Motion File No. M49615
Court of Appeal File No. C65861
Superior Court File Nos. CV-18-00603797-00
CV-18-00602494-00
CV-18-00603633-00

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 Party)

-and-

CITY OF TORONTO

Respondent
(Respondent in appeal – Responding Party)

(Title of Proceedings Continued on p.2)

BOOK OF AUTHORITIES OF RESPONDING PARTY (RESPONDENT IN APPEAL), CITY OF TORONTO

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)

BOOK OF AUTHORITIES OF RESPONDING PARTY (RESPONDENT IN APPEAL), CITY OF TORONTO

September 16, 2018

CITY SOLICITOR'S OFFICE
City of Toronto, Legal Services
Metro Hall
55 John Street, 26th Floor
Toronto, Ontario M5V 3C6
fax: (416) 397 – 5624

Diana W. Dimmer (LSO No. 24932L)
Tel: (416) 392 – 7229
Email: diana.dimmer@toronto.ca

Glenn K.L. Chu (LSO No. 40392F)
Tel: (416) 397 – 5407
Email: glenn.chu@toronto.ca

Philip Chan (LSO No. 68681S)
Tel: (416) 392 – 1650
Email: pchan7@toronto.ca

Lawyers for the Responding Party (Respondent in Appeal), City of Toronto

TO: **THE ATTORNEY GENERAL OF ONTARIO**
Constitutional Law Branch
McMurtry-Scott Building
720 Bay Street, 4th Floor
Toronto, Ontario M7A 2S9
Fax: 416-326-4015

Robin Basu (LSO# 32742K)
Tel: (416) 326-4476
Email: robin.basu@ontario.ca

Yashoda Ranganathan (LSO# 57236E)
Tel: (416) 326-4456
Email: yashoda.ranganathan@ontario.ca

Audra Ranalli (LSO# 72362U)
Tel: (416) 326-4473
Email: audra.ranalli@ontario.ca

Lawyers for the Respondent,
Attorney General of Ontario

AND TO: **ROCCO K. ACHAMPONG**
Barrister & Solicitor
2500-1 Dundas Street West
Toronto, Ontario, M5G 1Z3

Rocco Achampong (LSO# 57837J)
Gavin Magrath (LSO# 51553A)
Selwyn Pieters (LSO# 50303Q)

roccoachampong@gmail.com
gavin@magraths.ca
selwyn@selwynpieters.com

Applicant/Counsel for Applicant (Respondent in Appeal), Rocco K. Achampong

AND TO: **GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1039
Toronto, ON M5G 2C2

Howard Goldblatt (LSO# 15964M)
Steven M. Barrett (LSO# 24871B)
Simon Archer (LSO# 46263D)
Christine Davies (LSO# 57390F)
Heather Ann McConnell (LSO# 54357O)
Geetha Philipupillai (LSO# 74741S)

hgoldblatt@goldblattpartners.com
sbarrett@goldblattpartners.com
sarcher@goldblattpartners.com
cdavies@goldblattpartners.com
hmcconnell@goldblattpartners.com
gphilipupillai@goldblattpartners.com

Counsel for the Applicants (Respondent in Appeal),
Chris Moise, Ish Aderonmu and Prabha Kosla on her own behalf and on behalf of all members of Women Win TO

AND TO: **PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**
155 Wellington Street West
35th Floor
Toronto, ON M5V 3H1

Donald K. Eady (LSO# 30635P)
Caroline V. (Nini) Jones (LSO# 43956J)
Jodi Martin (LSO# 54966V)

donald.eady@paliareroland.com
nini.jones@paliareroland.com
jodi.martin@paliareroland.com

Counsel for the Intervenors (Respondents in Appeal),
Jennifer Hollet, Lily Cheng, Susan Dexter, Geoff Kettel, and Dyanoosh Youssefi

AND TO: **DLA PIPER (CANADA) LLP**
Suite 6000, 1 First Canadian Place
PO Box 367, 100 King St. W.
Toronto, ON M5X 1E2

Derek Bell (LSO# 43420J)
Ashley Boyes (LSO# 74477G)

derek.bell@dlapiper.com
ashley.boyes@dlapiper.com

Counsel for the Intervenor,
The Canadian Taxpayers Federation

AND TO: **TORONTO DISTRICT SCHOOL BOARD**
Legal Services
5050 Yonge Street, 5th Floor
Toronto, ON M2N 5N8

Patrick Cotter (LSO# 40809E)

Patrick.cotter@tdsb.on.ca

Counsel for the Intervener,
Toronto District School Board

AND TO: **STIKEMAN ELLIOTT LLP**
Barristers & Solicitors
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Patrick G. Duffy (LSO# 50187S)
Emma Romano (LSO# 74765N)

pduffy@stikeman.com
ERomano@stikeman.com

Counsel for the Intervener,
Clerk of the City of Toronto

INDEX

INDEX

TAB 1

Indexed as:

Reference Re Provincial Electoral Boundaries (Sask.)

The Attorney General for Saskatchewan, appellant;
v.
Roger Carter, Q.C., respondent, and
Attorney General of Canada, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Alberta, Attorney General of Newfoundland, Minister of Justice of the Northwest Territories, Minister of Justice of the Yukon, John F. Conway, British Columbia Civil Liberties Association, Douglas Billingsley, Wilson McBryan, Leonard Jason, Daniel Wilde, Alberta Association of Municipal Districts & Counties, City of Edmonton, City of Grande Prairie, Equal Justice For All, interveners.

[1991] 2 S.C.R. 158

[1991] 2 R.C.S. 158

[1991] S.C.J. No. 46

[1991] A.C.S. no 46

File No.: 22345.

Supreme Court of Canada

1991: April 29, 30 / 1991: June 6.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN (92 paras.)

Constitutional law -- Charter of Rights -- Right to vote -- Electoral boundaries -- Variances in size of voter populations among constituencies -- Whether Charter right to vote infringed -- Canadian

Charter of Rights and Freedoms, ss. 1, 3 -- Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1, ss. 14, 20.

The Saskatchewan Court of Appeal, on a reference dealing with the provincial electoral distribution, found that proposed changes to the electoral boundaries infringed [page159] s. 3 of the Canadian Charter of Rights and Freedoms. The Electoral Boundaries Commission Act imposed a strict quota of urban and rural ridings and required that urban ridings coincide with existing municipal boundaries. The resulting distribution map, unlike the one it replaced, revealed a number of ridings with variations in excess of 15 percent from the provincial quotient and indicated a problem of under-representation in urban areas.

Two questions were stated for the court's opinion. The first queried whether the variance in the size of voter populations among those constituencies infringed Charter rights guaranteed by the Charter and if so, in what particulars. It also queried whether any such denial of rights was justified by s. 1 of the Charter. The second queried whether the distribution of those constituencies among urban, rural and northern areas infringed Charter rights and if so, in what particulars were these rights infringed and in what particulars were they justified. This question too queried whether any such denial of rights was justified by s. 1 of the Charter.

Held (Lamer C.J. and L'Heureux-Dubé and Cory JJ. dissenting): The appeal should be allowed.

Per La Forest, Gonthier, McLachlin, Stevenson and Iacobucci JJ.: At issue here was whether the variances and distribution reflected in the constituencies themselves violated the Charter guarantee of the right to vote. The validity of The Representation Act, 1989 in so far as it defined the constituencies, was indirectly called into question.

The definition of provincial voting constituencies is subject to the Charter and is not a matter of constitutional convention relating to the provincial constitution which is impervious to judicial review. Although legislative jurisdiction to amend the provincial constitution cannot be removed from the province without a constitutional amendment and is in this sense above Charter scrutiny, the provincial exercise of its legislative authority is subject to the Charter. The province is empowered by convention to establish its electoral boundaries but that convention is subject to s. 3 of the Charter.

The content of the Charter right to vote is to be determined in a broad and purposive way, having regard to historical and social context. The broader philosophy [page160] underlying the historical development of the right to vote must be sought and practical considerations, such as social and physical geography, must be borne in mind. The Court, most importantly, must be guided by the ideal of a "free and democratic society" upon which the Charter is founded.

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". The right to vote therefore comprises many factors, of which equity is but one. The section does not guarantee equality of voting power.

Relative parity of voting power is a prime condition of effective representation. Deviations from absolute voter parity, however, may be justified on the grounds of practical impossibility or the provision of more effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative

assemblies effectively represent the diversity of our social mosaic. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced.

The history or philosophy of Canadian democracy does not suggest that the framers of the Charter in enacting s. 3 had the attainment of voter parity as their ultimate goal. Their goal, rather, was to recognize the right long affirmed in this country to effective representation in a system which gives due weight to voter equity but admits other considerations where necessary. Effective representation and good government in this country compel that factors other than voter parity, such as geography and community interests, be taken into account in setting electoral boundaries. Departures from the Canadian ideal of effective representation, where they exist, will be found to violate s. 3 of the Charter.

The actual allocation of seats between urban and rural areas closely followed the population distribution between those areas and effectively increased the number of urban seats to reflect population increases in urban areas. In general the variations between boundaries in the southern part of the province appeared to be justifiable on the basis of factors such as geography, community interests and population growth patterns. The northern boundaries were appropriate, given the sparse population and the difficulty of communication [page161] in the area. A violation of s. 3 of the Charter was not established.

Per Sopinka J.: The reasons of McLachlin J. were substantially agreed with, although the interpretation of s. 3 of the Charter was differently approached.

The framers of the Charter did not intend to create a new right and accordingly the primary inquiry was to determine on what principles the right to vote was based. Historically, the drawing of electoral boundaries has been governed by the attempt to achieve voter equality with liberal allowances for deviations based on the kinds of considerations enumerated in s. 20 of The Electoral Boundaries Commission Act. Deviations were avoided which deprived voters of fair and effective representation. Under the Charter, deviations are subjected to judicial scrutiny and must not be such as to deprive voters of fair and effective representation.

The Charter guarantee in s. 3 does not extend to the process. The legislature was not required to establish an electoral commission or to ensure that a commission, when established, was able to fulfill its mandate freely without guidelines imposed by the legislature.

The constitutional validity of the factors in s. 20 or s. 14 was not at issue but rather the effect that their application produced. The extent of deviation from strict voter equality and the reasons for those deviations were not such as to deny fair and effective representation.

Per Lamer C.J. and L'Heureux-Dubé and Cory JJ. (dissenting): In Canada, each citizen as a minimum must have the right to vote, to cast that vote in private and to have that vote honestly counted and recorded. Equally important, each vote must be relatively equal to every other vote; there cannot be wide variations in population size among the 64 southern constituencies. Deviations from equality will be permitted where they can be justified as contributing to the better government of the people as a whole, giving due weight to regional issues involving demographics and geography.

The restrictions placed on the Electoral Boundaries Commission by The Electoral Boundaries Commission Act were unknown to previous commissions.

The electoral map at issue which resulted from the impugned legislation must be considered even if the [page162] Charter infringements involved might be thought to be relatively minor. This is because the right to vote is fundamentally important to a democracy and to its citizens.

The problems with the impugned distribution were almost entirely a function of the two conditions placed on the Commission by the Act and were unacceptable and, given the eminently fair riding map of the previous distribution, quite unnecessary. The first imposed a strict quota of urban and rural ridings and the second required that the boundaries of the urban ridings coincide with the existing municipal boundaries effectively "quarantining" them from the others.

The fundamental importance of the right to vote demands a reasonably strict surveillance of legislative provisions pertaining to elections. Scrutiny under s. 3 attaches not only to the actual distribution in question but also to the underlying process from which the electoral map was derived. While the actual distribution map may appear to have achieved a result that is not too unreasonable, the effect of the statutory conditions interfered with the rights of urban voters. Once an independent boundaries commission is established, it is incumbent on the legislature to ensure that the Commission was able to fulfill its mandate freely and without unnecessary interference. The right to vote is so fundamental that this interference is sufficient to constitute a breach of s. 3 of the Charter.

The creation of the two northern ridings met all the requisite conditions of the Oakes test and was justified under s. 1 of the Charter. Geography and demography demonstrated a pressing and substantial need and the creation of these constituencies was rationally connected to the concept that they have effective representation.

The southern ridings were in a different position legally and geographically. While the differing representational concerns of urban and rural areas may properly be considered in drawing constituency boundaries, the voter population of each constituency should be approximately equal and the type of mandatory conditions imposed here are therefore precluded. Given the initial premise of equality, the Commission should be free to consider such factors as geography, demography and communities of interest in drawing constituency boundaries and allocating ridings between rural and urban areas. No explanation was given why the balancing of relevant factors could not be left to the Commission [page163] and instead had to be mandated by the legislature. The less equitable distribution that resulted because of these legislatively mandated conditions was, absent a reasonable explanation, suspect. There was no basis for concluding that the legislature's objective in imposing these conditions was pressing and substantial. Even assuming a pressing and substantial need, the legislation did not affect the rights of urban voters as little as possible. Earlier and more equitable distributions indicated that the rights of urban voters could be interfered with to a lesser extent.

Cases Cited

By McLachlin J.

Referred to: Dixon v. B.C. (A.G.) (1986), 7 B.C.L.R. (2d) 174; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Edwards v. Attorney-General for Canada, [1930] A.C. 124; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; McGowan v. Maryland, 366 U.S. 420 (1961); R. v. Schwartz, [1988] 2 S.C.R. 443; United States of America v. Cotroni, [1989] 1 S.C.R. 1469; R. v. Oakes, [1986] 1 S.C.R. 103; Dix-

on v. B.C. (A.G.), [1989] 4 W.W.R. 393; Baker v. Carr, 369 U.S. 186 (1962); Karcher v. Daggett, 462 U.S. 725 (1983); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Attorney-General (Aus.); Ex rel. McKinlay v. Commonwealth (1975), 135 C.L.R. 1; Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; Canada v. Schmidt, [1987] 1 S.C.R. 500; Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49.

Statutes and Regulations Cited

Act to re-adjust the Representation in the House of Commons, S.C. 1872, c. 13.
Canadian Charter of Rights and Freedoms, ss. 1, 3.
Constituency Boundaries Commission Act, 1972, S.S. 1972, c. 18, s. 16(1).
Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1, ss. 14, 20.
Electoral Boundaries Commission Act, 1991, S.S. 1991, c. E-6.11, s. 9(2), 11(1), (2).
Representation Act, 1981, S.S. 1980-81, c. R-20.1.
Representation Act, 1989, S.S. 1989-90, c. R-20.2.

[page164]

Authors Cited

Canada. House of Commons Debates, Vol. III, 4th Sess., June 1, 1872. Ottawa: Robertson, Roger & Co., 1872.

APPEAL from a judgment of the Saskatchewan Court of Appeal (1991), 90 Sask. R. 174, 78 D.L.R. (4th) 449, [1991] 3 W.W.R. 593, on a reference by the Lieutenant Governor in Council. Appeal allowed, Lamer C.J. and L'Heureux-Dubé and Cory JJ. dissenting.

Robert G. Richards and Thomson Irvine, for the appellant. Roger Carter, Q.C., for the respondent. Ivan G. Whitehall, Q.C., and Susan D. Clarke, for the intervener, the Attorney General of Canada. Louis Rochette and Marise Visocchi, for the intervener, the Attorney General of Quebec. E. Robert A. Edwards, Q.C., and Frank A.V. Falzon, for the intervener, the Attorney General of British Columbia. Rosemary Scott and Gordon L. Campbell, for the intervener, the Attorney General of Prince Edward Island. Peter M. Owen, Q.C., and P. Jon Fauld, for the intervener, the Attorney General for Alberta. B. Gale Welsh, for the intervener, the Attorney General of Newfoundland. Bernard W. Funston and Elizabeth J. Stewart, for the intervener, the Minister of Justice of the Northwest Territories. T. Murray Rankin, for the intervener, the Minister of Justice of the Yukon. Peter T. Costigan, for the intervener, the Alberta Association of Municipal Districts and Counties. John F. Conway, for the intervener, John F. Conway.

[page165]

Robert D. Holmes, for the intervener, the British Columbia Civil Liberties Association. Donald J. Boyer, Q.C., for the interveners, Douglas Billingsley, Wilson McBryan, Leonard Jason and Daniel Wilde. Timothy J. Christian, for the interveners, the cities of Edmonton and Grande Prairie. Larry W. Kowalchuk, for the intervener, Equal Justice for All.

[Quicklaw note: Please see complete list of solicitors appended at the end of the judgment.]

The reasons of Lamer C.J. and L'Heureux-Dubé and Cory JJ. were delivered by

1 **CORY J.** (dissenting):-- This appeal is concerned with the most fundamental of our rights in a democratic society, the right to vote. I have read with great interest the reasons of my colleague Justice McLachlin. Although I agree with many of the principles she has set forth, I have come to a different conclusion and would dismiss the appeal.

Something of History and Background

2 The right to vote is synonymous with democracy. It is the most basic prerequisite of our form of government. In a democratic society based upon the right of its citizens to vote, the right must have some real significance. In Canada it is accepted that, as a minimum, each citizen must have the right to vote, to cast that vote in private, and to have that vote honestly counted and recorded.

3 There is, I believe, a further, equally important aspect of the right, namely that each vote must be relatively equal to every other vote. That is not to say that there cannot be variations in population size between constituencies. These variations or deviations from equality will be permitted where, in the words of my colleague at p. 183, they "can be justified on the ground that they contribute to the better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."

4 Free people have always striven for relative equality of voting power. The Americans of 1776 sought [page166] recognition of the reasonable principle that there was to be no taxation without representation and further, that representation was to be based upon the equal weight of every ballot.

5 It is argued, quite correctly, that our Canadian background is different from that of our American neighbour. It is said that we have never insisted upon precise equality of voting power, but instead have traditionally placed greater emphasis on the representation of community interests and given wider recognition to geographic considerations. I agree with these submissions. In Canada we have recognized that the vast, sparsely settled regions in the north must be adequately represented even where their population is less than half of that of a constituency in the south. To recognize this is to recognize the reality of Canada and Canadian geography. At the same time, in the rest of Canada there has been a conscious and continuing move towards greater equality among constituencies.

6 Saskatchewan became a province in 1905. The early electoral maps of the province show a wide divergence in riding populations. However, this tendency has changed greatly over the years, particularly since 1972 when the first electoral boundaries commission was established. Unlike the Electoral Boundaries Commission upon whose recommendations the impugned distribution is based, the Constituency Boundaries Commissions of 1973 and 1979-80, established pursuant to The Constituency Boundaries Commission Act, 1972, S.S. 1972, c. 18, were not bound by any fixed allocation of ridings between urban and rural areas, nor were they required to draw urban boundaries so as to coincide with municipal limits. These restrictions placed upon the Electoral Boundaries Commission by the provisions of The Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1 (the "E.B.C.A."), restrictions unknown to previous boundaries commissions, are in my view of great significance to the disposition of this appeal.

7 The maps for 1981 and 1989 are attached as schedules to these reasons. Putting aside the two northern constituencies, which are in a class by [page167] themselves, the distribution map of 1981 illustrates how equitably electoral boundaries can be drawn. A glance at the 1981 map demonstrates that each and every southern riding, whether urban or rural, is within 15 percent of the provincial quotient -- the figure obtained by dividing the southern voting population by the number of southern ridings. It seems that the figure of 15 percent is an eminently reasonable accommodation of the greater difficulties that may be encountered in representing some of the large rural ridings of Saskatchewan.

The Impugned Distribution

8 The E.B.C.A., which set into motion the process which eventually resulted in the impugned distribution, imposed two conditions on the Boundaries Commission. First, a strict quota of urban and rural ridings was imposed. Second, the boundaries of the urban ridings were required to coincide with the existing municipal boundaries. It is as though the urban ridings were to be "quarantined" from the others. The conditions imposed are both unacceptable and, particularly in light of the eminently fair riding map achieved in 1981, quite unnecessary.

9 The absence of the mandatory conditions in the earlier legislation resulted in an electoral map that was fairer to all electors. The legislation then in force (The Constituency Boundaries Commission Act, 1972) provided:

> 16.--(1) In determining the area to be included in, and in fixing the boundaries of, any constituency in the portion of the province lying south of the line described in section 14, the commission shall be governed by the following rules:
>
> 1. The division of that portion of the province into constituencies and the description of the boundaries thereof by the commission shall proceed on the basis that the population of each constituency as a result thereof shall correspond as nearly as possible to the quotient established under section 15;
>
> 2. The commission may depart from the strict application of rule 1 in any case where:
>
> (a) special geographic considerations including in particular sparsity, density or relative rate of growth [page168] of population of various regions of the portion of the province lying south of the line described in section 14, the accessibility of such regions or the size or shape thereof appear to the commission to render such a departure necessary or desirable;
> (b) any special community or diversity of interests of the inhabitants of various regions of the portion of the province mentioned in clause (a) appears to the commission to render such a departure necessary or desirable;
> (c) physical features of any area or any other similar and relevant factors, including variations in the requirements of the population of

any constituency in the portion of the province mentioned in clause (a) appear to the commission to render such a departure desirable;

but in no case shall the population of any constituency in the province as a result thereof depart from the constituency quotient to a greater extent than fifteen per cent more or fifteen per cent less.

10 It is interesting that the boundaries commission legislation currently in force in Saskatchewan, which in April 1991 replaced the legislation now before the Court, omits any reference to the numbers of urban and rural ridings. Further, it does not fix the boundaries of urban ridings so as to coincide with municipal limits. The relevant provisions of the new legislation (The Electoral Boundaries Commission Act, 1991, assented to April 16, 1991) are as follows:

9. ...

(2) In fixing the boundaries of proposed constituencies, the commission shall:

...

(b) divide the area of Saskatchewan south of the dividing line into 64 constituencies.

11(1) In determining the area to be included in a proposed constituency south of the dividing line and in fixing the boundaries of that constituency, the commission shall ensure that the voter population of each proposed constituency be, as near as possible, equal to the constituency population quotient.

(2) Notwithstanding subsection (1), the commission may depart from the requirements of that subsection where, in the opinion of the commission, it is necessary to do so because of:

[page169]

(a) special geographic considerations, including:

(i) sparsity, density or relative rates of growth of population in various regions south of the dividing line;
(ii) accessibility to the regions mentioned in subclause (i); or
(iii) the size and shape of the regions described in subclause (i);

(b) a special community of interests or diversity of interests of persons residing in regions south of the dividing line; or
(c) physical features of regions south of the dividing line.

11 The difference between the old boundaries commission legislation and that implicated in the present appeal is of fundamental importance. The presence of the two mandatory conditions in the E.B.C.A., on the basis of which the impugned distribution was established, is a serious cause for concern. The impact of these conditions on the quality of the distribution is demonstrated by com-

paring the 1981 and 1989 distribution maps. The deterioration in the quality of the distribution from 1981 to 1989 is evidence of the effect of the two mandatory conditions, in terms of the potential for inequality and unfairness to which they give rise. (I would also observe in passing that the problematic -- and unnecessary -- nature of the two mandatory conditions is underscored by the notable absence of those conditions from the most recent boundaries commission legislation.)

12 The riding map which resulted from the E.B.C.A. is not as fair as the 1981 riding map. The 1989 distribution map reveals a number of constituencies with variations in excess of 15 percent from the provincial quotient. The problem of under-representation is most acute in the major urban centres of the province. Thus, for example, based on its population, the growing city of Saskatoon should be entitled to elect another 1.1 members. I hasten to add, however, that it is not for a court to get into the details of the riding boundaries set by the Boundaries Commission. That work has been conscientiously performed by its eminent members. Rather, a court can only determine if there has been an infringement of the s. 3 Charter right to vote. A comparison of the 1981 map to that [page170] of 1989 convinces me that there has been such an infringement.

13 It is said that the current map reflects such a minor infringement that it is not worth considering. I cannot accept that argument as correct for two reasons. First, the right to vote is fundamental to a democracy. If the right to vote is to be of true significance to the individual voter, each person's vote should, subject only to reasonable variations for geographic and community interests, be as nearly as possible equal to the vote of any other voter residing in any other constituency. Any significant diminution of the right to relative equality of voting power can only lead to voter frustration and to a lack of confidence in the electoral process. The 1981 distribution map demonstrates that relative equality can be achieved in all of the southern Saskatchewan ridings. This degree of equality should be maintained.

14 Second, the reason for the departure from riding equality must be considered. In my view, the problems with the impugned distribution are almost entirely a function of the shackling of the Boundaries Commission by the two conditions imposed by the underlying legislation, the E.B.C.A. These conditions prevented the Commission from sufficiently accommodating the changing demographic reality. By stipulating a mandatory rural-urban allocation of ridings and by confining urban ridings to municipal boundaries, the E.B.C.A. has led to greater variances than would otherwise have been the case had the Boundaries Commission been completely free in making its recommendations.

15 Specifically, the mandatory rural-urban allocation may have prevented the Commission from taking sufficient account of the diminishing rural population and the corresponding urban growth in the province. The requirement of conformity of urban ridings to municipal limits similarly poses a potential obstacle to the necessary accommodation of demographic realities, particularly since municipal boundaries often fail to reflect urban development. On this point, it was said that there was no such thing as dormitory communities in Saskatchewan cities. I accept that as correct. Yet the demographic material filed indicates [page171] that there continues to be a movement of population away from the province and, more significantly, a movement of people from the rural areas to the urban centres. This indicates a need for flexibility, not only in the allocation of seats between urban and rural areas, but also in the fixing of the boundaries of urban ridings. It also highlights the steadily growing need for the fair representation of the urban resident.

16 The fundamental importance of the right to vote demands a reasonably strict surveillance of legislative provisions pertaining to elections. While I agree with my colleague McLachlin J. re-

garding the meaning of the s. 3 right to vote and the relevant criteria to be considered in assessing whether a given distribution violates that right, I am of the view that the inquiry cannot be restricted solely to the ultimate result achieved. We are concerned in this appeal not only with results but also with process. In my view, s. 3 scrutiny attaches not only to the actual distribution in question, but also to the underlying process from which the electoral map was derived. It is this process that concerns me.

17 Thus, while the actual distribution map may appear to have achieved a result that is not too unreasonable, I am of the view that the effect of the statutory conditions has been to interfere with the rights of urban voters. Once an independent boundaries commission was established, it was incumbent upon the Saskatchewan legislature to ensure that the commission was able to fulfill its mandate freely and without unnecessary interference. The public would, quite properly, perceive the Commission to be an independent and trustworthy body. It would be an affront for the legislature to undermine the jurisdiction and authority which members of the public would reasonably expect the Commission to possess. I should add that, had the Saskatchewan government chosen to legislate the boundaries directly rather than by establishing an independent boundaries commission, the s. 3 right would still be engaged.

[page172]

18 The right to vote is so fundamental that this interference is sufficient to constitute a breach of s. 3 of the Charter. To diminish the voting rights of individuals is to violate the democratic system. Such actions are bound to incur the frustration of voters and risk bringing the democratic process itself into disrepute. The haunting spectre of "rotten boroughs" is not that far removed as to be forgotten. The right to vote is too important to be diluted in the absence of some valid justification. No such justification exists in this case.

Is the Infringement Justifiable under s. 1 of the Charter?

19 The northern regions are in a class by themselves. The geography of these sparsely settled regions clearly demonstrates a pressing and substantial need for two northern constituencies. The creation of these constituencies is certainly rationally connected to the concept that these vast, underpopulated areas need effective representation. In short, the creation of the two northern ridings meets all the requisite conditions and they are justified under s. 1 of the Charter.

20 The southern ridings are in a different position legally as well as geographically. I readily agree that the differing representational concerns of urban and rural areas may properly be considered in the determination of constituency boundaries. However, any body charged with creating an electoral map should commence with the proposition that, to the extent that it is reasonable and feasible, the voter population of each constituency should be approximately equal. In my view, this necessarily precludes the type of mandatory conditions imposed in the present case.

21 Proceeding from the initial premise of equality, the Commission should, in determining constituency boundaries and allocating ridings between urban and rural areas, be free to consider such factors as geography, demography and communities of interest. In any given distribution, the degree of variance between constituencies and the allocation of ridings between urban and rural areas will depend on the nature of the [page173] constituencies under consideration and the extent to which these factors are present.

22 For instance, the 1981 map provides proof that it is possible in Saskatchewan to achieve equality within 15 percent of the provincial quotient for all southern constituencies while still addressing other relevant considerations such as the differing nature of rural and urban interests. In other provinces, these concerns will be balanced differently. Depending on the particular characteristics of each province, non-population factors may require greater or less deviation. Thus, for example, a 25 percent variation has been found to be necessary and acceptable in British Columbia, whereas the legislation in Manitoba limits the variation to 10 percent.

23 In Saskatchewan, the basic requirement of reasonable equality was met when the 1981 constituency map was drawn. No reason has been provided as to why it was no longer possible to achieve the degree of equality reflected in that distribution. Moreover, no explanation has been given as to why the balancing of the relevant factors could not, as it was previously, be left to the Commission rather than being mandated by the legislature. The province has failed to justify the need to shackle the Commission with the mandatory rural-urban allocation and the confinement of urban boundaries to municipal limits. The effect of these mandatory conditions was to force the Commission to recommend a distribution which departs from the higher degree of equality achieved in 1981. In the absence of a reasonable explanation as to why this was necessary, the distribution in question is suspect and there is no basis upon which to conclude that the legislature's objective in imposing the mandatory conditions was pressing and substantial.

24 However, even assuming that the mandatory conditions were enacted in pursuit of some pressing and substantial need, it cannot be said that the legislation affected the rights of urban voters as little as possible. The earlier Constituency Boundaries Commission Act, 1972 and the maps resulting from that legislation demonstrate that significantly less intrusive means can be utilized to provide good and proper rural representation. The 1981 map demonstrates not only that [page174] it is possible to achieve a greater degree of electoral equality than exists in the impugned distribution, but also that the goal of ensuring adequate representation of rural areas can be met without imposing restrictions on the boundaries commission. Thus, the earlier legislation and resulting constituency maps clearly demonstrate that there are means of drawing the constituency boundaries which interfere with the rights of urban voters to a lesser extent.

25 I wish to emphasize that this is not a matter of a court entering the domain of the legislature. Rather, it is no more than a requirement that the legislature refrain from infringing Charter rights. It requires no more of the Saskatchewan legislature than that it comply with either its earlier or subsequent enactments on the same subject.

26 In summary, it has not been established that there was a pressing or substantial need either to rigidly fix the number of urban and rural ridings in southern Saskatchewan or to confine the urban ridings to existing municipal boundaries. It follows that the first requirement of s. 1 has not been met. Even if it had, I would think it impossible to find that the rights of urban voters had been interfered with as little as possible. The impugned legislation cannot therefore be justified under s. 1 of the Charter.

Conclusion

27 The fundamental right to vote should not be diminished without sound justification. To water down the importance and significance of an individual's vote is to weaken the democratic process. Here no sound basis has been put forward to justify legislation which clearly has the effect of diminishing the rights of urban voters and reducing the representation of urban residents in the leg-

islature. Democracy can all too easily be eroded by diluting voters' rights and representation. Voting is far too important and precious a right to be unreasonably and unnecessarily diluted.

Disposition

28 In the result I would dismiss the appeal and answer the reference questions in the same manner as the Saskatchewan Court of Appeal.

[page175]

1981 DISTRIBUTION PROVINCIAL QUO- 9507
TIENT:

[Quicklaw note: The distribution map and legend showing constituencies in Saskatchewan could not be reproduced online. Please see paper copy.]

[page176]

1989 (PROPOSED) DISTRIBUTION PROVINCIAL QUO- 10147
TIENT:

[Quicklaw note: The distribution map and legend showing constituencies in Saskatchewan could not be reproduced online. Please see paper copy.]

[page177]

The judgment of La Forest, Gonthier, McLachlin, Stevenson and Iacobucci JJ. was delivered by

29 McLACHLIN J.:-- This appeal involves a constitutional challenge to provincial electoral distribution in the province of Saskatchewan. My conclusion is that the electoral boundaries created by The Representation Act, 1989, S.S. 1989-90, c. R-20.2, do not violate the right to vote enshrined in s. 3 of the Canadian Charter of Rights and Freedoms.

30 I reach this conclusion through consideration of a number of subsidiary issues:

I The Question to be Answered

II Application of the Charter

III Defining the Right to Vote

IV Is the Right to Vote Violated by the Saskatchewan Boundaries?

V Section l and Justification

I The Question to be Answered

31 This case comes to us as an appeal from a reference to the Saskatchewan Court of Appeal (1991), 90 Sask. R. 174. The reference requested that court's opinion on the following questions:

> In respect of the constituencies defined in The Representation Act, 1989:
>
> (a) Does the variance in the size of voter populations among those constituencies, as contemplated by s. 20 of The Electoral Boundaries Commission Act, S.S. l986-87-88, c. E-6.1, and recommended in the Sasketchewan Electoral Boundaries Commission 1988 Final Report, infringe or deny rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms? If so, in what particulars? Is any such limitation or denial of rights or freedoms justified by s. 1 of the Canadian Charter of Rights and Freedoms?
>
> (b) Does the distribution of those constituencies among urban, rural and northern areas, as contemplated by s. 14 of The Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1, and recommended in the Saskatchewan [page178] Electoral Boundaries Commission 1988 Final Report, infringe or deny rights or freedoms guaranteed by the Canadian Charter of Rights and Freedoms? If so, in what particulars? Is any such limitation or denial of rights or freedoms justified by s. 1 of the Canadian Charter of Rights and Freedoms?

32 Different views have been expressed as to what issues these questions raise. The appellant asserts that what is at issue is the constitutional validity of The Representation Act, 1989. The respondent contends that the question is not whether the Act was unconstitutional, but whether the electoral boundaries created pursuant to the Act violate the Charter.

33 I am of the view that it is the boundaries themselves which are at issue on this appeal. The questions focus, not on the Act, but on the constitutionality of "the variance in the size of voter populations among [the] constituencies" and "the distribution of those constituencies among urban, rural and northern areas". In so far as The Representation Act, 1989 defines the constituencies, the validity of that Act is indirectly called into question. And in so far as The Electoral Boundaries Commission Act provides the criteria by which the boundaries are to be fixed, that Act may affect the answers given to the questions posed. But the basic question put to this Court is whether the

variances and distribution reflected in the constituencies themselves violate the Charter guarantee of the right to vote.

II Application of the Charter

34 A preliminary question arises of whether the definition of provincial voting constituencies is subject to the Charter.

35 The Minister of Justice of the Northwest Territories submits that the Charter does not apply since the legislation whereby constituencies are created is part of the constitution of Canada and hence not subject to the Charter. He submits that the provinces have had the right to establish electoral boundaries since joining Confederation. In his view, the place of voter equality in this determination is a matter of constitutional convention which is impervious to judicial [page179] review. The right of the provinces to create electoral boundaries as they see fit "must be taken as being an inherent limitation on the right to vote in s. 3."

36 I cannot accept this submission. Although legislative jurisdiction to amend the provincial constitution cannot be removed from the province without a constitutional amendment and is in this sense above Charter scrutiny, the provincial exercise of its legislative authority is subject to the Charter; as McEachern C.J. observed "[i]f the fruit of the constitutional tree does not conform to the Charter ... then it must to such extent be struck down": Dixon v. B.C. (A.G.) (1986), 7 B.C.L.R. (2d) 174, at p. 188. The convention for which the Minister contends goes no further than to empower the province to establish its electoral boundaries. The particular exercise of that power is subject to s. 3 of the Charter, which binds Saskatchewan as it does every province and territory of Canada.

III Defining the Right to Vote

37 Section 3 of the Canadian Charter of Rights and Freedoms reads as follows:

> 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.

38 The question is simply stated: What is meant by "the right to vote" in s. 3? Before addressing this question it is necessary to address the way the Court should go about determining the content of the right.

A. General Principles Applicable to Defining the Right

39 The content of a Charter right is to be determined in a broad and purposive way, having regard to historical and social context. As Dickson J. (as he then was) said in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344:

[page180]

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

40 From this general statement of principle I turn to more particular considerations which bear relevance to this appeal.

41 The first of these is the doctrine that the Charter is engrafted onto the living tree that is the Canadian constitution: Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at pp. 155-56; Reference Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, at p. 509. Thus, to borrow the words of Lord Sankey in Edwards v. Attorney-General for Canada, [1930] A.C. 124, at p. 136, it must be viewed as "a living tree capable of growth and expansion within its natural limits."

42 The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed: Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357, at p. 366. It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the Charter. The tree is rooted in past and present institutions, but must be capable of growth to meet the future. As Dickson J. stated in R. v. Big M Drug Mart Ltd., supra, at pp. 343-44:

> ... 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 [page181] by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter. [Emphasis in original.]

This admonition is as apt in defining the right to vote as it is in defining freedom of religion. The right to vote, while rooted in and hence to some extent defined by historical and existing practices, cannot be viewed as frozen by particular historical anomalies. What must be sought is the broader philosophy underlying the historical development of the right to vote -- a philosophy which is capable of explaining the past and animating the future.

43 This appeal also engages the general principle that practical considerations must be borne in mind in constitutional interpretation: R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713. Courts must be sensitive to what Frankfurter J. (McGowan v. Maryland, 366 U.S. 420 (1961)) calls "the practical living facts" to which a legislature must respond: per La Forest J. in Edwards Books, supra, at pp. 794-95, approved in R. v. Schwartz, [1988] 2 S.C.R. 443; United States of America v. Cotroni, [1989] 1 S.C.R. 1469. This is nowhere more true than in considering the right to vote,

where practical considerations such as social and physical geography may impact on the value of the citizen's right to vote.

44 Of final and critical importance to this appeal is the canon that in interpreting the individual rights conferred by the Charter the Court must be guided by the ideal of a "free and democratic society" upon which the Charter is founded. As Dickson C.J. stated in R. v. Oakes, [1986] 1 S.C.R. 103, 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.

[page182]

45 The first task on an appeal such as this is to define the scope of the right to vote under s. 3 of the Charter. The second is to evaluate the existing electoral boundaries in the light of that definition to determine if they violate s. 3 of the Charter. If a violation is found, a third task arises -- determining whether the limitation on the right is "demonstrably justified in a free and democratic society" and hence saved under s. 1 of the Charter. The general principles to which I have referred, while bearing particularly on the task of defining the ambit of the right, also animate the second and third steps of the analysis.

B. The Focus of the Debate

46 The question for resolution on this appeal can be summed up in one sentence: to what extent, if at all, does the right to vote enshrined in the Charter permit deviation from the "one person - one vote" rule? The answer to this question turns on what one sees as the purpose of s. 3. Those who start from the premise that the purpose of the section is to guarantee equality of voting power support the view that only minimal deviation from that ideal is possible. Those who start from the premise that the purpose of s. 3 is to guarantee effective representation see the right to vote as comprising many factors, of which equality is but one. The contest, as I see it, is most fundamentally between these two views, although the submissions before us vary in the emphasis they place on different factors and hence on where they would draw the line.

47 The Saskatchewan Court of Appeal, as I read its reasons, fell into the camp of those who see the purpose of s. 3 as guaranteeing equality of voting power per se. It suggested that the only deviation permissible from the ideal of equality under s. 3 is that required by the practical problems of ensuring that the number of voters in each constituency is mathematically equal on the day of voting (at pp. 21, 24). On the basis of this definition, it found that the electoral boundaries in Saskatchewan violated s. 3 of the Charter. Other considerations, such as geography, historical boundaries and community interests, fell to be considered under s. 1. The court found that the [page183] boundaries were not justified under s. 1, except for the two northern ridings where population is extremely sparse.

48 In this Court, the respondent, supporting the judgment of the Court of Appeal, urged that the goal of s. 3 is equality of voting power, as nearly as may possibly be achieved. The appellant, while

not going so far as to deny the importance of equality in a meaningful right to vote, urged that equality was but one of many factors relevant to the right to vote enshrined in s. 3 and that the fundamental purpose of s. 3 was not to ensure equality of voting power, but effective and fair representation conducive to good government. The interveners tended to ally themselves with one of these two positions, stressing their own particular perspectives. For example, Equal Justice for All urged no deviation from equality, except as might be justified in aid of disadvantaged groups, while the Attorney General for Alberta went so far as to deny equality's place as a "core" or "fundamental" value in assessing the right to vote.

C. The Meaning of the Right to Vote

49 It is my conclusion that 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; as noted in Dixon v. B.C. (A.G.), [1989] 4 W.W.R. 393, at p. 413, elected representatives function in two roles -- legislative and what has been termed the "ombudsman role".

50 What are the conditions of effective representation? The first is relative parity of voting power. A system which dilutes one citizen's vote unduly as compared with another citizen's vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the [page184] citizen whose vote is diluted will be reduced, as may be access to and assistance from his or her representative. The result will be uneven and unfair representation.

51 But parity of voting power, though of prime importance, is not the only factor to be taken into account in ensuring effective representation. Sir John A. Macdonald in introducing the Act to re-adjust the Representation in the House of Commons, S.C. l872, c. 13, recognized this fundamental fact (House of Commons Debates, Vol. III, 4th Sess., p. 926 (June 1, 1872)):

> ... it will be found that, ... while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes and localities should be fairly represented, that the principle of numbers should not be the only one.

52 Notwithstanding the fact that the value of a citizen's vote should not be unduly diluted, it is a practical fact that effective representation often cannot be achieved without taking into account countervailing factors.

53 First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district. Voters die, voters move. Even with the aid of frequent censuses, voter parity is impossible.

54 Secondly, such relative parity as may be possible of achievement may prove undesirable because it has the effect of detracting from the primary goal of effective representation. Factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic. These are but examples of considerations which may justify departure from absolute voter parity in the pursuit of more effective representation; the list is not closed.

[page185]

55 It emerges therefore that deviations from absolute voter parity may be justified on the grounds of practical impossibility or the provision of more effective representation. Beyond this, dilution of one citizen's vote as compared with another's should not be countenanced. I adhere to the proposition asserted in Dixon, supra, at p. 414, that "only those deviations should be admitted which can be justified on the ground that they contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed."

56 This view of the meaning of the right to vote in s. 3 of the Charter conforms with the general principles of interpretation discussed at the outset.

57 The first and most important rule is that the right must be interpreted in accordance with its purpose. As will be seen, there is little in the history or philosophy of Canadian democracy that suggests that the framers of the Charter in enacting s. 3 had as their ultimate goal the attainment of voter parity. That purpose would have represented a rejection of the existing system of electoral representation in this country. The circumstances leading to the adoption of the Charter negate any intention to reject existing democratic institutions. As noted in Dixon, supra, at p. 412: "There is no record of such fundamental institutional reform having been mentioned at the conferences that preceded the adoption of the [proposed] Charter". Nor was the issue raised by any of the plethora of interest groups making submissions in respect of voting rights during the prolonged Joint Senate and House of Commons Committee Hearings on the proposed Charter. The framers of the Charter had two distinct electoral models before them -- the "one person - one vote" model espoused by the United States Supreme Court in Baker v. Carr, 369 U.S. 186 (1962), Karcher v. Daggett, 462 U.S. 725 (1983), and Kirkpatrick v. Preisler, 394 U.S. 526 (1969), and the less radical, more pragmatic approach which had developed in England and in this country through the centuries and which was actually in place. In the absence of any supportive evidence to the contrary (as may be found in the United States in the speeches of the founding fathers), it would be wrong to infer that in enshrining the right to vote in our written constitution [page186] the intention was to adopt the American model. On the contrary, we should assume that the goal was to recognize the right affirmed in this country since the time of our first Prime Minister, Sir John A. Macdonald, to effective representation in a system which gives due weight to voter parity but admits other considerations where necessary.

58 I turn next to the history of our right to vote. As already noted, the history of our right to vote and the context in which it existed at the time the Charter was adopted support the conclusion that the purpose of the guarantee of the right to vote is not to effect perfect voter equality, in so far as that can be done, but the broader goal of guaranteeing effective representation. As I noted in Dixon, supra, at p. 409, democracy in Canada is rooted in a different history than in the United States:

> Its origins lie not in the debates of the founding fathers, but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English tradition of democratic government as did the Americans; on the contrary, they embraced it and changed it to suit their own perceptions and needs.

I went on to describe the Canadian tradition as one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation, which even in its advanced stages tolerates deviation from voter parity in the interests of better representation:

> What is that tradition? It was a tradition of evolutionary democracy, of increasing widening of representation through the centuries. But it was also a tradition which, even in its more modern phases, accommodates significant deviation from the ideals of equal representation. Pragmatism, rather than conformity to a philosophical ideal, has been its watchword.

59 Other Commonwealth countries have affirmed the same tradition. Thus the Australian High Court rejected a "one person - one vote" approach in favour [page187] of an approach which permitted consideration of countervailing factors: Attorney-General (Aus.); Ex rel. McKinlay v. Commonwealth (1975), 135 C.L.R. 1. Stephen J. wrote, at p. 57:

> It is, then, quite apparent that representative democracy is descriptive of a whole spectrum of political institutions, each differing in countless respects yet answering to that generic description ....
>
> To contend that the presence of what is described as "as near as practicable equality of numbers" within electoral divisions is essential to representative democracy, to a legislature "chosen by the people", is to deny proper meaning to language and to ignore long chapters in the evolution of democratic institutions both in this country and overseas, in which, representative democracy having been attained, its details have undergone frequent changes in response to community pressures but have failed to possess this feature of equality of numbers on which the plaintiffs now insist.

See also Gibbs J., at p. 45 and Barwick C.J., at p. 25.

60 To return to the metaphor of the living tree, our system is rooted in the tradition of effective representation and not in the tradition of absolute or near absolute voter parity. It is this tradition that defines the general ambit of the right to vote. This is not to suggest, however, that inequities in our voting system are to be accepted merely because they have historical precedent. History is important in so far as it suggests that the philosophy underlying the development of the right to vote in this country is the broad goal of effective representation. It has nothing to do with the specious argument that historical anomalies and abuses can be used to justify continued anomalies and abuses, or to suggest that the right to vote should not be interpreted broadly and remedially as befits Charter rights. Departures from the Canadian ideal of effective representation may exist. Where they do, they will be found to violate s. 3 of the Charter.

61 I turn finally to the admonition that courts must be sensitive to practical considerations in interpreting [page188] Charter rights. The "practical living fact", to borrow Frankfurter J.'s phrase, is that effective representation and good government in this country compel those charged with setting electoral boundaries sometimes to take into account factors other than voter parity, such as geography and community interests. The problems of representing vast, sparsely populated territories, for example, may dictate somewhat lower voter populations in these districts; to insist on voter parity might deprive citizens with distinct interests of an effective voice in the legislative process as well as of effective assistance from their representatives in their "ombudsman" role. This is only one

of a number of factors which may necessitate deviation from the "one person - one vote" rule in the interests of effective representation.

62 In the final analysis, the values and principles animating a free and democratic society are arguably best served by a definition that places effective representation at the heart of the right to vote. The concerns which Dickson C.J. in Oakes associated with a free and democratic society -- respect for the inherent dignity of the human person, commitment to social justice and equality, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals in society -- are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity. Respect for individual dignity and social equality mandate that citizen's votes not be unduly debased or diluted. But the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that other concerns also be accommodated.

63 In summary, I am satisfied that the precepts which govern the interpretation of Charter rights support the conclusion that the right to vote should be defined [page189] as guaranteeing the right to effective representation. The concept of absolute voter parity does not accord with the development of the right to vote in the Canadian context and does not permit of sufficient flexibility to meet the practical difficulties inherent in representative government in a country such as Canada. In the end, it is the broader concept of effective representation which best serves the interests of a free and democratic society.

IV Do the Saskatchewan Boundaries Violate the Right to Vote?

A. The Issue

64 It is important at the outset to remind ourselves of the proper role of courts in determining whether a legislative solution to a complex problem runs afoul of the Charter. This Court has repeatedly affirmed that the courts must be cautious in interfering unduly in decisions that involve the balancing of conflicting policy considerations: see Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, per Le Dain J., at p. 392; Canada v. Schmidt, [1987] 1 S.C.R. 500, per La Forest J., at pp. 522-23; Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49, per Dickson C.J., at pp. 90-92. These considerations led me to suggest in Dixon, supra, at p. 419, that "the courts ought not to interfere with the legislature's electoral map under s. 3 of the Charter unless it appears that reasonable persons applying the appropriate principles ... could not have set the electoral boundaries as they exist."

65 Before turning to the constituencies in question, it is necessary to clarify what is being tested. As noted at the outset, the issue in this appeal concerns the "variance" in voter populations among constituencies and the "distribution" of constituencies among urban, rural and northern areas. This wording suggests a focus on the result obtained rather than the process, [page190] although, as will be seen, I conclude that the process used here did not in fact violate s. 3.

66 The Court of Appeal focused on the constitutionality of The Electoral Boundaries Commission Act. It held at p. 189 that the Act was unconstitutional because it did not "direct the Commission to be guided by the fundamental principle of equality of voting power", and in fact barred the

electoral commission from applying the principle of equality by requiring a specified number of urban, rural and northern seats. As the second stage of its analysis, the court considered the effect of the legislation. After pointing out a number of discrepancies between various ridings, the court concluded that the electoral boundaries themselves violated the right to vote guaranteed under the Charter. In arriving at this conclusion, the court applied a s. 3 test which I have suggested is wrong -- the test of voter parity in so far as it is possible of achievement. It is therefore necessary to address this question anew in the light of the test for s. 3 which I have proposed.

B. The Boundaries

67 The Electoral Boundaries Commission Act required the electoral commission to create 29 urban, 35 rural and 2 northern ridings. The 64 urban and rural ridings fall roughly into the south half of the province, while the two northern ridings make up its north half. In the southern half of the province, the voter population of each constituency is within plus or minus 25 percent of the provincial quotient. The Act specifically permitted the two northern ridings to vary from the provincial quotient by up to plus or minus 50 percent. The Court of Appeal, under s.1, found that special treatment for northern ridings was constitutionally acceptable, and no issue is taken on that point. The main focus is on the southern ridings, which the Court of Appeal found violate s. 3 of the Charter.

[page191]

68 The question is whether the deviations from voter parity in southern ridings can be justified on the basis of valid considerations. The respondent suggests that the voter population disparities between ridings cannot be justified and violate s. 3. In support of this he argues: (l) that the electoral commission, constrained as it was by the legislation, acted arbitrarily; and (2) that in fact there are discrepancies in the population of various ridings which are unjustified. The first argument is concerned mainly with process; the second with result.

69 I turn first to the proposition that the electoral commission acted arbitrarily and without due regard for the need to maintain relative voter parity. The argument in support of this position, accepted by the Court of Appeal, is that the electoral commission was improperly prevented from giving due weight to voter equity because The Electoral Boundaries Commission Act required that it produce an electoral map with a specified number of urban, rural and northern seats.

70 This argument overlooks the genesis of the stipulation in the legislation and the actual population distribution that underpinned the allocation of urban and rural seats. The allotment of seats to the various urban centres in The Representation Act, 1989 flows logically from the electoral map that it replaced. Under The Representation Act, 1981 the number of seats in the various urban centres was as follows: Moose Jaw - 2; Regina - 10; Saskatoon - 10; Swift Current - 1; North Battleford - 1; Prince Albert had one seat within city limits and another, Prince Albert-Duck Lake, which was comprised of part of the City and a small part of a neighbouring area. The City of Yorkton was part of a riding comprised of the City itself and a very small surrounding area. This map was made by an impartial commission not required to establish a particular number of rural or urban ridings.

[page192]

71 The configuration of urban seats in The Representation Act, 1989 simply reflects population growth in those areas from the time the earlier map was put in place. The 1989 map includes additional seats for the growing centres of Saskatoon and Regina. The increased size of the City of

Yorkton is reflected in the fact that it became a self-contained riding shorn of the surrounding rural area. Similarly, Prince Albert, another rapidly growing city, was divided into two seats comprised exclusively of the urban area itself. This is not an "arbitrary" allocation of constituencies. It is founded on the electoral map made by an impartial and unfettered commission in 1981 and the population growth that has since occurred.

72 Overall, the electoral map put in place by The Representation Act, 1989 admits of a tendency for "urban" seats to have more voters than "rural" seats. Urban ridings generally have somewhat more voters than the quotient and rural ridings generally have somewhat fewer. The discrepancies, however, are not great and there are a number of exceptions. Several rural seats are larger than a number of urban ones. Moreover, "rural" seats are not necessarily "farm" or "agricultural" seats. A number of relatively major centres including Weyburn, Estevan, Melville, Nipawin, Melfort and Lloydminster are included in these "rural" areas.

73 The actual allocation of seats between urban and rural areas is very close to the population distribution between those areas. The rural areas have 53.0 percent of the seats and 50.4 percent of the population. Urban areas have 43.9 percent of the seats and 47.6 percent of the population. The rural areas are, therefore, somewhat over-represented, and the urban areas somewhat under-represented, but these deviations are relatively small. Similar deviations occurred on the redistributions proposed by the Constituency Boundaries Commissions of 1974 and 1979-80. For example, the 1979-80 Report allocated only 40.6 percent of seats to urban areas even though they had 42.6 percent [page193] of the population. In the 1974 redistribution, urban areas had only 36.1 percent of the seats but 38.9 percent of the population. It is thus seen that the effect of the allocation of seats to urban and rural ridings in the 1989 legislation was mainly to increase the number of urban seats to reflect population increases in urban areas. This belies the suggestion that the 1989 Act was an unjustified attempt to adjust boundaries to benefit the governing party.

74 The argument that the commission was arbitrarily constrained by the governing legislation may also be criticized on the ground that it assumes an unduly constrained view of The Electoral Boundaries Commission Act. Section 20 of the Act sets out the criteria which must govern the electoral map:

> 20 A commission, in determining the area to be included in and in fixing the boundaries of all proposed constituencies:
>
> (a) shall determine a constituency population quotient by dividing the voter population by the number of constituencies, from which:
>
> (i) no proposed southern constituency population shall vary, subject to section 14 and subsection 15(1), by more than 25%;
> (ii) no proposed northern constituency population shall vary, subject to section 14, by more than 50%;
>
> (b) may use the allowable variation from the population quotient mentioned in clause (a) to accommodate:
>
> (i) the sparsity, density or relative rate of growth of population of any proposed constituency;

(ii) any special geographic features including size and means of communication between the various parts of the proposed constituency;
(iii) the community or diversity of interests of the population, including variations in the requirements of the population of any proposed constituency; and
(iv) other similar or relevant factors.

[page194]

75 The Commission adhered to these criteria in setting the boundaries, applying a test consistent with s. 3 of the Charter as I have interpreted it, noting at p. 4 of its Final Report:

> In the opinion of the Commission, the principle of representation by population is recognized in the legislation by the establishment of a constituency voter population quotient. Clearly the Act by necessary inference implies that such voter population quotient must be the benchmark for all constituencies. The right of the Commission to depart from that quotient is not an absolute one. It is entitled to depart therefrom only for the reasons set forth in the Act and only to the extent that the special circumstances properly permit, and the legislation requires. This was the interpretation followed by the Commission in submitting its Interim Report and in reviewing the representations made whether written or oral, in respect to that Report. [Emphasis added.]

76 I am satisfied that the proposition that the Commission was unduly constrained by the governing legislation and consequently failed to take into consideration the appropriate factors must fail. The process, viewed as a whole, was fair. The original division between urban and rural ridings was the work of an unimpeded commission; the subsequent adjustment largely reflected population changes, and gave due weight to the principle of voter parity. The fact that the legislature was involved in the readjustment does not in itself render the process arbitrary or unfair, in my view.

77 I turn then to the contention that the distribution of seats itself violates s. 3 of the Charter. As already noted, variances between southern seats fall within plus or minus 25 percent of the provincial quotient. Moreover, the distribution between urban and rural seats closely approximates the actual split between urban and rural population. It remains, however, to consider whether unjustifiable deviations exist with respect to particular ridings in the southern half of the province.

78 Before examining the electoral boundaries to determine if they are justified, it may be useful to mention some of the factors other than equality of voting power which figure in the analysis. One of the [page195] most important is the fact that it is more difficult to represent rural ridings than urban. The material before us suggests that not only are rural ridings harder to serve because of difficulty in transport and communications, but that rural voters make greater demands on their elected representatives, whether because of the absence of alternative resources to be found in urban centres or for other reasons. Thus the goal of effective representation may justify somewhat lower voter populations in rural areas. Another factor which figured prominently in the argument before us is geographic boundaries; rivers and municipal boundaries form natural community dividing lines and hence natural electoral boundaries. Yet another factor is growth projections. Given that the boundaries will govern for a number of years -- the boundaries set in 1989, for example, may be in place

until 1996 -- projected population changes within that period may justify a deviation from strict equality at the time the boundaries are drawn.

79 Against this background, I turn to the boundaries themselves.

80 The Commission did not address deviations on a riding by riding basis in its report, contenting itself with a general description of the factors it relied on in establishing the boundaries. It did, however, point out the importance of geography in drawing boundaries in the sparsely populated southwestern areas, where river banks often serve to demarcate distinct regions and communities and additionally affect transportation and the ease of servicing the populace. The Commission also commented specifically on the two ridings showing the greatest deviation, Morse Constituency and Humboldt Constituency. In each case, it provided good reasons in its Final Report, at p. 7, for the degree of variation:

> The two proposed constituencies to which criticism was primarily directed were those of Morse and Humboldt. [page196] Morse has the smallest voter population of any rural constituency and Humboldt has the largest. This is understandable. Morse lies in that area of rural Saskatchewan where there is a sparsity of population whereas Humboldt encompasses an area of the province in which there is a much denser population.
>
> The Commission sees no benefit to be gained by altering the boundaries of Morse constituency. A study of the map will show that the adjoining constituencies are also sparsely settled areas. To add voters to the proposed constituency of Morse would only reduce the voter population in the surrounding constituencies for no beneficial purpose. As well, the northern boundary of the Morse constituency is the South Saskatchewan River, a true natural boundary. Moreover, the constituency of Morse surrounds the City of Swift Current. If satellite villages should develop outside the City of Swift Current, as some people have suggested, the voter population will increase accordingly.
>
> The recommendations made in this Final Report go some distance in reducing voter population in the constituency of Humboldt. The Commission feels that this constituency has reached its optimum population. It is also of the opinion that eventually the central and park area of the province will experience to some extent, the same changes that have occurred in the prairies areas. With the increased use of large equipment, it is likely that farms in that area of Saskatchewan will become larger with consequent loss of population in the future.

81 A third riding which was criticized was Saskatoon Greystone, with a variance of plus 23 percent, which adjoins Saskatoon Sutherland - University with a variance of minus 24 percent. A view of the electoral map for Saskatoon reveals that Saskatoon Greystone is entirely built up, while Saskatoon Sutherland-University is not. It may be, as the appellant suggests, that the potential for future increases in the population of Saskatoon Sutherland - University is a factor in the discrepancy. On the other hand, the respondent has presented no evidence apart from population figures supporting the contention that the variance between these two ridings is illogical or arbitrary.

82 I have earlier suggested that population discrepancies between urban and rural ridings are not great. In [page197] so far as the election map may separate certain dormitory communities from adjacent rural ridings, it is not self-evident that such communities should be joined with the communities where the residents worked. Their interests may differ from those of the community in the urban riding, and their inclusion might sweep in truly rural residents.

83 In summary, the evidence supplied by the province is sufficient to justify the existing electoral boundaries. In general, the discrepancies between urban and rural ridings is small, no more than one might expect given the greater difficulties associated with representing rural ridings. And discrepancies between particular ridings appear to be justified on the basis of factors such as geography, community interests and population growth patterns. It was not seriously suggested that the northern boundaries are inappropriate, given the sparse population and the difficulty of communication in the area. I conclude that a violation of s. 3 of the Charter has not been established.

84 In these circumstances, it is unnecessary to consider s. 1.

V Conclusion

85 I would allow the appeal and answer both Reference Questions in the negative.

The following are the reasons delivered by

86 SOPINKA J.:-- I have read the reasons of my colleagues, Justice Cory and Justice McLachlin, and while I agree with the result reached by McLachlin J. and substantially with her reasons, I would approach the interpretation of s. 3 of the Canadian Charter of Rights and Freedoms differently.

87 In my opinion, in using the simple words in s. 3 that "[e]very citizen ... has the right to vote ...", the framers did not intend to invent or give birth to a right not previously enjoyed by the citizens of [page198] Canada. Indeed, it was frankly conceded in argument that the right to vote had existed in Saskatchewan prior to 1982. Accordingly, in interpreting s. 3, the primary inquiry is to determine on what principles the right to vote, which has existed in this country for many years, was based.

88 A review of the historical background shows that not only in Saskatchewan, but in other provinces as well, the drawing of electoral boundaries has been governed by the attempt to achieve voter equality with liberal allowances for deviations based on the kinds of considerations which are enumerated in s. 20 of The Electoral Boundaries Commission Act, S.S. 1986-87-88, c. E-6.1. Deviations were avoided which deprived voters of fair and effective representation. Under the Charter, the deviations are subjected to judicial scrutiny and must not be such as to deprive voters of fair and effective representation.

89 The questions raised in this appeal require us to opine on the legislative result of the process embodied in The Electoral Boundaries Commission [page199] Act. The product of this process is contained in The Representation Act, 1989, S.S. 1989-90, c. R-20.2. My colleague Cory J. is of the view that once an independent boundaries commission was established, it was incumbent upon the Saskatchewan legislature to ensure that the commission was able to fulfill its mandate freely without unnecessary interference such as that contained in s. 14 of The Electoral Boundaries Commission Act. With respect, I cannot agree. Cory J.'s position assumes that there is some kind of constitutional guarantee for the process. It was not necessary for the Saskatchewan legislature to create an

independent commission, and, had it simply legislated the impugned boundaries, the process itself would not have been subject to judicial scrutiny. Having chosen to delegate the task to the commission, there is no reason why the legislature should be prohibited from laying down tight guidelines delineating the powers to be conferred on the commission.

90 With respect to the guidelines, they are set out in ss. 14 and 20 of The Electoral Boundaries Commission Act. The factors in s. 20 could be applied in such a way as to produce deviations that deprived voters of fair and effective representation but equally, they could be applied to achieve that objective. Similarly, while s. 14 of The Electoral Boundaries Commission Act, which mandates a fixed number of rural and urban ridings, could have resulted in producing variations from the objective which were so extreme as to amount to a breach of the right to vote, it did not have that effect in this case. We are not, therefore, concerned in this case with the constitutional validity of the factors in s. 20 or s. 14 but with the effect that their application has produced.

91 I am in agreement with the finding of Cory J. that the electoral boundaries established by the 1981 map are fair and did not violate the right to vote. The boundaries proposed in The Representation Act, 1989 adopt the existing electoral map of Saskatchewan with the addition of two urban ridings. The addition of the two urban constituencies reflects the increase in voter population in the relevant areas. The extent of deviation from strict voter equality, as well as the reasons for those deviations, are comparable to those which inspired the 1981 map. In these circumstances, it cannot be said that the deviations established by The Representation Act, 1989 are so extensive as to deny fair and effective representation. In these circumstances, they do not infringe the right to vote entrenched in s. 3 of the Charter.

92 Accordingly, I would dispose of the appeal as proposed by McLachlin J.

Solicitor for the appellant: Brian Barrington-Foote, Regina. Solicitor for the respondent: Roger Carter, Saskatoon. Solicitor for the intervener the Attorney General of Canada: John C. Tait, Ottawa.

[page200]

Solicitor for the intervener the Attorney General of Quebec: The Attorney General of Quebec, Ste-Foy. Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria. Solicitors for the intervener the Attorney General of Prince Edward Island: Stewart McKelvey Stirling Scales, Charlottetown. Solicitors for the intervener the Attorney General for Alberta: Field & Field Perraton Masuch, Edmonton. Solicitor for the intervener the Attorney General of Newfoundland: Paul D. Dicks, St. John's. Solicitor for the intervener the Minister of Justice of the Northwest Territories: The Minister of Justice of the Northwest Territories, Yellowknife. Solicitors for the intervener the Minister of Justice of the Yukon: Arvay, Finlay, Victoria. Solicitor for the intervener John F. Conway: John F. Conway, Regina. Solicitor for the intervener the British Columbia Civil Liberties Association: Robert D. Holmes, Vancouver. Solicitor for the interveners Douglas Billingsley, Wilson McBryan, Leonard Jason and Daniel Wilde: Donald J. Boyer, Edmonton. Solicitors for the intervener the Alberta Association of Municipal Districts and Counties: Brownlee Fryett, Edmonton. Solicitors for the interveners the cities of Edmonton and Grande Prairie: Timothy J. Christian and June M. Ross, Edmonton. Solicitor for the intervener Equal Justice for All: Larry W. Kowalchuk, Saskatoon.

TAB 2

Case Name:

Peter Kiewit Sons Co. v. Perry

Between
Peter Kiewit Sons Co. & Sea-To-Sky Highway Investment Limited Partnership, respondents (plaintiffs), and Dennis Perry, Bruce McArthur, John Doe & Jane Doe, applicants (defendants)

[2006] B.C.J. No. 1141

2006 BCCA 259

226 B.C.A.C. 280

21 C.E.L.R. (3d) 193

150 A.C.W.S. (3d) 1047

2006 CarswellBC 1238

Vancouver Registry No. CA034086

British Columbia Court of Appeal
Vancouver, British Columbia

Levine J.A.
(In Chambers)

Oral judgment: May 23, 2006.
Released: May 24, 2006.

(30 paras.)

Civil procedure -- Judgments and orders -- Enforcement -- Stay of -- Application by the defendants for an interim stay of proceedings pending disposition of their application for leave to appeal, and a stay of proceedings pending appeal dismissed -- Application for an interim injunction preventing the respondents from proceeding with construction of highway had been dismissed -- Applicants were concerned about adverse environmental impact -- No irreparable harm demonstrated --

Compensation Plan for mitigation of any adverse environmental effects of construction in the area had been accepted by all responsible authorities.

Application by the defendants for an interim stay of proceedings pending disposition of their application for leave to appeal, and a stay of proceedings pending appeal. The applicants were directors of the Eagleridge Bluffs and Wetlands Preservation Society. On May 15, 2006, an order was issued enjoining the applicants from interfering with construction of a five kilometer portion of highway. The Society's application for an interim injunction preventing the respondents from proceeding with construction was dismissed. The applicants opposed any highway construction in the area of the Eagleridge Bluffs because of adverse environmental effects.

HELD: Application dismissed. There was little chance of success on the applicants' appeal, but the court could not say that the appeal was frivolous or completely without merit. However, the applicants failed to show that irreparable harm would ensue if the respondents were allowed to proceed with construction. The evidence was that there was a Compensation Plan for mitigation of any adverse environmental effects of construction in the area of the Eagleridge Bluffs that had been accepted by all of the responsible authorities of the federal and provincial governments. The applicants failed to show that the balance of convenience favoured granting the stay. The evidence supported the conclusion that the activities of the respondents and the Ministry had been undertaken in accordance with the requirements of the applicable legislation, including mitigation of the adverse environmental effects. That weighed the balance of convenience in their favour.

Statutes, Regulations and Rules Cited:

Environmental Assessment Act, S.B.C. 2002, c. 43

Transportation Act, S.B.C. 2004, c. 44, s. 64(1)

Counsel:

D.C. Harbottle J. Thayer: Counsel for the Applicants

P.L. Rubin: Counsel for the Respondent Sea-To-Sky Investment Limited Partnership

D.A. Brindle, Q.C.: Counsel for the Respondent Peter Kiewet Sons Co.

N.E. Brown: Counsel for the Attorney General of British Columbia

---

1 LEVINE J.A. (orally):-- On May 15, 2006, Mr. Justice Grist made an order enjoining the applicants, Messrs. Perry, McArthur and others, from interfering with the construction of a five-kilometre portion of the Sea-to-Sky Highway over the Eagleridge Bluffs near Horseshoe Bay in West Vancouver. The applicants oppose any highway construction in the area of the Eagleridge Bluffs because of adverse environmental effects. They seek an interim stay of proceedings until their application for leave to appeal and a stay of proceedings pending appeal can be heard in approximately a week.

2 The respondents, Peter Kiewit & Sons Co. and Sea-to-Sky Investment Limited Partnership, applied for the injunction after the applicants blocked access to and obstructed construction in the area. The Eagleridge Bluffs & Wetlands Preservation Society, of which the applicants are directors, applied by petition for an interim injunction preventing the respondents from proceeding with construction. After six-and-a-half days of hearing both applications, which included *viva voce* cross-examination on affidavits, Grist J. granted the respondents' application for an injunction and dismissed that of the Society (his reasons for judgment are indexed at [2006] B.C.J. No. 1132, 2006 BCSC 815).

3 The applicants claimed that the respondents have not followed the procedure for obtaining approvals mandated in the Environmental Assessment Certificate issued in June 2004 under the ***Environmental Assessment Act***, S.B.C. 2002, c. 43, to the Ministry of Transportation for the Sea-to-Sky Improvement Project. They raise two requirements which they describe as "pre-conditions" to construction of the section of the Project that includes the Eagleridge Bluffs. (The whole of the Project extends from Horseshoe Bay to Whistler; the section that includes the Eagleridge Bluffs extends from Horseshoe Bay to Sunset Beach, and is called "DB1" in the relevant documents.) The applicants claim that the Certificate requires that an Environmental Management Plan ("EMP") for all of the DB1 section of the Project, and a Compensation Plan for the threatened ecosystems in the Horseshoe Bay area, be developed before construction starts.

4 When these proceedings commenced, neither an EMP for the DB1 section of the Project, nor a Compensation Plan, had been made available to the public. The respondents had prepared two "phased", or what the applicants term "fractured", EMP's for specific aspects of the construction in a portion of DB1.

5 On the basis of these alleged failures to comply with the Certificate, the applicants defended the respondents' injunction application on the ground that the respondents were acting unlawfully in proceeding with construction. In its petition, the Society sought orders quashing the Certificate and the decision of the Ministry of Transportation to proceed with construction of the highway instead of a tunnel; a declaration that the phased EMP's do not comply with the ***Act*** or the Certificate; and injunctions restraining construction until these legal issues could be determined.

6 During the course of the hearing, it was disclosed, in the affidavit of Ms. Isobel Doyle, the Environmental Manager of the Project for the Ministry of Transportation, that a Compensation Plan existed, and that the respondents and the authorities responsible for reviewing and accepting compliance with the Certificate had determined that phased EMP's would be more effective to manage the environmental issues than one plan for an entire section.

7 The chambers judge considered on the merits the claims of the applicants and the Society that the respondents were acting unlawfully in proceeding with construction. He concluded that the Society had not satisfied the first test for granting an interim injunction: that there is a serious question to be tried: see ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311.

8 The chambers judge rejected outright (at para. 7) the claim that either the process leading to the issuance of the Certificate or the decision of the Ministry to construct the highway as opposed to a tunnel were subject to challenge. He concluded (at para. 10) that the phased EMP's were not contrary to the conditions of the Certificate and (at para. 11) that the uncontroverted evidence showed that a Compensation Plan was in place. He also concluded (at para. 13) that there was no triable is-

sue or significant harm in respect of clearing an access road (the "Black Mountain Trail"), an issue that arose during the hearing.

9 There was no dispute that the applicants were acting unlawfully in blocking access to and obstructing construction. Mr. Justice Grist found (at para. 17) that they were contravening s. 64(1) of the ***Transportation Act***, S.B.C. 2004, c. 44:

> 64(1) A person must not
>
> (a) directly or indirectly interfere with or obstruct the planning, design, acquisition, holding, construction, use, operation, upgrading, alteration, expansion, extension, maintenance, repair, rehabilitation, protection, removal, discontinuance or closure of a provincial public undertaking, or of any related land or improvement, that is authorized under this Act, another enactment or at law, or
>
> . . .

10 Having rejected the applicants' defence and the Society's application on the merits, the chambers judge did not expressly consider the other two matters an applicant must establish on an application for an interim injunction: that it would suffer irreparable harm if the injunction were not granted; and that the balance of convenience favours granting the injunction: see ***RJR-MacDonald***, at paras. 43, 57-60, 62-74, 78-81. He did, however, note (at para. 10) that the evidence that the phased EMP's better dealt with "time-sensitive concerns individual to project stages" and the Society had not shown that any harm resulted from the change (that is, from not providing an EMP for all of DB1), bore on the "balance of inconvenience".

11 The orders granting the injunction to the respondents and dismissing the Society's application were entered May 18, 2006.

12 On an application for a stay in this Court, the applicant must establish the same three matters as must be established on an application for an interim injunction: that there is a serious question to be tried; that the applicant would suffer irreparable harm if the stay was not granted; and that the balance of convenience favours a stay: see ***Coburn v. Nagra***, [2001] B.C.J. No. 2128, 2001 BCCA 607 at para. 3. Other principles applied in this Court (summarized in ***Roe, McNeill & Co. v. McNeill*** (1994), 49 B.C.A.C. 247, quoted in ***Coburn*** at para. 11) include that a successful plaintiff is entitled to the fruits of his judgment and should not be deprived of them unless the interests of justice require that they be withheld; the court's power to grant a stay is discretionary and should only be exercised where it is necessary to preserve the subject matter of the litigation or to prevent irremedial damage or where there are other special circumstances; the court may weigh the interests of the parties, the balance of convenience and any prejudice that may arise; a first step is to consider whether the appeal is without merit or has no reasonable prospect of success.

13 In considering the merits of an appeal on an application for a stay, (that is, whether there a serious question to be tried), it is relevant to bear in mind that this Court, on an appeal of a discretionary decision of a chambers judge on an injunction application, will only interfere if the chambers judge has erred in principle or made an order which is not supported by the evidence, or it appears that the order appealed from will result in an injustice: see ***Mikado Resources Ltd. v. Dragoon Resources Ltd.*** (1990), 46 B.C.L.R. (2d) 354 at 357 (C.A.), Wood J.A. (In Chambers).

14 On the other hand, as Sopinka and Cory JJ. said in ***RJR-MacDonald*** (at para. 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*, [1987] 1 S.C.R. 110, at p. 150. ...

[Underlining added.]

15 In my opinion, the applicants and the Society have raised only one legal question worthy of consideration; that is, whether the phased EMP's comply with the Certificate. The chambers judge concluded, from a review of the relevant documents and evidence, that they did. The applicants contend that he exceeded his function in deciding that question in the context of an application for an interlocutory injunction, where the consideration of legal questions is meant to be of a more preliminary nature.

16 In this case, however, the hearing extended over a period of six-and-a-half days, an extraordinary length of time for an application for an injunction. The question of whether the staged EMP's satisfied the conditions set out in the Certificate was essentially a matter of interpreting the Certificate and the Concession Agreement entered into by the respondents with the Province. It is the Concession Agreement that expressly sets out the intention to develop an EMP for an entire section of the Project. The applicants contend that the chambers judge was wrong in concluding that the parties to the Concession Agreement have the authority to amend that Agreement and develop phased EMP's, because, they say, the Agreement reflects the (implicit) terms of the Certificate.

17 In my opinion, there is little chance of success on appeal, but I cannot say that the appeal is frivolous or completely without merit. I will therefore move on to consider the latter two considerations on an application for a stay.

18 The applicants claim that irreparable harm will occur if the respondents are allowed to proceed with construction. The land will be laid bare in five days, thus, they say, destroying the subject of the litigation. They also invoke the public interest, claiming that public confidence in environmental legislation in Canada and the U.S. will be compromised, leading to the public taking matters into their own hands.

19 These are serious claims. On the applicants' side, it cannot be disputed that every human interference with an existing ecosystem can be considered irreparable: once a tree is cut or a plant species disturbed, it cannot be replaced as it was. On the other hand, the suggestion, or threat, to the Court, that citizens will be moved to disobey the law if the remedy they seek is not granted, is inflammatory and inappropriate. If citizens seek the intervention of the Court, the rule of law requires that they adhere to its orders and seek alternative, legal, relief if they are dissatisfied with the outcome.

20 On the respondents' side, they have expended and continue to incur considerable sums in obtaining approval for the Project and complying with its conditions. They say that their damages are not fairly capable of calculation, and could not be satisfied by the applicants if the appeal fails in any event.

21 The Court's consideration of whether interference with the environment will cause irreparable harm is necessarily not as black and white as that of the applicants, but must consider the legal context in which the conditions for interfering with the environment by construction of the highway were developed. Whether "paving over Paradise and turning it into a parking lot" (or a highway) will ultimately cause irreparable adverse environmental effects is a question, phrased differently, that the Legislature has confided to an agency, the Environmental Assessment Office, which has authority under the ***Act*** to determine whether a significant adverse environmental effect can be mitigated. If it can, then legally, the effect of that finding is that there is no "irreparable harm".

22 In this case, the evidence is that there is a Compensation Plan for mitigation of the adverse environmental effects of construction in the area of the Eagleridge Bluffs that has been accepted by all of the responsible authorities of the federal and provincial governments. As the chambers judge noted (at para. 11), the mitigation accepted in the Compensation Plan involves creating replacement habitats away from the construction site, requiring no halt to construction.

23 In the context of this dispute, I am of the opinion that in the legal sense, the applicants have not shown that denying the stay will cause "irreparable harm".

24 That leads to the question of the balance of convenience.

25 The applicants complain that they have not been given the opportunity for meaningful public consultation in respect of the EMP's or Compensation Plan" because they were not posted on the websites for the Project. In their submissions to the chambers judge, they suggested "dual injunctions" that would accommodate a hearing of the Society's petition while continuing construction away from the environmentally sensitive areas. At bottom, however, the applicants oppose the construction of a highway through the Eagleridge Bluffs and seek remedies that would stop it. They claim to represent the public interest. This is relevant to the question of the balance of convenience.

26 There are differing views of the public interest in this dispute: that of the applicants, who seek to preserve the Eagleridge Bluffs ecosystem; that of the respondents, who refer to improved safety of the new highway; and that of the Ministry and government, who have made public commitments to improve the highway within a budget and to whom delays in construction will result in considerable public cost. The Ministry says that a tunnel is not a viable alternative, and there is no merit to any argument that the chambers judge erred in determining that that is a political decision not subject to review by the courts.

27 In ***RJR-MacDonald***, the Supreme Court defined (at para. 66) the "public interest" as including "both the concerns of society generally and the particular interests of identifiable groups", and assessed the onus of showing the balance of convenience where the public interest is invoked (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 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.

[Underlining added.]

28 The evidence supports the conclusion that the activities of the respondents and the Ministry have been undertaken in accordance with the requirements of the applicable legislation, including mitigation of the adverse environmental effects. That weights the balance of convenience in their favour.

29 It is my opinion that the applicants have not shown that the balance of convenience favours granting the stay.

30 In the result, for the reasons given, I dismiss the application for an interim stay of proceedings.

LEVINE J.A.

TAB 3

Case Name:

Carter v. Canada (Attorney General)

Between
Lee Carter, Hollis Johnson, Dr. William Shoichet, The British Columbia Civil Liberties Association and Gloria Taylor, Respondents, Appellants on Cross Appeal (Plaintiffs), and Attorney General of Canada, Appellant, Respondent on Cross Appeal (Defendant), and Attorney General of British Columbia, Respondent (Defendant)

[2012] B.C.J. No. 1672

2012 BCCA 336

266 C.R.R. (2d) 341

327 B.C.A.C. 10

291 C.C.C. (3d) 373

103 W.C.B. (2d) 607

2012 CarswellBC 2366

Docket: CA040079

British Columbia Court of Appeal
Vancouver, British Columbia

J.E. Prowse J.A.
(In Chambers)

Heard: August 3, 2012.
Judgment: August 10, 2012.

(47 paras.)

Constitutional law -- Constitutional proceedings -- Practice and procedure -- Orders -- Stay of orders -- Application by Crown to stay terminally ill woman's constitutional exemption from Criminal

Code provisions preventing physician-assisted suicide dismissed -- Crown failed to establish it would suffer irreparable harm if stay not granted pending its appeal -- Reasonable members of public would not consider Crown's value for human life diminished if woman exercised rights under exemption -- If prevented from exercising right pending appeal, woman might end up incapacitated by ALS and unable to exercise rights -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 15.

Criminal law -- Criminal Code offences -- Offences against person and reputation -- Suicide -- Counselling or aiding suicide -- Application by Crown to stay terminally ill woman's constitutional exemption from Criminal Code provisions preventing physician-assisted suicide dismissed -- Crown failed to establish it would suffer irreparable harm if stay not granted pending its appeal -- Reasonable members of public would not consider Crown's value for human life diminished if woman exercised rights under exemption -- If prevented from exercising right pending appeal, woman might end up incapacitated by ALS and unable to exercise rights.

Criminal law -- Appeals -- Powers of appellate court -- Stay of proceedings -- Application by Crown to stay terminally ill woman's constitutional exemption from Criminal Code provisions preventing physician-assisted suicide dismissed -- Crown failed to establish it would suffer irreparable harm if stay not granted pending its appeal -- Reasonable members of public would not consider Crown's value for human life diminished if woman exercised rights under exemption -- If prevented from exercising right pending appeal, woman might end up incapacitated by ALS and unable to exercise rights.

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Remedies for denial of rights -- Specific remedies -- Constitutional exemption -- Application by Crown to stay terminally ill woman's constitutional exemption from Criminal Code provisions preventing physician-assisted suicide dismissed -- Crown failed to establish it would suffer irreparable harm if stay not granted pending its appeal -- Reasonable members of public would not consider Crown's value for human life diminished if woman exercised rights under exemption -- If prevented from exercising right pending appeal, woman might end up incapacitated by ALS and unable to exercise rights.

Application by the Crown to stay an order granting Taylor a constitutional exemption to the Criminal Code provisions prohibiting physician-assisted suicide. Taylor was terminally ill with ALS. She wanted to avoid becoming completely paralyzed because she wanted her loved ones to remember her as she was. She had obtained an order declaring the Code provisions invalid and permitting her to obtain physician-assisted death under certain conditions. The Crown's appeal from the order was set for March 2013. The Crown took the position it would suffer irreparable harm if the stay was not granted because Taylor might exercise her rights under the exemption before its appeal was heard and decided.

HELD: Application dismissed. The harm the Crown would sustain if Taylor exercised her rights under the exemption before the appeal was heard was not irreparable. Reasonable members of the public would not expect Taylor to sacrifice her right to a concept of the greater good. Failing to grant a stay would not cause the public to see the value of life as having been diminished by the state or the judiciary. Taylor stood to suffer irreparable harm if the stay was granted, as she might end up dying in the state she wished to avoid and would inevitably lose the peace of mind that came with obtaining the exemption.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 7, s. 15

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

Insurance Act, R.S.O. 1980, c. 281, "spouse

Appeal From:

On appeal from the Supreme Court of British Columbia, June 15, 2012 (*Carter v. Canada (Attorney General)*, 2012 BCSC 886, Vancouver Registry, Docket Number S112688)

Counsel:

Counsel for the Appellant, Attorney General of Canada: D. Nygard, M. Nicolls.

Counsel for the Respondents: S.M. Tucker, A.M. Latimer.

No one appearing for the Attorney General of British Columbia.

Reasons for Judgment

J.E. PROWSE J.A.:--

NATURE OF APPLICATION

1 On June 15, 2012, following a 23-day trial involving thousands of pages of evidence and many days of oral testimony, Madam Justice Smith made an order containing declaratory and other relief which I will summarize as follows:

> (1) The impugned provisions [of the *Criminal Code* (the "*Code*") prohibiting assisted suicide] unjustifiably infringe ss. 7 and 15 of the *Charter* and are of no force and effect to the extent that they prohibit physician-assisted suicide by a medical practitioner in the context of a physician-patient relationship, where the assistance is provided to a fully-informed, non-ambivalent competent adult patient who: (a) is free from coercion and undue influence, is not clinically depressed and who personally (not through a substituted decision-maker) requests physician-assisted death; and (b) is materially physically disabled or is soon to become so, has been diagnosed by a medical practitioner as having a serious illness, disease or disability (including disability arising from traumatic injury), is in a state of advanced weakening capacities with no chance of improvement, has an illness that is without remedy as determined by reference to treatment options acceptable to the person, and has an illness causing enduring physical or psychological suffering that is intolerable to that person and cannot be alleviated by any medical treatment acceptable to that person.
>
> (2) The effect of the declarations is suspended for one year; and

(3) During the period of suspension of the declaration of constitutional invalidity, Ms. Taylor is granted a constitutional exemption permitting her to obtain physician-assisted death under the following conditions:

(a) Ms. Taylor provides a written request;
(b) Her attending physician attests that Ms. Taylor is terminally ill and near death, and there is no hope of her recovering.
(c) Her attending physician attests that Ms. Taylor has been:

(i) informed of her medical diagnosis and prognosis;
(ii) informed of the feasible alternative treatments, including palliative care options;
(iii) informed of the risks associated with physician-assisted dying and the probable result of the medication proposed for use in her physician-assisted death;
(iv) referred to a physician with palliative care expertise for a palliative care consultation;
(v) advised that she has a continuing right to change her mind about terminating her life.

(d) Her attending physician and a consulting psychiatrist each attest that Ms. Taylor is competent and that her request for physician-assisted death is voluntary and non-ambivalent. If a physician or consulting psychiatrist has declined to make that attestation, that fact will be made known to subsequent physicians or consulting psychiatrists and to the court.
(e) Her attending physician attests to the kind and amount of medication proposed for use in any physician-assisted death that may occur.
(f) Unless Ms. Taylor has become physically incapable, the mechanism for the physician-assisted death shall be one that involves her own unassisted act and not that of any other person.

2 The order goes on to provide that if the above conditions are met, Ms. Taylor may apply to the B.C. Supreme Court, "without notice to any other party, and upon proof of the above to the Court's satisfaction, the Court shall order that":

(a) a physician may legally provide Ms. Taylor with a physician-assisted death at the time of her choosing provided that Ms. Taylor is, at the material time:

(i) suffering from enduring and serious physical or psychological distress that is intolerable to her and that cannot be alleviated by any medical or other treatment acceptable to her;
(ii) competent, and voluntarily seeking a physician-assisted death, in the opinion of the assisting physician and a consulting psychiatrist;

(b) notwithstanding any other provision of law, should Ms. Taylor seek and obtain a physician-assisted death, that the assisting physician be authorized to complete

her death certificate indicating death from her underlying illness as cause of death.

3 The Attorney General of Canada ("AG Canada") filed a Notice of Appeal from this decision on July 13, 2012. It is seeking an order staying the provisions of both the declarations of invalidity and the exemption until such time as the appeal has been heard and decided by this Court. In that regard, the appeal has been tentatively set for hearing for five days commencing March 4, 2013.

4 It is common ground that, no matter what the result of the appeal in this Court, it is highly likely that the decision will be appealed, with leave, to the Supreme Court of Canada.

5 The Attorney General of British Columbia ("AGBC"), who is a party to the appeal, did not appear or take any position on this application.

CONSENT ORDER

6 Prior to the hearing of the stay application, the respondents, Lee Carter, Hollis Johnson, Dr. William Shoichet, the British Columbia Civil Liberties Association and Gloria Taylor, consented to an order staying the declarations of invalidity and the running of the suspension of those declarations from August 3, 2012 (the date the stay application was heard) to the date of the decision of this Court on the appeal. I would, therefore, make an order to that effect, the wording of which I leave with counsel.

7 The only issue to be decided on this application, therefore, is whether a stay should be granted of the exemption order permitting Ms. Taylor to seek a physician-assisted death pending the outcome of this appeal.

THE LAW TO BE APPLIED ON AN APPLICATION FOR A STAY OF PROCEEDINGS

8 The starting point on an analysis for a stay of proceedings is the general proposition that successful parties are entitled to what are referred to as "the fruits of their judgment"; that is, they are entitled to the benefit of the order under appeal unless, and until, it is set aside. (See for example, *P. Kiewit Sons Co. v. Perry*, 2006 BCCA 259, at para. 12, (Levine J.A. in Chambers).) This is consistent with another general proposition of law that an order is presumed to be correct unless and until it is set aside. Thus, as a starting point, Ms. Taylor is entitled to the benefit of the exemption granted to her, subject to the application of the other important principles to which I will now refer.

9 The parties are agreed that, in determining whether to grant a stay of proceedings, the Court should apply the test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17, namely:

(1) whether there is a serious question to be determined;
(2) whether the applicant would suffer irreparable harm if the stay were not granted; and
(c) whether the balance of convenience favours granting a stay.

10 Before turning to the application of those principles in this case, I will touch briefly on the background giving rise to this application, much of which is well-known because of the degree of publicity which has surrounded these proceedings and the ensuing judgment.

11 Given the fact that the judgment under appeal is 395 pages in length, I will do no more than refer to some basic facts relating to the proposed stay of the exemption provisions of the order which impact directly on Ms. Taylor.

12 Ms. Taylor is the mother of two grown sons and the grandmother of an 11-year-old granddaughter to whom she is very close. In December 2009, she was diagnosed with amyotrophic lateral sclerosis ("ALS"), also known as Lou Gehrig's disease. ALS is a neurodegenerative disorder that causes progressive muscle weakness and eventually progresses to near total paralysis. The trial judge referred to evidence at trial that, while cognition and sensation remain generally intact, ALS patients become increasingly incapacitated. They lose the ability to use their hands and feet; the ability to walk, to chew and to swallow; the ability to make their speech intelligible to others; and, ultimately, the ability to breathe.

13 In January 2010, Ms. Taylor was advised by her neurologist that she would likely be paralyzed in six months and would likely die within the year. As of the time of the trial in November and December 2011, her condition had deteriorated, but she still enjoyed significant quality of life. There is no question, however, that ALS is a fatal disease with no known cure and that it is simply a matter of time before Ms. Taylor's condition deteriorates to the point where she will be incapable of ending her own life without assistance, and will be left to die in circumstances which are painful, frightening and repugnant to her. In that regard, I will refer to only one paragraph from her affidavit, referred to at para. 56 of Madam Justice Smith's reasons for judgment:

> I am dying. I do not want to, but I am going to die; that is a fact. I can accept death because I recognize it as a part of life. What I fear is a death that negates, as opposed to concludes, my life. I do not want to die slowly, piece by piece. I do not want to waste away unconscious in a hospital bed. I do not want to die wracked with pain. It is very important to me that my family, and my granddaughter in particular, have final memories that capture me as I really am - not as someone I cannot identify with and have no desire to become.

14 It is Ms. Taylor, and no one else, who has the benefit of the exemption for which the stay is sought. AG Canada's suggestion that it is possible that others could apply for similar exemptions in the future is, in my view, speculative and of little assistance on this application.

15 While I accept that others have genuine concerns about the possible implications of Ms. Taylor's exemption, the validity of the laws in issue will be determined in the foreseeable future by this Court, and, ultimately, by the Supreme Court of Canada.

16 I turn, now, to the application of the test for a stay of the provisions of the order relating to the exemption.

APPLICATION OF THE TEST FOR A STAY

(a) The Merits of the Appeal

17 The question at the first stage of the analysis is whether there is a serious question to be tried; that is, whether the appeal is frivolous or vexatious. Counsel for Ms. Taylor acknowledges, and I concur, that there is a serious question to be tried and that the appeal is neither frivolous nor vexatious. Thus, on the face of it, the first stage of the test for a stay has been met. That is so with respect to both the declaration of invalidity and the exemption.

18 Generally speaking, at this stage of the test for a stay, the court engages in a very limited review of the merits. Counsel for AG Canada submits, however, that "a higher level of scrutiny" of the merits may be appropriate in this case in relation to the exemption on the basis that granting a stay of the exemption may result in a final determination of this issue. In other words, if the stay is granted, Ms. Taylor may never receive the benefit of the exemption. Although I did not understand her to press the point, counsel for Ms. Taylor agreed that it is open to the Court to take a closer look at the merits in relation to the exemption than would normally be the case, given that a stay could preclude Ms. Taylor from ever obtaining her constitutional remedy.

19 In support of the proposition that a more rigorous review of the merits of the grounds of appeal may be appropriate in these circumstances, counsel referred to para. 51 of *RJR*, which states:

> 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, [1975] A.C. 396, 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.
>
> [Emphasis added.]

20 Where a more extensive review of the merits is required and conducted, the results of that analysis, in terms of the relative strength of the appeal, can be taken into account in the latter two stages of the test for a stay.

21 In this case, the granting or refusal of a stay in relation to the exemption will not have the practical effect of putting an end to the appeal, since the main issues on appeal relate to the declarations of invalidity. In that respect, this case is unlike many of those which come before the Court, often on an interlocutory basis in a commercial or labour law context, where the granting or refusal of a stay will determine the main issue in dispute. Further, the court in *RJR* made it clear that the circumstances which call for a more extensive review of the merits will be "rare."

22 At this early stage of the appeal, there are no appeal books, transcripts, or factums. Thus, I would have to rest any analysis of the relative merits of the appeal on the reasons for judgment and the submissions of counsel. (To give some idea of the nature and breadth of the decision, I attach as

Schedule "A" to these reasons the Table of Contents from the reasons for judgment of Madam Justice Smith.)

23 Upon considering the limited nature of the stay application relating to the exemption, and given the main focus of the appeal, I conclude that this is not one of those rare cases which require an extensive examination of the merits. I will, however, touch briefly on the arguments raised by AG Canada.

24 Counsel for AG Canada submits that Madam Justice Smith erred by:

(1) creating a benefit or remedy for Ms. Taylor which is not available to others who are similarly situated, in a manner inconsistent with *Miron v. Trudel*, [1995] 2 S.C.R. 418, (where the definition of "spouse" in the *Insurance Act*, R.S.O. 1980, c. 281, was found to be unconstitutional as being in breach of s. 15 of the *Charter* insofar as it excluded common law spouses from its benefits);
(2) effectively usurping the role of Parliament by drafting conditions for Ms. Taylor's exercise of the exemption which amount to reading in exceptions to the legislation (albeit impacting on only one individual), and doing so in such a way that AG Canada has no role to play in the exercise of the exemption;
(3) improperly fettering the discretion of the judge who may consider Ms. Taylor's application to pursue her exemption by stating that, if the conditions set forth in the order for the exercise of the exemption are satisfied, the trial judge "shall" issue a form of order giving effect to the exemption.

25 At the hearing of this application, counsel for AG Canada also alleged that Madam Justice Smith erred in distinguishing the decision in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, with respect to arguments under ss. 7, 15 and 1 of the *Charter*, by finding that the law had developed significantly with respect to certain aspects of ss. 7 and 1 subsequent to the *Rodriguez* decision such that she was not bound to follow it in those respects. Counsel for AG Canada relies on the recent decision of *Canada v. Craig*, 2012 SCC 43, as support for that proposition.

26 Since I have concluded that a close review of the merits is not called for in these circumstances in relation to the exemption, I do not propose to detail the submission of the respondents. I would, however, make the following brief points:

(1) While the *Craig* decision may be relevant to the merits of the main appeal, it does not have direct application to the exemption. (Although the fate of the exemption is clearly linked to the main appeal, counsel did not suggest that I engage in a more intense scrutiny of Madam Justice Smith's analysis of ss. 7, 15 and 1 on this application.)
(2) The *Miron* decision is distinguishable in significant respects, not the least because in that case the court was choosing between two effective remedies which were available as a result of the finding of constitutional invalidity, one of which (reading in) enabled the court to extend the benefit of the legislation to similarly situated persons. In this case, the exemption is the only effective remedy available to Ms. Taylor. While the result is to provide a benefit to her which is not

available to those similarly situated, this will invariably be the effect of an exemption - that is the very nature of an exemption.

(3) With respect to the impugned terms of the exemption, it is important to note that, unlike legislation, these provisions were designed solely in relation to Ms. Taylor to ensure she derived a remedy (as a result of the declarations of invalidity and suspension). Further, to the extent they may or may not be flawed, it does not necessarily follow that this Court would simply overturn the exemption if it upheld the declaration of invalidity but found the trial judge had erred with respect to the terms of the exemption. It is open to this Court, in appropriate cases, to make the order which should have been made by the trial judge.

27 Madam Justice Smith engaged in a very complete discussion of the nature of a constitutional exemption, the fact that it is a remedy which is rarely granted, and various methods of giving effect to it to ensure that both the public interest and the interest of Ms. Taylor were protected. Given the complexity of the issues, and the arguments put forward by AG Canada, both on this application and in the trial court, I am satisfied that AG Canada has established a case which exceeds the relatively low threshold of a serious question to be tried. Based on the limited material before me, I can say no more than that I would place the merits midway along the spectrum from weak to strong.

28 I turn, next, to the question of irreparable harm.

(b) Irreparable Harm

29 In *RJR*, at para. 60, the court observed that:

> 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.

30 AG Canada submits that it would suffer irreparable harm if the stay is not granted because Ms. Taylor may successfully exercise her rights under the exemption before the appeal is heard and decided. I understand AG Canada's concern in that regard to relate both to Ms. Taylor, and the risk that she will exercise the exemption while in a vulnerable state despite the safeguards provided in the order, and to the public, which may view her possible death pending appeal as a "state-sanctioned" devaluation of human life. With respect to this submission, AG Canada's position is that the judiciary forms part of the "state" in the broadest sense of that word.

31 While the irreparable harm to be considered at this stage of the test is irreparable harm to the appellant only, I note that counsel for Ms. Taylor submits it is Ms. Taylor who is more likely to suffer irreparable harm if the stay is granted, since she will be precluded from exercising her rights under the exemption and she will lose the peace of mind and solace which the exemption provides to her in the interim. Under the authorities, however, this point is more appropriately dealt with in discussing the balance of convenience.

32 AG Canada submits that it is entitled to a presumption of irreparable harm. In support of that proposition, it refers to paras. 71 and 72 of *RJR*, which state:

> ... 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.
>
> 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.]

33 Counsel for Ms. Taylor submits that these passages must be read together with para. 73, which states:

> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* [[1987] 1 S.C.R. 110], 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 the law is suspended entirely. [Emphasis added.]

34 There is no doubt that Parliament is charged with the duty of promoting and protecting the public interest and that the assisted suicide provisions of the *Code* were designed to protect the public. For that reason, if the question were whether AG Canada would suffer irreparable harm if the declarations of invalidity were not stayed, I would be more inclined to answer "yes", at least if the declaration took effect immediately and there were no safeguards in place. The reasoning in paras. 71 and 72 of *RJR* would appear to apply. In this case, however, I am unable to see that AG Canada is entitled to a presumption of irreparable harm if its application for a stay of the exemption only is dismissed.

35 Having said that, I accept that the exemption has important symbolic and, perhaps, psychological, value, which extends beyond Ms. Taylor to those who are similarly situated, whether or not they agree with the decision under appeal. I also accept that the fact "only" one life is at stake under the exemption does not detract from the fact that what is at issue is the value of a human life - what has been referred to as the sanctity of a human life. In other words, I do not see the public interest aspect of the exemption as being of relative insignificance because "only" one life is at stake. Whether Ms. Taylor wishes it or not, her life, including her death, has become a focal point for the debate on the value of human life in relation to physician-assisted dying. Providing a means for her

to exercise a right to a physician-assisted death, even under the very stringent criteria set by Madam Justice Smith, is seen by many individuals and groups as being "the thin edge of the wedge".

36 But can it reasonably be said that permitting the exemption to stand pending the resolution of this appeal would result in irreparable harm to AG Canada as representative of the public interest? In my view, it cannot. I do not consider that reasonable members of the public, fully apprised of the circumstances of this case, and having read the reasons of the trial judge, would conclude that the public interest would suffer irreparable harm if the exemption were permitted to continue, even knowing that Ms. Taylor may find it necessary to exercise her rights under the exemption before the appeal is concluded. I do not consider that those members of the public would find it necessary that Ms. Taylor, who has fought so courageously and in such difficult circumstances to assert this right, should be required to sacrifice her right to a concept of the "greater good" if it should come to that. Nor do I consider it a likely consequence of allowing the exemption to stand pending the resolution of this appeal that the value of life would seen to be diminished either by the state, which has pursued this relief with a view to the public good, or by the judiciary, which is required to tackle these difficult issues.

37 I accept that the exercise by Ms. Taylor of her rights under the exemption would give rise to some harm to the public interest, which is concerned with the value of all life, but I am not persuaded that the level of harm reaches the level of irreparable harm alleged by AG Canada. In coming to that conclusion, I place some weight on the distinction between the stay of the declarations of invalidity, the refusal of which is more likely to result in irreparable harm for the reasons set out at paras. 71-72 of *RJR*, and the stay of the exemption.

38 If I am wrong, however, and irreparable harm to AG Canada would flow from the very fact of the exemption in these circumstances, that would not end the analysis. I would then have to go on to consider the balance of convenience. This is so because it is only irreparable harm to the appellant which is considered at the second stage of the test for a stay, whereas the balance of convenience requires the Court to consider the degree of harm to Ms. Taylor in the event the stay is granted.

39 I will, therefore, approach the third stage of the analysis on the assumption that failure to grant a stay would cause irreparable harm to AG Canada as representative of the public interest.

(c) The Balance of Convenience

40 Assessing the balance of convenience requires me to consider whether refusing the stay would cause greater harm to AG Canada and the public interest it represents than the harm to Ms. Taylor if the stay is granted. Some of the comments I have made in relation to relative harm at the second stage of the analysis also apply at this stage.

41 As foreshadowed by my earlier remarks, I accept the submission of counsel for Ms. Taylor that she would suffer irreparable harm if a stay were granted. I agree with her counsel that irreparable harm to her takes two forms. The first, and most significant, is the irreparable harm which she would suffer if her condition deteriorated to the point where she wished to exercise her rights under the exemption pending the resolution of this appeal, but, because of the stay, she was unable to do so. In that circumstance, all of her worst fears would be realized and she would be forced to endure the very death which she has fought so assiduously to avoid. Counsel for AG Canada does not purport to say that this ending to Ms. Taylor's life would not constitute irreparable harm. Rather, as I

understand the position of counsel for AG Canada, the harm Ms. Taylor would suffer is outweighed by the greater harm to the public if the stay were not granted and she succeeded in obtaining a physician-assisted death.

42 The second category of irreparable harm which Ms. Taylor alleges if a stay is granted is the loss of the peace of mind and solace now available to her as a result of the exemption, in knowing that if living becomes unbearable to her for any of the reasons she has given, she can bring her life to an end upon fulfilling the requirements set forth in the order governing the exemption. The exemption also gives her the potential for a longer life since she can continue to live, even in difficult circumstances where she may be incapable of ending her own life, if she still enjoys some quality of life which she considers makes it worth living.

43 I accept that Ms. Taylor would suffer both forms of harm if the stay were granted, and that they constitute irreparable harm to her.

44 Assuming, therefore, that refusing a stay would result in irreparable harm to AG Canada as representative of the public interest, and finding that granting a stay would result in irreparable harm to Ms. Taylor, I am left in the invidious position of having to compare degrees of irreparable harm in determining where the balance of convenience lies. Comparing relative harm in these circumstances is obviously unlike the task which accompanies the balancing act in most cases which usually arise in the commercial context and do not involve matters of life and death.

45 In the result, and not without some hesitation, I conclude that the balance of convenience favours refusing a stay. I am not persuaded that the harm to the public contended for by counsel for AG Canada outweighs the harm to Ms. Taylor if she is left without a remedy pending the resolution of this appeal, and possibly at all. She may be a symbol, but she is also a person, and I do not find that it is necessary for the individual to be sacrificed to a concept of the "greater good" which may, or may not, be fully informed. The reasons for judgment in this case put squarely at issue the important public values with which this Court (and, likely, the Supreme Court of Canada) will ultimately have to grapple in determining whether, and in what circumstances, assisted suicide may, or may not, be in accord with the public interest, including the interest of that minority of the public in circumstances similar to those of Ms. Taylor. It is apparent there are competing arguments and interests on both sides of the issue which will be elaborated upon as the appeal progresses. The public as a whole will benefit from this process. In the meantime, if it should happen that Ms. Taylor is not present for the end of the story because she exercised her right to end her life in accordance with the exemption, I am not persuaded that the nature of any harm suffered by the public as a result offsets the likely final and irrevocable nature of the harm to Ms. Taylor if a stay is granted.

CONCLUSION

46 I would grant the application for a stay of the declarations of invalidity and the running of the suspension of those declarations, from August 3, 2012 to the date of the decision of this Court on appeal, by consent. I would dismiss the application for a stay of the portions of the order granting the constitutional exemption. I leave it to counsel to draft the precise terms of the order.

47 In closing, I thank counsel for their excellent submissions.

J.E. PROWSE J.A.

* * * * *

SCHEDULE A

Table of Contents

TAB 4

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

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, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

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, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *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.

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 rotogravе 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:

14

> *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):

15

> *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:

16

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

17 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

18 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.

19 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.

20 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 adver tising 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)

21 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)

22 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.

23 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.

24 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)

25 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.

26 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

27 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.

28 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.

29 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.

30 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

31

> *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

32

> 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.

33 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.

34 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.

35 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.

36 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.]

37 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.

38 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.

39 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

40 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

41 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

42 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.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 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.

45 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?

46 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.

47 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.

48 *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

49 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.

50 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.

51 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.

52 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.

53 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."

54 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.

55 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.

56 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.

57 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.]

58 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.

59 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.

60 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.

61 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

62 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.

63 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.

64 "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.)).

65 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.

66 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

67 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.

68 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."

69 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

70 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.

71 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.

72 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.]

73 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.

74 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 .

75 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 pub lic interest is equally well served, in the same sense, by any appeal....

76 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.

77 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.

78 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 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 .

79 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

80 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

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 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.

83 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.

84 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.

85 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.

86 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

87 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

88 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.

89 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

90 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.

91 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.

92 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" (p. 147).

93 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 demo cratically-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.]

94 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.

95 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.

96 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.

97 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.

98 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 pre vention of the widespread and serious medical problems directly attributable to smoking.

99 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.

Applications dismissed.

Solicitors of record:
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 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: *McCarthy, Tétrault* , Toronto.

TAB 5

Case Name:

Bedford v. Canada (Attorney General)

Between
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)

[2010] O.J. No. 5155

2010 ONCA 814

271 O.A.C. 155

330 D.L.R. (4th) 162

265 C.C.C. (3d) 390

2010 CarswellOnt 8998

199 A.C.W.S. (3d) 1057

93 W.C.B. (2d) 434

Dockets: M39380 (C52799)

Ontario Court of Appeal
Toronto, Ontario

M. Rosenberg J.A.

Heard: November 22, 2010.
Judgment: December 2, 2010.

(86 paras.)

Criminal law -- Appeals -- Procedure -- Motion by Crown for stay of judgment pending appeal allowed -- Respondents were former and current sex trade workers who obtained judgment striking

down certain prostitution provisions of Criminal Code as unconstitutional -- Judgment was stayed until earlier of April 29, 2011 or argument of appeal -- Public interest warranted stay of relatively short duration, as legislative void created short-term harm to communities -- Continued enforcement offered some measure of safety to harms faced by sex trade workers while permitting government to craft legislative response following full appellate review -- Criminal Code of Canada, ss. 210, 212(1)(j), 213(1)(c).

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Procedure -- Motion by Crown for stay of judgment pending appeal allowed -- Respondents were former and current sex trade workers who obtained judgment striking down certain prostitution provisions of Criminal Code as unconstitutional -- Judgment was stayed until earlier of April 29, 2011 or argument of appeal -- Public interest warranted stay of relatively short duration, as legislative void created short-term harm to communities -- Continued enforcement offered some measure of safety to harms faced by sex trade workers while permitting government to craft legislative response following full appellate review -- Criminal Code of Canada, ss. 210, 212(1)(j), 213(1)(c).

Motion by the appellants, the federal and provincial Crown, for a stay of judgment pending appeal. The respondents were three former and current sex trade workers who obtained a judgment striking down certain prostitution provisions of the Criminal Code as unconstitutional. In particular, the judgment struck down the common bawdy-house provisions of the Code as they applied to prostitution, the living on the avails of adult prostitution offence, and the communication for the purpose of prostitution offence. The judge ruled that the provisions were contrary to ss. 2(b) and 7 of the Charter and were not saved under s. 1. Enforcement of the impugned provisions prevented prostitutes from reducing the risk of harm inherent in their work in a manner inconsistent with the fundamental principles of justice. The judgment left intact several other provisions related to prostitution. The parties agreed to stay the original judgment for 30 days pending the predicate motion. The Crown sought extension of the stay until a full appellate review had been conducted. The Crown submitted that the judgment left a legislative void that had profound implications for the public interest. There was no dispute that the matter raised issues to be tried. The respondents submitted that the Crown's evidence of harm to the public interest was speculative, as the impact of the judgment could only be measured with the passage of time. The respondents argued that a stay would perpetuate the law's contribution to violence against a vulnerable segment of the population.

HELD: Motion allowed. The public interest warranted a stay for a relatively short duration to permit appellate review of the decision. Maintenance of the status quo minimized public confusion regarding the state of the law in Ontario. Police were able to continue enforcement practices that they say provided a measure of safety to sex trade workers, while government had the opportunity to consider a legislative response to the judgment informed by a full appellate review. On the other hand, maintenance of the status quo left in place a legislative framework that seriously impacted on the physical security of individuals working in an occupation that was not illegal per se. However, there was no evidence as to how the suspension of the impugned provisions would measurably increase the safety of prostitutes during the relatively short time pending appeal. The invalidity of the impugned provisions would leave unregulated an area of activity 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 recognized in the judgment under appeal. Under such circumstances, the balance of convenience

favoured the Crown and the relief sought. Consequently, the judgment was further stayed until the earlier of April 29, 2011, or until the appeal was argued.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2(b), s. 7

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 172, s. 197, s. 197(1), s. 210, s. 212(1)(j), s. 213(1)(c)

Appeal From:

On a motion to stay the judgment of Justice Susan Himel of the Superior Court of Justice, dated September 28, 2010, reported at 2010 ONSC 4264, pending appeal.

Counsel:

Michael Morris, Gail Sinclair, Julie Jai and Roy Lee, for the Attorney General of Canada.

Alan Young, for Terri Jean Bedford, Amy Lebovitch and Valerie Scott.

Shelley Maria Hallett, for the Attorney General of Ontario.

M. 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 (AG)*, [1994] 1 S.C.R. 311 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, 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 deci-

sion 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 in-

formed 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 *Westendorp v. The Queen*, [1983] 1 S.C.R. 43. 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 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123 [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 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 re-

> ceive 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, exploita-

> tion 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 decriminali-

zation 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. Ct. J. (Prov. Div.)), rev'd (1996), 27 O.R. (3d) 643 (C.A.), aff'd in part [1997] 2 S.C.R. 630. 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 et al. v. Canada*, 2008 FCA 40, 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 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) 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 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.

M. ROSENBERG J.A.

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 6

Indexed as:

Sauvé v. Canada (Chief Electoral Officer) (T.D.)*

Richard Sauvé (Respondent) (Plaintiff)
v.
The Chief Electoral Officer of Canada, the Solicitor General of Canada, the Attorney General of Canada (Applicants) (Defendants)
and
Sheldon McCorrister, Chairman, Lloyd Knezacek, Vice Chairman on their own behalf and on behalf of the Stony Mountain Institution Inmate Welfare Committee, and Clair Woodhouse, Chairman, Aaron Spence, Vice Chairman on their own behalf and on behalf of the Native Brotherhood Organization of Stony Mountain Institution, and Serge Belanger, Emile A. Bear and Randy Opoonechaw (Respondents) (Plaintiffs)
v.
The Attorney General of Canada (Applicant) (Defendant)

[1997] 3 F.C. 628

[1997] F.C.J. No. 594

Court File Nos. T-2257-93, T-1084-94

Federal Court of Canada - Trial Division

Wetston J.

Heard: Ottawa, May 15, 1997.
Judgment: Toronto, May 16, 1997.

Practice -- Judgments and orders -- Stay of execution -- Application to stay, pending appeal, effect of declaration Canada Elections Act provision denying certain convicts right to vote in federal elections unconstitutional -- S.C.C. decision in RJR--McDonald Inc. applied -- Balance of inconvenience not favouring applicants.

* This order was affirmed on appeal ([1997] 3 F.C. 643).

Constitutional law -- Charter of rights -- Democratic rights -- Application to stay effect of declaration Canada Elections Act provision denying certain convicts right to vote in federal elections violating Charter, s. 3 -- Crown not meeting onus of establishing irreparable harm to public interest -- Public interest also including protection of democratic rights enshrined in Charter.

Elections -- Application to stay, pending appeal, effect of F.C.T.D. judgment declaring Canada Elections Act, s. 51(e) (prohibiting certain convicts from voting in federal elections) in violation of Charter, s. 3 -- Appeal would not be heard prior to next general election -- Crown not meeting onus of establishing irreparable harm to public interest.

After a trial of the action, reported at ([1996] 1 F.C. 857), this Court declared paragraph 51(e) of the Canada Elections Act (prohibiting prisoners serving more than two years from voting in a federal election) to be in violation of section 3 of the Charter. This was an application to stay that decision pending the outcome of an appeal, the hearing of which would not likely take place prior to a federal election to be held on June 2, 1997.

Held, the motion should be dismissed.

The principles to be considered in deciding whether or not a stay is to be granted in cases where the constitutionality of legislation is in issue have been determined by the Supreme Court of Canada in RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311. It adopted the tripartite test established in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.) (serious question, irreparable harm and balance of inconvenience).

First, there was clearly a serious question to be tried. The fact that granting the stay would essentially grant the applicants the remedy sought in the appeal would not justify a consideration of the merits and should not be considered at this stage, but under the weighing of balance of convenience.

At to the second part of the text, irreparable harm, the burden is on the Crown. The legislation already having been held unconstitutional, the Crown does not benefit from an assumption of irreparable harm. Public interest, however, as an aspect of irreparable harm, may be demonstrated at a lower standard. But it was in the discretion of the Court to determine at this stage whether the alleged harm to the public interest was sufficient in the context of the case to satisfy stage two. The benefit of the assumption of irreparable harm to public interest does not arise in all cases. To interpret this test otherwise would effectively mean that the applicants would obtain the full extent of the relief sought despite the fact that this Court has declared paragraph 51(e) of the Canada Elections Act to be unconstitutional. A greater amount of discretion is granted to the motions judge where the alleged harm itself takes the form of a breach of a right protected by the Charter, as it does here. The Crown filed no evidence in support of this application for a stay, but only an affidavit stating that, at trial, the objectives of the impugned legislation were found to be pressing and substantial for the enhancement of civic responsibility, respect for the rule of law and the enhancement of the general purposes of the criminal sanction. The Crown has not discharged the burden of establishing irreparable harm.

Third, the balance of inconvenience was in favour of the respondents. The public interest, which the federal government is charged with the duty of promoting and protecting, must also include the protection of democratic rights (including the fundamental right to vote in a free and democratic society) enshrined in the Charter. In this case, the respondents could not be compensated for the de-

nial of their right to vote in the upcoming federal election. A consideration of the short-term impact of a stay is an important consideration when the Court is faced with the decision to stay an order in which a law has been declared to be contrary to the Charter. The Crown did not argue that there was any administrative burden that could not be met to allow prisoners to vote. Furthermore, no motion for a stay of the order declaring the law to be unconstitutional was made prior to the holding of two federal by-elections. Prisoners voted therein, as well as in the 1992 Constitutional referendum, and prisoner voting is allowed in four provinces, yet no evidence was led to prove that any negative effects have been shown to arise from the participation of the inmates in those elections. There was no evidence presented, therefore, that any harm occurred to the public interest or that public confidence in the rule of law was in any way affected by those occasions in which prisoners voted.

Considering the nature of the relief sought, the harm which the parties contend they would suffer and the denial of a democratic right under the Charter, the balance of inconvenience did not favour the applicants.

Statutes and Regulations Judicially Considered

Canada Elections Act, R.S.C., 1985, c. E-2, s. 51(e) (as am. by S.C. 1993, c. 19, s. 23).
Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act, 1982, Schedule B, Canada Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 3.
Federal Court Rules, C.R.C., c. 663, R. 341A (as enacted by SOR/79-57, s. 8).
Special Voting Rules, R.S.C., 1985, c. E-2, Sch. II.

Cases Judicially Considered

Applied:

RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311; (1994), 111 D.L.R. (4th) 385; 54 C.P.R. (3d) 114; 164 N.R. 1; 60 Q.A.C. 241;
American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 396 (H.L.);
143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General), [1994] 2 S.C.R. 339; (1994), 61 Q.A.C. 81; 90 C.C.C. (3d) 1; 31 C.R. (4th) 120; 167 N.R. 321;
Attorney General of Canada v. Gould, [1984] 1 F.C. 1133; (1984), 13 D.L.R. (4th) 485; 42 C.R. (3d) 88; 54 N.R. 232 (C.A.); affd [1984] 2 S.C.R. 124; (1984), 13 D.L.R. (4th) 485; 42 C.R. (3d) 88; 53 N.R. 394;
Schreiber v. Canada (Attorney General), [1996] 3 F.C. 947; (1996), 96 DTC 6493; 118 F.T.R. 231 (T.D.).

Distinguished:

Thibaudeau v. M.N.R., [1994] 2 F.C. 189; (1994), 114 D.L.R. (4th) 261; 21 C.R.R. (2d) 35; [1994] 2 C.T.C. 4; 94 DTC 6230; 167 N.R. 161; 3 R.F.L. (4th) 153 (C.A.); affd [1995] 2 S.C.R. 627; (1995), 124 D.L.R. (4th) 449; 29 C.R.R. (2d) 1; [1995] 1 C.T.C. 382; 95 DTC 5273; 182 N.R. 1; 12 R.F.L. (4th) 1.

MOTION to stay a decision of this Court ([1996] 1 F.C. 857; (1995), 132 D.L.R. (4th) 136; 106 F.T.R. 241) declaring paragraph 51(e) of the Canada Elections Act to be in violation of section 3 of the Charter. Motion dismissed.

Counsel:

Fergus J. O'Connor for respondent Sauvé (plaintiff).
Arne Peltz for respondents McCorrister et al. (plaintiffs).
Gerald L. Chartier, Glenn D. Joyal for applicants (defendants).

Solicitors:

O'Connor and Napier, Kingston, Ontario, for respondent Sauvé (plaintiff).
Arne Peltz, Public Interest Law Centre, Legal Aid Manitoba, Winnipeg, for respondents McCorrister et al. (plaintiffs).
Deputy Attorney General of Canada for applicants (defendants).

The following are the reasons for order rendered in English by

1 **WETSTON J.**:-- This is a motion to stay a decision of this Court [[1996] 1 F.C. 857] which declared paragraph 51(e) of the Canada Elections Act, R.S.C., 1985, c. E-2 (as am. by S.C. 1993, c. 19, s. 23), to be in violation of section 3 of the Charter [Canadian Charter of Rights and Freedoms, being Part I of the Constitution Act 1982, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44]]. At the request of the parties, this motion was heard by myself on an urgent basis.

2 Paragraph 51(e) of the Canada Elections Act prohibits prisoners serving more than two years from voting in a federal election. The decision that paragraph 51(e) was unconstitutional was made after a lengthy trial in this Court. On January 19, 1996, the Crown appealed the decision of December 27, 1995, to the Federal Court of Appeal. The Crown took no steps after the appeal was filed to stay the effect of this Court's earlier decision. As a result, prisoners were entitled to vote in 7 by-elections which occurred on March 25, 1996, and June 17, 1996, after the application for appeal was filed. The applicants have not expedited the hearing of the appeal before the Federal Court of Appeal and it is unlikely that it will be heard before the federal election (June 2, 1997).

3 On April 23, 1997, the Crown filed this motion, in anticipation of a federal election call, to stay the effect of the decision of this Court pending the outcome of the appeal. On April 27, 1997, the federal government announced a federal election to be held on June 2, 1997. Steps were then taken to prepare for prisoners' voting day, pursuant to Special Voting Rules [R.S.C., 1985, c. E-2, Sch. II], set for May 23, 1997.

4 Rule 341A [Federal Court Rules, C.R.C., c. 663 (as enacted by SOR/79-57, s. 8)] grants this Court the discretionary authority to suspend the operation of any judgment of the Court pending an appeal. The principles to be considered in deciding whether or not a stay is to be granted in such a case have been determined by the Supreme Court of Canada in RJR--MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311. In that case, the applicant, RJR--MacDonald, applied to the Supreme Court of Canada for a suspension of the legal effects of regulations pending the ultimate hearing before the Supreme Court regarding the constitutionality of the enabling legislation. The Supreme Court of Canada indicated, at pages 333-334, that in such a case a careful balancing process must be undertaken:

> 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 am guided by these introductory remarks in my consideration of whether a stay should be granted in this case.

5 In RJR--MacDonald, supra, at page 347, the Supreme Court reviewed the factors to be considered on an application for a stay in a Charter case. The Court adopted the three-part American Cyanamid Co. v. Ethicon Ltd. [[1975] A.C. 396 (H.L.)] test to be applied for stays in both private law and Charter cases. This tripartite test is well-known. At the first stage, an applicant must demonstrate a serious question to be tried. At the second stage, the applicant must convince the Court that it will suffer irreparable harm if the relief is not granted. At the third stage, the applicant is required to demonstrate that the balance of inconvenience is in its favour. In this regard, the Supreme Court was careful to note that the requirement to assess the balance of inconvenience will often determine the result in applications involving Charter rights.

Serious Question to be Tried

6 In considering the tripartite test as set out in RJR--MacDonald, supra, I am of the opinion that there is a serious issue in this matter. The Supreme Court has stated that it is not the role of the motions judge to consider the merits of the case to be heard and that, particularly in Charter cases, it is a low threshold to meet at this stage: RJR--MacDonald, supra, at page 337. It is also important to note that the Court outlined two exceptions to this principle. The first exception applies where the interlocutory motion will in effect amount to a final determination of the action. The second applies where the question of constitutionality is one which is a simple question of law alone and the motions judge may be able to dispose of the case.

7 In the case at bar, granting the stay would essentially grant the applicants the remedy sought in the appeal; that is, it would deny prisoners the right to vote in the federal election. While I do not believe that this would justify a consideration of the merits of the case under the exceptions set out above, I do believe that it is an issue which should be considered under the weighing of balance of inconvenience.

Irreparable Harm

8 The second stage of the tripartite test requires that the applicant establish that irreparable harm would occur if the stay was not granted. The test for irreparable harm has been described as follows in RJR--MacDonald, supra, at page 341:

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's [sic] 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.

9 The applicants in this case are public authorities and, as such, it should be noted that the type of harm claimed will necessarily be different from that of a private applicant. In RJR--MacDonald, supra, it was stated, at page 346:

> 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.

10 In RJR--MacDonald, supra, the public authority was the respondent and not the applicant, as in this case. The Court defined the test for a public authority acting as an applicant as follows, at page 349:

> 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.

11 It is clear from the above that as an applicant the Crown bears the burden of establishing irreparable harm at stage two of the test. I do not accept the Crown's submission that the two stages are collapsed into one consideration under balance of inconvenience. I interpret this passage to mean that where the Crown is the applicant, and by implication the legislation has already been found to be unconstitutional, they do not benefit from an assumption of irreparable harm at stage two. However, public interest, as an aspect of irreparable harm, may be demonstrated at a lower standard. It is, nonetheless, in the discretion of the Court, to determine at this stage whether the alleged harm to the public interest, as an aspect of irreparable harm, is sufficient in the context of the case to satisfy stage two.

12 This interpretation is supported by the comments of the majority of Supreme Court of Canada in 143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General), [1994] 2 S.C.R. 339, at page 385:

> In RJR--MacDonald, supra, it was held that the onus of demonstrating harm to the public interest is a relatively low one for government authorities opposing interlocutory orders. [Emphasis added.]

The Supreme Court relied on the passage from RJR--MacDonald, supra, at page 346, with added emphasis on the phrase "nearly always" and "in most cases". In other words, the benefit of the assumption of irreparable harm to public interest, in satisfying stage two, does not arise in all cases.

13 To interpret this test otherwise would effectively mean that the applicants would obtain the full extent of the relief sought despite the fact that this Court has declared paragraph 51(e) of the Canada Elections Act to be unconstitutional. This is contrary to the principle discussed earlier that a party should not be allowed to achieve the ultimate remedy by means of an interlocutory motion. In this regard, I have considered the decision of Attorney General of Canada v. Gould, [1984] 1 F.C. 1133 (C.A.); affd [1984] 2 S.C.R. 124. To grant the relief requested by the applicants, in this case, would effectively mean that, despite the declaration of invalidity of paragraph 51(e) by this Court after a full trial of the action and prior to the Court of Appeal having considered this matter, that prisoners would have their right to vote suspended in the upcoming election. In my opinion, this runs contrary to the principles outlined in Gould, supra.

14 Finally, with respect to the matter of irreparable harm, it may be worthwhile to consider one further passage from the Supreme Court of Canada in 143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General), [1994] 2 S.C.R. 339, wherein La Forest J. (in dissent) stated, at page 359:

> However, a monetary remedy is not always contemplated in cases where the Charter is invoked. This results from the nature of the rights it guarantees and of the parties. That is why the Court held that in most situations the existence of irreparable harm must be presumed. But when the alleged harm itself takes the form of a breach of a right protected by the Charter, as it does here, the judge who has the responsibility for ruling on the merits of the interlocutory motion is in the best position to determine its nature and extent and whether it is irreparable.

15 The Crown filed no evidence in support of this application for a stay. The only affidavit that was filed was that of Mr. Henderson who stated that the objectives of paragraph 51(e) of the Canada Elections Act were found to be pressing and substantial at the trial of this action and were as follows:

a) the enhancement of civic responsibility and respect for the rule of law; and
b) the enhancement of the general purposes of the criminal sanction.

The Crown relies upon this finding for its submission that there would be irreparable harm to the public interest if the stay is not granted.

16 The Crown argued that if they do not have the benefit of the assumption as described in RJR--MacDonald, supra, then it would be virtually impossible for the Crown to ever obtain a stay. I do not believe that this is the case. Even if the Crown does not have the benefit of the assumption of irreparable harm in satisfying the second stage in all cases, it is still open to the Crown to lead evidence of harm. That was the case in both Schreiber v. Canada (Attorney General), [1996] 3 F.C. 947 (T.D.); and 143471 Canada Inc. v. Quebec (Attorney General), supra, in which the Crown led evidence regarding the public harm that would be suffered in the period pending the appeal if the stay was not granted. Furthermore, the Crown may also establish that, on balance, the public interest outweighs any harm to the respondents at the third stage.

17 The Crown submitted that stages two and three ought to be considered together and did not argue irreparable harm as a separate issue under stage two. For the above reasons, and the fact that the Crown provided no other evidence as to irreparable harm, in the context of the denial of a democratic right, I conclude that the Crown has not met its onus at this stage. In the event that I am wrong, I will, nonetheless, consider the issue of harm to the public interest, as submitted by the Crown, under stage three, balance of inconvenience.

Balance of Inconvenience

18 In weighing the balance of inconvenience between the parties, the factors to be considered are as follows, RJR--MacDonald, supra, at page 350:

> 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.

In addition, the Crown submits that once the minimal requirements are met regarding irreparable harm to the public interest (which in their opinion is deemed to exist), in the absence of strong evidence of a sufficiently weighty public benefit arising from the refusal of the stay, the balance of convenience favours the public authority.

19 The relief sought in this case is the application of a legislative provision which has been found to be unconstitutional. The respondents argue that, while the consequences of the loss of the right to vote are considerable, the specific harm to the respondents is the denial of a democratic right. They submit that, should the respondents not be able to vote in the upcoming election, that harm is irreparable. They argue that the harm in this case is even more serious because the respondents were excluded from the last general election in 1993 under paragraph 51(e) of the Act. They were also denied the right to vote in 1988 under the previous provisions even though that disqualification was subsequently struck down by the Supreme Court of Canada.

20 With respect to the issue of public interest, the government alone does not have a monopoly. It was stated in RJR--MacDonald, supra, at page 344:

> 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.

21 In the case at bar, I have no doubt that the federal government is charged with the duty of promoting and protecting the public interest. The question is what is the public interest in this case? The applicants argue that the public interest should be found in the two pressing and substantial objectives that this legislation was found to have at trial; namely, the enhancement of civic responsi-

bility and respect for the rule of law and the enhancement of the general purposes of criminal sanctions.

22 In my opinion, the public interest in this type of case must be considered more broadly than in the manner advocated by the applicants. I accept the applicants' submission regarding the pressing and substantial objectives of the government in passing the legislation: however, the public interest must also include the protection of democratic rights enshrined in the Charter. What could be more fundamental than the right to vote in a free and democratic society? In defining public interest, therefore, consideration must be given not only to the pressing and substantial objectives noted above, but also to the protection of rights guaranteed under the Charter.

23 In this case, can it be said that the denial of the franchise which has been declared unconstitutional by this Court is consistent with the government's role in protecting Charter rights? There may be circumstances in which a court would delay or stay the effects of an unconstitutional ruling and on several occasions the Supreme Court of Canada has done just that. For example, the Crown referred to the case of Thibaudeau v. M.N.R., [1994] 2 F.C. 189 (C.A.); affd [1995] 2 S.C.R. 627, as authority for the proposition that a declaration of unconstitutionality could be stayed pending an appeal. I would note that Thibaudeau is different from this case in several ways. In the first place, while the law had been found to violate section 15 of the Charter, the harm which would be suffered if the legislation was enforced was monetary and could be compensated in damages if the finding was upheld on appeal. In this case, the respondents cannot be compensated for the denial of their right to vote in the upcoming federal election. Furthermore, no reasons were given by the Supreme Court of Canada in allowing the stay in Thibaudeau.

24 As part of the argument in this case, the respondents referred the Court to the decision of Schreiber v. Canada (Attorney General), supra, at page 954, wherein Gibson J., on a motion for a stay of a constitutional decision of this Court, noted that the "short term context of a period, pending disposition of an appeal "was the relevant period to address in a motion for a stay. In Schreiber there was affidavit evidence before Gibson J. upon which he determined that the short term interference with international criminal investigations was sufficient harm to justify a stay.

25 I am of the opinion that a consideration of the short term impact of a stay pending an appeal is an important consideration when the Court is faced with the decision to stay an order in which a law has been declared to be contrary to the Charter. This is particularly the case on a motion for a stay where the longer term implications of declaring a provision invalid rests with the judge who has the responsibility during the trial. Similarly, that responsibility should rest with the Federal Court of Appeal and ultimately with the Supreme Court of Canada in considering the appeals on the merits.

26 In this case, the respondents argue that at best the Crown's case is one in which, over the long term, prisoner voting may erode the respect for the rule of law and undermine the criminal law sanction. Counsel for the respondents noted that evidence during the trial by one of the experts called by the Crown was to the effect that the more general development of the loss of responsibilities and duties attendant upon rights, of which prisoner voting is merely one example, would take place only after the passage of several decades and maybe even generations.

27 In weighing the balance of inconvenience, I note that the Crown only argued that irreparable harm, in this case, would be harm to the public interest. While this is of significance, the Crown did not argue that there was any administrative burden that could not be met to allow prisoners to vote,

nor did they seriously argue that the vote of 14 000 prisoners disseminated throughout various ridings in Canada could affect the overall outcome of the election. In fact, everything is in place at this time for prisoners to vote. Posters have been placed in prisons advising them of the upcoming voting and steps have been taken to put the machinery for voting in place.

28 During 1996, after the filing of the Crown's notice of appeal in this matter, there were seven by-elections held under the Canada Elections Act. No motion for a stay of the order declaring the law to be unconstitutional was made by the Crown prior to the holding of either the March 25 or the June 17, 1996, federal by-elections. As such, prisoners voted in those by-elections. The Crown distinguished voting in a by-election from voting in a federal election because, in the latter, citizens are voting for their government. In a by-election they are voting for individual members of parliament. For the purposes of determining harm to the public interest, I am not persuaded by this distinction submitted by the Crown.

29 Counsel for the respondents further argued that all inmates were allowed to vote in the 1992 Constitutional referendum and prisoner voting is allowed in four provinces, yet no evidence was led to prove that any negative effects have been shown to arise from the participation of the inmates in those elections. There was no evidence presented, therefore, that any harm occurred to the public interest or that public confidence in the rule of law was in any way affected by those occasions in which prisoners voted.

30 Based on the evidence before me, and in weighing the public interest concerns as between the parties, I am not satisfied that in the short term the fact that prisoners might vote in the upcoming election, pending the decision in the Federal Court of Appeal, would amount to irreparable harm to the public interest. In considering the nature of the relief sought, the harm which the parties contend they would suffer and the denial of a democratic right under the Charter, I am not persuaded that, in this case, the balance of inconvenience favours the applicants.

31 Accordingly, the motion for a stay shall be dismissed and the respondents shall have their costs.

TAB 7

Case Name:

Frank v. Canada (Attorney General)

Between
Gillian Frank and Jamie Duong, Responding Party/Applicants (Respondents in Appeal), and
The Attorney General of Canada, Moving Party/Respondent (Appellant in Appeal)

[2014] O.J. No. 2981

2014 ONCA 485

313 C.R.R. (2d) 67

120 O.R. (3d) 732

241 A.C.W.S. (3d) 521

323 O.A.C. 73

2014 CarswellOnt 8434

Docket: M43860 (C58876)

Ontario Court of Appeal
Toronto, Ontario

R.J. Sharpe J.A.
(In Chambers)

Heard: June 20, 2014.
Judgment: June 23, 2014.

(33 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Reasonable limits on Charter rights -- Demonstrably justified in free and democratic society -- Oakes test -- Rational connection -- Minimal impairment -- Proportionality -- Democratic rights -- Right to vote and hold elected office -- Remedies for denial of rights -- Legislative remedies -- Nullification or declaration of inva-

lidity -- Motion by Crown for stay pending appeal dismissed -- Judgment under appeal found disenfranchisement of citizens absent from Canada for more than five years breached s. 3 Charter right to vote and could not be saved under s. 1 -- Although Crown raised arguable issues for appeal, refusal of stay would not cause irreparable harm and was consistent with balance of convenience -- Judgment did not require dismantling administrative apparatus or create legislative void -- Stay would require Elections Canada to rescind recent non-resident voter registrations and possibly deprive vote of non-resident citizen who had right to cast ballot -- Canada Elections Act, s. 11(d).

Constitutional law -- Constitutional proceedings -- Appeals and judicial review -- Practice and procedure -- Orders -- Stay of orders -- Motion by Crown for stay pending appeal dismissed -- Judgment under appeal found disenfranchisement of citizens absent from Canada for more than five years breached s. 3 Charter right to vote and could not be saved under s. 1 -- Although Crown raised arguable issues for appeal, refusal of stay would not cause irreparable harm and was consistent with balance of convenience -- Judgment did not require dismantling administrative apparatus or create legislative void -- Stay would require Elections Canada to rescind recent non-resident voter registrations and possibly deprive vote of non-resident citizen who had right to cast ballot -- Canada Elections Act, s. 11(d).

Government law -- Elections -- Voters or electors -- Qualifications -- Residency -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Appeals and judicial review -- Practice and procedure -- Motion by Crown for stay pending appeal dismissed -- Judgment under appeal found disenfranchisement of citizens absent from Canada for more than five years breached s. 3 Charter right to vote and could not be saved under s. 1 -- Although Crown raised arguable issues for appeal, refusal of stay would not cause irreparable harm and was consistent with balance of convenience -- Judgment did not require dismantling administrative apparatus or create legislative void -- Stay would require Elections Canada to rescind recent non-resident voter registrations and possibly deprive vote of non-resident citizen who had right to cast ballot -- Canada Elections Act, s. 11(d).

Motion by the Crown for a stay of judgment pending appeal. Under s. 11 of the Canada Elections Act, limited classes of non-resident Canadian citizens were eligible to vote in Canadian elections by mail. Under the Act, non-resident citizens who resided outside of Canada for more than five years were denied the vote. The judgment under appeal held that the disenfranchisement of citizens absent for more than five years violated the right to vote guaranteed by s. 3 of the Charter. The judge found that the objectives limiting non-resident voting were vague and abstract, and that the limitation on non-resident voting was not proportional to the objectives of fairness and avoiding possible election abuses. The judge also found no rational connection between the objectives and the denial of the vote to certain non-residents. The deleterious effect of losing the right to vote outweighed what the judge characterized as a tenuous salutary impact of the law. The judge struck down s. 11(d) of the Canada Elections Act and replaced it with wording that effectively granted the vote to any citizen who resided outside of Canada. The Crown appealed and sought a stay of the judgment pending appeal.

HELD: Motion dismissed. The Crown did not have a presumptive or automatic right to a stay as a guardian of the public interest, or where legislation had been ruled unconstitutional. There was an arguable issue on appeal concerning whether the five-year limit on non-resident voting was propor-

tional and justifiable on the basis of electoral fairness. The consideration of irreparable harm was neutral, as the remote possibility of a non-resident vote deciding an election offset the disenfranchisement of a non-resident deciding vote. The balance of convenience weighed in favour of refusing a stay. The decision under appeal did not require dismantling or constructing a complex statutory or administrative scheme to give effect to the judgment, nor resulted in a legislative void. Imposition of a stay would require Elections Canada to rescind recent registrations of non-resident electors and refuse the vote of a citizen who may well have had the right to cast a ballot.

Statutes, Regulations and Rules Cited:

Canada Elections Act, S.C. 2000, c. 9, s. 11, s. 11(d)

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 3

Appeal From:

Motion for a stay of the judgment of Mr. Justice Michael A. Penny of the Superior Court of Justice dated May 2 and 15, 2014.

Counsel:

Peter Southey, Gail Sinclair, Peter Hajecek for the applicant, The Attorney General of Canada.

Shaun O'Brien and Amanda Darrach for the respondents, Gillian Frank and Jamie Duong.

---

1 **R.J. SHARPE J.A.**:-- 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, 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, aff'd. [1997] 3 F.C. 643 (C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 264. 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, 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 (A.G.),* [1994] 1 S.C.R. 311 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.

TAB 8

Case Name:

Canadian Federation of Students v. Greater Vancouver Transportation Authority

Between
The Canadian Federation of Students - British Columbia Component and British Columbia Teachers' Federation, Appellants (Plaintiffs), and
The Greater Vancouver Transportation Authority and British Columbia Transit, Respondents (Defendants), and
B.C. Civil Liberties Association, Intervenor, and Attorney General of British Columbia, Respondent

[2007] B.C.J. No. 770

2007 BCCA 221

282 D.L.R. (4th) 170

239 B.C.A.C. 301

42 C.P.C. (6th) 123

153 C.R.R. (2d) 282

156 A.C.W.S. (3d) 525

2007 CarswellBC 780

Vancouver Registry No. CA033921

British Columbia Court of Appeal
Vancouver, British Columbia

Lowry J.A.
(In Chambers)

Heard: March 20, 2007.
Judgment: April 18, 2007.

(26 paras.)

Constitutional Law -- Canadian Charter of Rights and Freedoms -- Fundamental freedoms -- Freedom of expression -- Application by Greater Vancouver Transportation Authority and British Columbia Transit for a stay of an order pending appeal -- The order in question declared certain advertising policies of the applicants to be of no force and effect, as they were found to have violated freedom of expression under s. 2(b) of Charter -- Application dismissed -- Public interest in protecting freedom of expression guaranteed under Charter outweighed any public interest in maintaining impugned policies -- Although issue was serious, balance of convenience favoured respondents and was not offset by the irreparable harm that applicants might suffer if stay refused.

Civil Procedure -- Appeals -- Stay of proceedings pending appeal -- Balance of convenience -- Irreparable harm -- Serious issue to be tried -- Application by Greater Vancouver Transportation Authority and British Columbia Transit for a stay of an order pending appeal -- The order in question declared certain advertising policies of the applicants to be of no force and effect, as they were found to have violated freedom of expression under s. 2(b) of Charter -- Application dismissed -- Public interest in protecting freedom of expression guaranteed under Charter outweighed any public interest in maintaining impugned policies -- Although issue was serious, balance of convenience favoured respondents and was not offset by the irreparable harm that applicants might suffer if stay refused.

Application by the Greater Vancouver Transportation Authority (TransLink) and British Columbia Transit (B.C. Transit) for a stay of an order pending the outcome of its application for leave and appeal to the Supreme Court of Canada. The order in question followed the court's earlier declaration that certain aspects of TransLink's advertising policies unjustifiably infringed the right to freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms. The policies prohibited political advertising and advertising that was likely to cause offence to any person or group of persons, or create controversy. The order had stipulated that the impugned policies were of no force and effect. The applicants submitted that if the stay was refused, they would suffer irreparable harm.

HELD: Application dismissed. Although the court found that there was a serious issue to be tried and that the impugned policies, which had as their purpose promotion and protection of the public interest, would impose irreparable harm to the public interest and therefore to the applicants, the court held that a stay would effectively preclude political expression in the form of advertising on the exterior of the applicants' buses. Further, the impact of a stay extended beyond the silencing of political expression more broadly as the impugned policies excluded advertising that advocated or opposed any ideology, point of view, policy or action, and as such they impacted the public interest in expression broadly. The public interest in protecting freedom of expression guaranteed under the Charter outweighed any public interest in maintaining the impugned policies. Ultimately, the balance of convenience favoured the respondents and was not offset by any irreparable harm that the applicants might suffer if the stay was refused.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 2(b), s. 32

Counsel:

M.G. Underhill: Counsel for the Appellants.

D.F. Sutherland: Counsel for the Respondents, Greater Vancouver Transportation Authority and British Columbia Transit.

C.D. Wilson: Counsel for the B.C. Civil Liberties Association.

---

1 **LOWRY J.A.**:-- The Greater Vancouver Transportation Authority ("TransLink") and British Columbia Transit ("B.C. Transit") apply for a stay of the order entered upon this Court's judgment pronounced 28 November 2006 pending the outcome of the applicants' application for leave and appeal to the Supreme Court of Canada.

Background

2 The Canadian Federation of Students - British Columbia Component (the "CFS") and the British Columbia Teachers' Federation (the "BCTF") commenced an action seeking, *inter alia*, a declaration that certain aspects of TransLink's advertising policies unjustifiably infringed their right to freedom of expression under s. 2(b) of the ***Charter***. Effectively, the policies permit commercial advertising on the exterior of transit vehicles operated by B.C. Transit and TransLink, but prohibit political advertising and advertising "likely to cause offence to any person or group of persons or create controversy". The trial judge rejected the claim that the policies infringed the right to freedom of expression under s. 2(b) and accordingly dismissed the application for declaratory relief. The CFS and the BCTF appealed.

3 A majority of this Court allowed the appeal, concluding that although the trial judge properly decided that TransLink and B.C. Transit constitute "government" within the meaning of s. 32 of the ***Charter***, he erred in finding that the policies did not breach the appellants' right to freedom of expression under s. 2(b). The majority of the Court, finding the breach unjustifiable, granted declaratory relief as follows:

> (a) Standard 9 of the policies is inconsistent with the protection of freedom of expression guaranteed under the ***Charter*** and of no force and effect; and
> (b) Standard 7 of the policies is inconsistent with the protection of freedom of expression guaranteed under the ***Charter*** and of no force and effect to the extent that it excludes advertisements because they are political.

Discussion

4 The Supreme Court of Canada in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] 1 S.C.R. 311 at 334-35 affirmed the three-stage test to be applied when considering an application for a stay of proceeding. The court, citing its decision in ***Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.***, [1987] 1 S.C.R. 110, articulated the applicable test as follows:

> 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.

5 The applicants are only entitled to the relief sought if they can satisfy the above test. I address each stage in turn.

i) A Serious Question to be Tried

6 The court in ***RJR-MacDonald*** characterized the threshold in the first stage as low. Here it is not disputed that the instant case engages serious constitutional issues.

ii) Irreparable Harm

7 The second stage centres on whether the applicant for a stay would, unless the stay is granted, suffer irreparable harm. In ***RJR-MacDonald***, *supra* at 341-42, the court elaborated on this stage as follows:

> 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.
>
> "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*, [*American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396]); 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 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.
>
> ... 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.

8 The applicants contend that if the stay is refused, they will suffer irreparable harm to their reputation. Public transit patrons, confronted with political or other controversial advertising, may equate the views expressed with those of the applicants. Patrons with a contrasting opinion may hold the applicants in lesser regard. If such patrons consequently opt for alternative transportation, it is alleged the applicants will suffer loss of business in addition to reputational harm. The applicants claim that such damage cannot be undone if the policies are reinstated following a successful appeal. They also emphasize the virtual impossibility of quantifying the ensuing reputational harm and business loss because the number of patrons responding negatively to the advertisements, and the number of those patrons who will cease using public transit, cannot be accurately predicted. In any event, the applicants note that in ***Charter*** cases, quantifiable financial loss does not preclude a finding of irreparable harm: ***RJR-Macdonald***, *supra* at 342.

9 In my view, this cannot properly be characterized as harm which is "irreparable". I do not consider the applicants will have suffered permanent market loss or irrevocable damage to their business reputation if the policies are ultimately reinstated. The applicants can, in their contracts for political and advocacy advertising, insert a provision allowing them to terminate the contract in the event they succeed on appeal. Further, I am doubtful that members of the public will attribute the views expressed in controversial advertisements to the applicants, and even more doubtful there is any real prospect of the use of the public transit system being adversely affected.

10 However, the applicants also allege harm to the public interest, which inevitably harms them as guardians of that interest. In ***RJR-MacDonald***, *supra* at 349, the court clarified that:

> ... 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.

11 The applicants say the impugned policies aim to protect the public, including public transit riders and drivers, from exposure to potentially offensive or otherwise inappropriate messages. Another purpose is to ensure a safe and welcoming environment for public transit riders and drivers. Conceivably, the policies will limit advertising on transit to that which is commercial or service-oriented (and not inherently controversial). The applicants contend that without the protection afforded by the impugned policies, the public interest will be adversely affected.

12 It is important to bear in mind the following comments of the court in ***RJR-MacDonald***, *supra* at 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.

13 Further, the court stated at 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.
>
> 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.]

14 In the instant case, it can be said that the applicants undertook the impugned action - adoption of the policies - in furtherance of their responsibility to promote or protect the public interest. The above passages from ***RJR-MacDonald*** suggest that it would be usual for a court to assume that irreparable harm to the public interest would result from the restraint of that action. I do not consider the circumstances of the case warrant deviation from this usual course. Invalidation of the policies in dispute, which have as their purpose promotion and protection of the public interest, would impose irreparable harm to the public interest and therefore to the applicants.

iii) The Balance of Inconvenience and the Public Interest

15 The third stage consists of a determination of which party will suffer greater harm from the granting or refusal of a stay, pending a decision on the merits. The Supreme Court of Canada observed in ***RJR-MacDonald***, *supra* at 342 that:

> 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.

16 The court added at 343 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.

17 The court remarked at page 344 that it was open to both parties to rely upon considerations of the public interest. Specifically:

> 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.

18 It has been stated that when everything is equal, prudence dictates preservation of the *status quo*. However, the court in ***RJR-MacDonald***, *supra* at page 347 articulated the general rule that this approach:

> ... has no merit ... 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.

19 As I have said in the context of irreparable harm, the applicants contend there is a compelling public interest in the granting of a stay. They highlight the purpose of the policies - to promote and protect the public interest. Specifically, the policies aim to ensure a safe and welcoming environment for riders and drivers, and to minimize a certain public exposure to potentially offensive messages.

20 In response, effort is made to demonstrate a compelling public interest in the refusal of a stay, emphasizing public interest in political expression. It is well established that "[p]olitical expression is at the very heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Canadian *Charter*": ***Libman v. Quebec (Attorney General)***, [1997] 3 S.C.R. 569 at para. 29. A stay would effectively preclude political expression in the form of advertising on the exterior of the applicants' buses. It is said the Supreme Court of Canada may render its decision on the leave application by the end of May 2007 and, if leave is granted, may decide the case on its merits by the end of May 2009. A municipal election is expected in the fall of 2008, a provincial election in May 2009, and a federal election at any time.

21 Further, the impact of a stay extends beyond silencing of political expression. The impugned policies exclude advertising that "advocates or opposes any ideology ... point of view, policy or action". As such, they impact the public interest in expression broadly.

22 Reliance is placed on the fact that the CFS and the Amalgamated Transit Union have indicated interest in displaying political advertising on the sides of TransLink's buses. A stay would exclude the possibility of such advertising, thereby depriving the groups' interest in political expres-

sion. "Public interest" includes the particular interests of identifiable groups: ***RJR-MacDonald***, *supra* at 344.

23 This Court has held that certain aspects of the applicants' policies unjustifiably breach the freedom of expression entrenched by the ***Charter***. In *Constitutional Law of Canada*, vol. 2, loose-leaf (Scarborough: Thomson, 1997) c. 55.2 at 55-6, Professor Hogg makes the following statement:

> Once a law has actually been held to be unconstitutional, even if the holding is under appeal, the public interest in the continued enforcement of the law is enormously diminished. The government is therefore usually unsuccessful in obtaining a stay of judgment to keep the law in force pending the decision on appeal.

24 He cites the decision of ***Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.*** (1990), 74 O.R. (2d) 161 (C.A.), in which the court upheld a dismissal of the Attorney General's motion for a stay of the order declaring the ***Retail Business Holidays Act***, R.S.O. 1980, c. 453 to be unconstitutional. The court in ***Peel*** considered that if the appeal failed, those whose constitutional rights had been infringed by the legislation would, for a time, have been deprived of a judgment so declaring.

25 In the instant case, the public interest in protecting the freedom of expression guaranteed under the ***Charter***outweighs any public interest in maintaining the impugned policies, which have as their purported aims the creation of a safe and welcoming environment for riders and drivers of public transit and the minimization of a certain public exposure to offensive advertisements. Ultimately, the balance of inconvenience lies in favour of the respondents on the application (the appellants) and is not offset by the irreparable harm that the applicants (the respondents, TransLink and B.C. Transit) may suffer if the stay is refused.

Disposition

26 The application for a stay is accordingly dismissed.

LOWRY J.A.

Motion File No. M49615
Court of Appeal File No. C65861

CITY OF TORONTO Applicant (Respondent in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondent (Appellant)			Superior Court File No. CV-18-00603797-00
ROCCO ACHAMPONG Applicant (Respondent in appeal)	and	ONTARIO Respondents (Appellants)	and	CITY OF TORONTO Respondent (Respondent in appeal)	Superior Court File No. CV-18-00602494-00
CHRIST MOISE et al. Applicants (Respondents in appeal)	and	ATTORNEY GENERAL OF ONTARIO Respondents (Appellants)	and	CITY OF TORONTO Respondent (Respondent in appeal)	Superior Court File No. CV-18-00603633-00

COURT OF APPEAL FOR ONTARIO
Proceeding Commenced at Toronto

BOOK OF AUTHORITIES OF RESPONDING PARTY (RESPONDENT IN APPEAL), CITY OF TORONTO

CITY SOLICITOR'S OFFICE
City of Toronto, Legal Services
Metro Hall
55 John Street, 26th Floor
Toronto, ON M5V 3C6
fax: (416) 397 – 5624

Diana Dimmer
LSO No. 24932L
Tel: (416) 392 – 7229
diana.dimmer@toronto.ca

Glenn K.L. Chu
LSO No. 40392F
Tel: (416) 397 – 5407
glenn.chu@toronto.ca

Philip Chan
LSO No. 68681S
Tel: (416) 392 – 1650
pchan7@toronto.ca

Lawyers for the Responding Party (Respondent in Appeal), City of Toronto