

> Having found that this "comprehensive code" infringes the *Charter*, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.

67 In both these cases, the significance of the non-offending provision was so markedly changed in the absence of the offending provision that the assumption that the legislature would have passed it was unsafe. The problem with striking down only the inconsistent portion is that the significance of the remaining portion changes so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

68 In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. For instance, in *Knodel, supra*, Rowles J. extended the provision of benefits to spouses to include same-sex spouses. She considered this course to be far less intrusive to the intention of the legislature than striking down the benefits to heterosexual spouses since the group to be added was much smaller than the group already benefitted (at p. 391):

> In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.

69 In *Tétrault-Gadoury v. Canada (Employment and Immigration Commission), supra*, this Court decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. This is also a case in which the group to be added was much smaller than the group already benefitted.

70 Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers *per se*. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions. *R. v. Hebb* (1989), 69 C.R. (3d) 1 (N.S.T.D.), is an example of this.

(iv) The Significance of the Remaining Portion

71 Other cases have focused on the significance or long-standing nature of the remaining portion. This sort of analysis is most apparent in *Russow v. B.C. (A.G.)* (1989), 35 B.C.L.R. (2d) 29 (S.C.). The court examined the various versions of the relevant provision which had been in force in the province from the time of Confederation to the present, and noted that the permissible portion had been invariably present. This helped the court to come to the conclusion that it was safe to assume that the legislature would have enacted the permissible portion without the impermissible portion (at pp. 33-35).

72 This consideration was also highlighted by Harlan J. in *Welsh v. United States*, 398 U.S. 333 (1970), at p. 366:

> When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it.

73 It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

74 The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision. Earlier I referred to the articles by Duclos and Roach, and Caminker, which point out that the Constitution may encourage particular kinds of remedies even if it does not directly mandate them. This aspect of remedial choice was specifically relied on in *R. v. Hebb, supra*. In that case the court considered a provision which required the court to consider the means of accused to pay a fine before incarceration upon default. This provision only applied to persons aged 18 to 22. The court found that this constituted discrimination on the basis of age. The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision.

75 The court observed that either course, severance or nullification, would interfere with the intention of Parliament to some extent. That is, severance would expand the protection of the provision to a group Parliament had not intended to benefit by it, and nullification would remove protection from the group Parliament had intended to have it. The court, at p. 21, then found it important that the protection in question was "constitutionally encouraged," and thought that this was a good reason to favour expansion of the provision rather than nullification:

> To sever the age-related phrase provides protection to persons of all ages who are charged with a crime, in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.
>
> It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged — that is, judicial consideration before incarceration — as opposed to the enlarging of such a protection, it is submitted that the

court should favour a result that would expand the group of persons protected rather than remove that protection completely.

76 This reasoning is sensible given our knowledge of how legislatures act generally. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

77 This factor may have been important in a case which dealt specifically with human rights statutes. In *Re Blainey and Ontario Hockey Association* (1986), 54 O.R. (2d) 513 (C.A.), the statute (*Human Rights Code, 1981*, S.O. 1981, c. 53) provided, in s. 1, a right to equal treatment without discrimination on the basis of, *inter alia*, sex. Section 19, however, provided that s. 1 was not violated when athletic activities were restricted on the basis of sex. The court found that s. 19 violated the guarantee of equality under the *Charter*. It was argued by the Hockey Association that s. 19 was not severable from s. 1, since it could not be assumed that the legislature would have passed s. 1 without s. 19. It was said that this meant that s. 19 should not be struck down, even though it violated the *Charter*. In fact, if it were true that s. 19 was inextricably linked to s. 1, then the result would be not that s. 19 was saved, but rather that s. 1 would be lost, even though there was nothing impermissible about it, considered in isolation. However, it is clear that it is safe to assume that the legislature would have passed the general prohibition on dis crimination even if it could not limit its application in the area of athletics.

(v) Conclusion

78 It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of the *Charter* are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

C. Whether to Temporarily Suspend the Declaration of Invalidity

79 Having identified the extent of the inconsistency, and having determined whether that inconsistency should be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down. The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended.

80 A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (*R. v. Swain, supra*) or otherwise threatens the rule of law (*Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without pro viding them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

81 I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the *Constitution Act, 1982*. While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52.

82 A delayed declaration is a serious matter from the point of view of the enforcement of the *Charter*. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the *Charter* to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is

much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the *Charter*.

83 Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

84 The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

D. Summary

85 It is valuable to summarize the above propositions with respect to the operation of s. 52 of the *Constitution Act, 1982* before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the *Charter*. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

(i) The Extent of the Inconsistency

86 The extent of the inconsistency should be defined:

A. broadly where the legislation in question fails the first branch of the *Oakes* test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a *Charter* right or, indeed, if the purpose is itself held to be unconstitutional — perhaps the legislation in its entirety;

B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the *Oakes* test in that the means used to achieve that purpose are held not to be rationally connected to it — generally limited to the particular portion which fails the rational connection test; or,

C. flexibly where the legislation fails the second or third element of the proportionality branch of the *Oakes* test.

(ii) Severance/Reading In

87 Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;

B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,

C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

(iii) Temporarily Suspending the Declaration of Invalidity

88 Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;

B. striking down the legislation without enacting something in its place would threaten the rule of law; or,

C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

89 I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

III. Section 24(1)

A. Section 24(1) Alone

90 Where s. 52 of the *Constitution Act, 1982* is not engaged, a remedy under s. 24(1) of the *Charter* may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's *Charter* rights. Section 24(1) would there provide for an individ ual remedy for the person whose rights have been so infringed.

91 This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, when I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

B. Section 24(1) in Conjunction with Section 52

92 An individual remedy under s. 24(1) of the *Charter* will rarely be available in conjunction with an action under s. 52 of the *Constitution Act, 1982*. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

IV. Remedial Options Appropriate to this Case

A. The Nature of the Right Involved

93 The right which was determined to be violated here is a positive right: the right to equal *benefit* of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd. Certainly the intrusion into the legislative sphere of extending a constitutionally guaranteed benefit is warranted when the benefit was itself guaranteed by the legislature through constitutional amendment.

94 Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.

95 The benefit with which we are concerned here is a monetary benefit for parents under the *Unemployment Insurance Act, 1971*, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Par liament is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements. All of the intervening provincial Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of the appellants. The question which remains is whether this is a case in which it is appropriate to go further and read the excluded group into the legislation. This question must be answered with reference to the specific legislation under consideration.

B. The Context of the Unemployment Insurance Act. 1971

96 It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in *Tétreault-Gadoury, supra*, at p. 41:

> ... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

97 It is, however, not as simple to discern the objective of the particular provision. It is not clear on the text of the provision alone that the purpose of it is to extend benefits to parents of newborns caring for them at home, a purpose which reading in the excluded group would further. Indeed, on the express language of the provision, one could quickly conclude that the benefits were only intended to be conferred on adoptive parents and that natural parents were deliberately excluded. One could postulate that the provision was specifically aimed at responding to circumstances peculiar to adoptive parents. Certainly this possibility cannot be ruled out on the basis of the text of the provision alone, and we have not been provided with the further assistance of a s. 1 argument here or in the courts below.

98 Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in *Tétreault-Gadoury, supra*. There, the budgetary

implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

99 Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the legislative body in ques tion to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

100 I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

The Constitutional Questions

101 Following from the above analysis, I would answer the constitutional questions as follows:

> 1. Is the Federal Court Trial Division, having found that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act*, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the *Canadian Charter of Rights and Freedoms*, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the *Constitution Act, 1982* to declare that s. 32 is of no force and effect?

102 The answer to question one is, in the present circumstances, yes, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. This is not to say that s. 52 does not provide the flexibility to stop short of striking out an unconstitutional provision in its entirety. Given the appropriate circumstances, a court may choose the options of severance or reading in by which to bring the provision in line with the *Charter*. These options should be exercised only in the clearest of cases, keeping in mind the principles articulated above relating to the nature of the right and the specific context of the legislation.

> 2. Does s. 24(1) of the *Charter* confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

103 The answer to question two is no. Section 24(1) provides an individual remedy for actions taken under a law which violate an individual's *Charter* rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the *Constitution Act, 1982*.

Disposition

104 In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the *Unemployment Insurance Act, 1971* (subsequently s. 20 of the *Unemployment Insurance Act, 1985*) be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

105 Further, this is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

106 Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by *La Forest J.*:

107 I have had the benefit of reading the reasons of the Chief Justice and I agree with his proposed disposition and answers to the constitutional questions. I take this approach on the simple basis that the legislation concerned concededly violates the *Canadian Charter of Rights and Freedoms* and that it does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being obviously intended by the legislature in any event. As the Chief Justice points out, there is a long tradition of reading down legisla tion, and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation. I also agree that there is little point in light of Parliament's subsequent action to declare the impugned legislation invalid and then suspend that declaration.

108 That is sufficient to dispose of the case, and I find it unnecessary to elaborate further. In limiting my reasons in this way, however, I would not wish it to be thought that I fundamentally disagree with what the Chief Justice has to say regarding the means for assessing when the techniques of reading down or reading in should be adopted. Indeed, I find his reasons very helpful in this regard. Rather I take this narrow approach because the unsatisfactory manner in which this case has been presented to us makes it necessary to respond to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.

109 To begin with, I am by no means sure there was a violation of the *Charter* in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the monies intended to meet the problem Parliament may have had in contemplation. This Court has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time. But the manner in which the case was presented requires us to assume constitutional invalidity in the absence of any evidence as to context, which I would have thought was essential to a consideration of the extent of inconsistency with the *Charter*.

110 Ordinarily, a case is dealt with in light of facts that define the scope of the Court's pronouncement. Here we are forced to deal with the tests for reading down or reading in in a manner that may give the impression that they are of universal application. But it must be underlined that the case is one involving a scheme of social assistance which may dictate a quite different approach from that which one would follow in other areas. Thus this Court has repeatedly stated in cases like *R. v. Wong*, [1990] 3 S.C.R. 36, for example, that it was not the business of the courts to invent schemes that had the effect of increasing police powers (at pp. 56-57). The rationale for this was not so much the complexity of possible schemes (as the Chief Justice appears to suggest at one stage), but rather that this could distract the courts from their fundamental duty under the *Charter* to protect the rights guaranteed to the individual.

111 The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

112 I have added these comments to underline that there are further dimensions (and I have mentioned only a few) to the issue of reading in and reading down that will require qualifications to the propositions set down by the Chief Justice. I note that he has wisely indicated that these propositions are intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context.

113 Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in *R. v. Oakes*, [1986] 1 S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues, such as those to which I have referred above, issues that go well beyond the factual context.

Appeal allowed, with costs to the respondent. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Solicitors of record:
Solicitor for the appellants: *John C. Tait*, Ottawa.
Solicitors for the respondent Shalom Schachter: *Osler, Hoskin* & *Harcourt*, Toronto.
Solicitors for the respondent Women's Legal Education and Action Fund: *Tory, Tory, DesLauriers* & *Binnington*, Toronto.
Solicitor for the intervener the Attorney General for Ontario: *The Attorney General for Ontario*, Toronto.
Solicitor for the intervener the Attorney General of Quebec: *The Attorney General of Quebec*, Ste-Foy.
Solicitor for the intervener the Attorney General for New Brunswick: *The Attorney General for New Brunswick*, Fredericton.
Solicitor for the intervener the Attorney General of British Columbia: *The Attorney General of British Columbia*, Victoria.
Solicitor for the intervener the Attorney General for Saskatchewan: *Brian Barrington-Foote*, Regina.
Solicitor for the intervener the Attorney General for Alberta: *The Attorney General for Alberta*, Edmonton.
Solicitor for the intervener the Attorney General of Newfoundland: *The Attorney General of Newfoundland*, St. John's.
Solicitors for the intervener Minority Advocacy Rights Council: *Cogan* & *Cogan*, Ottawa.

TAB 20

2017 ONCA 539
Ontario Court of Appeal

Tisi v. St. Amand

2017 CarswellOnt 9728, 2017 ONCA 539, 280 A.C.W.S. (3d) 690

Lynn Tisi (Applicant / Appellant / Moving Party) and Claude St. Amand (Respondent / Respondent / Responding Party)

David Brown J.A., In Chambers

Heard: June 23, 2017
Judgment: June 27, 2017
Docket: CA M47973 (C63870)

Counsel: Derek A. Schmuck, for Moving Party
Duncan M. Macfarlane, for Responding Party

Headnote

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — General principles

Parties disputed validity and enforceability of agreement of purchase and sale for residential house by applicant from respondent — Applicant brought application for specific performance of agreement and respondent brought application for declaration that agreement was null and void together with injunction — Application judge found that parties were not ad idem on essential elements of contract and declared no valid agreement of purchase and sale was entered into by them — Applicant appealed — Applicant brought application for stay of proceedings pending appeal — Application granted — Applicant met low threshold for establishing serious question for appeal — Applicant would suffer irreparable harm if stay not granted as house was custom-built — Balance of convenience favoured applicant as there was lack of evidence about what prejudice continued registration of certificate of pending litigation was causing respondent coupled with applicant's willingness to expedite appeal.

Table of Authorities

Cases considered by *David Brown J.A., In Chambers*:

BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust (2011), 2011 ONCA 620, 2011 CarswellOnt 10330, 283 O.A.C. 321 (Ont. C.A. [In Chambers]) — followed

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général)*) 60 Q.A.C. 241, 54 C.P.R. (3d) 114, 111 D.L.R. (4th) 385, 1994 CarswellQue 120F, [1994] 1 S.C.R. 311, 1994 CarswellQue 120 (S.C.C.) — followed

Semelhago v. Paramadevan (1996), 197 N.R. 379, 3 R.P.R. (3d) 1, 28 O.R. (3d) 639 (note), 136 D.L.R. (4th) 1, 91 O.A.C. 379, [1996] 2 S.C.R. 415, 1996 CarswellOnt 2737, 1996 CarswellOnt 2738, 38 O.R. (3d) 639 (note) (S.C.C.) — referred to

Yaiguaje v. Chevron Corp. (2014), 2014 ONCA 40, 2014 CarswellOnt 456, 315 O.A.C. 109, 62 C.P.C. (7th) 368 (Ont. C.A.) — followed

***David Brown J.A., In Chambers*:**

1 The parties dispute the validity and enforceability of an Agreement of Purchase and Sale dated November 2, 2016 (the "Agreement") for the purchase of a residential house by the moving party appellant, Lynn Tisi, from the respondent, Claude St. Amand. As a result of their dispute, both commenced applications: Ms. Tisi sought specific performance of the Agreement, with a claim for damages in lieu; Mr. St. Amand sought a declaration the Agreement was null and void,

together with an injunction prohibiting Ms. Tisi from encumbering title to the property. Ms. Tisi obtained and registered a certificate of pending litigation ("CPL") against the property prior to the hearing of the applications.

2 By reasons dated May 19, 2017, the application judge found the parties were not *ad idem* on the essential elements of the contract and declared no valid agreement of purchase and sale was entered into by them. She ordered Mr. St. Amand to return the $10,000 deposit to Ms. Tisi. He did, but Ms. Tisi has not cashed the cheque. The application judge also ordered Ms. Tisi to discharge the certificate of pending litigation ("CPL") she registered against the property. Ms. Tisi has not.

3 Instead, Ms. Tisi filed a notice of appeal dated June 5, 2017. She now moves for a stay pending appeal of para. 3 of the Judgment directing her to discharge the CPL.

B. GOVERNING PRINCIPLES

4 The principles governing the granting of a stay pending appeal are those set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at p. 334, as explained and applied by this court in several decisions, including *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 620 (Ont. C.A. [In Chambers]), at paras. 18 and 19, and *Yaiguaje v. Chevron Corp.*, 2014 ONCA 40 (Ont. C.A.), at para. 19. The over-arching principle is that the court must decide whether the interests of justice call for a stay.

C. ANALYSIS

Serious question for appeal

5 The party seeking a stay must demonstrate her appeal raises serious issues for appeal. The threshold to overcome is a low one. Although the grounds of appeal advanced by Ms. Tisi in her notice of appeal largely concern questions of fact or mixed fact and law where a deferential standard of review applies, I am satisfied she has met the low threshold for establishing a serious question for appeal.

Irreparable harm

6 Under the second element of the *RJR-MacDonald* test, Ms. Tisi must establish she will suffer irreparable harm should a stay not be granted. Generally, demonstrating irreparable harm requires the moving party to establish she will suffer a loss not quantifiable in monetary terms.

7 In the present case, Ms. Tisi sought specific performance of the Agreement or, in the alternative, damages in lieu thereof. Specific performance should not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415 (S.C.C.), at para. 22.

8 In an affidavit on the application, Ms. Tisi deposed the house at issue is a custom-built one. The respondent did not file any evidence disputing that characterization. Given Ms. Tisi's evidence, I am satisfied she has demonstrated she would suffer irreparable harm should a stay not be granted.

Balance of convenience

9 The balance of convenience branch of the stay test requires a court to consider and balance the respective harm to each party from the grant or refusal of a stay.

10 Ms. Tisi has filed evidence that Mr. St. Amand was "wrapping things up" in Welland and moving further north in Ontario. As well, she has filed the results of some title searches that disclose Mr. St. Amand sold three properties in the Niagara area during May 2017. This evidence may well support an inference that Mr. St. Amand is wrapping up his business in the Niagara area, but it does not suggest he lacks assets in Ontario.

11 In his factum, Mr. St. Amand argues the CPL places an unfair burden on him by preventing the sale of the house and "accounting to his mortgagee and other creditors." Although he did not file evidence to support those submissions, it is common sense that the house likely will remain unsold as long as a CPL is registered against title.

12 That said, I am puzzled by the lack of a responding affidavit from Mr. St. Amand on this motion. In his February affidavit on the application, he talked about the need for his business to close the sale to Ms. Tisi by mid-March of this year. Yet, he has not filed any evidence about the current state of affairs regarding the house — Is it finished? Is he trying to sell it? — or about the effect of the CPL on his business. Simply put, there is a lack of evidence about what prejudice, if any, the continued registration of the CPL is causing Mr. St. Amand.

13 When one adds to this state of the record Ms. Tisi's willingness to expedite her appeal, I see the balance of convenience tipping in her favour.

Conclusion

14 Ms. Tisi has met the low threshold of establishing a serious question on appeal, she has demonstrated some irreparable harm, and the balance of convenience tips in her favour. The over-arching principle is that the court must decide whether the interests of justice call for a stay. In the present circumstances, I am satisfied Ms. Tisi has demonstrated a stay should be granted.

D. DISPOSITION

15 For the reasons set out above, I grant the motion. I order Ms. Tisi to perfect her appeal by July 17, 2017, following which the parties shall secure an expedited date for the hearing of this appeal.

16 I fix the costs of this motion at $3,000, payable in the cause of the appeal.

Application granted.

Court of Appeal File No.: C65861
Motion File No.: M49615

ROCCO ACHAMPONG Applicant (Respondent in appeal)	and	ONTARIO Respondent (Appellants)	and	CITY OF TORONTO Respondent (Respondent on Appeal)
THE CITY OF TORONTO Applicant (Respondent in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellant)		
CHRIS MOISE *et al.* Applicants (Respondent in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellants)	and	CITY OF TORONTO Respondent (Respondent on Appeal)

Superior Court File No.: CV-18-00602494-0000

Superior Court File No.: CV 18-00603797-0000

Superior Court File No. CV-18-00603633-0000

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF MOVING PARTY (STAY PENDING APPEAL)

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