Court File No. CV-18-00603797-0000

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CITY OF TORONTO

Applicant

- and -

ATTORNEY GENERAL OF ONTARIO

Respondent

APPLICATION UNDER Rule 14.05(3)(d), (g.1) and (h) of the *Rules of Civil Procedure*.

BOOK OF AUTHORITIES OF THE APPLICANT

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TAB 1

Case Name:

Nanaimo (City) v. Rascal Trucking Ltd.

City of Nanaimo, appellant;
v.
Rascal Trucking Ltd., respondent.

[2000] S.C.J. No. 14

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File No.: 26786.

Supreme Court of Canada

1999: November 3 / 2000: March 2.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA (39 paras.)

Municipal law -- Powers of municipalities -- Municipal resolutions -- Validity -- Nuisances -- Removal of dangerous erections -- Meaning of phrase "or other matter or thing" -- Whether municipality had jurisdiction under Municipal Act to pass resolutions declaring pile of soil a nuisance and ordering its removal -- Standard of review applicable to municipality's decisions -- Municipal Act, R.S.B.C. 1979, c. 290, s. 936.

Municipal law -- Decisions of municipalities -- Standard of review applicable to municipality's decisions.

The respondent company leased a parcel of land located within the appellant city. The city granted a permit to the company to deposit 15,000 cubic yards of soil on its site to conduct soil processing operations. Neighbouring residents complained about dust and noise emissions and a city inspector recommended that the soil be removed. The city council passed resolutions declaring the pile of soil a nuisance pursuant to s. 936 of the Municipal Act and ordered the company and its lessor to remove it. The company and its lessor failed to comply. The city brought a petition for a declaration that it was entitled to access the property and remove the pile of soil. The petition was granted. The company and its lessor unsuccessfully brought a second petition requesting that the resolutions be quashed. The Court of Appeal allowed the company's appeal and quashed both resolutions and both court orders.

Held: The appeal should be allowed.

Section 936 of the Municipal Act empowered the city to issue resolutions declaring the company's pile of soil a nuisance and ordering its removal. The process of delineating municipal jurisdiction is an exercise in statutory construction. A statute must be construed purposively in its entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature's true intent. The legislature, by including the phrase "or other matter or thing", did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. Rather the phrase serves to extend the two classes of nuisance outlined in the section -- that is, constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the ejusdem generis limited class rule. A pile of soil falls within the phrase "building, structure or erection of any kind" since it does not materialize on its own, must at least be erected and clearly may be a "hazardous erection" either in the sense of reducing air quality through dust pollution, or by posing a serious risk to curious children.

The "pragmatic and functional" approach used to discern the standard of review applicable to an administrative tribunal can be harmoniously applied to a municipality's adjudicative functions as both bodies are delegates of provincial jurisdiction. The decision in question was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases and

a significant impact on the rights of the parties. The "pragmatic and functional" approach is a contextual one that must be adapted to the body in question. A consideration of the relevant factors in this case militates against a deferential standard on the question of jurisdiction. Section 936 requires the municipal council to apply principles of statutory interpretation in order to answer the legal question of the scope of its authority. On such questions, municipalities do not possess any greater institutional competence or expertise than the courts. The test on jurisdiction and questions of law is correctness. Further, the nature of municipal government and the extent of municipal expertise do not warrant a heightened degree of deference on review. First, municipalities exercise a plenary set of legislative and executive powers yet do not have an independent constitutional status. They essentially represent delegated government. Second, municipalities are political bodies. Neither experience nor proficiency in municipal law and municipal planning is required to be elected a councillor. Finally, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent and are necessarily motivated by political considerations and not by an entirely impartial application of expertise. As a result, the courts may review those jurisdictional questions on a standard of correctness. Here, the city was correct in construing s. 936 as extending to it jurisdiction to issue resolutions declaring the company's pile of soil a nuisance and ordering its removal.

The standard upon which the courts may review intra vires municipal decisions must be one of patent unreasonableness. Municipal councils are elected representatives of their community and accountable to their constituents. Municipalities also often balance complex and divergent interests in arriving at decisions in the public interest. These considerations warrant that intra vires decisions be reviewed upon a deferential standard. Here, the city's decision to declare the company's pile of soil a nuisance was not patently unreasonable.

Cases Cited

Considered: Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231; referred to: R. v. Sharma, [1993] 1 S.C.R. 650; R. v. Greenbaum, [1993] 1 S.C.R. 674; Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919; U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048; Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982; Godbout v. Longueuil (City), [1997] 3 S.C.R. 844; Kruse v. Johnson, [1898] 2 Q.B. 91.

Statutes and Regulations Cited

Constitution Act, 1867, s. 92(8), (16). Interpretation Act, R.S.B.C. 1996, c. 238, s. 8. Municipal Act, R.S.B.C. 1960, c. 255, s. 873. Municipal Act, R.S.B.C. 1979, c. 290, ss. 932, 936. Municipal Act, R.S.B.C. 1996, c. 323, ss. 725, 727. Municipal Government Act, S.A. 1994, c. M-26.1, s. 539. Statute Revision Act, R.S.B.C. 1996, c. 440, s. 8.

APPEAL from a judgment of the British Columbia Court of Appeal (1998), 49 B.C.L.R. (3d) 164, 109 B.C.A.C. 12, 177 W.A.C. 12, 161 D.L.R. (4th) 177, 47 M.P.L.R. (2d) 315, [1998] B.C.J. No. 1545 (QL), allowing the respondent's appeal from two orders permitting the appellant to remove top soil from respondent's property. Appeal allowed.

Guy E. McDannold, for the appellant. Patrick G. Foy, Q.C., and Angus M. Gunn, for the respondent.

Solicitors for the appellant: Staples McDannold Stewart, Vancouver. Solicitors for the respondent: Ladner Downs, Vancouver.

[Editor's note: An errata was published at [2002] 4 S.C.R., page iv. The change indicated therein has been made to this document and the text of the errata as published in S.C.R. is appended to the judgment.]

The judgment of the Court was delivered by

1 MAJOR J.:-- This appeal engages an interpretation of s. 936 of the Municipal Act, R.S.B.C. 1979, c. 290 (now R.S.B.C. 1996, c. 323, s. 727). As well, it raises the standard of judicial review applicable to municipal bodies, previously visited by this Court in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231.

I. Factual Background

2 The respondent, Rascal Trucking Ltd. ("Rascal"), leased a parcel of land located within the City of Nanaimo ("Nanaimo" or the "City") from Kismet Enterprises Inc. ("Kismet"). In April 1996, Rascal applied for and received a permit from the appellant Nanaimo to deposit approximately 15,000 cubic yards of soil on its site with the intent to conduct soil processing operations, an activity permitted by the applicable zoning classification.

3 Shortly after Rascal started delivering soil to the site, neighbouring residents raised complaints about dust and noise emissions. A city inspector inspected the site and recommended that an order be issued compelling the owner to remove the pile of soil.

4 On July 3, 1996, Nanaimo held a public meeting where it heard from local residents and the respondent. It received a professional engineer's report analysing the noise emissions from the property, and an opinion from its legal counsel. The Nanaimo council deliberated and ultimately passed a resolution declaring the pile of soil a nuisance pursuant to s. 936 of the Municipal Act, and ordered Kismet to remove it within 30 days. It did not comply.

5 On August 19, 1996, Nanaimo passed a second resolution ordering the respondent to remove the topsoil within 15 days, in default of which it would be removed by the City at the respondent's or owner's cost. Neither the owner Kismet nor the respondent Rascal obeyed. On September 6, 1996, Rascal denied access for removal purposes to agents of the City.

6 These events precipitated two applications before the Supreme Court of British Columbia. Nanaimo brought the first, asking for a declaration that it was entitled to access the property and remove the offending pile of soil. Maczko J. granted the petition on the basis that Nanaimo had the jurisdiction both to declare the dirt pile a nuisance and order its removal.

7 Kismet and Rascal brought the second petition, requesting that the resolutions be quashed. Rowan J. dismissed the petition.

8 The British Columbia Court of Appeal allowed Rascal's appeal, set aside the orders and quashed the July 3rd and August 19th resolutions: (1998), 49 B.C.L.R. (3d) 164.

II. Relevant Statutory Provisions

9 Municipal Act, R.S.B.C. 1979, c. 290

Nuisances and disturbances

932. The council may by bylaw

...

(b) prevent, abate and prohibit nuisances, and provide for the recovery of the cost of abatement of nuisances from the person causing the nuisance or other persons described in the bylaw;

...

(i) require the owners or occupiers of real property, or their agents, to eliminate or reduce the fouling or contaminating of the atmosphere through the emission of smoke, dust, gas, sparks, ash, soot, cinders, fumes or other effluvia; and prescribe measures and precautions to be taken for the purpose; and fix limits not to be exceeded for those emissions;

Removal of dangerous erections

936. (1) The council may declare a building, structure or erection of any kind, or a drain, ditch, watercourse, pond, surface water or other matter or thing, in or on private land or a highway, or in or about a building or structure, a nuisance, and may direct and order that it be removed, pulled down, filled up or otherwise dealt with by its owner, agent, lessee or occupier, as the council may determine and within the time after service of the order that may be named in it.

...

(3) The council may further order that, in case of default by the owner, agent, lessee or occupier to comply with the order within the period named in it, the municipality, by its employees and others, may enter and effect the removal, pulling down, filling up or other dealing at the expense of the person defaulting, and may further order that the charges for doing so, including all incidental expenses, if unpaid on December 31 in any year, shall be added to and form part of the taxes payable on that land or real property as taxes in arrear.

...

(5) This section applies to any building, structure or erection of any kind which the council believes is so dilapidated or unclean as to be offensive to the community.

Interpretation Act, R.S.B.C. 1996, c. 238

Enactment remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Statute Revision Act, R.S.B.C. 1996, c. 440

Legal effect of revision

8 (1) A revision does not operate as new law but has effect and must be interpreted as a consolidation of the law contained in the Acts and provisions replaced by the revision.

(2) If a revised provision has the same effect as a provision replaced by the revision, the revised provision

(a) operates retrospectively as well as prospectively, and
(b) is deemed to have been enacted and to have come into force on the day on which the provision replaced by the revision came into force.

(3) If a revised provision does not have the same effect as a provision replaced by the revision,

(a) the provision replaced by the revision governs all transactions, matters and things before the revision comes into force, and
(b) the revised provision governs all transactions, matters and things after the revision comes into force.

III. Judicial History

A. British Columbia Supreme Court (Maczko J.)

10 The issue before Maczko J. was whether Nanaimo had the power under s. 936 of the Municipal Act to declare a pile of soil a nuisance and order its removal. He declared that Nanaimo had

jurisdiction to do so, but did not extend his order to conclude on Nanaimo's right to do so in the case before him.

B. British Columbia Supreme Court (Rowan J.)

11 Rascal and Kismet filed a second petition requesting that the court quash Nanaimo's resolutions on the basis that the City exceeded its jurisdiction by declaring the pile of soil to be a nuisance. Rowan J. held that the pile of soil fell within the traditional meaning of a nuisance, specifically something harmful or offensive to the public for which there is a legal remedy. Therefore, he declined to intervene and quash the City's resolutions, finding it had acted within its jurisdiction.

C. British Columbia Court of Appeal (per Newbury J.A.)

12 The Court of Appeal held that Maczko J. erred in declaring Nanaimo had jurisdiction to declare the pile of soil a nuisance and to order its removal. As the ruling of Rowan J. was predicated on the ruling of Maczko J., that too was held to be in error. The court allowed the appeal and quashed the City's resolutions.

IV. Issues

13 This appeal raises two issues:

(1) Did s. 936 of the Municipal Act empower the appellant to pass the resolutions declaring the pile of soil a nuisance and ordering its removal?
(2) If so, upon what standard must the appellant's decision be reviewed?

V. Analysis

(1) Did s. 936 of the Municipal Act Empower the Appellant to Pass the Resolutions Declaring the Pile of Soil a Nuisance and Ordering Its Removal?

14 Nanaimo relied upon s. 936 of the Municipal Act as its authority to declare Rascal's pile of soil a nuisance and to order its removal. The appellant submitted that a "broad and benevolent" rule of statutory construction be adopted in ascertaining its jurisdiction under s. 936 rather than the narrow view adopted by the Court of Appeal. Nanaimo argued that s. 936's reference to "or other matter or thing" cannot be limited to the genus of constructed things and watercourses preceding it. To the contrary, Nanaimo said this phrase is meant to stand alone and apart from the preceding items. Therefore, the power to declare "other matter or thing" a nuisance referred to the municipality's jurisdiction to abate nuisances and health hazards generally.

15 In support of this conclusion Nanaimo pointed out that prior to the 1979 revision of the Municipal Act, the predecessor equivalent of s. 936 (Municipal Act, R.S.B.C. 1960, c. 255, s. 873) contained an additional comma prior to "or other matter or thing", which it was argued was included to set this phrase off as a stand alone grant of general power. Although this comma was removed in the 1979 revision, Nanaimo claims s. 8 of the Statute Revision Act required the Court to interpret s. 936 as if the comma remained, should the inclusion of a comma have the substantive effect of setting off this phrase as a general grant of jurisdiction over nuisances.

16 The respondent argued that this Court should not subscribe a priori to either a benevolent or strict approach, but rather seek to discern the "true intent" of s. 936. In the respondent's submission,

such an analysis, aided by the ejusdem generis or limited class rule, forces the conclusion that s. 936 empowered Nanaimo to address only two classes of potential nuisance -- constructed things and things associated with the handling, transit, or storage of water. To ascribe greater meaning to the phrase "or other matter or thing" it was said would run contrary to the intent of listing specific items before it, as well as deprive those words of meaning. In light of the specific items enumerated, the respondent company said it would be anomalous to conclude that reference to "or other matter or thing" permits a municipality to, in effect, declare anything to be a nuisance.

17 The first step is to consider the approach the courts should take when construing municipal legislation. As noted by Iacobucci J. in R. v. Sharma, [1993] 1 S.C.R. 650, at p. 668:

> ... as statutory bodies, municipalities "may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation".

18 The process of delineating municipal jurisdiction is an exercise in statutory construction. There is ample authority, on the interpretation of statutes generally and of municipal statutes specifically, to support a broad and purposive approach.

19 While R. v. Greenbaum, [1993] 1 S.C.R. 674, favoured restricting a municipality's jurisdiction to those powers expressly conferred upon it by the legislature, the Court noted that a purposive interpretation should be used in determining what the scope of those powers are. See Iacobucci J. (at pp. 687-88):

> As Davies J. wrote in his reasons in City of Hamilton v. Hamilton Distillery Co. (1907), 38 S.C.R. 239, at p. 249, with respect to construing provincial legislation enabling municipal by-laws:
>
> > In interpreting this legislation I would not desire to apply the technical or strict canons of construction sometimes applied to legislation authorizing taxation. I think the sections are, considering the subject matter and the intention obviously in view, entitled to a broad and reasonable if not, as Lord Chief Justice Russell said in Kruse v. Johnson [[1898] 2 Q.B. 91], at p. 99, a "benevolent construction", and if the language used fell short of expressly conferring the powers claimed, but did confer them by a fair and reasonable implication I would not hesitate to adopt the construction sanctioned by the implication.
>
> Accordingly, a court should look to the purpose and wording of the provincial enabling legislation when deciding whether or not a municipality has been empowered to pass a certain by-law ... [A] somewhat stricter rule of construction than that suggested above by Davies J. is in order where the municipality is attempting to use a power which restricts common law or civil rights.

20 This conclusion follows recent authorities dictating that statutes be construed purposively in their entire context and in light of the scheme of the Act as a whole with a view to ascertaining the legislature's true intent. See Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at paras. 21-23, M

& D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961, at para. 25, and the B.C. Interpretation Act, s. 8.

21 It is my opinion that the legislature, by including the phrase "or other matter or thing", did not intend to expand the scope of s. 936 to allow municipalities to declare almost anything to be a nuisance. I accept the respondent's submission that to construe that phrase as creating a third class of potential nuisance would effectively negate the purpose of including rather specific preceding language.

22 The phrase "or other matter or thing" extends the two classes of nuisances outlined before it, that is constructed or erected things, and watercourses. This interpretation follows from both a purposive interpretation and the application of the ejusdem generis limited class rule. It is not reasonable to believe that the legislature intended to subscribe such importance to the missing comma, namely that such minor punctuation should render null the specific items listed before.

23 It should also be noted that s. 932 of the Municipal Act (now s. 725) gave municipalities the authority to address nuisances, broadly defined, through duly passed by-laws. Under the Act, the procedure established to pass a by-law is more onerous and time consuming than that required to pass a resolution. Were reference to "or other matter or thing" interpreted to govern nuisances generally, s. 936 would necessarily encompass those nuisances addressed by s. 932. Section 932 would, in practice, be redundant. No reasonable and efficient municipality would address a nuisance through s. 932 in light of the less cumbersome procedure available under s. 936. The legislature could not have intended such redundancy.

24 The fact that s. 936 empowers municipalities to declare only two classes of thing to be a nuisance does not foreclose the possibility that a pile of soil may fall within one of those categories. It is clear that a pile of soil does not fall within any of the water-related items constituting the second class. However, does a pile of soil fall within the first class of constructed or erected things? Specifically, does it fall within the phrase "building, structure or erection of any kind"? I conclude that it does. A pile of soil does not materialize on its own. It must at least be erected presumably by piling or dumping. As well, a pile of soil clearly may be a "hazardous erection" within the wording of s. 936's heading, either in the sense of reducing air quality through dust pollution, or by posing a serious risk to curious children.

25 Rizzo & Rizzo Shoes, supra, at para. 27, noted "[i]t is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences". In this sense, an absurdity would result if s. 936 did not extend to a pile of soil. It would mean a building, structure or pond could be declared a nuisance, but the soil excavated to create them could not.

26 It is my opinion that s. 936 empowered the appellant to issue resolutions declaring Rascal's pile of soil a nuisance and ordering its removal. As a result of that conclusion the second question requires review.

(2) Upon What Standard Must the Appellant's Decision Be Reviewed?

27 The standard of judicial review applicable to municipal policy making decisions was reviewed and set out in Shell, supra. See Sopinka J. (at p. 273):

> As creatures of statute, however, municipalities must stay within the powers conferred on them by the provincial legislature. In R. v. Greenbaum, [1993] 1 S.C.R. 674, Iacobucci J., speaking for the Court, stated, at p. 687:
>
> > Municipalities are entirely the creatures of provincial statutes. Accordingly, they can exercise only those powers which are explicitly conferred upon them by a provincial statute.
> >
> > It follows that the exercise of a municipality's statutory powers...is reviewable to the extent of determining whether the actions are intra vires.

28 In this case we are considering the standard of review applicable to a municipality's adjudicative function as opposed to its policy making. The decision in question was clearly adjudicative as it involved an adversarial hearing, the application of substantive rules to individual cases and a significant impact on the rights of the parties. (See 2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool), [1996] 3 S.C.R. 919, at para. 24.) In U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, and subsequent cases, this Court adopted what was described as a "pragmatic and functional" approach to discerning the standards of review applicable to administrative tribunals, be they delegates of federal or provincial jurisdiction. As municipalities are also delegates of provincial jurisdiction, there is harmony in applying the pragmatic and functional approach in ascertaining the standard of review applicable to municipalities exercising an adjudicative function.

29 As recently noted in Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982, at paras. 29-38, several factors must be weighed in determining whether to afford an administrative tribunal curial deference. The approach is a contextual one that must be adapted to the body in question. It considers, where relevant, the existence of a privative clause, if any, the body's expertise, the purpose of the body's enabling legislation and whether the question at issue is one of law or fact. Here, s. 936 requires the municipal council to apply principles of statutory interpretation in order to answer the legal question of the scope of its authority. On such questions, municipalities do not possess any greater institutional competence or expertise than the courts so as to warrant a heightened degree of deference on review. The test on jurisdiction and questions of law is correctness.

30 A consideration of the nature of municipal government and the extent of municipal expertise further militates against a deferential standard on the question of jurisdiction. Furthermore, these factors reflect the institutional realities that make municipalities creatures distinct and unique from administrative bodies.

31 First, in contrast to administrative tribunals, that usually adjudicate matters pertaining to a specialized and confined area, municipalities exercise a rather plenary set of legislative and executive powers, a role that closely mimics that of the provincial government from which they derive their existence. Yet, unlike provincial governments, municipalities do not have an independent constitutional status. (See Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, at para. 52, and the Constitution Act, 1867, ss. 92(8) and 92(16).) While administrative agencies are equally statutory delegates, they are not a substitute for provincial legislative and executive authority to the extent that municipalities are. Municipalities essentially represent delegated government.

32 Second, municipalities are political bodies. Whereas tribunal members should be and are, generally, appointed because they possess an expertise within the scope of the agency's authority, municipal councillors are elected to further a political platform. Neither experience nor proficiency in municipal law and municipal planning, while desirable, is required to be elected a councillor. Given the relatively broad range of issues that a municipality must address, it is unlikely that most councillors will develop such special expertise even over an extended time. Finally, as opposed to administrative tribunals, council decisions are more often by-products of the local political milieu than a considered attempt to follow legal or institutional precedent. To a large extent council decisions are necessarily motivated by political considerations and not by an entirely impartial application of expertise.

33 The fact that councillors are accountable at the ballot box, is a consideration in determining the standard of review for intra vires decisions but does not give municipal councillors any particular advantage in deciding jurisdictional questions in the adjudicative context. As a result, the courts may review those jurisdictional decisions on a standard of correctness.

34 Given the interpretation of s. 936 set out in part 1 of these reasons, it is my opinion that Nanaimo was correct in construing s. 936 as extending to it jurisdiction to issue resolutions declaring Rascal's pile of soil a nuisance and ordering its removal.

35 In light of the conclusion that Nanaimo acted within its jurisdiction in passing the resolutions at issue, it is necessary to consider the standard upon which the courts may review those intra vires municipal decisions. Municipal councillors are elected by the constituents they represent and as such are more conversant with the exigencies of their community than are the courts. The fact that municipal councils are elected representatives of their community, and accountable to their constituents, is relevant in scrutinizing intra vires decisions. The reality that municipalities often balance complex and divergent interests in arriving at decisions in the public interest is of similar importance. In short, these considerations warrant that the intra vires decisions of municipalities be reviewed upon a deferential standard.

36 Kruse v. Johnson, [1898] 2 Q.B. 91 (Div. Ct.), has long been an authority in Canadian courts for scrutinizing the reasonableness of municipal by-laws. There, Lord Russell of Killowen offered the courts some cautionary language on findings of unreasonableness (at p. 100):

> A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges.

Or as more recently expressed in Shell, supra, per McLachlin J., at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best

> for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in Greenbaum, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

37 I find these comments equally persuasive in the scrutiny of municipal resolutions. The conclusion is apparent. The standard upon which courts may entertain a review of intra vires municipal actions should be one of patent unreasonableness.

38 An example of legislative intent in the review of municipal by-laws or resolutions is found in the Province of Alberta where the province seeks to shield it's municipalities from a challenge on unreasonableness alone. See the Municipal Government Act, S.A. 1994, c. M-26.1, that states:

> 539 No bylaw or resolution may be challenged on the ground that it is unreasonable.

39 We are left to consider whether Nanaimo was patently unreasonable in declaring this specific pile of soil a nuisance. The pile of soil had serious and continuing effects upon the neighbouring community. It was an annoyance and a source of pollution. Nanaimo's decision to declare Rascal's pile of soil a nuisance was not patently unreasonable. I would allow the appeal with costs throughout, set aside the order of the British Columbia Court of Appeal and reinstate the orders of Maczko J. and Rowan J. below, as well as Nanaimo's resolutions dated July 3, 1996 and August 19, 1996.

* * * * *

Errata, published at [2002] 4 S.C.R., page iv

[2000] 1 S.C.R. p. 357, para. 35, line 16 of the English version. Read "the intra vires decisions of municipalities" instead of "the intra vires decision of municipalities".

TAB 2

Case Name:

114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)

114957 Canada Ltée (Spraytech, Société d'arrosage) and Services des espaces verts Ltée/Chemlawn, appellants;

v.

Town of Hudson, respondent, and Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada, Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns -- Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond, and Fédération interdisciplinaire de l'horticulture ornementale du Québec, interveners.

[2001] S.C.J. No. 42

[2001] A.C.S. no 42

2001 SCC 40

2001 CSC 40

[2001] 2 S.C.R. 241

[2001] 2 R.C.S. 241

200 D.L.R. (4th) 419

271 N.R. 201

J.E. 2001-1306

40 C.E.L.R. (N.S.) 1

19 M.P.L.R. (3d) 1

106 A.C.W.S. (3d) 270

REJB 2001-24833

File No.: 26937.

Supreme Court of Canada

2000: December 7 / 2001: June 28.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC (56 paras.)

Municipal law -- By-laws -- Regulation and restriction of pesticide use -- Town adopting by-law restricting use of pesticides within its perimeter to specified locations and enumerated activities -- Whether Town had statutory authority to enact by-law -- Whether by-law rendered inoperative because of conflict with federal or provincial legislation -- Town of Hudson By-law 270 -- Cities and Towns Act, R.S.Q., c. C-19, s. 410(1).

The appellants are landscaping and lawn care companies operating mostly in the greater Montreal area, with both commercial and residential clients. They make regular use of pesticides approved by the federal Pest Control Products Act in the course of their business activities and hold the requisite licences under Quebec's Pesticides Act. In 1991 the respondent Town, located west of Montreal, adopted By-law 270, which restricted the use of pesticides within its perimeter to specified locations and for enumerated activities. The definition of pesticides in By-law 270 replicates that in the Pesticides Act. Under s. 410(1) of the Quebec Cities and Towns Act ("C.T.A."), the council may make by-laws to "secure peace, order, good government, health and general welfare in the territory of the municipality", while under s. 412(32) C.T.A. it may make by-laws to "regulate or prohibit the ... use of ... combustible, explosive, corrosive, toxic, radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within l km therefrom". In 1992 the appellants were charged with having used pesticides in violation of By-law 270. They brought a motion for declaratory judgment asking the Superior Court to declare By-law 270 to be inoperative and ultra vires the Town's authority. The Superior Court denied the motion, and the Court of Appeal affirmed that decision.

Held: The appeal should be dismissed.

Per L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ.: As statutory bodies, municipalities may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation. Included in this authority are

"general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. Section 410 C.T.A. is an example of such a general welfare provision and supplements the specific grants of power in s. 412. While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, courts faced with an impugned by-law enacted under an "omnibus" provision such as s. 410 C.T.A. must be vigilant in scrutinizing the true purpose of the by-law.

By-law 270 does not fall within the ambit of s. 412(32) C.T.A. There is no equation of pesticides and "toxic ... materials" either in the terms of the by-law or in any evidence presented during this litigation. Since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) C.T.A. By-law 270 read as a whole does not impose a total prohibition, but rather permits the use of pesticides in certain situations where that use is not purely an aesthetic pursuit. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1) C.T.A. The distinctions impugned by the appellants as restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) C.T.A. Moreover, reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. The interpretation of By-law 270 set out here respects international law's "precautionary principle". In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

By-law 270 was not rendered inoperative because of a conflict with federal or provincial legislation. As a product of provincial enabling legislation, By-law 270 is subject to the "impossibility of dual compliance" test for conflict between federal and provincial legislation set out in Multiple Access. The federal Pest Control Products Act regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. The Multiple Access test also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation. In this case, there is no barrier to dual compliance with By-law 270 and the Quebec Pesticides Act, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The Pesticides Act establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

Per Iacobucci, Major and LeBel JJ.: The basic test to determine whether there is an operational conflict remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. Nor does a conflict exist with the Quebec Pesticides Act, for the reasons given by the majority.

The issues in this case remain strictly first whether the C.T.A. authorizes municipalities to regulate the use of pesticides within their territorial limits, and second whether the particular regulation conforms with the general principles applicable to delegated legislation. The Town concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1) C.T.A. While it appears to be sound legislative and administrative policy, under general welfare provisions, to grant local governments a residual authority to address emerging or changing issues concerning the

welfare of the local community living within their territory, it is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In this case, the by-law targets problems of use of land and property, and addresses neighborhood concerns that have always been within the realm of local government activity. The by-law was thus properly authorized by s. 410(1).

Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. While on its face, By-law 270 involves a general prohibition and then authorizes some specific uses, when it is read as a whole its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural purposes. Moreover, although the by-law discriminates, there can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. An implied authority to discriminate was thus unavoidably part of the delegated regulatory power.

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By L'Heureux-Dubé J.

Distinguished: R. v. Greenbaum, [1993] 1 S.C.R. 674; Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231; applied: Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; referred to: Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031; Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; R. v. Hydro-Québec, [1997] 3 S.C.R. 213; R. v. Sharma, [1993] 1 S.C.R. 650; Re Weir and The Queen (1979), 26 O.R. (2d) 326; Kuchma v. Rural Municipality of Tache, [1945] S.C.R. 234; Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, 2000 SCC 13; Scarborough v. R.E.F. Homes Ltd. (1979), 9 M.P.L.R. 255; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. Case No. 53; Vellore Citizens Welfare Forum v. Union of India, [1996] Supp. 5 S.C.R. 241; M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Bank of Montreal v. Hall, [1990] 1 S.C.R. 121; Attorney General for Ontario v. City of Mississauga (1981), 15 M.P.L.R. 212; Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd. (1975), 7 O.R. (2d) 484; British Columbia Lottery Corp. v. Vancouver (City) (1999), 169 D.L.R. (4th) 141; Law Society of Upper Canada v. Barrie (City) (2000), 46 O.R. (3d) 620; Huot v. St-Jérôme (Ville de), J.E. 93-1052; St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc., [1992] R.J.Q. 875.

By LeBel J.

Applied: Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; referred to: M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961; Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 2 S.C.R. 409, 2000 SCC 45; Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15; Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; R. v. Sharma, [1993] 1 S.C.R. 650; Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, 2000 SCC 13; R. v. Greenbaum, [1993] 1 S.C.R. 674; Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231.

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Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, ss. 54, 102.
Code of Civil Procedure, R.S.Q., c. C-25, art. 453.
Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h), 11(1).
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Municipal Government Act, S.A. 1994, c. M-26.1, ss. 3(c), 7.
Municipal Government Act, S.N.S. 1998, c. 18, s. 172.
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Town of Hudson By-law 248.
Town of Hudson By-law 270 [am. 1995, by-law 327; am. 1996, by-law 341], arts. 1, 2, 3, 4, 5, 6, 10.

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APPEAL from a judgment of the Quebec Court of Appeal, [1998] Q.J. No. 2546 (QL), J.E. 98-1855, affirming a decision of the Superior Court (1993), 19 M.P.L.R. (2d) 224, dismissing the appellants' motion for declaratory judgment. Appeal dismissed.

Counsel:

Gérard Dugré and Denis Manzo, for the appellants.

Stéphane Brière and Pierre Lepage, for the respondent.

Stewart A. G. Elgie and Jerry V. DeMarco, for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada.

Written submissions only by Theresa A. McClenaghan and Paul Muldoon, for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns -- Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond.

Jean Piette, for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec.

Solicitors for the appellants: Fraser Milner Casgrain, Montréal.

Solicitors for the respondent: Bélanger Sauvé, Montréal.

Solicitors for the interveners Federation of Canadian Municipalities, Nature-Action Québec Inc. and World Wildlife Fund Canada: Sierra Legal Defence Fund, Toronto.

Solicitors for the interveners Toronto Environmental Alliance, Sierra Club of Canada, Canadian Environmental Law Association, Parents' Environmental Network, Healthy Lawns -- Healthy People, Pesticide Action Group Kitchener, Working Group on the Health Dangers of the Urban Use of Pesticides, Environmental Action Barrie, Breast Cancer Prevention Coalition, Vaughan Environmental Action Committee and Dr. Merryl Hammond: Canadian Environmental Law Association, Toronto.

Solicitors for the intervener Fédération interdisciplinaire de l'horticulture ornementale du Québec: Ogilvy Renault, Québec.

The judgment of L'Heureux-Dubé, Gonthier, Bastarache and Arbour JJ. was delivered by

1 **L'HEUREUX-DUBÉ J.**:-- The context of this appeal includes the realization that our common future, that of every Canadian community, depends on a healthy environment. In the words of the Superior Court judge: "Twenty years ago, there was very little concern over the effect of chemicals such as pesticides on the population. Today, we are more conscious of what type of an environment we wish to live in, and what quality of life we wish to expose our children [to]" ((1993), 19 M.P.L.R. (2d) 224, at p. 230). This Court has recognized that "[e]veryone is aware that individually and collectively, we are responsible for preserving the natural environment ... environmental protection [has] emerged as a fundamental value in Canadian society": Ontario v. Canadian Pacific Ltd., [1995] 2 S.C.R. 1031, at para. 55. See also Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, at pp. 16-17.

2 Regardless of whether pesticides are in fact an environmental threat, the Court is asked to decide the legal question of whether the Town of Hudson, Quebec, acted within its authority in enacting a by-law regulating and restricting pesticide use.

3 The case arises in an era in which matters of governance are often examined through the lens of the principle of subsidiarity. This is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity. La Forest J. wrote for the majority in R. v. Hydro-Québec, [1997] 3 S.C.R. 213, at para. 127, that "the protection of the environment is a major challenge of our time. It is an international problem, one that requires action by governments at all levels" (emphasis added). His reasons in that case also quoted with approval a passage from Our Common Future, the report produced in 1987 by the United Nations' World Commission on the Environment and Development. The so-called "Brundtland Commission" recommended that "local governments [should be] empowered to exceed, but not to lower, national norms" (p. 220).

4 There are now at least 37 Quebec municipalities with by-laws restricting pesticides: J. Swaigen, "The Hudson Case: Municipal Powers to Regulate Pesticides Confirmed by Quebec Courts" (2000), 34 C.E.L.R. (N.S.) 162, at p. 174. Nevertheless, each level of government must be respectful of the division of powers that is the hallmark of our federal system; there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere. Ours is a legal inquiry informed by the environmental policy context, not the reverse.

I. Facts

5 The appellants are landscaping and lawn care companies operating mostly in the region of greater Montreal, with both commercial and residential clients. They make regular use of pesticides approved by the federal Pest Control Products Act, R.S.C. 1985, c. P-9, in the course of their business activities and hold the requisite licences under Quebec's Pesticides Act, R.S.Q., c. P-9.3.

6 The respondent, the Town of Hudson ("the Town"), is a municipal corporation governed by the Cities and Towns Act, R.S.Q., c. C-19 ("C.T.A."). It is located about 40 kilometres west of Montreal and has a population of approximately 5,400 people, some of whom are clients of the appellants. In 1991, the Town adopted By-law 270, restricting the use of pesticides within its perimeter to specified locations and for enumerated activities. The by-law responded to residents' concerns, repeatedly expressed since 1985. The residents submitted numerous letters and comments to the Town's Council. The definition of pesticides in By-law 270 replicates that of the Pesticides Act.

7 In November 1992, the appellants were served with a summons by the Town to appear before the Municipal Court and respond to charges of having used pesticides in violation of By-law 270. The appellants pled not guilty and obtained a suspension of proceedings in order to bring a motion for declaratory judgment before the Superior Court (under art. 453 of Quebec's Code of Civil Procedure, R.S.Q., c. C-25). They asked that the court declare By-law 270 (as well as By-law 248, which is not part of this appeal) to be inoperative and ultra vires the Town's authority.

8 The Superior Court denied the motion for declaratory judgment, finding that the by-laws fell within the scope of the Town's powers under the C.T.A. This ruling was affirmed by a unanimous Quebec Court of Appeal.

II. Relevant Statutory Provisions

9 Town of Hudson By-law 270

> 1. The following words and expressions, whenever the same occur in this By-Law, shall have the following meaning:
>
> a) "PESTICIDES": means any substance, matter or micro-organism intended to control, destroy, reduce, attract or repel, directly or indirectly, an organism which is noxious, harmful or annoying for a human being, fauna, vegetation, crops or other goods or intended to regulate the growth of vegetation, excluding medicine or vaccine;
> b) "FARMER": means a farm producer within the meaning of the Farm Producers Act (R.S.Q., chap., P-28);
>
> ...
>
> 2. The spreading and use of a pesticide is prohibited throughout the territory of the Town.
> 3. Notwithstanding article 2, it is permitted to use a pesticide in the following cases:
>
> a) in a public or private swimming-pool;
> b) to purify water intended for the use of human beings or animals;
> c) inside of a building;
> d) to control or destroy animals which constitute a danger for human beings;
> e) to control or destroy plants which constitute a danger for human beings who are allergic thereto.

4. Notwithstanding article 2, a farmer using a pesticide on an immoveable which is exploited for purposes of agriculture or horticulture, in a hot house or in the open, is requested to

   a) register, by written declaration, with the Town, in the month of march of each year, the products which he stores and which he will be using during that year.
   b) also provide, in the written declaration at article 4 a), the schedule of application of said products and the area(s) of his property where the products will be applied.

5. Notwithstanding article 2, it is permitted to use a pesticide on a golf course, for a period not exceeding five (5) years from the date this by-law comes into force:

...

6. Notwithstanding article 2, it is permitted to use a biological pesticide to control or destroy insects which constitute a danger or an inconvenience for human beings.

...

10. For the purpose of article 8 of the Agricultural Abuses Act (R.S.Q. chap. A-2) an inspector designated by the Town may use a pesticide, notwithstanding article 2 of the By-Law, if there is no other efficient way of destroying noxious plants determined as such by the Provincial Government and the presence of which is harmful to a real and continuous agricultural exploitation.

Cities and Towns Act, R.S.Q., c. C-19

410. The council may make by-laws:

(1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter;

...

In no case may the council make by-laws on the matters contemplated in the Agricultural Products, Marine Products and Food Act (chapter P-29) or in the Dairy Products and Dairy Products Substitutes Act (chapter P-30). This paragraph applies notwithstanding any provision of a special Act granting powers on those matters to any municipality other than Ville de Trois-Rivières and Ville de Sherbrooke.

...

412. The council may make by-laws:

...

(32) To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom;

By-laws passed under the first paragraph in respect of corrosive, toxic or radioactive materials require the approval of the Minister of the Environment;

...

463.1 Subject to the Pesticides Act (chapter P-9.3) and the Environment Quality Act (chapter Q-2), the municipality may, with the consent of the owner of an immovable, carry out pesticide application works on the immovable.

Pesticides Act, R.S.Q., c. P-9.3

102. The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community.

102. [As revised in 1993; not yet in force] The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision

-- concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

-- prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

...

105. [Not yet in force] The Government shall enact by regulation a Pesticide Management Code which may prescribe rules, restrictions or prohibitions respecting activities related to the distribution, storage, transportation, sale or use of any pesticide, pesticide container or any equipment used for any of those activities.

105.1. [Not yet in force] The Pesticide Management Code may require a person who stores pesticides of a determined category or in a determined quantity to subscribe civil liability insurance, the kind, extent, duration, amount and other

applicable conditions of which are determined in the said Code, and to furnish proof thereof to the Minister.

106. [Not yet in force] The Pesticide Management Code may cause any rule elaborated by another government or by a body to be mandatory.

In addition, the code may cause any instructions of the manufacturer of a pesticide or of equipment used for any activity referred to in the code to be mandatory.

107. [Not yet in force] The Government may prescribe that the contravention of the provisions of this code which it determines constitutes an offence.

Pest Control Products Act, R.S.C. 1985, c. P-9

4. (1) No person shall manufacture, store, display, distribute or use any control product under unsafe conditions.

...

(3) A control product that is not manufactured, stored, displayed, distributed or used as prescribed or that is manufactured, stored, displayed, distributed or used contrary to the regulations shall be deemed to be manufactured, stored, displayed, distributed or used contrary to subsection (1).

...

6. (1) The Governor in Council may make regulations

...

(j) respecting the manufacture, storage, distribution, display and use of any control product;

Pest Control Products Regulations, C.R.C. 1978, c. 1253

45. (1) No person shall use a control product in a manner that is inconsistent with the directions or limitations respecting its use shown on the label.

(2) No person shall use a control product imported for the importer's own use in a manner that is inconsistent with the conditions set forth on the importer's declaration respecting the control product.

(3) No person shall use a control product that is exempt from registration under paragraph 5(a) for any purpose other than the manufacture of a registered control product.

III. Judgments

A. Superior Court (1993), 19 M.P.L.R. (2d) 224

10 Kennedy J. held that by-laws are presumed valid and legal. He found that By-laws 248 and 270 were adopted under s. 410 C.T.A. and, thus, did not require ministerial approval to enter into effect. Both by-laws deal with pesticides and not toxic substances and since "pesticides" are not included in s. 412(32), ministerial approval is not required. According to Kennedy J., the Town, faced with a situation involving health and the environment, acted in the public interest by enacting the by-laws in question. Consequently, the Town could rely on s. 410(1) C.T.A. as the legislative provision that enabled it to adopt these by-laws.

11 Kennedy J. then considered the provisions of the Pesticides Act to determine whether the by-laws conflicted with provincial legislation. He found it clear that the Pesticides Act was enacted with the intention to allow municipalities to adopt by-laws of this nature. In this regard, Kennedy J. cited ss. 102 and 105 to 107 of the Pesticides Act, which envision the creation of a Pesticide Management Code allowing the provincial government to restrict or prohibit pesticides. Section 102 of that Act states that the provisions of the Code are to take precedence over inconsistent by-laws. Yet, given that the Code had yet to come into force, nothing prohibited municipalities from regulating pesticide use in the interim. Kennedy J. thus concluded that there was no conflict between the by-laws and provincial or federal legislation.

B. Court of Appeal, [1998] Q.J. No. 2546 (QL)

12 Before the Court of Appeal, the Town conceded that By-law 248 was inoperative. Thus, only By-law 270 was at issue. The appellants challenged Kennedy J.'s ruling on two grounds. First, they argued that By-law 270 was inoperative given that it was incompatible with the Pesticides Act. Second, the appellants contended that since the regulation of toxic substances was covered by s. 412(32) C.T.A., Kennedy J. erred in finding that the by-law was enacted under s. 410(1) C.T.A. While the latter provision allows a municipality to enact by-laws considered necessary for public health and welfare, s. 412(32) C.T.A. is concerned with "toxic" materials, and states that by-laws addressing this subject matter require approval from the Minister of the Environment. Given that the Town did not obtain such approval when it enacted By-law 270, the appellants argued that the by-law was invalid.

13 The Court of Appeal, per Delisle J.A., accepted the Town's position that By-law 270 was enacted under s. 410(1) C.T.A. In reaching this conclusion, the court noted that By-law 270 repeated the definition of "pesticide" that is found in the Pesticides Act. This definition makes no reference to terms used in s. 412(32) or to toxicity. Moreover, the C.T.A. itself does not discuss whether pesticides are "toxic ... materials", nor does it require ministerial approval for regulations relating to pesticides. No evidence was submitted concerning the toxic character of pesticides. The Court of Appeal also held that By-law 270 furthered the objectives set out in s. 410(1) C.T.A. It reiterated the statements of Kennedy J. that by-laws are presumed to be valid and legal and that there is a presumption that legislators act in good faith and in the public interest. It found that s. 410(1) is a very general enabling clause and must receive a liberal interpretation.

14 The court agreed with Kennedy J.'s finding that the by-law was enacted by the Town in the public interest and in response to health concerns expressed by residents. The court noted that these concerns were recorded in the Town Council's meeting minutes and manifested themselves in letters

to Council, as well as a petition with more than 300 signatures. Moreover, the Court of Appeal recognized that s. 410 C.T.A. describes when a municipality may not act under its general governance powers. By-laws on subjects contemplated in the Pesticides Act were not included in this list of unauthorized areas of regulation. The appellants argued that s. 410(1) does not permit the Town to ban pesticides. The Court of Appeal held that an absolute ban would be forbidden, but that the by-law does not impose an absolute ban.

15 The Court of Appeal then examined whether By-law 270 was in conflict with the Pesticides Act and thus inoperative. It found that s. 102 of the Pesticides Act -- which states that the Pesticide Management Code and all regulations of the Pesticides Act take precedence over any incompatible municipal by-law -- contemplated municipal regulation of pesticide use. The court also commented that the revised version of s. 102, as well as ss. 105 to 107 regarding the Pesticide Management Code, had yet to be enacted. As a result, it held that, as opposed to a real conflict, a potential future incompatibility between the by-law and the Code did not suffice to render the by-law inoperative.

16 Finally, the Court of Appeal noted that, although not yet in force, the revised version of s. 102 of the Pesticides Act allows municipalities to adopt by-laws concerning pesticides, so long as these are not incompatible with the Pesticide Management Code. At the same time, even if such incompatibility arises, the by-laws can continue to be operative if they relate to landscaping activities, or if they aim to prevent or reduce injury or damage to people, animals, the environment or property. As such, this new regime would enable municipalities to enact by-laws that are more restrictive than the provisions set out in the provincial Pesticide Management Code. Based on these reasons, the Court of Appeal dismissed the appeal, holding that By-law 270 was validly enacted and operative.

IV. Issues

17 There are two issues raised by this appeal:

(1) Did the Town have the statutory authority to enact By-law 270?
(2) Even if the Town had authority to enact it, was By-law 270 rendered inoperative because of a conflict with federal or provincial legislation?

V. Analysis

A. Did the Town Have the Statutory Authority to Enact By-law 270?

18 In R. v. Sharma, [1993] 1 S.C.R. 650, at p. 668, this Court recognized "the principle that, as statutory bodies, municipalities 'may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those indispensable powers essential and not merely convenient to the effectuation of the purposes of the corporation' (Makuch, Canadian Municipal and Planning Law (1983), at p. 115)". Included in this authority are "general welfare" powers, conferred by provisions in provincial enabling legislation, on which municipalities can draw. As I. M. Rogers points out, "the legislature cannot possibly foresee all the powers that are necessary to the statutory equipment of its creatures... . Undoubtedly the inclusion of 'general welfare' provisions was intended to circumvent, to some extent, the effect of the doctrine of ultra vires which puts the municipalities in the position of having to point to an express grant of authority to justify each corporate act" (The Law of Canadian Municipal Corporations (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at p. 367).

19 Section 410 C.T.A. is an example of such a general welfare provision and supplements the specific grants of power in s. 412. More open-ended or "omnibus" provisions such as s. 410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see Municipal Government Act, S.A. 1994, c. M-26.1, ss. 3(c) and 7; Local Government Act, R.S.B.C. 1996, c. 323, s. 249; Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; Municipalities Act, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; Municipal Government Act, S.N.S. 1998, c. 18, s. 172; Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; Municipal Act, R.S.O. 1990, c. M.45, s. 102; Municipal Act, R.S.Y. 1986, c. 119, s. 271.

20 While enabling provisions that allow municipalities to regulate for the "general welfare" within their territory authorize the enactment of by-laws genuinely aimed at furthering goals such as public health and safety, it is important to keep in mind that such open-ended provisions do not confer an unlimited power. Rather, courts faced with an impugned by-law enacted under an "omnibus" provision such as s. 410 C.T.A. must be vigilant in scrutinizing the true purpose of the by-law. In this way, a municipality will not be permitted to invoke the implicit power granted under a "general welfare" provision as a basis for enacting by-laws that are in fact related to ulterior objectives, whether mischievous or not. As a Justice of the Ontario Divisional Court, Cory J. commented instructively on this subject in Re Weir and The Queen (1979), 26 O.R. (2d) 326 (Div. Ct.), at p. 334. Although he found that the City of Toronto's power to regulate matters pertaining to health, safety and general welfare (conferred by the Municipal Act, R.S.O. 1970, c. 284, s. 242) empowered it to pass a by-law regulating smoking in public retail shops, Cory J. also made the following remark about the enabling provision: "There is no doubt that a by-law passed pursuant to the provisions of s. 242 must be approached with caution. If such were not the case, the municipality could be deemed to be empowered to legislate in a most sweeping manner."

21 Within this framework, I turn now to the specifics of the appeal. As a preliminary matter, I agree with the courts below that By-law 270 was not enacted under s. 412(32) C.T.A. This provision authorizes councils to "make by-laws: To regulate or prohibit the storage and use of gun-powder, dry pitch, resin, coal oil, benzine, naphtha, gasoline, turpentine, gun-cotton, nitro-glycerine, and other combustible, explosive, corrosive, toxic or radioactive or other materials that are harmful to public health or safety, in the territory of the municipality or within 1 km therefrom" (emphasis added). In replicating the definition of "pesticides" found in the provincial Pesticides Act, By-law 270 avoids falling under the ambit of s. 412(32). There is no equation of pesticides and "toxic ... materials" either in the terms of the by-law or in any evidence presented during this litigation. The provincial government did not consider By-law 270 to fall under s. 412(32): see letter of July 5, 1991 from the Deputy Minister of the Environment. As Y. Duplessis and J. Hétu state in Les pouvoirs des municipalités en matière de protection de l'environnement (2nd ed. 1994), at p. 110,

> [TRANSLATION] ... these subsections concerning "corrosive, toxic or radioactive materials" in no way limit the other more general powers granted to municipalities that could justify municipal intervention in relation to pesticides.

As a result, since there is no specific provision in the provincial enabling legislation referring to pesticides, the by-law must fall within the purview of s. 410(1) C.T.A. The party challenging a by-law's validity bears the burden of proving that it is ultra vires: see Kuchma v. Rural Municipality

of Tache, [1945] S.C.R. 234, at p. 239, and Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368, at p. 395.

22 The conclusion that By-law 270 does not fall within the purview of s. 412(32) C.T.A. distinguishes this appeal from R. v. Greenbaum, [1993] 1 S.C.R. 674. In that case, various express provisions of the provincial enabling legislation at issue covered the regulation of Toronto sidewalks. The appellant was therefore trying to expand the ambit of these specific authorizations by recourse to the "omnibus" provision in Ontario's Municipal Act. Moreover, that provision, s. 102, stated that "[e]very council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act as may be deemed expedient and are not contrary to law ... ." (emphasis added). The Court thus held in Greenbaum, at p. 693, that "[t]hese express powers are ... taken out of any power included in the general grant of power". Since the C.T.A. contains no such specific provisions concerning pesticides (nor a clause limiting its purview to matters not specifically provided for in the Act) the "general welfare" provision of the C.T.A., s. 410(1), is not limited in this fashion.

23 Section 410(1) C.T.A. provides that councils may make by-laws:

> (1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter.

In Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, 2000 SCC 13, at para. 36, this Court quoted with approval the following statement by McLachlin J. (as she then was) in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in Greenbaum, and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives. [Emphasis added.]

24 The appellants argue that By-law 270 imposes an impermissible absolute ban on pesticide use. They focus on s. 2 of the by-law, which states that: "The spreading and use of a pesticide is prohibited throughout the territory of the Town." In my view, the by-law read as a whole does not impose such a prohibition. By-law 270's ss. 3 to 6 state locations and situations for pesticide use. As one commentary notes, "by-laws like Hudson's typically target non-essential uses of pesticides. That is, it is not a total prohibition, but rather permits the use of pesticides in certain situations where the use of pesticides is not purely an aesthetic pursuit (e.g. for the production of crops)": Swaigen, supra, at p. 178.

25 The appellants further submit that the province's adoption in 1997 of s. 463.1 C.T.A., which states that a municipality may get permission to introduce pesticides onto private property, indicates, by virtue of the principle of expressio unius est exclusio alterius (express mention of one is the exclusion of the other), that the province did not intend to allow municipal regulation of pesticides. I find this argument to be without merit, since, even if this subsequent enactment were considered to instantiate prior legislative intent, there is absolutely no implication in s. 463.1 C.T.A., a permissive provision, that it is meant to exhaust municipalities' freedom of action concerning pesticides.

26 In Shell, supra, at pp. 276-77, Sopinka J. for the majority quoted the following with approval from Rogers, supra, s. 64.1:

> In approaching a problem of construing a municipal enactment a court should endeavour firstly to interpret it so that the powers sought to be exercised are in consonance with the purposes of the corporation. The provision at hand should be construed with reference to the object of the municipality: to render services to a group of persons in a locality with a view to advancing their health, welfare, safety and good government.

In that case, Sopinka J. enunciated the test of whether the municipal enactment was "passed for a municipal purpose". Provisions such as s. 410(1) C.T.A., while benefiting from the generosity of interpretation discussed in Nanaimo, supra, must have a reasonable connection to the municipality's permissible objectives. As stated in Greenbaum, supra, at p. 689: "municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not impinge upon the civil or common law rights of citizens in passing ultra vires by-laws".

27 Whereas in Shell, the enactments' purpose was found to be "to affect matters beyond the boundaries of the City without any identifiable benefit to its inhabitants" (p. 280), that is not the case here. The Town's By-law 270 responded to concerns of its residents about alleged health risks caused by non-essential uses of pesticides within Town limits. Unlike Shell, in which the Court felt bound by the municipal enactments' "detailed recital of ... purposes" (p. 277), the by-law at issue requires what Sopinka J. called the reading in of an implicit purpose. Based on the distinction between essential and non-essential uses of pesticides, it is reasonable to conclude that the Town by-law's purpose is to minimize the use of allegedly harmful pesticides in order to promote the health of its inhabitants. This purpose falls squarely within the "health" component of s. 410(1). As R. Sullivan appositely explains in a hypothetical example illustrating the purposive approach to statutory interpretation:

> Suppose, for example, that a municipality passed a by-law prohibiting the use of chemical pesticides on residential lawns. With no additional information, one might well conclude that the purpose of this by-law was to protect persons from health hazards contained in the chemical spray. This inference would be based on empirical beliefs about the harms chemical pesticides can cause and the risks of exposure created by their use on residential lawns. It would also be based on assumptions about the relative value of grass, insects and persons in society and the desirability of possible consequences of the by-law, such as putting peo-

> ple out of work, restricting the free use of property, interfering with the conduct of businesses and the like. These assumptions make it implausible to suppose that the municipal council was trying to promote the spread of plant-destroying insects or to put chemical workers out of work, but plausible to suppose that it was trying to suppress a health hazard.
>
> (Driedger on the Construction of Statutes (3rd ed. 1994), at p. 53)

Kennedy J. correctly found (at pp. 230-31) that the Town Council, "faced with a situation involving health and the environment", "was addressing a need of their community." In this manner, the municipality is attempting to fulfill its role as what the Ontario Court of Appeal has called a "trustee of the environment" (Scarborough v. R.E.F. Homes Ltd. (1979), 9 M.P.L.R. 255, at p. 257).

28 The appellants claim that By-law 270 is discriminatory and therefore ultravires because of what they identify as impermissible distinctions that affect their commercial activities. There is no specific authority in the C.T.A. for these distinctions. Writing for the Court in Sharma, supra, at p. 668, Iacobucci J. stated the principle that:

> ... in Montréal (City of) v. Arcade Amusements Inc., supra, this Court recognized that discrimination in the municipal law sense was no more permissible between than within classes (at pp. 405-6). Further, the general reasonableness or rationality of the distinction is not at issue: discrimination can only occur where the enabling legislation specifically so provides or where the discrimination is a necessary incident to exercising the power delegated by the province (Montréal (City of) v. Arcade Amusements Inc., supra, at pp. 404-6). [Emphasis added.]

See also Shell, supra, at p. 282; Allard Contractors Ltd. v. Coquitlam (District), [1993] 4 S.C.R. 371, at p. 413.

29 Without drawing distinctions, By-law 270 could not achieve its permissible goal of aiming to improve the health of the Town's inhabitants by banning non-essential pesticide use. If all pesticide uses and users were treated alike, the protection of health and welfare would be sub-optimal. For example, withdrawing the special status given to farmers under the by-law's s. 4 would work at cross-purposes with its salubrious intent. Section 4 thus justifiably furthers the objective of By-law 270. Having held that the Town can regulate the use of pesticides, I conclude that the distinctions impugned by the appellants for restricting their businesses are necessary incidents to the power delegated by the province under s. 410(1) C.T.A. They are "so absolutely necessary to the exercise of those powers that [authorization has] to be found in the enabling provisions, by necessary inference or implicit delegation"; Arcade Amusements, supra, at p. 414, quoted in Greenbaum, supra, at p. 695.

30 To conclude this section on statutory authority, I note that reading s. 410(1) to permit the Town to regulate pesticide use is consistent with principles of international law and policy. My reasons for the Court in Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 70, observed that "the values reflected in international human rights law may help inform the contextual approach to statutory interpretation and judicial review". As stated in Driedger on the Construction of Statutes, supra, at p. 330:

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

31 The interpretation of By-law 270 contained in these reasons respects international law's "precautionary principle", which is defined as follows at para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990):

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Canada "advocated inclusion of the precautionary principle" during the Bergen Conference negotiations (D. VanderZwaag, CEPA Issue Elaboration Paper No. 18, CEPA and the Precautionary Principle/Approach (1995), at p. 8). The principle is codified in several items of domestic legislation: see for example the Oceans Act, S.C. 1996, c. 31, Preamble (para. 6); Canadian Environmental Protection Act, 1999, S.C. 1999, c. 33, s. 2(1)(a); Endangered Species Act, S.N.S. 1998, c. 11, ss. 2(1)(h) and 11(1).

32 Scholars have documented the precautionary principle's inclusion "in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment" (D. Freestone and E. Hey, "Origins and Development of the Precautionary Principle", in D. Freestone and E. Hey, eds., The Precautionary Principle and International Law (1996), at p. 41. As a result, there may be "currently sufficient state practice to allow a good argument that the precautionary principle is a principle of customary international law" (J. Cameron and J. Abouchar, "The Status of the Precautionary Principle in International Law", in ibid., at p. 52). See also O. McIntyre and T. Mosedale, "The Precautionary Principle as a Norm of Customary International Law" (1997), 9 J. Env. L. 221, at p. 241 ("the precautionary principle has indeed crystallised into a norm of customary international law"). The Supreme Court of India considers the precautionary principle to be "part of the Customary International Law" (A.P. Pollution Control Board v. Nayudu, 1999 S.O.L. Case No. 53, at para. 27). See also Vellore Citizens Welfare Forum v. Union of India, [1996] Supp. 5 S.C.R. 241. In the context of the precautionary principle's tenets, the Town's concerns about pesticides fit well under their rubric of preventive action.

B. Even if the Town Had Authority to Enact it, Was By-law 270 Rendered Inoperative Because of a Conflict with Federal or Provincial Legislation?

33 This Court stated in Hydro-Québec, supra, at para. 112, that Oldman River, supra, "made it clear that the environment is not, as such, a subject matter of legislation under the Constitution Act, 1867. As it was put there, 'the Constitution Act, 1867 has not assigned the matter of "environment" sui generis to either the provinces or Parliament' (p. 63). Rather, it is a diffuse subject that cuts across many different areas of constitutional responsibility, some federal, some provincial (pp. 63-64)." As there is bijurisdictional responsibility for pesticide regulation, the appellants allege conflicts between By-law 270 and both federal and provincial legislation. These contentions will be examined in turn.

1. Federal Legislation

34 The appellants argue that ss. 4(1), 4(3) and 6(1)(j) of the Pest Control Products Act ("PCPA"), and s. 45 of the Pest Control Products Regulations allowed them to make use of the particular pesticide products they employed in their business practices. They allege a conflict between these legislative provisions and By-law 270. In Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at p. 187, Dickson J. (as he then was) for the majority of the Court reviewed the "express contradiction test" of conflict between federal and provincial legislation. At p. 191, he explained that "there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says 'yes' and the other says 'no'; 'the same citizens are being told to do inconsistent things'; compliance with one is defiance of the other". See also M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961, at paras. 17 and 40; Bank of Montreal v. Hall, [1990] 1 S.C.R. 121, at p. 151. By-law 270, as a product of provincial enabling legislation, is subject to this test.

35 Federal legislation relating to pesticides extends to the regulation and authorization of their import, export, sale, manufacture, registration, packaging and labelling. The PCPA regulates which pesticides can be registered for manufacture and/or use in Canada. This legislation is permissive, rather than exhaustive, and there is no operational conflict with By-law 270. No one is placed in an impossible situation by the legal imperative of complying with both regulatory regimes. Analogies to motor vehicles or cigarettes that have been approved federally, but the use of which can nevertheless be restricted municipally, well illustrate this conclusion. There is, moreover, no concern in this case that application of By-law 270 displaces or frustrates "the legislative purpose of Parliament". See Multiple Access, supra, at p. 190; Bank of Montreal, supra, at pp. 151 and 154.

2. Provincial Legislation

36 Multiple Access also applies to the inquiry into whether there is a conflict between the by-law and provincial legislation, except for cases (unlike this one) in which the relevant provincial legislation specifies a different test. The Multiple Access test, namely "impossibility of dual compliance", see P. W. Hogg, Constitutional Law of Canada (loose-leaf ed.), vol. 1, at p. 16-13, was foreshadowed for provincial-municipal conflicts in dicta contained in this Court's decision in Arcade Amusements, supra, at p. 404. There, Beetz J. wrote that "otherwise valid provincial statutes which are directly contrary to federal statutes are rendered inoperative by that conflict. Only the same type of conflict with provincial statutes can make by-laws inoperative: I. . Rogers, The Law of Canadian Municipal Corporations, vol. 1, 2nd ed., 1971, No. 63.16" (emphasis added).

37 One of the competing tests to Multiple Access suggested in this litigation is based on Attorney General for Ontario v. City of Mississauga (1981), 15 M.P.L.R. 212 (Ont. C.A.). In that case, decided before Multiple Access, Morden J.A. saw "no objection to borrowing, in this field, relevant principles of accommodation which have been developed in cases involving alleged federal-provincial areas of conflict. In both fields great care is, and should be, taken before it is held that an otherwise properly enacted law is inoperative" (p. 232). He added, at p. 233, the important point that "a by-law is not void or ineffective merely because it 'enhances' the statutory scheme of regulation by imposing higher standards of control than those in the related statute. This is not conflict or incompatibility per se" (quoting Township of Uxbridge v. Timber Bros. Sand & Gravel Ltd. (1975), 7 O.R. (2d) 484 (C.A.)). See also P.-A. Côté, The Interpretation of Legislation in Canada (3rd ed.

2000), at p. 353 ("In some cases, the courts have held that the provincial statute does not imply full repeal of the municipal power. The municipality retains its authority as long as there is no conflict with provincial legislation. It may be more demanding than the province, but not less so").

38 Some courts have already made use of the Multiple Access test to examine alleged provincial-municipal conflicts. For example, in British Columbia Lottery Corp. v. Vancouver (City) (1999), 169 D.L.R. (4th) 141, at pp. 147-48, the British Columbia Court of Appeal stated that cases pre-dating Multiple Access, including the Ontario Court of Appeal decision in Mississauga, supra, "must be read in the light of [that] decision".

> It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity. [Emphasis added.]

The court summarized the applicable standard as follows: "A true and outright conflict can only be said to arise when one enactment compels what the other forbids." See also Law Society of Upper Canada v. Barrie (City) (2000), 46 O.R. (3d) 620 (S.C.J.), at pp. 629-30: "Compliance with the provincial Act does not necessitate defiance of the municipal By-law; dual compliance is certainly possible"; Huot v. St-Jérôme (Ville de), J.E. 93-1052 (Sup. Ct.), at p. 19: [TRANSLATION] "A finding that a municipal by-law is inconsistent with a provincial statute (or a provincial statute with a federal statute) requires, first, that they both deal with similar subject matters and, second, that obeying one necessarily means disobeying the other."

39 As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter. As stated by the Quebec Court of Appeal in an informative environmental decision, St-Michel-Archange (Municipalité de) v. 2419-6388 Québec Inc., [1992] R.J.Q. 875 (C.A.), at pp. 888-91:

> [TRANSLATION] According to proponents of the unitary theory, although the provincial legislature has not said so clearly, it has nonetheless established a provincial scheme for managing waste disposal sites. It has therefore reserved exclusive jurisdiction in this matter for itself, and taken the right to pass by-laws concerning local waste management away from municipalities. The Environment Quality Act therefore operated to remove those powers from municipal authorities.
>
> According to proponents of the pluralist theory, the provincial legislature very definitely did not intend to abolish the municipality's power to regulate; rather, it intended merely to better circumscribe that power, to ensure complementarity with the municipal management scheme... .
>
> ...

> The pluralist theory accordingly concedes that the intention is to give priority to provincial statutory and regulatory provisions. However, it does not believe that it can be deduced from this that any complementary municipal provision in relation to planning and development that affects the quality of the environment is automatically invalid.
>
> ...
>
> A thorough analysis of the provisions cited supra and a review of the environmental policy as a whole as it was apparently intended by the legislature leads to the conclusion that it is indeed the pluralist theory, or at least a pluralist theory, that the legislature seems to have taken as the basis for the statutory scheme.

In this case, there is no barrier to dual compliance with By-law 270 and the Pesticides Act, nor any plausible evidence that the legislature intended to preclude municipal regulation of pesticide use. The Pesticides Act establishes a permit and licensing system for vendors and commercial applicators of pesticides and thus complements the federal legislation's focus on the products themselves. Along with By-law 270, these laws establish a tri-level regulatory regime.

40 According to s. 102 of the Pesticides Act, as it was at the time By-law 270 was passed: "The provisions of the Pesticide Management Code and of the other regulations of this Act prevail over any inconsistent provision of any by-law passed by a municipality or an urban community." Evidently, the Pesticides Act envisions the existence of complementary municipal by-laws. As Duplessis and Hétu, supra, at p. 109, put it, [TRANSLATION] "the Quebec legislature gave the municipalities the right to regulate pesticides, provided that the by-law was not incompatible with the regulations and the Management Code enacted under the Pesticides Act". Since no Pesticide Management Code has been enacted by the province under s. 105, the lower courts in this case correctly found that the by-law and the Pesticides Act could co-exist. In the words of the Court of Appeal, at p. 16: [TRANSLATION] "The Pesticides Act thus itself contemplated the existence of municipal regulation of pesticides, since it took the trouble to impose restrictions."

41 I also agree with the Court of Appeal at p. 16, that: [TRANSLATION] "A potential inconsistency is not sufficient to invalidate a by-law; there must be a real conflict". In this regard, the Court of Appeal quoted, at p. 17, St-Michel-Archange, supra, at p. 891, to the effect that: [TRANSLATION] "However, to the extent that and for as long as the provincial regulation is not in force, the municipal by-law continues to regulate the activity, provided, of course, that it complies with all the rules established by the law and the courts concerning its validity."

42 I note in conclusion that the 1993 revision to the Pesticide Act added a new s. 102 stating:

> The Pesticide Management Code and any other regulation enacted pursuant to this Act shall render inoperative any regulatory provision concerning the same matter enacted by a municipality or an urban community, except where the provision
>
> -- concerns landscaping or extermination activities, such as fumigation, as defined by government regulation, and

> -- prevents or further mitigates harmful effects on the health of humans or of other living species or damage to the environment or to property.

This revised language indicates more explicitly that the Pesticides Act is meant to co-exist with stricter municipal by-laws of the type at issue in this case. Indeed, the new s. 102, by including the word "health", echoes the enabling legislation that underpins By-law-270, namely s. 410(1) C.T.A. Once a Pesticide Management Code is enacted, municipalities will be able to draw on s. 102 in order to continue their independent regulation of pesticides. As Duplessis and Hétu, supra, explain at p. 111: [TRANSLATION] "the Quebec legislature has again recognized that municipalities have a role to play in pesticide control while at the same time indicating that it intends to make the municipal power subordinate to its own regulatory activity".

VI. Disposition

43 I have found that By-law 270 was validly enacted under s. 410(1) C.T.A. Moreover, the by-law does not render dual compliance with its dictates and either federal or provincial legislation impossible. For these reasons, I would dismiss the appeal with costs.

The reasons of Iacobucci, Major and LeBel JJ.were delivered by

LeBEL J.:--

Introduction

44 I agree with Justice L'Heureux-Dubé that the impugned by-law on pesticide use adopted by the respondent, the Town of Hudson, is valid. It does not conflict with relevant federal and provincial legislation on the use and control of pesticides and is a valid exercise of municipal regulatory power under s. 410(1) of the Cities and Towns Act, R.S.Q., c. C-19 ("C.T.A.").

45 I view this case as an administrative and local government law issue. Although I agree with L'Heureux-Dubé J. on the disposition of the appeal, I wish to add some comments on some of the problems raised by the appellants. First, I will discuss the alleged operational conflict with the regulatory and legislative systems put in place by other levels of government. I will then turn to the difficulties created by the use of broad provisions like s. 410 and the application of the general principles of administrative law governing delegated legislation.

The Operational Conflict

46 As its first line of attack against By-law 270 of the Town of Hudson, the appellants raise the issue of an operational conflict with the federal Pest Control Products Act, R.S.C. 1985, c. P-9, and the Pest Control Products Regulations, C.R.C. 1978, c. 1253. The appellants also assert that the by-law conflicts with the Quebec Pesticides Act, R.S.Q., c. P-9.3. As L'Heureux-Dubé J. points out, the applicable test to determine whether an operational conflict arises is set out in Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, at pp. 187 and 189. There must be an actual conflict, in the sense that compliance with one set of rules would require a breach of the other. This principle was recently reexamined and restated by Binnie J. in M & D Farm Ltd. v. Manitoba Agricultural Credit Corp., [1999] 2 S.C.R. 961, at paras. 39-42. The basic test remains the impossibility of dual compliance. From this perspective, the alleged conflict with federal legislation simply does not exist. The federal Act and its regulations merely authorize the importation, manufacturing, sale and distribution of the products in Canada. They do not purport to state where, when and how pesticides

could or should be used. They do not grant a blanket authority to pesticides' manufacturers or distributors to spread them on every spot of greenery within Canada. This matter is left to other legislative and regulatory schemes. Nor does a conflict exist with the provincial Pesticides Act, and I agree with L'Heureux-Dubé J.'s analysis on this particular point. The operational conflict argument thus fails.

The Administrative Law Issues

47 The most serious problems raised by the appeal involve pure administrative law issues. The appellants' arguments raise some basic issues of administrative law as applied in the field of municipal governance.

48 The appellants assert that no provision of the C.T.A. authorizes By-law 270. If such legislative authority exists, the by-law is nevertheless void because of its discriminatory and prohibitory nature. A solution is to be found in the principles governing the interpretation and application of the laws governing cities and towns like the respondent in the Province of Quebec. Interesting as they may be, references to international sources have little relevance. They confirm the general importance placed in modern society and shared by most citizens of this country on the environment and the need to protect it. Nevertheless, no matter how laudable the purpose of the by-law may be, and although it may express the will of the members of the community to protect their local environment, the means to do it must be found somewhere in the law. The issues in this case remain strictly, first, whether the C.T.A. authorizes municipalities to regulate the use of pesticides within their territorial limits and, second, whether the particular regulation conforms with the general principles applicable to delegated legislation.

49 A tradition of strong local government has become an important part of the Canadian democratic experience. This level of government usually appears more attuned to the immediate needs and concerns of the citizens. Nevertheless, in the Canadian legal order, as stated on a number of occasions, municipalities remain creatures of provincial legislatures (see Public School Boards' Assn. of Alberta v. Alberta (Attorney General), [2000] 2 S.C.R. 409, 2000 SCC 45, at paras. 33-34; Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General), [2001] 1 S.C.R. 470, 2001 SCC 15, at paras. 29 and 58-59). Municipalities exercise such powers as are granted to them by legislatures. This principle is illustrated by numerous decisions of our Court (see, for example, Montréal (City of) v. Arcade Amusements Inc., [1985] 1 S.C.R. 368; R. v. Sharma, [1993] 1 S.C.R. 650). They are not endowed with residuary general powers, which would allow them to exercise dormant provincial powers (see I. M. Rogers, The Law of Canadian Municipal Corporations (2nd ed. (loose-leaf)), Cum. Supp. to vol. 1, at pp. 358 and 364; J. Hétu, Y. Duplessis and D. Pakenham, Droit Municipal: Principes généraux et contentieux (1998), at p. 651). If a local government body exercises a power, a grant of authority must be found somewhere in the provincial laws. Although such a grant of power must be construed reasonably and generously (Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, 2000 SCC 13), it cannot receive such an interpretation unless it already exists. Interpretation may not supplement the absence of power.

50 The appellants argue that no power to regulate the use of pesticides was delegated to municipalities in Quebec, either under a specific grant of power or under the more general provisions of s. 410(1) C.T.A. The respondent concedes that the only provision under which its by-law can be upheld is the general clause of s. 410(1). It no longer asserts that it could be supported under s. 412(32) concerning toxic materials.

51 As the appellants interpret a general clause like s. 410 C.T.A., it would amount to an empty shell. Any exercise of municipal regulatory authority would require a specific and express grant of power. The history of the C.T.A. confirms that the Quebec legislature has generally favoured a drafting technique of delegating regulatory or administrative powers to municipalities through a myriad of specific provisions, which are amended frequently. The reader is then faced with layers of complex and sometimes inconsistent legislation.

52 In the case of a specific grant of power, its limits must be found in the provision itself. Non-included powers may not be supplemented through the use of the general residuary clauses often found in municipal laws (R. v. Greenbaum, [1993] 1 S.C.R. 674).

53 The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, Municipalities and Canadian Law: Defining the Authority of Local Governments (1996), at pp. 17-24).

54 In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was properly authorized by s. 410(1). I must then turn briefly to the second part of the administrative law argument raised by the appellants, that the particular exercise of the existing municipal power breached principles of delegated legislation against prohibitory and discriminatory regulations.

55 Two basic and longstanding principles of delegated legislation state that a by-law may not be prohibitory and may not discriminate unless the enabling legislation so authorizes. (See P. Garant, Droit administratif (4th ed. 1996), vol. 1, at pp. 407 et seq.; R. Dussault and L. Borgeat, Administrative Law: A Treatise (2nd ed. 1985), vol. 1, at pp. 435 et seq.; Hétu, Duplessis and Pakenham, supra, at pp. 677-82 and 691-96.) The drafting technique used in the present case creates an apparent problem. On its face, the by-law involves a general prohibition and then authorizes some specific uses. This obstacle may be overcome through global interpretation of the by-law. When it is read as a whole, its overall effect is to prohibit purely aesthetic use of pesticides while allowing other uses, mainly for business or agricultural purposes. It does not appear as a purely prohibitory legal instrument. As such, it conforms with this first basic principle of municipal law. There remains the problem of the discriminatory aspect of the by-law. Although the by-law discriminates, I

agree with L'Heureux-Dubé J. that this kind of regulation implies a necessary component of discrimination. There can be no regulation on such a topic without some form of discrimination in the sense that the by-law must determine where, when and how a particular product may be used. The regulation needed to identify the various distinctions between different situations. Otherwise, no regulation would have been possible. An implied authority to discriminate was then unavoidably part of the delegated regulatory power.

56 For these reasons, the appeal is dismissed, with costs to the respondent the Town of Hudson.

TAB 3

Case Name:

United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)

City of Calgary, appellant;
v.
United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd., respondents, and Attorney General of Alberta, intervener.

[2004] S.C.J. No. 19

[2004] A.C.S. no 19

2004 SCC 19

2004 CSC 19

[2004] 1 S.C.R. 485

[2004] 1 R.C.S. 485

236 D.L.R. (4th) 385

318 N.R. 170

[2004] 7 W.W.R. 603

J.E. 2004-733

26 Alta. L.R. (4th) 1

346 A.R. 4

12 Admin. L.R. (4th) 1

46 M.P.L.R. (3d) 1

50 M.V.R. (4th) 1

18 R.P.R. (4th) 1

129 A.C.W.S. (3d) 816

2004 CarswellAlta 355

File No.: 29321.

Supreme Court of Canada

Heard: December 8, 2003;
Judgment: March 25, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

(18 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Municipal law -- Bylaws -- Jurisdiction to pass bylaws -- Municipal bylaw regulating taxi industry by stipulating licence requirements and freezing number of licences -- Proper approach to interpretation of statutes empowering municipalities -- Whether bylaw ultra vires municipality under its governing legislation -- Municipal Government Act, S.A. 1994, c. M-26.1, ss. 7, 8, 9.

Administrative law -- Judicial review -- Standard of review applicable to decision of municipality delineating its jurisdiction.

Summary:

The City of Calgary regulates its taxi industry by virtue of the *Taxi Business Bylaw* which requires that all taxis have a taxi plate licence. In 1993, the bylaw froze the number of taxi plate licences issued. The following year, the provincial government enacted a new *Municipal Government Act*. The respondents challenged the validity of the freeze on the issuance of taxi plate licences on the basis that the freeze is *ultra vires* the City under its governing legislation, the *Municipal Government Act*. The trial judge held that the City had authority under the new Act to limit the number of taxi plate licences. A majority of the Court of Appeal reversed that decision.

Held: The appeal should be allowed.

The City of Calgary was authorized under the *Municipal Government Act* to enact the bylaw and to limit the number of taxi plate licences. Municipalities must always be correct in delineating their jurisdiction. Such questions will always be subject to a standard of review of correctness.

The evolution of the municipality has produced a shift in the proper approach to interpreting statutes that empower municipalities. A broad and purposive approach to the interpretation of municipal legislation reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes and is consistent with the Court's approach to statutory interpretation generally. The *Municipal Government Act* reflects the modern method of drafting municipal legislation which must be construed using this broad and purposive approach.

Under the *Municipal Government Act* the City still has the power to limit the issuance of taxi plate licences. There is no indication in the Act that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature sought to enhance the City's powers under the Act. Further, the respondents' narrow interpretation cannot be reconciled with the language of the Act. Section 7 which empowers municipalities to pass bylaws respecting business must be read with s. 8 of the Act illustrating some of the broad powers exercisable by a municipality. The power to limit the number of licences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. Thus, the City has the power under the Act to pass bylaws limiting the number of taxi plate licences.

Cases Cited

Referred to: Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342, 2000 SCC 13; Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; Merritt v. City of Toronto (1895), 22 O.A.R. 205.

Statutes and Regulations Cited

Alberta Bill of Rights, R.S.A. 2000, c. A-14, s. 1.

Canadian Charter of Rights and Freedoms, ss. 6, 7, 15.

Cities Act, S.S. 2002, c. C-11.1.

City of Calgary, Bylaw No. 91/77, Taxi Business Bylaw (April 18, 1977), ss. 7(1), 9.1(a), (b) [am. 23M93], 9.2(a), (b), 9.3(a).

Gaming and Liquor Act, R.S.A. 2000, c. G-1, s. 37(1)(d).

Interpretation Act, R.S.A. 2000, c. I-8, s. 10.

Municipal Act, R.S.Y. 2002, c. 154.

Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225.

Municipal Act, 2001, S.O. 2001, c. 25.

Municipal Government Act, R.S.A. 1980, c. M-26, ss. 234(1) [am. 1991, c. 23, s. 3(13)], (2)(a) [idem], (b) [idem], 8.

Municipal Government Act, S.A. 1994, c. M-26.1 [now R.S.A. 2000, c. 26], ss. 3, 7, 8, 9, 70-75, 715.

Municipal Government Act, S.N.S. 1998, c. 18.

Wildlife Act, R.S.A. 2000, c. W-10, s. 13(1)(a).

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Oxford English Dictionary, vol. XIII, 2nd ed. Oxford: Clarendon Press, 1989, "regulate".

Sullivan, Ruth. Sullivan and Driedger on the Construction of Statutes, 4th ed. Markham, Ont.: Butterworths, 2002.

History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal, [2002] 8 W.W.R. 51, 3 Alta. L.R. (4th) 211, 303 A.R. 249, 273 W.A.C. 249, 94 C.R.R. (2d) 290, 30 M.P.L.R. (3d) 155, [2002] A.J. No. 694 (QL), 2002 ABCA 131, reversing a judgment of the Court of Queen's Bench (1998), 60 Alta. L.R. (3d) 165, 217 A.R. 1, 45 M.P.L.R. (2d) 16, [1998] A.J. No. 1478 (QL), 1998 ABQB 184. Appeal allowed.

Counsel:

Leila J. Gosselin, Brand R. Inlow, Q.C., and R. Shawn Swinn, for the appellant.

Dale Gibson and Sandra Anderson, for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi.

No one appeared for the respondent Aero Cab Ltd.

Gabor I. Zinner, for the respondent Air Linker Cab Ltd.

Lorne Merryweather, for the intervener.

The judgment of the Court was delivered by

BASTARACHE J.:--

I. Overview

1 The City of Calgary (the "City") regulates its taxi industry by virtue of Bylaw No. 91/77, the *Taxi Business Bylaw* (the "bylaw"), which sets out several licensing requirements. Among them is a requirement that all taxi vehicles have a taxi plate licence. In 1986, the City's Taxi Commission adopted a restricted entry system for the taxi business to increase efficiency and stability, and accordingly froze the number of taxi plate licences. The freeze was continued in 1993 under s. 9.1 of the bylaw. Other sections of the bylaw permitted the transfer of licences and the creation of a lottery system to distribute revoked or relinquished licences. The following year, the provincial government enacted a new *Municipal Government Act*, S.A. 1994, c. M-26.1 (now R.S.A. 2000, c. M-26).

Section 715 of the new Act deemed the existing bylaw to have the same effect as if it had been passed under the new Act.

2 The respondents, the United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal, Haringer Singh Dhesi, Aero Cab Ltd. and Air Linker Cab Ltd., challenged the validity of the freeze and the lottery process. The respondents sought a declaration that the City's actions were: *ultra vires* the City's governing legislation, the *Municipal Government Act*; a violation of the common law rule prohibiting municipalities from enacting discriminatory legislation; and an unconstitutional violation of their mobility rights, their right to liberty and their right to be free from discrimination as guaranteed by ss. 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The only issue before this Court is whether the City's freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*.

3 The trial judge concluded that the City had the authority under the *Municipal Government Act* to limit the number of taxi plate licences: (1998), 60 Alta. L.R. (3d) 165, 1998 ABQB 184. The majority of the Court of Appeal disagreed: [2002] 8 W.W.R. 51, 2002 ABCA 131. Wittmann J.A., writing for the majority, concluded that while the old *Municipal Government Act* expressly granted the City the power to limit the number of taxi plate licences, the new Act did not. O'Leary J.A., in dissent, held that the new *Municipal Government Act* expressly and impliedly authorized the limit on the issuance of taxi plate licences.

II. Relevant Statutory Provisions

4 City of Calgary, Bylaw No. 91/77 (*Taxi Business Bylaw*)

7. (1) The Commission may limit the number of taxi licenses, which may be issued in any one-license period.

...

9.1 (a) The prohibition on the issuance of any new taxi licenses for the operation of a regular class taxi instituted by the Taxi Commission as of February 6, 1986, and continued by the Taxi Commission up to the date of the passage of this Bylaw, is hereby continued and the Taxi Commission shall issue no new licenses for the operation of a regular class taxi but only renew to licensees, in accordance with the Taxi Business Bylaw, such regular class taxi licenses as were issued to such licensees for the previous license year.

(b) Notwithstanding subsection (a) the Taxi Commission may issue licenses in accordance with the lottery provisions described in Section 9(28) ... .

9.2 (a) "immediate family member" means the spouse, siblings or children of the taxi licensee.

(b) Notwithstanding section 9(15) a taxi license held by a deceased taxi licensee shall be capable of being transferred to the estate of the deceased licensee, or to an immediate family member of the deceased, if the transfer occurs without remuneration from the estate of the deceased to the transferee.

...

9.3 (a) The licensee of a taxi license shall not transfer or otherwise dispose of a taxi license unless:

(1) the licensee does so in accordance with this Bylaw and the regulations; and
(2) the licensee pays the license transfer fee as set out in this Bylaw.

Municipal Government Act, R.S.A. 1980, c. M-26

234(1) A council may pass by-laws licensing, regulating and controlling the taxi and limousine business.

(2) Without restricting the generality of the foregoing a council may pass by-laws to

(a) establish and specify the rates or fares that may be charged for hire of taxis and limousines;
(b) limit the number of taxi and limousine licences that may be issued in the municipality having regard to its population or the area to be served in it or by any other means the council considers to be just and equitable;

...

(8) A council, by by-law, may establish a commission to be known as the taxi commission

(a) which shall be composed of the number of resident electors the council selects including, if it seems desirable, any members of council or officials of the municipality who are considered appropriate, and
(b) which may exercise any power or make any decisions which the council may make pursuant to this section as the by-law provides.

Municipal Government Act, S.A. 1994, c. M-26.1

3 The purposes of a municipality are

(a) to provide good government,

(b) to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality, and
(c) to develop and maintain safe and viable communities.

...

7 A council may pass bylaws for municipal purposes respecting the following matters:

(a) the safety, health and welfare of people and the protection of people and property;

...

(d) transport and transportation systems;
(e) businesses, business activities and persons engaged in business; ...

8 Without restricting section 7, a council may in a bylaw passed under this Division

(a) regulate or prohibit;
(b) deal with any development, activity, industry, business or thing in different ways, divide each of them into classes and deal with each class in different ways;
(c) provide for a system of licences, permits or approvals, including ... :

...

(iii) prohibiting any development, activity, industry, business or thing until a licence, permit or approval has been granted;

(iv) providing that terms and conditions may be imposed on any licence, permit or approval, the nature of the terms and conditions and who may impose them;

(v) setting out the conditions that must be met before a licence, permit or approval is granted or renewed, the nature of the conditions and who may impose them;
(vi) providing for the duration of licences, permits and approvals and their suspension or cancellation for failure to comply with a term or condition of the bylaw or for any other reason specified in the bylaw;

...

9 The power to pass bylaws under this Division is stated in general terms to

(a) give broad authority to councils and to respect their right to govern municipalities in whatever way the councils consider appropriate, within the jurisdiction given to them under this or any other enactment, and
(b) enhance the ability of councils to respond to present and future issues in their municipalities.

...

715 A bylaw passed by a council under the former *Municipal Government Act* ... continues with the same effect as if it had been passed under this Act.

III. Analysis

A. *The Standard of Review*

5 The only question in this case is whether the freeze on the issuance of taxi plate licences was *ultra vires* the City under the *Municipal Government Act*. M unicipalities do not possess any greater institutional competence or expertise than the courts in delineating their jurisdiction. Such a question will always be reviewed on a standard of correctness: *Nanaimo (City) v. Rascal Trucking Ltd.*, [2000] 1 S.C.R. 342 , 2000 SCC 13, at para. 29. There is no need to engage in the pragmatic and functional approach in a review for *vires*; such an inquiry is only required where a municipality's adjudicative or policy-making function is being exercised.

B. *The Proper Approach to the Interpretation of Municipal Powers*

6 The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in *Shell Canada Products Ltd. v. Vancouver (City)*, [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: *Nanaimo, supra*, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: *The Municipal Act*, S.M. 1996, c. 58, C.C.S.M. c. M225; *Municipal Government Act*, S.N.S. 1998, c. 18; *Municipal Act*, R.S.Y. 2002, c. 154; *Municipal Act, 2001*, S.O. 2001, c. 25; *The Cities Act*, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: *Shell Canada*, at pp. 238 and 245.

7 Alberta's *Municipal Government Act* follows the modern method of drafting municipal legislation. The legislature's intention to enhance the powers of its municipalities by drafting the bylaw passing provisions of the Act in broad and general terms is expressly stated in s. 9. Accordingly, to determine whether a municipality is authorized to exercise a certain power, such as limiting the issuance of taxi plate licences, the provisions of the Act must be construed in a broad and purposive manner.

8 A broad and purposive approach to the interpretation of municipal legislation is also consistent with this Court's approach to statutory interpretation generally. The contextual approach requires "the words of an Act ... to be read in their entire context and in their grammatical and ordi-

nary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26. This approach is also consistent with s. 10 of Alberta's *Interpretation Act*, R.S.A. 2000, c. I-8, which provides that every provincial enactment must be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

C. *The City's Power to Limit the Number of Licences*

9 The respondents argue that the City does not have the power to limit the number of taxi plate licences under the Act. They submit that the authority to regulate has never implied numerical limits and that ss. 7 and 8 of the current *Municipal Government Act*, unlike s. 234 of the previous *Municipal Government Act*, neither expressly nor impliedly grant a municipality the power to limit the number of taxi plate licences. The respondents argue that while the Act expands the "matters" over which municipalities may enact bylaws under s. 7, the Act limits the "powers" exercisable by municipalities to those expressly specified. As the power to limit the number of taxi plate licences is not expressly specified in s. 8, the respondents allege it has been abolished.

10 In my respectful opinion, the respondents' argument must fail.

11 It is well established that the legislature is presumed not to alter the law by implication: *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at p. 395. Rather, where it intends to depart from prevailing law, the legislature will do so expressly. Here, there is no indication in the Act that the legislature intended to remove the municipality's power to limit the number of taxi plate licences. To the contrary, s. 9(b) indicates that the legislature did not intend to curtail the powers exercised by municipalities but rather sought to enhance those powers under the new Act subject to the limitations in ss. 70 to 75, which do not preclude limiting the number of taxi licences. It is inconceivable, in my view, that the legislature would have intended to indirectly limit the ability of municipalities to regulate the taxi industry according to a practice dating 15 years and to adopt the restrictive approach defined in *Merritt v. City of Toronto* (1895), 22 O.A.R. 205, at pp. 207-8, simply by changing its method of drafting legislation. The new method was in fact specifically designed to avoid the need for listing specific matters and powers. Accordingly, a provision explicitly limiting the number of licences such as s. 13(1)(a) of the *Wildlife Act*, R.S.A. 2000, c. W-10, and s. 37(1)(d) of the *Gaming and Liquor Act*, R.S.A. 2000, c. G-1, is unnecessary.

12 The respondents' narrow interpretation cannot be reconciled with the language of the Act. According to the respondents, the broad authority conferred on municipalities only applies to s. 7 which deals exclusively with matters and not to s. 8 which deals exclusively with powers. I disagree. First, s. 9 clearly states that the power to pass bylaws is stated in general terms to "give broad authority" in respect of matters attributed to them. Second, to accept this matter/power distinction renders the opening words of s. 8, "[w]ithout restricting section 7", useless. Rather, ss. 7 and 8 must be read together, as one is without restriction to the other. Section 8 is supplementary to s. 7 and speaks of the "broad authority" mentioned in s. 9. On this reading of ss. 7, 8 and 9 the respondents' interpretation must be rejected because their narrow and literal approach to s. 8 effectively restricts s. 7, which grants the power to regulate businesses.

13 Applying a broad and purposive interpretation, ss. 7 and 8 grant the City the power to pass bylaws limiting the number of taxi plate licences. As discussed, s. 8 supplements s. 7 by illustrating some of the broad powers exercisable by a municipality. Here the power to limit the number of li-

cences could fall under either s. 8(a), the power to regulate, or s. 8(c), the power to provide for a system of licences. To "regulate", as defined in the *Oxford English Dictionary* (2nd ed. 1989), vol. XIII, is "subject to ... restrictions". Thus, as O'Leary J.A. in dissent aptly stated, the "jurisdiction to regulate the taxi business necessarily implies the authority to limit the number of TPLs [taxi plate licences] issued": para. 202. This accords with the legislative history.

14 The power to limit the issuance of licences also falls under the power to provide for a system of licences under s. 8(c). Sections 8(c)(i) through (vi) represent some of the types of bylaws that provide for a system of licences. The use of the word "including" indicates that the list is non-exhaustive; therefore, any type of bylaw that is consistent with the list is authorized. There is clearly no room for the application of the *expressio unius est exclusio alterius* principle advocated by the respondents. Common to each of the provisions is the power to impose limitations on licences such as setting out the conditions that must be satisfied before a licence is granted or renewed. The bylaw limiting the number of taxi plate licences is consistent with the examples provided as it also imposes a specific limit on a licensed activity.

15 The respondents have also argued that the bylaw is inconsistent with the right to enjoyment of property protected by the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14, s. 1, and with s. 3 of the *Municipal Government Act* which provides that the purposes of municipalities are good governance and the development and maintenance of safe and viable communities. Both arguments relate to the effects of the bylaw which the respondents allege have transformed taxi licences into an expensive commodity benefiting a small group of brokers.

16 As noted earlier in these reasons, there is no challenge before this Court to the legislation based on the *Charter* and no record to support the allegation now being made that the *Alberta Bill of Rights* has been breached. This Court in *Bell ExpressVu, supra*, at para. 62, held that absent any challenge on constitutional grounds, courts are bound to interpret and apply statutes in accordance with the sovereign intent of the legislature. In this case, I find no ambiguity in the legislation that would bring me to consider whether the Act is reflective of *Charter* values and no reason to question the authority of the Council for the City of Calgary to decide the best interests of its citizens in the regulation of the taxi industry. Here, as in *Bell ExpressVu*, some citizens are affected by the restrictions imposed, but this has no bearing on the jurisdiction of the municipal government to regulate.

17 Accordingly, the City of Calgary was authorized under the Act to enact Bylaw 91/77.

IV. Conclusion

18 The appeal is allowed with costs throughout.

Solicitors:

Solicitor for the appellant: City of Calgary Law Department, Calgary.

Solicitors for the respondents United Taxi Drivers' Fellowship of Southern Alberta, Rashpal Singh Gosal and Haringer Singh Dhesi: Dale Gibson & Associates, Edmonton.

Solicitors for the respondent Air Linker Cab Ltd.: Zinner & Sara, Calgary.

Solicitor for the intervener: Attorney General of Alberta, Edmonton.

TAB 4

Case Name:

Croplife Canada v. Toronto (City)

Between
Croplife Canada, appellant, and
City of Toronto, respondent

[2005] O.J. No. 1896

75 O.R. (3d) 357

254 D.L.R. (4th) 40

198 O.A.C. 35

14 C.E.L.R. (3d) 207

10 M.P.L.R. (4th) 1

2005 CanLII 15709

139 A.C.W.S. (3d) 368

2005 CarswellOnt 1877

Docket: C41220

Ontario Court of Appeal
Toronto, Ontario

S.T. Goudge, K.N. Feldman and S.E. Lang JJ.A.

Heard: November 4, 2004.
Judgment: May 13, 2005.

(75 paras.)

On appeal from the judgment of Justice William P. Somers of the Superior Court of Justice dated December 8, 2003.

Counsel:

J. Scott Maidment, Jennifer Dent, and Lisa Parliament for the appellant

Graham Rempe, Susan L. Ungar, and Mark Siboni for the respondent

Justin Duncan and Robert V. Wright for the intervenors World Wildlife Fund and Federation of Canadian Municipalities

Paul Muldoon and Marlene Cashin for the intervenors Toronto Environmental Alliance, Canadian Association for Physicians for the Environment, Sierra Club of Canada, Canadian Environmental Law Association, Environmental Defence, and Ontario College of Family Physicians.

[Editor's note: A corrected version was released by the Court August 12, 2005; the corrections have been made to the text and the corrigendum is appended to this document.]

The judgment of the Court was delivered by

1 K.N. FELDMAN J.A.:-- The issue in this case is whether the City of Toronto had the authority under s. 130 of the new Municipal Act, 2001, S.O. 2001, c. 25 (the "Municipal Act, 2001" or the "new Act") to enact By-Law 456-2003, which limits the application of pesticides within the City.

2 In its decision in 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town), [2001] 2 S.C.R. 241 ("Spraytech"), the Supreme Court of Canada held that the Town of Hudson in Quebec had the authority under a section of its Cities and Towns Act, R.S.Q., c. C-19, similar to s. 102 of the former Municipal Act, R.S.O. 1990, c. M.45 (the "old Municipal Act" or the "old Act") to enact a by-law regulating the use of pesticides in the town. Section 102 of the old Municipal Act was the predecessor of s. 130 of the Municipal Act, 2001.

3 The appellant says the Spraytech decision does not apply to s. 130 of the Municipal Act, 2001. Bearing in mind that the Municipal Act, 2001 was enacted after the Spraytech decision, s. 130 must be interpreted narrowly and restrictively because of, (a) its placement within the structure of the new Act, and (b) the addition of new language into the section that makes it distinguishable from s. 102 of the old Municipal Act.

4 The motion judge rejected the appellant's arguments and upheld the by-law. For the reasons that follow, I agree with the conclusion of the motion judge and would dismiss the appeal.

Background

5 The appellant, a trade association that includes pesticide producers, challenges the authority of the City of Toronto to enact By-Law No. 456-2003, which regulates the use of pesticides within the city. The city enacted the by-law under s. 130 of the Municipal Act, 2001 on May 23, 2003. The by-law is set out in its entirety below:

CITY OF TORONTO

BY-LAW No. 456-2003

To adopt a new City of Toronto Municipal Code Chapter 612, Pesticides, Use of.

WHEREAS environmental protection has emerged as a fundamental value in Canadian society and the common future of every Canadian community depends on a healthy environment; and

WHEREAS the Council of the City of Toronto wishes to respond to the concerns expressed by City residents about health risks associated with the use of pesticides within the City of Toronto; and

WHEREAS avoiding unnecessary exposure to pesticides conforms to the precautionary principle as it applies to the use of pesticides; and

WHEREAS minimizing the use of pesticides will promote the health of the inhabitants of the City of Toronto; and WHEREAS pesticides used in lawn and garden care are known to enter streams and rivers, which discharge into Lake Ontario, the source of drinking water for the City of Toronto; and

WHEREAS under section 130 of the Municipal Act, 2001, by-laws may be passed by a municipality to provide for the protection of the health, safety and well-being of residents in the municipality; and

WHEREAS under section 425 of the Municipal Act, 2001, by-laws may be passed by a municipality for providing that any person who contravenes any by-law of the municipality, passed under the authority of the Municipal Act, 2001, is guilty of an offence;

The Council of the City of Toronto HEREBY ENACTS as follows:

1. The City of Toronto Municipal Code is amended by adding the following chapter:

Chapter 612

PESTICIDES, USE OF

Section 612-1. Definitions.

As used in this chapter, the following terms shall have the meanings indicated:

ENCLOSED -- Closed in by a roof or ceiling and walls with an appropriate opening or openings for ingress or egress, which openings are equipped with doors which are kept closed except when actually in use for egress or ingress.

HEALTH HAZARD -- A pest which has or is likely to have an adverse effect on the health of any person.

INFESTATION -- The presence of pests in numbers or under conditions which involve an immediate or potential risk of substantial loss or damage.

PEST -- An animal, a plant or other organism that is injurious, noxious or troublesome, whether directly or indirectly, and an injurious, noxious or troublesome condition or organic function of an animal, a plant or other organism.

PESTICIDE -- Includes

A. A product, an organism or a substance that is a registered control product under the federal Pest Control Products Act which is used as a means for directly or indirectly controlling, destroying, attracting or repelling a pest or for mitigating or preventing its injurious, noxious or troublesome effects.
B. Despite Subsection A, a pesticide does not include:

    (1) A product that uses pheromones to lure pests, sticky media to trap pests or 'quick-kill' traps for vertebrate species considered pests such as mice and rats.
    (2) A product that is or contains any of the following active ingredients:

        (a) A soap;
        (b) A mineral oil, also called dormant or horticultural oil;
        (c) Silicon dioxide, also called diatomaceous earth;
        (d) Bt (Bacillus thuringiensis), nematodes and other biological control organisms;
        (e) Borax, also called boric acid or boracic acid;
        (f) Ferric phosphate;
        (g) Acetic acid;
        (h) Pyrethrum or pyrethrins;
        (i) Fatty acids; or
        (j) Sulphur.

Section 612-2. Restrictions.

A. No person shall apply or cause or permit the application of pesticides within the boundaries of the City.
B. The provision set out in Subsection A does not apply when pesticides are used:

    (1) To disinfect swimming pools, whirlpools, spas or wading pools;
    (2) To purify water intended for the use of humans or animals;
    (3) Within an enclosed building;
    (4) To control termites;
    (5) To control or destroy a health hazard;

(6) To control or destroy pests which have caused infestation to property;
(7) To exterminate or repel rodents;
(8) As a wood preservative;
(9) As an insecticide bait which is enclosed by the manufacturer in a plastic or metal container that has been made in a way that prevents or minimizes access to the bait by humans and pets;
(10) For injection into trees, stumps or wooden poles;
(11) To comply with the Weed Control Act and the regulations made thereunder; or
(12) As an insect repellent for personal use.

Section 612-3. Offences.

Any person who contravenes any provision of this chapter is guilty of an offence and upon conviction, is liable to a fine or penalty provided for in the Provincial Offences Act.

2. This by-law comes into force on April 1, 2004.

History of the Municipal Act, 2001

6 The Municipal Act, 2001 received royal assent on December 12, 2001 and came into force January 1, 2003. It was the first overhaul of the old Act and its predecessors in 150 years. The purpose of creating a new Act was to give municipalities "the tools they need to tackle the challenges of governing in the 21st century" (Ontario, Legislative Assembly, Official Report of Debates (Hansard), 53 (18 October 2001) at 1350 (Hon. Chris Hodgson)), including more authority, accountability and flexibility so that municipal governments would be able to deliver services as they saw fit.

7 One of the ways in which the new Act introduces more flexibility is by giving municipalities two kinds of powers. Part II of the new Act, for the first time, gives municipalities the power of a natural person (s. 8) and as well, ten broad "spheres of jurisdiction" (s. 11) within which municipal councils have wide discretion to enact by-laws. Part III of the new Act gives municipalities specifically defined by-law making powers, as under the old Act.

8 Part II of the new Act is entitled "General Municipal Powers." That Part contains not only the two new general powers of a municipality in ss. 8 and 11, but also rules of interpretation. For example, s. 9(1) in Part II provides:

9.(1) Sections 8 and 11 shall be interpreted broadly so as to confer broad authority on municipalities,

(a) to enable them to govern their affairs as they consider appropriate; and
(b) to enhance their ability to respond to municipal issues.

9 Section 9(1) applies to the s. 11 spheres of jurisdiction contained in Part II, but also to s. 8, which is in Part II but gives municipalities the capacity and powers of a natural person for all purposes under the new Act. Similarly s. 14, which sets out a "conflicts rule" for determining the validity of by-laws that regulate matters already dealt with by federal or provincial legislation, is a rule

of general application that applies to any by-law enacted by a municipality, not just to those by-laws enacted under one of the spheres of jurisdiction in Part II. Section 14 provides:

> 14. A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

10 Part III of the new Act is entitled "Specific Municipal Powers." These include detailed powers to enact by-laws in areas such as highways, transportation, and waste management, although these are also named as spheres of jurisdiction under s. 11. In order to clarify the relationship between the spheres of jurisdiction powers and the specific powers enumerated in Part III, s. 15(1) in Part II provides:

> 15.(1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

11 Section 130, the provision at issue in this case, is one of the specific powers in Part III and provides:

> 130. A municipality may regulate matters not specifically provided for by this Act or any other Act for purposes related to the health, safety and well-being of the inhabitants of the municipality.

12 The predecessor to this section, then numbered s. 102, was referred to under the old Municipal Act as the general welfare provision and read:

> 102. Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality in matters not specifically provided for by this Act and for governing the conduct of its members as may be deemed expedient and are not contrary to law.

13 Section 130 was deliberately left as a specific power and not a sphere of jurisdiction when the new Act was created and passed. The language of the section was amended to remove the reference to morality and the conduct of municipal council members, and the term "welfare" was changed to "well-being." In addition, the words "not contrary to law" were removed, as that condition is now provided in s. 14 of the Act. Most importantly for the purposes of this case, the authority granted by s. 130 now excludes not just matters "specifically provided for by this Act" but also matters "specifically provided for by ... any other Act."

14 It is common ground that the Municipal Act, 2001 contains no named specific power to make by-laws regarding the use of pesticides within a municipality, nor is there a sphere of jurisdiction that might encompass such a power. The appellant has two main arguments. First, it says that because s. 9(1) of the new Act directs a broad interpretation of the powers contained in the spheres of jurisdiction granted in Part II, the specific powers in Part III are to be interpreted narrowly. Con-

sequently, the scope of the former general welfare power in s. 102 of the old Act has been pared down to what the appellant terms a "specific health power" with little or no scope, and certainly without scope to give the city the power to regulate pesticide use within the municipality.

15 The appellant's second argument is that by the addition of the words "or any other Act" to the phrase "matters not specifically provided for by this Act," the effect of s. 130 is to prohibit any by-laws on matters the "pith and substance" of which are already the subject of legislation, whether federal or provincial. There is both federal and provincial legislation dealing with pesticides: in the case of the federal Pest Control Products Act, R.S.C. 1985, c. P-9 (the "PCPA"), with the importing, manufacturing, and labelling of pesticides; and in the case of the Ontario Pesticides Act, R.S.O. 1990, c. P.11, with the storage of pesticides and the licensing of commercial applicators and exterminators. The appellant characterizes both acts as legislation regulating the use of pesticides. Consequently, the appellant argues, a municipality cannot use s. 130 to enact any by-law that also regulates the use of pesticides.

Evolution of the Interpretation of the Scope of Municipal By-Law Making Authority

16 Historically, the courts interpreted the powers of municipalities to enact by-laws restrictively. The rule they applied was known as "Dillon's Rule" (from the text, Dillon on Municipal Corporations, 4th ed.), which stated that "a municipality may exercise only those powers expressly conferred by statute, those powers necessarily or fairly implied by the expressed power in the statute, and those powers essential to, and not merely convenient for, the effectuation of the purposes of the corporation": Stanley M. Makuch, Neil Craik & Signe B. Leisk, Canadian Municipal and Planning Law, 2d ed. (Toronto: Thomson-Carswell, 2004) at 82. In Verdun (City) v. Sun Oil Co., [1952] 1 S.C.R. 222, Fauteux J. articulated the restrictive approach in this way at p. 228: "That the municipalities derive their legislative powers from the provincial Legislature and must, consequently, frame their by-laws strictly within the scope delegated to them by the Legislature, are undisputed principles."

17 However, in the 1990s the Supreme Court of Canada began to move away from Dillon's Rule. The court favoured instead a "benevolent construction" or "broad and purposive" approach that allowed for a more generous interpretation of municipal powers, with a view toward showing deference to, and respect for, the decisions of locally elected officials.

18 The move began with the dissenting reasons of McLachlin J. (as she then was) in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, where she first identified a more liberal approach to the construction of enabling statutes that was already reflected in such cases as Hamilton (City) v. Hamilton Distillery Co. (1907), 38 S.C.R. 239; Howard v. Toronto (City) (1928), 61 O.L.R. 563 (C.A.); Associated Picture Houses, Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 (C.A.); and Kuchma v. Tache (Rural Municipality), [1945] S.C.R. 234. She then observed at p. 244:

> Recent commentary suggests an emerging consensus that courts must respect the responsibility of elected municipal bodies to serve the people who elected them and exercise caution to avoid substituting their views of what is best for the citizens for those of municipal councils. Barring clear demonstration that a municipal decision was beyond its powers, courts should not so hold. In cases where powers are not expressly conferred but may be implied, courts must be prepared to adopt the "benevolent construction" which this Court referred to in Green-

> baum, [infra], and confer the powers by reasonable implication. Whatever rules of construction are applied, they must not be used to usurp the legitimate role of municipal bodies as community representatives.

McLachlin J. concluded at p. 248:

> It may be that, as jurisprudence accumulates, a threshold test for judicial intervention in municipal decisions will develop. For the purposes of the present case, however, I find it sufficient to suggest that judicial review of municipal decisions should be confined to clear cases. The elected members of council are discharging a statutory duty. The right to exercise that duty freely and in accordance with the perceived wishes of the people they represent is vital to local democracy. Consequently, courts should be reluctant to interfere with the decisions of municipal councils. Judicial intervention is warranted only where a municipality's exercise of its powers is clearly ultra vires, or where council has run afoul of one of the other accepted limits on municipal power.

19 McLachlin J.'s broad and purposive approach to the interpretation of municipal statutes was subsequently adopted and approved by the Supreme Court in several cases, including Nanaimo (City) v. Rascal Trucking Ltd., [2000] 1 S.C.R. 342; United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485; and Spraytech, supra.

20 At the same time, some provinces, starting with Alberta and now including Ontario, began to enact broader and more flexible enabling statutes for their municipalities. The United Taxi case, supra, arose under Alberta's new Municipal Government Act, S.A. 1994, c. M-26.1, which, like the Ontario Municipal Act, 2001, incorporates the concept of spheres of jurisdiction. The issue in that case was whether the City of Calgary had the authority under Alberta's new Act to freeze the number of taxi licenses it issued. Although he was dealing with the interpretation of broadly worded powers in the Act to pass bylaws to regulate transportation and licenses, Bastarache J.'s discussion of the new broad and purposive interpretive approach was not confined to the new form of statute. He stated at para. 6:

> The evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities. This notable shift in the nature of municipalities was acknowledged by McLachlin J. (as she then was) in Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, at pp. 244-45. The "benevolent" and "strict" construction dichotomy has been set aside, and a broad and purposive approach to the interpretation of municipal powers has been embraced: Nanaimo, supra, at para. 18. This interpretive approach has evolved concomitantly with the modern method of drafting municipal legislation. Several provinces have moved away from the practice of granting municipalities specific powers in particular subject areas, choosing instead to confer them broad authority over generally defined matters: The Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M255; Municipal Government Act, S.N.S. 1998, c. 18; Municipal Act, R.S.Y. 2002, c. 154; Municipal Act, 2001, S.O. 2001, c. 25; The Cities Act, S.S. 2002, c. C-11.1. This shift in legislative drafting reflects the true nature of modern municipalities which require greater flexibility in fulfilling their statutory purposes: Shell Canada, at pp. 238 and 245.

21 Finally, in Spraytech, supra, the issue was whether the Town of Hudson, Quebec, had the authority to enact a by-law limiting the non-essential use of pesticides in the town. Section 410(1) of the province of Quebec's Cities and Towns Act, supra, read:

> 410. The council may make by-laws:
>
> (1) To secure peace, order, good government, health and general welfare in the territory of the municipality, provided such by-laws are not contrary to the laws of Canada, or of Québec, nor inconsistent with any special provision of this Act or of the charter;

22 Writing for the majority of the Supreme Court, L'Heureux-Dubé J. identified this section as a general welfare provision that supplements the specific grants of power in other sections, and stated the following about such provisions at para. 19:

> Section 410 C.T.A. is an example of such a general welfare provision and supplements the specific grants of power in s. 412. More open-ended or "omnibus" provisions such as s. 410 allow municipalities to respond expeditiously to new challenges facing local communities, without requiring amendment of the provincial enabling legislation. There are analogous provisions in other provinces' and territories' municipal enabling legislation: see Municipal Government Act, S.A. 1994, c. M-26.1, ss. 3(c) and 7; Local Government Act, R.S.B.C. 1996, c. 323, s. 249; Municipal Act, S.M. 1996, c. 58, C.C.S.M. c. M225, ss. 232 and 233; Municipalities Act, R.S.N.B. 1973, c. M-22, s. 190(2), First Schedule; Municipal Government Act, S.N.S. 1998, c. 18, s. 172; Cities, Towns and Villages Act, R.S.N.W.T. 1988, c. C-8, ss. 54 and 102; Municipal Act, R.S.O. 1990, c. M.45, s. 102; Municipal Act, R.S.Y. 1986, c. 119, s. 271.

23 In assessing whether the general welfare power in the Quebec Cities and Towns Act empowered the Town of Hudson to enact its pesticide by-law, L'Heureux-Dubé J. first examined whether there was a specific by-law making power that the town should have used and concluded that there was not, an exercise mandated by the court's 1993 decision in R. v. Greenbaum, [1993] 1 S.C.R. 674.

24 Having concluded that there was no specific power in the Quebec's Cities and Towns Act that would allow the Town to enact a pesticide control by-law, L'Heureux-Dubé J. had to determine whether the town could use the general welfare power to enact such a by-law. To interpret the general welfare power, she first turned to the Nanaimo case, supra, where the court had approved McLachlin J.'s view in Shell Canada advocating the benevolent construction approach to the implication of municipal powers that are not expressly conferred. L'Heureux-Dubé J. also referred to Sopinka J.'s majority judgment in Shell Canada, which enunciated the test that the municipal enactment had to have been "passed for a municipal purpose." L'Heureux-Dubé J. then quoted the following passage from Greenbaum, supra at 689:

> Municipal by-laws are to be read to fit within the parameters of the empowering provincial statute where the by-laws are susceptible to more than one interpretation. However, courts must be vigilant in ensuring that municipalities do not im-

> pinge upon the civil or common law rights of citizens in passing ultra vires by-laws.

25 Applying these principles from Nanaimo, Shell Canada, and Greenbaum, L'Heureux-Dubé J. examined the purpose of the Town of Hudson's pesticide by-law. She concluded that its purpose was to address the concerns of the town's inhabitants about the health risks arising from the non-essential use of pesticides and to minimize those risks. That purpose fell "squarely within the 'health' component" of the general welfare power.

26 L'Heureux-Dubé J. also observed that to read the general welfare provision to permit the pesticide by-law accords with international law and policy and with the "precautionary principle." She referred to the definition in para. 7 of the Bergen Ministerial Declaration on Sustainable Development (1990) as follows:

> In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

27 Canada had advocated including this principle during the Bergen Conference, and has codified it in several pieces of federal legislation. L'Heureux-Dubé J. concluded that the town's concerns about pesticides fit within the precautionary principle's rubric of preventative action.

28 Finally, having concluded that the Town of Hudson had the authority to enact its pesticide by-law, L'Heureux-Dubé J. had to decide whether the by-law was inoperative because of a conflict with federal or provincial legislation regulating pesticides, i.e., the federal PCPA or the Quebec Pesticides Act, R.S.Q., c. P-9.3. L'Heureux-Dubé J. applied the "impossibility of dual compliance" test from Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, under which a provincial law is invalidated if compliance with it would result in the breach of a federal law. Looking first at the federal PCPA, L'Heureux-Dubé J. described it as regulating and authorizing the import, export, sale, manufacture, packaging, and labelling of pesticides, as well as their registration for use in Canada. L'Heureux-Dubé J. concluded that there was no operational conflict between the federal PCPA and the Town of Hudson's pesticide by-law, because it was not impossible to comply with both. She also found that the application of the by-law would not frustrate or displace the legislative purpose of Parliament.[1]

29 Turning to the Quebec Pesticides Act, L'Heureux-Dubé J. found that it established a permit and licensing system for vendors and commercial applicators of pesticides. She noted that the provincial legislation complemented the focus of the federal PCPA, which is on the products themselves. She concluded, importantly, that "[a]long with By-law 270, these laws establish a tri-level regulatory regime" (para. 39). She found that there was neither a problem with dual compliance with Quebec's Pesticides Act and the Town of Hudson's pesticide by-law, nor any "plausible evidence that the legislature intended to preclude municipal regulation of pesticide use." In the result, the Supreme Court upheld the by-law.

The Issues

(1) Did the motion judge err in applying the broad and purposive approach to the interpretation of s. 130, when that section is not one of the spheres of jurisdiction in Part II of Ontario's Municipal Act, 2001 but is a specific power under Part III?
(2) What is the proper interpretation of the limitation that s. 130 can only be used to enact by-laws related to "matters not specifically provided for by this Act or any other Act"?
(3) Do the words "matters not specifically provided for by this Act or any other Act" require a comparison with legislation enacted by the other levels of government, either through an application of the "impossibility of dual compliance" test, or of a test focusing on the pith and substance of the potentially conflicting legislation?
(4) Does the precautionary principle apply to the interpretation of the by-law making power in s. 130?

(1) The Proper Interpretive Approach

30 In his discussion of the proper interpretation of s. 130, the motion judge applied the broad and purposive approach that I have discussed above. The appellant contends that the motion judge erred in so doing.

31 The appellant submits that, through its structure and, more particularly, through the interpretive provision in s. 9(1), the Municipal Act, 2001 adopts the broad and purposive approach for the interpretation of the spheres of jurisdiction in Part II, but not for the specific powers in Part III. By applying the generous approach to the interpretation of s. 130, which is found in Part III, the motion judge effectively elevated the general welfare power (which, as noted, the appellant refers to as the "specific health power") to a sphere of jurisdiction, contrary to the purport of the new Act.

32 I do not agree with this submission, based on my reading of the language of the new Act and on the development of the new approach to the interpretation of municipal by-law making powers, which I have canvassed above.

33 Although s. 9(1) is contained in Part II of the new Act and expressly requires a broad interpretation of the s. 11 spheres of jurisdiction, it imposes the same requirement for the interpretation of s. 8, the natural person power, which is found in Part II but applies to the entire Act.[2] Also, s. 9(1) contains no language that suggests that the broad approach is to be limited to the interpretation of the spheres of jurisdiction and is not to be applied when interpreting other parts or sections of the new Act. In light of the development of the jurisprudence in this area over the last twelve years and the clear adoption by the Supreme Court of a generous approach that accords deference to municipal governments, it would take clear legislative language to return to Dillon's Rule when interpreting those parts of the new Act not contained in Part II: see United Taxi, supra at para. 11.

34 Furthermore, it would be a retrograde step to apply the former, restrictive approach to interpret the balance of the Municipal Act, 2001 outside Part II, when the goal of modernizing the Act, as stated by the Minister of Municipal Affairs at the time, was to give municipalities in Ontario the "the tools they need to tackle the challenges of governing in the 21st century."

35 As I discussed above, in the United Taxi case, Bastarache J. did not limit the application of the new approach to the interpretation of powers granted in spheres of jurisdiction. It is also useful to refer to the concurring reasons of Lebel J. in the Spraytech case. He viewed the question in that

case to be an administrative law issue applied to the field of municipal governance. In his view, the restrictive interpretation urged by the appellants in that case would have made the general welfare section "an empty shell." The following is his analysis at paras. 53 and 54:

> The case at bar raises a different issue: absent a specific grant of power, does a general welfare provision like s. 410(1) authorize By-law 270? A provision like s. 410(1) must be given some meaning. It reflects the reality that the legislature and its drafters cannot foresee every particular situation. It appears to be sound legislative and administrative policy, under such provisions, to grant local governments a residual authority to deal with the unforeseen or changing circumstances, and to address emerging or changing issues concerning the welfare of the local community living within their territory. Nevertheless, such a provision cannot be construed as an open and unlimited grant of provincial powers. It is not enough that a particular issue has become a pressing concern in the opinion of a local community. This concern must relate to problems that engage the community as a local entity, not a member of the broader polity. It must be closely related to the immediate interests of the community within the territorial limits defined by the legislature in a matter where local governments may usefully intervene. In Shell Canada Products Ltd. v. Vancouver (City), [1994] 1 S.C.R. 231, the Court emphasized the local ambit of such power. It does not allow local governments and communities to exercise powers in questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously (see F. Hoehn, Municipalities and Canadian Law: Defining the Authority of Local Governments (1996), at pp. 17-24).
>
> In the present case, the subject matter of the by-law lies within the ambit of normal local government activities. It concerns the use and protection of the local environment within the community. The regulation targets problems of use of land and property, and addresses neighbourhood concerns that have always been within the realm of local government activity. Thus, the by-law was properly authorized by s. 410(1). [Original emphasis.]

36 Relying on Toronto v. Goldlist Properties (2003), 67 O.R. (3d) 441 at 461 (C.A.), the appellant points to aspects of the legislative history to support its narrow reading of s. 130, including the fact that there was consideration given to including "health, safety and well-being of people and protection of property", as well as "the natural environment" as spheres of jurisdiction in Part II, but ultimately that was not done.[3] There is also some equivocal discussion in Hansard from when the legislation was before the Standing Committee on General Government about whether the Spraytech decision would apply under the new Act. However, in his 2001/02 Report to the Legislature, Ontario's Environmental Commissioner gave the opinion that s. 130 could be viewed as authorizing municipalities to enact pesticide by-laws to protect the health, safety, and well-being of their inhabitants. In my view, the legislative history in this case is of little assistance to this court. The fact that s. 130 remains a specific power in Part III of the new Act does not exempt it from the modern interpretive rules discussed above.

37 I conclude that absent an express direction to the contrary in the Municipal Act, 2001, which is not there, the jurisprudence from the Supreme Court is clear that municipal powers, including

general welfare powers, are to be interpreted broadly and generously within their context and statutory limits, to achieve the legitimate interests of the municipality and its inhabitants. The trial judge did not err by adopting this approach to the general welfare power in s. 130.

(2) Interpreting the phrase "matters not specifically provided for in this Act or any other Act"

38 In Spraytech, supra, a pesticide by-law with very similar aims and objectives was found to be within the ambit of the general welfare power in s. 410(1) of the Cities and Towns Act, which was the province of Quebec's counterpart to s. 102 of the old Ontario Municipal Act. The question, then, is: Does the wording of s. 130 of the new Act, properly interpreted, make the result in Spraytech inapplicable to the case at bar? To answer that question, I must consider the differences between s. 130 and its predecessor provision.

39 Section 102 of the old Municipal Act provided:

> 102. Every council may pass such by-laws and make such regulations for the health, safety, morality and welfare of the inhabitants of the municipality *in matters not specifically provided for by this Act* as may be deemed expedient and *are not contrary to law*. [Emphasis added.]

40 The appellant acknowledges that, as it was worded in s. 102, the phrase "in matters not specifically provided for by this Act" articulated a "rule against circumvention". That is, the phrase articulated a rule prohibiting a municipality from making by-laws using the s. 102 general welfare power to circumvent restrictions on its ability to enact by-laws regarding a particular subject-matter, contained in specific powers in other parts of the old Act. To formulate a simple example, if a specific provision elsewhere in the old Municipal Act provided that a municipality could pass by-laws related to pool safety, but not height limits for diving boards, a municipality could not then pass a by-law purporting to limit the height of diving boards under s. 102.

41 Another example of this rule can be found in the Supreme Court decision in Greenbaum. In that case, the court held that Metropolitan Toronto could not use its general welfare power in s. 102 of the old Municipal Act to enact a by-law prohibiting the sale of goods on Metro sidewalks except to licensed owners or occupiers of abutting property. The court's reasoning was that there were other specific sections of the old Act that authorized by-laws for the purposes of controlling sidewalk obstructions, street vending, and public nuisances. If those specific powers did not give Metro the authority to enact the impugned by-law, then the municipality could not find that authority in the general welfare section.

42 The appellant submits that the rule against circumvention is now codified in Part II of the Municipal Act, 2001 in s. 15(1), which by its terms, relates only to ss. 8 and 11. Section 15(1) provides:

> 15.(1) If a municipality has power to pass a by-law under section 8 or 11 and also under a specific provision of this or any other Act, the power conferred by section 8 or 11 is subject to any procedural requirements, including conditions, approvals and appeals, that apply to the power and any limits on the power contained in the specific provision.

43 The appellant argues that the words in s. 130 that provided for the rule against circumvention in the old s. 102, must now have a different meaning, since the only rule against circumvention in the new Act is in s. 15(1).

44 The appellant also submits that the addition of the words "or any other Act" to the words "matters not specifically provided for by this Act" indicates a change in meaning. The appellant says that the phrase that was the rule against circumvention of more restrictive by-law making powers elsewhere in the Act, now means that where the subject matter of the by-law is already the subject of federal or provincial legislation, the municipality is precluded from legislating in respect of that subject matter. I will discuss this argument when dealing with issue (3), below.

45 The City's position is that the phrase "matters not specifically provided for by this Act or any other Act" in s. 130 is an extended version of the rule against circumvention from the old Act. The motion judge agreed with this interpretation and so do I. I do so for three reasons.

46 The first is that the legislature has repeated the same phrase from the former s. 102, merely adding the four additional words "or any other Act". Citing Sullivan and Driedger on the Construction of Statutes, 4th ed. (Markham, Ont.: Butterworths Canada Ltd., 2002) at 395, Bastarache J. in United Taxi, supra at para. 11, stated: "It is well established that the legislature is presumed not to alter the law by implication ... Rather, where it intends to depart from prevailing law, the legislature will do so expressly." The use in s. 130 of language identical to s. 102, with the addition of the words "or any other Act," is not enough to signal a change in meaning. Rather, it simply indicates an extension of the same rule against circumvention that existed in the old Municipal Act to by-law making powers granted to municipalities in acts other than the Municipal Act, 2001.

47 Consistent with this interpretation, the respondent points out that with the passage of the new Act, the legislature transferred some by-law making powers out of the old Municipal Act into other provincial acts such as the Fire Protection and Prevention Act, 1997, S.O. 1997, c. 4, s. 7.1, and the Fluoridation Act, R.S.O. 1990, c. F.22, s. 2.1. See Municipal Act, 2001, supra at s. 475, 476. Some of these powers may well relate to matters of health and safety.

48 Second, I reject the appellant's argument that s. 15(1) is the only "rule against circumvention" in the new Act, and that therefore the court must adopt a radically different interpretation of the limiting words in s. 130. The purpose of s. 15(1) is to ensure that, where the spheres of jurisdiction in s. 11 or the natural person powers in s. 8 overlap with any specific power in Part III, the procedural or other restrictions in the specific power will be respected. There is no indication that this section in any way replaces the limitation that has always been part of the general welfare power. If the appellant's argument were correct, it would mean that there no longer is any language in s. 130 that specifically addresses how the general welfare power is to be interpreted in relation to other powers in the Act. Again, that would represent a significant and unworkable shift in the meaning of s. 130, when compared to the interpretation given to s. 102 of the old Municipal Act by Iacobucci J. in Greenbaum, supra.

49 Third, the clearest and most logical interpretation of the phrase "matters not specifically provided for in this Act or any other Act" is its historical meaning, which is the rule against circumvention. It is to be noted that this rule goes back at least as far as the 1937 case of Morrison v. Kingston (1937), 69 C.C.C. 251 (Ont. C.A.), which was cited by Iacobucci J. in Greenbaum, supra. In Morrison, Middleton J.A. interpreted essentially the same language as follows (at p. 255):

> A third limitation is I think to be found in the express enactments of the Municipal Act. Very few subjects falling within the ambit of local government are left to the general provisions of s. 259 [the general welfare power at that time]. Almost every conceivable subject proper to be dealt with by a municipal council is specifically enumerated in the detailed provisions in the Act, and in some instances there are distinct limitations imposed on the powers of the municipal council. These express powers are, I think, taken out of any power included in the general grant of power by s. 259.

50 In other words, previously, when there was no other specifically related by-law making power elsewhere within the old Municipal Act, then a matter could be made the subject of a by-law under s. 102 or its predecessors. Under s. 130 of the Municipal Act, 2001, a matter can be regulated by by-law so long as there is no other specifically related by-law making power elsewhere in the new Act or in any other act.

(3) Is the by-law in conflict with federal or provincial legislation?

51 The other significant change in s. 130 is the removal of the requirement in s. 102 of the old Act that the by-laws not be "contrary to law," under which a by-law would not be effective in the event of a conflict with a federal or provincial law. This requirement is now set out in s. 14 of the new Act, which I repeat here for ease of reference:

> 14. A by-law is without effect to the extent of any conflict with,
>
> (a) a provincial or federal Act or a regulation made under such an Act; or
> (b) an instrument of a legislative nature, including an order, licence or approval, made or issued under a provincial or federal Act or regulation.

52 The appellant acknowledges that s. 14 applies to by-laws made under Part III, including under s. 130, as well as Part II of the new Act, and that s. 14 represents a codification of the "impossibility of dual compliance" conflicts test articulated and applied by L'Heureux-Dubé J. in Spraytech, supra. The appellant also concedes that the City of Toronto's pesticide by-law meets that test. It is not impossible to comply with the city's pesticide by-law and at the same time to comply with the requirements of the federal PCPA or the Ontario Pesticides Act.

53 The appellant says, however, that the conflicts test from Spraytech, supra, is not relevant for the purposes of s. 130. In other words, the fact that dual (in fact, triple) compliance is possible is not determinative in this case. Again, the appellant points to the words "matters not specifically provided for by this Act or any other Act" in s. 130. The appellant says that because the "impossibility of dual compliance" conflicts rule is articulated in s. 14, the words in s. 130 cannot be a reference to the same conflicts rule, but must have another meaning. Moreover, as discussed under issue (2) above, because of the addition of the words "or any other Act", the phrase is no longer a reference to the rule against circumvention.

54 The appellant's position is that the effect of the language of s. 130 is that a municipality only has the power to enact a by-law for health, safety, or well-being where the subject-matter of the by-law in pith and substance is not specifically provided for in any other act. The appellant says that the federal PCPA and the Ontario Pesticides Act together form a comprehensive regime for the regulation of pesticides, with a view to the protection of health and the environment. Therefore, the

subject matter is provided for in other legislation, causing the by-law to be ultra vires. Stated another way, the appellant says that the proper approach is to determine the pith and substance of the by-law, then to see if there is any other legislation dealing with the same pith and substance. If there is, the by-law is invalid. A central implication of the appellant's position is that, contrary to the approach endorsed by L'Heureux-Dubé J. in Spraytech, s. 130 of the Municipal Act, 2001 precludes municipalities in Ontario from participating in a tri-level regime to regulate the use of pesticides, where each level of government plays a role in the regulatory scheme.

55 Both in its factum and in oral argument, the appellant developed a detailed examination of the federal PCPA and of the Ontario Pesticides Act. The appellant sought to show that, although they deal in the case of the PCPA with such issues as registering and labelling pesticide products, and in the case of the Pesticides Act with the licensing of pesticide contractors, the true "matter" of those acts is the protection of human health through restrictions on the use of registered pesticides. Since this is also the "matter" of the by-law, the appellant argues that the pesticide by-law is ultra vires the City of Toronto. In my view, the position of the appellant is without merit and must be rejected.

56 As I stated in the discussion of issue (2), above, as a matter of statutory interpretation there is no basis to read the phrase "matters not specifically provided for by this Act or any other Act" other than in accordance with Iacobucci J.'s interpretation from Greenbaum, supra. The phrase is a mere restatement, and modest extension, of the traditional rule against circumvention. This reading gives the provision a pragmatic and workable meaning; it is consistent with the accepted interpretation of those words in previous incarnations of the Municipal Act; and there is nothing in the language used to indicate that the legislature intended that a new and different meaning be given to the phrase. Had the legislature wanted such a drastic change, it would have used very clear language to communicate that intention: United Taxi, supra at para. 11.

57 Once it is accepted that the words "matters not specifically provided for by this Act or any other Act" is merely a rule against circumvention referring to other specific municipal by-law making powers, the appellant's argument collapses.

58 Regardless, the appellant's proposed interpretation is one that would have to be clearly intended and expressed by the legislature because its effect would be to turn the "impossibility of dual compliance" conflicts rule from Multiple Access, supra, and Spraytech, supra, on its head. It would reintroduce the approach to paramountcy, long since rejected in Canada, that legislation by one level of government occupies the field and precludes complementary legislation by other levels: see Peter W. Hogg, Constitutional Law of Canada, 4th ed. looseleaf (Scarborough, Ont.: Thomson-Carswell, 1997) at 16-7 to 16-13. Moreover, the validity of tri-level regulation, which the appellant's position repudiates, has been unambiguously endorsed by the Supreme Court of Canada in Spraytech, supra at para. 39, as the accepted model in our federal system.

59 The most recent discussion by the Supreme Court of the conflicts rule and the doctrine of paramountcy is in Major J.'s decision in Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13. The issue in that case was whether s. 30 of the federal Tobacco Act, S.C. 1997, c. 13, rendered s. 6 of the Saskatchewan Tobacco Control Act, S.S. 2001, c. T-14.1 inoperative, based on the doctrine of paramountcy. Section 30 of the federal act permits the retail display of tobacco products or accessories as an exception to a prohibition of the promotion of tobacco products contained in s. 19 of the same Act. Section 6 of the Saskatchewan Act bans all advertising and promotion of tobacco products in any place where persons under 18 are allowed.

60 In Rothmans, Major J., writing for the court, set out at para. 15 a two-part test to determine whether a provincial provision is so inconsistent with a federal provision that the paramountcy doctrine renders it inoperative: (1) can a person simultaneously comply with both provisions? (the impossibility of dual compliance test); and (2) does the provincial provision frustrate Parliament's purpose in enacting the federal provision? Major J. concluded that a person could comply with both s. 6 of the Saskatchewan Tobacco Control Act and s. 30 of the federal Tobacco Act. The federal Act did not grant a positive right to advertise tobacco products. Although the federal government's constitutional jurisdiction to legislate in the area came from its criminal law power, the purpose of the Act was to promote public health and to protect young persons by restricting access to tobacco. Major J. observed that a provision enacted in the prohibitory context would not ordinarily create a freestanding right. Indeed, such a right would be inconsistent with the stated purpose of the Act.

61 Major J. at para. 21 specifically rejected the suggestion that Parliament intended to occupy the field with respect to the regulation of the retail display of tobacco products: "In my view, to impute to Parliament such an intention to 'occup[y] the field' in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least O'Grady [O'Grady v. Sparling, [1960] S.C.R. 804], at p. 820." He also found that the more stringent provincial prohibition on the retail display of tobacco products enhanced rather than frustrated the legislative purpose of the federal Act.

62 The Rothmans case is the latest in the series of cases from the Supreme Court that explains how different levels of government may legislate in related or overlapping fields. The only restrictions on this co-operative view of federalism are that the legislative provisions may not expressly conflict, and the legislation of the lower levels of government may not frustrate the legislative purpose of the more senior level of government.

63 Applying these principles to the issues in this case, the conflicts test explicitly provided in s. 14 of the Municipal Act, 2001 must be interpreted in accordance with the two-pronged test prescribed in Rothmans: (1) Is it impossible to comply simultaneously with the pesticide by-law and with the federal PCPA or the Ontario Pesticides Act?; (2) Does the by-law frustrate the purpose of Parliament or the Ontario legislature in enacting those laws? If the answer to both questions is "no," then the by-law is effective.

64 Using Major J.'s analysis, had either Parliament or the Ontario legislature intended to occupy the field of pesticide regulation with the federal PCPA or the provincial Pesticides Act, they would have used very clear language to say so. Furthermore, had the Ontario legislature intended to prevent municipalities in Ontario from having the authority to enact by-laws limiting the use of pesticides following the Supreme Court's decision in Spraytech, it could have done so explicitly either in the Municipal Act, 2001, which was enacted after the Spraytech decision, or by including a provision prohibiting municipalities from enacting pesticide by-laws in the provincial Pesticides Act.[4]

65 The appellant concedes it that it is possible to comply with the City of Toronto's pesticide by-law, the federal PCPA, and the Ontario Pesticides Act at the same time. However, in subsequent submissions, the appellant took the position that the pesticide by-law contravenes the second part of the test from Rothmans, suggesting that it frustrates the purpose of the federal pesticide regime, which the appellant says is to make pesticides available for use by the public.

66 The appellant also refers to the new federal Pest Control Products Act, 2002, c. 28, which has been passed but is not yet in force. The preamble to that Act states that, "[P]est control products

of acceptable risk and value can contribute significantly to the attainment of the goals of sustainable pest management." The appellant says that the by-law deprives residents of Toronto of the benefits of the pesticides that are regulated by the PCPA but are restricted or prohibited by the by-law.

67 In my view, this argument has been addressed and determined by the Supreme Court in Spraytech, supra. There the court held that the Town of Hudson's pesticide by-law would not frustrate the purpose of the old federal PCPA, which, like the new federal Act, is permissive only. Its purpose is to make certain pesticides available by regulating their manufacture and labelling, but it does not require that everyone be able to use every regulated product in an unrestricted way.

(4) The Role of the Precautionary Principle

68 In Spraytech, supra, after concluding that s. 410(1), the general welfare provision of the province of Quebec's Cities and Towns Act, gave the Town of Hudson statutory authority to enact its pesticide by-law, L'Heureux-Dubé J. noted that reading the section in that way was consistent with the precautionary principle (see para. 26 above). Since Spraytech, the precautionary principle has been referred to in two appellate decisions, but in neither case was it determinative: R. v. Kingston (City) (2004), 70 O.R. (3d) 577 at para. 86 (C.A.); Western Canada Wilderness Committee v. British Columbia (Ministry of Forests, South Island Forest District) (2003), 15 B.C.L.R. (4th) 229 at para. 80 (B.C.C.A.).

69 In this case, the third paragraph of the preamble to the City of Toronto's pesticide by-law invokes the precautionary principle. However, in his decision, the motion judge did not discuss the principle, although he did address the appellant's submission about alleged deficiencies with the city's scientific evidence supporting the by-law. He concluded that the court was not in a position to judge the sufficiency of the city's research. However, he found that Dr. Sheela Basrur, then the city's medical officer of health, had made substantial inquiries and reviewed numerous reports and publications to assess whether the by-law would protect the health of Toronto's citizens.

70 The appellant submits that it is not appropriate for the city to seek to support its pesticide by-law based on the precautionary principle for two reasons: (1) It says the city conducted no meaningful assessment of the by-law's impact, which assessment is necessary to rely on the precautionary principle. (2) The precautionary principle cannot be used to confer power where there is none.

71 I agree that if there was no credible research basis for enacting the by-law, and if the municipality did not otherwise have the power to enact the by-law, the precautionary principle could not be used as authority for upholding the effectiveness of the by-law. However, that is not the case here. As the motion judge did not rely on the precautionary principle to support his conclusions, there is no need for this court to address the issue further on this appeal.

Summary

72 The motion judge found that the by-law is aimed primarily at the matters of health, safety, and well-being of the City of Toronto's inhabitants. Its municipal purpose therefore falls squarely within the authority granted by s. 130 of the Municipal Act, 2001.

73 No by-law can be enacted under s. 130 to regulate matters of health, safety, or well-being of the inhabitants of the city if the purpose of the by-law is to regulate a "matter that is specifically provided for by this Act or any other Act." These limiting words require the court to examine the

Municipal Act, 2001 and other provincial acts to determine if they give municipalities any specific powers to regulate the use of pesticides. If so, no such by-law can be enacted using s. 130. There is no dispute that there is no specific municipal power to regulate pesticide use contained in the Municipal Act, 2001 or in any other Ontario statute. Therefore, the limiting words of s. 130 do not preclude enactment of the pesticide by-law.

74 Finally, the by-law will not be effective if it expressly contradicts any other law, whether federal or provincial, or if it frustrates the purpose of those laws. The appellant concedes that it is not impossible to comply with the pesticide by-law at the same time as the federal PCPA or the Ontario Pesticides Act. Moreover, as I have found, the pesticide by-law does not frustrate the purpose of those acts. Therefore, the by-law is not rendered inoperative by the conflicts test in s. 14 of the Municipal Act, 2001, applied in accordance with the Supreme Court's decisions in Spraytech and Rothmans, supra.

Conclusion

75 As I have concluded that the City had the authority to pass the by-law under s. 130 of the Municipal Act, 2001, I would dismiss the appeal with costs payable by the appellant to the respondent in the amount of $50,000. No costs to the intervenors, as agreed.

K.N. FELDMAN J.A.
S.T. GOUDGE J.A. -- I agree.
S.E. LANG J.A. -- I agree.

* * * * *

Corrigendum
Released: August 12, 2005

A correction was made to paragraph 63 the word "possible" has been corrected to read "impossible".

1 This second prong of the conflicts test, focusing on purpose, was recently strengthened by the Supreme Court of Canada in Rothmans, Benson & Hedges Inc. v. Saskatchewan, 2005 SCC 13, [2005] S.C.J. No. 1. Rothmans made clear that in any paramountcy case, a court must ask two questions: (1) can a person simultaneously comply with the provincial and the federal legislation? and (2) does the provincial legislation frustrate the purpose of the federal legislation? As Rothmans was released while the decision of this court was under reserve, counsel were given the opportunity to make written submissions on its effect, if any, for the purpose of this appeal.

2 Section 8 provides:

> s. 8 A municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act.

3 I have set out the wording of these two spheres of jurisdiction in accordance with the appellant's submissions, to which the respondents did not object. The fact that these spheres were once considered is confirmed by a 1998 government consultation document: Ministry of Municipal Affairs and Housing, A Proposed New Municipal Act: Draft Legislation, Including Explanatory Notes (Consultation Document) (Queen's Printer for Ontario, 1998) at iii-iv.

4 As it did, for example, in s. 20 of the Milk Act, R.S.O. 1990, c. M.12, which states: "Despite this or any other Act, no council of a local municipality shall by by-law require that fluid milk products sold in the municipality be produced or processed in the municipality or in any other designated area."

TAB 5

Case Name:

232169 Ontario Inc. (c.o.b. Farouz Sheesha Café) v. Toronto (City)

Between
232169 Ontario Inc. O/A Farouz Sheesha Café, 7923406 Canada Inc., Club Layal El Sharke Inc., Oum Kulthoum, and Nile Palace Cafe, Applicants (Appellants),
and
The City of Toronto, Respondent (Respondent in Appeal)

[2017] O.J. No. 3042

2017 ONCA 484

2017 CarswellOnt 8931

280 A.C.W.S. (3d) 184

67 M.P.L.R. (5th) 183

Docket: C62904

Ontario Court of Appeal

K.M. Weiler, K.M. van Rensburg and G. Huscroft JJ.A.

Heard: June 6, 2017.
Judgment: June 13, 2017.

(27 paras.)

Municipal law -- Bylaws and resolutions -- Statutory authority -- Interpretation -- Grounds for invalidity -- Improper motive -- Appeal by hookah lounge owners from dismissal of challenge to validity of Toronto bylaw prohibiting hookah smoking in premises dismissed -- Judge entitled to accept that valid purpose of bylaw was to protect health and safety of employees and patrons -- City had broad authority over property and civil rights -- Bylaw not confiscatory, as owners permitted to retain hookahs but not allowed to permit their use -- City of Toronto Act, ss. 8(2), 213.

Appeal by the owners of several hookah lounges in Toronto from the dismissal of their challenge to the validity of a 2015 bylaw prohibiting the use of hookahs in premises, vehicles and licenced establishments. The judge found that the City had the authority to pass the bylaw and that the bylaw was valid. The judge considered the City's stated purpose for enacting the bylaw, the protection of health and safety, as valid. The judge accepted that the bylaw was enacted to protect the health and safety of employees and patrons of hookah lounges, given the expert evidence from the City's Medical Officer that hookah smoke included some of the same carcinogenic chemicals associated with tobacco smoke, while many people wrongly assumed it was less harmful.

HELD: Appeal dismissed. The judge was entitled to accept that the City enacted the bylaw for the purpose of protecting health and safety, not to close hookah lounges. The owners were still able to sell food and shisha, but could not allow hookah pipes to be used on their premises. The economic impact that the bylaw might have on the owners' businesses was incidental to, but not determinative of, the purpose of the bylaw. The judge was correct in finding that the bylaw was not confiscatory or tantamount to an expropriation. The City had broad authority over property and civil rights. It was not obliged to adopt measures short of a prohibition on hookah smoking to protect employment in hookah lounges.

Statutes, Regulations and Rules Cited:

City of Toronto Act, 2006, S.O. 2006, c. 11, s. 8(2), s. 213

City of Toronto By-Law 1331-2015,

Occupation Health and Safety Act, R.S.O. 1990, c. O.1,

Appeal From:

On appeal from the judgment of Justice R.F. Goldstein of the Superior Court of Justice, dated October 7, 2016.

Counsel:

Ryan P. Zigler, for the appellants.

Kirsten Franz and Leslie Mendelson, for the respondents.

REASONS FOR DECISION

The following judgment was delivered by

THE COURT:--

A. OVERVIEW

1 The appellants operate hookah lounges in Toronto. Hookah lounges offer beverages and food for sale, but are known primarily as places to socialize or relax, and smoke hookahs, a form of water

pipe. Hookah lounges charge for the use of hookahs and sell shisha, a legal substance that is smoked.

2 In 2015, the City of Toronto passed By-Law 1331-2015. The by-law prohibits the use of hookah devices in connection with premises, vehicles, or things required to be licensed by the City for various purposes. In particular, the by-law prohibits the inhaling or exhaling of smoke from a hookah, as well as the holding of an activated hookah.

3 The appellants brought an application challenging the validity of the by-law. The application judge found as follows:

* the purpose of the by-law is to deal with public health and safety, and that this purpose was specifically authorized by the *City of Toronto Act, 2006*, S.O. 2006, c. 11;

* a broad and purposive approach should be taken to municipal powers;

* although the City concedes that some hookah lounge operators may go out of business as a result of the by-law, the by-law does not have a confiscatory effect;

* the City has the authority to prohibit a business in any event;

* the by-law does not conflict with or frustrate the operation of the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"); and

* the City did not act in bad faith.

4 The application judge held that the City had the authority to pass the by-law and that the by-law was valid.

5 The appellants appeal from the judgment dismissing their application. The City agreed to suspend the operation of the by-law pending the outcome of this appeal.

6 For the reasons that follow, the appeal is dismissed.

B. ISSUES ON APPEAL

7 The appellants raise three grounds on appeal.

8 First, they submit that the application judge erred in determining that the purpose of the by-law was the protection of health. They characterize the purpose of the by-law as the prohibition of hookah lounges, a purpose they say is beyond the City's legislative competence.

9 Second, the appellants submit that regardless of the purpose of the by-law, it infringes on their property and civil rights to an extent not permitted by the *City of Toronto Act* or the common law.

10 Third, the appellants submit that the application judge erred in concluding that the by-law does not conflict with or frustrate the purpose of the *OHSA*.

11 We address each of these issues in turn.

(1) The purpose of the by-law

12 The appellants submit that the purpose of the by-law must be determined having regard not only to its apparent purpose, but also its effect. They characterize health and safety concerns as the *motive* for the by-law, but submit that the effect of the by-law is the closure of many, if not most of the appellants' businesses, and that this is determinative of the by-law's purpose.

13 The appellants do not submit that the City's stated purpose -- the protection of health and safety -- is somehow colourable, but say that the primary effect of the law will be the closing of hookah lounges, and that this overwhelms the City's health and safety motive when characterizing the purpose of the by-law.

14 This argument must be rejected.

15 As the application judge noted, the appellants are licensed by the City to sell food and may continue to do so. Indeed, they may continue to sell shisha. What they cannot do is to permit the smoking of hookah pipes on their business premises. There is no doubt that many hookah lounges will suffer economic harm as a result of the by-law and may no longer be economically viable, but it does not follow that this is the by-law's purpose. The protection of public health and safety necessarily has economic impact on the operation of the appellants' businesses, but that impact is incidental to, rather than determinative of, the purpose of the by-law.

16 The application judge reviewed the background to the passage of the by-law, including the evidence of the City's Medical Officer of Health, who reported to the City Council that hookah smoke was a health hazard to staff and patrons of establishments where it was smoked -- regardless of what was smoked in the hookah. He noted that hookah smoking included some of the same carcinogenic chemicals associated with tobacco, and yet many wrongly assumed that hookah smoking was less harmful than smoking tobacco. The Medical Officer prepared a comprehensive report for the Board of Health that reviewed legislative responses from other jurisdictions in Canada and abroad, and recommended that hookah smoking in businesses licensed by the City be prohibited.

17 In short, there was ample support in the record for the application judge's conclusion that the purpose of the by-law was the protection of public health and safety, a purpose specifically authorized by s. 8(2) of the *City of Toronto Act*.

18 That is sufficient to dispose of this ground of appeal. It is not necessary to determine whether the City has the broader power to prohibit the operation of a business.

(2) Does the by-law infringe property and civil rights?

19 The appellants submit that the City's by-law making power has to be given a limited reading in order to minimally impair their common law property rights. The appellants describe the legislation as in effect targeting and destroying their business property without compensation, a result that should be avoided in the absence of clear language in the *Act* or proof that the prohibition was necessary or essential to achieve the health and safety purpose.

20 We disagree.

21 The *City of Toronto Act* establishes broad by-law making authority. It is not to be given the narrow construction advocated by the appellants: *Toronto Livery Association v. Toronto (City)*, 2009 ONCA 535, 253 O.A.C. 56, at paras. 29-30.

22 There is no basis to impugn the application judge's finding that the by-law was not confiscatory in any event. This is not a case in which the City has taken something from the appellants, nor is the by-law tantamount to an expropriation. The by-law regulates business establishments otherwise licensed by the City. In no sense can the by-law be said to confiscate the appellants' property.

(3) Does the by-law conflict with or frustrate the *Occupational Health and Safety Act*?

23 There is no merit to the appellants' submission that the by-law conflicts with or frustrates the purpose of the *OHSA*.

24 The by-law protects the health and safety of patrons as well as employees of businesses. It does not render compliance with the *OHSA* impossible, or even more difficult. On the contrary, the by-law is complementary to both the purpose and the provisions of the *OHSA*. Contrary to the appellants' submission, the *OHSA* does not require the City to adopt measures short of a prohibition on hookah smoking in order to protect employment in hookah lounges.

C. CONCLUSION

25 The application judge was alive to the hardship the passage of the by-law may occasion for the appellants. However, he recognized that it was not the court's role to second-guess policy decisions made by elected municipal officials. The *City of Toronto Act* specifically immunizes by-laws against judicial review for reasonableness: s. 213. The application judge was limited to determining the legal validity of the city's by-law, and he made no errors doing so.

26 The appeal is dismissed.

27 By agreement of the parties, each side will bear its own costs.

K.M. WEILER J.A.
K.M. van RENSBURG J.A.
G. HUSCROFT J.A.

TAB 6

UNWRITTEN CONSTITUTIONAL PRINCIPLES: WHAT IS GOING ON?

The Rt Hon Beverley McLachlin*

This is the edited text of the annual Lord Cooke of Thorndon Lecture, delivered at the Victoria University of Wellington Law School on 1 December 2005.

A few years ago, a new subject emerged on the hot list of legal academe – unwritten constitutional principles. It was greeted with interest and optimism by some, but puzzlement and scepticism by others. What were these principles? Was the phrase "unwritten constitutional principles" not an oxymoron, given that constitutions are generally understood to be written documents? And if one surmounts these difficulties, how and by whom are these so-called unwritten constitutional principles to be discovered? The judges, you say? But what gives the judges the right to set forth constitutional principles capable of invalidating laws and executive acts, when Parliament has not seen fit to set these principles out in writing in the nation's constitution?

Yet despite these inauspicious murmurs, the subject has engaged judges, parliamentarians and academics in countries as far flung as Israel, Australia and the United States. It has been debated both in countries that have written constitutions and countries that do not. In fact, many political scientists and legal scholars observe that participation in the "rights revolution" may be less about the precise wording of constitutional texts – or even about bills of rights at all – but instead a reflection of a certain kind of supportive legal and political culture.[1] Whatever the cause, it is certainly clear that the post-Second World War period can properly be called the "age of rights".[2] Clearly something is going on here; something that cannot be dismissed with a wave of the judicial hand. Tonight I would like to explore that question. Hence the title of my address: "Unwritten Constitutional Principles: What is Going On?"

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* Chief Justice of Canada.

1 See Charles R Epp *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, Chicago, 1998).

2 Lorraine E Weinrib "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Can Bar Rev 699.

I will suggest that actually quite a lot is going on, and that it is important. What is going on is the idea that there exist fundamental norms of justice so basic that they form part of the legal structure of governance and must be upheld by the courts, whether or not they find expression in constitutional texts. And the idea is important, going to the core of just governance and how we define the respective roles of Parliament, the executive and the judiciary.

Lord Cooke, for whom this lecture is named, has played a key role in the debate about these principles in New Zealand and more broadly in the common law world. In his decision in *Taylor v New Zealand Poultry Board*, he identified an inherent limit in the capacity of Parliament to enact enforceable laws: "I do not think", he wrote, "that literal compulsion, by torture for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not override them."[3]

He elaborated on this sentiment in an article in 1988 written for the New Zealand Law Journal, where he concluded that:[4]

> Within very broad limits Parliament has the constitutional role of laying down policy, and undoubtedly there is a corresponding duty on the Courts to uphold and respect Parliament's role. But … one can no longer talk about "some vague unspecified law of natural justice" or resort to similar anodynes. One may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility.

This understanding of the role of judges in relation to fundamental rights did not depend on a written bill of rights, although it is not surprising that Lord Cooke also supported the constitutional entrenchment of rights protection, based on the model of the Canadian Charter of Rights and Freedoms.[5]

In his prescient way, Lord Cooke put his finger on a question that would come to more and more preoccupy the common law world in the years that followed: do judges have the right to invoke fundamental norms to trump written laws? And in his usual forthright way, he staked out his turf on the issue in no uncertain terms. He argued that an independent judiciary is the safeguard of parliamentary democracy, and urged courts not to be afraid to assume their role in protecting certain fundamental principles as essential to the rule of law and the expression of democratic will, even if these "deep rights" were not in written form.

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3 *Taylor v New Zealand Poultry Board* [1984] 2 NZLR 394, 398 (CA) Cooke J.

4 Rt Hon Sir Robin Cooke "Fundamentals" [1988] NZLJ 158, 164–165.

5 Cooke, above n 4.

Not everyone, of course, accepted the position that Lord Cooke had so eloquently defended. Critics argued that the invocation of unwritten norms cloaks unelected and unaccountable judges with illegitimate power and runs afoul of the theory of parliamentary supremacy propounded, as they see it, by the venerated legal scholar, Dicey.[6] It is for Parliament, and Parliament alone, they argued, to set out the fundamental constitutional principles of the nation. Some went so far as to suggest that the idea of unwritten constitutional principles was a barely concealed power grab by activist judges.

So who is right? Lord Cooke, who asserts that upholding fundamental norms, even those that have not been written down, is an inherent and legitimate aspect of the judge's role? Or the critics, who assert that the judges have no business going beyond the written word of the constitution?

But I'm getting ahead of myself. The proper outcome of this debate depends on the answer to more profound questions. What do we mean when we speak of unwritten constitutional principles? Are there some principles or norms that are so important, so fundamental, to a nation's history and identity that a consensus of reasonable citizens would demand that they be honoured by those who exercise state power? What do we mean by a constitution? Is the idea of unwritten constitutional principles really a new idea, or is it merely a new incarnation of established legal thought?

To these questions I would answer as follows. First, unwritten constitutional principles refer to unwritten norms that are essential to a nation's history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third – and this is important because of the tone that this debate often exhibits – the idea of unwritten constitutional principles is *not* new and should not be seen as a rejection of the constitutional heritage our two countries share.

The contemporary concept of unwritten constitutional principles can be seen as a modern reincarnation of the ancient doctrines of natural law. Like those conceptions of justice, the identification of these principles seems to presuppose the existence of some kind of natural order. Unlike them, however, it does not fasten on theology as the source of the unwritten principles that transcend the exercise of state power. It is derived from the history, values and culture of the nation, viewed in its constitutional context.

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6 See generally A V Dicey *Introduction to the Study of the Law of the Constitution* (10 ed, Macmillan, Basingstoke, 1959). This view of Dicey's constitutionalism is not universal. Some academics have attempted to re-cast it by noting his discussions of "judicial legislation" and seeking to reconcile them with his conception of a supreme Parliament. For this proposed "more plausible reading", see T R S Allan *Constitutional Justice: A Liberal Theory of the Rule of Law* (Clarendon Press, Oxford, 2001) 13.

As Professor Walters has argued in the Canadian context:[7]

> [I]nsofar as the theory of unwritten fundamental law is regarded as an assertion of the supremacy of natural law, right reason, or universal principles of political morality and human rights over legislation, it is part of a rich intellectual tradition that has informed common law thinking from medieval times, through the English and American revolutionary ages, and into the high Victorian era of empire out of which Canada's written constitution emerged.

If the professor is right, and I think he is, then this idea is neither American nor British, but is shaped by both legal traditions and a common heritage that goes back much further.

This "rich intellectual tradition" of natural law seeks to give the law minimum moral content. It rests on the proposition that there is a distinction between rules and the law. Rules and rule systems can be good, but they can also be evil. Something more than the very existence of rules, it is argued, is required for them to demand respect: in short, to transform rules into law. The distinction between rule *by* law, which is the state of affairs in certain developing countries, and rule *of* law, which developed democracies espouse, succinctly captures the distinction between a mere rules system and a proper *legal* system that is founded on certain minimum values. The debate about unwritten constitutional principles can thus be seen as a debate about the nature of the law itself and what about it demands our allegiance.[8]

Modern democratic theory, as espoused by most developed Western democracies, combines two inherently contradictory doctrines. The first is what is often identified as the Diceyan doctrine that it is for Parliament and Parliament alone to establish the law, and, by implication, the fundamental norms upon which it rests. The second is the belief, widely accepted in developed modern democracies since World War II, that legal systems must adhere to certain basic norms. At a minimum they must allow citizens to vote for those who rule them, and they must not kill any (or many, depending on the state) of their citizens. This much we insist on since the Holocaust. Beyond this minimum, there is a variance, although still a solid core of agreement. States, most hold, should not torture their citizens. States should not discriminate on the basis of gender, race or religion. Finally, at the developing fringes of the new natural law, which goes by the name human rights, are other assertions. Not only should states not directly kill their citizens, they should avoid killing them indirectly by famine, medical neglect, and degradation of the environment.

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7 Mark D Walters "The Common Law Constitution in Canada: Return of *Lex non Scripta* as Fundamental Law" (2001) 51 UTLJ 91, 136.

8 The Hart–Fuller debates are, of course, a particularly striking manifestation of the dividing lines in the discussion. See H L A Hart "Positivism and the Separation of Law and Morals" (1958) in *Essays in Jurisprudence and Philosophy* (Oxford University Press, Oxford, 1983) and *The Concept of Law* (Oxford University Press, Oxford, 1961); Lon L Fuller *The Morality of Law* (Yale University Press, New Haven, 1969).

Although cast in the language of religion, early natural law theories saw the manifestation of the divine in something that became the foundation of the Western world's conception of itself: human rationality. For Thomas Aquinas, it was human reason that allowed individuals to access, in some form, a deeper understanding of justice. Natural law was, he wrote, "something appointed by reason."[9] And yet the limits of that reason made written law incomplete in two important ways. On the one hand, law-makers may abuse their power by deviating from reason and enacting unjust laws. On the other, because law-makers can never imagine all possible circumstances under which their laws apply, just laws will become unjust in certain circumstances.[10]

Today's fundamental norms are cast more clearly and exclusively in terms of reason that take at their heart the notion, in some form, of basic human dignity. There is no doubt that the norms I mentioned earlier – government by consent, the protection of life and personal security, and freedom from discrimination – can all be advanced by moral argument. It is worth noting, however, that they can also be supported by a democratic argument grounded in conceptions of the state and fundamental human dignity that we have developed since John Stuart Mill.

If the state, as we believe, exists as an expression of its citizens, then it follows that its legitimacy and power must be based on the citizens' consent. Hence, citizens must be given the right to vote their governments into and out of office. Similarly, as Canada's *Secession Reference* illustrates, transitions from one form of citizenship to another must be premised on democratic norms.[11] This is so whether the right is written down or not; it flows from our conception of the democratic state. Similarly, if one agrees that the raison d'être of the modern state is to promote the interests of its citizens, it follows that states should not be allowed to exterminate entire sectors of the society. And if we accept equality based in the fundamental dignity of every human being, then it follows that states should not be able to single out innocent groups or individuals for torture or death. These precepts can be seen as the expression of unwritten constitutional principles based on the structure of democracy itself.

Thus the legitimacy of the modern democratic state arguably depends on its adhesion to fundamental norms that transcend the law and executive action. This applies to all of the branches of state governance – Parliament, the executive and the judiciary. For example, the *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of*

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9 Thomas Aquinas *Summa Theologiae* I–II, Question 94, First Article. Cited from William P Baumgarth and Richard J Regan (eds) *Thomas Aquinas on Law, Morality and Politics* (Hackett, Indianapolis, 1988) 45.

10 Thomas Aquinas *Summa Theologiae* I–II, Question 96, Sixth Article, cited from Baumgarth, above n 9, 75:

> Since, then, the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore, if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.

11 *Reference re Secession of Quebec* [1998] 2 SCR 217 (*Secession Reference*).

Government, which were based on the Latimer House Guidelines of 1998 and endorsed by heads of government in 2003, state in article 1:[12]

> Each Commonwealth country's Parliaments, Executives and Judiciaries are the guarantors in their respective spheres of the rule of law, the promotion and protection of fundamental human rights and the entrenchment of good governance based on the highest standards of honesty, probity and accountability.

Rule of law. Human rights. Good governance. Principles that all branches of government, including the judiciary, must seek to uphold. Principles that may be written down, in some measure, in some countries. But principles that the Commonwealth countries have asserted should prevail everywhere.

One way to confirm the link between fundamental norms and our understanding of statehood and the law is to examine the work of courts operating in systems with no written constitutional bill of rights. Even without clearly written constitutional powers of enforcement, courts have found ways to ensure fundamental justice.[13]

In Canada, decades before the Charter, Rand J of the Supreme Court alluded to enforceable – if unwritten – norms of fairness, stating that "[i]n public regulation of this sort there is no such thing as absolute and untrammelled discretion" and good faith must always be presumed.[14] To do otherwise, he wrote, "would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure."[15] Nearly 80 years before Rand J, the courts of British Columbia struggled with a series of anti-Chinese provincial and local laws and used the division of powers in our constitution to strike them down.[16] Members of the Supreme Court of British Columbia – a court on which I would serve 100 years later, at the time of the introduction of the Charter – relied on the text of the constitution, but also on the principles of English law that underlay that text.[17] In 1938, in the *Reference re Alberta Statutes* case,[18] in the absence of a

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12 *Commonwealth Principles on the Accountability of and the Relationship Between the Three Branches of Government* (Commonwealth Secretariat and others, April 2004) <http://www.thecommonwealth.org/> (last accessed 19 September 2006).

13 Epp, above n 1, 201. He concludes that a bill of rights "may be only a secondary effect" in the empowerment of judiciaries given that these "seem capable of deriving legitimacy from sources other than a bill of rights; and constituencies of support for judiciaries have not always been oriented toward a bill of rights."

14 *Roncarelli v Duplessis* [1959] SCR 121, 140.

15 *Roncarelli v Duplessis* , above n 14, 142.

16 *Tai Sing v Maguire* (1878) 1 BCR (Pt 1) 101 (SC); *R v Wing Chong* (1885) 1 BCR (Pt 2) 150 (SC); *R v Mee Wah* (1886) 3 BCR 403 (Cty Ct); *R v Gold Commissioner of Victoria District* (1886) 1 BCR (Pt 2) 260 (Div Ct); and *R v Corporation of Victoria* (1888) 1 BCR (Pt 2) 331 (SC).

17 See John McLaren "The Early British Columbia Supreme Court and the 'Chinese Question': Echoes of the Rule of Law" (1991) 20 Man LJ 107.

18 *Reference re Alberta Statutes* [1938] SCR 100, 133–135 Duff CJ, 145 Cannon J.

written guarantee, the Supreme Court held that freedom of political expression must be recognised as inherent in the nature of democracy.

At this point, you will not be surprised to hear me declare my position. As a modern natural law proponent, I believe that the world was right, in the wake of the horrors of Nazi Germany and the Holocaust, to declare that there are certain fundamental norms that no nation should transgress. I believe that it was right to prosecute German judges in the Nuremberg Trials for applying laws that sent innocent people to concentration camps and probable deaths. I believe that the drafting and adoption of the Universal Declaration of Human Rights in 1948 was a giant step forward in legal and societal thinking. And I believe that judges have the duty to insist that the legislative and executive branches of government conform to certain established and fundamental norms, even in times of trouble. In short, I am with Lord Cooke on this issue.

The real debate, it seems to me, is not about whether judges should ever be able to rely on basic norms to trump bad laws or state action. At least in some circumstances they must be able to do this. If a state were to pass a genocidal law, for example, I think it would clearly be the duty of the judges to deny the law's validity on the ground that it offended the basic norm that states must not exterminate their people. If we agree on this – and I suspect most of us would – then the debate is not about whether judges should *ever* use unwritten constitutional norms to invalidate laws, but rather about *what norms* may justify such action.

The argument I have been advancing may dispose of the suggestion that, as a matter of principle, it is inherently wrong for judges to rely on unwritten constitutional norms, if constitutional is understood here in the sense of an overriding principle that can invalidate laws and executive acts. However, it does not dispose of the contradiction alluded to earlier between the theory that sees Parliament as the source of all law, and the idea that the law may include principles that Parliament has not made. Professor David Dyzenhaus calls this a central contradiction in modern democracies, and he articulates it in terms referable to judges:[19]

> On the one hand, if they fail to give the rule of law substantive content, they will appear to be more concerned with upholding their sense of role than with doing the job that explains why they should have that role. On the other hand, as they give the rule of law content, so they run the risk of appearing to usurp the legislative role … .

Either way, judges lose.

The same conundrum is described by Professor Benjamin Berger, who observes that since the adoption of the Canadian Charter in 1982, "[r]ightly or wrongly … when Canadians hear the word 'Constitution' they hear the promise of a just society. The post-Charter Constitution is held out as a

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19 David Dyzenhaus "The Unwritten Constitution and the Rule of Law" (2004) 23 SCLR (2d) 383, 401.

justice-seeking document."[20] What Berger makes clear is that if Canadians have embraced their constitution as a means to achieve justice, they have not yet established a consensus on where that justice comes from and on what it's based. As he notes:[21]

> But if this symbolic change is clear, we are not at all resolved on our sense of the rightful source of justice in our political structure. Is a just society the fruit of reason or will? Our commitment to democratic institutions that represent the views of the populace – a deep commitment grounded in our history of Parliamentary supremacy – suggests that justice is a question of the authentic representation of will. By contrast, our modern faith in human rights (of which the *Charter* is our national manifestation) suggests that justice is not a matter of majoritarian or popular debate, but an expression of a reasoned commitment to the dignity of all human beings.
>
> What we are seeing in the debates … is an expression of this tension.

The answer to the conundrum between justice as an expression of parliamentary will and justice as an expression of fundamental principles, sometimes unarticulated, lies in the answer to three more particular problems that arise from the concept of underlying unwritten constitutional norms. The first is the problem of how unwritten norms can be squared with the precept that law should be set out in advance of its application. The second is the problem of how to identify these fundamental unwritten principles that are capable of trumping laws and executive action. The third is the problem of judicial legitimacy. I now turn to these problems, dealing with each in turn. It will quickly become apparent, however, that all three are related to a central issue: the legitimacy of unwritten constitutional norms.

I turn first to the precept that the law must be known in advance of its application, and the problem that – on their face – unwritten constitutional norms violate this principle. One of the foundational concepts in law, it is said, is the importance of the "law on the books". The rule of law signifies that all actors in our society – public and private, individual and institutional – are subject to and governed by law. The rule of law excludes the exercise of arbitrary power in all its forms. It requires that laws be known or ascertainable to citizens, and ensures that laws are applied consistently to each citizen, without favouritism, thus ensuring the legitimacy of state exercise of power.

This is a greater problem in some jurisdictions than in others. Many countries have adopted written bills of rights, which may be seen as an attempt to provide clarity, both to citizens and other jurisdictions, about the law of the land. The Magna Carta of the 13th century can in many ways be seen as the first of what we would recognise as a bill of this sort, and of course the 18th

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20 Benjamin L Berger "Judicial Appointments and Our Changing Constitution" (16 September 2005) *The Lawyers Weekly* Canada 3.

21 Berger, above n 20, 4.

century revolutionaries of the United States and in France produced impressive documents that sought to capture the essence of the values of their political movements and mechanisms to express them. In the United States, the constitutional texts have achieved mythical status as embodying not only the limits on government, but the basic values of the state. Renewed interest in setting out basic principles in written form emerged last century out of the horrors of the Second World War and the perceived need for clarity about basic principles that would not be violated. Even in countries with strong common law traditions, the need to set out basic principles in writing increasingly gained currency among both elites and the masses.

The desire to reduce legal principles to writing is significant, but it should not be used to oversimplify the complex issue of the place of unwritten norms in our constitutions. Two points are relevant here.

First, in common law countries, it is distinctly *not* the case that all law must be "on the books". England's attitude to the importance of writing down the law is at best ambivalent. On the one hand, the Magna Carta is a foundational text designed to provide written guarantees of fundamental principles. On the other, the common law fleshed out and supplemented these principles by a catalogue of largely judge-made rules. The presumption of innocence, the rejection of the state's power to use violence against citizens implicit in the common law confessions rule, and the principle of freedom of political expression are but examples of fundamental constraints on executive power articulated by judges. While Parliament theoretically had the power to attenuate and perhaps reverse these judge-made rules, the fact that it by and large chose not to shows a relaxed attitude to the need to set laws down in writing for the citizen's guidance. Indeed, the ability of the common law to develop ex post facto responses to new situations is frequently cited as its genius.

Not everyone, of course, thought this lack of written laws a good thing. Jeremy Bentham decried what he saw reflected in the common law of crimes. In 1792, he wrote that it amounted to "dog law". "When your dog does any thing you want to break him of," he explained, "you wait till he does it, and then beat him for it. This is the way you make laws for your dog: and this is the way the Judges make law for you and me."[22]

The second point that should be made about the view that all laws should be in writing is that even when the legislature takes the trouble to write down laws, the result is almost always incomplete. Laws are necessarily stated in general terms. They are intended to apply to a wide variety of situations. Law-makers cannot conceivably foresee all the situations to which a legal provision may apply, nor how it should do so. Judges must reduce the legislative general to the situational particular. The result is that even where laws are written down, it is often impossible to

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22 Jeremy Bentham *Truth Versus Ashhurst; or, Law as it is, Contrasted with What it is Said to be* (T Moses, London, 1823) 11.

predict precisely how the law will apply in a particular situation in advance of a judicial ruling on the matter. This is as true for civil code countries where all laws are reduced to writing, as it is for common law countries. In this sense, much of the law is never "on the books".

This is also true of constitutions. Benjamin Berger, writing about the Canadian constitution, has this to say:[23]

> When we think about what counts as constitutional law, we generally look exclusively to two sources: the text of the Constitution and the decisions of the Supreme Court of Canada. As any first-year student will learn in constitutional law, this gaze is an under-inclusive one.
>
> Since Confederation, many of the arrangements central to the shape and functioning of our government have taken the form of convention and political construction.

In other words, even inclusive, written constitutions leave much out, requiring us to look at convention and usage. In addition, the broad, open-textured language used in constitutional documents admits of a variety of interpretations. In order to resolve the interpretational issues that may arise from this language, judges may need to resort to conventions and principles not articulated in the written constitution itself.

What then do we mean when we say law should be "on the books"? We mean, it seems to me, that applications of the law should be connected to generally accepted rules. It is not necessary that the law foretell precise results. It is sufficient that the law provide a general idea of what kind of result may ensue, and that the result, once established by judicial rulings, be justifiable in terms of what is written on the books and legal convention or usage.

Fundamental constitutional principles, whether written or unwritten, meet these requirements. Unwritten common law constitutional norms, such as the right not to be punished without a trial, to retain and instruct counsel, or to enjoy the presumption of innocence, are so fixed in convention and usage that judicial rulings based upon them will be understood and accepted as just. I conclude that while it is useful to articulate fundamental constitutional norms insofar as we can, the fact that a principle or its application does not take written form does not provide a principled reason for rejecting judicial reliance on it.

This brings us to the second problem: identifying those unwritten constitutional principles that can prevail over laws and executive action. At least three sources of unwritten constitutional principles can be identified: customary usage; inferences from written constitutional principles; and the norms set out or implied in international legal instruments to which the state has adhered.

Traditionally at common law, unwritten fundamental principles of constitutional or quasi-constitutional significance have been identified by past usage, chiefly the cases that have been

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23 Berger, above n 20.

decided by judges in the past. Judgments identifying or clarifying constitutional norms are typically supported by a culture in which Parliament and the executive accept the appropriateness of the norm and permit it to stand. Occasional exceptions, such as states of emergency, do not negate the general acceptance of these norms. As Dean Palmer of this Faculty of Law notes in a recently published paper, bureaucratic and political actors not only respond to constitutional interpretation, but they also engage in it themselves when they acknowledge and respect the legitimate constraints on their spheres of decision-making.[24] Usage is thus not only about how judges view the constitution, but how decision-makers more generally understand their function in a broader system of governance.

The recourse to usage for constitutional guidance is clearly understood in post-colonial countries, such as Canada and New Zealand. Thus the preamble to Canada's 1867 constitutional text stipulates "a Constitution similar in principle to that of the United Kingdom,"[25] contemplating reference to unwritten constitutional norms derived from British history.

This brings me to the second source of unwritten constitutional principles – inference from the constitutional principles and values that have been set down in writing. While they may interpret their written constitutions, courts are never free to ignore them. Confronted with a new situation requiring a new norm, judges must look to the written constitution for the values that capture the ethos of the nation. In Canada, the 1998 *Secession Reference*[26] provides an instructive example of how courts may draw unwritten constitutional principles from the written provisions of the constitution. The background was a provincial referendum ten years ago in which citizens in Quebec defeated the proposition that Quebec secede from Canada, but did so by a margin of just over one per cent. Shocked, the Canadian government referred the question of the legality of unilateral secession to the Supreme Court.

The texts of Canada's constitution are silent on whether a province can secede from the federation. No written principles set the legal framework that would govern an attempt to secede. In order to answer the question before it, the Supreme Court turned to Canada's history and conventions, as well as the values that Canadians, through their governments, had entrenched in their written constitution. It examined these in the light of a long-recognised treatment of Canada's evolving constitution as a "living tree".[27]

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24 Matthew S R Palmer "What Is New Zealand's Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders" (2006) 17 PLR 133, 152–153.

25 Constitution Act 1867 (UK), 30 & 31 Vic, c 3, preamble (reprinted in RS C 1985 App II, No 5).

26 *Secession Reference*, above n 11.

27 *Edwards v Attorney-General for Canada* [1930] AC 124 (PC) 136; *Secession Reference*, above n 11, para 52.

The Court identified four "fundamental and organizing principles of the Constitution"[28] which were relevant to the question: federalism; democracy; constitutionalism and the rule of law; and respect for minorities. Although unwritten, the Court found that "it would be impossible to conceive of our written structure without them"[29] and found that they were "not merely descriptive, but … also invested with a powerful normative force, and are binding upon both courts and governments."[30] By exploring both the foundations and implications of each of these principles, the Court provided the answer to the question posed by the government: under Canadian law, unilateral succession by a province was not possible. However, the Court went on to state that these same organising principles imposed an obligation on the federal and provincial governments to enter into negotiations if the citizens of Quebec were to provide "a clear expression of a clear majority"[31] on the question of secession. By examining constitutional texts in light of the principles that underlay them and gave their content meaning, the Court ensured that an important legal gap was filled. This permitted the Court to suggest concrete steps that would have to be followed in a process that would provide the certainty, stability and predictability that are cornerstones of the rule of law.

The third source that may suggest and inform unwritten constitutional principles is international law. Customary international law has been accepted as a legitimate part of the common law without controversy, largely because it is based on both usage and on an acceptance of a sense of obligation: what we call *opinio juris.* As for treaties signed by the Crown, however, the traditional "dualism" of the common law has generally required the explicit incorporation of international norms into domestic law. Yet as British barrister Rabinder Singh has recently noted, judgments in the United Kingdom seem to reveal an increasing acceptance that even unincorporated treaties can be used not only to resolve ambiguity, but may establish a "presumption of compatibility" in the absence of express statutory language to the contrary.[32] As courts continue to struggle to understand the precise legal effect of a country's international commitments,[33] it surely must be the case that these can inform our understanding of the basic

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28 *Secession Reference*, above n 11, para 32.

29 *Secession Reference*, above n 11, para 51.

30 *Secession Reference*, above n 11, para 54.

31 *Secession Reference*, above n 11, para 92.

32 Rabinder Singh "Globalisation of Human Rights and International Norms" (Paper Presented at UK–Canada Legal Exchange, London, 30 September 2005) (on file with the New Zealand Journal of Public and International Law). He points in particular to Lord Bingham of Cornhill in *A v Secretary of State for the Home Department* [2005] 2 UKHL 71 and Lord Steyn and Lord Nicholls in *Kuwait Airways Corporation* [2002] 2 UKHL 19.

33 For a discussion of the Canadian context, see Jutta Brunnée and Stephen J Toope "A Hesitant Embrace: *Baker* and the Application of International Law by Canadian Courts" in David Dyzenhaus (ed) *The Unity of Public Law* (Hart Publishing, Oxford, 2004).

values that the state publicly and formally embraces. Where a country adheres to international covenants, such as the United Nations Convention Against Torture[34] or the International Covenant on Civil and Political Rights,[35] it thereby signals its intentions to be bound by their principles. This may amplify indications from usage and convention and the written text of the constitution and help to establish the boundaries of certain unwritten principles.

I return to the question: how can unwritten constitutional principles be identified? The answer is that they can be identified from a nation's past custom and usage; from the written text, if any, of the nation's fundamental principles; and from the nation's international commitments. Unwritten principles are not the arbitrary or subjective view of this judge or that. Rather, they are ascertained by a rigorous process of legal reasoning. Where, having regard to convention, written provisions and internationally affirmed values, it is clear that a nation and its people adhere to a particular fundamental principle or norm, then it is the court's duty to recognise it. This is not law-making in the legislative sense, but legitimate judicial work.

Having examined whether unwritten constitutional principles violate the idea that laws should be written, and having identified three sources from which these principles can be ascertained, I turn now to the final problem: the problem of judicial legitimacy.

Here we face another apparent contradiction. On the one hand, the legitimacy of the judiciary depends on the justification of its decisions by reference to a society's fundamental constitutional values.[36] This is what we mean when we say the task of judges is to do justice. Judges who enforce unjust laws – laws that run counter to fundamental assumptions about the just society – lose their legitimacy. When judges allow themselves to be co-opted by evil regimes, they are no longer fit to be judges. This is the lesson of the Nuremberg Trials. It is also a lesson, however, that should embolden judges when faced with seemingly more mundane manifestations of injustice.

However, matters are not so simple. As judges give content to unwritten constitutional principles, they may be accused of usurping the functions of Parliament; of making the law rather than interpreting and applying it; in short, of judicial activism. We should not lightly dismiss this concern – a concern that troubles many who sincerely care about just democratic governance. They argue that unelected judges cannot be trusted to determine issues of fundamental significance to citizens. They say that unwritten constitutional principles are not anchored in a text arrived at through a democratic consensus. There is therefore no safeguard to ensure that judges do not

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34 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1465 UNTS 85) was adopted in 1984. Canada signed it in 1985 and ratified it in 1987; New Zealand signed it in 1987 and ratified it in 1989.

35 The International Covenant on Civil and Political Rights (999 UNTS 171) was adopted in 1966. Canada acceded to it in 1976; New Zealand signed it in 1968 and ratified it in 1979.

36 Dyzenhaus, above n 19, 412.

merely express their personal preferences about important political issues. In the words of one American scholar, "When judges look outside the Constitution" – and here he means the written constitution – "they ultimately look inside themselves."[37] Moreover, even if one could trust the judges to get the right answer, asking unelected appointees to do so would be wrong on principle because it depends not on the will of the people but of the individual. In a word, it is undemocratic, the critics contend. These arguments are sometimes supplemented by the concern that as members of elite groups, judges may import unwritten constitutional principles to undermine the protection of minorities and the vulnerable or to advance narrow interests.[38]

The question of judicial legitimacy returns us to the conundrum I alluded to at the outset. To be legitimate, judges must conform to fundamental moral norms of a constitutional nature. But when they do, they risk going beyond what would appear to be their judicial functions. How is the conundrum to be resolved? The answer, I would suggest, is that the conundrum is a false one; that judges must be able to do justice and at the same time stay within the proper confines of their role.

The role of judges in a democracy is to interpret and apply the law. The law involves rules of different orders. The highest is the order of fundamental constitutional principles. These are the rules that guide all other law-making and the exercise of executive power by the state. More and more in our democratic states, we try to set these out in writing. But when we do not, or when, as is inevitable, the written text is unclear or incomplete, recourse must be had to unwritten sources. The task of the judge, confronted with conflict between a constitutional principle of the highest order on the one hand, and an ordinary law or executive act on the other, is to interpret and apply the law as a whole – including relevant unwritten constitutional principles.

This presupposes that the constitutional principle is established having regard to the three sources just discussed – usage and custom; values affirmed by relevant textual constitutional sources; and principles of international law endorsed by the nation. Determining whether these sources disclose such principles is quintessential judicial work. It must be done with care and objectivity. It is not making the law, but interpreting, reconciling and applying the law, thus fulfilling the judge's role as guarantor of the constitution.

How does the judge discharge this duty? First, it seems to me, the judge must seek to interpret a suspect law in a way that reconciles it with the constitutional norm, written or unwritten.

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37 Ronald D Rotunda "Interpreting an Unwritten Constitution" (1989) 12 Harv JL & Pub Pol'y 15, 17.

38 In Canada, these democratic and social class arguments come from both left and right. For examples, see Michael Mandel *The Charter of Rights and the Legalization of Politics in Canada* (rev ed) (Thompson Educational Publishing, Toronto, 1992); Allan C Hutchinson *Waiting for Coraf: A Critique of Law and Rights* (University of Toronto Press, Toronto, 1995); F L Morton and Rainer Knopf *The Charter Revolution and the Court Party* (Broadview Press, Peterborough (ON), 2000); and Patrick James, Donald E Abelson and Michael Lusztig (eds) *The Myth of the Sacred: The Charter, the Courts, and the Politics of the Constitution in Canada* (McGill–Queen's University Press, Montreal and Kingston, 2002).

Usually, this will resolve the problem. But in rare cases, it may not. If an ordinary law is clearly in conflict with a fundamental constitutional norm, the judge may have no option but to refuse to apply it.

In the 1961 film *Judgment at Nuremberg*, Judge Dan Haywood – played by Spencer Tracy – delivers a powerful set of justifications for punishing those who not only had violated the law, but who had done so under the cover of their own allegiance to the state and its positive law. The judge rules as follows:[39]

> But the Tribunal does say that the men in the dock are responsible for their actions, men who sat in black robes in judgment on other men; men who took part in the enactment of laws and decrees, the purpose of which was the extermination of human beings; men who in executive positions actively participated in the enforcement of these laws – illegal even under German law.

By this, I take the judge to mean that these laws and decrees were unconstitutional under the higher principles as affirmed by Germany's history, culture and constitution. Moments later the judge notes that what is shocking about the atrocities is the degree to which they were normalised. Had the defendants been "degraded perverts" or "sadistic monsters and maniacs, then these events would have no more moral significance than an earthquake, or any other natural catastrophe." Judges must resist this normalisation – this making "law" out of what cannot be just, and hence, in a profound sense, cannot be legal. To do otherwise is to allow injustice to hide itself under the cloak of false legality.

Critics often concede the point, but suggest that this duty is narrow and limited. Professor Jeffrey Goldsworthy's landmark critique[40] of the judicial enforcement of unwritten principles, for example, allows that it may at times be proper, morally, for a judge to contradict Parliament in the face of injustice. At the same time, he argues that to turn this kind of moral obligation into a legal one is to confuse morality and legality.[41] He goes on to argue that a view of the law that affirms its moral content is one that shows insufficient concern for the democratic consequences of this kind of judicial role:[42]

> In a healthy democratic society, cases of clear and extreme injustice are rare; in most cases, whether or not a law violates some basic right is open to reasonable arguments on both sides. The whole point of having a democracy is that in these debatable cases the opinion of the majority rather than of an unelected élite is supposed to prevail.

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39 Stanley Kramer (director/producer) and Abby Mann *Judgment at Nuremberg* (Roxton Films, USA, 1961).

40 Jeffrey Goldsworthy *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, Oxford, 1999) 277.

41 Goldsworthy, above n 40, 263–272.

42 Goldsworthy, above n 40, 269.

Goldsworthy's refutation, however, is a partial one. It applies only in a "healthy democratic society", where cases of "clear and extreme injustice are rare", and only to "debatable cases", where it is easy, and arguably right, to say that judges should leave the final resolution to the legislature or the executive. But what of unhealthy societies, less debatable cases?

Interpreting and applying constitutional principles, written and unwritten, requires that the judge hold uncompromisingly to his or her judicial conscience, informed by past legal usage, written constitutional norms and international principles to which the nation has attorned. But judicial conscience is not to be confused with personal conscience. Judicial conscience is founded on the judge's sworn commitment to uphold the rule of law. It is informed not by the judge's personal views, nor the judge's views as to what policy is best. It is informed by the law, in all its complex majesty, as manifested in the three sources I've suggested.

In Robert Bolt's drama, *A Man For All Seasons*, we encounter a scene in which Cardinal Wolsey, seeking to advance the King's interests, confronts the conscience of Sir Thomas More, not yet Lord Chancellor, who serves as a symbol of the law and the constitution in the face of arbitrariness and the demands of politics. The Cardinal presents arguments of expedience, personal and public, for assisting the King, who requires a divorce. Appeals are made to More's "common sense" and he is implored to abandon the blinders of his "moral squint" to better see the political picture.[43] But Thomas More cannot forsake a conscience grounded in deeper legal principles. He states his creed this way: "I believe, when statesmen forsake their own private conscience for the sake of their public duties … they lead their country by a short route to chaos."[44]

While Bolt's More speaks of "private conscience", it is clear that what he means is the legal conscience of a jurist who has considered the nature of the law. Indeed, the historical Thomas More viewed conscience as the foundation of law precisely because he did not see it as an expression of personal feeling or passion. Instead, what he termed "conscience" was what allowed all individuals, even traitors and tyrants, to access justice if they applied their reason.[45] Never advocating open resistance by the masses in the face of unjust laws, and expressing concerns about lawlessness, More nevertheless understood that the positive laws did not define the boundaries of law. His correspondence with his daughter while imprisoned – in what would be his final days – reveals a man burdened by his own reasoned legal conscience. In what has been called More's

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43 Robert Bolt *A Man For All Seasons* (Irwin, Toronto, 1963) Act I, Sc II, 10.

44 Bolt, above n 43, 12.

45 See Gerard B Wegemer *Thomas More on Statesmanship* (Catholic University of America Press, Washington, 1996) 73.

"Dialogue on Conscience",[46] he takes some comfort, even in prison and facing death, from his certainty that his conscience was clear and was the product of good faith, reason and diligence.[47]

It is a similar conscience, grounded and schooled in custom and the law, that is the surest guide to upholding the fundamental principles upon which justice and democracy rest. Modern judges may not be called upon to exercise the courage of Thomas More, who described his choice as lying between "beheading and hell".[48] But I do suggest that a judge, if he or she is to take seriously the duties of the office, must apply his or her judicial conscience and reason, and that this may at times mean making decisions that are difficult or unpopular.

Lest I be accused of advocating "dog law", let me say again that the principles that guide these difficult decisions are not those of individual judges, but those implicit in the very system that gives the judges their authority. Ignoring one's judicial conscience is not about staying within one's role, but instead about abdicating one's responsibility to the law. There do indeed exist unwritten principles without which the law would become contradictory and self-defeating, and it is the duty of judges not only to discover them, but also to apply them. To forsake them, in Robert Bolt's phrase, is indeed to take the short route to chaos.

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46 Wegemer, above n 45, 210–211.

47 In More's letter of 3 June 1535 to his daughter, Margaret Roper, only a month before his execution, he writes of his certainty about the correctness of his rejection of the King's positive law:

> And whereas it might haply seem to be but small cause of comfort because I might take harm here first in the meanwhile, I thanked God that my case was such in this matter through the clearness of mine own conscience that though I might have pain I could not have harm, for a man in such case lose his head and have no harm. For I was very sure that I had no corrupt affection … .

Further, he notes

> … I said that I was very sure that mine own conscience so informed as it is by such diligence as I have so long taken therein may stand with mine own salvation. I meddle not with the conscience of them that think otherwise; every man *suo domino stat et cadit* [stands and falls as his own ruler].

James J Greene and John P Dolan (eds) *The Essential Thomas More* (Mentor-Omega, New York, 1967) 277, 279.

48 Greene and Dolan (eds), above n 47, 278.

TAB 7

Case Name:

Sauvé v. Canada (Chief Electoral Officer)

Richard Sauvé, appellant;
v.
The Attorney General of Canada, the Chief Electoral Officer of Canada and the Solicitor General of Canada, respondents.
And between
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 Bélanger, Emile A. Bear and Randy Opoonechaw, appellants;
v.
The Attorney General of Canada, respondent, and The Attorney General for Alberta, the Attorney General of Manitoba, the Canadian Association of Elizabeth Fry Societies, the John Howard Society of Canada, the British Columbia Civil Liberties Association, the Aboriginal Legal Services of Toronto Inc. and the Canadian Bar Association, interveners.

[2002] S.C.J. No. 66

[2002] A.C.S. no 66

2002 SCC 68

2002 CSC 68

[2002] 3 S.C.R. 519

[2002] 3 R.C.S. 519

218 D.L.R. (4th) 577

294 N.R. 1

J.E. 2002-1974

168 C.C.C. (3d) 449

5 C.R. (6th) 203

98 C.R.R. (2d) 1

117 A.C.W.S. (3d) 553

55 W.C.B. (2d) 21

REJB 2002-35062

File No.: 27677.

Supreme Court of Canada

Heard: December 10, 2001;
Judgment: October 31, 2002.

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

(208 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Constitutional law -- Charter of Rights -- Right to vote -- Prisoners -- Canada Elections Act provision disqualifying persons imprisoned in correctional institution serving sentences of two years or more from voting in federal elections -- Crown conceding that provision infringes right to vote -- Whether infringement justified -- Canadian Charter of Rights and Freedoms, ss. 1, 3 -- Canada Elections Act, R.S.C. 1985, c. E-2, s. 51(e).

Constitutional law -- Charter of Rights -- Equality rights -- Prisoners -- Canada Elections Act provision disqualifying persons imprisoned in correctional institution serving sentences of two years or more from voting in federal elections -- Whether provision infringes equality rights -- Canadian Charter of Rights and Freedoms, s. 15(1) -- Canada Elections Act, R.S.C. 1985, c. E-2, s. 51(e).

Elections -- Disqualifications of electors -- Prisoners -- Canada Elections Act provision disqualifying persons imprisoned in correctional institution serving sentences of two years or more from voting in federal elections -- Whether provision constitutional -- Canadian Charter of Rights and Freedoms, ss. 1, 3, 15(1) -- Canada Elections Act, R.S.C. 1985, c. E-2, s. 51(e).

Summary:

Section 51(*e*) of the *Canada Elections Act* denies the right to vote to "[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more." The constitutionality of s. 51(*e*) was challenged on the grounds that it contravenes ss. 3 and 15(1) of the *Canadian Charter of Rights and Freedoms* and is not demonstrably justified under s. 1. In the Federal Court, Trial Division, the Crown conceded that s. 51(*e*) infringes the right to vote guaranteed by s. 3 of the *Charter* and the trial judge found that the infringement was not justified under s. 1 of the *Charter*. The majority of the Federal Court of Appeal set aside the decision and upheld the constitutionality of s. 51(*e*). The court held that the infringement of s. 3 was justifiable in a free and democratic society and that s. 51(*e*) did not infringe the equality rights guaranteed by s. 15(1) of the *Charter*.

Held (L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. dissenting): The appeal should be allowed.

Per McLachlin C.J. and Iacobucci, Binnie, Arbour and LeBel JJ.: To justify the infringement of a *Charter* right under s. 1, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified. The government's argument that denying the right to vote to penitentiary inmates requires deference because it is a matter of social and political philosophy is rejected. While deference may be appropriate on a decision involving competing social and political policies, it is not appropriate on a decision to limit fundamental rights. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause. The argument that the philosophically-based or symbolic nature of the objectives in itself commands deference is also rejected. Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny. Here, s. 51(*e*) is not justified under s. 1 of the *Charter*.

The government has failed to identify particular problems that require denying the right to vote, making it hard to conclude that the denial is directed at a pressing and substantial purpose. In the absence of a specific problem, the government asserts two broad objectives for s. 51(*e*): (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment or "enhance the general purposes of the criminal sanction". Vague and symbolic objectives, however, make the justification analysis difficult. The first objective could be asserted of virtually every criminal law and many non-criminal measures. Concerning the second objective, nothing in the record discloses precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed. Nevertheless, rather than dismissing the government's objectives outright, prudence suggests that we proceed to the proportionality inquiry.

Section 51(*e*) does not meet the proportionality test. In particular, the government fails to establish a rational connection between s. 51(*e*)'s denial of the right to vote and its stated objectives. With respect to the first objective of promoting civic responsibility and respect for the law, denying peni-

tentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits. Moreover, the argument that only those who respect the law should participate in the political process cannot be accepted. Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*. It also runs counter to the plain words of s. 3 of the *Charter*, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern.

With respect to the second objective of imposing appropriate punishment, the government offered no credible theory about why it should be allowed to deny a fundamental democratic right as a form of state punishment. Denying the right to vote does not comply with the requirements for legitimate punishment -- namely, that punishment must not be arbitrary and must serve a valid criminal law purpose. Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender. Section 51(*e*) *qua* punishment bears little relation to the offender's particular crime. As to a legitimate penal purpose, neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. By imposing a blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct, s. 51(*e*) does not meet the requirements of denunciatory, retributive punishment, and is not rationally connected to the government's stated goal.

The impugned provision does not minimally impair the right to vote. Section 51(*e*) is too broad, catching many people who, on the government's own theory, should not be caught. Section 51(*e*) cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise.

Lastly, the negative effects of denying citizens the right to vote would greatly outweigh the tenuous benefits that might ensue. Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and undermines correctional law and policy directed towards rehabilitation and integration. In light of the disproportionate number of Aboriginal people in penitentiaries, the negative effects of s. 51(*e*) upon prisoners have a disproportionate impact on Canada's already disadvantaged Aboriginal population.

Since s. 51(*e*) unjustifiably infringes s. 3 of the *Charter*, it is unnecessary to consider the alternative argument that it infringes the equality guarantee of s. 15(1) of the *Charter*.

Per L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. (dissenting): This case rests on philosophical, political and social considerations which are not capable of "scientific proof". It involves justifications for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. When faced with such justifications, this Court ought to turn to the text of s. 1 of the *Charter* and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the *Charter*. Particu-

larly, s. 1 of the *Charter* requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive *Charter* scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional. In the realm of competing social or political philosophies, reasonableness is the predominant s. 1 justification consideration. Section 1 of the *Charter* does not constrain Parliament or authorize this Court to prioritize one reasonable social or political philosophy over reasonable others, but only empowers this Court to strike down those limitations which are not reasonable and which cannot be justified in a free and democratic society. The decision before this Court is therefore not whether or not Parliament has made a proper policy decision, but whether the policy position chosen by Parliament is an acceptable choice amongst those permitted under the *Charter*.

Since this case is about evaluating choices regarding social or political philosophies and about shaping and giving practical application to values, especially values that may lie outside the *Charter* but are of fundamental importance to Canadians, the "dialogue" between courts and Parliament is of particular importance. The dialogue metaphor does not signal a lowering of the s. 1 justification standard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends. In this case, 'dialogue' has existed insofar as Parliament had been addressing, since well before the Federal Court of Appeal decision, an evaluation of the right to vote, and specifically, the issue of prisoner disenfranchisement. This evaluation was obviously undertaken with the many cases concerning prisoner disenfranchisement that had occurred up to that point in mind. In enacting s. 51(*e*) of the *Canada Elections Act* and in providing a justification of that provision before the courts, Parliament has indicated that it has drawn a line.

In this case, while it has been conceded that s. 51(*e*) of the *Canada Elections Act* infringes s. 3 of the *Charter*, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society. The objectives of s. 51(*e*) are pressing and substantial. Both objectives are based upon a reasonable and rational social or political philosophy. The first objective, that of enhancing civic responsibility and respect for the rule of law, relates to the promotion of good citizenship. The social rejection of serious crime reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community. The "promotion of civic responsibility" may be abstract or symbolic, but symbolic or abstract purposes can be valid of their own accord and must not be downplayed simply for the reason of their being symbolic. The second objective is the enhancement of the general purposes of the criminal sanction. Section 51(*e*) clearly has a punitive aspect with a retributive function. It is a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime. The disenfranchisement is a civil disability arising from the criminal conviction.

Section 51(*e*) meets the proportionality test. First, the impugned legislation is rationally connected to the objectives. While a causal relationship between disenfranchising prisoners and the objectives is not empirically demonstrable, reason, logic and common sense, as well as extensive expert evidence, support a conclusion that there is a rational connection between disenfranchising offenders incarcerated for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction. With respect to the first

objective, the removal of the right to vote from serious incarcerated criminals does no injury to, but rather recognizes, their dignity. Further, the disenfranchisement of serious criminal offenders serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. Society may choose to curtail temporarily the availability of the vote to serious criminals to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation. With respect to the second objective, the disenfranchisement is carefully tailored to apply to perpetrators of serious crimes, and there is evidence in the record indicating that the denial of the right to vote is perceived as meaningful by the prisoners themselves and can therefore contribute to the rehabilitation of prisoners. Lastly, many other democracies have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement.

Second, the impairment of the *Charter* right is minimal. Minimal impairment is about analyzing the line that has been drawn. This analysis does not require the Crown to have adopted the absolutely least intrusive means for promoting the purpose, although it does require that the Crown prefer a significantly less intrusive means if it is of equal effectiveness. Here, no less intrusive measure would be equally effective. Only "serious offenders", as determined by Parliament, are subject to disenfranchisement. Since Parliament has drawn a two-year cut off line which identifies which incarcerated offenders have committed serious enough crimes to warrant being deprived of the vote, any alternative line will not be of equal effectiveness. Equal effectiveness is a dimension of the analysis that should not be underemphasized, as it relates directly to Parliament's ability to pursue its legitimate objectives effectively. Any other line insisted upon amounts to second-guessing Parliament as to what constitutes a "serious" crime. The provision is reasonably tailored insofar as disenfranchisement reflects the length of the sentence and actual incarceration, which, in turn, reflect the seriousness of the crime perpetrated and the intended progress towards the ultimate goals of rehabilitation and reintegration. Section 51(*e*) is not arbitrary: it is related directly to particular categories of conduct. The two-year cut off line also reflects several practical considerations. Further, since this Court gave the impression that it was up to Parliament to do exactly this after the first *Sauvé* case was heard in 1993, there is a need for deference to Parliament in its drawing of a line. The analysis of social and political philosophies and the accommodation of values in the context of the *Charter* must be sensitive to the fact that there may be many possible reasonable and rational balances. Line drawing, amongst a range of acceptable alternatives, is for Parliament, especially in this case where any alternate line would not be equally effective, in that the line drawn reflects Parliament's identification of what amounts to serious criminal activity.

Third, when the objectives and the salutary effects are viewed in the totality of the context, they outweigh the temporary disenfranchisement of the serious criminal offender. The enactment of the measure is itself a salutary effect. The legislation intrinsically expresses societal values in relation to serious criminal behaviour and the right to vote in our society. Value emerges from the signal or message that those who commit serious crimes will temporarily lose one aspect of the political equality of citizens. Furthermore, the temporary disenfranchisement is perceived as meaningful by the offenders themselves and could have an ongoing positive rehabilitative effect. The most obvious deleterious effect of s. 51(*e*) is the potential temporary loss of the vote. This, however, must be considered in light of Parliament's objectives, as illuminated by the totality of the context. The statistical data mentioned by the Federal Court of Appeal indicate that the provision catches serious and repeat offenders and that most prisoners will only be deprived of participation in one election. Be-

cause the duration of the disenfranchisement is directly related to the duration of incarceration, a serious criminal offender may never actually be denied the opportunity to vote if there is no election during the time he is incarcerated. In light of the special context of this case -- that the justification advanced by Parliament is rooted in a social or political philosophy that is not susceptible to proof in the traditional sense -- deference is appropriate since the impugned provision raises questions of penal philosophy and policy.

Section 51(*e*) does not infringe s. 15(1) of the *Charter*. Even if it were presumed that the legislation draws a distinction based on personal characteristics, prisoners do not constitute a group protected by analogous or enumerated grounds under s. 15(1). The fact of being incarcerated does not arise because of a stereotypical application of a presumed group characteristic. The status of being a prisoner is brought about by the past commission of serious criminal offences, acts committed by the individual himself or herself. The unifying group characteristic is past criminal behaviour. The argument that imprisonment should be recognized as an analogous ground because of adverse effect or impact discrimination based on the fact that Aboriginal peoples make up a "disproportionate" percentage of prisoners must be rejected. It is not plausible to say that the temporary disenfranchisement provision is in some way targeted at Aboriginal people. The fact of incarceration does not necessarily arise due to any personal attribute such as race or ethnic origin and neither does it necessarily relate to social condition. It hinges only upon the commission of serious criminal offences.

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By McLachlin C.J.

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By Gonthier J. (dissenting)

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal, [2000] 2 F.C. 117, 180 D.L.R. (4th) 385, 248 N.R. 267, 29 C.R. (5th) 242, 69 C.R.R. (2d) 106, [1999] F.C.J. No. 1577 (QL), allowing the respondents' appeal and dismissing the appellants' cross-appeal from a decision of the Trial Division, [1996] 1 F.C. 857, 106 F.T.R. 241, 132 D.L.R. (4th) 136, [1995] F.C.J. No. 1735 (QL). Appeal allowed, L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. dissenting.

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The judgment of McLachlin C.J. and Iacobucci, Binnie, Arbour and LeBel JJ. was delivered by

1 **McLACHLIN C.J.**:-- The right of every citizen to vote, guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*, lies at the heart of Canadian democracy. The law at stake in this appeal denies the right to vote to a certain class of people -- those serving sentences of two years or more in a correctional institution. The question is whether the government has established that this denial of the right to vote is allowed under s. 1 of the *Charter* as a "reasonable limi[t] ... demonstrably justified in a free and democratic society". I conclude that it is not. The right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason. Here, the reasons offered do not suffice.

I. Statutory Provisions

2 The predecessor to s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences. This section was held unconstitutional as an unjustified denial of the right to vote guaranteed by s. 3 of the *Charter: Sauvé v. Canada (Attorney General)*, [1993] 2 S.C.R. 438. Parliament responded to this litigation by replacing this section with a new s. 51(*e*) (S.C. 1993, c. 19, s. 23), which denies the right to vote to all inmates serving sentences of two years or more. Section 51(*e*), which is now continued in substantially the same form at s. 4(*c*) of the Act (S.C. 2000, c. 9), and the relevant *Charter* provisions are set out below.

Canada Elections Act, R.S.C. 1985, c. E-2

> **51.** The following persons are not qualified to vote at an election and shall not vote at an election:
>
> ...
>
> (*e*) Every person who is imprisoned in a correctional institution serving a sentence of two years or more;

Canadian Charter of Rights and Freedoms

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

...

> **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.

...

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

II. Judgments

A. *Federal Court, Trial Division*, [1996] 1 F.C. 857

3 The trial judge, Wetston J., held that s. 51(*e*) of the *Canada Elections Act* violated the *Charter* guarantee of the right to vote without being demonstrably justified, and was therefore void. Although he found that the government's objectives were pressing and substantial, he concluded that the denial of voting rights to all inmates serving a sentence of two years or longer was overbroad and failed the minimal impairment test. In addition, he found at p. 913 that denying the right to vote "hinder[ed] the rehabilitation of offenders and their successful reintegration into the community". The negative consequences of the challenged provision were thus disproportionate to any benefits it might produce.

B. *Federal Court of Appeal*, [2000] 2 F.C. 117

4 The majority of the Federal Court of Appeal, *per* Linden J.A., reversed the trial judge and upheld the denial of voting rights, holding that Parliament's role in maintaining and enhancing the integrity of the electoral process and in exercising the criminal law power both warranted deference. The denial of the right to vote at issue fell within a reasonable range of alternatives open to Parliament to achieve its objectives and was not overbroad or disproportionate. Desjardins J.A., applying the "stringent formulation of the *Oakes* test", emphasized the absence of evidence of benefits flowing from the denial and would have dismissed the appeal.

III. Issues

5

1. Does s. 51(*e*) of the *Canada Elections Act* infringe the guarantee of the right of all citizens to vote under s. 3 of the *Charter* and if so, is the infringement justified under s. 1 of the *Charter*?
2. Does s. 51(*e*) of the *Canada Elections Act* infringe the equality guarantee of s. 15(1) of the *Charter* and if so, is the infringement justified under s. 1 of the *Charter*?

IV. Analysis

6 The respondents concede that the voting restriction at issue violates s. 3 of the *Charter*. The restriction is thus invalid unless demonstrably justified under s. 1. I shall therefore proceed directly to the s. 1 analysis.

A. *The Approach to Section 1 Justification*

7 To justify the infringement of a *Charter* right, the government must show that the infringement achieves a constitutionally valid purpose or objective, and that the chosen means are reasonable and demonstrably justified: *R. v. Oakes*, [1986] 1 S.C.R. 103. This two-part inquiry -- the legitimacy of the objective and the proportionality of the means -- ensures that a reviewing court examine rigorously all aspects of justification. Throughout the justification process, the government bears the burden of proving a valid objective and showing that the rights violation is warranted -- that is, that it is rationally connected, causes minimal impairment, and is proportionate to the benefit achieved.

8 My colleague Justice Gonthier proposes a deferential approach to infringement and justification. He argues that there is no reason to accord special importance to the right to vote, and that we should thus defer to Parliament's choice among a range of reasonable alternatives. He further argues that in justifying limits on the right to vote under s. 1, we owe deference to Parliament because we are dealing with "philosophical, political and social considerations", because of the abstract and symbolic nature of the government's stated goals, and because the law at issue represents a step in a dialogue between Parliament and the courts.

9 I must, with respect, demur. The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court's philosophical preference for that of the legislature, but of ensuring that the legislature's proffered justification is supported by logic and common sense.

10 The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens. Insulating a rights restriction from scrutiny by labeling it a matter of social philosophy, as the government attempts to do, reverses the constitutionally imposed burden of justification. It removes the infringement from our radar screen, instead of enabling us to zero in on it to decide whether it is demonstrably justified as required by the *Charter*.

11 At the first stage, which involves defining the right, we must follow this Court's consistent view that rights shall be defined broadly and liberally: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 156; *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, at p. 344; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 53. A broad and purposive interpretation of the right is particularly critical in the case of the right to vote. The framers of the *Charter* signaled the special importance of this right not only by its broad, untrammeled language, but by exempting it from legislative override under s. 33's notwithstanding clause. I conclude that s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns, as the government appears to argue. These concerns are for the government to raise under s. 1 in justifying the limits it has imposed on the right.

12 At the s. 1 stage, the government argues that denying the right to vote to penitentiary inmates is a matter of social and political philosophy, requiring deference. Again, I cannot agree. This Court has repeatedly held that the "general claim that the infringement of a right is justified under s. 1" does not warrant deference to Parliament: *M. v. H.*, [1999] 2 S.C.R. 3, at para. 78, *per* Iacobucci J. Section 1 does not create a presumption of constitutionality for limits on rights; rather, it requires the state to justify such limitations.

13 The core democratic rights of Canadians do not fall within a "range of acceptable alternatives" among which Parliament may pick and choose at its discretion. Deference may be appropriate on a decision involving competing social and political policies. It is not appropriate, however, on a decision to limit fundamental rights. This case is not merely a competition between competing social philosophies. It represents a conflict between the right of citizens to vote -- one of the most fundamental rights guaranteed by the *Charter* -- and Parliament's denial of that right. Public debate on an issue does not transform it into a matter of "social philosophy", shielding it from full judicial scrutiny. It is for the courts, unaffected by the shifting winds of public opinion and electoral interests, to safeguard the right to vote guaranteed by s. 3 of the *Charter*.

14 *Charter* rights are not a matter of privilege or merit, but a function of membership in the Canadian polity that cannot lightly be cast aside. This is manifestly true of the right to vote, the cornerstone of democracy, exempt from the incursion permitted on other rights through s. 33 override. Thus, courts considering denials of voting rights have applied a stringent justification standard: *Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.) ("*Sauvé No. 1*"), and *Belczowski v. Canada*, [1992] 2 F.C. 440 (C.A.).

15 The *Charter* charges courts with upholding and maintaining an inclusive, participatory democratic framework within which citizens can explore and pursue different conceptions of the good. While a posture of judicial deference to legislative decisions about social policy may be appropriate in some cases, the legislation at issue does not fall into this category. To the contrary, it is precisely when legislative choices threaten to undermine the foundations of the participatory democracy guaranteed by the *Charter* that courts must be vigilant in fulfilling their constitutional duty to protect the integrity of this system.

16 Nor can I concur in the argument that the philosophically based or symbolic nature of the government's objectives in itself commands deference. To the contrary, this Court has held that broad, symbolic objectives are problematic, as I discuss below: see *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 59, *per* Cory J.; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 87, *per* Bastarache J.; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at paras. 143-44, *per* McLachlin J. (as she then was). Parliament cannot use lofty objectives to shield legislation from *Charter* scrutiny. Section 1 requires valid objectives and proportionality.

17 Finally, the fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue". Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again".

18 While deference to the legislature is not appropriate in this case, legislative justification does not require empirical proof in a scientific sense. While some matters can be proved with empirical or mathematical precision, others, involving philosophical, political and social considerations, cannot. In this case, it is enough that the justification be convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has: see *RJR-MacDonald, supra*, at para. 154, *per* McLachlin J.; *R. v. Butler*, [1992] 1 S.C.R. 452, at pp. 502-3, *per* Sopinka J. What is required is "rational, reasoned defensibility": *RJR-MacDonald*, at para. 127. Common sense and in-

ferential reasoning may supplement the evidence: *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 78, *per* McLachlin C.J. However, one must be wary of stereotypes cloaked as common sense, and of substituting deference for the reasoned demonstration required by s. 1.

19 Keeping in mind these basic principles of *Charter* review, I approach the familiar stages of the *Oakes* test. I conclude that the government's stated objectives of promoting civic responsibility and respect for the law and imposing appropriate punishment, while problematically vague, are capable in principle of justifying limitations on *Charter* rights. However, the government fails to establish proportionality, principally for want of a rational connection between denying the vote to penitentiary inmates and its stated goals.

B. *The Government's Objectives*

20 The objectives' analysis entails a two-step inquiry. First, we must ask what the objectives are of denying penitentiary inmates the right to vote. This involves interpretation and construction, and calls for a contextual approach: *Thomson Newspapers, supra*, at para. 87. Second, we must evaluate whether the objectives as found are capable of justifying limitations on *Charter* rights. The objectives must not be "trivial", and they must not be "discordant with the principles integral to a free and democratic society": *Oakes, supra*, at p. 138. To borrow from the language of German constitutional law, there must be a constitutionally valid reason for infringing a right: see D. Grimm, "Human Rights and Judicial Review in Germany", in D. M. Beatty, ed., *Human Rights and Judicial Review: A Comparative Perspective* (1994), 267, at p. 275. Because s. 1 serves first and foremost to protect rights, the range of constitutionally valid objectives is not unlimited. For example, the protection of competing rights might be a valid objective. However, a simple majoritarian political preference for abolishing a right altogether would not be a constitutionally valid objective.

21 Section 51(*e*) denying penitentiary inmates the right to vote was not directed at a specific problem or concern. Prisoners have long voted, here and abroad, in a variety of situations without apparent adverse effects to the political process, the prison population, or society as a whole. In the absence of a specific problem, the government asserts two broad objectives as the reason for this denial of the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment, or "enhanc[e] the general purposes of the criminal sanction". The record leaves in doubt how much these goals actually motivated Parliament; the Parliamentary debates offer more fulmination than illumination. However, on the basis of "some glimmer of light", the trial judge at p. 878 concluded that they could be advanced as objectives of the denial. I am content to proceed on this basis.

22 This leaves the question of whether the objectives of enhancing respect for law and appropriate punishment are constitutionally valid and sufficiently significant to warrant a rights violation. Vague and symbolic objectives such as these almost guarantee a positive answer to this question. Who can argue that respect for the law is not pressing? Who can argue that proper sentences are not important? Who can argue that either of these goals, taken at face value, contradicts democratic principles? However, precisely because they leave so little room for argument, vague and symbolic objectives make the justification analysis more difficult. Their terms carry many meanings, yet tell us little about why the limitation on the right is necessary, and what it is expected to achieve in concrete terms. The broader and more abstract the objective, the more susceptible it is to different meanings in different contexts, and hence to distortion and manipulation. One articulation of the objective might inflate the importance of the objective; another might make the legislative measure appear more narrowly tailored. The Court is left to sort the matter out.

23 At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective": *per* Cory J. in *U.F.C.W., Local 1518, supra*, at para. 59; see also *Thomson Newspapers, supra*, at para. 96; *RJR-MacDonald, supra*, at para. 144. A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) in *Sauvé No. 1, supra*, at p. 487, that "the highly symbolic and abstract nature of th[e] objective ... detracts from its importance as a justification for the violation of a constitutionally protected right". If Parliament can infringe a crucial right such as the right to vote simply by offering symbolic and abstract reasons, judicial review either becomes vacuously constrained or reduces to a contest of "our symbols are better than your symbols". Neither outcome is compatible with the vigorous justification analysis required by the *Charter*.

24 The rhetorical nature of the government objectives advanced in this case renders them suspect. The first objective, enhancing civic responsibility and respect for the law, could be asserted of virtually every criminal law and many non-criminal measures. Respect for law is undeniably important. But the simple statement of this value lacks the context necessary to assist us in determining whether the infringement at issue is demonstrably justifiable in a free and democratic society. To establish justification, one needs to know what problem the government is targeting, and why it is so pressing and important that it warrants limiting a *Charter* right. Without this, it is difficult if not impossible to weigh whether the infringement of the right is justifiable or proportionate.

25 The second objective -- to impose additional punishment on people serving penitentiary sentences -- is less vague than the first. Still, problems with vagueness remain. The record does not disclose precisely why Parliament felt that more punishment was required for this particular class of prisoner, or what additional objectives Parliament hoped to achieve by this punishment that were not accomplished by the sentences already imposed. This makes it difficult to assess whether the objective is important enough to justify an additional rights infringement.

26 Quite simply, the government has failed to identify particular problems that require denying the right to vote, making it hard to say that the denial is directed at a pressing and substantial purpose. Nevertheless, despite the abstract nature of the government's objectives and the rather thin basis upon which they rest, prudence suggests that we proceed to the proportionality analysis, rather than dismissing the government's objectives outright. The proportionality inquiry allows us to determine whether the government's asserted objectives are in fact capable of justifying its denial of the right to vote. At that stage, as we shall see, the difficulties inherent in the government's stated objectives become manifest.

C. *Proportionality*

27 At this stage the government must show that the denial of the right to vote will promote the asserted objectives (the rational connection test); that the denial does not go further than reasonably necessary to achieve its objectives (the minimal impairment test); and that the overall benefits of the measure outweigh its negative impact (the proportionate effect test). As will be seen, the vagueness of the government's justificatory goals coupled with the centrality of the right to vote to Canadian democracy, the rule of law, and legitimate sentencing, make the government's task difficult indeed.

1. Rational Connection

28 Will denying the right to vote to penitentiary inmates enhance respect for the law and impose legitimate punishment? The government must show that this is likely, either by evidence or in reason and logic: *RJR-MacDonald*, *supra*, at para. 153.

29 The government advances three theories to demonstrate rational connection between its limitation and the objective of enhancing respect for law. First, it submits that depriving penitentiary inmates of the vote sends an "educative message" about the importance of respect for the law to inmates and to the citizenry at large. Second, it asserts that allowing penitentiary inmates to vote "demeans" the political system. Finally, it takes the position that disenfranchisement is a legitimate form of punishment, regardless of the specific nature of the offence or the circumstances of the individual offender. In my respectful view, none of these claims succeed.

30 The first asserted connector with enhancing respect for the law is the "educative message" or "moral statement" theory. The problem here, quite simply, is that denying penitentiary inmates the right to vote is bad pedagogy. It misrepresents the nature of our rights and obligations under the law, and it communicates a message more likely to harm than to help respect for the law.

31 Denying penitentiary inmates the right to vote misrepresents the nature of our rights and obligations under the law and consequently undermines them. In a democracy such as ours, the power of lawmakers flows from the voting citizens, and lawmakers act as the citizens' proxies. This delegation from voters to legislators gives the law its legitimacy or force. Correlatively, the obligation to obey the law flows from the fact that the law is made by and on behalf of the citizens. In sum, the legitimacy of the law and the obligation to obey the law flow directly from the right of every citizen to vote. As a practical matter, we require all within our country's boundaries to obey its laws, whether or not they vote. But this does not negate the vital symbolic, theoretical and practical connection between having a voice in making the law and being obliged to obey it. This connection, inherited from social contract theory and enshrined in the *Charter*, stands at the heart of our system of constitutional democracy.

32 The government gets this connection exactly backwards when it attempts to argue that depriving people of a voice in government teaches them to obey the law. The "educative message" that the government purports to send by disenfranchising inmates is both anti-democratic and internally self-contradictory. Denying a citizen the right to vote denies the basis of democratic legitimacy. It says that delegates elected by the citizens can then bar those very citizens, or a portion of them, from participating in future elections. But if we accept that governmental power in a democracy flows from the citizens, it is difficult to see how that power can legitimately be used to disenfranchise the very citizens from whom the government's power flows.

33 Reflecting this truth, the history of democracy is the history of progressive enfranchisement. The universal franchise has become, at this point in time, an essential part of democracy. From the notion that only a few meritorious people could vote (expressed in terms like class, property and gender), there gradually evolved the modern precept that all citizens are entitled to vote as members of a self-governing citizenry. Canada's steady march to universal suffrage culminated in 1982, with our adoption of a constitutional guarantee of the right of all citizens to vote in s. 3 of the *Charter*. As Arbour J.A. observed in *Sauvé No. 1*, *supra*, at p. 487:

> ... the slow movement toward universal suffrage in Western democracies took an irreversible step forward in Canada in 1982 by the enactment of s. 3 of the *Charter*. I doubt that anyone could now be deprived of the vote on the basis, not merely symbolic but actually demonstrated, that he or she was not decent or responsible. By the time the *Charter* was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry," previously defined by attributes such as ownership of land or gender, in favour of a pluralistic electorate which could well include domestic enemies of the state.

Under s. 3 of the *Charter*, the final vestiges of the old policy of selective voting have fallen, including the exclusion of persons with a "mental disease" and federally appointed judges: see *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.); and *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.). The disenfranchisement of inmates takes us backwards in time and retrenches our democratic entitlements.

34 The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power. A government that restricts the franchise to a select portion of citizens is a government that weakens its ability to function as the legitimate representative of the excluded citizens, jeopardizes its claim to representative democracy, and erodes the basis of its right to convict and punish law-breakers.

35 More broadly, denying citizens the right to vote runs counter to our constitutional commitment to the inherent worth and dignity of every individual. As the South African Constitutional Court said in *August v. Electoral Commission*, 1999 (3) SALR 1, at para. 17, "[t]he vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts." The fact that the disenfranchisement law at issue applies to a discrete group of persons should make us more, not less, wary of its potential to violate the principles of equal rights and equal membership embodied in and protected by the *Charter*.

36 In recognition of the seminal importance of the right to vote in the constellation of rights, the framers of the *Charter* accorded it special protections. Unlike other rights, the right of every citizen to vote cannot be suspended under the "notwithstanding clause". As Arbour J.A. said in *Sauvé No. 1, supra*, at p. 486:

> It is indeed significant that s. 3 of the *Charter* is immune from the notwithstanding clause contained in s. 33, which permits Parliament and the legislatures to enact legislation which would otherwise violate the *Charter*. It confirms that the right to vote must be protected against those who have the capacity, and often the interest, to limit the franchise. Unpopular minorities may seek redress against an infringement of their rights in the courts. But like everybody else, they can only seek redress against a dismissal of their political point of view at the polls.

37 The government's vague appeal to "civic responsibility" is unhelpful, as is the attempt to lump inmate disenfranchisement together with legitimate voting regulations in support of the government's position. The analogy between youth voting restrictions and inmate disenfranchisement breaks down because the type of judgment Parliament is making in the two scenarios is very differ-

ent. In the first case, Parliament is making a decision based on the experiential situation of all citizens when they are young. It is not saying that the excluded class is unworthy to vote, but regulating a modality of the universal franchise. In the second case, the government is making a decision that some people, whatever their abilities, are not morally worthy to vote -- that they do not "deserve" to be considered members of the community and hence may be deprived of the most basic of their constitutional rights. But this is not the lawmakers' decision to make. The *Charter* makes this decision for us by guaranteeing the right of "every citizen" to vote and by expressly placing prisoners under the protective umbrella of the *Charter* through constitutional limits on punishment. The *Charter* emphatically says that prisoners are protected citizens, and short of a constitutional amendment, lawmakers cannot change this.

38 The theoretical and constitutional links between the right to vote and respect for the rule of law are reflected in the practical realities of the prison population and the need to bolster, rather than to undermine, the feeling of connection between prisoners and society as a whole. The government argues that disenfranchisement will "educate" and rehabilitate inmates. However, disenfranchisement is more likely to become a self-fulfilling prophecy than a spur to reintegration. Depriving at-risk individuals of their sense of collective identity and membership in the community is unlikely to instill a sense of responsibility and community identity, while the right to participate in voting helps teach democratic values and social responsibility (testimony of Professor Jackson, appellants' record at pp. 2001-2). As J. S. Mill wrote:

> To take an active interest in politics is, in modern times, the first thing which elevates the mind to large interests and contemplations; the first step out of the narrow bounds of individual and family selfishness, the first opening in the contracted round of daily occupations... . The possession and the exercise of political, and among others of electoral, rights, is one of the chief instruments both of moral and of intellectual training for the popular mind ... .
>
> (J. S. Mill, "Thoughts on Parliamentary Reform" (1859), in J. M. Robson, ed., *Essays on Politics and Society*, vol. XIX, 1977, 311, at pp. 322-23)

To deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility.

39 Even if these difficulties could be overcome, it is not apparent that denying penitentiary inmates the right to vote actually sends the intended message to prisoners, or to the rest of society. People may be sentenced to imprisonment for two years or more for a wide variety of crimes, ranging from motor vehicle and regulatory offences to the most serious cases of murder. The variety of offences and offenders covered by the prohibition suggests that the educative message is, at best, a mixed and diffuse one.

40 It is a message sullied, moreover, by negative and unacceptable messages likely to undermine civic responsibility and respect for the rule of law. Denying citizen law-breakers the right to vote sends the message that those who commit serious breaches are no longer valued as members of the community, but instead are temporary outcasts from our system of rights and democracy. More profoundly, it sends the unacceptable message that democratic values are less important than punitive measures ostensibly designed to promote order. If modern democratic history has one lesson to

teach it is this: enforced conformity to the law should not come at the cost of our core democratic values.

41 I conclude that denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values. The government's novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation. That not all self-proclaimed democracies adhere to this conclusion says little about what the Canadian vision of democracy embodied in the *Charter* permits. Punitive disenfranchisement of inmates does not send the "educative message" that the government claims; to the contrary, it undermines this message and is incompatible with the basic tenets of participatory democracy contained in and guaranteed by the *Charter*.

42 The government also argues that denying penitentiary inmates the vote will enhance respect for law because allowing people who flaunt the law to vote demeans the political system. The same untenable premises we have been discussing resurface here -- that voting is a privilege the government can suspend and that the commission of a serious crime signals that the offender has chosen to "opt out" of community membership. But beyond this, the argument that only those who respect the law should participate in the political process is a variant on the age-old unworthiness rationale for denying the vote.

43 The idea that certain classes of people are not morally fit or morally worthy to vote and to participate in the law-making process is ancient and obsolete. Edward III pronounced that citizens who committed serious crimes suffered "civil death", by which a convicted felon was deemed to forfeit all civil rights. Until recently, large classes of people, prisoners among them, were excluded from the franchise. The assumption that they were not fit or "worthy" of voting -- whether by reason of class, race, gender or conduct -- played a large role in this exclusion. We should reject the retrograde notion that "worthiness" qualifications for voters may be logically viewed as enhancing the political process and respect for the rule of law. As Arbour J.A. stated in *Sauvé No. 1, supra*, at p. 487, since the adoption of s. 3 of the *Charter*, it is doubtful "that anyone could now be deprived of the vote on the basis ... that he or she was not decent or responsible".

44 Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy and the *Charter*: compare *August, supra*. It also runs counter to the plain words of s. 3, its exclusion from the s. 33 override, and the idea that laws command obedience because they are made by those whose conduct they govern. For all these reasons, it must, at this stage of our history, be rejected.

45 This brings us to the government's final argument for rational connection -- that disenfranchisement is a legitimate weapon in the state's punitive arsenal against the individual lawbreaker. Again, the argument cannot succeed. The first reason is that using the denial of rights as punishment is suspect. The second reason is that denying the right to vote does not comply with the requirements for legitimate punishment established by our jurisprudence.

46 The argument, stripped of rhetoric, proposes that it is open to Parliament to add a new tool to its arsenal of punitive implements -- denial of constitutional rights. I find this notion problematic. I do not doubt that Parliament may limit constitutional rights in the name of punishment, provided that it can justify the limitation. But it is another thing to say that a particular class of people for a particular period of time will completely lose a particular constitutional right. This is tantamount to

saying that the affected class is outside the full protection of the *Charter*. It is doubtful that such an unmodulated deprivation, particularly of a right as basic as the right to vote, is capable of justification under s. 1. Could Parliament justifiably pass a law removing the right of all penitentiary prisoners to be protected from cruel and unusual punishment? I think not. What of freedom of expression or religion? Why, one asks, is the right to vote different? The government offers no credible theory about why it should be allowed to deny this fundamental democratic right as a form of state punishment.

47 The social compact requires the citizen to obey the laws created by the democratic process. But it does not follow that failure to do so nullifies the citizen's continued membership in the self-governing polity. Indeed, the remedy of imprisonment for a term rather than permanent exile implies our acceptance of continued membership in the social order. Certain rights are justifiably limited for penal reasons, including aspects of the rights to liberty, security of the person, mobility, and security against search and seizure. But whether a right is justifiably limited cannot be determined by observing that an offender has, by his or her actions, withdrawn from the social compact. Indeed, the right of the state to punish and the obligation of the criminal to accept punishment are tied to society's acceptance of the criminal as a person with rights and responsibilities. Other *Charter* provisions make this clear. Thus s. 11 protects convicted offenders from unfair trials, and s. 12 from "cruel and unusual treatment or punishment".

48 The second flaw in the argument that s. 51(*e*) furthers legitimate punishment is that it does not meet the dual requirements that punishment must not be arbitrary and must serve a valid criminal law purpose. Absence of arbitrariness requires that punishment be tailored to the acts and circumstances of the individual offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. In the immortal words of Gilbert and Sullivan, the punishment should fit the crime. Section 51(*e*) *qua* punishment bears little relation to the offender's particular crime. It makes no attempt to differentiate among inmates serving sentences of two years and those serving sentences of twenty. It is true that those serving shorter sentences will be deprived of the right to vote for a shorter time. Yet the correlation of the denial with the crime remains weak. It is not only the violent felon who is told he is an unworthy outcast; a person imprisoned for a non-violent or negligent act, or an Aboriginal person suffering from social displacement receives the same message. They are not targeted, but they are caught all the same. For them the message is doubly invidious -- not that they are cast out for their apparently voluntary rejection of society's norms, but that they are cast out arbitrarily, in ways that bear no necessary relation to their actual situation or attitude towards state authority.

49 Punishment must also fulfill a legitimate penal purpose: see *Smith, supra*, at p. 1068. These include deterrence, rehabilitation, retribution, and denunciation: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 82. Neither the record nor common sense supports the claim that disenfranchisement deters crime or rehabilitates criminals. On the contrary, as Mill recognized long ago, participation in the political process offers a valuable means of teaching democratic values and civic responsibility.

50 This leaves retribution and denunciation. Parliament may denounce unlawful conduct. But it must do so in a way that closely reflects the moral culpability of the offender and his or her circumstances. As Lamer C.J. indicated in *M. (C.A.), supra*, at para. 80:

> Retribution in a criminal context, by contrast [to vengeance], represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the

> intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. [Emphasis in original.]

Denunciation as a symbolic expression of community values must be individually tailored in order to fulfill the legitimate penal purpose of condemning a particular offender's conduct (see *M. (C.A.), supra*, at para. 81) and to send an appropriate "educative message" about the importance of law-abiding behavior.

51 Section 51(*e*) imposes blanket punishment on all penitentiary inmates regardless of the particular crimes they committed, the harm they caused, or the normative character of their conduct. It is not individually tailored to the particular offender's act. It does not, in short, meet the requirements of denunciatory, retributive punishment. It follows that it is not rationally connected to the goal of imposing legitimate punishment.

52 When the facade of rhetoric is stripped away, little is left of the government's claim about punishment other than that criminals are people who have broken society's norms and may therefore be denounced and punished as the government sees fit, even to the point of removing fundamental constitutional rights. Yet, the right to punish and to denounce, however important, is constitutionally constrained. It cannot be used to write entire rights out of the Constitution, it cannot be arbitrary, and it must serve the constitutionally recognized goals of sentencing. On all counts, the case that s. 51(*e*) furthers lawful punishment objectives fails.

53 I conclude that the government has failed to establish a rational connection between s. 51(*e*)'s denial of the right to vote and the objectives of enhancing respect for the law and ensuring appropriate punishment.

2. Minimal Impairment

54 If the denial of a right is not rationally connected to the government's objectives, it makes little sense to go on to ask whether the law goes further than is necessary to achieve the objective. I simply observe that if it were established that denying the right to vote sends an educative message that society will not tolerate serious crime, the class denied the vote -- all those serving sentences of two years or more -- is too broad, catching many whose crimes are relatively minor and who cannot be said to have broken their ties to society. Similarly, if it were established that this denial somehow furthers legitimate sentencing goals, it is plain that the marker of a sentence of two years or more catches many people who, on the government's own theory, should not be caught.

55 The question at this stage of the analysis is not how many citizens are affected, but whether the right is minimally impaired. Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*. It follows that this legislation cannot be saved by the mere fact that it is less restrictive than a blanket exclusion of all inmates from the franchise. First, it is difficult to substantiate the proposition that a two-year term is a reasonable means of identifying those who have committed "serious", as opposed to "minor", offences. If serious and minor offences are defined by the duration of incarceration, then this is a tautology. If the two-year period is meant to serve as a proxy for something else, then the government must give content to the notion of "serious" vs. "minor" offences, and it must demonstrate the correlation between this distinction and the entitlement to vote. It is no answer to the overbreadth critique to say that the measure is saved because a limited class of people is affected: the question is why individuals in this class are singled

out to have their rights restricted, and how their rights are limited. The perceived "seriousness" of the crime is only one of many factors in determining the length of a convicted offender's sentence and the time served. The only real answer the government provides to the question "why two years?" is because it affects a smaller class than would a blanket disenfranchisement.

56 Nor is it any answer to say that the infringement will end when the imprisonment ends. The denial of the right to vote during the period of imprisonment affects penitentiary inmates consistently, to an absolute degree, and in arbitrary ways that bear no necessary relation to their actual situation or attitude towards state authority. Section 51(*e*) thus denies a prisoner's rights in precisely the same fashion as its unconstitutional predecessor.

3. Proportionate Effect

57 If a connection could be shown between the denial of the right to vote and the government's objectives, the negative effects of denying citizens the right to vote would greatly outweigh the tenuous benefits that might ensue.

58 Denial of the right to vote to penitentiary inmates undermines the legitimacy of government, the effectiveness of government, and the rule of law. It curtails the personal rights of the citizen to political expression and participation in the political life of his or her country. It countermands the message that everyone is equally worthy and entitled to respect under the law -- that everybody counts: see *August, supra*. It is more likely to erode respect for the rule of law than to enhance it, and more likely to undermine sentencing goals of deterrence and rehabilitation than to further them.

59 The government's plea of no demonstrated harm to penitentiary inmates rings hollow when what is at stake is the denial of the fundamental right of every citizen to vote. When basic political rights are denied, proof of additional harm is not required. But were proof needed, it is available. Denying prisoners the right to vote imposes negative costs on prisoners and on the penal system. It removes a route to social development and rehabilitation acknowledged since the time of Mill, and it undermines correctional law and policy directed towards rehabilitation and integration (testimony of Professor Jackson, appellants' record at pp. 2001-2). As the trial judge clearly perceived at p. 913, s. 51(*e*) "serves to further alienate prisoners from the community to which they must return, and in which their families live".

60 The negative effects of s. 51(*e*) upon prisoners have a disproportionate impact on Canada's already disadvantaged Aboriginal population, whose overrepresentation in prisons reflects "a crisis in the Canadian criminal justice system": *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 64, *per* Cory and Iacobucci JJ. To the extent that the disproportionate number of Aboriginal people in penitentiaries reflects factors such as higher rates of poverty and institutionalized alienation from mainstream society, penitentiary imprisonment may not be a fair or appropriate marker of the degree of individual culpability. Added to this is the cost of silencing the voices of incarcerated Aboriginal people; with due respect, the fact that 1,837 Aboriginal people are disenfranchised by this law, while close to 600,000 are not directly affected, does not justify restricting the rights of those 1,837 individuals for reasons not demonstrably justified under the *Charter*: see Court of Appeal decision at para. 169. Aboriginal people in prison have unique perspectives and needs. Yet, s. 51(*e*) denies them a voice at the ballot box and, by proxy, in Parliament. That these costs are confined to the term of imprisonment does not diminish their reality. The silenced messages cannot be retrieved, and the prospect of someday participating in the political system is cold comfort to those whose rights are denied in the present.

61 In the final analysis, even if there were merit in the Court of Appeal's view that the trial judge relied too heavily on the absence of concrete evidence of benefit, it is difficult to avoid the trial judge's conclusion, at p. 916, that "the salutary effects upon which the defendants rely are tenuous in the face of the denial of the democratic right to vote, and are insufficient to meet the civil standard of proof".

62 I conclude that s. 51(*e*)'s disenfranchisement of prisoners sentenced to two years or more cannot be justified under s. 1 of the *Charter*. I leave for another day whether some political activities, like standing for office, could be justifiably denied to prisoners under s. 1. It may be that practical problems might serve to justify some limitations on the exercise of derivative democratic rights. Democratic participation is not only a matter of theory but also of practice, and legislatures retain the power to limit the modalities of its exercise where this can be justified. Suffice it to say that the wholesale disenfranchisement of all penitentiary inmates, even with a two-year minimum sentence requirement, is not demonstrably justified in our free and democratic society.

D. *The Guarantee of Equality under Section 15(1) of the Charter*

63 Having found that s. 51(*e*) unjustifiably infringes s. 3 of the *Charter*, it is unnecessary to consider the alternative argument that it infringes the equality guarantee of s. 15(1).

V. Conclusion

64 I would allow the appeal, with costs to the appellants. Section 51(*e*) infringes s. 3 of the *Charter*, and the infringement is not justified under s. 1. It follows that s. 51(*e*) is inconsistent with the *Charter* and is of no force or effect by operation of s. 52 of the *Constitution Act, 1982*. I would answer the constitutional questions as follows:

1. Does s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, infringe the right to vote in an election of members of the House of Commons, as guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*?

Yes.

2. If the answer to Question 1 is yes, is the infringement a reasonable limit, prescribed by law, which can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

It is unnecessary to answer the constitutional questions regarding s. 15(1) of the *Charter*.

The reasons of L'Heureux-Dubé, Gonthier, Major and Bastarache JJ. were delivered by

GONTHIER J. (dissenting):--

I. Introduction

A) *Specific Issue Before this Court*

65 Is Parliament able to temporarily suspend the exercise of the right to vote for criminals incarcerated for the commission of serious crimes for the duration of their incarceration? This is the question raised by this appeal. The answer will depend on whether s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (the "Act"), which prohibits "[e]very person who is imprisoned in a correctional institution serving a sentence of two years or more" from voting, is in breach of ss. 3 or 15 of the *Canadian Charter of Rights and Freedoms* in a manner not justifiable under s. 1.

66 The trial judge was of the view that s. 51(*e*) of the Act did not satisfy the test mandated by s. 1 of the *Charter*. I am in respectful disagreement with the reasons of my colleague, Chief Justice McLachlin, which support the disposition reached by the trial judge. I generally agree with the reasoning of the majority of the Federal Court of Appeal below that this provision is constitutionally sound. In my view, s. 51(*e*) of the Act is not an infringement of s. 15 of the *Charter*, and while having been conceded to be an infringement of the s. 3 *Charter* right, it is capable of being justified under s. 1 of the *Charter* as a reasonable limitation thereupon.

B) *The More Fundamental Issue Arising from the Context of the Case at Bar*

67 My disagreement with the reasons of the Chief Justice, however, is also at a more fundamental level. This case rests on philosophical, political and social considerations which are not capable of "scientific proof". It involves justifications for and against the limitation of the right to vote which are based upon axiomatic arguments of principle or value statements. I am of the view that when faced with such justifications, this Court ought to turn to the text of s. 1 of the *Charter* and to the basic principles which undergird both s. 1 and the relationship that provision has with the rights and freedoms protected within the *Charter*. Particularly, s. 1 of the *Charter* requires that this Court look to the fact that there may be different social or political philosophies upon which justifications for or against the limitations of rights may be based. In such a context, where this Court is presented with competing social or political philosophies relating to the right to vote, it is not by merely approving or preferring one that the other is necessarily disproved or shown not to survive *Charter* scrutiny. If the social or political philosophy advanced by Parliament reasonably justifies a limitation of the right in the context of a free and democratic society, then it ought to be upheld as constitutional. I conclude that this is so in the case at bar.

II. Legislative Provision in Question

68 I am of the view that by enacting s. 51(*e*) of the Act, Parliament has chosen to assert and enhance the importance and value of the right to vote by temporarily disenfranchising serious criminal offenders for the duration of their incarceration. This point is worth underlining. The Chief Justice and I are in agreement that the right to vote is profoundly important, and ought not to be demeaned. Our differences lie principally in the fact that she subscribes to a philosophy whereby the temporary disenfranchising of criminals does injury to the rule of law, democracy and the right to vote, while I prefer deference to Parliament's reasonable view that it strengthens these same features of Canadian society.

69 The reasons of the Chief Justice refer to the historical evolution of the franchise in Canada. This evolution has generally involved the weeding out of discriminatory exclusions. It is undeniable and, obviously, to be applauded, that, over time, Canada has been evolving towards the universalization of the franchise in such a manner. The provision in question in the case at bar, however, is strikingly and qualitatively different from these past discriminatory exclusions. It is a temporary

suspension from voting based exclusively on the serious criminal activity of the offender. It is the length of the sentence, reflecting the nature of the offence and the criminal activity committed, that results in the temporary disenfranchisement during incarceration. Thus, far from being repugnant and discriminatory, based on some irrelevant personal characteristic, such as gender, race, or religion, s. 51(*e*) of the Act distinguishes persons based on the perpetrating of acts that are condemned by the *Criminal Code*, R.S.C. 1985, c. C-46. Parliament has recognized this distinction as being different from other exclusions by its continued assertion that being convicted of a serious criminal offence is a ground for temporary disenfranchisement.

70 The reasons of the Chief Justice at para. 33 cite with approval a passage from Arbour J.A.'s reasons in the first *Sauvé* case which suggests that:

> By the time the *Charter* was enacted, exclusions from the franchise were so few in this country that it is fair to assume that we had abandoned the notion that the electorate should be restricted to a "decent and responsible citizenry", previously defined by attributes such as ownership of land or gender, in favour of a pluralistic electorate which could well include domestic enemies of the state.
>
> (*Sauvé v. Canada (Attorney General)* (1992), 7 O.R. (3d) 481 (C.A.), at p. 487)

While there is little logical correlation between maintaining a "decent and responsible citizenry" and any of the past discriminatory exclusions (such as land-ownership, religion, gender, ethnic background), there clearly is such a logical connection in the case of distinguishing persons who have committed serious criminal offences. "Responsible citizenship" does not relate to what gender, race, or religion a person belongs to, but is logically related to whether or not a person engages in serious criminal activity.

71 A further dimension of this qualitative difference is that serious criminal offenders are excluded from the vote for the reason that they are the subjects of punishment. The disenfranchisement only lasts as long as the period of incarceration. Thus, disenfranchisement, as a dimension of punishment, is attached to and mirrors the fact of incarceration. This fact makes the Canadian experience significantly different from the situation in some American states which disenfranchise ex-offenders for life, a situation addressed by many American academics: see, for example, L. H. Tribe, "The Disenfranchisement of Ex-Felons: Citizenship, Criminality, and 'The Purity of the Ballot Box'" (1989), 102 Harv. L. Rev. 1300.

72 It is important to look at prisoner disenfranchisement from the perspective of each serious criminal offender rather than perceive it as a form of targeted group treatment. Disenfranchised prisoners can be characterized loosely as a group, but what is important to realize is that each of these prisoners has been convicted of a serious criminal offence and is therefore serving a personalized sentence which is proportionate to the act or acts committed. Punishment is guided by the goals of denunciation, deterrence, rehabilitation and retribution and is intended to be morally educative for incarcerated serious criminal offenders. Each prisoner's sentence is a temporary measure aimed at meeting these goals, while also being aimed at the long-term objective of reintegration into the community.

73 The reasons of the Chief Justice express the view that the temporary disenfranchisement of serious criminal offenders necessarily undermines their inherent "worth" or "dignity." I disagree. In fact, it could be said that the notion of punishment is predicated on the dignity of the individual: it

recognizes serious criminals as rational, autonomous individuals who have made choices. When these citizens exercise their freedom in a criminal manner, society imposes a concomitant responsibility for that choice. As Professor J. Hampton, one of the Crown's experts, writes in an article cited by Linden J.A. below, "Punishment, Feminism, and Political Identity: A Case Study in the Expressive Meaning of the Law" (1998), 11 Can. J. L. & Jur. 23, at p. 43:

> By telling people "you can have your right to vote suspended if, through your actions, you show contempt for the values that make our society possible", this law links the exercise of freedom with responsibility for its effects. Indeed, *not* to construct a punishment that sends this message is ... to indirectly undermine the values of a democratic society. [Underlining added; italics in original.]

74 If there is any negative connotation associated with this temporary disenfranchisement, it arises from the fact that a criminal act was perpetrated, an act for which the criminal offender is consequently being punished. This is not stereotyping. Criminal acts are rightly condemned by society. Serious criminals being punished and temporarily disenfranchised are not in any way of less "worth" or "dignity" because social condemnation is of the criminal acts and its purpose is not to diminish the individual prisoner as a person.

75 The argument that the temporary disenfranchisement of serious criminal offenders undermines the inherent "worth" or "dignity" of prisoners presents a potentially problematic line of reasoning. Is it possible to "punish" serious criminals without undermining their "worth"? It must be so. This is inherently recognized in the *Charter* itself insofar that s. 12 only renders unconstitutional punishment that is "cruel and unusual". The *Criminal Code* and its provisions are declaratory of values, values on which Canadian society rests: see *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 769 and 787. Protecting and enhancing these values through the imposition of punishment for criminal activity is not an affront to dignity. On the contrary, the temporary disenfranchisement of serious criminal offenders reiterates society's commitment to the basic moral values which underpin the *Criminal Code*; in this way it is morally educative for both prisoners and society as a whole.

76 The punishment of serious criminal offenders is also aimed at protecting society and the "dignity" and "worth" of those members of society who have been or may become the victims of crime. Punishment is intended to act as a general deterrent to potential criminals and as a specific deterrent *vis-à-vis* incarcerated persons. *Charter* analysis is meant to consider the *Charter* rights of other members of society: see *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 187; *Keegstra, supra*, at p. 756. Serious criminal activity is clearly often an affront to numerous *Charter* values.

III. The Right to Vote in Section 3 of the *Charter*

77 The current status of the vote in Canada is that all citizens are empowered to vote in federal elections, save incarcerated offenders who are disenfranchised by s. 51(*e*) of the Act (now continued in substantially the same form at s. 4(*c*) of the Act (S.C. 2000, c. 9)), the Chief and Assistant Chief Electoral Officers, and persons under the age of 18 as of polling day. The most recent changes to the scope of the franchise were made by Parliament in 1993, when the disqualifications of federally appointed judges and persons suffering from "mental disease" were removed: S.C. 1993, c. 19, s. 23 amending s. 51 of the Act, and s. 24 which added s. 51.1. These modifications included s. 51(*e*), which disqualified incarcerated persons serving sentences of two years or more. It was al-

ready enacted at the time this Court heard the first *Sauvé* case, [1993] 2 S.C.R. 438 (the "first *Sauvé* case"), but since it was inapplicable to the case under appeal, the Court did not comment on it.

78 The respondents conceded that s. 3 of the *Charter* has been infringed by s. 51(*e*) of the Act. I would like to sound a cautionary note regarding the appropriateness of concessions of infringement. The specific problem with such a concession is that it may deprive the courts of the benefit of the fruitful argument which most often occurs at that initial phase of the analysis, in defining the scope of the right, particularly with regard to historical and philosophical context. The development of contextual factors examined with regard to the scope of the right is of great importance since they clearly "animate" the later stages of the test elaborated in *R. v. Oakes*, [1986] 1 S.C.R. 103: see McLachlin J. (as she then was) in *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158, at p. 182. The following comment, which I shared with L'Heureux-Dubé and Bastarache JJ. in *Sharpe*, *supra*, at para. 151, is equally apposite here: "it is unfortunate that the Crown conceded that the right to free expression was violated in this appeal in all respects, thereby depriving the Court of the opportunity to fully explore the content and scope of s. 2(*b*) as it applies in this case".

IV. Section 1 of the *Charter*

A) *Oakes: Flexibility and Context*

79 To decide whether the limit upon the s. 3 *Charter* right found in s. 51(*e*) of the Act is justified, one must determine whether it constitutes a "reasonable limit prescribed by law that can be demonstrably justified in a free and democratic society". Pursuant to the test formulated in *Oakes*, *supra*, this analysis proceeds in two stages. At the preliminary phase, it must be determined whether the objective behind the limit is of sufficient importance to justify overriding a *Charter* right. At the second stage, we must consider whether the legislative measure chosen is rationally connected to the legislative objective, whether the measure minimally impairs the *Charter* right which has been infringed, and finally whether the effects of the measure are proportional to the significance of the objective and whether the salutary and deleterious effects of the measure are proportional.

80 When engaging in *Charter* analysis, context and flexibility are highly relevant. The need for flexibility in the application of the *Oakes* test was noted by La Forest J. in *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, at pp. 1489-90:

> In the performance of the balancing task under s. 1, it seems to me, a mechanistic approach must be avoided. While the rights guaranteed by the *Charter* must be given priority in the equation, the underlying values must be sensitively weighed in a particular context against other values of a free and democratic society sought to be promoted by the legislature.

Dickson C.J. adopted the above passage in his majority reasons in *Keegstra, supra*, and he went on to state at pp. 737-38:

> ... I hope it is clear that a rigid or formalistic approach to the application of s. 1 must be avoided. The ability to use s. 1 as a gauge which is sensitive to the values and circumstances particular to an appeal has been identified as vital in past cases ... . The sentiments of La Forest J. correctly suggest that the application of

> the *Oakes* approach will vary depending on the circumstances of the case, including the nature of the interests at stake.

81 Factual, social, historical, and political context provides a backdrop which is essential to develop in order to properly analyse what is at stake in the case of an alleged infringement of a right. As Bastarache J. noted in *Thomson Newspapers Co. v. Canada (Attorney General),* [1998] 1 S.C.R. 877, at para. 87:

> The analysis under s. 1 of the *Charter* must be undertaken with a close attention to context. This is inevitable as the test devised in *R. v. Oakes*, [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem which it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, context is the indispensable handmaiden to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a *Charter* right. [Emphasis added.]

See also *Sharpe, supra,* at paras. 132 and 156.

82 L'Heureux-Dubé and Bastarache JJ. and myself in *Sharpe, supra,* at para. 153, noted that it is by virtue of attention to context that courts come to consider other communal values which must be addressed in s. 1 analysis:

> While the guidelines set out in *Oakes* provide a useful analytical framework for the practical application of s. 1, it is important not to lose sight of the underlying purpose of that section, namely to balance individual rights and our communal values. Where courts are asked to consider whether a violation is justified under s. 1, they must be sensitive to the competing rights and values that exist in our democracy.

These other communal values have a legitimate role to play in *Charter* analysis. As stated by Dickson C.J. in *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, at p. 1056: "There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*."

83 In the case at bar, given that the context involves evaluating choices regarding social or political philosophies and relates to shaping, giving expression, and giving practical application to communal values, it is of the utmost significance.

B) *Section 3 is Subject to Section 1*

84 The flexible contextual approach to s. 1 of the *Charter* and the *Oakes* test necessitates that this Court keep in mind first principles. The right to vote for all citizens is clearly encapsulated in s. 3 of the *Charter* and, by the terms of s. 1, it is subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The right, therefore, is not absolute, but is qualified -- as are all rights under the *Charter* -- by s. 1. A violation of the *Charter* only

manifests after the s. 1 inquiry has been entertained, since s. 1 permits and envisions that the rights and freedoms enshrined in the *Charter* are capable of such limitation.

85 An examination of the development of the language of s. 3 when the wording of the *Charter* was being reviewed by the Special Joint Committee on the Constitution evidences Parliament's intent that s. 3 must be read as subject to s. 1 limitations. Professor P. W. Hogg, in *Constitutional Law of Canada* (loose-leaf ed.), offers the following commentary regarding an earlier version of the language of s. 3, at p. 42-2, fn. 12:

> Section 3 of the Charter was in the October 1980 version in the following terms:
>
> > 3. Every citizen of Canada has, without unreasonable distinction or limitation, the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
>
> The April 1981 version contained the final version of s. 3. In the final version the words "without unreasonable distinction or limitation" are deleted. The reason for the deletion was, no doubt, that the words were redundant having regard to s. 1. [Emphasis added.]

The Minutes of Proceedings and Evidence of the Special Joint Committee on the Constitution of Canada, Issue No. 43, January 22, 1981, at pp. 43:79 - 43:90, support this statement: that Committee decided to remove the built-in limitation within s. 3 simply because s. 1 was intended to apply to s. 3 and allow demonstrably justifiable limitations to survive constitutional scrutiny.

86 This general approach to s. 3 does not mean that justificatory concerns play a role in defining the content of s. 3, or that the right to vote necessarily has inherent limitations within it. This proposition was rejected by the majority of this Court in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at paras. 29-32. It does mean that the specific context needs to be brought into the s. 1 *Charter* test for the balancing of interests, since s. 3, like all *Charter* rights, is not absolute. This is similar to the approach advocated in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 61, where McLachlin J. and Iacobucci J. stressed:

> ... the importance of interpreting rights in a contextual manner -- not because they are of intermittent importance but because they often inform, and are informed by, other similarly deserving rights or values at play in particular circumstances.

87 To graphically illustrate the above as it might be applied to prisoners, one may ask the question: could a prisoner argue successfully that, by reason of his incarceration, there was a violation of s. 6(1) of the *Charter*, which guarantees that "[e]very citizen of Canada has the right to enter, remain in and leave Canada"? It would border on the ludicrous to suggest that a limitation on this right was not possible under s. 1 of the *Charter*.

88 In the same vein, what of the s. 3 *Charter* guarantee that every citizen has a right to be qualified for membership in the House of Commons? Must a prisoner have the right to stand as a candi-

date? Were an incarcerated offender to be elected, would he or she have a right to be released from prison to take up that representative role?

89 To construe s. 3 as an absolute right presents other problems. For example, currently only persons of the age of 18 or older are permitted to vote. How, then, can there be a justification for denying the vote to a politically mature 16 or 17 year-old? To justify this line, would Parliament have to resort to the argument that persons below the age of majority are not, in some sense, citizens in the fullest sense? The answer must simply lie in the fact that s. 1 allows Parliament to make such choices as long as they are rational and reasonable limitations which are justified in a free and democratic society.

C) *Justification Under Section 1 Where the Context Involves Competing Social or Political Philosophies*

90 Generally, the result of a concession of a breach of a right is that the burden for justifying the infringement falls to the Crown. With regard to the standard of proof for s. 1 analysis, the civil standard of the balance of probabilities applies, and it is important to stress that this standard does not require scientific proof: *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 39. The application of common sense to what is known will suffice, even if this falls short of a scientific standard: McLachlin J. at para. 137 of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199. Justification can be based upon reason, logic, common sense, and knowledge of human nature: see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 524, referring to *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, and *Keegstra, supra.* In the case at bar, there is very little quantitative or empirical evidence either way. In such cases, the task of justification relates to the analysis of human motivation, the determination of values, and the understanding of underlying social or political philosophies -- it truly is justification rather than measurement.

91 Justifying, therefore, is not a matter of one value clearly prevailing over the other, but is rather a matter of developing the significance of the values being dealt with and asking whether Parliament, in its attempt to reconcile competing interests, has achieved a rational and reasonable balance. Proportionality, in the context of *Charter* analysis, does not mean a perfect solution, as any balance arising from competing interests will involve preferring one value over the other to some extent.

92 As emerges from the submissions before this Court, there seem generally to be two options available for dealing with the issue at hand. The first, that chosen by the Chief Justice, is to prefer an inclusive approach to democratic participation for serious criminal offenders incarcerated for two years or more. This view locates democratic participation as a central dimension of rehabilitation, insofar as the incarcerated offenders remain citizens with the fullest exercise of their democratic rights. By the same token, the unrestricted franchise enhances democratic legitimacy of government, and confirms or enhances the citizenship or standing of prisoners in society. To do otherwise, it is suggested, undermines the "dignity" or "worth" of prisoners. The alternative view, adopted by Parliament, considers that the temporary suspension of the prisoner's right to vote, in fact, enhances the general purposes of the criminal sanction, including rehabilitation. It does so by underlining the importance of civic responsibility and the rule of law. This approach sees the temporary removal of the vote as a deterrent to offending or re-offending and the return of the vote as an inducement to reject further criminal conduct. In withdrawing for a time one expression of political participation concurrently with personal freedom, the significance of both are enhanced. Rather than undermine

the dignity or worth of prisoners, the removal of their vote takes seriously the notion that they are free actors and attaches consequences to actions that violate certain core values as expressed in the *Criminal Code*.

93 Both of these approaches, however, entail accepting logically prior political or social philosophies about the nature and content of the right to vote. The former approach, that accepted by the reasons of the Chief Justice, entails accepting a philosophy that preventing criminals from voting does damage to both society and the individual, and undermines prisoners' inherent worth and dignity. The latter approach also entails accepting a philosophy, that not permitting serious incarcerated criminals to vote is a social rejection of serious crime which reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community. Both of these social or political philosophies, however, are aimed at the same goal: that of supporting the fundamental importance of the right to vote itself. Further, both of these social or political philosophies are supported by the practices of the various Canadian provinces, the practices of other liberal democracies, and academic writings. Finally, neither position can be proven empirically -- rather, the selection of one over the other is largely a matter of philosophical preference. What is key to my approach is that the acceptance of one or the other of these social or political philosophies dictates much of the constitutional analysis which ensues, since the reasonableness of any limitation upon the right to vote and the appropriateness of particular penal theories and their relation to the right to vote will logically be related to whether or not the justification for that limitation is based upon an "acceptable" social or political philosophy.

94 The reasons of the Chief Justice hold, at para. 18, that the challenge of the government is to present a justification that is "convincing, in the sense that it is sufficient to satisfy the reasonable person looking at all the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". I agree with this test, subject only to a recognition that as the context of the case at bar involves evaluating competing social or political philosophies, the analysis runs the risk of lapsing into the realm of *ipse dixit*. In the realm of competing social or political philosophies, reasonableness is the predominant s. 1 justification consideration.

95 The reasons of the Chief Justice apply something seemingly more onerous than the "justification" standard referred to just above. She describes the right to vote as a "core democratic right" and suggests that its exemption from the s. 33 override somehow raises the bar for the government in attempting to justify its restriction (paras. 13 and 14). This altering of the justification standard is problematic in that it seems to be based upon the view that there is only one plausible social or political philosophy upon which to ground a justification for or against the limitation of the right. This approach, however, is incorrect on a basic reading of s. 1 of the *Charter*, which clearly does not constrain Parliament or authorize this Court to prioritize one reasonable social or political philosophy over reasonable others, but only empowers this Court to strike down those limitations which are not reasonable and which cannot be justified in a free and democratic society.

96 The analysis cannot be skirted by qualifying the right to vote as a core democratic right. It does not follow from the fact that Parliament is denied the authority to remove or qualify the right to vote in its sole discretion under s. 33 that limitations on that right may not be justified under s. 1, or that a more onerous s. 1 analysis must necessarily apply. Constitutional writers and commentators point out that s. 33 was a political compromise, meant to bring together provinces opposed to the entrenchment of constitutional rights, with those in favour: P. Macklem et al., *Canadian Constitutional Law* (2nd ed. 1997), at pp. 597 and 646. Indeed Macklem et al. write at p. 597: "Added to

the Charter at the last moment, this controversial provision captured the final political compromise among the provinces and federal government that facilitated the adoption of the Charter". There is little evidence of the intention behind excluding democratic rights (along with mobility rights, language rights, and enforcement provisions) from the ambit of s. 33, nor has this Court ever seriously considered the significance of such exclusion. The Chief Justice's conclusion at para. 11 that "[t]he framers of the *Charter* signaled the special importance of this right ... by exempting it from legislative override ..." requires examination before it can be used as support for nearly insulating the right to vote from s. 1 limitations. In fact, s. 33 and s. 1 are clearly different in their purpose, and the *Charter* clearly distinguishes their application to the right to vote. It does not behoove the Court to read s. 33 into s. 3 by finding in s. 3, when divorced from s. 1, the statement of a political philosophy which preempts another political philosophy which is reasonable and justified under the latter section. The *Charter* was not intended to monopolize the ideological space.

97 There is a flaw in an analysis which suggests that because one social or political philosophy can be justified, it necessarily means that another social or political philosophy is not justified: in other words, where two social or political philosophies exist, it is not by approving one that you disprove the other. Differences in social or political philosophy, which result in different justifications for limitations upon rights, are perhaps inevitable in a pluralist society. That having been said, it is only those limitations which are not reasonable or demonstrably justified in a free and democratic society which are unconstitutional. Therefore, the most significant analysis in this case is the examination of the social or political philosophy underpinning the justification advanced by the Crown. This is because it will indicate whether the limitation of the right to vote is reasonable and is based upon a justification which is capable of being demonstrated in a free and democratic society. If the choice made by Parliament is such, then it ought to be respected. The range of choices made by different legislatures in different jurisdictions, which I will review below, supports the view that there are many resolutions to the particular issue at bar which are reasonable; it demonstrates that there are many possible rational balances.

98 The role of this Court, when faced with competing social or political philosophies and justifications dependent on them, is therefore to define the parameters within which the acceptable reconciliation of competing values lies. The decision before this Court is therefore not whether or not Parliament has made a proper policy decision, but whether or not the policy position chosen is an acceptable choice amongst those permitted under the *Charter*. This was the view advanced by Linden J.A. for the Court of Appeal ([2000] 2 F.C. 117, at para. 60):

> Whether paragraph 51(*e*) of the Act is good penal policy or good public policy is not at issue in this appeal. It is not the role of this Court to decide what works with regard to penal policy and what does not. It is not the role of this Court to determine what theories of penology should be adopted by our elected legislatures. This case is about what, if anything, Parliament may or may not do to interfere with prisoner voting rights within the bounds of section 1 of the Charter. At issue is whether the statutory prohibition is sufficiently tailored and appropriately proportional, or whether Parliament must try again to fashion a still narrower bar, adopt a different approach, or abandon the objective altogether. [Emphasis in original.]

This Court has often affirmed this view that courts must be cautious not to unduly interfere in decisions which 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.

D) *Symbolic Arguments and Evidentiary Problems*

99 A subject that is related to and follows from the above discussion concerning the evaluation of competing social or political philosophies is the role of symbolic arguments in *Charter* adjudication. In the context of the *Charter* analysis, it is important not to downplay the importance of symbolic or abstract arguments. Symbolic or abstract arguments cannot be dismissed outright by virtue of their symbolism: many of the great principles, the values upon which society rests, could be said to be symbolic. In fact, one of the more important dimensions of s. 3 of the *Charter* is clearly its symbolism: the affirmation of political equality reflected in all citizens being guaranteed the right to vote, subject only to reasonable limits prescribed by law that can be demonstrably justified in a free and democratic society. The case at bar concerns debates about symbolism, as the arguments involved relate to abstract concepts such as democracy, rights, punishment, the rule of law and civic responsibility. To choose a narrow reading of rights over the objectives advanced by Parliament is to choose one set of symbols over another.

100 In her reasons, the Chief Justice claims at para. 16 that Parliament is relying on "lofty objectives", and suggests at para. 23 that the presence of "symbolic and abstract" objectives is problematic. However, the reasons of the Chief Justice have the very same objective -- to protect the value of the right to vote and the rule of law -- and rely on equally vague concepts. Breaking down the meaning and value of the right to vote, one is unavoidably led to abstract and symbolic concepts such as the rule of law, the legitimacy of law and government, and the meaning of democracy. The Chief Justice discusses these concepts at length, along with theories of individual motivation. For instance, relying on the philosopher J. S. Mill, she suggests at para. 38 that "[t]o deny prisoners the right to vote is to lose an important means of teaching them democratic values and social responsibility". This type of statement is as symbolic, abstract and philosophical as the government's claim that denying serious incarcerated criminals the right to vote will strengthen democratic values and social responsibility.

101 Most of the evidence in this case is that of expert opinions on the matters of political theory, moral philosophy, philosophy of law, criminology, correctional policy, and penal theory. I would suggest distinguishing between two kinds of expert evidence in this case. First, there is very limited social scientific evidence, e.g. in the field of criminology, that seeks to establish the practical or empirical consequences of maintaining or lifting the ban on prisoner voting. Second, there is copious expert testimony in the nature of legal and political philosophy. I do not think that the Court need necessarily defer to this second type of expertise, or take into account the "skill" and "reputation" of the experts in weighing this evidence (as the trial judge purported to do at [1996] 1 F.C. 857, at pp. 865-66). First, most if not all of the philosophers or theorists on which these experts rely never in fact even addressed the specific issue of prisoner enfranchisement or disenfranchisement. Second, legal theory expert testimony in this context essentially purports to justify axiomatic principles. Therefore, these arguments are either persuasive or not. In this context, it is appropriate for courts to look not only to such theoretical arguments but also beyond, to factors such as the extent

of public debate on an issue, the practices of other liberal democracies and, most especially, to the reasoned view of our democratically elected Parliament.

102 The evidence in this case, offered by both the appellants and the Crown, is abstract and symbolic and does not lend itself to being easily demonstrated. For example, it was submitted before this Court that the Crown ought to have to demonstrate actual benefits or actual effectiveness of the provision which Parliament has chosen. On the facts, this is a nearly impossible task. The same demand, however, if made with regard to the effectiveness of the *Criminal Code* in general or in its specific provisions, would raise similar challenges: can it be shown that the *Criminal Code* is generally effective? It is as if to say that because there are still criminals, we ought to do away with the *Criminal Code*, because the existence of crime itself points towards an effectiveness problem. Symbolic or abstract arguments must be examined seriously for what they are, because that is effectively all that is before this Court. Further, one must not deny that the choices between and the interpretation of these symbolic or abstract arguments are clearly connected to significant concrete effects.

103 A key justification before this Court, to be analysed in depth below, is that serious crime reflects contempt for the rule of law and a rejection of the basis for the operation of a free and democratic society. This, if it is symbolic or abstract, reflects a core value of the community, a value that is reflected throughout the *Criminal Code* and in the provision before us today. As will be argued below, this value is based on a reasonable social or political philosophy. Temporarily removing the vote from serious criminal offenders while they are incarcerated is both symbolic and concrete in effect. Returning it on being released from prison is the same.

E) *"Dialogue" and Deference*

104 Linden J.A., in the Federal Court of Appeal below, stressed the importance of deference to Parliament. In para. 56 of his reasons, he stated:

> This case is another episode in the continuing dialogue between courts and legislatures on the issue of prisoner voting. In 1992 and 1993, two appeal courts and the Supreme Court of Canada held that a blanket disqualification of prisoners from voting, contained in earlier legislation which was challenged, violated section 3 of the Charter and could not be saved by section 1 of the Charter. Parliament responded to this judicial advice by enacting legislation aimed at accomplishing part of its objectives while complying with the Charter. That legislation, which is being challenged in this case, disqualifies from voting only prisoners who are serving sentences of two years or more. [Footnotes omitted.]

This Court has stressed the importance of "dialogue" in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, at paras. 138-39, and in *Mills*, *supra*, at paras. 20, 57 and 125. (See also P. W. Hogg and A. A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 Osgoode Hall L.J. 75.) I am of the view that since this case is about evaluating choices regarding social or political philosophies and about shaping, giving expression, and giving practical application to values, especially values that may lie outside the *Charter* but are of fundamental importance to Canadians, "dialogue" is of particular importance. In my view, especially in the context of the case at bar, the heart of the dialogue metaphor is that neither the courts nor Parliament hold a monopoly on the determination of values. Importantly, the dialogue metaphor does not signal a lowering of the s. 1 justification stand-

ard. It simply suggests that when, after a full and rigorous s. 1 analysis, Parliament has satisfied the court that it has established a reasonable limit to a right that is demonstrably justified in a free and democratic society, the dialogue ends; the court lets Parliament have the last word and does not substitute Parliament's reasonable choices with its own.

105 Linden J.A. stressed the need for deference to Parliament's having chosen to draw a particular line regarding which criminal offences are serious enough to warrant the loss of the vote. I suggest that regardless of the relationship between the timing of the Royal Assent to the modifications to s. 51(*e*) of the Act and the decision of this Court in the first *Sauvé* case, there has been, generally, "dialogue" undertaken between the courts and Parliament. "Dialogue" has existed insofar as Parliament had been addressing, since well before the decision of the Court of Appeal below, an evaluation of the nature of the right to vote, and specifically, the issue of prisoner disenfranchisement. This evaluation was obviously undertaken with the many cases concerning prisoner disenfranchisement that had occurred up to that point in mind, including: *Re Jolivet and The Queen* (1983), 1 D.L.R. (4th) 604 (B.C.S.C.); *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124, aff'g [1984] 1 F.C. 1133 (C.A.), rev'g [1984] 1 F.C. 1119 (T.D.); *Lévesque v. Canada (Attorney General)*, [1986] 2 F.C. 287 (T.D.); *Badger v. Attorney-General of Manitoba* (1986), 30 D.L.R. (4th) 108 (Man. Q.B.), aff'd (1986), 32 D.L.R. (4th) 310 (Man. C.A.); *Badger v. Canada (Attorney General)* (1988), 55 Man. R. (2d) 211 (Q.B.), rev'd (1988), 55 D.L.R. (4th) 177 (Man. C.A.), leave to appeal refused, [1989] 1 S.C.R. v; *Sauvé v. Canada (Attorney General)* (1988), 66 O.R. (2d) 234 (H.C.), rev'd (1992), 7 O.R. (3d) 481 (C.A.); *Belczowski v. Canada*, [1991] 3 F.C. 151 (T.D.), aff'd [1992] 2 F.C. 440 (C.A.). What is also particularly relevant is that s. 51(*e*) of the Act received Royal Assent on May 6, 1993, well after both the Ontario Court of Appeal handed down its decision in the first *Sauvé* case (March 25, 1992) and the Federal Court of Appeal handed down its decision in *Belczowski* (February 17, 1992).

106 I note as well that a Royal Commission on Electoral Reform and Party Financing, the "Lortie Commission", was established in November 1989. The Final Report of that Commission was submitted to Cabinet in November 1991. That report canvassed specifically the issue of the disqualification of certain groups of voters, including prison inmates.

107 To repeat: deference does not mean that this Court must not rigorously examine the justifications presented by the Crown for s. 51(*e*) of the Act. As Iacobucci J. noted in his partial dissent in *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69, at para. 221: "While deference is appropriate, our Court cannot abdicate its duty to demand that the government justify legislation limiting *Charter* rights." This point was also discussed by McLachlin J. in *RJR-MacDonald*, *supra*, at para. 136, explaining that there is a fine line between the appropriateness of deference and the role of this Court to safeguard *Charter* rights:

> ... care must be taken not to extend the notion of deference too far. Deference must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable. Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parlia-

> ment's view simply on the basis that the problem is serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and our nation is founded.

108 Most basically, what the commentary regarding "dialogue" and deference goes to in this case is keeping in mind the importance of what was discussed above regarding the existence of competing social or political philosophies when embarking upon flexible and contextual s. 1 *Charter* analysis. In the specific factual context of the case at bar, I think that this challenge was well summarized by Lord Justice Kennedy in a recent case from the United Kingdom regarding prisoner disenfranchisement in the context of the U.K.'s incorporation in the *Human Rights Act 1998* (U.K.), 1998, c. 42, of the European *Convention for the Protection of Human Rights and Fundamental Freedoms* (also known as the *European Convention on Human Rights* ("*ECHR*")), 213 U.N.T.S. 221. In *Pearson v. Secretary of State for the Home Department*, [2001] E.W.J. No. 1566 (QL) (Div. Ct.), Lord Justice Kennedy stated, at para. 23:

> As Parliament has the responsibility for deciding what shall be the consequences of conviction by laying down the powers and duties of a sentencing tribunal or other body it necessarily follows that lines have to be drawn, and that on subsequent examination a case can be made in favour of the line being drawn somewhere else, but in deference to the legislature courts should not easily be persuaded to condemn what has been done, especially where it has been done in primary legislation after careful evaluation and against a background of increasing public concern about crime.

F) *A Rational and Reasonable Social or Political Philosophy Underpins the Crown's Justification for the Limitation of the Section 3 Right*

109 What social or political philosophy has motivated Parliament to insist on the temporary disenfranchisement of prisoners? Is it reasonable and rational? I suggest that, in enacting s. 51(*e*) of the Act and in providing a justification of that provision before the courts, Parliament has indicated that it has drawn a line. This line reflects a moral statement about serious crime, and about its significance to and within the community. The core of this moral statement is the denunciation of serious crime, serious antisocial acts. Parliament has indicated that criminal conduct of such severity that it warrants imprisonment for a sentence of two years or more also carries with it the disenfranchisement of the offender for the duration of his or her incarceration. Most importantly, as I will develop below, this basis for the Crown's justification is both rational and reasonable.

110 The fact that the line drawn is related to sentences which flow from the commission of crimes under the *Criminal Code* is of great relevance. As noted above, this Court has held that the *Criminal Code* and its provisions are declaratory of values, values on which society rests: see *Keegstra, supra*, at pp. 769 and 787. Therefore, it is perfectly appropriate to look to these underlying values and their explanation to assist in the seeking of a reconciliation of the competing interests at hand. With regard to importing such values into *Charter* analysis, I refer not only to my discussion above regarding reading s. 3 of the *Charter* with s. 1, but also to the oft-cited statement by Dickson C.J. for the majority in *Slaight Communications, supra*, at p. 1056, that "[t]he underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights."

111 In my concurring opinion in *Butler, supra*, I discussed the legitimate role of the state to act on the basis of morality. I stated, at p. 522, that "I cannot conceive that the State could not legitimately act on the basis of morality. Since its earliest *Charter* pronouncements, this Court has acknowledged this possibility". I continued at pp. 523-24:

> In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. The guarantees of s. 2 of the *Charter* protect this pluralistic diversity. However, if the holders of these different conceptions agree that some conduct is not good, then the respect for pluralism that underlies s. 2 of the *Charter* becomes less insurmountable an objection to State action ... . In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality. This is also comprised in the phrase "pressing and substantial".

112 This view of the role of morality in law has been developed by Professor J. Raz, who states in his book *The Morality of Freedom* (1986), at p. 133, that "... it is the goal of all political action to enable individuals to pursue valid conceptions of the good and to discourage evil or empty ones". I agree with this view. In *Making Men Moral* (1993), at p. 170, Professor R. P. George describes Professor Raz's view as the following:

> ... political theory cannot prescind from questions of individual morality -- it cannot simply leave individual morality to the individual. The principles of political morality are tightly connected to the principles that establish the moral rectitude or culpability of individual action. He [Professor Raz] does not conclude that the state is warranted in enforcing every moral norm; but he does argue that the state cannot adopt a position of neutrality with respect to these norms.

113 In my view, the real challenge is not justifying state activity on the basis of morality in the abstract, but determining which specific moral claims are sufficient to warrant consideration in determining the extent of *Charter* rights. As I quoted in *Butler, supra*, at p. 523, Professor R. Dworkin's *Taking Rights Seriously* (1977) notes, at p. 255, that:

> The claim that a moral consensus exists is not itself based on a poll. It is based on an appeal to the legislator's sense of how his community reacts to some disfavored practice. But this same sense includes an awareness of the grounds on which that reaction is generally supported. If there has been a public debate involving the editorial columns, speeches of his colleagues, the testimony of interested groups, and his own correspondence, these will sharpen his awareness of what arguments and positions are in the field. He must sift these arguments and positions, trying to determine which are prejudices or rationalizations, which pre-suppose general principles or theories vast parts of the population could not be supposed to accept, and so on.

The issue is therefore identifying what amounts to a fundamental enough conception of morality. In *Butler, supra*, at p. 523, I developed reasoning to assist in such identification. The first inquiry to be satisfied is that the moral claim is grounded, meaning that it "... must involve concrete problems such as life, harm, well-being ... and not merely differences of opinion or of taste. Parliament cannot

restrict *Charter* rights simply on the basis of dislike; this is what is meant by the expression 'substantial and pressing' concern". The second inquiry is that "... a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people".

114 In the case at bar, the provision in question denounces serious crime, with a view to enhancing the general purposes of the criminal sanction and to promoting civic responsibility and the rule of law. Surely such objectives qualify as reflecting a "fundamental conception of morality". Attention to what is "moral" is concerned "... with the distinction between right and wrong" (*Concise Oxford Dictionary* (9th ed. 1995)). The provision in question, like the *Criminal Code* in its entirety, by virtue of the focus upon criminal activity, is addressed at specifically this.

115 The denunciation of crime and its effects on society is often explained by reference to the notion of the social contract. The social contract is the theoretical basis upon which the exercise of rights and participation in the democratic process rests. In my view, the social contract necessarily relies upon the acceptance of the rule of law and civic responsibility and on society's need to promote the same. The preamble to the *Charter* establishes that "... Canada is founded upon principles that recognize the supremacy of God and the rule of law...". In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 750, this Court cited with approval a passage from *The Authority of Law* (1979) by Professor Raz, wherein he states that '"The rule of law' means literally what it says ... . It has two aspects: (1) that people should be ruled by the law and obey it, and (2) that the law should be such that people will be able to be guided by it." The important point arising from that passage is the corollary that promoting law-abiding behaviour can be thought to be a dimension of the rule of law as well. Further, the rule of law, as was said in the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, at p. 257, "vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs." Given its fundamental importance in our society, it is not surprising that Parliament occasionally insists on taking some action to promote it, to safeguard it. As was stated by Wilson J. in *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 489: "There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, *Taking Rights Seriously* (1977), p. 267."

116 Permitting the exercise of the franchise by offenders incarcerated for serious offences undermines the rule of law and civic responsibility because such persons have demonstrated a great disrespect for the community in their committing serious crimes: such persons have attacked the stability and order within our community. Society therefore may choose to curtail temporarily the availability of the vote to serious criminals both to punish those criminals and to insist that civic responsibility and respect for the rule of law, as goals worthy of pursuit, are prerequisites to democratic participation. I say "goals worthy of pursuit" because it is clear that not all those who are otherwise eligible to vote are guaranteed to exercise civic responsibility, since, for example, there may be serious criminal offenders who may have avoided being apprehended and therefore still vote. This does not, however, detract from the laudability of the goal.

117 Related to the notion of the social contract is the importance of reinforcing the significance of the relationship between individuals and their community when it comes to voting. This special relationship is inherent in the fact that it is only "citizens" who are guaranteed the right to vote within s. 3 of the *Charter*. This limitation of the scope of s. 3 of the *Charter* stands in stark contrast to the protections offered by the fundamental freedoms, legal rights, and equality rights in the *Charter*, which are available to "everyone" or to "every individual". I am of the view that this limitation reflects the special relationship, characterized by entitlements and responsibilities, between

citizens and their community. It is this special relationship and its responsibilities which serious criminal offenders have assaulted.

118 It is for this same reason, the importance of the nexus between voters and their community, that many jurisdictions qualify the right to vote with residency requirements. This Court, in *Haig v. Canada*, [1993] 2 S.C.R. 995, upheld residency requirements as a reasonable qualification to the eligibility to vote in a referendum. While it is clear that there was no breach of s. 3 of the *Charter* in that case since s. 3 does not apply to referenda, *Haig, supra*, generally seems to imply that residency requirements may be capable of being reasonable qualifications upon the right to vote. This reasonableness arises not only from practical concerns, but also from the nexus between a particular individual's eligibility to vote in an election, their relationship to the community, and the fact that it is that community which will be subjected to the results of the election.

119 The American constitutional law scholar, Professor L. H. Tribe, notes in his text *American Constitutional Law* (2nd ed. 1988), at p. 1084:

> Every state, as well as the federal government, imposes some restrictions on the franchise. Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity. If nothing else, even though anyone in the world might have some interest in any given election's outcome, a community should be empowered to exclude from its elections persons with no real nexus to the community as such. [Emphasis added.]

This analysis explains why citizenship or residency is a reasonable minimum requirement for voting, since such indicators are often equated with identification to a particular political community. The importance of the nexus, however, also helps to understand the context of the particular disenfranchisement in question in the case at bar. The disenfranchisement of serious criminal offenders serves to deliver a message to both the community and the offenders themselves that serious criminal activity will not be tolerated by the community. In making such a choice, Parliament is projecting a view of Canadian society which Canadian society has of itself. The commission of serious crimes gives rise to a temporary suspension of this nexus: on the physical level, this is reflected in incarceration and the deprivation of a range of liberties normally exercised by citizens and, at the symbolic level, this is reflected in temporary disenfranchisement. The symbolic dimension is thus a further manifestation of community disapproval of the serious criminal conduct.

120 From the perspective of persons whose criminal activity has resulted in their temporary disenfranchisement, their benefiting from society brought with it the responsibility to be subjected to the sanctions which the state decides will be attached to serious criminal activity such as they have chosen to undertake. This understanding is complemented by the rehabilitative view that those who are in jail will hope and expect to regain the exercise of the vote on their release from incarceration, just like they hope and expect to regain the exercise of the fullest expressions of their liberty. Once released from prison, they are on the road to reintegration into the community. Obtaining the vote once released or paroled is a recognition of regaining the nexus with the community that was temporarily suspended during the incarceration.

121 In *Haig, supra*, at p. 1031, L'Heureux-Dubé J. stated for the majority that "... in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state". I am of the view that the objectives pursued by Parliament in s. 51(*e*) of the Act do reflect values of the Canadian community, values related specifically to safeguarding the integrity and health of democracy itself. These goals may be abstract, but they are the foundation of our society. These are important values upon which s. 1 of the *Charter* itself rests. A dimension of the rule of law is taking measures to see that law is obeyed. Therefore, the disenfranchisement of serious criminal offenders is to be seen as protecting Canadian democracy rather than undermining it. It is up to Parliament to enhance the value of the franchise. It has responded with s. 51(*e*) of the Act, which is premised on the view that broadening of the franchise does not, in all cases, necessarily mean strengthening it.

G) *Prisoner Disenfranchisement in Canadian Provinces, Other Countries, and International Law: Illustration of a Range of Reasonable Balances*

122 As I noted above, a review of the legislation regarding prisoner disenfranchisement across Canadian provinces, in some other countries, and in some international instruments assists in demonstrating that there are a range of reasonable and rational balances that may be struck regarding this particular issue.

123 In Canada, the situation across the provinces is obviously related to, and to some extent reflects, the evolution of the ongoing controversy regarding the federal legislation. That having been said, an overview of provincial legislation actually demonstrates that a quite diverse range of balances has been struck with regard to provincial electoral law. In Ontario, Quebec, Newfoundland, Prince Edward Island, and Manitoba, all prisoners vote: *Election Statute Law Amendment Act, 1998*, S.O. 1998, c. 9, s. 13, repealing R.S.O. 1990, c. E.6, s. 16; *Election Act*, R.S.Q., c. E-3.3, s. 273; *Elections Act, 1991*, S.N. 1992, c. E-3.1; *Election Act*, S.P.E.I. 1996, c. 12; *Elections Act*, R.S.M. 1987, c. E30, s. 31 (rep. & sub. S.M. 1998, c. 4, s. 21) disenfranchised "[e]very inmate of a correctional facility serving a sentence of five years or more", but it was struck down by the Manitoba Court of Queen's Bench in *Driskell v. Manitoba (Attorney General)*, [1999] 11 W.W.R. 615. In the Yukon, Saskatchewan and New Brunswick, all inmates serving sentences of imprisonment are disenfranchised: *Election Act, 1996*, S.S. 1996, c. E-6.01, s. 17; *Elections Act*, R.S.N.B. 1973, c. E-3, s. 43(2)(*e*); and *Elections Act*, R.S.Y. 1986, c. 48, s. 5(d). The Alberta Court of Appeal in *Byatt v. Dykema* (1998), 158 D.L.R. (4th) 644, struck down legislation providing for complete prisoner disenfranchisement, as it found itself bound by the decision of this Court in the first *Sauvé* case. The Alberta Legislature then responded with legislation which provides for the disenfranchisement of all incarcerated persons serving a sentence of more than 10 days. Section 45(c) of the *Election Act*, R.S.A. 2000, c. E-1, now declares ineligible to vote

> persons who have been convicted of offences and on polling day are serving their sentences in a correctional institution under the *Corrections Act*, in a penitentiary under the *Corrections and Conditional Release Act* (Canada), in a place of custody under the *Young Offenders Act* or the *Young Offenders Act* (Canada) or in any other similar institution outside Alberta, excluding persons sentenced to terms of imprisonment of 10 days or less or for the non-payment of fines.

The law in British Columbia, Nova Scotia, and the Northwest Territories and Nunavut parallels s. 51(*e*) of the Act that is being challenged in the case at bar: *Election Act*, R.S.B.C. 1996, c. 106, s.

30(b); *Elections Act*, R.S.N.S. 1989, c. 140, s. 29(d) as amended by S.N.S. 2001, c. 43, s. 13; *Elections Act*, R.S.N.W.T. 1988, c. E-2, s. 27(3), as amended by S.N.W.T. 1995, c. 14, s. 6.

124 Turning to the United States, the U.S. Constitution does not explicitly protect the vote. In fact, s. 2 of the Fourteenth Amendment makes tangential reference to the ability of the States to disenfranchise persons "... for participation in rebellion, or other crime". That having been said, the Fifteenth Amendment provides that the vote cannot be denied "on account of race, color, or previous conditions of servitude". Other constraints on the legislature's ability to control the franchise include the Nineteenth Amendment, which disallows denial of the vote "on account of sex"; the Twenty-Fourth Amendment, which disallows denial "by reason of failure to pay any poll tax or other tax"; and the Twenty-Sixth Amendment, which disallows denial "on account of age" greater than 18 years.

125 In the United States, it is the states that have control of disenfranchising inmates for both state and federal elections: U.S. Constitution, Art. 1, s. 2, cl. 1 (for the House of Representatives); Seventeenth Amendment, s. 1 (for the Senate). A general overview yields the conclusion that nearly all states (48 of 50 plus the District of Columbia) disqualify inmates incarcerated for felony offences for both state and federal elections, while some disenfranchise offenders permanently. Only two states do not disqualify at all: Maine and Vermont. In November 2000, the Massachusetts electorate voted in favour of a State constitutional amendment limiting prisoners' voting rights.

126 A majority of the states which deprive inmates of the right to vote do so for the entirety of their sentence, including parole: 32 states prohibit felons from voting while they are on parole and 28 of those 32 also exclude felony probationers. Other states allow a convicted felon to vote once incarceration ends. Some states only remove the vote if the criminal has committed certain crimes. A felon automatically regains the right to vote in most states upon completion of his or her sentence. In a small number of states, a felon must apply for a pardon to be permitted to vote. As mentioned above, some states remove the vote from convicted felons even after they have completed their sentences and paroles. This practice was upheld as constitutional by the U.S. Supreme Court in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

127 Looking now to Europe, Art. 3 of the First Protocol to the *ECHR* (Eur. T.S. No. 9) guarantees "... free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature". Article 3 has been considered on three occasions by the European Human Rights Commission ("the Commission"): *X. v. Netherlands*, Application No. 6573/74, December 19, 1974, D.R. 1, p. 87; *H. v. Netherlands*, Application No. 9914/82, July 4, 1983, D.R. 33, p. 242; and *Holland v. Ireland*, Application No. 24827/94, April 14, 1998, D.R. 93-A, p. 15.

128 In *H. v. Netherlands*, *supra*, the Commission established that Art. 3 of the First Protocol to the *ECHR* recognizes the principle of universal suffrage, but it also noted that the right to vote is not absolute and noted that "a large number of State Parties to the Convention have adopted legislation whereby the right to vote of a prisoner serving a term of imprisonment of a specific duration is suspended in certain cases, even beyond the duration of the sentence" (p. 245). The general principle which supported the ability of the legislator to restrict the right to vote in respect of convicted persons was addressed as follows, at p. 246:

> Such restrictions can be explained by the notion of dishonour that certain convictions carry with them for a specific period, which may be taken into consideration by legislation in respect of the exercise of political rights. Although, at first glance, it may seem inflexible that a prison sentence of more than one year should always result in the suspension of the exercise of the right to vote for three years, the Commission does not feel that such a measure goes beyond the restrictions justifiable in the context of Article 3 of the Protocol.

More recently, in *Holland, supra*, the Commission, at pp. 26-27, made a reference to:

> ... its constant case-law to the effect that, although Article 3 of Protocol No. 1 implies a recognition of the principle of universal suffrage (including the right to vote in elections for the legislature), this right is neither absolute nor without limitations but subject to such restrictions which are not arbitrary and which do not affect the expression of the opinion of the people in the choice of the legislature... .

In that same case, the Commission noted that it did not consider the disenfranchisement of prisoners for the duration of their incarceration to affect the expression of the opinion of the people in their choice of the legislature.

129 The European Court of Human Rights addressed the issue in the *Mathieu-Mohin and Clerfayt* case, judgment of 2 March 1987, Series A No. 113. Therein, the court found, at para. 51, that Art. 3 of the First Protocol conferred the right to vote and to stand for election, despite the wording of the Article, which, on its face, seems not to confer such rights. The court went on to state in para. 52 of its judgment, however, that:

> The rights in question are not absolute. Since Article 3 recognises them without setting them forth in express terms, let alone defining them, there is room for implied limitations ... . In their internal legal orders the Contracting States make the rights to vote and to stand for election subject to conditions which are not in principle precluded under Article 3 ... . They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate ... . In particular, such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature".

130 European countries demonstrate a broad range of practices. Seventeen European countries have no form of electoral ban for incarcerated offenders: Bosnia, Croatia, Cyprus, Denmark, Iceland, Ireland, Finland, Latvia, Lithuania, Macedonia, Netherlands, Poland, Slovenia, Spain, Sweden, Switzerland and the Ukraine. In Greece, prisoners serving life sentences or indefinite sentences are disqualified; otherwise the matter is left to the discretion of the court. In some other European countries, electoral disqualification depends on the crime committed or the length of the sentence: Austria, Malta and San Marino ban all prisoners serving more than one year from voting; Belgium disqualifies all offenders serving sentences of four months or more; Italy disenfranchises based on

the crime committed and/or the sentence length; Norway removes the vote for prisoners sentenced for specific offences; and in France and Germany, the disqualification of a prisoner is dependent upon the sentence handed down by the court specifically providing for disenfranchisement (in France, certain crimes are identified which carry automatic forfeiture of political rights; in Germany, prisoners convicted of offences which target the integrity of the German state or its democratic order lose the vote). Armenia, Bulgaria, the Czech Republic, Estonia, Hungary, Luxembourg, Romania and Russia all have complete bans for sentenced offenders.

131 Australia, New Zealand and the United Kingdom all disenfranchise at least some of the inmate population. In Australia, prisoners vote in two of seven states. In federal elections, inmates serving sentences of five years or more are disqualified from voting. In New Zealand, prisoners serving sentences for three years or more, preventative detention or life imprisonment are not qualified to vote. In the United Kingdom, prisoners are completely disenfranchised for Parliamentary elections, elections to the European Assembly, and local government elections: s. 3(1) of the *Represention of the People Act 1983* (U.K.), 1983, c. 2 (as amended in 1985 and 2000), and s. 2(1) of Schedule 1 to the *European Assembly Elections Act 1978* (U.K.), 1978, c. 10. The only exceptions are for remand prisoners, persons imprisoned for contempt of court and persons detained for default in complying with their sentence.

132 When the *Human Rights Act 1998* came into force in the United Kingdom in October 2000, the guarantee found in Art. 3 of Protocol No. 1 to the *ECHR* became part of U.K. law. Three prisoners recently challenged the ban on prisoners' voting as contained in the *Representation of the People Act 1983*, as being incompatible with the *Human Rights Act 1998*: *Pearson, supra*. In that case, the court construed the question before it as whether s. 3(1) of the *Representation of the People Act 1983* satisfied the standard outlined by the European Court of Human Rights in *Mathieu-Mohin, supra*. The analysis undertaken therein by Lord Justice Kennedy is informative, and very much in line with my disposal of the case at bar. In fact, Lord Justice Kennedy devoted much of his analysis to the Canadian experience, and he specifically approved of the reasoning of Linden J.A. in the Federal Court of Appeal in the case at bar, with which I substantially agree. Lord Justice Kennedy found that the balancing that was undertaken in the Canadian constitutional context was highly informative for the balancing which had to be undertaken under Art. 3 of Protocol No. 1 to the *ECHR*, as incorporated in the *Human Rights Act 1998*. Lord Justice Kennedy stated, at para. 50, that:

> ... there is a broad spectrum of approaches among democratic societies, and the United Kingdom falls into the middle of the spectrum. In course of time this position may move, either by way of further fine tuning, as was done recently in relation to remand prisoners and others, or more radically, but its position in the spectrum is plainly a matter for Parliament not for the courts.

I find this informative, especially in light of the fact that the line chosen by Parliament in Canada in s. 51(*e*) of the Act is far more moderate than the line drawn by Parliament in the United Kingdom.

133 Certain international instruments also address the issue of prisoner voting. Article 25 of the *International Covenant on Civil and Political Rights* ("*ICCPR*") states that every citizen shall have the "right and the opportunity" to vote "without unreasonable restrictions": *ICCPR*, 999 U.N.T.S. 171, entered into force March 23, 1976. The United Nations Human Rights Committee, in a comment on Art. 25 of the *ICCPR*, stated that restrictions on the right to vote should be "objective and

reasonable" and that "[i]f conviction for an offence is a basis for suspending the right to vote, the period of such suspension should be proportionate to the offence and the sentence": "General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights", General Comment No. 25 (57), Annex V, CCPR/C/21, Rev. 1, Add. 7, August 27, 1996. It is likely caveats, such as the one in Art. 25 of the *ICCPR*, which led the international non-governmental organization Penal Reform International, in their 1995 publication *Making Standards Work -- An International Handbook on Good Prison Practice*, at pp. 13-14, to distinguish between "retained rights", which it advocated must be retained in a prison setting, and other rights which may be limited, amongst which was listed the right to vote.

134 Therefore, when one looks to the range of balances selected by Canadian provinces, other countries, and as reflected in international instruments, it becomes clear that in theory there is not a single response to the question at hand. The overview presents a range of reasonable and rational balances which have been struck. On the spectrum which is the result of the above overview, Canada's line appears quite moderate.

H) *Application of the Oakes Test*

135 With all of the above commentary regarding flexibility, context, especially the relationship between the justification put forth by the Crown and a reasonable and logical prior social or political philosophy, the role of symbolic arguments, the importance of deference, and the variety of reasonable and rational balances struck by Canadian provinces and within the international community in mind, I now turn to the application of the *Oakes* test itself.

(1) Is the Limit Prescribed by Law?

136 It is obvious that the limit is prescribed by law: s. 51(*e*) of the Act is clear and not vague.

(2) Are the Objectives Pressing and Substantial?

137 The task of the Court at this phase of the *Oakes* test is to determine whether the concern which prompted the enactment of the impugned provision is pressing and substantial and whether the purpose of the legislation is one of sufficient importance: *Irwin Toy, supra*, at p. 987, *per* Dickson C.J., Lamer J. (as he then was) and Wilson J. At this stage, there is an important distinction to be made between the objective and the means chosen to implement that objective, since this phase is related to the Court's checking that the objectives are consistent with the principles, integral in a free and democratic society, pressing and substantial and directed to the realization of collective goals of fundamental importance: *Oakes, supra*, at pp. 138-39.

138 As a preliminary matter I think it is important to stress that, given the nature of the impugned provision and the nature of this particular context, it is advisable to not become over-constrained by the specific language or formulation of the objectives offered by the Crown. Therefore, I agree with Linden J.A. in his general statement, at para. 99:

> ... I would leave to philosophers the determination of the "true nature" of the disenfranchisement. It may be argued that this legislation does different things -- it imposes a civil consequence, it fixes a civil disability, it imposes a criminal penalty, it furthers a civic goal, it promotes an electoral goal, or it is part of the

> sentencing process. I believe that these arguments, made alone, are of limited assistance. There are elements of all these ideas and ideals at work here. [Emphasis in original.]

139 Parliament's two principal objectives in s. 51(*e*) of the Act, accepted by both the trial judge and the Federal Court of Appeal below, are: the enhancement of civic responsibility and respect for the rule of law, and the enhancement of the general purposes of the criminal sanction. Above, I developed the view that these objectives are based upon a reasonable and rational social or political philosophy. Thus, I am of the view that any provision which seeks to advance such objectives clearly has a pressing and substantial purpose.

140 With regard to the first objective, that of enhancing civic responsibility and respect for the rule of law, the Crown submits that it basically relates to the promotion of good citizenship. This objective also reflects society's desire to buttress the rule of law. I discussed both of these notions above, where I addressed how they relate to a reasonable and rational political or social philosophy, the view that the social rejection of serious crime reflects a moral line which safeguards the social contract and the rule of law and bolsters the importance of the nexus between individuals and the community.

141 The Crown submits that it is illustrative to look to other jurisdictions so as to note that many liberal democracies do limit prisoner voting. The trial judge, agreeing with Strayer J. in *Belczowski* (at the trial level), *supra*, questioned the usefulness of looking to other jurisdictions. Particularly, after having surveyed the evidence, Wetston J. at trial below noted that it was difficult to draw meaningful conclusions about why some free and democratic societies disenfranchise criminal offenders while others do not. It has been submitted that the fact that there is no single accepted theoretical basis for liberal democracy, no unified liberal political theory, means that civic responsibility should not be considered a significant objective of public policy. I do not agree with this submission. I acknowledge that the practices of other liberal democracies, as reviewed above, are mixed. I suggest, however, that while such evidence is clearly not capable of disposing of the issue, it is highly relevant. The examination of other liberal democracies simply demonstrates that there is a range of reasonable and rational balances that have been struck. The promotion of civic responsibility does not hinge on there being a single theory for liberal democracy. The lack of there being a unified political theory is, so to speak, the point of the overview. Reasonable and rational persons and legislatures disagree on the issue of prisoner disenfranchisement.

142 As noted above, it has been alleged that the "promotion of civic responsibility" is excessively abstract, generalized, symbolic, unrealistic and ambiguous. I spent some time above discussing that symbolic or abstract purposes can be valid of their own accord and must not be downplayed simply for the reason of their being symbolic.

143 The crux of the trial judge's analysis regarding this first objective is found at pp. 882-83 of his reasons:

> ... attention must be focussed on the democratic ideals which Canada, as a free and democratic society, fosters. There may well be no unified western tradition of political theory, but it is clear from the evidence in this trial that civic and moral responsibility are key components of our liberal democratic traditions. In fact, the preamble to the Charter declares that Canada is founded upon principles that recognize "the rule of law". The rule of law may be the subject of a number

> of interpretations, such as a call to law and order, or a legal ordering of social life: J. Rawls, *A Theory of Justice* ... at pages 235-243. The ideals of the rule of law express the requirements of legal rules formulated in such a manner as to secure voluntary compliance with the standard of conduct which they set. Of course, while no legal system can expect that all of its laws will be known by the public, it is nevertheless important, as part of the shaping of the voluntary social order, for persons to know in advance what the consequences of their actions might be: E. Colvin, "Criminal Law and The Rule of Law" in *Crime, Justice & Codification* ... at page 125.

144 The pressing and substantial nature of this objective was agreed with by the majority of the Federal Court of Appeal below. To support this, Linden J.A. cited as fn. 103 in para. 100 a passage from the decision of this Court in *Harvey, supra,* where the majority of this Court upheld similarly abstract objectives. At para. 38 of that case, La Forest J. wrote that:

> I have no doubt that the primary goal of the impugned legislation is to maintain and enhance the integrity of the electoral process. Nor do I doubt that such an objective is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society. [Emphasis added.]

I am of the view that the objectives advanced in the case at bar are highly similar and are clearly pressing and substantial.

145 Turning now to the second objective, that of the enhancement of the general purposes of the criminal sanction, the Crown submits that this objective has retributive, denunciatory and morally educative functions. The appellants submit that this is an additional and gratuitous punishment, and serves only to comfort those outside prison by further stigmatizing those in prison as disconnected social outcasts. They submit that a retributive philosophy of punishment does not correspond to the empirical realities of present-day Canadian society.

146 Hugessen J.A., in *Belczowski* at the Federal Court of Appeal, and Arbour J.A., in the first *Sauvé* case, were of the view that disenfranchisement of prisoners is problematic since it effectively amounts to a "punishment for imprisonment rather than for the commission of an offence". I disagree. Disenfranchisement arising from s. 51(*e*) of the Act is directly related to the length of the sentence, reflecting the nature of the criminal offence and the criminal activity committed. It is a valid objective for Parliament to develop appropriate sanctions and punishments for serious crime. Further, it cannot be necessary for the nature of a sanction to be in some way directly related to the nature of the crime perpetrated, i.e. that only those convicted of electoral offences be deprived of the vote. As discussed above, incarcerated persons lose the vote because they have been convicted of serious criminal offences and are the subjects of punishment. The disenfranchisement is a civil disability arising from the criminal conviction. The key fact which gives rise to the disenfranchisement is serious criminal activity as identified by Parliament.

147 The trial judge held that s. 51(*e*) of the Act clearly does have a punitive aspect with a retributive function. This conclusion was adopted by Linden J.A. at the Court of Appeal, in para. 100.

> Paragraph 51(*e*) of the CEA has a punitive aspect. There is little doubt that retribution is a concept that is not alien to criminal sanctions. Indeed, sentences are invariably partly punitive in nature. As stated by La Forest J. in *R. v. Lyons* ... at page 329: "In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender." See also *R. v. Goltz* ... at page 503.

148 I am of the view that there was no error made by the courts below in identifying the objectives and in determining them to be pressing and substantial. I think that the importance of both objectives is obvious.

(3) Proportionality

(a) *Rational Connection*

149 This first branch of the proportionality inquiry demands that this Court examine whether there is a rational connection between the disenfranchisement in s. 51(*e*) of the Act and the objectives of the legislation. Therefore, the question is whether Parliament had a reasonable basis, based on the arguments and evidence advanced, for thinking that the temporary disenfranchisement of serious criminal offenders would augment civic responsibility and respect for the rule of law and enhance the general purposes of the criminal sanction. In *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 291, Wilson J. summarized what this inquiry demands:

> The *Oakes* inquiry into "rational connection" between objectives and means to attain them requires nothing more than a showing that the legitimate and important goals of the legislature are logically furthered by the means government has chosen to adopt. [Emphasis added.]

150 This Court has unanimously agreed that "[r]ational connection is to be established, upon a civil standard, through reason, logic or simply common sense": *RJR-MacDonald, supra, per* La Forest J., at para. 86, McLachlin J., at paras. 156-58, and Iacobucci J., at para. 184; referred to in *Thomson Newspapers, supra*, at para. 39. The existence of scientific proof is simply of probative value in supporting this reason, logic or common sense. In the case at bar, as discussed above, a causal relationship between disenfranchising prisoners and the objectives approved of above is not empirically demonstrable. However, this Court has clearly stated that Parliament must be afforded a margin of appreciation in regard to legitimate objectives which may, nonetheless, be based upon somewhat inconclusive social science evidence: Sopinka J. in *Butler, supra*, at pp. 502-3. I offer two examples: in *Butler*, Sopinka J. found, at p. 502, that it was "reasonable to presume" that there was a causal relationship between obscenity and harm to society, and in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 101, La Forest J. stated that it was "reasonable to anticipate" that there was a causal link between anti-Semitic activity by school teachers outside school and discriminatory attitudes within school. Thus, it is clear that this Court's approach to this dimension of the test demands not the strongest connection, the most convincing rational connection, but a logical or rational connection.

151 In my view, it is obvious that s. 51(*e*) of the Act meets this requirement. The arguments in favour of the rational connection clearly meet the standard which this Court normally applies at this

stage of the analysis, that the pressing and substantial legislative objectives are at least logically furthered by the means selected by Parliament in s. 51(*e*) of the Act. At this phase of the proportionality inquiry, it is particularly important to continue to keep in mind the contextual factors which have been discussed above.

152 The trial judge below stated that while he was of the view that there was a complete lack of empirical evidence to support the rational connection, this was not determinative, in that he was satisfied that there was a rational or common sense basis upon which to assume that disenfranchising prisoners is meant to promote civic responsibility. He thus concluded that a rational connection was, as a matter of common sense, made out. I agree. He based this largely upon the view that the objectives here are symbolic: society strongly disapproves of certain forms of conduct. He also found the morally educative argument to be a compelling basis for the rational connection. The fact that many offenders are not caught, and thus perhaps those who are actually incarcerated are clearly singled out, also fails to undermine the rational connection.

153 The crux of the trial judge's reasoning concerning the first objective was that he

> seems to have accepted the evidence of Dr. Thomas Pangle and Dr. Christopher Manfredi, who testified that a legislative objective of enhancing civic responsibility and fostering respect for the rule of law was rationally connected to legislation which denounces disrespect for the process of law and for the social contract, and which restricts the franchise as a means of showing connection to the Canadian polity.
>
> (As *per* Linden J.A. at the Federal Court of Appeal, para. 105)

With regard to the second objective, the trial judge found at p. 892 of his reasons that:

> ... a rational connection exists between the impugned provision and the stated objective of enhancing the criminal sanction. As an aid to punishment, the provision clearly imposes a sanction, and denounces bad conduct. In the present case, the sanction takes the form of a disenfranchisement, in addition to the loss of liberty. A fundamental democratic right has been removed for crimes committed, and its removal is clearly felt as a deprivation by Mr. Sauvé and Mr. Spence. It is also reasonable to conclude that a morally educative message is sent to offenders, and possibly to the general population, by the imposition of a sanction.

154 The majority of the Federal Court of Appeal agreed with the trial judge that the promotion of civic responsibility is rationally connected to the impugned provision. The majority noted specifically that, while it was also possible to argue that all laws strive to promote civic responsibility, the common sense connection was adequately established in this case. Linden J.A. also agreed with the trial judge that the objective of promoting the criminal sanction was also made out.

155 Linden J.A. was satisfied that the two-year cutoff did catch serious and repeat offenders, based on the statistical data which showed that, as of April 1995, of a sample of 14,179 inmates in federal penitentiaries who had been sentenced to two or more years, each had committed, on average, 29.5 offences. I think that this is highly relevant, particularly given the Chief Justice's view that the disenfranchising provision is insufficiently tailored. Wetston J., at pp. 878-79, looked to the criminal records of the appellants as illustrative of this point:

> Mr. Sauvé, for example, was convicted of murder as an aider and abettor. While he committed only one significant offence, he was sentenced to a period of twenty-five years in prison. In contrast, Mr. Spence's criminal record reveals a history of repeated crimes which eventually led to a four-year term of imprisonment for armed robbery and related offences. Clearly, both individuals engaged in serious criminal conduct, which the courts punished by way of prison sentences of more than two years. Thus, the records of Mr. Sauvé and Mr. Spence also lend support to the defendants' assertion that prison sentences of two years or more target serious criminals and repeat offenders.

156 I note that in *Harvey, supra*, La Forest J. was convinced that the five-year disqualification from voting, holding office, or being elected to the Legislative Assembly for persons found guilty of illegal electoral practices found in the New Brunswick *Elections Act* was rationally connected to the legislative objective of enhancing the integrity of the electoral process. He noted at para. 41:

> A mandatory disqualification acts as a strong deterrent and helps to promote confidence in the electoral system ... . [T]he ... contention that the disqualification displays paternalism on the part of the legislature misses the point. The provision is meant to protect the public not only from a particular offender, but from offenders in general. In other words the legislature is aiming at both general and specific deterrence.

He concluded at para. 43 by noting:

> ... s. 119(*c*) is rationally connected to the objective of preserving the integrity of the electoral process and is not arbitrary in that it applies only to a specified group of individuals who are charged with and convicted of specified offences.

In my view, a similar analysis applies in the case at bar.

157 I support the analysis of the courts below: reason, logic and common sense, as well as extensive expert evidence support a conclusion that there is a rational connection between disenfranchising offenders incarcerated for serious crimes and the objectives of promoting civic responsibility and the rule of law and the enhancement of the general objectives of the penal sanction. The rational connection between the disenfranchisement and the first objective is explained above, in my discussion of dignity and the fact that removing the right to vote from serious incarcerated criminals does no injury to, but rather recognizes their dignity (see paras. 68-76). It is also explained above in the section entitled "A Rational and Reasonable Social or Political Philosophy Underpins the Crown's Justification for the Limitation of the Section 3 Right" (see especially paras. 114-121), and below in my discussion of the salutary effects of the measure (see especially paras. 180-183). In the latter section, I discuss the legislation's expression of societal values and its signalling effect. The Chief Justice prefers a different line of reasoning. Citing Mill as her authority, she states that "denying penitentiary inmates the right to vote is more likely to send messages that undermine respect for the law and democracy than messages that enhance those values" (para. 41). However, apart from one philosopher, she provides no support for this contention; she simply replaces one reasonable position with another, dismissing the government's position as "unhelpful" (para. 37 of the Chief Justice's reasons).

158 The rational connection between the legislation and the enhancement of the criminal sanction is also elaborated on elsewhere. Below, at paras. 160 to 174 on minimal impairment, I explain at length that the disenfranchisement is carefully tailored to apply to perpetrators of serious crimes. I therefore disagree with the Chief Justice's statement that denial of the right to vote is insufficiently tailored and therefore not rationally connected to legitimate punishment. I also explain below, at para. 183 of my discussion of salutary effects, that denial of the right to vote is perceived as meaningful by the prisoners themselves (the evidence of the appellant Aaron Spence supports this) and can therefore contribute to the rehabilitation of prisoners.

159 The arguments raised by the appellants are not destructive of the rational connection between Parliament's objectives and legislative action, and do not support disregarding the findings of both lower courts. As *per* Wilson J. in *Lavigne, supra*, Parliament's goals are obviously "logically furthered by the means government has chosen to adopt" (p. 291 (emphasis added)). In particular, I share the view of the courts below that given that, the objectives are largely symbolic, common sense dictates that social condemnation of criminal activity and a desire to promote civic responsibility are reflected in disenfranchisement of those who have committed serious crimes. This justification is rooted in a reasonable and rational social and political philosophy which has been adopted by Parliament. Further, it can hardly be seen as "novel", as stated in the Chief Justice's reasons, at para. 41. The view of the courts below is that generally supported by democratic countries. Countries including the United States, the United Kingdom, Australia, New Zealand, and many European countries such as France and Germany, have, by virtue of choosing some form of prisoner disenfranchisement, also identified a connection between objectives similar to those advanced in the case at bar and the means of prisoner disenfranchisement.

(b) *Minimal Impairment*

160 The Crown must demonstrate that the impairment of rights is minimal, i.e. that the law was carefully tailored so that *Charter* rights are impaired no more than is necessary to meet the legislative provision's objectives. Minimal impairment is about analysing the line that has been drawn. This analysis does not, notably, require the Crown to have adopted the absolutely least intrusive means for promoting the purpose, although it does require that the Crown prefer a significantly less intrusive means if it is of equal effectiveness. In *RJR-MacDonald, supra*, at para. 160, McLachlin J. stated:

> The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement... .

In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 782, Dickson C.J. stated: "The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line." See also *Ross, supra*, at para. 108. In the case at bar, these passages are of the utmost relevance, insofar as they encompass a recognition of the need for deference in the context of a case such as the one at bar.

161 I emphasize that it was "particularly" on the ground of minimal impairment that this Court, in the first *Sauvé* case, established that the previous s. 51(*e*) of the Act, which disenfranchised all

prisoners regardless of the duration of their incarceration, was contrary to the *Charter* and incapable of being justified under s. 1. Our decision was, at pp. 439-40:

> We are all of the view that these appeals should be dismissed.
>
> The Attorney General of Canada has properly conceded that s. 51(*e*) of the *Canada Elections Act*, R.S.C., 1985, c. E-2, contravenes s. 3 of the *Canadian Charter of Rights and Freedoms* but submits that s. 51(*e*) is saved under s. 1 of the *Charter*. We do not agree. In our view, s. 51(*e*) is drawn too broadly and fails to meet the proportionality test, particularly the minimal impairment component of the test, as expressed in the s. 1 jurisprudence of the Court.

The language of Iacobucci J.'s reasons seem to imply that, while Parliament's complete ban of prisoner voting in the old provision was unconstitutional, Parliament was free to investigate where an appropriate line could be drawn. This is exactly what it was in the process of doing at the time the first *Sauvé* case was heard. It has drawn a line in the form of s. 51(*e*) of the Act.

162 The appellants and their experts have argued that there are less intrusive means for the Crown to pursue its objectives: disenfranchisement could be left to the discretion of the sentencing judge; as *per* the Lortie Commission, only those convicted of the most serious offences (those punishable by a maximum of life) and the most serious sentences (those punishable by 10 years in jail or more) could lose the vote; an offence-oriented approach could define specific types of crimes which could be seen as bearing a rational connection to the franchise; or the measure could allow for the vote to be restored if the offender demonstrated good behaviour while incarcerated. To these I add that it is obvious that any higher cutoff line, i.e. 5, 10, or 25 years of incarceration, would also, technically, be less intrusive.

163 I am of the view that no less intrusive measure would be equally effective. Since Parliament has drawn a line which identifies which incarcerated offenders have committed serious enough crimes to warrant being deprived of the vote, any alternative line will not be of equal effectiveness. Equal effectiveness is a dimension of the analysis that should not be underemphasized, as it relates directly to Parliament's ability to pursue its legitimate objectives effectively. Any other line insisted upon amounts to second-guessing Parliament as to what amounts to "serious" crime.

164 The trial judge below stressed that the legislative process did undertake a rigorous evaluation of the line chosen regarding "serious" crime. He noted that the legislative history of s. 51(*e*) of the Act involved a report from the Lortie Commission. Notably, the Lortie Commission, despite the conclusion of a Research Study commissioned under it which recommended that all prisoners get the right to vote, concluded that prisoners who had been convicted of an offence punishable by a maximum of life imprisonment and who had been sentenced to a prison term of 10 years or more should be disqualified from voting for the duration of their incarceration. A Special Committee on Electoral Reform, which reviewed the Lortie Commission's Report, recommended, however, that a two-year cutoff was appropriate since this would catch "serious offenders". Wetston J. stated, at p. 877:

> The Special Committee spent a great deal of time trying to determine whether a two-year limit for the disqualification was appropriate, or whether a cutoff of five

> years, or seven years, or ten years (as recommended by the Lortie Commission) was more justifiable. Eventually, the Special Committee recommended a two-year cutoff since, in their view, serious offenders may be considered to be those individuals who have been sentenced to a term of two years or more in a correctional institution. Generally, that means a federal penitentiary, but not exclusively.

165 The debates in the House of Commons regarding the provision in question demonstrate that there was a view that disenfranchisement would have an "educative effect": see Wetston J. at pp. 877-78 of his reasons and *House of Commons Debates*, vol. XIV, 3rd Sess., 34th Parl., April 2, 1993, at pp. 18015-21. Further, the debates emphasize the view that the prisoners actually disenfranchised themselves by their engaging in criminal conduct. Most generally, and most importantly, Linden J.A. aptly noted, at para. 96:

> ... that Parliament, both in general session and in Committee, debated this measure vigorously. The Parliamentary Committee reviewing the matter carefully considered the submissions of the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission), recommending disenfranchisement to all those prisoners serving sentences of 10 years or more. While in session, Parliament debated and ultimately rejected a motion to repeal the disenfranchisement, and an alternative motion to trigger the disenfranchisement only after a sentence of five years or more is handed down.

Linden J.A. noted that Parliament did not consider a finite list of offences which would result in the loss of the vote, but he noted that the cutoff selected achieved the same objective by a different method: serious offences were specifically targeted.

166 The Crown and its experts submitted that the impugned provision is minimally impairing for three reasons: only prisoners serving sentences for two years or more are disenfranchised, and thus the provision only targets what Parliament has identified as those who have perpetrated "serious" offences; the disenfranchisement is temporary, in the sense that the vote returns to the offenders once they leave jail; and the return of the vote once the offender leaves jail is automatic.

167 The trial judge, appropriately, was concerned that Parliament be granted some latitude to select alternative policy options. In his final analysis, however, Wetston J. rejected all but one of the appellants' suggested "less intrusive" options. What he believed would be a less intrusive measure is the selective disenfranchisement of each individual offender as a matter of the sentencing judge's discretion. He preferred this approach since it would not be automatic; it would take into account the particular circumstances of each offender. He noted that this option was not heavily considered by Parliament. Further, he noted that legislative criteria could assist the sentencing judge in his or her determinations. The trial judge was also of the view that there would be a greater degree of public attention if the issue of disqualification were to be decided by the sentencing judge, and thus the morally educative dimension of the disenfranchisement would be enhanced. The trial judge thus found that in light of this available option the provision was not minimally impairing. Desjardins J.A., in dissent at the Federal Court of Appeal, was effectively of the same view.

168 I am not convinced by the trial judge's preference for this approach. First, it seems to designate the actual purpose of the voting ban to be more clearly the enhancement of the punitive sanction than the promotion of civic responsibility. I am of the view that if the offender has committed a

crime which falls within the category identified by Parliament as bringing with it disenfranchisement, the sentencing judge's discretion has little place in determining whether civic responsibility will be better or worse promoted by the disenfranchisement of the particular offender. It is therefore clearly not of equal effectiveness. Second, I cannot imagine what factors a sentencing judge would appropriately weigh to decide this issue. The "personal circumstances" which a sentencing judge might employ to reduce a sentence have, in my view, no place in determining whether a particular offender be permitted to vote. The disenfranchisement comes solely from having committed a crime serious enough to bring with it a term of incarceration of two years or more.

169 The trial judge also noted that legislative guidelines could be provided to assist the sentencing judge. I fail to see how such guidelines would be any more effective than the line currently drawn since the current line is Parliament's choice of a guideline: it clearly identifies a line which Parliament believes represents what amounts to "serious crime". The suggestion that a sentencing judge be able to exercise a discretion, in my view, trivialises the gravity of all offences which Parliament has said, by virtue of the cutoff line selected in relation to the *Criminal Code*, are serious.

170 It could be said that there are many other less intrusive methods to promote civic responsibility or the rule of law, methods which do not involve prisoners at all. For example, it could be said that a program of compulsory voting for all citizens, as is in effect in Australia or Belgium, might be such an alternative. With regard to such suggestions, I note the following passage from Dickson C.J. in *Keegstra, supra*, at pp. 784-85:

> ... s. 1 should not operate in every instance so as to force the government to rely upon only the mode of intervention least intrusive of a *Charter* right or freedom. It may be that a number of courses of action are available in the furtherance of a pressing and substantial objective, each imposing a varying degree of restriction upon a right or freedom. In such circumstances, the government may legitimately employ a more restrictive measure, either alone or as part of a larger programme of action, if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim. [Emphasis added.]

171 The approach taken by Linden J.A. for the majority of the Federal Court of Appeal below is sound. He held that the current provision was minimally impairing for a number of reasons: only "serious offenders", as determined by Parliament, are subject to disenfranchisement; accused persons and those convicted but out on bail are permitted to vote; those out on parole are permitted to vote; and the provision acts proportionately since it is individualized insofar as those with longer sentences will be disenfranchised longer. The provision is reasonably tailored insofar as disenfranchisement reflects the length of the sentence and actual incarceration, which, in turn, reflects the seriousness of the crime perpetrated and the intended progress towards the ultimate goals of rehabilitation and reintegration.

172 Linden J.A. also, correctly in my view, drew a parallel to the approach to minimal impairment adopted by this Court in *Harvey*, *supra*. He noted at para. 123:

> Here too Parliament has sought to further electoral goals with a period during which the person convicted of the most serious crimes will be prohibited

from participating in the law-making process. I can see no reason why this Court should declare invalid the balancing engaged in by Parliament in this case.

173 I agree with the Crown that the impugned provision is not arbitrary: it is related directly to particular categories of conduct. I also note that the two-year cutoff line also reflects practical considerations: it reflects a distinguishing between offenders incarcerated in federal rather than provincial institutions (s. 743.1 of the *Criminal Code*); persons sentenced to a term of imprisonment of two years or more are not eligible to serve their sentence in open custody (s. 742.1 of the *Criminal Code*); and persons subject to a sentence of imprisonment of two years or more are subject to having a court delay parole until one half of the sentence is served (s. 743.6 of the *Criminal Code*).

174 In my view, it is particularly inappropriate, in the case at bar, to find the justification of the limitation of the right to be unconvincing at this phase of the *Oakes* test. First, as was noted above, there is a need for deference to Parliament in its drawing of a line, especially since this Court gave the impression that it was up to Parliament to do exactly that after the first *Sauvé* case was heard in 1993. Second, also as developed above, the analysis of social and political philosophies and the accommodation of values in the context of the *Charter* must be sensitive to the fact that there may be many possible reasonable and rational balances. Developing this point, it is important to note that, given the theoretical nature of the arguments raised by both parties in the case at bar, they do not gain proportionally in strength as the bar is moved higher. Symbolic and theoretical justifications such as employed in this case do not get stronger as the line changes. The fundamental premises underlying the line chosen would be the same if the cutoff was 10 years, or even 25 years. See, for example, *Driskell*, *supra*, in which similar analytical problems to those in the case at bar arose and resulted in a line of five years being held unconstitutional. Line drawing, amongst a range of acceptable alternatives, is for Parliament. This view is compounded by the point developed above that it is plain that any alternate line would not be equally effective, in that the line drawn reflects Parliament's identification of what amounts to serious criminal activity. The Federal Court of Appeal was correct to find the provision in question minimally impairing.

(c) *Proportionality of Effects*

175 The final prong of the *Oakes* test demands that the effects of the limiting measure (the impugned provision) must not so severely trench on *Charter* rights that the legislative objective, albeit important, is outweighed by the infringement of the rights. The basic test for determining proportionality is that the objectives must be balanced with the actual effects of the impugned provision: *Oakes*, *supra*; *Edwards Books*, *supra*; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229. This basic test, however, was restated and modified by Lamer C.J. in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835. Therein, it was held that in cases where a measure fully, or nearly fully, meets its legislative objective or objectives, then the conventional *Oakes* analysis stands: weigh the objectives with the actual effects of the impugned provision. Where a measure only partially achieves its legislative objective or objectives, the proportionality requirement is dual: not only must there be proportionality between the deleterious effects of the measure which are responsible for the limiting of the right in question and the objective, but there must also be proportionality between the deleterious and the salutary effects of the measures.

176 What of this case? The Crown alleges that the objectives have been fully met, and thus the pre-*Dagenais* approach should apply. As submitted by the Crown at para. 64 of their factum, "[t]he

enactment of the legislation creates the norm and fulfills the moral aim of the legislation. As in *Harvey* ... there is no need to balance the salutary and deleterious effects of this legislation".

177 In *Harvey*, *supra*, at para. 48, La Forest J. stated that "[t]he final step in the *Oakes* analysis is to determine if the effects of s. 119(c), the removal of the appellant as the member for Carleton North and his five-year disqualification from running as a candidate, are proportional to the section's objective of ensuring the integrity of the electoral process." Thus, La Forest J. did not go on to balance salutary and deleterious effects *per se*; the emphasis was only on weighing the proportionality of the deleterious effects to the objectives of the provision. While Linden J.A. did not definitively prefer the *Harvey* approach in this case, he noted at para. 133 that it "highlights that the context of the particular case is paramount in the *Oakes* analysis". Further, he noted at para. 134 that "it is hard to speak of salutary effects in the context of the penal sanction, especially in an age where there is little evidence proving that the penal sanction is effective in reducing or deterring crime, or in reducing recidivism". I agree and am of the view that regardless of which test is engaged, given the nature of the evidence and the fact that the objectives have clear symbolic effect, that the proportionality analysis is nonetheless satisfied.

178 It is my view that the arguments in this dimension of the analysis are basically either persuasive or not. If the objectives are taken to reflect a moral choice by Parliament which has great symbolic importance and effect and which are based on a reasonable social or political philosophy, then their resulting weight is great indeed. Over all, while the temporary disenfranchisement is clear, the salutary effects and objectives are, in my view, of greater countervailing weight. Generally, I agree with the analysis of Linden J.A. at the Federal Court of Appeal below to this effect.

179 The trial judge considered this dimension of the *Oakes* test despite having found that the impugned provision was not minimally impairing. He discussed the current situation across Canadian provinces with regard to prisoner enfranchisement for the purpose of provincial elections. He noted that four provinces (I note that it is now five) permit all prisoners to vote in provincial elections, others place some limits, while yet others provide for complete disenfranchisement. He then found that the Crown did not provide any evidence of harm flowing from instances where prisoners had exercised the right to vote, such as provincial elections or referenda. He also noted that the Crown did not provide any evidence of harm flowing from prisoner voting in other countries. I do not find this reasoning persuasive: the harm which flows from serious offenders voting is obviously not empirically demonstrable. As long as one holds democracy to be an abstract good, to find that empirically measurable harm flows from the result of any fair democratic process is an impossible argument to make.

180 The salutary effects in the case at bar are particularly difficult to demonstrate by empirical evidence given their largely symbolic nature. On this point, I note that it would be difficult for the Crown to justify all penal sanctions, if scientific proof was the standard which was required. I discussed this above, and would like to reiterate that many core values of the Canadian community might suffer if put to such a test. In such cases, the weighty merit of the objectives themselves must be considered with the social, legislative and factual context in mind. In this case, a central dimension of the context is Parliament's choice of a particular social or political philosophy on which the justification for the limitation of the right is based. As Bastarache J. noted in *Thomson Newspapers*, *supra*, at para. 125, this third phase of the proportionality prong of the *Oakes* test is unique in that it

> provides an opportunity to assess, in light of the practical and contextual details which are elucidated in the first and second stages, whether the benefits which accrue from the limitation are proportional to its deleterious effects as measured by the values underlying the *Charter*.

181 Linden J.A. found that the primary salutary effect was that the legislation, intrinsically, expresses societal values in relation to serious criminal behaviour and the right to vote in our society. He thus concluded, at para. 137, that it has more than symbolic effect:

> This legislation sends a message signalling Canadian values, to the effect that those people who are found guilty of the most serious crimes will, while separated from society, lose access to one of the levers of electoral power. This is an extremely important message, one which is not sent by incarceration alone. Incarceration is essentially separation from the community. Incarceration alone signals a denunciation of the offender's anti-societal behaviour and indicates society's hope for rehabilitation through separation from the community. Incarceration by itself, however, leaves those convicted of serious crimes free to exercise all the levers of electoral power open to all law-abiding citizens. This maintains a political parity between those convicted of society's worst crimes and their victims. Disqualification from voting, however, signals a denunciation of the criminal's anti-societal behaviour and sends the message that those people convicted of causing the worst forms of indignity to others will be deprived of one aspect of the political equality of citizens -- the right to vote. It can be said that, in this context, "kindness toward the criminal can be an act of cruelty toward his victims, and the larger community". [Footnotes omitted; emphasis in original.]

Linden J.A. suggested that value emerges from the signal or message that those who commit serious crimes will temporarily lose one aspect of the political equality of citizens. Therefore, "the enactment of the measure is itself a salutary effect" (para. 138). I agree. As can be drawn out from the overview of the arguments which were placed before this Court, one is forced to either accept the objectives, and consequently grant them weight at this stage of the analysis, or discount them. I am of the view that the salutary effects and objectives must be granted the respect of this Court.

182 The signalling function of s. 51(*e*) is highly important. Linden J.A., below, noted at paras. 139 and 141 of his reasons, that:

> The signal itself is a double signal, a message about the community's view of crime and a repudiation of the indignity perpetrated on victims of crime. Where someone, by committing a serious crime, evinces contempt for our basic societal values, their right to vote may be properly suspended. Indeed, not to do so undermines our democratic values.
>
> ...
>
> In context, this legislation puts forward a statement of principles by which Canadians live. That is a valid role which Parliament may play. The formal enactment of these principles itself is as important as any tangible effects that the law may have. [Footnotes omitted.]

This view is supported by the Crown's experts, Professors Pangle and Manfredi. Professor Pangle emphasized that the provision in question reflects a signal to society and to offenders that the commission of serious criminal acts will result in the loss of a dimension of political participation. Professor Manfredi developed the argument, employed above, that there is something important about the nexus between the exercise of the vote by citizens and the responsibilities and duties inherent in citizenship. Also as reflected upon above, the provision reflects society's desire to promote the rule of law and civic responsibility, which are inherent in and required by the rule of law and the notion of the social contract. This provision draws a line which sends a strong and beneficial moral message to society as a whole, the message that crime will not be tolerated. As was said in *Sharpe, supra,* by L'Heureux-Dubé and Bastarache JJ. and myself, at para. 191: "The Court should be particularly sensitive to the legitimate role of government in legislating with respect to our social values".

183 Another salutary effect of the impugned provision is that it has an effect that is noticed by the disenfranchised offenders themselves. Linden J.A. agreed and substantiated this view by quoting testimony from the appellant Aaron Spence to the effect that Mr. Spence was troubled by the fact that he was denied the vote, at para. 143:

> Q. The fact that you are deprived of the right to vote doesn't bother you?
> A. It does, it does bother me.
> Q. The answer to my question, then, Mr. Spence, unless I misunderstood your answer, is that you are, in fact, deprived of certain things that you think are valuable?
> A. Definitely.
> Q. Like the right to vote?
> A. That is true.

I am of the view that this evidences the salutary effect that the temporary disenfranchisement is perceived as meaningful by the offenders themselves. I am also of the view that based on this, there is reason to believe that the disenfranchisement could have an ongoing positive rehabilitative effect. Since the vote is meaningful to these offenders, then perhaps its temporary loss will be a factor which these offenders will carry with them as they pursue reintegration into the community on their release. The reasons of the Chief Justice deny this and suggest that the denial of the vote to prisoners makes reintegration and rehabilitation more difficult. As just stated, I disagree. I note as well, however, that it is possible to argue that incarceration itself may make rehabilitation and reintegration more difficult, but it is still, in some cases, an important dimension of punishment and indeed a step towards rehabilitation.

184 The most obvious deleterious effect of s. 51(*e*) is the potential temporary loss of the vote. This, however, must be considered in light of Parliament's objectives, as illuminated by the totality of the context. Based on statistical data, Linden J.A. concluded that the provision was effective insofar as it affected only the most serious offenders. Linden J.A. presented an overview of the number and percentage of inmates in federal penitentiaries serving time for particular offences in the form of a table reproduced at para. 145 of his reasons. Basically, it reflected the serious nature of the offences committed by those persons incarcerated for two years or more. As noted above, of the sample of 14,179 offenders incarcerated for two years or more, each was found to have, on average, 29.5 convictions. Linden J.A. thus properly concluded that the provision catches serious and repeat offenders. The statistics also indicate that 75 percent of prisoners incarcerated in federal penitentiaries are serving sentences of five years or less. Therefore, most prisoners will only be deprived of

participation in one election: see Linden J.A., at para. 145; see also Linden J.A., at para. 122, where fixed periods of disenfranchisement are discussed and a helpful parallel is drawn to this Court's approach in *Harvey, supra*. Lastly, because the duration of the disenfranchisement is directly related to the duration of incarceration, it may in fact be the case that a serious criminal offender who is technically disenfranchised during the period of his or her incarceration may never actually be denied the opportunity to vote, as there may be no election during the time he or she is incarcerated.

185 The reasons of the Chief Justice suggest that to be temporarily disenfranchised while incarcerated is to be severed from the body politic and silenced as an unworthy outsider. Above, I explained how temporary disenfranchisement does not undermine the "worth" or "dignity" of any offender but is instead focussed at criminal offences. I also have discussed how temporary disenfranchisement is to be seen as a dimension of punishment that is tailored towards rehabilitation and reintegration: it is therefore ultimately focussed upon inclusion rather than exclusion. One other point which I would like to make briefly is to note that, while being temporarily disenfranchised is clearly a significant measure, which is part of the reason why it carries such great symbolic weight, it does not amount to the complete extinguishment of all means of political expression or participation. There are many other avenues by which serious criminals who are incarcerated for two or more years may still exercise political expression: they can write to and lobby elected representatives, publish their ideas or policy proposals, or in other ways make their views known.

186 I return to the issue of deference to Parliament, and to the special context of this case, that the justification advanced by Parliament is rooted in a social or political philosophy that is not susceptible to proof in the traditional sense. Linden J.A. noted at the Federal Court of Appeal, at para. 114, that:

> While the notion of ensuring a "decent" or "moral" electorate may have little place in today's society, it is Parliament's role to maintain and enhance the integrity of the electoral process. Such considerations are by definition political and therefore warrant deference.

Deference is appropriate since the impugned provision raises questions of penal philosophy and policy. Linden J.A. stated, at para. 135 that "[t]he courts cannot prevent Parliament from proportionately compromising Charter rights in the name of denouncing crime, even if they disagree with Parliament's penal philosophy". On the issue of deference to choices regarding penal philosophy, I refer to this Court's decision in *R. v. Goltz*, [1991] 3 S.C.R. 485, where it upheld a mandatory sentence imposed under the British Columbia *Motor Vehicle Act*, on the basis that it was not an infringement of the guarantee against cruel or unusual punishment found in s. 12 of the *Charter*. In *Goltz* at p. 502, speaking for a majority of the Court, I cited from *R. v. Guiller* (1986), 48 C.R. (3d) 226 (Ont. Dist. Ct.), *per* Borins J., the following passage, approved of by Lamer J. in both *R. v. Luxton*, [1990] 2 S.C.R. 711, at p. 725, and *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1070:

> It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant

> to interfere with the considered views of Parliament and then only in the clearest cases... .

187 In his reasons, Linden J.A. made the appropriate comment that the recent evolution of penal policy has been an issue attracting significant political attention. At para. 116 he stated:

> This Court can appropriately note that since 1992 Canada has seen two federal elections in which views of crime and punishment were important. Since 1992, Canada's denunciation of crime and criminal behaviour has grown louder. The federal government has strengthened many aspects of the criminal law in an attempt to reflect the growing intolerance of crime in our communities. It is noteworthy that Parliament has also expended resources seeking alternatives to incarceration, and placing emphasis on victim's rights. While it is important to remember that the Charter exists to protect vulnerable people from oppressive public moods, it is also important to be sensitive to legitimate changes in Parliamentary attitudes toward what is and is not sound penal policy.

188 When the objectives and the salutary effects are viewed in the totality of the context, they outweigh the temporary disenfranchisement of the serious criminal offender which mirrors the fact of his or her incarceration. In my view, Parliament has enacted a law which is reasonable, and which is justified in a free and democratic society.

V. Section 15(1) of the *Charter*

189 I agree with the trial judge and unanimous Court of Appeal below (Desjardins J.A. was in agreement with Linden J.A.'s reasoning regarding s. 15(1)) that it is clear that there has been no infringement of s. 15(1) of the *Charter*.

190 In *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, Iacobucci J. summarized, at para. 88, the proper approach to s. 15(1) as follows:

> (3) ... a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
>
> (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
>
> and
>
> (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the stereotypical application of presumed group or personal characteristics, or

> which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

191 In *M. v. H.*, [1999] 2 S.C.R. 3, at para. 63, Cory and Iacobucci JJ. noted that for distinctions to be discriminatory, they must be made on the basis of an enumerated or analogous ground:

> Not every legislative distinction is discriminatory. Before it can be found that it gives rise to discrimination, it must be shown that an equality right was denied on the basis of an enumerated or analogous ground, and that this differential treatment discriminates "in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter*": *Law*, *supra*, at para. 39. [Emphasis in original.]

192 Even if I were to presume that a distinction has been based on personal characteristics pursuant to inquiry (A) of the *Law* criteria, I am of the view that the answer to (B) is clearly in the negative. The status of being a prisoner does not constitute an analogous ground.

193 Several courts have canvassed the issue of whether prisoner status constitutes an analogous ground: *Jackson v. Joyceville Penitentiary*, [1990] 3 F.C. 55 (T.D.); *Belczowski* (at the trial level), *supra*; *McKinnon v. M.N.R.*, 91 D.T.C. 1002 (T.C.C.); *Armstrong v. R.*, [1996] 1 C.T.C. 2745 (T.C.C.); *Mulligan v. R.*, [1997] 2 C.T.C. 2062 (T.C.C.), followed in *Wells v. R.*, [1998] 1 C.T.C. 2118 (T.C.C.); *Olson v. Canada*, [1996] 2 F.C. 168 (T.D.), leave to appeal refused, [1997] 3 S.C.R. xii; and *Alcorn v. Canada (Commissioner of Corrections)* (1999), 163 F.T.R. 1, aff'd (2002), 95 C.R.R. (2d) 326, 2002 FCA 154. All have held that prisoner status does not amount to a ground analogous to those enumerated under s. 15(1) of the *Charter*.

194 In *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, this Court agreed with the reasoning of the Federal Court of Appeal below on the point that permanent residents who had been convicted of criminal offences involving terms of imprisonment of five years or more did not constitute a category of persons analogous to those enumerated in s. 15(1). Pratte J.A. at the Federal Court of Appeal, [1990] 2 F.C. 299, at p. 311, stated:

> No analogy can be made between the grounds of discrimination mentioned in section 15 and the fact that certain permanent residents have been convicted of serious offences. Permanent residents who have been convicted of serious criminal offences do not fall into an analogous category to those specifically enumerated in section 15.

I am of the view that a similar analysis applies in the case at bar, although here the distinction drawn is between citizens who have committed serious criminal offences for which they have been incarcerated as punishment and other citizens, rather than the distinction in *Chiarelli* drawn between permanent residents who have committed serious offences warranting terms of imprisonment of five years or more and other permanent residents.

195 Prisoners do not constitute a group analogous to those enumerated in s. 15(1) because the fact of being incarcerated cannot be said to have arisen because of a stereotypical application of a presumed group characteristic. The status of being a prisoner is brought about by the past commission of serious criminal offences, acts committed by the individual himself or herself. The unifying

group characteristic is past criminal behaviour. This was the view of the trial judge in *Jackson, supra,* noted by the trial judge in the case at bar: the differential treatment arises "not from their personal characteristics, but from past courses of conduct" (p. 920). This was also the view of Strayer J. in *Belczowski* at the trial level, *supra*, at p. 162: "I am unable to conclude that a law applied to the plaintiff to his disadvantage by reason of the circumstance that he has committed a crime and is imprisoned under lawful sentence amounts to discrimination on some ground analogous to those specified in subsection 15(1)".

196 Linden J.A., below, correctly stated at para. 166 of his reasons:

> ... I cannot describe one's status as a prisoner as "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity". Imprisonment is neither immutable nor unchangeable; for all but a few prisoners it is a status that is meant to change over time. Further, it cannot be said that "the government has no legitimate interest in expecting" prisoners to change in order "to receive equal treatment under the law". In fact, the contrary is true -- the government has every reason to expect convicted criminals to change their behaviour in order to achieve equal treatment under the law. That is the very reason for imprisonment.

197 With regard to the argument that being imprisoned could be said to be immutable or constructively immutable, insofar as incarceration is, obviously, once it has begun, beyond a prisoner's control, the immutability or constructive immutability is nonetheless an inherent and necessary dimension of being incarcerated, which obviously and validly relates to the state's legitimate role of punishing serious criminals for their criminal activity. If one could change the fact of being incarcerated at one's own whim, then it would be a useless concept. Most importantly, while being incarcerated is beyond the immediate control of a prisoner, it is the result of their criminal activity, the commission of which was within their control. As Professor Hogg has aptly suggested, at p. 52-29 of *Constitutional Law of Canada, supra*:

> Another way of looking at immutability as the common element of the listed personal characteristics is to notice that the characteristics are inherent, rather than acquired. They do not reflect a voluntary choice by anyone, but rather an involuntary inheritance... . Section 15 prohibits laws that distinguish between people on the basis of their inherent attributes as opposed to their behaviour. Section 15 therefore does not prohibit laws that make special provision for those who have committed a crime, become insolvent, manufactured food or drugs, joined the legal profession, made a will, purchased a taxable good or service, etc. It is true that individuals may claim to be treated unfairly by the law for conditions that are their own responsibility, but this kind of claim even if fully justified does not warrant a constitutional remedy.

198 When discussing punishment and incarceration, it is important to also address s. 12 of the *Charter*. Section 12, which protects "[e]veryone" from "cruel and unusual treatment or punishment", addresses the condition of incarcerated persons and persons undergoing other forms of punishment or treatment. It, however, inherently recognizes the fact that incarcerated persons are clear-

ly subject to a kind of unequal treatment, but a form of treatment that is nonetheless constitutional as long as it is not "cruel and unusual".

199 I spent much time above addressing how being incarcerated for having committed a serious crime does not go to the "dignity" or "worth" of the perpetrator: it relates to the crime committed. Crime is appropriately disapproved of: disapproval is inherent in its definition, which relates to committing offences which are punishable by law. Prisoner status relates to the valid fact of punishment for this criminal activity.

200 Further, from the perspective of the general community and of victims or potential victims, I note that serious criminal conduct is often directly inimical to one of the two purposes of s. 15(1), that of ensuring the equal worth and dignity of all human persons: see *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 54.

201 It is clear that the case law of this Court indicates that equality does not necessarily connote identical treatment. In my view, to find prisoner status to be an analogous ground would be a distortion of the purpose of s. 15(1) and would come close to making a mockery of the *Criminal Code* and the values on which it is based and which it enshrines. This is because it makes little sense to suggest that the distinction being drawn between incarcerated persons and other citizens is based on a stereotypical or irrelevant ground. The relevant and valid ground of differentiation which results in becoming a prisoner is the conviction for a serious criminal offence.

202 An alternative argument was made before this Court that imprisonment should be recognized as an analogous ground because of adverse effect or impact discrimination based on the fact that Aboriginal peoples make up a "disproportionate" percentage of prisoners. I am not convinced by this argument. On this point, I adopt the following analysis of Linden J.A., from para. 169 of his reasons:

> First, since, according to the data offered, 1,837 Aboriginal people are disenfranchised by this law, it cannot be said that the over-representation of Aboriginal peoples in the prison system adversely affects the political expression of Aboriginal peoples generally, as there are over six hundred thousand registered Aboriginal people in Canada. If Aboriginal people generally, or a particular group of Aboriginal people, could show that disenfranchisement effectively and adversely compromised their political expression, a constitutional exemption from the operation of paragraph 51(*e*) of the CEA might conceivably be justified. This has not been done. Second, it cannot be said that the over-representation of Aboriginal peoples in prison is so overwhelming as to justify a conclusion that a law aimed at prisoners is *de facto* a law aimed at Aboriginal peoples. If the over-representation of Aboriginal peoples in prisons reaches a level where it could be said that a law aimed at prisoners was, *de facto*, a law aimed at Aboriginal peoples, then constitutional exemption from the operation of paragraph 51(*e*) of the CEA might be considered. That is not the case here. [Footnotes omitted.]

Beyond this, I find any analysis of adverse impact or effect discrimination seems parasitic on finding that prisoner status constitutes an analogous ground, since the adverse effect or impact is allegedly upon Aboriginal prisoners; it is the prisoner status which is alleged to result in the disadvantage, something which is not furthered within the category of Aboriginal prisoner status. It is clear that if the treatment was targeted against Aboriginal people in a direct way, they would have a

valid objection based on an enumerated ground of s. 15(1). As Linden J.A. noted, the numbers do not warrant the conclusion that the disenfranchisement provision is being used to target Aboriginal persons *per se* or has this effect.

203 The key is that the fact of incarceration does not necessarily arise due to any personal attribute such as race or ethnic origin and neither does it necessarily relate to social condition. It necessarily relates to having committed crimes. If Aboriginal inmates had their votes taken away for life, while non-Aboriginal inmates only suffered a temporary suspension, or if Aboriginal inmates were disenfranchised but not non-Aboriginal inmates, then such differential treatment would clearly warrant different analysis. But this is not the case here.

204 The reasons of the Chief Justice, at para. 60, refer to the fact that this Court, in *R. v. Gladue*, [1999] 1 S.C.R. 688, noted that the overrepresentation of Aboriginal persons in the criminal justice system and the prison population reflects a "crisis in the Canadian criminal justice system". I agree that a sad and pressing social problem exists, but suggest that it is quite a leap to then say that Parliament is incapable of enacting a provision which disenfranchises serious criminal offenders who have been sentenced to two or more years of incarceration. As noted above, it is not plausible to say that the temporary disenfranchisement is in some way targeted at Aboriginal people: it hinges only upon the commission of serious criminal offences. If there is a problem with the overrepresentation of Aboriginal people in our criminal justice system and prisons, then that issue must continue to be addressed, by not only continuing to pay attention to the sentencing considerations pursuant to s. 718.2(*e*) of the *Criminal Code*, which are specifically aimed at such a reduction, but also by addressing some of the root causes of the overrepresentation identified by this Court in *Gladue*, *supra*, including poverty, substance abuse, lack of education, lack of employment opportunities, and bias against Aboriginal people. The continuing need to address these factors does not, however, preclude the ability of Parliament to address other pressing social problems, including denouncing serious crime, enhancing the meaning of the criminal sanction and promoting civic responsibility and the rule of law, which s. 51(*e*) of the Act is directed to. Also in *Gladue*, at para. 78, this Court stated that it is unreasonable to assume that Aboriginal people do not believe in goals of punishment such as denunciation, deterrence and separation, to which I add, obviously, the principle of rehabilitation. These goals of punishment, as discussed above, are related to the temporary disenfranchisement of serious criminal offenders and are ultimately aimed at the reintegration of offenders, Aboriginal or otherwise, back into the community.

205 I also note that this Court stated in *Gladue*, at para. 79, that the more serious the offence, the more likely it will be that the terms of imprisonment for Aboriginal and non-Aboriginal persons will be similar or the same, even if the different considerations for sentencing are taken into account. Since the temporary disenfranchisement provision hinges on serious criminal activity, this point is directly relevant.

206 Having found that there is no infringement of s. 15(1) of the *Charter*, it is unnecessary to consider s. 1.

VI. Conclusion

207 Section 51(*e*) of the Act does not infringe s. 15(1) of the *Charter*. While it has been conceded that it does infringe s. 3 of the *Charter*, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society. I would therefore dismiss the appeal.

208 I would answer the constitutional questions as follows:

1. Does s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, infringe the right to vote in an election of members of the House of Commons, as guaranteed by s. 3 of the *Canadian Charter of Rights and Freedoms*?

   Yes; the infringement was conceded by the Crown.

2. If the answer to Question 1 is yes, is the infringement a reasonable limit, prescribed by law, which can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   Yes.

3. Does s. 51(*e*) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, infringe the right to equality before and under the law and equal benefit of the law without discrimination, as guaranteed by s. 15(1) of the *Canadian Charter of Rights and Freedoms*?

   No.

4. If the answer to Question 3 is yes, is the infringement a reasonable limit, prescribed by law, which can be demonstrably justified in a free and democratic society, pursuant to s. 1 of the *Canadian Charter of Rights and Freedoms*?

   It is not necessary to answer this question.

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Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

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TAB 8

Case Name:

Harper v. Canada (Attorney General)

Attorney General of Canada, appellant;
v.
Stephen Joseph Harper, respondent, and
Attorney General of Ontario, Attorney General of Quebec,
Attorney General of Manitoba, Democracy Watch and
National Anti-Poverty Organization, Environment Voters,
a division of Animal Alliance of Canada, and John
Herbert Bryden, interveners.

[2004] S.C.J. No. 28

[2004] A.C.S. no 28

2004 SCC 33

2004 CSC 33

[2004] 1 S.C.R. 827

[2004] 1 R.C.S. 827

239 D.L.R. (4th) 193

320 N.R. 49

[2004] 8 W.W.R. 1

J.E. 2004-1104

27 Alta. L.R. (4th) 1

348 A.R. 201

119 C.R.R. (2d) 84

130 A.C.W.S. (3d) 746

File No.: 29618.

Supreme Court of Canada

Heard: February 10, 2004;
Judgment: May 18, 2004.

Present: McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps and Fish JJ.

(147 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

Catchwords:

Constitutional law -- Charter of Rights -- Freedom of expression -- Federal elections -- Third party election advertising -- Spending limits -- Attribution, registration and disclosure requirements -- Blackout period -- Whether third party election advertising scheme and blackout on third party advertising on polling day infringe freedom of expression -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Canada Elections Act, S.C. 2000, c. 9, ss. 323, 350, 351, 352 to 357, 359, 360, 362.

Constitutional law -- Charter of Rights -- Right to vote -- Federal elections -- Third party election advertising -- Spending limits -- Attribution, registration and disclosure requirements -- Blackout period -- Whether third party election advertising scheme and blackout on third party advertising on polling day infringe right to vote -- Canadian Charter of Rights and Freedoms, s. 3 -- Canada Elections Act, S.C. 2000, c. 9, ss. 323, 350, 351, 352 to 357, 359, 360, 362.

Constitutional law -- Charter of Rights -- Freedom of association -- Federal elections -- Third party election advertising -- Spending limits -- Whether limits on third party election advertising expenses infringe freedom of association -- Canadian Charter of Rights and Freedoms, s. 2(d) -- Canada Elections Act, S.C. 2000, c. 9, ss. 351, 356, 357(3), 359, 362.

Summary:

The respondent brought an action for a declaration that ss. 323(1) and (3), 350 to 360, and 362 of the *Canada Elections Act* were of no force or effect for infringing ss. 2(*b*), 2(*d*) and 3 of the *Canadian Charter of Rights and Freedoms*. Section 350 limits third party election advertising expenses to $3000 in a given electoral district and $150,000 nationally; s. 351 prohibits individuals or groups from splitting or colluding for the purposes of circumventing these limits; ss. 352 to 357, 359, 360 and 362 require a third party to identify itself in all of its election advertising, to appoint financial agents and auditors, and to register with the Chief Electoral Officer; and s. 323 provides for a third party advertising blackout on polling day. The trial judge concluded that ss. 350 and 351 were in

prima facie violation of ss. 2(*b*) and 2(*d*) and that neither was justified under s. 1 of the *Charter*. The Court of Appeal upheld the unconstitutionality of ss. 350 and 351 and also struck down ss. 323, 352 to 357, 359, 360 and 362 on the basis that the provisions "must all stand or fall together as part of the same design".

Held (McLachlin C.J. and Major and Binnie JJ. dissenting in part): The appeal should be allowed. The impugned provisions of the *Canada Elections Act* are constitutional.

Per Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ.: The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. In promoting the equal dissemination of points of view by limiting the election advertising of third parties who are influential participants in the electoral process, the overarching objective of the spending limits is electoral fairness. This egalitarian model of elections seeks to create a level playing field for those who wish to engage in the electoral discourse, enabling voters to be better informed. The Court of Appeal erred in considering the provisions on third party spending limits globally. While the regime is internally coherent, its constituent parts stand on their own and the constitutionality of each set of provisions must be considered separately.

The limits on third party election advertising expenses set out in s. 350 infringe the right to freedom of political expression guaranteed by s. 2(*b*) of the *Charter* but they do not infringe the right to vote protected by s. 3. The right to meaningful participation in s. 3 of the *Charter* cannot be equated with the exercise of freedom of expression. The two rights are distinct and must be reconciled. Under s. 3, the right of meaningful participation in the electoral process is not limited to the selection of elected representatives and includes a citizen's right to exercise his or her vote in an informed manner. In the absence of spending limits, it is possible for the affluent or a number of persons pooling their resources and acting in concert to dominate the political discourse, depriving their opponents of a reasonable opportunity to speak and be heard, and undermining the voter's ability to be adequately informed of all views. Equality in the political discourse is thus necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. This right, therefore, does not guarantee unimpeded and unlimited electoral debate or expression. Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to the voter; if overly restrictive, they may undermine the informational component of the right to vote. Here, s. 350 does not interfere with the right of each citizen to play a meaningful role in the electoral process.

The harm that Parliament seeks to address in this case is electoral unfairness. Given the difficulties in measuring this harm, at the stage of the justification analysis a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient. Furthermore, on balance, the contextual factors favour a deferential approach to Parliament in determining whether such limits are demonstrably justified in a free and democratic society. While the right to political expression lies at the core of the guarantee of free expression and warrants a high degree of constitutional protection, there is nevertheless a danger that political advertising may manipulate or oppress the voter. Parliament had to balance the rights and privileges of all the participants in the electoral process. The difficulties of striking this balance are evident and, given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, a court must approach the justification analysis with deference.

Section 350 is justified under s. 1 of the *Charter*. While the overarching objective of the third party advertising expense limits is electoral fairness, more narrowly characterized, the objectives of the

scheme are threefold: (1) to promote equality in the political discourse; (2) to protect the integrity of the financing regime applicable to candidates and parties; and (3) to ensure that voters have confidence in the electoral process. In view of the findings of the Lortie Commission, the central piece of the evidential record in this case, these three objectives are pressing and substantial. Section 350 also meets the proportionality test. First, the third party advertising expense limits are rationally connected to the objectives. They prevent those who have access to significant financial resources, and are able to purchase unlimited amount of advertising, to dominate the electoral discourse to the detriment of others; they create a balance between the financial resources of each candidate or political party; and they advance the perception that the electoral process is substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process. Second, s. 350 minimally impairs the right to free expression. Third party advertising is unrestricted prior to the commencement of the election period, and third parties may freely spend money or advertise to make their views known or to persuade others. Further, the definition of "election advertising" in s. 319 only applies to advertising that is associated with a candidate or party. The limits set out in s. 350 allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties while precluding the voices of the wealthy from dominating the political discourse. Third, the s. 350's salutary effects of promoting fairness and accessibility in the electoral system and increasing Canadians' confidence in it outweigh the deleterious effect that the spending limits permit third parties to engage in informational but not necessarily persuasive campaigns.

Section 351 is ancillary to s. 350 and its primary purpose is to preserve the integrity of the advertising expense limits established under s. 350. It does not violate the freedom of expression, the right to vote or freedom of association. With respect to freedom of association, s. 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal but rather precludes an individual or group from undertaking an activity, namely circumventing the third party election advertising limits set out in s. 350.

Section 323 infringes the right to free expression by prohibiting third parties from advertising on polling day. While it also engages the informational component of the right to vote, s. 323 does not infringe s. 3 as it does not have an adverse impact on the information available to voters. The infringement of s. 2(*b*) can be saved under s. 1. The objective of s. 323 -- to provide an opportunity to respond to any potentially misleading election advertising -- is pressing and substantial. The section is rationally connected to this objective and is minimally impairing. The blackout period is approximately 20 hours long and only applies to advertising. It has not been demonstrated to have any deleterious effects.

Because they restrict the political expression of those who do not comply with the scheme, ss. 352 to 357, 359, 360 and 362 have the effect of limiting free expression. They do not infringe s. 3, however, as they enhance the right to vote. The infringement of s. 2(*b*) is justified under s. 1. These provisions advance the pressing and substantial objectives of proper implementation and enforcement of the third party election advertising limits and of provision to voters of relevant election information. They are rationally connected to the first objective and the disclosure provisions, by adding transparency to the electoral process, are also rationally connected to the second objective. Sections 352 to 357, 359, 360 and 362 are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising and the personal information required of contributors is minimal. The salutary effects of the impugned measures outweigh the deleterious effects. By increasing the transparency and accountability of the electoral process,

they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal.

Per McLachlin C.J. and Major and Binnie JJ. (dissenting in part): The third party advertising spending limits in s. 350 of the *Canada Elections Act* are inconsistent with the s. 2(*b*) *Charter* guarantees and, hence, invalid. The effect of third party limits for spending on advertising is to prevent citizens from effectively communicating their views on issues during an election campaign. The denial of effective communication to citizens violates free expression where it warrants the greatest protection -- the sphere of political discourse. Section 350 puts effective radio and television communication beyond the reach of "third party" citizens, preventing citizens from effectively communicating their views on election issues, and restricting them to minor local communication. Effective expression of ideas thus becomes the exclusive right of registered political parties and their candidates.

Because citizens cannot mount effective national television, radio and print campaigns, the only sustained messages voters see and hear during the course of an election campaign are from political parties. The right of a citizen to hold views not espoused by a registered party and to communicate those views is essential to the effective debate upon which our democracy rests, and lies at the core of the free expression guarantee. Any limits to this right must be justified under s. 1 of the *Charter* by a clear and convincing demonstration that they serve a valid objective, do not go too far, and enhance more than harm the democratic process. Promoting electoral fairness by ensuring the equality of each citizen in elections, preventing the voices of the wealthy from drowning out those of others, and preserving confidence in the electoral system, are pressing and substantial objectives in a liberal democracy.

However, the infringement of the right to free expression is not proportionate to these objectives. There is no evidence to support a connection between the limits on citizen spending and electoral fairness, and the legislation does not infringe the right to free expression in a way that is measured and carefully tailored to the goals sought to be achieved. The limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period, except through political parties. As in *Libman*, the Attorney General has not demonstrated that limits this draconian are required to meet the perceived dangers.

Section 351 is invalid since it is keyed exclusively to the spending limits in s. 350. The polling day blackout in s. 323 infringes s. 2(*b*) of the *Charter*, but is justified as a reasonable measure in a free and democratic society under s. 1 . The provisions in ss. 352 to 357, 359, 360 and 362 of the Act requiring citizens to register with the Chief Electoral Officer, self-identify on advertisements, and disclose their adherents and the nature of their expenditures serves the interests of transparency and an informed vote in the political process. Thus, the infringements to s. 2(*b*) are saved by s. 1.

Cases Cited

By Bastarache J.

Applied: Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158; Haig v. Canada, [1993] 2 S.C.R. 995; Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876; Figueroa v. Canada (Attorney General), [2003] 1 S.C.R. 912, 2003 SCC 37; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; R. v. Oak-

es, [1986] 1 S.C.R. 103; disapproved: Somerville v. Canada (Attorney General) (1996), 184 A.R. 241; Pacific Press v. British Columbia (Attorney General), [2000] 5 W.W.R. 219, 2000 BCSC 248; referred to: National Citizens' Coalition Inc. v. Attorney General of Canada (1984), 32 Alta. L.R. (2d) 249; R. v. Butler, [1992] 1 S.C.R. 452; R. v. Keegstra, [1990] 3 S.C.R. 697; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; Dunmore v. Ontario (Attorney General), [2001] 3 S.C.R. 1016, 2001 SCC 94; Canadian Egg Marketing Agency v. Richardson, [1998] 3 S.C.R. 157; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927.

By McLachlin C.J. and Major J. (dissenting in part)

Libman v. Quebec (Attorney General), [1997] 3 S.C.R. 569; R. v. Guignard, [2002] 1 S.C.R. 472, 2002 SCC 14; R. v. Sharpe, [2001] 1 S.C.R. 45, 2001 SCC 2; Thomson Newspapers Co. v. Canada (Attorney General), [1998] 1 S.C.R. 877; Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Reference re Alberta Statutes, [1938] S.C.R. 100; R. v. Keegstra, [1990] 3 S.C.R. 697; Figueroa v. Canada (Attorney General), [2003] 1 S.C.R. 912, 2003 SCC 37; R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd., [2002] 1 S.C.R. 156, 2002 SCC 8; U.F.C.W., Local 1518 v. KMart Canada Ltd., [1999] 2 S.C.R. 1083; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Red Lion Broadcasting Co. v. Federal Communications Commission, 395 U.S. 367 (1969); Martin v. City of Struthers, 319 U.S. 141 (1943); Kleindienst v. Mandel, 408 U.S. 753 (1972); United States v. Dellinger, 472 F.2d 340 (1972); Somerville v. Canada (Attorney General) (1996), 184 A.R. 241; Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876; R. v. Wholesale Travel Group Inc., [1991] 3 S.C.R. 154; McKinney v. University of Guelph, [1990] 3 S.C.R. 229; R. v. Butler, [1992] 1 S.C.R. 452; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; Schachter v. Canada, [1992] 2 S.C.R. 679.

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Canada Elections Act, S.C. 1974, c. 5.

Canada Elections Act, S.C. 2000, c. 9, ss. 319, 323, Part 17, 350, 351, 352 to 357, 359, 360, 362, 496, 500, 501.

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

International Covenant on Civil and Political Rights, Can. T.S. 1976 No. 47.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

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History and Disposition:

APPEAL from a judgment of the Alberta Court of Appeal (2002), 14 Alta. L.R. (4th) 4, 223 D.L.R. (4th) 275, 320 A.R. 1, [2003] 8 W.W.R. 595, [2002] A.J. No. 1542 (QL), 2002 ABCA 301, affirming a judgment of the Court of Queen's Bench (2001), 93 Alta. L.R. (3d) 281, 295 A.R. 1, 9 W.W.R. 650, [2001] A.J. No. 808 (QL), 2001 ABQB 558. Appeal allowed, McLachlin C.J. and Major and Binnie JJ. dissenting in part.

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Eugene B. Szach, for the intervener the Attorney General of Manitoba.

David Baker and Faisal Bhabha, for the interveners Democracy Watch and National Anti-Poverty Organization.

Peter F. M. Jones, for the intervener Environment Voters, a division of Animal Alliance of Canada.

John Herbert Bryden, appearing on his own behalf.

The reasons of McLachlin C.J. and Major and Binnie JJ. were delivered by

1 McLACHLIN C.J. and MAJOR J. (dissenting in part):-- This Court has repeatedly held that liberal democracy demands the free expression of political opinion, and affirmed that political speech lies at the core of the *Canadian Charter of Rights and Freedoms'* guarantee of free expression. It has held that the freedom of expression includes the right to attempt to persuade through peaceful interchange. And it has observed that the electoral process is the primary means by which the average citizen participates in the public discourse that shapes our polity. The question now before us is whether these high aspirations are fulfilled by a law that effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign.

2 The law at issue sets advertising spending limits for citizens -- called third parties -- at such low levels that they cannot effectively communicate with their fellow citizens on election issues during an election campaign. The practical effect is that effective communication during the writ period is confined to registered political parties and their candidates. Both enjoy much higher spending limits. This denial of effective communication to citizens violates free expression where it warrants the greatest protection -- the sphere of political discourse. As in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the incursion essentially denies effective free expression and far surpasses what is required to meet the perceived threat that citizen speech will drown out other political discourse. It follows that the law is inconsistent with the guarantees of the *Charter* and, hence, invalid.

I. Citizen Spending Limits

A. *What the Law Does*

3 The *Canada Elections Act*, S.C. 2000, c. 9, sets limits for spending on advertising for individuals and groups. It limits citizens to spending a maximum of $3,000 in each electoral district up to a total of $150,000 nationally. Section 350 provides:

> **350.** (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.
>
> (2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by
>
> (*a*) naming them;
>
> (*b*) showing their likenesses;
>
> (*c*) identifying them by their respective political affiliations; or
>
> (*d*) taking a position on an issue with which they are particularly associated.

Section 350(2)(*d*) is particularly restrictive. It prohibits individuals from spending more than the allowed amounts on any issue with which a candidate is "particularly associated". The candidates in an election are typically associated with a wide range of views on a wide range of issues. The evidence shows that the effect of the limits is to prevent citizens from effectively communicating their views on issues during an election campaign.

4 The limits do not permit citizens to effectively communicate through the national media. The Chief Electoral Officer testified that it costs approximately $425,000 for a one-time full-page advertisement in major Canadian newspapers. The Chief Electoral Officer knows from personal experience that this is the cost of such communication with Canadians, because he used this very method to inform Canadians of the changes to the *Canada Elections Act* prior to the last federal election. It is telling that the Chief Electoral Officer would have been unable to communicate this important

change in the law to Canadians were he subject -- as are other Canadians -- to the national expenditure limit of $150,000 imposed by the law.

5 Nor do the limits permit citizens to communicate through the mail. The Canada Post bulk mailing rate for some ridings amounts to more than $7,500, effectively prohibiting citizens from launching a mail campaign in these ridings without exceeding the $3,000 limit.

6 The $3,000 riding limits are further reduced by the national limit of $150,000, which precludes citizens from spending the maximum amount in each of the 308 ridings in Canada. This effectively diminishes the $3,000 riding maximum. Quite simply, it puts effective radio and television communication within constituencies or throughout the country beyond the reach of "third party" citizens.

7 Under the limits, a citizen may place advertisements in a local paper within her constituency. She may print some flyers and distribute them by hand or post them in conspicuous places. She may write letters to the editor of regional and national newspapers and hope they will be published. In these and other ways, she may be able to reach a limited number of people on the local level. But she cannot effectively communicate her position to her fellow citizens throughout the country in the ways those intent on communicating such messages typically do -- through mail-outs and advertising in the regional and national media. The citizen's message is thus confined to minor local dissemination with the result that effective local, regional and national expression of ideas becomes the exclusive right of registered political parties and their candidates.

8 Comparative statistics underline the meagerness of the limits. The national advertising spending limits for citizens represent 1.3 percent of the national advertising limits for political parties. In Britain, a much more geographically compact country, the comparable ratio is about 5 percent. It is argued that the British limits apply to different categories of advertising over a greater period, but the discrepancy nevertheless remains significant.

9 It is therefore clear that the *Canada Elections Act*'s advertising limits prevent citizens from effectively communicating their views on election issues to their fellow citizens, restricting them instead to minor local communication. As such, they represent a serious incursion on free expression in the political realm. The Attorney General raises three reasons why this restriction is justified as a reasonable limit in a free and democratic society under s. 1 of the *Charter*: to ensure the equality of each citizen in elections; to prevent the voices of the wealthy from drowning out those of others; and to preserve confidence in the electoral system. Whether that is so is the question in this appeal.

B. *Is the Incursion on Free Speech Justified?*

(1) The Significance of the Infringement

10 One cannot determine whether an infringement of a right is justified without examining the seriousness of the infringement. Our jurisprudence on the guarantee of the freedom of expression establishes that some types of expression are more important and hence more deserving of protection than others. To put it another way, some restrictions on freedom of expression are easier to justify than others.

11 Political speech, the type of speech here at issue, is the single most important and protected type of expression. It lies at the core of the guarantee of free expression; see *R. v. Guignard*, [2002]

1 S.C.R. 472, 2002 SCC 14, at para. 20; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, at para. 92; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, at p. 175; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 968.

12 The right of the people to discuss and debate ideas forms the very foundation of democracy; see *Reference re Alberta Statutes*, [1938] S.C.R. 100, at pp. 145-46. For this reason, the Supreme Court of Canada has assiduously protected the right of each citizen to participate in political debate. As Dickson C.J. stated in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 764, "[t]he state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all."

13 Section 2(*b*) of the *Charter* aims not just to guarantee a voice to registered political parties, but an equal voice to each citizen. The right of each citizen to participate in democratic discussion was embraced by Iacobucci J., who elaborated on the scope of s. 3 for the Court in *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37, at para. 26:

> Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly. [Emphasis added.]

14 Permitting an effective voice for unpopular and minority views -- views political parties may not embrace -- is essential to deliberative democracy. The goal should be to bring the views of all citizens into the political arena for consideration, be they accepted or rejected at the end of the day. Free speech in the public square may not be curtailed merely because one might find the message unappetizing or the messenger distasteful (*Figueroa, supra*, at para. 28):

> Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions... . This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

Participation in political debate "is ... the primary means by which the average citizen participates in the open debate that animates the determination of social policy"; see *Figueroa*, at para. 29.

15 The right to participate in political discourse is a right to effective participation -- for each citizen to play a "meaningful" role in the democratic process, to borrow again from the language of

Figueroa. In *Committee for the Commonwealth*, *supra*, at p. 250, McLachlin J. stated that s. 2(*b*) aspires to protect "the interest of the individual in effectively communicating his or her message to members of the public" (emphasis added). In the same case, Lamer C.J. declared that "it must be understood that the individual has an interest in communicating his ideas in a place which, because of the presence of listeners, will favour the effective dissemination of what he has to say" (emphasis added); see *Committee for the Commonwealth*, at p. 154.

16 The ability to engage in effective speech in the public square means nothing if it does not include the ability to attempt to persuade one's fellow citizens through debate and discussion. This is the kernel from which reasoned political discourse emerges. Freedom of expression must allow a citizen to give voice to her vision for her community and nation, to advocate change through the art of persuasion in the hope of improving her life and indeed the larger social, political and economic landscape; see *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156, 2002 SCC 8, at para. 32; *U.F.C.W., Local 1518 v. KMart Canada Ltd.*, [1999] 2 S.C.R. 1083, at para. 43.

17 Freedom of expression protects not only the individual who speaks the message, but also the recipient. Members of the public -- as viewers, listeners and readers -- have a right to information on public governance, absent which they cannot cast an informed vote; see *Edmonton Journal*, *supra*, at pp. 1339-40. Thus the *Charter* protects listeners as well as speakers; see *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712, at pp. 766-67.

18 This is not a Canadian idiosyncrasy. The right to receive information is enshrined in both the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47. Canada is a signatory to both. American listeners enjoy the same right; see *Red Lion Broadcasting Co. v. Federal Communications Commission*, 395 U.S. 367 (1969), at p. 390; *Martin v. City of Struthers*, 319 U.S. 141 (1943), at p. 143. The words of Marshall J., dissenting, in *Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775, ring as true in this country as they do in our neighbour to the south:

> [T]he right to speak and hear -- including the right to inform others and to be informed about public issues -- are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the means indispensable to the discovery and spread of political truth. [Citations omitted.]

19 The *Canada Elections Act* undercuts the right to listen by withholding from voters an ingredient that is critical to their individual and collective deliberation: substantive analysis and commentary on political issues of the day. The spending limits impede the ability of citizens to communicate with one another through public fora and media during elections and curtail the diversity of perspectives heard and assessed by the electorate. Because citizens cannot mount effective national television, radio and print campaigns, the only sustained messages voters see and hear during the course of an election campaign are from political parties.

20 It is clear that the right here at issue is of vital importance to Canadian democracy. In the democracy of ancient Athens, all citizens were able to meet and discuss the issues of the day in person. In our modern democracy, we cannot speak personally with each of our fellow citizens. We

can convey our message only through methods of mass communication. Advertising through mail-outs and the media is one of the most effective means of communication on a large scale. We need only look at the reliance of political parties on advertising to realize how important it is to actually reaching citizens -- in a word, to effective participation. The ability to speak in one's own home or on a remote street corner does not fulfill the objective of the guarantee of freedom of expression, which is that each citizen be afforded the opportunity to present her views for public consumption and attempt to persuade her fellow citizens. Pell J.'s observation could not be more apt: "[s]peech without effective communication is not speech but an idle monologue in the wilderness"; see *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), at p. 415.

21 This is the perspective from which we must approach the question whether the limitation on citizen spending is justified. It is no answer to say that the citizen can speak through a registered political party. The citizen may hold views not espoused by a registered party. The citizen has a right to communicate those views. The right to do so is essential to the effective debate upon which our democracy rests, and lies at the core of the free expression guarantee. That does not mean that the right cannot be limited. But it does mean that limits on it must be supported by a clear and convincing demonstration that they are necessary, do not go too far, and enhance more than harm the democratic process.

(2) The Law's Objective: Is It Pressing and Substantial?

22 Under this head we consider the reasons given by the Attorney General to justify limiting the right of citizens to freely express themselves on political issues during the election period. The Attorney General states that the objective of the legislation is to promote fair elections.

23 In more concrete terms, the limits are purported to further three objectives: first, to favour equality, by preventing those with greater means from dominating electoral debate; second, to foster informed citizenship, by ensuring that some positions are not drowned out by others (this is related to the right to participate in the political process by casting an informed vote); third, to enhance public confidence by ensuring equality, a better informed citizenship and fostering the appearance and reality of fairness in the democratic process.

24 These are worthy social purposes, endorsed as pressing and substantial by this Court in *Libman, supra*, at para. 47:

> Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources.

25 The Alberta courts in this case found that the stated objective was not pressing and substantial. We cannot accept that conclusion for two reasons. First, as discussed, this Court has clearly found it to be pressing and substantial in *Libman*, in so doing expressly rejecting the earlier Alberta decision in *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241 (C.A.). Second, the Alberta courts, with respect, posed the wrong question. They asked whether the evidence proved a pressing and substantial reason to impose limits on citizen spending existed. But the proper question at this stage of the analysis is whether the Attorney General has asserted a pressing and substantial objective. Whether the objective is furthered falls to be considered at the proportionality analysis

which inquires into rational connection, minimal impairment and whether the benefit conferred (if any) outweighs the significance of the infringement.

26 Common sense dictates that promoting electoral fairness is a pressing and substantial objective in our liberal democracy, even in the absence of evidence that past elections have been unfair; see *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876, at para. 38. A theoretical objective asserted as pressing and substantial is sufficient for purposes of the s. 1 justification analysis; see *Thomson Newspapers, supra*, at para. 38; *Harvey, supra*, at para. 38; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 191; *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, at p. 281; *Edmonton Journal, supra*, at pp. 1343-45.

27 Thus we find that the Attorney General has asserted a pressing and substantial objective.

C. *Proportionality*

(1) Rational Connection

28 The first inquiry in determining whether the infringement is proportionate to the harm done is whether there is a rational connection between the infringing measure and the pressing and substantial objective that the infringement is said to serve. In this case, the question is whether the limits on citizen spending are rationally connected to ensuring electoral fairness in the sense of giving citizens an equal voice in elections, informing the public on electoral issues and preserving public confidence in the electoral system.

29 The Attorney General has offered no evidence to support a connection between the limits on citizen spending and electoral fairness. However, reason or logic may establish the requisite causal link; see *Sharpe, supra*; *R. v. Butler*, [1992] 1 S.C.R. 452. In *Thomson Newspapers, supra*, the Court accepted as reasonable the conclusion that polls exert significant influence on the electoral process and individual electoral choice. More to the point, in *Libman, supra*, the Court concluded that electoral spending limits are rationally connected to the objective of fair elections. While some of the evidence on which this conclusion was based has since been discredited, the conclusion that limits may in theory further electoral fairness is difficult to gainsay.

30 Nevertheless, the supposition that uncontrolled spending could favour the messages of wealthier citizens or adversely affect the ability of less wealthy citizens to become informed on electoral issues is not irrational, particularly in a regime where party spending is limited. It follows that spending limits may, at least in principle, promote electoral fairness.

31 The real question in this case is not whether there exists a rational connection between the government's stated objectives and the limits on citizens imposed by the *Canada Elections Act*. It is whether the limits go too far in their incursion on free political expression.

(2) Minimal Impairment

32 The question at this stage is whether the legislation infringes the right to free expression in a way that is measured and carefully tailored to the goals sought to be achieved. The "impairment must be 'minimal', that is, the law must be carefully tailored so that rights are impaired no more than necessary": *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160. The difficulty with the Attorney General's case lies in the disproportion between the gravity of the

problem -- an apprehended possibility of harm -- and the severity of the infringement on the right of political expression.

33 It is impossible to say whether an infringement is carefully tailored to the asserted goals without having some idea of the actual seriousness of the problem being addressed. The yardstick by which excessive interference with rights is measured is the need for the remedial infringement. If a serious problem is demonstrated, more serious measures may be needed to tackle it. Conversely, if a problem is only hypothetical, severe curtailments on an important right may be excessive.

34 Here the concern of the Alberta courts that the Attorney General had not shown any real problem requiring rectification becomes relevant. The dangers posited are wholly hypothetical. The Attorney General presented no evidence that wealthier Canadians -- alone or in concert -- will dominate political debate during the electoral period absent limits. It offered only the hypothetical possibility that, without limits on citizen spending, problems could arise. If, as urged by the Attorney General, wealthy Canadians are poised to hijack this country's election process, an expectation of some evidence to that effect is reasonable. Yet none was presented. This minimizes the Attorney General's assertions of necessity and lends credence to the argument that the legislation is an overreaction to a non-existent problem.

35 On the other side of the equation, the infringement on the right is severe. We earlier reviewed the stringency of the limits. They prevent citizens from effectively communicating with their fellow citizens on election issues during a campaign. Any communication beyond the local level is effectively rendered impossible, and even at that level is seriously curtailed. The spending limits do not allow citizens to express themselves through mail-outs within certain ridings, radio and television media, nor the national press. Citizens are limited to 1.3 percent of the expenditures of registered political parties. This is significantly lower than other countries that have also imposed citizen spending limits. It is not an exaggeration to say that the limits imposed on citizens amount to a virtual ban on their participation in political debate during the election period. In actuality, the only space left in the marketplace of ideas is for political parties and their candidates. The right of each citizen to have her voice heard, so vaunted in *Figueroa, supra*, is effectively negated unless the citizen is able or willing to speak through a political party.

36 On this point, this case is indistinguishable from *Libman, supra,* where the Court held that the spending limits imposed on citizens in the course of a referendum campaign did not satisfy the requirement of minimal impairment. The Court held that the legislature in a case such as this must try to strike a balance between the right to free expression and equality among the citizens in expressing their views. The limits imposed failed to meet the minimal impairment test in the case of individuals and groups who could neither join nor affiliate themselves with the national committees. The Court stated that the restrictions were so severe that they came close to being a total ban and that better, less intrusive alternatives existed. The situation is precisely the same here.

37 In *Libman, supra,* at para. 63, the Court stated that "[i]t can be seen from the evidence that the legislature went to considerable lengths, in good faith, in order to adopt means that would be as non-intrusive as possible while at the same time respecting the objective it had set." Here, too, Parliament's good faith is advanced, said to be evidenced by the ongoing dialogue with the courts as to where the limits should be set. But as in *Libman,* good faith cannot remedy an impairment of the right to freedom of expression.

38 There is no demonstration that limits this draconian are required to meet the perceived dangers of inequality, an uninformed electorate and the public perception that the system is unfair. On the contrary, the measures may themselves exacerbate these dangers. Citizens who cannot effectively communicate with others on electoral issues may feel they are being treated unequally compared to citizens who speak through political parties. The absence of their messages may result in the public being less well informed than it would otherwise be. And a process that bans citizens from effective participation in the electoral debate during an election campaign may well be perceived as unfair. These fears may be hypothetical, but no more so than the fears conjured by the Attorney General in support of the infringement.

39 This is not to suggest that election spending limits are never permissible. On the contrary, this Court in *Libman* has recognized that they are an acceptable, even desirable, tool to ensure fairness and faith in the electoral process. Limits that permit citizens to conduct effective and persuasive communication with their fellow citizens might well meet the minimum impairment test. The problem here is that the draconian nature of the infringement -- to effectively deprive all those who do not or cannot speak through political parties of their voice during an election period -- overshoots the perceived danger. Even recognizing that "[t]he tailoring process seldom admits of perfection" (*RJR-MacDonald, supra*, at para. 160), and according Parliament a healthy measure of deference, we are left with the fact that nothing in the evidence suggests that a virtual ban on citizen communication through effective advertising is required to avoid the hypothetical evils of inequality, a misinformed public and loss of public confidence in the system.

(3) Proportionality

40 The same logic that leads to the conclusion that the Attorney General has not established that the infringement minimally impairs the citizen's right of free speech applies equally to the final stage of the proportionality analysis, which asks us to weigh the benefits conferred by the infringement against the harm it may occasion.

41 Given the unproven and speculative nature of the danger the limits are said to address, the possible benefits conferred by the law are illusory. The smaller the danger, the less the benefit conferred. Yet the infringement is serious. It denies the citizen the right of effective political communication except through a registered party. The denial is made all the more serious because political expression lies at the heart of the guarantee of free expression and underpins the very foundation of our democracy. The measures may actually cause more inequality, less civic engagement and greater disrepute than they avoid. In the absence of any evidence to the contrary, it cannot be said that the infringement does more good than harm.

42 Having had the advantage of reviewing the reasons of Bastarache J., we believe it is important to make three observations. First, whether or not citizens dispose of sufficient funds to meet or exceed the existing spending limits is irrelevant. What is important is that citizens have the capacity, should they so choose, to exercise their right to free political speech. The spending limits as they currently stand do not allow this. Instead, they have a chilling effect on political speech, forcing citizens into a Hobson's choice between not expressing themselves at all or having their voice reduced to a mere whisper. Faced with such options, citizens could not be faulted for choosing the former.

43 Second, it is important to recognize that the spending limits do not constrain the right of only a few citizens to speak. They constrain the political speech of all Canadians, be they of superior

or modest means. Whether it is a citizen incurring expenditures of $3001 for leafleting in her riding or a group of citizens pooling 1501 individual contributions of $100 to run a national advertising campaign, the *Charter* protects the right to free political speech.

44 Finally, even it were true that spending limits constrained the political speech rights of only a few citizens, it would be no answer to say, as suggests Bastarache J., at para. 112, that few citizens can afford to spend more than the limits anyway. This amounts to saying that even if the breach of s. 2(*b*) is not justified, it does not matter because it affects only a few people. *Charter* breaches cannot be justified on this basis. Moreover, one may question the premise that only a few people are affected by the spending limits. Indeed, if so few can afford to spend more than the existing limits, why, one may ask, are they needed?

II. The Anti-Circumvention Provisions

45 Section 351 is designed to prevent a citizen group from circumventing the spending limits imposed in s. 350 by either splitting into two or more groups, or by joining with another group to incur election advertising expenditures exceeding the imposed limits. It provides:

> **351.** A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

46 This provision is too closely bound up with s. 350 to survive on its own. Under the doctrine of severance, "when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared"; see *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 696. Moreover, "[t]o refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify"; see *Schachter*, at p. 696. But, as Lamer C.J. has explained, at p. 697 (citing *Attorney-General for Alberta v. Attorney-General for Canada*, [1947] A.C. 503 (P.C.), at p. 518), the heart of the matter is

> whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

Parliament cannot be assumed to have enacted s. 351 independently of the citizen election spending limits in s. 350; see *Schachter*, at p. 711. The section is keyed to the spending limits and has no other purpose. For this reason, s. 351 is invalid.

III. The Polling Day Blackout

47 The Attorney General concedes that the blackout on polling day election advertising imposed by s. 323 infringes s. 2(*b*) of the *Charter*. The blackout is directed at political speech -- the core purpose of the freedom of expression -- and restricts political speech in both aim and effect,

creating an unqualified ban preventing candidates, political parties and citizens from issuing election day advertising through the close of polls. However, we agree with Bastarache J. that the infringement of s. 2(*b*) is justified as a reasonable measure in a free and democratic society under s. 1 of the *Charter*.

IV. The Attribution, Disclosure and Registration Requirements

48 These requirements, variously found in ss. 352 to 357, 359, 360 and 362 of the *Canada Elections Act*, are not keyed to the citizen election spending limits in s. 350. Requiring citizens to register with the Chief Electoral Officer, self-identify on advertisements, and disclose their adherents and the nature of their expenditures serves the interests of transparency and an informed vote in the political process. We agree with Bastarache J. that the infringement that these provisions work on the freedom of expression is saved by s. 1.

V. Conclusion

49 We would allow the appeal in part and answer the constitutional questions as follows:

1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

Yes with respect to ss. 323(1) and (3), 350, 352 to 357, 359, 360 and 362. It is not necessary to answer this question with respect to s. 351.

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

No with respect to s. 350. Yes with respect to ss. 323(1) and (3), 352 to 357, 359, 360 and 362. It is not necessary to answer this question with respect to s. 351.

3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?

No.

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

It is not necessary to answer this question.

5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

No with respect to ss. 356, 357(3), 359 and 362. It is not necessary to answer this question with respect to s. 351.

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

It is not necessary to answer this question.

The judgment of Iacobucci, Bastarache, Arbour, LeBel, Deschamps and Fish JJ. was delivered by

BASTARACHE J.:--

I. Introduction

50 At issue in this appeal is whether the third party spending provisions of the *Canada Elections Act*, S.C. 2000, c. 9, violate ss. 2(*b*), 2(*d*) and 3 of the *Canadian Charter of Rights and Freedoms*. To resolve this issue, the Court must reconcile the right to meaningfully participate in elections under s. 3 with the right to freedom of expression under s. 2(*b*). This appeal also requires the Court to revisit the principles and guidelines set out in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, in the regulation of elections. Finally, this appeal calls for a consideration of the principles developed in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877, about the nature and sufficiency of evidence required when Parliament adopts a regulatory regime to govern the electoral process.

II. Judicial History

A. *Alberta Court of Queen's Bench* (2001), 93 Alta. L.R. (3d) 281

51 The trial judge, Cairns J., divided the impugned provisions of the Act's third party electoral advertising regime into four broad categories: spending limits; the attribution, registration and disclosure requirements; the election day advertising blackout; and the off-shore contributions ban. He concluded that the spending limits found in ss. 350 and 351 infringed ss. 2(*b*) and 2(*d*) of the *Charter* and could not be saved under s. 1. Not only did Cairns J. find s. 350 void for vagueness (para. 216), he also found that the Attorney General of Canada had not adduced sufficient evidence to establish that the objective of the limits -- electoral fairness -- was pressing and substantial. According to Cairns J., there was no actual evidence on the record before him of third party spending leading to a disproportionate influence upon the electorate. Nor was there any evidence that third party spending had dominated the electoral discourse (para. 261). In his view, the Court's decision in *Libman, supra*, did not determine any of the issues before him (para. 193). In particular, Cairns J. placed little weight on the findings of the Royal Commission on Electoral Reform and Party Financing ("Lortie Commission"), which concluded that third party spending limits were necessary to promote and preserve electoral fairness (*Reforming Electoral Democracy* (1991), vol. 1 ("Lortie

Report")). He took the position that the Commission's recommendations regarding third party spending were of little value as they relied primarily on a preliminary study by Richard Johnston ("The Volume and Impact of Third Party Advertising in the 1988 Election" (1990) ("Johnston Report"), concluding that third party advertising had an impact on the outcome of the 1988 federal election. Johnston later changed his position based on the final statistical analysis of his study (R. Johnston et al., *Letting the People Decide: Dynamics of a Canadian Election* (1992)).

B. *Alberta Court of Appeal* (2002), 14 Alta. L.R. (4th) 4

52 The Court of Appeal dismissed the appeal. Paperny J.A., writing for the majority, also allowed the cross-appeal and struck down ss. 323, 350 to 357, 359, 360 and 362 of the Act on the basis that the provisions "must all stand or fall together as part of the same design" (para. 193). Berger J.A. dissented. While the spending limits infringed s. 2(*b*), they were reasonable and demonstrably justified under s. 1. In his opinion, the enactments were an appropriate legislative response to the judicial guidance provided by this Court in *Libman, supra*.

III. Relevant Statutory Provisions

53 *Canada Elections Act*, S.C. 2000, c. 9

> **323.** (1) No person shall knowingly transmit election advertising to the public in an electoral district on polling day before the close of all of the polling stations in the electoral district.
>
> (2) The transmission to the public of a notice of an event that the leader of a registered party intends to attend or an invitation to meet or hear the leader of a registered party is not election advertising for the purpose of subsection (1).
>
> (3) For the purpose of subsection (1), a person includes a registered party and a group within the meaning of Part 17.
>
> **350.** (1) A third party shall not incur election advertising expenses of a total amount of more than $150,000 during an election period in relation to a general election.
>
> (2) Not more than $3,000 of the total amount referred to in subsection (1) shall be incurred to promote or oppose the election of one or more candidates in a given electoral district, including by
>
> (*a*) naming them;
>
> (*b*) showing their likenesses;
>
> (*c*) identifying them by their respective political affiliations; or

(*d*) taking a position on an issue with which they are particularly associated.

(3) The limit set out in subsection (2) only applies to an amount incurred with respect to a leader of a registered party or eligible party to the extent that it is incurred to promote or oppose his or her election in a given electoral district.

(4) A third party shall not incur election advertising expenses of a total amount of more than $3,000 in a given electoral district during the election period of a by-election.

(5) The amounts referred to in subsections (1), (2) and (4) shall be multiplied by the inflation adjustment factor referred to in section 414 that is in effect on the issue of the writ or writs.

351. A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

352. A third party shall identify itself in any election advertising placed by it and indicate that it has authorized the advertising.

353. (1) A third party shall register immediately after having incurred election advertising expenses of a total amount of $500 and may not register before the issue of the writ.

(2) An application for registration shall be sent to the Chief Electoral Officer in the prescribed form and shall include

(*a*) the name, address and telephone number of

(i) if the third party is an individual, the individual,
(ii) if the third party is a corporation, the corporation and the officer who has signing authority for it, and
(iii) if the third party is a group, the group and a person who is responsible for the group;

(*b*) the signature of the individual, officer or person referred to in subparagraph (*a*)(i), (ii) or (iii), respectively, as the case may be;

(*c*) the address and telephone number of the office of the third party where its books and records are kept and of the office to which communications may be addressed; and

(*d*) the name, address and telephone number of the third party's financial agent.

(3) An application under subsection (2) must be accompanied by a declaration signed by the financial agent accepting the appointment.

(4) If a third party's financial agent is replaced, it shall, without delay, provide the Chief Electoral Officer with the new financial agent's name, address and telephone number and a declaration signed by the new financial agent accepting the appointment.

(5) If the third party is a trade union, corporation or other entity with a governing body, the application must include a copy of the resolution passed by its governing body authorizing it to incur election advertising expenses.

(6) The Chief Electoral Officer shall, without delay after receiving an application, determine whether the requirements set out in subsections (1) to (3) and (5) are met and shall then notify the person who signed the application whether the third party is registered. In the case of a refusal to register, the Chief Electoral Officer shall give reasons for the refusal.

(7) A third party may not be registered under a name that, in the opinion of the Chief Electoral Officer, is likely to be confused with the name of a candidate, registered party, registered third party or eligible party.

(8) The registration of a third party is valid only for the election period during which the application is made, but the third party continues to be subject to the requirement to file an election advertising report under subsection 359(1).

354. (1) A third party that is required to register under subsection 353(1) shall appoint a financial agent who may be a person who is authorized to sign an application for registration made under that subsection.

(2) The following persons are not eligible to be a financial agent of a third party:

(*a*) a candidate or an official agent of a candidate;

(*b*) a person who is the chief agent, or a registered agent, of a registered party;

(*c*) an election officer or an employee of a returning officer; and

(*d*) a person who is not a Canadian citizen or a permanent resident as defined in subsection 2(1) of the *Immigration Act*.

355. (1) A third party that incurs election advertising expenses in an aggregate amount of $5,000 or more must appoint an auditor without delay.

(2) The following are eligible to be an auditor for a third party:

(*a*) a person who is a member in good standing of a corporation, an association or an institute of professional accountants; or

(*b*) a partnership every partner of which is a member in good standing of a corporation, an association or an institute of professional accountants.

(3) The following persons are not eligible to be an auditor for a third party:

(*a*) the third party's financial agent;

(*b*) a person who signed the application made under subsection 353(2);

(*c*) an election officer;

(*d*) a candidate;

(*e*) the official agent of a candidate;

(*f*) the chief agent of a registered party or an eligible party; and

(*g*) a registered agent of a registered party.

(4) Every third party, without delay after an auditor is appointed, must provide the Chief Electoral Officer with the auditor's name, address, telephone number and occupation and a signed declaration accepting the appointment.

(5) If a third party's auditor is replaced, it must, without delay, provide the Chief Electoral Officer with the new auditor's name, address, telephone number and occupation and a signed declaration accepting the appointment.

356. The Chief Electoral Officer shall maintain, for the period that he or she considers appropriate, a registry of third parties in which is recorded, in relation to each third party, the information referred to in subsections 353(2) and 355(4) and (5).

357. (1) Every contribution made during an election period to a registered third party for election advertising purposes must be accepted by, and every election advertising expense incurred on behalf of a third party must be authorized by, its financial agent.

(2) A financial agent may authorize a person to accept contributions or incur election advertising expenses, but that authorization does not limit the responsibility of the financial agent.

(3) No third party shall use a contribution for election advertising if the third party does not know the name and address of the contributor or is otherwise unable to determine within which class of contributor referred to in subsection 359(6) they fall.

359. (1) Every third party shall file an election advertising report in the prescribed form with the Chief Electoral Officer within four months after polling day.

(2) An election advertising report shall contain

(*a*) in the case of a general election,

(i) a list of election advertising expenses referred to in subsection 350(2) and the time and place of the broadcast or publication of the advertisements to which the expenses relate, and

(ii) a list of all election advertising expenses other than those referred to in paragraph (*a*) and the time and place of broadcast or publication of the advertisements to which the expenses relate; and

(*b*) in the case of a by-election, a list of election advertising expenses referred to in subsection 350(3) and the time and place of the broadcast or publication of the advertisements to which the expenses relate.

(3) If a third party has not incurred expenses referred to in paragraph (2)(*a*) or (*b*), that fact shall be indicated in its election advertising report.

(4) The election advertising report shall include

(*a*) the amount, by class of contributor, of contributions for election advertising purposes that were received in the period beginning six months before the issue of the writ and ending on polling day;

(*b*) for each contributor who made contributions of a total amount of more than $200 for election advertising purposes during the period referred to in paragraph (*a*), subject to paragraph (*b*.1), their name, address and class, and the amount and date of each contribution;

(*b*.1) in the case of a numbered company that is a contributor referred to in paragraph (*b*), the name of the chief executive officer or president of that company; and

(*c*) the amount, other than an amount of a contribution referred to in paragraph (*a*), that was paid out of the third party's own funds for election advertising expenses.

(5) For the purpose of subsection (4), a contribution includes a loan.

(6) For the purposes of paragraphs (4)(*a*) and (*b*), the following are the classes of contributor:

(*a*) individuals;

(*b*) businesses;

(*c*) commercial organizations;

(*d*) governments;

(*e*) trade unions;

(*f*) corporations without share capital other than trade unions; and

(*g*) unincorporated organizations or associations other than trade unions.

(7) If the third party is unable to identify which contributions were received for election advertising purposes in the period referred to in paragraph (4)(*a*), it must list, subject to paragraph (4)(*b*.1), the names and addresses of every contributor who donated a total of more than $200 to it during that period.

(8) An election advertising report shall include the signed declarations of the financial agent and, if different, of the person who signed the application made under subsection 353(2) that the report is accurate.

(9) A third party shall, at the request of the Chief Electoral Officer, provide the original of any bill, voucher or receipt in relation to an election advertising expense that is in an amount of more than $50.

360. (1) The election advertising report of a third party that incurs $5,000 or more in election advertising expenses must include a report made under subsection (2).

(2) The third party's auditor shall report on the election advertising report and shall make any examination that will enable the auditor to give an opinion in the report as to whether the election advertising report presents fairly the information contained in the accounting records on which it is based.

(3) An auditor shall include in the report any statement that the auditor considers necessary, when

(*a*) the election advertising report that is the subject of the auditor's report does not present fairly the information contained in the accounting records on which it is based;

(*b*) the auditor has not received from the third party all of the required information and explanation; or

(*c*) based on the auditor's examination, it appears that proper accounting records have not been kept by the third party.

(4) The auditor shall have access at any reasonable time to all of the documents of the third party, and may require the third party to provide any information or explanation, that, in the auditor's opinion, is necessary to enable the auditor to prepare the report.

362. The Chief Electoral Officer shall, in the manner he or she considers appropriate,

(*a*) publish the names and addresses of registered third parties, as they are registered; and

(*b*) publish, within one year after the issue of the writ, reports made under subsection 359(1).

IV. Issues

54 The following constitutional questions were stated by the Chief Justice:

1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?
2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?

4. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?
5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?
6. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

V. Analysis

A. *Third Party Electoral Advertising Regime*

55 Numerous groups and organizations participate in the electoral process as third parties. They do so to achieve three purposes. First, third parties may seek to influence the outcome of an election by commenting on the merits and faults of a particular candidate or political party. In this respect, the influence of third parties is most pronounced in electoral districts with "marginal seats", in other words, in electoral districts where the incumbent does not have a significant advantage. Second, third parties may add a fresh perspective or new dimension to the discourse surrounding one or more issues associated with a candidate or political party. While third parties are true electoral participants, their role and the extent of their participation, like candidates and political parties, cannot be unlimited. Third, they may add an issue to the political debate and in some cases force candidates and political parties to address it.

56 Third party spending limits in Canada have a long and litigious history. Limits on third party spending, together with limits on candidate and political party spending, were introduced in 1974 in the *Canada Elections Act*, pursuant to the recommendations of the Barbeau Committee (*Report of the Committee on Election Expenses* (1966)). Parliament prohibited all independent election spending that directly promoted or opposed a particular candidate or political party (Lortie Report, *supra*, at pp. 327-28). The constitutionality of this prohibition was successfully challenged in *National Citizens' Coalition Inc. v. Attorney General of Canada* (1984), 32 Alta. L.R. (2d) 249 (Q.B.). Although the decision was binding only in Alberta, Elections Canada decided not to enforce the prohibition elsewhere in the country (Lortie Report, p. 332). Following the 1988 federal election, Parliament commissioned another Royal Commission, the Lortie Commission, and ultimately re-enacted third party spending limits; see ss. 259.1(1) and 259.2(2) of the *Canada Elections Act*, R.S.C. 1985,

c. E-2. The Alberta Court of Appeal declared these federal limits unconstitutional in *Somerville v. Canada (Attorney General)* (1996), 184 A.R. 241.

57 Parliament enacted new third party spending limits as part of a larger third party electoral advertising regime in the 2000 *Canada Elections Act*. Part 17 of the Act, ss. 349 to 362, creates a scheme that limits the advertising expenses of individuals and groups who are not candidates or political parties. The scheme also requires such expenses to be reported to the Chief Electoral Officer. The regime can be broadly divided into four parts. First, s. 350 limits election advertising expenses to $3,000 in a given electoral district and $150,000 nationally. "[E]lection advertising" is defined in s. 319 of the Act as follows:

> "election advertising" means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include
>
> (*a*) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;
>
> (*b*) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;
>
> (*c*) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be; or
>
> (*d*) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.

Thus, the limits do not apply to third party advertising prior to the election period or to advertising which promotes an issue that is not associated with a candidate or political party. The second part of the regime is closely related to s. 350 as it prohibits individuals or groups from splitting or colluding for the purposes of circumventing the election advertising limits. Third, the attribution, registration and disclosure provisions (ss. 352 to 357, 359, 360 and 362) require a third party to identify itself in all of its election advertising and, under certain circumstances, to appoint financial agents and auditors who are required to record expenses, to register with, and to report to the Chief Electoral Officer who, in turn, makes this information available to the public. Finally, although s. 323 is not strictly part of the third party electoral advertising regime, third parties are also subject to the advertising blackout on polling day.

58 Therefore, while the regime is internally coherent, it is evident that its constituent parts stand on their own. Indeed, in the absence of advertising expense limits, the attribution, registration and disclosure provisions become increasingly important by shedding light on who is involved in election advertising. Accordingly, the constitutionality of each set of provisions must be considered separately. The Court of Appeal erred in considering them globally.

59 This case represents the first opportunity for this Court to determine the constitutionality of the third party election advertising regime established by Parliament. This Court has however previously considered the constitutionality of limits on independent spending in the regulation of referendums in *Libman, supra*.

B. *Libman v. Quebec (Attorney General)*

60 In *Libman*, the Court was asked to determine the constitutionality of the independent spending limits set out in Quebec's referenda legislation, the *Referendum Act*, R.S.Q., c. C-64.1. The impugned provisions of the *Referendum Act* circumscribed groups' or individuals' participation in a referendum campaign by requiring that they join the national committee supporting their position or by affiliating themselves with it. Only the national committees and the affiliated groups were permitted to incur "regulated expenses", which were effectively advertising expenses. Mr. Libman did not wish to endorse either position advocated by the national committee. Rather than supporting the "yes" or "no" position, Mr. Libman advocated in favour of abstaining from the vote. Mr. Libman argued that the impugned provisions infringed his rights to freedom of political expression and freedom of association because they restricted campaign expenditures conducted independently of the national committees.

61 The Court agreed that the limits on independent spending set out in the *Referendum Act* were not justified. The Court did, however, endorse spending limits as an essential means of promoting fairness in referenda and elections which the Court held were parallel processes: *Libman*, at para. 46. The Court, relying on the Lortie Report, endorsed several principles applicable to the regulation of election spending generally and of independent or third party spending specifically. They include (at paras. 47-50):

> [1] If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate... . To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard [equal dissemination of points of view].
>
> [2] Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties [free and informed vote]... .
>
> [3] For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups [application to all-effectiveness of spending limits generally]... .
>
> [4] The actions of independent individuals and groups can [either] directly or indirectly support one of the parties or candidates, thereby resulting in an imbal-

> ance in the financial resources each candidate or political party is permitted... . "At elections, the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications, either direct or indirect: voters cast their ballots for candidates and not for issues" [issue advocacy vs partisan advocacy]... .
>
> [5] It is also important to limit independent spending more strictly than spending by candidates or political parties... . [O]wing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate [application to all-effectiveness of spending limits generally]. [Emphasis added.]

62 The Court's conception of electoral fairness as reflected in the foregoing principles is consistent with the egalitarian model of elections adopted by Parliament as an essential component of our democratic society. This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation; see C. Feasby, "*Libman v. Quebec (A.G.)* and the Administration of the Process of Democracy under the *Charter*: The Emerging Egalitarian Model" (1999), 44 McGill L.J. 5. Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. The state can equalize participation in the electoral process in two ways; see O. M. Fiss, *The Irony of Free Speech* (1996), at p. 4. First, the State can provide a voice to those who might otherwise not be heard. The Act does so by reimbursing candidates and political parties and by providing broadcast time to political parties. Second, the State can restrict the voices which dominate the political discourse so that others may be heard as well. In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another. In contrast, the libertarian model of elections favours an electoral process subject to as few restrictions as possible.

63 The current third party election advertising regime is Parliament's response to this Court's decision in *Libman*. The regime is clearly structured on the egalitarian model of elections. The overarching objective of the regime is to promote electoral fairness by creating equality in the political discourse. The regime promotes the equal dissemination of points of view by limiting the election advertising of third parties who, as this Court has recognized, are important and influential participants in the electoral process. The advancement of equality and fairness in elections ultimately encourages public confidence in the electoral system. Thus, broadly speaking, the third party election advertising regime is consistent with an egalitarian conception of elections and the principles endorsed by this Court in *Libman*.

64 In determining the constitutionality of the third party advertising regime, the lower courts failed to follow this Court's guidance in *Libman*. First, they did not give any deference to Parliament's choice of electoral model. Second, they discarded the findings of the Lortie Commission on the basis of the Johnston Report. Discarding the Lortie Commission's findings led the lower courts to the conclusion that there was no evidence that the objectives of the impugned measures were pressing and substantial. Respectfully, the lower courts erred in doing so. I will deal with the question of the nature and sufficiency of the evidence justifying the third party advertising regime as

well as the deference owed to Parliament in adopting a scheme to govern the electoral process in the s. 1 analysis below.

65 I consider first the constitutionality of each discrete set of provisions regulating third party advertising.

C. *Election Advertising Expense Limits*

(1) Freedom of Expression

66 The appellant rightly concedes that the limits on election advertising expenses infringe s. 2(*b*) of the *Charter*. Most third party election advertising constitutes political expression and therefore lies at the core of the guarantee of free expression. As discussed below, in some circumstances, third party election advertising may be less deserving of constitutional protection where it seeks to manipulate voters.

(2) The Right to Vote

67 The respondent also alleges that s. 350 infringes the right to vote protected by s. 3 of the *Charter* on the basis that it guarantees a right to unimpeded and unlimited electoral debate or expression. The respondent effectively equates the right to meaningful participation with the exercise of freedom of expression. Respectfully, this cannot be. The right to free expression and the right to vote are distinct rights; see *Thomson Newspapers, supra*, at para. 80. The more appropriate question is: how are these rights and their underlying values and purposes properly reconciled?

68 The purpose of s. 3 was first considered in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. McLachlin J. (as she then was), in concluding that s. 3 does not require absolute equality of voting power, held that the purpose of s. 3 is effective representation. She explained, at p. 183:

> 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... . [Emphasis in original.]

The Court has confirmed that effective representation is the purpose of s. 3 on several occasions; see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Thomson Newspapers, supra*; and *Figueroa v. Canada (Attorney General)*, [2003] 1 S.C.R. 912, 2003 SCC 37.

69 The right to effective representation is, however, more than just a right to be effectively represented in Parliament. As L'Heureux-Dubé J. concluded in *Haig, supra*, at p. 1031, the right to vote also includes the "right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate" (emphasis added). The Court expounded on this broader conception of the purpose of s. 3 in *Figueroa*.

70 The right to play a meaningful role in the electoral process under s. 3 of the *Charter* implicates a right of meaningful participation in that process. Meaningful participation is not limited to the selection of elected representatives. As Iacobucci J. explained in *Figueroa*, at para. 29:

> It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process. [Emphasis added.]

Greater participation in the political discourse leads to a wider expression of beliefs and opinions and results in an enriched political debate, thereby enhancing the quality of Canada's democracy.

71 This case engages the informational component of an individual's right to meaningfully participate in the electoral process. The right to meaningful participation includes a citizen's right to exercise his or her vote in an informed manner. For a voter to be well informed, the citizen must be able to weigh the relative strengths and weaknesses of each candidate and political party. The citizen must also be able to consider opposing aspects of issues associated with certain candidates and political parties where they exist. In short, the voter has a right to be "reasonably informed of all the possible choices": *Libman*, at para. 47.

72 The question, then, is what promotes an informed voter? For voters to be able to hear all points of view, the information disseminated by third parties, candidates and political parties cannot be unlimited. In the absence of spending limits, it is possible for the affluent or a number of persons or groups pooling their resources and acting in concert to dominate the political discourse. The respondent's factum illustrates that political advertising is a costly endeavour. If a few groups are able to flood the electoral discourse with their message, it is possible, indeed likely, that the voices of some will be drowned out; see *Libman*, *supra*; *Figueroa*, *supra*, at para. 49. Where those having access to the most resources monopolize the election discourse, their opponents will be deprived of a reasonable opportunity to speak and be heard. This unequal dissemination of points of view undermines the voter's ability to be adequately informed of all views. In this way, equality in the political discourse is necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. Therefore, contrary to the respondent's submission, s. 3 does not guarantee a right to unlimited information or to unlimited participation.

73 Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to voters. Spending limits which are overly restrictive may undermine the informational component of the right to vote. To constitute an infringement of the right to vote, these spending limits would have to restrict information in such a

way as to undermine the right of citizens to meaningfully participate in the political process and to be effectively represented.

74 The question, then, is whether the spending limits set out in s. 350 interfere with the right of each citizen to play a meaningful role in the electoral process. In my view, they do not. The trial judge found that the advertising expense limits allow third parties to engage in "modest, national, informational campaigns" as well as "reasonable electoral district informational campaigns" but would prevent third parties from engaging in an "effective persuasive campaign" (para. 78). He did not give sufficient attention to the potential number of third parties or their ability to act in concert. Meaningful participation in elections is not synonymous with the ability to mount a media campaign capable of determining the outcome. In fact, such an understanding of "meaningful participation" would leave little room in the political discourse for the individual citizen and would be inimical to the right to vote. Accordingly, there is no infringement of s. 3 in this case and no conflict between the right to vote and freedom of expression.

(3) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

75 The central issue at this stage of the analysis is the nature and sufficiency of the evidence required for the Attorney General to demonstrate that the limits imposed on freedom of expression are reasonable and justifiable in a free and democratic society. The Attorney General of Canada alleges that the lower courts erred in requiring scientific proof that harm had actually occurred and, specifically, by requiring conclusive proof that third party advertising influences voters and election outcomes, rendering them unfair.

76 This is not the first time the Court has addressed the standard of proof the Crown must satisfy in demonstrating possible harm. Nor is it the first time that the Court has been faced with conflicting social science evidence regarding the problem that Parliament seeks to address. Indeed, in *Thomson Newspapers, supra*, this Court addressed the nature and sufficiency of evidence required when Parliament adopts a regulatory regime to govern the electoral process. The context of the impugned provision determines the type of proof that a court will require of the legislature to justify its measures under s. 1; see *Thomson Newspapers*, at para. 88. As this pivotal issue affects the entire s. 1 analysis, it is helpful to consider the contextual factors at the outset.

(a) *Contextual Factors*

(i) The Nature of the Harm and the Inability to Measure It

77 The legislature is not required to provide scientific proof based on concrete evidence of the problem it seeks to address in every case. Where the court is faced with inconclusive or competing social science evidence relating the harm to the legislature's measures, the court may rely on a reasoned apprehension of that harm.

78 This Court has, in the absence of determinative scientific evidence, relied on logic, reason and some social science evidence in the course of the justification analysis in several cases; see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 503; *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 768 and 776; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 137; *Thomson Newspapers, supra*, at paras. 104-7; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2. In *RJR-MacDonald*, the Court held, in the absence of direct scientific evidence showing a causal link

between advertising bans and a decrease in tobacco consumption/use, that as a matter of logic advertising bans and package warnings lead to a reduction in tobacco use; see paras. 155-58. McLachlin J. held, at para. 137, that:

> Discharge of the civil standard does not require scientific demonstration; the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.

In *Thomson Newspapers*, the evidence as to the influence of polls on voter choice was uncertain. Nevertheless, the majority of the Court concluded, as a matter of logic assisted by some social science evidence, that the possible influence of polls on voter choice was a legitimate harm that Parliament could seek to remedy, and was thus a pressing and substantial objective; see paras. 104-107.

79 Similarly, the nature of the harm and the efficaciousness of Parliament's remedy in this case is difficult, if not impossible, to measure scientifically. The harm which Parliament seeks to address can be broadly articulated as electoral unfairness. Several experts, as well as the Lortie Commission, concluded that unlimited third party advertising can undermine election fairness in several ways. First, it can lead to the dominance of the political discourse by the wealthy (Lortie Report, *supra*, at p. 326; Professor Peter Aucoin's evidence, at Cairns J.'s paras. 60-61). Second, it may allow candidates and political parties to circumvent their own spending limits through the creation of third parties (Lortie Report, at p. 15; Professor Frederick James Fletcher and Chief Electoral Officer, at Cairns J.'s para. 62). Third, unlimited third party spending can have an unfair effect on the outcome of an election (Lortie Report, at pp. 15-16). Fourth, the absence of limits on third party advertising expenses can erode the confidence of the Canadian electorate who perceive the electoral process as being dominated by the wealthy. This harm is difficult, if not impossible, to measure because of the subtle ways in which advertising influences human behaviour; the influence of other factors such as the media and polls; and the multitude of issues, candidates and independent parties involved in the electoral process. In light of these difficulties, logic and reason assisted by some social science evidence is sufficient proof of the harm that Parliament seeks to remedy.

(ii) Vulnerability of the Group

80 Third party spending limits seek to protect two groups. First, the limits seek to protect the Canadian electorate by ensuring that it is possible to hear from all groups and thus promote a more informed vote. Generally, the Canadian electorate "must be presumed to have a certain degree of maturity and intelligence"; see *Thomson Newspapers*, *supra*, at para. 101. Where, however, third party advertising seeks to systematically manipulate the voter, the Canadian electorate may be seen as more vulnerable; see *Thomson Newspapers*, at para. 114.

81 The members of the second group protected by the legislation are candidates and political parties. The appellant argues that the provisions seek to ensure that candidates and political parties have an equal opportunity to present their positions to the electorate. As discussed in *Figueroa*, *supra*, at para. 41, all political parties, whether large or small, are "capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy". Thus, regardless of their size, political parties are important to the democratic process. Nevertheless, neither candidates nor political parties can be said to be vulnerable.

(iii) Subjective Fears and Apprehension of Harm

82 Perception is of utmost importance in preserving and promoting the electoral regime in Canada. Professor Aucoin emphasized that "[p]ublic *perceptions* are critical precisely because the legitimacy of the election regime depends upon how citizens assess the extent to which the regime advances the values of their electoral democracy" (emphasis in original). Electoral fairness is key. Where Canadians perceive elections to be unfair, voter apathy follows shortly thereafter.

83 Several surveys indicate that Canadians view third party spending limits as an effective means of advancing electoral fairness. Indeed, in *Libman, supra*, at para. 52, the Court relied on the survey conducted by the Lortie Commission illustrating that 75 percent of Canadians supported limits on spending by interest groups to conclude that spending limits are important to maintain public confidence in the electoral system.

(iv) The Nature of the Infringed Activity: Political Expression

84 Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse (Lortie Report, *supra*, at p. 340). As such, the election advertising of third parties lies at the core of the expression guaranteed by the *Charter* and warrants a high degree of constitutional protection. As Dickson C.J. explained in *Keegstra, supra*, at pp. 763-64:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

85 In some circumstances, however, third party advertising will be less deserving of constitutional protection. Indeed, it is possible that third parties having access to significant financial resources can manipulate political discourse to their advantage through political advertising. In *Thomson Newspapers, supra*, at para. 94, the majority of the Court explained:

> [U]nder certain circumstances, the nature of the interests (i.e., a single party or faction with a great preponderance of financial resources) of the speakers could make the expression itself inimical to the exercise of a free and informed choice by others.

There is no evidence before the Court that indicates that third party advertising seeks to be manipulative. Nor is there any evidence that third parties wish to use their advertising dollars to smear candidates or engage in other forms of non-political discourse. Nevertheless, the danger that political advertising may manipulate or oppress the voter means that some deference to the means chosen by Parliament is warranted.

86 The Attorney General of Canada argues that although the impugned provisions limit the political expression of some, the provisions enhance the political expression of others. This Court explored this dichotomy in *Libman, supra*, at para. 61:

> ... the legislature's objective, namely to enhance the exercise of the right to vote, must be borne in mind. Thus, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness. The latter is related to the very values the Canadian *Charter* seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society. The impugned provisions impose a balance between the financial resources available to the proponents of each option in order to ensure that the vote by the people will be free and informed and that the discourse of each option can be heard. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions. [Emphasis added.]

Further, by limiting political expression, the spending limits bring greater balance to the political discourse and allow for more meaningful participation in the electoral process. Thus, the provisions also enhance a second *Charter* right, the right to vote.

87 Under the egalitarian model of elections, Parliament must balance the rights and privileges of the participants in the electoral process: candidates, political parties, third parties and voters. Advertising expense limits may restrict free expression to ensure that participants are able to meaningfully participate in the electoral process. For candidates, political parties and third parties, meaningful participation means the ability to inform voters of their position. For voters, meaningful participation means the ability to hear and weigh many points of view. The difficulties of striking this balance are evident. Given the right of Parliament to choose Canada's electoral model and the nuances inherent in implementing this model, the Court must approach the justification analysis with deference. The lower courts erred in failing to do so (Paperny J.A., at para. 135). In the end, the electoral system, which regulates many aspects of an election, including its duration and the control and reimbursement of expenses, reflects a political choice, the details of which are better left to Parliament.

88 On balance, the contextual factors favour a deferential approach to Parliament in determining whether the third party advertising expense limits are demonstrably justified in a free and democratic society. Given the difficulties in measuring this harm, a reasoned apprehension that the absence of third party election advertising limits will lead to electoral unfairness is sufficient.

(b) *Limits Prescribed by Law*

89 The respondent argues that the entire third party advertising expense regime is too vague to constitute a limit prescribed by law on the basis that the legislation provides insufficient guidance as to when an issue is "associated" with a candidate or party. Thus, it is unclear when advertising constitutes election advertising and is subject to the regime's provisions. This argument is unfounded.

The definition of election advertising in s. 319, although broad in scope, is not unconstitutionally vague.

90 A provision will be considered impermissibly vague where there is no adequate basis for legal debate or where it is impossible to delineate an area of risk; see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at pp. 639-40. The interpretation of the terms at issue here must be contextual. It is clear that a regulatory regime cannot by necessity provide for a detailed description of all eventualities and must give rise to some discretionary powers -- a margin of appreciation. What is essential is that the guiding principles be sufficiently clear to avoid arbitrariness. While no specific criteria exist, it is possible to determine whether an issue is associated with a candidate or political party and, therefore, to delineate an area of risk. For example, it is possible to discern whether an issue is associated with a candidate or political party from their platform. Where an issue arises in the course of the electoral campaign, the response taken by the candidate or political party may be found in media releases (Lortie Report, *supra*, at p. 341). Whether the definition is impermissibly broad is a matter for legal debate and is more properly considered at the minimal impairment stage of the justification analysis.

(c) *Is the Objective Pressing and Substantial?*

91 The overarching objective of the third party election advertising limits is electoral fairness. Equality in the political discourse promotes electoral fairness and is achieved, in part, by restricting the participation of those who have access to significant financial resources. The more voices that have access to the political discourse, the more voters will be empowered to exercise their right in a meaningful and informed manner. Canadians understandably have greater confidence in an electoral system which ultimately encourages increased participation.

92 For the purpose of the s. 1 analysis, however, "it is desirable to state the purpose of the limiting provision as precisely and specifically as possible so as to provide a clear framework for evaluating its importance, and the precision with which the means have been crafted to fulfil that objective"; see *Thomson Newspapers*, at para. 98. More narrowly characterized, the objectives of the third party election advertising scheme are threefold: first, to promote equality in the political discourse; second, to protect the integrity of the financing regime applicable to candidates and parties; and third, to ensure that voters have confidence in the electoral process.

93 As discussed, the Attorney General of Canada does not need to provide evidence of actual harm to demonstrate that each objective is pressing and substantial; see *Butler*, *supra*; *Sharpe*, *supra*; *RJR-MacDonald*, *supra*. The lower courts effectively required scientific proof that, in Canada, the absence of third party spending limits has rendered Canadian elections unfair. The lower courts sought evidence establishing that third party advertising influences the electorate in a disproportionate way (Cairns J., at para. 261; Paperny J.A., at para. 157). To require the Attorney General to produce definitive social science evidence establishing the causes of every area of social concern would be to place an unreasonably high onus on the Attorney General. In this case, the Attorney General adduced sufficient informed evidence of the importance of electoral regulation in our free and democratic society.

94 In this case, the Lortie Report is the central piece of the evidentiary record establishing the possible harm engendered by uncontrolled third party advertising and justifying the limits set by Parliament on the advertising expenses of third parties.

95 As mentioned, the trial judge and the majority of the Court of Appeal discarded the findings of the Lortie Commission on the basis of the Johnston Report matter as the courts had done in *Pacific Press v. British Columbia (Attorney General)*, [2000] 5 W.W.R. 219, 2000 BCSC 248, and *Somerville, supra*. In doing so, the trial judge concluded that there was no actual evidence that third party advertising influenced the electorate (para. 261). The majority of the Court of Appeal also placed little weight on the findings of the Lortie Commission and concluded that the remaining evidence was inconclusive (paras. 108 and 114). In my view, the shift in Professor Johnston's empirical conclusion of the effect of third party spending on voter outcome of the 1988 federal election does not undermine the overall persuasiveness of the Lortie Report for several reasons.

96 Johnston's preliminary findings regarding the effect of third party spending on the 1988 federal election were not determinative of the position taken by the Lortie Commission on third party spending generally. It is inconceivable that the findings of a Royal Commission would be based solely on one preliminary report in the presence of numerous other expert reports. Professor Aucoin, the Lortie Commission research director, confirmed that he would still recommend third party spending limits to preserve the fairness of the electoral system (Cairns J., para. 67).

97 Further, Johnston's conclusions in *Letting the People Decide: Dynamics of a Canadian Election, supra,* only focus on one component of electoral fairness: the outcome of the election. *Letting the People Decide* does not speak to the impact of third party advertising on the fairness of the electoral process. As discussed, in the context of elections, process is as important as outcome; see *Figueroa, supra,* at para. 29 of its report. The Lortie Commission emphasized, at p. 14, that "the right to vote can be politically meaningful and the equality of voters assured only if the electoral process itself is fair". Nor does *Letting the People Decide* speak to the impact of unlimited third party advertising on the confidence Canadians have in their democratic electoral system. On this issue, the Lortie Commission opined that "[t]he integrity of the electoral process must be enhanced if Canadians are to be fully confident that their democratic rights are secure" (Lortie Report, at p. 16). Among other things, integrity of the electoral process requires that political advertising is not perceived as manipulating voters.

98 Finally, *Letting the People Decide* does not address the reasonable possibility that unlimited advertising expenses could, in future elections, impact the outcome of the election. As A. Blais, one of the co-authors of *Letting the People Decide,* noted in evidence:

> The findings of that study indicate that-third party advertising did not have an impact on the vote in one specific instance, the 1988 election. They do not allow us, however, to conclude that third-party advertising will never have an impact in Canadian elections.

The respondent alleges that evidence of the actual pernicious effect of the lack of spending limits in past elections is necessary to establish that the objective is important and that the measures are proportional to the infringement of the rights of third parties. Surely, Parliament does not have to wait for the feared harm to occur before it can enact measures to prevent the possibility of the harm occurring or to remedy the harm, should it occur. As noted earlier, this Court has concluded on several occasions that a reasoned apprehension of harm is sufficient.

99 As the lower courts' conclusions on the respective weight to be attributed to the Lortie Report and *Letting the People Decide* relate to social science evidence, they are entitled to little deference by this Court; see *RJR-MacDonald, supra,* at paras. 139-41. For the reasons stipulated above,

the findings of the Lortie Commission can be relied upon to establish that third party advertising expense limits are a means to preserve electoral fairness and promote confidence in the integrity of the electoral system. Studies later published in the United States are also relevant in evaluating our own electoral system in a limited way. In the absence of third party advertising expense limits, electoral unfairness is a real possibility. To the extent that the lower courts in *Somerville, supra*, and *Pacific Press, supra*, gave no weight to the findings of the Lortie Report, they are wrong.

100 In my view, the findings of the Lortie Report can be relied upon in this appeal to determine whether the third party advertising limits are justified. Indeed, this Court has already provided significant guidance in its past jurisprudence on the importance of the following objectives based on the Lortie Report; see *Harvey, supra*; *Libman, supra*; and *Figueroa, supra*.

(i) To Promote Equality in the Political Discourse

101 As discussed, the central component of the egalitarian model is equality in the political discourse; see *Libman*, at para. 61. Equality in the political discourse promotes full political debate and is important in maintaining both the integrity of the electoral process and the fairness of election outcomes; see *Libman*, at para. 47. Such concerns are always pressing and substantial "in any society that purports to operate in accordance with the tenets of a free and democratic society"; see *Harvey*, at para. 38.

(ii) To Protect the Integrity of the Financing Regime Applicable to Candidates and Parties

102 The primary mechanism by which the state promotes equality in the political discourse is through the electoral financing regime. The Court emphasized the importance of this regime in *Figueroa*, at para. 72:

> The systems and regulations that govern the process by which governments are formed should not be easily compromised. Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime be preserved.

Accordingly, protecting the integrity of spending limits applicable to candidates and parties is a pressing and substantial objective.

(iii) To Maintain Confidence in the Electoral Process

103 Maintaining confidence in the electoral process is essential to preserve the integrity of the electoral system which is the cornerstone of Canadian democracy. In *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136, Dickson C.J. concluded that faith in social and political institutions, which enhance the participation of individuals and groups in society, is of central importance in a free and democratic society. If Canadians lack confidence in the electoral system, they will be discouraged from participating in a meaningful way in the electoral process. More importantly, they will lack faith in their elected representatives. Confidence in the electoral process is, therefore, a pressing and substantial objective.

(d) *Rational Connection*

104 At this stage of the analysis, the Attorney General "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic"; see *RJR-MacDonald, supra,* at para. 153. The lower courts erred by demanding too stringent a level of proof, in essence, by requiring the Attorney General to establish an empirical connection between third party spending limits and the objectives of s. 350. There is sufficient evidence establishing a rational connection between third party advertising expense limits and promoting equality in the political discourse, protecting the integrity of the financing regime applicable to candidates and parties, and maintaining confidence in the electoral process.

(i) To Promote Equality in the Political Discourse

105 To establish that third party advertising expense limits promote equality in the political discourse, the Attorney General must establish, first, that political advertising influences voters, and second, that in the absence of regulation some voices could dominate and, in effect, drown others out.

106 The majority of the Court of Appeal concluded, at para. 114, that the social science evidence of the impact of political advertising on voters was inconclusive. Professor Aucoin (in evidence) elucidated why there was a paucity of conclusive social science evidence:

> [T]here is no prima facie reason, or evidence, for the claim that the advertising of third parties can never have its desired effect. It is advertising like all other advertising: sometimes it works, in the sense that it has its intended effects; sometimes it does not (as in having no effect, or having a negative or perverse effect). As with candidate and political party spending on advertising, there are other factors at work and certain conditions must exist for advertising to have its intended effect. Third parties cannot simply spend on advertising and always expect to have influence, anymore than candidates or parties can expect to "buy" elections.

That political advertising influences voters accords with logic and reason. Surely, political parties, candidates, interest groups and corporations for that matter would not spend a significant amount of money on advertising if it was ineffective. Indeed, advertising is the primary expenditure of candidates and political parties.

107 Where advertising influences the electorate, and those who have access to significant financial resources are able to purchase an unlimited amount of advertising, it follows that they will be able to dominate the electoral discourse to the detriment of others, both speakers and listeners. An upper limit on the amount that third parties can dedicate to political advertising curtails their ability to dominate the electoral debate. Thus, third party advertising expense limits are rationally connected to promoting equality in the political discourse.

(ii) To Protect the Integrity of the Financing Regime Applicable to Candidates and Parties

108 Third party advertising can directly support a particular candidate or political party. Third party advertising can also indirectly support a candidate or political party by taking a position on an issue associated with that candidate or political party. In effect, third party advertising can create an imbalance between the financial resources of each candidate or political party; see *Libman, supra,*

at para. 44. For candidate and political party spending limits to be truly effective, the advertising expenses of third parties must also be limited. Indeed, the Lortie Commission concluded that the electoral financing regime would be destroyed if third party advertising was not limited concomitantly with candidate and political party spending (Berger J.A., dissenting, at para. 261). The Commission explained, at p. 327 of the Lortie Report:

> If individuals or groups were permitted to run parallel campaigns augmenting the spending of certain candidates or parties, those candidates or parties would have an unfair advantage over others not similarly supported. At the same time, candidates or parties who were the target of spending by individuals or groups opposed to their election would be put at a disadvantage compared with those who were not targeted. Should such activity become widespread, the purpose of the legislation would be destroyed, the reasonably equal opportunity the legislation seeks to establish would vanish, and the overall goal of restricting the role of money in unfairly influencing election outcomes would be defeated.

Thus, limiting third party advertising expenses is rationally connected with preserving the integrity of the financing regime set for candidates and parties.

(iii) To Maintain Confidence in the Electoral Process

109 Limits on third party advertising expenses foster confidence in the electoral process in three ways. The limits address the perception that candidates and political parties can circumvent their spending limits through the creation of special interest groups. The limits also prevent the possibility that the wealthy can dominate the electoral discourse and dictate the outcome of elections. Finally, the limits assist in preventing overall advertising expenses from escalating. Thus, third party advertising expense limits advance the perception that access to the electoral discourse does not require wealth to be competitive with other electoral participants. Canadians, in turn, perceive the electoral process as substantively fair as it provides for a reasonable degree of equality between citizens who wish to participate in that process.

(e) *Minimal Impairment*

110 To be reasonable and demonstrably justified, the impugned measures must impair the infringed right or freedom as little as possible. The oft-cited quote from *RJR-MacDonald*, *supra*, at para. 160, sets out the appropriate standard:

> The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

Thus, the impugned measures need not be the least impairing option.

111 The contextual factors speak to the degree of deference to be accorded to the particular means chosen by Parliament to implement a legislative purpose; see *Thomson Newspapers*, *supra*, at para. 111. In this case, the contextual factors indicate that the Court should afford deference to

the balance Parliament has struck between political expression and meaningful participation in the electoral process. As Berger J.A. in dissent aptly noted, at para. 268, "[t]he Court should not substitute judicial opinion for legislative choice in the face of a genuine and reasonable attempt to balance the fundamental value of freedom of expression against the need for fairness in the electoral process".

112 The Chief Justice and Major J. assert that short of spending well over $150,000 nationally and $3,000 in a given electoral district, citizens cannot effectively communicate their views on election issues to their fellow citizens (para. 9). Respectfully, this ignores the fact that third party advertising is not restricted prior to the commencement of the election period. Outside this time, the limits on third party intervention in political life do not exist. Any group or individual may freely spend money or advertise to make its views known or to persuade others. In fact, many of these groups are not formed for the purpose of an election but are already organized and have a continued presence, mandate and political view which they promote. Many groups and individuals will reinforce their message during an electoral campaign.

113 The nature of Canada's political system must be considered when deciding whether individuals and groups who engage in election advertising will be affected unduly by the limits set out in s. 350. First, as the Court discussed in *Figueroa*, there are few obstacles for individuals to join existing political parties or to create their own parties to facilitate individual participation in elections. Still, some will participate outside the party affiliations; this explains why the existence of multiple organizations and parties of varying sizes requires Parliament to balance their participation during the election period. Further, the reality in Canada is that regardless of the spending limits in the Act, the vast majority of Canadian citizens simply cannot spend $150,000 nationally or $3,000 in a given electoral district. What prevents most citizens from effectively exercising their right of political free speech as defined by the Chief Justice and Major J. is a lack of means, not legislative restrictions. Contrary to what the Chief Justice and Major J. say at para. 44, I do not suggest that since the breach of s. 2(*b*) only affects a few people, it is therefore justifiable. As discussed, the objective is to ensure the political discourse is not dominated by those who have greater resources. The proper focus is on protecting the right to meaningful participation of the entire electorate. Let me now examine in more detail how this is achieved.

114 Section 350 minimally impairs the right to free expression. The definition of "election advertising" in s. 319 only applies to advertising that is associated with a candidate or party. Where an issue is not associated with a candidate or political party, third parties may partake in an unlimited advertising campaign.

115 The $3,000 limit per electoral district and $150,000 national limit allow for meaningful participation in the electoral process while respecting the right to free expression. Why? First, because the limits established in s. 350 allow third parties to advertise in a limited way in some expensive forms of media such as television, newspaper and radio. But, more importantly, the limits are high enough to allow third parties to engage in a significant amount of low cost forms of advertising such as computer generated posters or leaflets or the creation of a 1-800 number. In addition, the definition of "election advertising" in s. 319 does not apply to many forms of communication such as editorials, debates, speeches, interviews, columns, letters, commentary, the news and the Internet which constitute highly effective means of conveying information. Thus, as the trial judge concluded, at para. 78, the limits allow for "modest, national, informational campaigns and reasonable electoral district informational campaigns".

116 Second, the limits set out in s. 350 are justifiably lower than the candidate and political party advertising limits, as recommended by the Lortie Commission. As this Court explained in *Libman, supra*, at paras. 49-50, the third party limit must be low enough to ensure that a particular candidate who is targeted by a third party has sufficient resources to respond. It cannot be forgotten that small political parties, who play an equally important role in the electoral process, may be easily overwhelmed by a third party having access to significant financial resources. The limits must also account for the fact that third parties generally have lower overall expenses than candidates and political parties. The limits must also appreciate that third parties tend to focus on one issue and may therefore achieve their objective less expensively. Thus, the limits seek to preserve a balance between the resources available to candidates and parties taking part in an election and those resources that might be available to third parties during this period. Professor Fletcher confirmed (in evidence) that the limits set out in s. 350 achieve this goal.

117 The Chief Justice and Major J. rely on the higher ratio of advertising spending limits for citizens to political parties in Britain as compared to Canada as evidence that the Canadian spending limits are too low (para. 8). In my view, this comparison is inappropriate. The British provisions apply to different categories of advertising and apply over different time periods.

118 Certainly, one can conceive of less impairing limits. Indeed, any limit greater than $150,000 would be less impairing. Nevertheless, s. 350 satisfies this stage of the *Oakes* analysis. The limits allow third parties to inform the electorate of their message in a manner that will not overwhelm candidates, political parties or other third parties. The limits preclude the voices of the wealthy from dominating the political discourse, thereby allowing more voices to be heard. The limits allow for meaningful participation in the electoral process and encourage informed voting. The limits promote a free and democratic society.

(f) *Proportionality*

119 The final stage of the *Oakes* analysis requires the Court to weigh the deleterious effects against the salutary effects.

120 Section 350 has several salutary effects. It enhances equality in the political discourse. By ensuring that affluent groups or individuals do not dominate the political discourse, s. 350 promotes the political expression of those who are less affluent or less capable of obtaining access to significant financial resources and ensures that candidates and political parties who are subject to spending limits are not overwhelmed by third party advertising. Section 350 also protects the integrity of the candidate and political party spending limits by ensuring that these limits are not circumvented through the creation of phony third parties. Finally, s. 350 promotes fairness and accessibility in the electoral system and consequently increases Canadians' confidence in it.

121 The deleterious effect of s. 350 is that the spending limits do not allow third parties to engage in unlimited political expression. That is, third parties are permitted to engage in informational but not necessarily persuasive campaigns, especially when acting alone. When weighed against the salutary effects of the legislation, the limits must be upheld. As the Court explained in *Libman, supra,* at para. 84:

> [P]rotecting the fairness of referendum campaigns is a laudable objective that will necessarily involve certain restrictions on freedom of expression. Freedom of political expression, so dear to our democratic tradition, would lose much val-

> ue if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process. [First emphasis in original; second emphasis added.]

Accordingly, s. 350 should be upheld as a demonstrably justified limit in a free and democratic society.

D. *Section 351: Splitting and Collusion*

122 The respondent alleges that s. 351 infringes the right to free expression, the right to vote and the right to free association. For convenience, I reproduce s. 351:

> **351.** A third party shall not circumvent, or attempt to circumvent, a limit set out in section 350 in any manner, including by splitting itself into two or more third parties for the purpose of circumventing the limit or acting in collusion with another third party so that their combined election advertising expenses exceed the limit.

The primary purpose of s. 351 is to preserve the integrity of the advertising expense limits established under s. 350. Thus, s. 351 is more properly viewed as ancillary to s. 350.

(1) Freedom of Expression

123 Section 351 does not infringe the right to free expression in purpose or effect.

(2) The Right to Vote

124 Section 351 does not violate the right to vote. There is no evidence indicating that the splitting and collusion rules infringe on the right to meaningfully participate in elections. Indeed, the provision enhances the right to vote by enforcing the third party advertising expense limits.

(3) Freedom of Association

125 The splitting and collusion provision does not violate s. 2(*d*) of the *Charter*. Section 2(*d*) will be infringed where the State precludes activity because of its associational nature, thereby discouraging the collective pursuit of common goals; see *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 16. It is only the associational aspect of the activity, not the activity itself, which is protected; see *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157, at para. 104.

126 Section 351 does not prevent individuals from joining to form an association in the pursuit of a collective goal. Rather, s. 351 precludes an individual or group from undertaking an activity, namely circumventing the third party election advertising limits set out in s. 350.

127 The trial judge relied on the Court's finding that s. 2(*d*) was infringed in *Libman* to conclude that s. 351 also infringed s. 2(*d*). This is an inappropriate comparison. The referenda legislation in *Libman* effectively forced individuals to associate with an affiliated or national committee to

incur regulated expenses. As discussed, this is not the case here. Section 351 exists only as a mechanism to enforce s. 350.

E. *Section 323: Advertising Blackout*

128 Section 323 prohibits anyone from knowingly transmitting election advertising on polling day before the closing of all the polling stations in the electoral district. The prohibition applies for approximately 20 hours (Cairns J., at para. 133), and does not apply to the media (Cairns J., at para. 134).

(1) Freedom of Expression

129 The appellant concedes that s. 323 infringes the right to free expression by prohibiting third parties from advertising on polling day.

(2) The Right to Vote

130 Section 323, like s. 350, engages the informational component of the right to vote. As discussed, the right to meaningful participation in the electoral process includes a citizen's right to exercise his or her vote in an informed manner. Section 323 does not infringe s. 3 of the *Charter* as it does not have an adverse impact on the information available to voters. The ban is of short duration, lasting only 20 hours. Further, the ban does not extend to media organizations. The ban only forecloses advertising from third parties, candidates or political parties. As the trial judge aptly concluded, at para. 134:

> If there is information that voters must have in the time immediately preceding polling day, it can most likely be obtained through the media, who are not covered by the ban. It is difficult to envision that the ban could lead to a deprivation of information such that a voter could not cast a rational and informed ballot.

Accordingly, there is no infringement of the right to vote.

(3) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

131 The provision infringing the right to free expression can be saved under s. 1.

132 The advertising blackout provision seeks to advance two objectives. First, it seeks to provide commentators and others with an opportunity to respond to any potentially misleading election advertising (Cairns J., at para. 303). To the extent that voters may be misled by third party advertising, this is a pressing and substantial objective. Berger J.A., in dissent, identified a second pressing and substantial objective (para. 283). The blackout rule ensures that electors in different parts of the country have access to the same information before they go to the polls.

133 The blackout period is rationally connected to preventing voters from relying on inaccurate information. It provides a period within which misleading advertising may be assessed, criticized and possibly corrected. This achieves a broader objective, discussed throughout: informed voting. The blackout period is also rationally connected to ensuring that all voters receive the same information where possible. The blackout period would preclude an election advertisement appearing in Western Canada after the polls had closed in Eastern Canada.

134 The blackout period is approximately 20 hours in duration in a 36-day campaign period. It only applies to advertising. The trial judge was correct to conclude that the provision is minimally impairing.

135 There is no evidence that the blackout period has had any deleterious effects. Accordingly, the infringement of freedom of expression in s. 323 is demonstrably justified in a free and democratic society.

F. *Sections 352 to 357, 359, 360 and 362: Attribution, Registration and Disclosure*

136 The attribution, registration and disclosure provisions set out several requirements that third parties must meet under certain circumstances. All third parties must identify themselves in any election advertising (s. 352). Third parties who spend $500 or more on election advertising must appoint a financial agent and register with the Chief Electoral Officer (ss. 353 and 354). The financial agent must accept all contributions made during an election period to a third party, and must incur all advertising expenses on behalf of the third party (s. 357). The Chief Electoral Officer must maintain and publish a registry of third parties (ss. 356 and 362). Third parties that spend $5,000 or more must appoint an auditor (s. 355). All third parties that spend $500 or more must file an election advertising report to the Chief Electoral Officer (ss. 359 and 360). The election advertising report must include the time and place of the broadcast or publication of the advertisement and the expenses associated with them; the amount of contributions for election advertising purposes received in the period beginning six months before the issue of the writ and ending on polling day; the name, address and class of each contributor who contributes $200 or more; and the amount paid out of the third party's own funds for election advertising expenses (s. 359). The Chief Electoral Officer, in turn, must publish the names and addresses of registered third parties and the election advertising reports within one year after the issue of the writ (s. 362).

137 The respondent challenges the various sections of the attribution, registration and disclosure provisions under ss. 2(*b*), 2(*d*) and 3 of the *Charter*. The attribution, registration and disclosure provisions are interdependent. Thus, their constitutionality must be determined together.

(1) Freedom of Expression

138 The attribution, registration and disclosure provisions infringe s. 2(*b*) as they have the effect of limiting free expression. Even where the purpose of the impugned measure is not to control or restrict attempts to convey a meaning, the effect of the government action may restrict free expression; see *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 976.

139 As discussed, the attribution, registration and disclosure provisions require third parties to provide information to the Chief Electoral Officer. Where a third party fails to provide this information, they are guilty of a strict liability offence under s. 496 and are subject to a fine, imprisonment or any other additional measure that the court considers appropriate to ensure compliance with the Act (ss. 500-501). In this way, the attribution, registration and disclosure obligations have the effect of restricting the political expression of those who do not comply with the scheme.

(2) The Right to Vote

140 The attribution, registration and disclosure provisions do not infringe s. 3 of the *Charter*. As discussed, s. 3 protects the right to meaningfully participate in the electoral process which includes the right to an informed vote. As Professor Aucoin explained in evidence:

> [The attribution, registration and disclosure provisions] advance the objective of an informed vote, an important objective in its own right. Transparency, in short, advances an informed vote. Secrecy does not. With disclosure, voters are made aware of who contributes and who spends in the electoral process and thus who stands behind electoral communications.

Thus, these provisions enhance the right to vote under s. 3.

(3) Freedom of Association

141 The respondent has not provided sufficient argument or evidence to establish that ss. 356, 357(3), 359 or 362 infringe s. 2(*d*) of the *Charter*.

(4) The Section 1 Justification Applicable to the Infringement of Freedom of Expression

142 The attribution, registration and disclosure provisions advance two objectives: first, the proper implementation and enforcement of the third party election advertising limits; second, to provide voters with relevant election information. As discussed, the former is a pressing and substantial objective. To adopt election advertising limits and not provide for a mechanism of implementation and enforcement would be nonsensical. Failure to do so would jeopardize public confidence in the electoral system. The latter objective enhances a *Charter* value, informed voting, and is also a pressing and substantial objective.

143 The registration and disclosure requirements are rationally connected to the enforcement of the election advertising regime. The registration requirement notifies the Chief Electoral Officer of which individuals and groups qualify as third parties subject to the advertising expense limits. The reporting requirement allows the Chief Electoral Officer to determine the extent to which third parties have advertised during an election. These measures enable the Chief Electoral Officer to scrutinize spending more easily. Certain provisions facilitate the supervision of third parties. The appointment of a financial agent or auditor as the designated person accountable for the administration of contributions to the third party advertising expenditures facilitates the reporting process and provides the Chief Electoral Officer with a contact who is responsible for all advertising expenses incurred by the third party. The Chief Electoral Officer is also empowered to request any original bill or receipt of an advertising expense greater than $50.

144 The disclosure requirements add transparency to the electoral process and are, therefore, rationally connected to providing information to voters. Third parties must disclose the names and addresses of contributors as well as the amount contributed by each. The Chief Electoral Officer, in turn, must disclose this information to the public. In conjunction with the attribution requirements, this information enables voters to identify who is responsible for certain advertisements. This is especially important where it is not readily apparent who stands behind a particular third party. Thus, voters can easily find out who contributes and who spends.

145 The attribution, registration and disclosure provisions are minimally impairing. The disclosure and reporting requirements vary depending on the amount spent on election advertising. The personal information required of contributors, name and address, is minimal. Where a corporation is a contributor, the name of the chief executive officer or president is required. The financial information that must be disclosed, contributions and advertising expenses incurred, pertains only to election advertising. The appointment of a financial agent or auditor is not overly onerous. Rather, it arguably facilitates the reporting requirements.

146 The salutary effects of the impugned measures outweigh the deleterious effects. The attribution, registration and disclosure requirements facilitate the implementation and enforcement of the third party election advertising scheme. By increasing the transparency and accountability of the electoral process, they discourage circumvention of the third party limits and enhance the confidence Canadians have in their electoral system. The deleterious effects, by contrast, are minimal. The burden is certainly not as onerous as the respondent alleges. There is no evidence that a contributor has been discouraged from contributing to a third party or that a third party has been discouraged from engaging in electoral advertising because of the reporting requirements.

VI. Conclusion

147 The appeal is allowed with costs throughout. I would answer the constitutional questions as follows:

1. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

   Sections 323(1) and (3), 350, 352, 353, 354, 355, 356, 357, 359, 360 and 362 infringe s. 2(*b*). In other words, all but s. 351 infringe s. 2(*b*).

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

   Yes.

3. Do ss. 323(1) and (3), 350, 351, 352, 353, 354, 355, 356, 357, 359, 360 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 3 of the *Canadian Charter of Rights and Freedoms*?

   No.

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

   It is not necessary to answer this question.

5. Do ss. 351, 356, 357(3), 359 and 362 of the *Canada Elections Act*, S.C. 2000, c. 9, infringe s. 2(*d*) of the *Canadian Charter of Rights and Freedoms*?

   No.

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

   It is not necessary to answer this question.

Solicitors:

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Code Hunter, Calgary.

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

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Quebec.

Solicitor for the intervener the Attorney General of Manitoba: Attorney General of Manitoba, Winnipeg.

Solicitors for the interveners Democracy Watch and National Anti-Poverty Organization: Bakerlaw, Toronto.

Solicitors for the intervener Environment Voters, a division of Animal Alliance of Canada: Paterson, MacDougall, Toronto.

TAB 9

Case Name:

Figueroa v. Canada (Attorney General)

Miguel Figueroa, appellant;
v.
Attorney General of Canada, respondent, and
Attorney General of Quebec, intervener.

[2003] S.C.J. No. 37

[2003] A.C.S. no 37

2003 SCC 37

2003 CSC 37

[2003] 1 S.C.R. 912

[2003] 1 R.C.S. 912

227 D.L.R. (4th) 1

306 N.R. 70

J.E. 2003-1228

176 O.A.C. 89

108 C.R.R. (2d) 66

123 A.C.W.S. (3d) 471

File No.: 28194.

Supreme Court of Canada

Heard: November 5, 2002;
Judgment: June 27, 2003.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major,

Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

(183 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Catchwords:

Constitutional law -- Charter of Rights -- Democratic rights of citizens -- Right to vote -- Right to be qualified for membership in House of Commons or provincial legislative assembly -- Right to meaningful participation in electoral process -- Canada Elections Act providing that political parties must nominate candidates in at least 50 electoral districts to qualify for certain benefits -- Whether provisions infringe right to vote or to run for office -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 3 -- Canada Elections Act, R.S.C. 1985, c. E-2, ss. 24(2), 24(3), 28(2).

Summary:

Under the *Canada Elections Act*, a political party must nominate candidates in at least 50 electoral districts in order to obtain, and then to retain, registered party status. Registered parties qualify for several benefits including the right of candidates to issue tax receipts for donations made outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers. The appellant challenged the constitutionality of the 50-candidate threshold. The trial judge held that the threshold was inconsistent with s. 3 of the *Canadian Charter of Rights and Freedoms* and that this infringement could not be justified under s. 1 of the *Charter*. The Court of Appeal held that the 50-candidate threshold was not inconsistent with s. 3 of the *Charter*, except to the extent that it denied candidates of non-registered parties the right to identify their party affiliation on the election ballot.

Held: The appeal should be allowed. Sections 24(2), 24(3) and 28(2) of the *Canada Elections Act* are declared unconstitutional. The declaration of unconstitutionality is suspended for 12 months.

Per McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ.: While on its face, s. 3 grants only a right to vote and to run for office in elections, *Charter* analysis requires looking beyond the words of the section and adopting a broad and purposive approach. The purpose of s. 3 is effective representation. Section 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government. This right is participatory and adverts only to a right to participate in the electoral process. This definition ensures that s. 3 is not construed too narrowly and emphasizes the reasons why individual participation is important, including respect for diverse opinions and the capacity of individuals to enhance democracy. Full political debate ensures an open society benefiting from diverse opinions and a social policy sensitive to the needs and interests of a broad range of citizens. Participation in the electoral process has an intrinsic value independent of the outcome of elections. The right to run for office provides an opportunity to present ideas and opinions to the electorate and the right to vote provides an opportunity for citizens to express support for ideas and opinions. In a democracy, sovereign power resides in the people as a whole and each citizen must have a genuine

opportunity to take part in the governance of the country through participation in the selection of elected representatives.

The right to play a meaningful role in the electoral process is not subject to countervailing collective interests. A proportionality analysis considering benefits related to other democratic values should occur under s. 1, where limitations on the right are to be justified. This analytical approach does not vary with the nature of the alleged breach nor is s. 3 qualified in the same sense as ss. 7 and 8 of the *Charter*. The fact that we identify its implicit content with qualified phrases such as a voter's right to be reasonably informed or a candidate's right to have a reasonable opportunity to present a position reflects only that s. 3 does not protect the right of each citizen to play an unlimited role in the electoral process. The aggregation of political preferences is not to be elevated to constitutional status nor does s. 3 protect values or objectives embedded in our current electoral system.

Members and supporters of political parties that nominate fewer than 50 candidates meaningfully participate in the electoral process. The ability of a party to make a valuable contribution is not dependent upon its capacity to offer the electorate a genuine "government option". Political parties have a much greater capacity than any one citizen to participate in debate and they act as a vehicle for the participation of individual citizens in the political life of the country. All political parties are capable of introducing unique interests and concerns into the political discourse and marginal or regional parties tend to raise issues not adopted by national parties. Political parties provide individual citizens with an opportunity to express an opinion on the policy and functioning of government. Each vote in support of a party increases the likelihood that its platform will be taken into account by those who implement policy and votes for parties with fewer than 50 candidates are an integral component of a vital and dynamic democracy.

Withholding the right to issue tax receipts and to retain unspent election funds from candidates of parties that have not met the 50-candidate threshold undermines the right of each citizen to meaningful participation in the electoral process. Section 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation. Political parties that have satisfied the threshold requirement have more resources for communication than those that have not. The 50-candidate threshold thus infringes s. 3 of the *Charter* by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders. Moreover, the right to vote in accordance with preferences requires each citizen to have information to assess party platforms and the legislation undermines the right to information protected by s. 3.

Withholding the right to list party affiliations on ballots from parties that have not satisfied the 50-candidate threshold also infringes s. 3 of the *Charter*. First, withholding this benefit diminishes the capacity of individual citizens to participate in the public discourse since there is a close connection between the support a party receives in an election and its capacity to influence policy. Second, it undermines the right of each citizen to make an informed choice and to vote according to preference. Affiliation has a significant informational component and some voters may be unable to vote for a preferred candidate if the party affiliation is not listed on the ballot paper.

The infringement is not saved by s. 1 of the *Charter*. While the objective of ensuring the cost-efficiency of the tax credit scheme is pressing and substantial, the 50-candidate threshold does not meet the proportionality branch of the *Oakes* test. There is no connection whatsoever between the objective and the threshold requirement with respect to transfers of unspent election funds or

listing party affiliations on ballot papers. Nor is the restriction on the right of political parties to issue tax receipts for donations received outside the election period rationally connected to the objective. The connection between legislation that has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective is tenuous at best. Moreover, the government has provided no evidence that the threshold actually improves the cost-efficiency of the tax credit scheme. The legislation also fails the minimal impairment test because cost savings can be achieved without violating s. 3. Further, any benefits associated with the reduced costs of the tax credit scheme do not outweigh the deleterious effects of this legislation.

While preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state, this objective provides no justification for the restriction on the right of candidates to list their party affiliation on the ballot papers. The same is true of the restriction on the right to issue tax credits and the right to transfer unspent election funds to the party. Furthermore, even if the restrictions on the right to issue the tax credit and the right to retain unspent election funds prevent the misuse of the electoral financing regime, the legislation fails the minimal impairment test. In each instance, the government has failed to demonstrate that it could not achieve the same results without violating s. 3 of the *Charter*.

Lastly, articulating the objective as ensuring a viable outcome for responsible government in the form of majority governments is problematic. In any event, the 50-candidate threshold fails the rational connection test and its salutary benefits have not been shown to outweigh its deleterious effects.

Per Gonthier, LeBel and Deschamps JJ.: While capacity to play a meaningful role in the electoral process is a core value of s. 3, stating the sole question at the infringement stage of the analysis as whether the legislation interferes with that capacity understates the complexity of effective representation and meaningful participation. These concepts comprise intertwined and opposed principles. The proper approach is to define the right through a contextual and historical analysis. The impugned legislation furthers significant democratic values by forming part of a scheme that recognizes and regulates political parties. The 50-candidate threshold benefits parties with broad appeal and encourages the aggregation of political will. These are important values, as evidenced by their place in our history and institutions, that in principle could be furthered at the price of compromising individual participation to a certain extent. In this case, however, the legislation goes too far and conflicts with s. 3.

Individual participation is of central importance, but s. 3 is also concerned with the representation of communities. Meaningful participation involves political groups and alliances between groups representing communities. Section 3 must also be interpreted in harmony with our political traditions and a purely individualistic approach is difficult to reconcile with Canadian political values. Not every government measure with an adverse impact on participation renders it meaningless and legislation to further other democratic values may compromise individual participation without necessarily depriving citizens of meaningful representation.

Diminution of one aspect of effective representation can ultimately result in more effective representation, suggesting that effective representation consists of many different components. Meaningful participation similarly comprises different aspects. It can be just as meaningful to participate as a member of a group as it is to participate as an individual. Enhancing group participation almost inevitably entails some cost to individual participation. The question is whether there is undue dilution of the individual citizen's capacity to participate, in other words, whether the opportunity to

make free choices or to compete fairly in the political process is so constricted that there is no genuine opportunity to participate.

The infringement analysis should not stop with a finding of interference with meaningful participation. It should examine the severity of the interference and the reason for it, considering all relevant contextual factors. Some balancing of competing values is appropriate when defining protected rights and values and a full proportionality analysis should consider the competing values in s. 3. Ascertaining whether s. 3 has been infringed requires acknowledging the need for an appropriate compromise between the competing forces that together define meaningful participation. The content and scope of every *Charter* right is determined with reference to its purpose, which may be connected to both individual and group concerns. Section 3 is not a qualified right but its implicit content is identified with qualified phrases. Section 3 ensures that voters are reasonably informed and that parties and candidates have a reasonable opportunity to present their positions. These implicit protections are to be included if s. 3 is to be given full effect. Section 3 cannot be understood without reference to its social and systemic context. Its exercise requires state involvement. It obliges the government to set up an electoral system providing for democratic government in accordance with voters' choices. Measuring the system requires assessing how well it represents both Canadian society as a whole and the groups that make up our social fabric. The analysis should consider whether it provides effective representation and meaningful participation, bearing in mind countervailing values including social and collective values. This is not equated with a s. 1 analysis but does depend on whether there are corresponding benefits related to other democratic values and whether the end result is a deprivation of meaningful participation.

The 50-candidate threshold furthers an aspect of effective representation that can validly be weighed against the value of individual participation. It enhances the aggregation of political preferences and promotes cohesion, values closely connected to the role of political parties in the Canadian electoral system. The threshold is part of a scheme furthering the important democratic values of accountability, political communication, and grassroots participation and cannot be divorced from its context for the purposes of constitutional scrutiny.

Legal recognition of parties necessitates a definition of a party. Parties develop policy and compete in elections. The registration system relates to their competitive role and making the benefits of registration available to groups that do not seriously compete in elections could undermine the scheme. The 50-candidate rule shuts out genuine competitors, however, and limits opportunities to support small parties. It would be possible to enhance democratic values without so large a threshold.

Inequities in the electoral system are not acceptable merely because they have historical precedent and institutions are not constitutional merely because they already exist. Our electoral infrastructure is deliberately designed to confer advantages on mainstream political movements. Our system of voting tends to produce majority governments and reflects a preference for broadly supported parties. The government has latitude in how to design the electoral system and the prerogative to choose to enhance aggregation of political will and cohesiveness. These values should be taken into account and our history and existing institutions identify a philosophy that recognizes values other than individual participation. Within the limits of what is permissible set by the right to meaningful participation, the legislative choice of a version of democratic representation is a matter in which this Court should not intervene. Regional representation, a third aspect and a component of effective representation and meaningful participation, is also implicated. Regional representation can conflict with the value of individual participation on an equal footing. Regional representation, although not

to be overstated, is one of the values to be taken into account in defining meaningful representation and determining whether government action offends s. 3.

The 50-candidate threshold infringes s. 3 by denying some candidates and their supporters the opportunity for meaningful participation. It is a burden for parties committed to running serious campaigns in a few ridings and it is not a perfect tool for aggregating political preferences or identifying parties with a commitment to electoral competition and a substantial political agenda. Nominating a candidate does not necessarily indicate support in a constituency. The rule can be over- or underinclusive and is potentially subject to manipulation. It permits registrations of parties viewed as far removed from mainstream politics or as single-issue movements. It can shut out parties with fully developed platforms and a genuine interest in electoral competition. Finally, it conflicts with regional representation and has a disparate impact in that registration of a single-province party can occur only in Ontario and Quebec.

The justifications advanced by the government have been considered in the infringement stage of this analysis and the finding that the threshold infringes s. 3 essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. There would be no reason in a full s. 1 analysis to doubt that the legislative objectives are pressing and substantial. The values furthered are consistent with some of the fundamental principles of a free and democratic society and favouring large parties may not be discordant with those principles. The Crown should not be required to demonstrate that the electoral system adopted by Parliament results in substantially better governance than an alternative system because it is hard to imagine how it would prove that proposition and the definition of good or better government should not be fixed as a legal standard. The Court risks unduly expanding the scope of judicial review of the design of the electoral system by suggesting that the motive behind the legislation may itself be illegitimate. Whatever system is adopted must respect the right of each individual to meaningful participation but that right should not be defined too inflexibly.

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By Iacobucci J.

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By LeBel J.

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Canada Elections Act, S.C. 2000, c. 9, ss. 370(1), 385.

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History and Disposition:

APPEAL from a judgment of the Ontario Court of Appeal (2000), 50 O.R. (3d) 161, 189 D.L.R. (4th) 577, 137 O.A.C. 252, [2000] O.J. No. 3007 (QL), varying a judgment of the Ontario Court (General Division) (1999), 43 O.R. (3d) 728, 170 D.L.R. (4th) 647, 61 C.R.R. (2d) 91, [1999] O.J. No. 689 (QL). Appeal allowed.

Counsel:

Peter Rosenthal and Kikelola Roach, for the appellant.

Roslyn J. Levine, Q.C., Gail Sinclair and Peter Hajecek, for the respondent.

Dominique A. Jobin and Sébastien Arès, for the intervener.

The judgment of McLachlin C.J. and Iacobucci, Major, Bastarache, Binnie and Arbour JJ. was delivered by

IACOBUCCI J.:--

I. Introduction

1 This appeal raises fundamental questions in respect of the democratic process in our country. More specifically, this appeal focusses on the purpose and meaning to be given to s. 3 of the *Canadian Charter of Rights and Freedoms*, which confers on each citizen the right to vote in the election of members of the House of Commons and the provincial legislative assemblies and to be qualified for membership therein. The issue is whether federal legislation that restricts access to certain benefits to parties that have nominated candidates in at least 50 electoral districts violates s. 3. I conclude that it does and would therefore allow the appeal.

II. Legislative Background

2 Under the *Canada Elections Act*, R.S.C. 1985, c. E-2 (the "*Elections Act*"), political parties seeking registered party status must comply with a number of requirements. A political party seeking registered party status must have at least 100 members and must appoint a leader, a chief agent and an auditor. These requirements are not at issue in this appeal.

3 At issue in this appeal is the requirement that a political party must nominate candidates in at least 50 electoral districts in order to obtain, and then to retain, registered party status:

24... .

(2) On receipt of an application for registration of a political party pursuant to subsection (1), the Chief Electoral Officer shall examine the application and determine whether the party can be registered under this section and

(*a*) where he determines that, on the nomination by the party of fifty candidates in accordance with paragraph 3(*a*) or (*b*), whichever is applicable, the party could be registered, so inform the leader of the party; or

(*b*) in any other case, inform the leader of the party that the party cannot be registered.

(3) Where the leader of a political party has been informed by the Chief Electoral Officer pursuant to paragraph 2(*a*) that, on the nomination of fifty candidates in accordance with paragraph (*a*) or (*b*), whichever is applicable, the party could be registered, the party shall be registered

(*a*) if the application for registration is filed within the period commencing with the day following polling day at one general election and terminating on the sixtieth day before the issue of writs for the next general election, on the day after the party had officially nominated candidates in fifty electoral districts at the next general election, or

(*b*) if the application for registration is filed within the period commencing with the fifty-ninth day before the issue of writs for a general election and terminating on polling day at that election, on the day after the party has officially nominated candidates in fifty electoral districts at the general election next following the general election falling within that period,

and if the political party fails to nominate fifty candidates in accordance with paragraph (*a*) or (*b*), whichever is applicable, the Chief Electoral Officer shall inform the leader of the party that the party cannot be registered.

28... .

(2) The Chief Electoral Officer shall, on the close of nominations at a general election, delete from the registry referred to in subsection 24(1), any registered party that did not at the close of nominations on that day have candidates in at least fifty of the electoral districts.

4 Upon obtaining registered party status, a political party is qualified for a number of benefits. Among these benefits is the right to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote. The constitutionality of withholding these benefits from political parties that have not satisfied the 50-candidate threshold is not at issue in this appeal. The only benefits that will be considered in this appeal are the right of a political party to issue tax receipts for donations received outside the election period, the right of a candidate to transfer unspent election funds to the party

(rather than remitting them to the government), and the right of a party's candidates to list their party affiliation on the ballot papers.

5 The right of the party to issue tax receipts for donations received outside the election period is provided for by s. 127(3) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.):

> **127...** .
>
> (3) There may be deducted from the tax otherwise payable by a taxpayer under this Part for a taxation year in respect of the total of all amounts each of which is a monetary contribution made by the taxpayer in the year to a registered party or to a candidate whose nomination has been confirmed in an election of a member or members to serve in the House of Commons of Canada (in this section referred to as "the total"),
>
> (*a*) 75% of the total, if the total does not exceed $200,
>
> (*b*) $150 plus 50% of the amount by which the total exceeds $200, if the total exceeds $200 and does not exceed $550, or
>
> (*c*) the lesser of
>
> (i) $325 plus 33 1/3% of the amount by which the total exceeds $550, and
> (ii) $500,
>
> if payment of each monetary contribution that is included in the total is proven by filing a receipt with the Minister, signed by a registered agent of the registered party or by the official agent of the candidate whose nomination has been confirmed, as the case may be, that contains prescribed information.

6 The right of a candidate to transfer unspent election funds to the party rather than the Receiver General is provided for by s. 232 of the *Elections Act*:

> **232.** Where the aggregate of all money received by
>
> (*a*) an official agent of a candidate pursuant to paragraph 217(1)(*b*),
>
> (*b*) the official agent pursuant to sections 241 to 247, and
>
> (*c*) the candidate as a refund under this Act of the deposit made by him pursuant to paragraph 81(1)(*j*),
>
> is in excess of the amount required by the candidate to pay the aggregate of the deposit referred to in paragraph 81(1)(*j*) and

(*d*) election expenses and all other reasonable expenses incidental to the election,

(*e*) personal expenses,

(*f*) auditor's fees in excess of the amount paid under paragraph 243(4)(*b*) or subsection 244(2), and

(*g*) costs with respect to a recount pursuant to subsection 171(1) or sections 176 to 184 of the votes cast in his electoral district, to the extent that the costs exceed any amount paid to the candidate by the Receiver General pursuant to subsection 171(5),

incurred by him in relation to the election, the amount of the excess shall be paid by the official agent,

(*h*) where the political affiliation of the candidate was shown on the ballot paper as a registered party, to any local organization or association of members of the party in the electoral district of the candidate or to the registered agent of the party, or

(*i*) in any other case, to the Receiver General,

within one month after the official agent of the candidate receives reimbursement pursuant to subsection 243(4) in respect of the candidate's election expenses or two months after the filing by the official agent of the return respecting election expenses in respect of the candidate, whichever is the later.

7 Finally, the right of the party's candidates to list their party affiliation on the ballot papers is provided for by s. 100 of the *Elections Act*:

100. (1) All ballot papers shall be of the same description and as nearly alike as possible and each ballot paper shall be a printed paper on which

(*a*) the names of the candidates, alphabetically arranged in the order of their surnames, shall be set out as those names appear in their nomination papers;

(*b*) the political affiliation of each candidate, if any, as indicated under section 81 at the time of nomination of the candidate, shall be set out, after or under the name of the candidate;

...

(2) Notwithstanding subsection (1), where a candidate at an election has filed an instrument in writing pursuant to paragraph 81(1)(*h*) stating that the po-

> litical affiliation of the candidate is a registered party named in the instrument and the registered party is deleted from the registry by the Chief Electoral Officer, either before or after nomination of the candidate, neither the word "independent" nor any other political affiliation shall be set out after or under the name of the candidate on the ballot paper for the electoral district for which the candidate has been nominated.

8 The effect of these provisions is that candidates nominated by political parties that have not satisfied the 50-candidate threshold are not entitled to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party or to list their party affiliation on the ballot papers.

III. Judicial History

A. *Ontario Court (General Division)* (1999), 43 O.R. (3d) 728

9 Molloy J. held that implicit in the right to vote is the right to vote in a fair and democratic election in which all participants are treated as equals. She was of the view that the values underlying the *Charter* demand that democratic rights be available to all citizens on an equal basis. As a consequence, if the government decides to extend a benefit to one political party, that benefit must be equally available to all political parties. Because the effect of the 50-candidate threshold is that only certain political parties are entitled to the benefits in question, Molloy J. found that the threshold is inconsistent with the right of each citizen to run for office. It also is inconsistent with s. 3 of the *Charter* because it deprives voters of the information necessary to make an informed decision. It was her conclusion that the right to vote includes the right to be fully informed as to the party affiliation of each candidate.

10 Molloy J. then held that this infringement of s. 3 could not be justified under s. 1 of the *Charter* because the stated objective of distinguishing between parties with different levels of support was not pressing and substantial. She held that providing benefits only to those political parties with a broad base of support is the very antithesis of a true democracy. Moreover, even if that objective could be characterized as pressing and substantial, the legislation would fail the *Oakes* test because the 50-candidate threshold is not rationally connected to that objective since the 50-candidate threshold does not accurately measure public support.

11 Molloy J. thus ordered that the 50-candidate threshold for registered party status be read down to a 2-candidate threshold. The Attorney General appealed to the Court of Appeal for Ontario.

B. *Ontario Court of Appeal* (2000), 50 O.R. (3d) 161

12 Doherty J.A. held that Molloy J. was incorrect to conclude that s. 3 includes a general fairness requirement that requires that benefits provided to some political parties must be provided to all political parties. In his view, the question of whether the 50-candidate threshold violates s. 3 of the *Charter* must be determined with reference to the purpose of s. 3, which is the protection of the right to "effective representation" (para. 69). The issue to be determined, then, is whether the favoured treatment of political parties that nominate candidates in 50 or more electoral districts is inconsistent with the right to effective representation.

13 According to Doherty J.A., effective representation is the desired end product of the electoral process. On this view, the capacity of a political party to enhance effective representation be-

comes operative only where the party structures voter choice at the national level and offers the electorate an opportunity to become involved in the choosing of a government. As a consequence, statutory provisions that bestow benefits on political parties as a means of enhancing effective representation properly distinguish between (i) parties whose commitment to the process is sufficient to serve that goal and (ii) parties whose commitment is so minimal as to be incapable of serving that goal. Doherty J.A. found that the 50-candidate threshold is an acceptable means of gauging that level of commitment.

14 With respect to the right of candidates to identify their party affiliation on election ballots, Doherty J.A. held that the right to effective representation includes the right to make an informed, rational choice. Because the identification of party affiliation is an essential aspect of this right, extending this benefit only to registered parties constitutes a violation of s. 3 of the *Charter*. Doherty J.A. held that this violation could not be saved under s. 1. Although the objective of ensuring that voters are not confused or misled by information on election ballots is pressing and substantial, the 50-candidate threshold fails the minimal impairment test, owing to the fact that it extends the prohibition to instances in which there is no danger that the identification of a candidate's party affiliation would confuse or mislead voters.

15 Doherty J.A. thereby determined that the requirement that a political party must nominate at least 50 candidates to attain registered party status is not inconsistent with s. 3 of the *Charter*, except to the extent that it denies candidates of non-registered parties the right to identify their party affiliation on the election ballot.

IV. Issues

16 The question to be determined in this appeal is whether ss. 24(2), 24(3) and 28(2) of the *Elections Act* infringe s. 3 of the *Charter* by withholding from candidates nominated by political parties that have failed to satisfy the 50-candidate threshold the right to issue tax receipts for donations received outside the election period, the right to transfer unspent election funds to the party, and the right to list their party affiliation on the ballot papers -- and, if so, whether that infringement is reasonable and demonstrably justified under s. 1 of the *Charter*.

17 The appellant also submits that ss. 24(2), 24(3) and 28(2) of the *Elections Act* infringe ss. 2(*d*) and 15(1) of the *Charter*, and that those infringements cannot be justified under s. 1. Having determined that this matter can be disposed of solely with reference to s. 3 of the *Charter*, I do not address either of those submissions. I also note that this appeal centres on participation in the electoral process that precedes the Parliamentary process. Hence, the manner in which Parliament determines which political parties have official status in the House of Commons is not at issue in this appeal.

V. Analysis

A. *Does the 50-Candidate Threshold Violate Section 3 of the Charter?*

18 The first question to be determined in this appeal is whether the restriction on the right of candidates to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party, and to list their party affiliation on the ballot papers infringes s. 3 of the *Charter*. This requires the Court to perform two tasks. The first is to define the purpose of s. 3 of the *Charter*. The second is to evaluate the 50-candidate threshold in light of that definition in order to determine whether it violates s. 3 of the *Charter*.

(1) Section 3 of the *Charter*

19 Under s. 3 of the *Charter*, "[e] very 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". On its face, the scope of s. 3 is relatively narrow: it grants to each citizen no more than the bare right to vote and to run for office in the election of representatives of the federal and provincial legislative assemblies. But *Charter* analysis requires courts to look beyond the words of the section. In the words of McLachlin C.J.B.C.S.C. (as she then was), "[m]ore is intended [in the right to vote] than the bare right to place a ballot in a box": *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, at p. 403.

20 In order to determine the scope of s. 3, the Court must first ascertain its purpose . As Dickson J. (as he then was) wrote in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 344, "[t]he interpretation [of a section of the *Charter*] should be ... 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". In interpreting the scope of a *Charter* right, courts must adopt a broad and purposive approach that seeks to ensure that duly enacted legislation is in harmony with the purposes of the *Charter*.

21 This Court first considered the purpose of s. 3 in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"). In determining that s. 3 does not require absolute equality of voting power, McLachlin J. held that the purpose of s. 3 is "effective representation" (p. 183). This Court has subsequently confirmed, on numerous occasions, that the purpose of s. 3 is effective representation: see *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; and *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877.

22 The Court of Appeal for Ontario concluded that effective representation is "the desired end product of the electoral process" (para. 80). In particular, it found that effective representation exists where the electoral process results in the formation of a majority government that has structured choice and aggregated preferences at the national level. On this view, the purpose of s. 3 is engaged only by those political parties that possess the capacity to aggregate interests on a national level and participate in the governance of the country subsequent to an election. A party that does not participate in an election with a view to forming a government, or at least of winning a substantial number of seats in Parliament, is not a party that possesses the capacity to advance the objective of effective representation . Thus, it is not improper to withhold benefits from political parties whose level of participation is so minimal as to be incapable of serving that goal.

> [para23]With respect, this is not how I understand McLachlin J.'s statement that the purpose of s. 3 is effective representation. In my view, McLachlin J. was not referring to a collective interest in a desired end product of the electoral process that results in majority government. Rather, my colleague emphasized the right of each citizen to an effective representative in the legislative assembly. She wrote, at p. 183: 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. [First emphasis added; second emphasis in original.]

The issue in that case was not whether the departure from absolute voter parity could be justified by virtue of the benefits that it provided to rural voters, but whether the departure from absolute voter parity was inconsistent with the right of urban voters to an effective representative in the legislative assembly. The Court concluded that the departure from absolute voter parity was consistent with s. 3, not because the departure provided for the more effective representation of rural voters, but, rather, because it did not interfere with the right of urban voters to an effective representative in the legislative assembly.

24 Consequently, I do not agree with LeBel J.'s conclusion, at para. 117 of his reasons, that the *Saskatchewan Reference* established that the diminution of one aspect of effective representation (parity) can ultimately result in the provision of more effective representation. Rather, the *Saskatchewan Reference* established that it is a mistake to conflate the right of each citizen to effective representation with a right to absolute voter parity. As McLachlin J. wrote, at p. 181, "practical considerations such as social and physical geography may impact on the value of the citizen's right to vote" (emphasis added). The *Saskatchewan Reference, supra*, instructs us that it may be necessary to consider a broad range of social factors prior to determining that a departure from absolute voter parity does, in fact, interfere with the right of each citizen to effective representation. If the departure from absolute voter parity does not interfere with the right of each citizen to effective representation, it does not infringe s. 3.

25 But the right to effective representation contemplates more than the right to an effective representative in Parliament or a legislative assembly. In *Haig, supra*, L'Heureux-Dubé J., for the majority of the Court, summarized McLachlin J.'s discussion of the purpose of s. 3 as follows (at p. 1031):

> Clearly, in a democratic society, the right to vote as expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:
>
> > ... the purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se*, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative.
>
> The purpose of s. 3 of the *Charter* is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legisla-

> tion for which they will be accountable to their electorate. [First emphasis in original; second emphasis added.]

As this passage indicates, this Court has already determined that the purpose of s. 3 includes not only the right of each citizen to have and to vote for an elected representative in Parliament or a legislative assembly, but also to the right of each citizen to play a meaningful role in the electoral process. This, in my view, is a more complete statement of the purpose of s. 3 of the *Charter*.

26 Support for the proposition that s. 3 should be understood with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government, is found in the fact that the rights of s. 3 are participatory in nature. Section 3 does not advert to the composition of Parliament subsequent to an election, but only to the right of each citizen to a certain level of participation in the electoral process. On its very face, then, the central focus of s. 3 is the right of each citizen to participate in the electoral process. This signifies that the right of each citizen to participate in the political life of the country is one that is of fundamental importance in a free and democratic society and suggests that s. 3 should be interpreted in a manner that ensures that this right of participation embraces a content commensurate with the importance of individual participation in the selection of elected representatives in a free and democratic state. Defining the purpose of s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process, rather than the composition of Parliament subsequent to an election, better ensures that the right of participation that s. 3 explicitly protects is not construed too narrowly.

27 An understanding of s. 3 that emphasizes the right of each citizen to play a meaningful role in the electoral process also is sensitive to the full range of reasons that individual participation in the electoral process is of such importance in a free and democratic society. As Dickson C.J. wrote i n *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.

In this passage, Dickson C.J. was addressing s. 1. Yet since reference to "a free and democratic society" is essential to an enriched understanding of s. 3, this passage indicates that the best interpretation of s. 3 is one that advances the values and principles that embody a free and democratic state, including respect for a diversity of beliefs and opinions. Defining the purpose of s. 3 with reference to the right of each citizen to meaningful participation in the electoral process, best reflects the capacity of individual participation in the electoral process to enhance the quality of democracy in this country.

28 As this Court frequently has acknowledged , the free flow of diverse opinions and ideas is of fundamental importance in a free and democratic society. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at pp. 763-64, Dickson C.J. described the connection between the free flow of diverse opinions and ideas and the values essential to a free and democratic society in the following terms:

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(*b*) guarantee, and the nature of this connection is

> largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.

Put simply, full political debate ensures that ours is an open society with the benefit of a broad range of ideas and opinions: see *Switzman v. Elbling*, [1957] S.C.R. 285, at p. 326; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, at p. 583; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1336; and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 23. This, in turn, ensures not only that policy makers are aware of a broad range of options, but also that the determination of social policy is sensitive to the needs and interests of a broad range of citizens.

29 It thus follows that participation in the electoral process has an intrinsic value independent of its impact upon the actual outcome of elections. To be certain, the electoral process is the means by which elected representatives are selected and governments formed, but it is also the primary means by which the average citizen participates in the open debate that animates the determination of social policy. The right to run for office provides each citizen with the opportunity to present certain ideas and opinions to the electorate as a viable policy option; the right to vote provides each citizen with the opportunity to express support for the ideas and opinions that a particular candidate endorses. In each instance, the democratic rights entrenched in s. 3 ensure that each citizen has an opportunity to express an opinion about the formation of social policy and the functioning of public institutions through participation in the electoral process.

30 In the final analysis, I believe that the Court was correct in *Haig*, *supra*, to define s. 3 with reference to the right of each citizen to play a meaningful role in the electoral process. Democracy, of course, is a form of government in which sovereign power resides in the people as a whole. In our system of democracy, this means that each citizen must have a genuine opportunity to take part in the governance of the country through participation in the selection of elected representatives. The fundamental purpose of s. 3, in my view, is to promote and protect the right of each citizen to play a meaningful role in the political life of the country. Absent such a right, ours would not be a true democracy.

31 For this reason, I cannot agree with LeBel J. that it is proper, at this stage of the analysis, to balance the right of each citizen to play a meaningful role in the electoral process against other democratic values, such as the aggregation of political preferences. Legislation that purports to encourage the aggregation of political preferences might advance certain collective interests, but it does not benefit all citizens, namely, those whose interests are not aggregated by the mainstream political parties. As a result, the proportionality analysis endorsed by LeBel J. clearly admits of the possibility that collective or group interests will be balanced against the right of each citizen to play a meaningful role in the electoral process at the infringement stage of the analysis. If the government is to interfere with the right of each citizen to play a meaningful role in the electoral process in order to advance other values, it must justify that infringement under s. 1.

32 This approach is consistent with the well-established principle that limitations on the individual rights that the *Charter* protects must be justified under s. 1. As this Court repeatedly has affirmed, this is no less true of s. 3 than it is of other sections of the *Charter*: see for example *Harvey, supra*, at p. 897, and *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 11, in which McLachlin C.J. wrote that the ambit of s. 3 "should not be limited by countervailing collective concerns". LeBel J. distinguishes this case from *Harvey* and *Sauvé* on the basis that those cases involved a literal prohibition on the right to vote or to run for office, whereas this case involves the conditions under which citizens exercise those rights. In his view, legislation that affects the conditions under which citizens vote or run for an election without directly clashing with its plain language calls for a different kind of analysis, namely, one that involves a balancing of competing values.

33 With respect, I do not agree with LeBel J. that the proper analytical approach varies with the nature of the alleged breach. The only difference, in my view, is one of proof. As discussed throughout, the purpose of s. 3 is to protect the right of each citizen to play a meaningful role in the electoral process. Where the impugned legislation is inconsistent with the express language of s. 3, it is unnecessary to consider the broader social or political context in order to determine whether the legislation interferes with the right of each citizen to play a meaningful role in the electoral process. It is plain and obvious that the legislation has this effect. But where the legislation affects the conditions in which citizens exercise those rights it may not be so obvious whether the legislation has this effect. Consequently, it may be necessary to consider a broad range of factors, such as social or physical geography, in order to determine whether the legislation infringes the right of each citizen to play a meaningful role in the electoral process. In neither instance, however, is the right of each citizen to play a meaningful role in the electoral process subject to countervailing collective interests. These interests fall to be considered under s. 1.

34 As this suggests, I do not believe that the right to play a meaningful role in the electoral process is a " qualified" right, in the same sense as the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (s. 7) or the right to be secure against unreasonable search and seizure (s. 8). It should be noted that the language of s. 7 and s. 8 contains balancing language within the provisions themselves. Accordingly, it is not only appropriate but obligatory to recognize this in interpreting their meaning: see for example *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; and *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, which are referenced by my colleague.

35 According to LeBel J., the fact that we identify the implicit content of s. 3 with reference to qualified phrases such as the right a voter to be "reasonably informed of all the possible choices", or the right of parties and candidates to have "a reasonable opportunity to present their positions" (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47 (emphasis added)) indicates that the balancing of individual and collective interests that is appropriate in the context of the expressly "qualified" rights also applies under s. 3, except when literal disqualifications are at issue.

36 In my view, the use of such language does not indicate that the right of each citizen to play a meaningful role in the electoral process is to be balanced against countervailing values, such as the collective interest in the aggregation of political preferences. Rather, the use of such phrases reflects that the purpose of s. 3 is not to protect the right of each citizen to play an unlimited role in the electoral process, but to protect the right of each citizen to play a meaningful role in the electoral process; the mere fact that the legislation departs from absolute voter equality or restricts the capac-

ity of a citizen to participate in the electoral process is an insufficient basis on which to conclude that it interferes with the right of each citizen to play a meaningful role in the electoral process. But if the legislation does, in fact, interfere with the capacity of each citizen to play a meaningful role in the electoral process, it is inconsistent with s. 3. Any corresponding benefits related to democratic values other than the right of each citizen to play a meaningful role must be considered under s. 1.

37 Finally, although certain aspects of our current electoral system encourage the aggregation of political preferences, I do not believe that this aspect of the current electoral system is to be elevated to constitutional status. In his reasons, LeBel J. argues that first-past-the-post elections favour mainstream parties that have aggregated political preferences on a national basis. This might, indeed, be true. But the fact that our current electoral system reflects certain political values does not mean that those values are embedded in the *Charter*, or that it is appropriate to balance those values against the right of each citizen to play a meaningful role in the electoral process. After all, the *Charter* is entirely neutral as to the type of electoral system in which the right to vote or to run for office is to be exercised. This suggests that the purpose of s. 3 is not to protect the values or objectives that might be embedded in our current electoral system, but, rather, to protect the right of each citizen to play a meaningful role in the electoral process, whatever that process might be.

(2) Does the 50-Candidate Threshold Violate Section 3?

38 Consequently, the essential question to be determined is whether the 50-candidate threshold interferes with the capacity of individual citizens to play a meaningful role in the electoral process. In order to answer this question, the Court must answer two prior questions. First, do the members and supporters of political parties that nominate fewer than 50 candidates play a meaningful role in the electoral process? And if so, does the restriction on the right to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to list their party affiliation on the ballot papers interfere with the capacity of the members and supporters of political parties that nominate fewer than 50 candidates to play a meaningful role in the electoral process?

(a) *The Role of Political Parties that Nominate Candidates in Fewer Than 50 Electoral Districts*

39 According to the Court of Appeal, the essential function of a political party only becomes operative where it assumes a level of participation in the electoral process sufficient to indicate that it aspires to participate in the governance of the country subsequent to the election. It is my conclusion that the ability of a political party to make a valuable contribution to the electoral process is not dependent upon its capacity to offer the electorate a genuine "government option". Rather, political parties enhance the meaningfulness of individual participation in the electoral process for reasons that transcend their capacity (or lack thereof) to participate in the governance of the country subsequent to an election. Irrespective of their capacity to influence the outcome of an election, political parties act as both a vehicle and outlet for the meaningful participation of individual citizens in the electoral process.

40 With respect to the ability of a political party to act as an effective vehicle for the meaningful participation of individual citizens in the electoral process, it is important to note that political parties have a much greater capacity than any one citizen to participate in the open debate that the electoral process engenders. By doing so in a representative capacity, on behalf of their members

and supporters, political parties act as a vehicle for the participation of individual citizens in the political life of the country. Political parties ensure that the ideas and opinions of their members and supporters are effectively represented in the open debate occasioned by the electoral process and presented to the electorate as a viable option. If those ideas and opinions are not subsequently adopted by the government of the day, it is not because they have not been considered, but, rather, because they have received insufficient public support.

41 Importantly, it is not only large political parties that are able to fulfil this function. It likely is true that a large party will be able to play a larger role in the open discourse of the electoral process, but it does not thereby follow that the capacity of a political party to represent the ideas and opinions of its members and supporters in the electoral process is dependent upon its capacity to offer the electorate a "government option". Large or small, all political parties are capable of introducing unique interests and concerns into the political discourse. Consequently, all political parties, whether large or small, are capable of acting as a vehicle for the participation of individual citizens in the public discourse that animates the determination of social policy.

42 For example, marginal or regional parties tend to dissent from mainstream thinking and to bring to the attention of the general public issues and concerns that have not been adopted by national parties. They might exert less influence than the national parties, but still can be a most effective vehicle for the participation of individual citizens whose preferences have not been incorporated into the political platforms of national parties. It is better that an individual citizen have his or her ideas and concerns introduced into the open debate of the electoral process by a political party with a limited geographical base of support than not to have his or her ideas and concerns introduced into that debate by any political party at all.

43 In respect of their ability to act as an effective outlet for the meaningful participation of individual citizens in the electoral process, the participation of political parties in the electoral process also provides individuals with the opportunity to express an opinion on governmental policy and the proper functioning of public institutions. A vote for a candidate nominated by a particular party is an expression of support for the platform or policy perspectives that the party endorses. The participation of political parties thereby enhances the capacity of individual citizens to express an opinion as to the type of country that they would like Canada to be through the exercise of the right to vote.

44 Once again, the capacity of a political party to provide individual citizens with an opportunity to express an opinion on governmental policy and the proper functioning of public institutions is not dependent upon its capacity to participate in the governance of the country subsequent to an election. As the preceding paragraph suggests, participation as a voter is not only about the selection of elected representatives. Irrespective of its effect on the outcome of an election, a vote for a particular candidate is an expression of support for a particular approach or platform. Whether that vote contributes to the election of a candidate or not, each vote in support of that approach or platform increases the likelihood that the issues and concerns underlying that platform will be taken into account by those who ultimately implement policy, if not now then perhaps at some point in the future.

45 As a consequence, there is no reason to think that political parties that have not satisfied the 50-candidate threshold do not act as an effective outlet for the meaningful participation of individual citizens in the electoral process. There is no correlation between the capacity of a political party to offer the electorate a government option and the capacity of a political party to formulate a unique policy platform for presentation to the general public. In each election, a significant number

of citizens vote for candidates nominated by registered parties in full awareness that the candidate has no realistic chance of winning a seat in Parliament -- or that the party of which she or he is a member has no realistic chance of winning a majority of seats in the House of Commons. Just as these votes are not "wasted votes", votes for a political party that has not satisfied the 50-candidate threshold are not wasted votes either. As a public expression of individual support for certain perspectives and opinions, such votes are an integral component of a vital and dynamic democracy.

46 It is thus my conclusion that the members and supporters of political parties that nominate candidates in fewer than 50 electoral districts do play a meaningful role in the electoral process. They are both a vehicle for the participation of individual citizens in the open debate occasioned by the electoral process and an outlet for the expression of support for political platforms that are different from those adopted by political parties with a broad base of support. The question that thus arises is whether the 50-candidate threshold interferes with the right of such citizens to play a meaningful role in the electoral process.

(b) *The Impact of the 50-Candidate Threshold*

47 As outlined earlier, the effect of the 50-candidate threshold is to extend the benefits of registration only to those parties that have nominated candidates in 50 electoral districts. At issue in this appeal are the rights of candidates to issue tax receipts for donations received outside the election period, to transfer unspent election funds to the party and to include their party affiliation on the ballot papers. The question to be determined is whether withholding these benefits from candidates of parties who have not met the 50-candidate threshold undermines the right of each citizen to meaningful participation in the electoral process. In each instance, it is my opinion that the threshold does, in fact, have this effect.

(i) The Right to Issue Tax Receipts and to Retain Unspent Election Funds

48 I begin by noting that it is not my position that s. 3 imposes upon Parliament a freestanding obligation to extend to political parties the right to issue tax credits for donations received outside the election period or to extend to candidates the right to transfer unspent election funds to the party. Section 3 prevents Parliament from interfering with the right of each citizen to play a meaningful role in the electoral process; it does not impose upon Parliament an obligation to enact legislation that enhances the capacity of political parties to raise funds for the purpose of communicating the ideas and opinions of its members and supporters to the general public. However, legislation that bestows a benefit upon some political parties, but not others, requires scrutiny. In this instance, it is only because Parliament has extended these benefits to political parties that satisfy the 50-candidate threshold that its consequent failure to extend these benefits to political parties that do not satisfy the threshold constitutes an infringement of s. 3.

49 The premise underlying this conclusion is a fairly simple one. Owing to the competitive nature of the electoral process, the capacity of one citizen to participate in the electoral process is closely connected to the capacity of other citizens to participate in the electoral process. The reason for this is that there is only so much space for political discourse; if one person "yells" or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse. It is possible, in other words, that the voices of certain citizens will be drowned out by the voices of those with a greater capacity to communicate their ideas and opinions to the general public.

50 It is thus my conclusion that s. 3 imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process. Where legislation extends a benefit to some citizens, but not to others, it is necessary to consider carefully the impact of that legislation on the citizens who have not received the benefit. If the legislation interferes with the right of certain citizens to play a meaningful role in the social discourse and dialogue that the electoral process engenders, it is inconsistent with s. 3 of the *Charter*.

51 Put differently, one might say that s. 3 imposes on Parliament an obligation not to interfere with the right of each citizen to participate in a fair election. As the Court observed in *Libman, supra,* at para. 47, electoral fairness is a fundamental value of democracy:

> The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens... . Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions... .

Importantly, this requirement of fairness is not synonymous with formal equality: see the *Saskatchewan Reference, supra,* in which the Court determined that s. 3 does not require absolute voter parity. It is not enough to offend s. 3 that the legislation differentiates between one citizen and another, or one political party or another. It also is necessary that the differential treatment have an adverse impact upon the applicant's right to play a meaningful role in the electoral process.

52 The effect of the restriction on the right to issue tax receipts for donations received outside the election period is that parties that have satisfied the 50-candidate threshold are able to raise more funds than they would otherwise be able to raise. Similarly, the effect of the restriction on the right to transfer unspent election funds to the party rather than the Receiver General is that only parties that have satisfied the 50-candidate threshold are able to retain unspent election funds. In each instance, the effect of the threshold is that political parties that have satisfied the threshold requirement have more resources at their disposal for the purpose of communicating their ideas and opinions to the general public. The flip side of the coin is that it is even more difficult for a party that has not satisfied the 50-candidate threshold to publicize its own ideas and views. As the Court observed in *Libman, supra,* at para. 47, there already is reason to be concerned that the most affluent parties will dominate the public discourse and deprive their opponents of a reasonable opportunity to speak and to be heard . Legislation that augments this disparity increases the likelihood that the already marginalized voices of political parties with a limited geographical base of support will be drowned out by mainstream parties with an increased ability to both raise and retain election funds.

53 This, in turn, diminishes the capacity of the individual members and supporters of such parties to play a meaningful role in the electoral process. As discussed above, political parties act as a vehicle for the participation of individual citizens in the electoral process; they are the primary mechanism by which individual citizens introduce their own ideas and opinions into the public dialogue that elections spawn. Legislation that contributes to a disparity in the capacity of the various political parties to participate in that dialogue ensures that some persons have a more effective vehicle for their ideas and opinions than others. The 50-candidate threshold thus infringes s. 3 of the *Charter* by decreasing the capacity of the members and supporters of the disadvantaged parties to introduce ideas and opinions into the open dialogue and debate that the electoral process engenders .

54 The restriction on these benefits has a more general adverse effect as well. The right to play a meaningful role in the electoral process includes the right of each citizen to exercise the right to vote in a manner that accurately reflects his or her preferences. In order to exercise the right to vote in this manner, citizens must be able to assess the relative strengths and weaknesses of each party's platform -- and in order to assess the relative strengths and weaknesses of each party, voters must have access to information about each candidate. As a consequence, legislation that exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public is inconsistent with s. 3. This, however, is precisely the effect of withholding from political parties that have not satisfied the 50-candidate threshold the right to issue tax receipts for donations received outside the election period and the right to retain unspent election funds. By derogating from the capacity of marginal or regional parties to present their ideas and opinions to the general public, it undermines the right of each citizen to information that might influence the manner in which she or he exercises the right to vote.

(ii) Withholding the Right to Include Party Affiliation on the Ballot Papers

55 The impact of the 50-candidate threshold on the right of candidates to include their party affiliation on the ballot papers has a similar effect on the right of each citizen to play a meaningful role in the electoral process. First, withholding this benefit from parties that have not satisfied the 50-candidate threshold diminishes the capacity of individual citizens to participate in the political discourse. There is a close connection between the capacity of the members and supporters of a political party to influence policy and the support that the party receives in any given election. Even if the party does not win a single seat in Parliament, the greater the number of votes that it receives the more likely it is that other citizens and the elected government will take seriously the ideas and opinions that it endorses. Legislation that reduces the number of votes that a candidate nominated by a particular party might receive interferes with the capacity of the members and supporters of that party to participate in the public discourse through participation in the selection of elected representatives. For the reasons below, it is my conclusion that the restriction on the right of a candidate to list his or her party affiliation on a ballot paper likely does have this effect.

56 As Molloy J. observed, political parties play such a prominent role in our democratic system that the choice of candidates by some voters is based largely, if not exclusively, on party affiliation. Many individuals are unaware of the personal identity or background of the candidate for whom they wish to vote. In the absence of a party identifier on the ballot paper, it is possible that certain voters will be unable to vote for their preferred candidate. Furthermore, it also is possible that voters who are familiar with the identity of the candidate of a particular party will be discouraged from voting for a candidate nominated by a non-registered party. Owing to the prominence of political parties in our system of representative democracy, affiliation with an officially recognized party is highly advantageous to individual candidates. In the minds of some voters, the absence of a party identifier might make candidates nominated by parties that have not satisfied the 50-candidate threshold a less attractive option. It might create the impression that the candidate is not, in fact, affiliated with a political party, or that the political party with which she or he is affiliated is not a legitimate political party. In each instance, the restriction on the right of candidates to list their party affiliation interferes with the capacity of non-registered parties to compete in the electoral process.

57 For similar reasons, the restriction on the right of candidates to include their party affiliation on the ballot paper also undermines the right of each citizen to make an informed choice from

among the various candidates. In order to make such a choice, it is best that a voter have access to roughly the same quality and quantity of information in respect of each candidate. In our system of democracy, the political platform of an individual candidate is closely aligned with the political platform of the party with which she or he is affiliated, and thus the listing of party affiliation has a significant informational component. Thus, legislation that allows some candidates to list their party affiliation yet prevents others from doing the same is inconsistent with the right of each citizen to exercise his or her right to vote in a manner that accurately reflects his or her actual preferences. It violates s. 3 by ensuring that voters are better informed of the political platform of some candidates than they are of others.

58 For these reasons, I conclude that the 50-candidate threshold does infringe s. 3 of the *Charter*. It undermines both the capacity of individual citizens to influence policy by introducing ideas and opinions into the public discourse and debate through participation in the electoral process, and the capacity of individual citizens to exercise their right to vote in a manner that accurately reflects their preferences. In each instance, the threshold requirement is inconsistent with the purpose of s. 3 of the *Charter*: the preservation of the right of each citizen to play a meaningful role in the electoral process.

B. *Is the Infringement Saved by Section 1 of the Charter?*

59 In order to justify the infringement of a *Charter* right under s. 1, the government must demonstrate that the limitation is reasonable and demonstrably justifiable in a free and democratic society. This involves a two-step analysis, pursuant to *Oakes, supra*, and related cases: *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Thomson Newspapers, supra*, and *M. v. H.*, [1999] 2 S.C.R. 3. Throughout this process the burden rests on the government. The government first must demonstrate that the objective of the legislation is sufficiently pressing and substantial to warrant violating a *Charter* right. The objectives must be neither "trivial" nor "discordant with the principles integral to a free and democratic society": *Oakes, supra*, at p. 138. Once this has been established, the government must then demonstrate that the infringement is proportionate, namely, that the legislation is rationally connected to the objective, that it minimally impairs the *Charter* right in question, and that the salutary benefits of the legislation outweigh the deleterious effects.

60 Before beginning this analysis, I note this Court's prior conclusion that limits on s. 3 require not deference, but careful examination: *Sauvé, supra*, at para. 9. As the Court observed in that case, s. 3 is one of the *Charter* rights that cannot be overridden by the invocation of s. 33 of the *Charter*. This highlights the extent to which s. 3 is fundamental to our system of democracy and indicates that great care must be exercised in determining whether or not the government has justified a violation of s. 3.

61 In his factum, the Attorney General of Canada submits that the objective of the 50-candidate threshold is "to enhance the effectiveness of Canadian elections, in both their process *and* outcome" (emphasis in original). More specifically, the Attorney General submits that the 50-candidate threshold advances three separate goals: (i) to improve the effectiveness of the electoral process; (ii) to protect the integrity of the electoral financing regime; and (iii) to ensure that the process is able to deliver a viable outcome for our form of responsible government. To provide a more complete analysis of the federal government's arguments under s. 1, I deal with each objective advanced separately. Consequently, in the analysis below, I consider each of the proposed objectives in turn to

determine first whether the government has demonstrated that any of the specific objectives is of pressing and substantial importance and, second, that the violation of s. 3 is proportionate.

(1) Improvement of the Electoral Process

62 The first objective that the Attorney General relies upon is the improvement of the electoral process through the public financing of political parties. To the extent that this actually is the objective of the 50-candidate threshold, the objective is a pressing and substantial one. The public financing of political parties makes a number of valuable contributions to our system of democracy.

63 The effective functioning of the electoral process requires that political parties have access to considerable financial resources. For the reasons discussed above, it is essential that voters are well informed. Voters that are not well informed cannot exercise their right to vote in a manner that reflects their actual preferences. Political parties, however, cannot ensure that voters are well informed unless they have access to sufficient financial resources to communicate their ideas to the general public. And many would argue that it is not only beneficial that political parties have access to adequate financial resources, but also that a significant percentage of those resources be received from individual citizens. The present law is based on the theory that candidates who have received modest contributions from a broad range of sources, including individuals, are more accountable to the citizens whose interests they ultimately represent than candidates who receive large contributions from a limited number of sources, such as business organizations and unions: *Report of the Committee on Election Expenses* (the Barbeau Committee) (1966), at pp. 33-34.

64 Thus, I agree that legislation that seeks to encourage individual citizens to donate funds to political parties advances a pressing and substantial objective. However, it is not the validity of legislation that encourages individual citizens to donate funds to political parties that is in question. Legislation that prevents certain political parties from issuing tax receipts or retaining unspent election funds does not encourage individual citizens to donate funds to political parties, but, rather, actively discourages the members and supporters of those parties from making such contributions. There is no connection whatsoever between the 50-candidate threshold and the objective of improving the electoral process through the public financing of political parties.

65 While the broad objective of "improving the electoral process through the public financing of political parties" will, therefore, not suffice to justify the legislation, it is possible that the more specific objective of ensuring that the electoral process is improved in what might be called a cost-efficient manner would satisfy the *Oakes* test. As an initial matter, I am apprehensive about concluding that the objective of ensuring the cost-efficiency of the tax credit scheme is sufficiently pressing and substantial to warrant violating a *Charter* right. There is no meaningful distinction between violating a *Charter* right for the purpose of advancing an otherwise valid objective in a cost-efficient manner and violating a *Charter* right for the purpose of preserving the public purse. It is not clear, however, that preserving the public purse is an objective that is sufficiently pressing and substantial to satisfy this branch of the *Oakes* test . As Lamer C.J. wrote in *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 709, "budgetary considerations cannot be used to justify a violation under s. 1"; see also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 99; and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

66 At the same time, I do not wish to rule out the possibility that there might be instances in which the potential impact upon the public purse is of sufficient magnitude to justify limiting the rights of individual citizens. For the sake of this analysis, then, I believe it prudent to accept that

ensuring the cost-efficiency of the tax credit scheme is a pressing and substantial concern. The question, then, is whether the 50-candidate threshold is proportional, that is, whether it is an acceptable means of ensuring the cost-efficiency of the financing regime. More specifically, is the threshold requirement rationally connected to the objective, does it impair s. 3 as minimally as possible, and do the benefits of the threshold outweigh its effects on the *Charter* rights of the individual citizen?

67 In respect of the restriction on the right of the candidates to transfer unspent election funds to the party and to list their party affiliation on the ballot papers, it is impossible to discern any connection whatsoever between the threshold requirement and the objective of ensuring the cost-efficiency of public financing. In neither instance is the benefit made available for the purpose of encouraging individual citizens to donate funds to political parties. Accordingly, it is impossible to conclude that the objective of the restriction is to ensure the cost-efficiency of the public financing regime. This objective can provide no justification for restricting the right of candidates to transfer unspent election funds to the party or to include party identifiers on their ballot papers.

68 At first glance, it might appear that the restriction on the right of political parties to issue tax receipts for donations received outside the election period is rationally connected to the objective of ensuring the cost-efficiency of the public financing regime. After all, each tax credit issued does reduce the country's tax revenues. Nonetheless, it is important to note that the threshold requirement has no impact whatsoever upon the potential overall burden of the tax credit scheme on the public purse. Even with the threshold in place, it still is possible for every citizen to obtain the full $500 credit that is available in respect of donations to political parties. Further, there is nothing in the *Elections Act* that would prevent each citizen from making a donation to a registered political party. The connection between legislation that has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective of ensuring the cost-efficiency of the tax credit scheme is tenuous at best. Moreover, the government has provided no evidence to substantiate its claim that the threshold actually improves the cost-efficiency of the tax credit scheme. It is thus my conclusion that the rational connection test had not been satisfied.

69 Even if the government was able to advance sufficient evidence to substantiate its claim that the threshold requirement is rationally connected to the advanced objective, the legislation still fails the minimal impairment test. If Parliament believes that the costs associated with the tax credit scheme are prohibitively high, a more appropriate means by which to address this problem would be to reduce the amount that each citizen is entitled to claim in respect of donations to political parties. This would not only be a more effective means of limiting the costs associated with the tax credit scheme, but it also would be a means of achieving that objective that did not result in the violation of any citizen's right to play a meaningful role in the electoral process. Where the same objective can be achieved without violating any citizen's *Charter* rights, the minimal impairment test of the *Oakes* test has not been satisfied.

70 Finally, even if the first two branches of the proportionality test had been met, the benefits associated with the reduced costs of the tax credit scheme still would not outweigh the deleterious effects on the right of individual citizens to play a meaningful role in the electoral process. The right to participate in the selection of elected representatives is one of the touchstones of a free and democratic state: see *Sauvé, supra*, at para. 58, in which McLachlin C.J. wrote that a violation of s. 3 undermines both the legitimacy and effectiveness of government. The deleterious effects associated with a violation of s. 3 are substantial. Conversely, the government has advanced no evidence indi-

cating that the 50-candidate threshold provides any significant benefit to the public purse. Rather, owing to the fact that political parties that nominate candidates in fewer than 50 electoral districts typically have a relatively small base of support, one would expect the percentage of political donations received by non-registered parties to be relatively insignificant -- as one would thereby expect the savings to the public purse to be relatively insignificant. If the right of individual citizens to play a meaningful role in the electoral process is to be limited for fiscal reasons, the savings would have to be much more substantial than those associated with the restriction on the right of non-registered parties to issue tax receipts to individual citizens for donations received outside the election period.

(2) Protecting the Integrity of the Electoral Financing Regime

71 The Attorney General submits that a second objective of the 50-candidate threshold is the preservation of the integrity of the electoral financing regime. It is his submission that the 50-candidate threshold is necessary to ensure that third parties that have no genuine interest in participating in the electoral process do not abuse the electoral financing regime.

72 This Court already has determined that preserving the integrity of the electoral process is a pressing and substantial concern in a free and democratic state. In *Harvey, supra*, in which the Court considered the constitutional validity of provincial legislation that prohibited members of New Brunswick's Legislative Assembly from holding or seeking office for a period of five years subsequent to conviction pursuant to the New Brunswick *Elections Act*, R.S.N.B. 1973, c. E-3, La Forest J. wrote as follows, at para. 38:

> I have no doubt that the primary goal of the impugned legislation is to maintain and enhance the integrity of the electoral process. Nor do I doubt that such an objective is always of pressing and substantial concern in any society that purports to operate in accordance with the tenets of a free and democratic society.

The systems and regulations that govern the process by which governments are formed should not be easily compromised. Electoral financing is an integral component of that process, and thus it is of great importance that the integrity of the electoral financing regime be preserved. Ensuring that funds raised pursuant to the *Elections Act* are not misused is a constitutionally valid objective.

73 The next question to be determined is whether there is a rational connection between the impugned legislation and the constitutionally valid objective: has the government demonstrated that the 50-candidate threshold is rationally connected to the objective of preserving the integrity of electoral financing regime? Once again, it is immediately clear that this objective provides no justification for the restriction on the right of candidates to list their party affiliation on the ballot papers. The restriction on the right of candidates to list their party affiliation on their ballot papers simply does not engage the electoral financing regime, let alone advance the objective of ensuring its integrity. Although it is perhaps less obvious, the same is true of the restriction on the right to issue tax receipts and the right to transfer unspent election funds to the party.

74 In respect of the restriction on the right to issue tax receipts, it is the Attorney General's submission that the threshold requirement prevents organizations that have no genuine interest in the electoral process from raising funds pursuant to s. 127(3) of the *Income Tax Act*. There would seem to be two possible aspects to this submission. The first is that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. The second is that the 50-candidate threshold actively discourages organizations that have no

electoral aim from seeking registered party status solely for the purpose of obtaining the right to issue tax receipts. Neither aspect of this submission provides a sufficient basis for concluding that the threshold requirement is rationally connected to the stated objective.

75 First, there is no merit whatsoever to the claim that failure to satisfy the 50-candidate threshold is evidence that a political party has no genuine interest in the electoral process. For all the reasons discussed above, a political party need not nominate candidates in 50 electoral districts in order to play a meaningful role in the electoral process. History reveals instances in which political parties that were once prominent in fielding candidates or electing members subsequently failed to meet the 50-candidate threshold. Most recently, the Communist Party of Canada failed to satisfy the threshold in 1993, as did the Social Credit Party in 1988. As these examples indicate, the 50-candidate threshold is an inadequate mechanism for determining whether an organization is a legitimate political party, with a genuine intention of participating in the electoral process.

76 The government also has failed to demonstrate that the threshold prevents third parties or lobby groups from nominating candidates for the sole purpose of obtaining the right to issue tax receipts for donations received outside the campaign period. I first note that all candidates, whether nominated by a registered party or not, are entitled to issue tax receipts for donations received during the campaign period. If third parties or lobby groups have not already nominated candidates for the purpose of obtaining this benefit, it seems unlikely that they would nominate candidates for the purpose of obtaining the right to issue tax receipts for donations received outside the election period. In addition, there are a substantial number of obligations that a registered party must comply with, such as submitting audited financial statements, audited financial transactions returns and audited election expenses returns. Absent evidence indicating that these requirements are not sufficient to prevent third parties from seeking registered party status for the sole purpose of abusing the tax credit scheme, there is no basis for concluding that the 50-candidate threshold actually advances the objective of preventing the misuse of the electoral financing regime.

77 In respect of the restriction on the right of candidates to transfer unspent election funds to the party, the respondent submits that a threshold requirement is necessary because non-registered parties are not subject to the reporting requirements of the *Elections Act*. This submission, however, is entirely circular. After all, the threshold requirement is the only reason that parties that nominate fewer than 50 candidates are not subject to the reporting requirements. If the reporting requirements already address the misuse of unspent election funds, it is unnecessary to require certain parties to transfer unspent election funds to the Receiver General. If, on the other hand, the reporting requirements are insufficient to prevent the misuse of election funds, the threshold requirement would do little to preserve the integrity of the electoral financing regime. The integrity of the electoral financing regime is not preserved by requiring but an extremely small subset of unspent election funds to be paid to the Receiver General.

78 Furthermore, even if the restrictions on the right to issue the tax receipt and the right to retain unspent election funds prevent the misuse of the electoral financing regime, the legislation fails the minimal impairment test. In each instance, the government has failed to demonstrate that it could not achieve the same results without violating s. 3 of the *Charter*. Consider, for example, the auditors and other investigators that the government already has at its disposal. There is no reason to think that auditors would not be equally capable, if not more so, of detecting, and thereby preventing, the misuse of funds raised pursuant to the electoral financing regime. The misuse of funds, after all, is precisely the sort of mischief that auditors are trained to uncover, and which the state can

properly criminalize in order to preserve the integrity of the electoral financing regime. The logical inference is that precisely the same result could be achieved through strict spending rules and the use of auditors. If the same result could be achieved without violating the *Charter*, the minimal impairment requirement has not been satisfied.

(3) Ensuring a Viable Outcome for Our Form of Responsible Government

79 The third objective advanced by the respondent is that of ensuring that the electoral process results in a viable outcome for our form of responsible government. The essence of this submission is that a certain type of outcome, considered from a non-partisan perspective, is better suited to our system of democracy. In particular, what the respondent would seem to envision is the formation of a majority government that has aggregated preferences on a national scale. It is the respondent's submission that majority governments provide more effective governance than governments that consist of coalitions between or among various political parties. On this view, legislation that increases the likelihood of such a government is legislation that advances a pressing and substantial objective.

80 Articulating the objective of the legislation in this manner is extremely problematic. In order to advance this objective, the legislation must interfere with the right of individual citizens to play a meaningful role in the electoral process to such an extent that it increases the likelihood that candidates nominated by national parties will be elected, thereby decreasing the likelihood that candidates nominated by regional or marginal parties will be elected. As noted above, in *Oakes, supra*, Dickson C.J. concluded that the objective of the impugned legislation must not be "discordant" with the principles integral to a free and democratic society. Legislation enacted for the express purpose of decreasing the likelihood that a certain class of candidates will be elected is not only discordant with the principles integral to a free and democratic society, but, rather, is the antithesis of those principles. Consequently, it is difficult to accept that the objective of ensuring that the electoral process results in a particular outcome is sufficiently pressing and substantial to warrant the violation of a *Charter* right.

81 There also are difficulties associated with the government's submission that a majority government that has aggregated preferences on a national scale is the only form of viable government in our system of democracy. Between 1882 and 1983 there were nine minority governments in the British Parliament. In Canada, there have been eight minority federal governments and a number of provincial minority governments. The Attorney General of Canada has presented no evidence that demonstrates that such governments are less democratic than majority governments, or that they provided less effective governance than majority governments. Importantly, I do not mean to suggest that Parliament must choose an electoral system that the Court believes will result in "good" or "better" governance. The *Charter* aside, the choice among electoral processes is, as LeBel J. states, a political one -- and not one in which the Court should involve itself. But if Parliament interferes with the right of each citizen to play a meaningful role in that process, it must be able to point to a pressing and substantial objective that it seeks to advance. In the absence of compelling reason to assert that a particular outcome will result in better governance, there is no basis on which to conclude that legislation that seeks to obtain that outcome advances an objective that is sufficiently pressing and substantial to warrant interfering with the right of each citizen to play a meaningful role in the electoral process.

82 At the same time, one can point to arguments to state that there are collective benefits associated with majority governments. For example, it is possible that the continuity and stability associated with majority governments results in better governance. The increased ease with which majority governments are able to implement policy might ensure that such governments are able to advance their objectives more effectively than a coalition, again resulting in better governance. This is sometimes argued to be a benefit of the Westminster model of parliamentary democracy, reflected in the preamble to the *Constitution Act, 1867*, giving Canada "a Constitution similar in Principle to that of the United Kingdom". It also is possible that there are benefits associated with factors unique to the Canadian political landscape. Or perhaps it is simply that this is a system that Canadians have grown accustomed to -- and that there exists an inverse relationship between public confidence in government and the fragmentation of Parliament. Accordingly, even if the election of a strong national government is not the only viable outcome of the electoral process, it at least is possible that there are certain benefits associated with the formation of a majority government that has aggregated preferences on a national basis.

83 But even if I were willing to accept that the collective benefits associated with the formation of a majority government are of sufficient magnitude to warrant interference with the right of each to play a meaningful role in the electoral process , serious difficulties remain. For the reasons discussed below, I conclude that the legislation fails the proportionality branch of the *Oakes* test. As a consequence, I believe it prudent to leave the question of whether majority building is a pressing and substantial objective unanswered at this time. Even if there are conceptual difficulties associated with the objective of ensuring that the electoral process results in a particular outcome, I would not want to foreclose the possibility that the government might be able to demonstrate that there is a reasonable basis for its belief that majority governments are more effective than minority governments.

84 In respect of the proportionality branch of the *Oakes* test, the first question to be determined is whether the 50-candidate threshold is rationally connected to the stated objective. On its face, it would appear that the legislation is rationally connected to the objective of majority building. After all, a large part of the reason that it was found to violate s. 3 is that it creates a competitive advantage for parties with a broad geographical base of support. Common sense would seem to suggest that legislation that makes it difficult for regional or marginal parties to garner support and to build political momentum is rationally connected to the objective of increasing the likelihood of a majority government.

85 Importantly, there exists no evidence that the 50-candidate threshold is a cause of this phenomenon. It is equally possible, if not more so, that most voters do not feel that their interests are reflected in the platforms of non-registered political parties, or would prefer to cast a vote for a political party that has a genuine opportunity of winning a substantial number of seats in Parliament. Indeed, it seems unlikely that removing the threshold requirement would have a significant impact, if it would have any impact at all, on the likelihood that the electoral process will result in the election of a majority government, either now or at any time in the foreseeable future. The more likely threat to majority governments is not the participation of regional or marginal parties that have failed to satisfy the 50-candidate threshold, but, rather, the proliferation of registered political parties generally. The *Elections Act*, however, imposes no limit on the number of political parties that qualify for registered party status.

86 Absent any evidence that the full participation of political parties that fail to satisfy the 50-candidate threshold would, in fact, decrease the likelihood that the electoral process will result in the formation of a majority government, the threshold requirement cannot reasonably be expected to advance the stated objective. For this reason alone, even if the objective in question was pressing and substantial, the 50-candidate threshold would fail the first branch of the proportionality test , namely, the rational connection test.

87 But even if the respondent could prove that the 50-candidate threshold has a meaningful impact on the likelihood that subsequent elections will result in the election of majority governments, it still would be my conclusion that the legislation fails the third branch of the proportionality test: the proportionate effects test. The government has failed to demonstrate that the salutary benefits of the legislation outweigh its deleterious effects.

88 On the one hand, the deleterious effects associated with this legislation are substantial. As discussed above, this legislation has a significant impact on the capacity of candidates nominated by non-registered political parties to communicate their ideas to the electorate. This, in turn, undermines the capacity of individual citizens to introduce ideas and opinions into the public discourse that the electoral process engenders, and to exercise their right to vote in a manner that accurately reflects their preferences. This, however, is not the only effect of the 50-candidate threshold. If the legislation is, in fact, rationally connected to the stated objective, it must do more than interfere with the right of individual citizens to play a meaningful role in the electoral process in order to obtain this objective: it must interfere to such an extent that it results not only in the election of individual candidates who would not otherwise have been elected, but also in the election of majority governments that would not otherwise have been elected. As noted above, it is difficult to reconcile legislation that seeks to have this effect with the principles that are integral to a free and democratic society. Legislation that violates s. 3 for this purpose does great harm to both individual participants and the integrity of the electoral process itself.

89 Legislation with such harmful effects would be difficult to justify. The government would have to point to salutary benefits that outweigh these very significant deleterious effects. More specifically, it is incumbent on the government to demonstrate, either through evidence or argument, that a majority government is likely to provide substantially better governance than a minority government. The government has failed to satisfy this burden. The government has not advanced sufficient evidence to demonstrate that the election of a majority government would result in benefits that outweigh the deleterious effects associated with legislation that violates s. 3 for the purpose of ensuring that the electoral process results in the election of a government that would not otherwise be elected. Nor has it provided a reasoned basis on which to conclude that this is the case. In the absence of either evidence or argument to this effect, it is impossible to conclude that the legislation is justifiable in a free and democratic society.

VI. Disposition

90 In the final analysis, I conclude both that the 50-candidate threshold is inconsistent with the right of each citizen to play a meaningful role in the electoral process, and that the government has failed to justify this violation.

91 However, before I dispose of this appeal I think it important to stress that this decision does not stand for the proposition that the differential treatment of political parties will always constitute a violation of s. 3. Nor does it stand for the proposition that an infringement of s. 3 arising from the

differential treatment of political parties could never be justified. Consequently, a lthough the disposition of this case will have an impact on sections of the *Elections Act* that provide access to free broadcast time, the right to purchase reserved broadcast time, and the right to partial reimbursement of election expenses upon receiving a certain percentage of the vote, I express no opinion as to the constitutionality of legislation that restricts access to those benefits. It is possible that it would be necessary to consider factors that have not been addressed in this appeal in order to determine the constitutionality of restricting access to those benefits.

92 In addition, the question also arises as to the number of candidates required to justify restricting access to the three benefits discussed in these reasons. The thrust of the reasons is that no threshold requirement is acceptable. However, I note the recent amendment to the *Elections Act* that reduces the threshold requirement in respect of the right of candidates to list their party affiliation on the ballot papers: S.C. 2001, c. 21, s. 12. Pursuant to this amendment, a political party need only nominate 12 candidates in order for its nominees to obtain the right to include their party affiliation on the ballots. Obviously, the constitutionality of the amended provision is not currently before the Court. It may well be that the government will be able to advance other objectives that justify a 12-candidate threshold. But suffice it to say, the objectives advanced do not justify a threshold requirement of any sort, let alone a 50-candidate threshold.

93 In the result, the appeal is allowed with costs and ss. 24(2), 24(3) and 28(2) of the *Elections Act* are declared unconstitutional. The declaration of unconstitutionality is suspended for 12 months in order to enable the government to comply with these reasons.

94 The constitutional questions are answered as follows:

1. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370(1) and 385, S.C. 2000, c. 9) limit the s. 3 *Canadian Charter of Rights and Freedoms* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: Yes.

2. If the answer to Question 1 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: No.

3. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370(1) and 385, S.C. 2000, c. 9) limit the s. 15(1) *Charter* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: It is not necessary to answer this question.

4. If the answer to Question 3 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

5. Do ss. 24(3)(*a*) and 28(2) of the *Canada Elections Act*, R.S.C. 1985, c. E-2 (now ss. 370(1) and 385, S.C. 2000, c. 9) limit the s. 2(*d*) *Charter* rights of candidates or supporters of non-registered political parties by requiring that, in order to become and remain a registered political party, a party must nominate candidates in at least 50 electoral districts in each general election?

Answer: It is not necessary to answer this question.

6. If the answer to Question 5 is in the affirmative, is this limitation reasonable and demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

The reasons of Gonthier, LeBel and Deschamps JJ. were delivered by

LeBEL J.:--

I. Introduction

95 In this appeal, our Court is called upon to answer important questions about the meaning of the democratic rights enshrined in the *Canadian Charter of Rights and Freedoms*. We must explore the meaning of "effective representation" for the first time outside the context of electoral boundary-drawing. I agree with much of the majority opinion, including Iacobucci J.'s disposition of the case, the remedy he proposes, and the emphasis on "meaningful participation" as a core value that determines the content of s. 3 of the *Charter*. But I must express reservations about the methodology used by my colleague to identify an infringement of s. 3.

96 In my opinion, the sole determinative question at the infringement stage of the analysis cannot be whether the impugned measure "interferes with the capacity of individual citizens to play a meaningful role in the electoral process" (Iacobucci J., at para. 38). Framing the question in this way understates the complexity of effective representation and meaningful participation. Such multifaceted concepts cannot be reduced to the purely individual aspects of political participation, but rather comprise a number of intertwined and often opposed principles. Indeed, as Iacobucci J. himself observes at para. 36, "the mere fact that the legislation ... restricts the capacity of a citizen to participate in the electoral process" is not enough to establish a violation of s. 3.

97 The proper approach is to apply the analytical template which has emerged from the jurisprudence of this Court and lower courts on electoral boundaries. The methodology developed in the

electoral boundaries cases recognizes that the right to vote comprises many factors, and that its content can only be defined through a contextual and historical analysis.

98 Applying that contextual and historical approach to the facts of this case leads to the conclusion that the legislation does further significant democratic values. The challenged provisions form part of the scheme in the *Canada Elections Act*, R.S.C. 1985, c. E-2, for the formal legal recognition and regulation of political parties. This scheme enhances the effectiveness of the party system which, in turn, is an important component of our democratic form of government. The requirement of nominating 50 candidates tends to benefit parties with a broad appeal, thus encouraging cohesiveness and the aggregation of political will. The importance of these values, deeply rooted as they are in Canadian political culture, is evidenced by their place in our history and existing institutions.

99 In principle, the values enhanced by the impugned measures could be furthered at the price of compromising individual participation to a certain extent. In this case, however, the legislation goes too far in creating unfairness both as between individual voters and as between different regions of the country. Ultimately, the challenged provisions conflict with the right to meaningful participation and are inconsistent with s. 3. But, before setting out my reasons for reaching that conclusion, I must first turn to the definition of the central issue at stake in this appeal, the definition of meaningful participation.

II. Analysis

A. *The Central Issue: The Definition of "Meaningful Participation"*

100 I agree with Iacobucci J. that s. 3 gives every Canadian citizen the right to meaningful participation in free and fair elections. Without such a right, no genuinely democratic system of government can be set up or endure. Citizens' political choices cannot be effectively represented unless they have the opportunity to participate in the process in a meaningful way. My disagreement with the majority is on how this right to meaningful participation is to be defined.

101 I do not agree with an approach that only takes into account the strictly individual aspects of participation in the political process. While I acknowledge the central importance of individual participation, s. 3 is also inherently concerned with the representation of communities, both the various communities that make up Canadian society and the broader community of all Canadians. Participation in the electoral process typically involves individual citizens acting as members of political groups, and alliances both within and between such groups can render participation more meaningful and result in better representation of communities and of national political preferences. Ignoring these communitarian aspects of s. 3 risks creating a distorted picture of the right.

102 It is important, too, to give due attention to the context within which democratic rights are exercised and to the history of Canadian political institutions. In my view, s. 3 must be interpreted in harmony with our political traditions. A purely individualistic approach is difficult to reconcile with the characteristic values of Canadian politics. For this reason, an analysis focussing strictly on the individual aspects of the right appears to depart from the approach this Court adopted in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 ("*Saskatchewan Reference*"), where the context of our tradition and established political practices was recognized as a source of the meaning of the rights enshrined in s. 3.

103 Although each citizen has a right to meaningful participation, not every government measure with an adverse impact on participation renders it meaningless. Legislation may compromise or

interfere with individual participation to a certain extent, without necessarily depriving citizens of meaningful representation. (In fact, it is difficult to conceive of an electoral system that does not constrict any citizen's individual participatory freedom in any way at all.) Such compromises may be acceptable if they are necessary for pragmatic reasons or if they serve to further other democratic values, which may be connected to the collective, communitarian or systemic aspects of s. 3. We should give due recognition to the competing values between which the government must choose in designing the electoral system, so as not to imply that it is constitutionally required to maximize one admittedly important value -- that of individual participation -- alone.

B. *The Saskatchewan Reference*

104 Most of the case law on s. 3 rights to this point has dealt with legislation that directly denies the right to vote to a particular group of people (prison inmates in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; mentally incompetent persons in *Canadian Disability Rights Council v. Canada*, [1988] 3 F.C. 622 (T.D.); federally appointed judges in *Muldoon v. Canada*, [1988] 3 F.C. 628 (T.D.); absentee voters in *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718 (B.C.C.A.); and persons convicted of offences involving corrupt electoral practices in *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876). The impugned legislation in those cases literally contradicted the language of s. 3, which states that every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. The question of whether the challenged limitations of those rights were consistent with Canada's democratic values therefore naturally fell to be considered in connection with s. 1 of the *Charter*.

105 Only on one previous occasion has this Court considered a challenge under s. 3 of the *Charter* to legislation that regulated the electoral process without literally denying anyone the right to vote or to be a candidate. That case was the *Saskatchewan Reference, supra*. At issue were the electoral boundaries for Saskatchewan's Legislative Assembly, which provided for a prescribed number of rural, northern and urban ridings, and permitted significant disparities between the different types of ridings in the number of voters per district. One northern district had 6,309 voters, while one of the urban districts had 12,567. In effect, a vote in the former district was "worth" about twice as much as a vote in the latter.

106 This Court acknowledged that s. 3 guarantees more than "the bare right to place a ballot in a box", as the present Chief Justice, when she was Chief Justice of the Supreme Court of British Columbia, put it in an earlier case on the issue of electoral boundaries (*Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, at p. 403). For the right to vote to have real substance, it must be exercised in an electoral system that gives genuine meaning to each citizen's vote. Thus the guarantee in s. 3 must implicitly include such basic incidents as the right to cast a vote in private, and the right to have that vote honestly counted and recorded (*Saskatchewan Reference, supra*, at p. 165, *per* Cory J., in dissent but not on this point). But it includes more than that. It implies that every Canadian citizen is entitled to "effective representation" through the democratic process. I would add that effective representation can only be achieved if every citizen has the opportunity for meaningful participation in elections.

107 At the heart of the right to vote is the citizen's entitlement to an opportunity to vote in fair elections. As the Court recognized in the *Saskatchewan Reference*, this means that each citizen's vote must be relatively equal in weight to that of every other citizen: "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" (*Saskatchewan Reference, supra*, at p. 183).

108 Voter parity itself is not, however, the objective of s. 3, but only one of the factors, albeit a factor of primary importance, to be taken into account in determining whether effective representation has been provided. McLachlin J. identified two situations where voter parity might be deviated from without offending s. 3: when pragmatic considerations required such deviation, and when it enabled "the provision of more effective representation" (*Saskatchewan Reference, supra*, at p. 185). She held that effective representation was defined not only by fairness as between individual voters, but also by other democratic values that can be in tension with voter parity -- the relevant consideration in that case being the special challenge of ensuring adequate representation of remote and sparsely populated areas. McLachlin J. observed that these countervailing or competing democratic values could include "geography, community history, community interests and minority representation", and that the list was not closed (*Saskatchewan Reference, supra*, at p. 184).

109 Lower courts have applied the principles set out in the *Saskatchewan Reference* and worked out a sophisticated methodology for evaluating the constitutionality of electoral boundaries: see *MacKinnon v. Prince Edward Island* (1993), 104 Nfld. & P.E.I.R. 232 (P.E.I.S.C.); *Reference re Electoral Boundaries Commission Act (Alberta)* (1991), 83 Alta. L.R. (2d) 210 (C.A.) ("*Alberta Reference*"); and *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1994), 24 Alta. L.R. (3d) 1 (C.A.). Courts have commented on the complexity of the task, one which involves reconciling democratic values that exist in tension with and sometimes directly contradict each other.

110 In the *Alberta Reference, supra*, for example, the Alberta Court of Appeal observed, at p. 216, that "the factors made relevant by the principles of parity and effective representation are both complicated and conflicting, and this mandates some balancing". The statute which was the subject of the reference aimed to avoid a rigid division between urban and rural areas. The legislative committee that recommended this approach thought that such divisions encouraged urban and rural voters to pursue their interests as adversarial factions. The Court of Appeal remarked that this situation illustrated the difficulty of the concept of effective representation. While ensuring that minorities have an effective voice is an important democratic value, so is the building of broadly based consensus. As the court explained, at p. 216:

> If every group in society with a community of interest can elect its own member of the Legislature, they may not be encouraged to develop the mutual understanding and respect that is essential to a healthy democratic life. Shared representation might encourage mutual respect, just as it might also permit the repression of the voice of those who become permanent minorities.

C. *Saskatchewan Reference Principles in the Context of this Case*

111 In this case, our Court must once again assess legislation that affects the exercise of democratic rights without literally denying them, but for the first time in a context outside the now relatively well-charted terrain of electoral boundaries. Here, the context is the regulation of political parties and the system of privileges and obligations that parties are subject to in our electoral system.

112 The case raises some complex issues that are absent from the electoral boundaries context. The direct effect of regulation of political parties is felt by the parties themselves and by their candidates for elective office. In this manner, this appeal engages the second right set out in s. 3, the right to be qualified for membership in Parliament or a legislative assembly (or, more simply, the right to be a candidate). The right to vote is also at play because, as an indirect consequence of the unequal treatment of parties, their supporters are treated unequally. Since an incentive to support registered parties also penalizes supporting unregistered ones, the impugned legislation constrains voters' freedom in choosing which party to support.

113 The key value on which this constitutional challenge is based is not equality of voting power *per se*, but fair and even-handed treatment of the political parties that compete for votes. The questions we must resolve therefore go beyond those we have already addressed in the *Saskatchewan Reference*. Nevertheless they remain closely related. As mentioned above, the *Saskatchewan Reference* provides a template for constitutional analysis that can be applied to the issues raised by this appeal.

114 The *Saskatchewan Reference* stands for the proposition that adverse effects on the capacity of an individual citizen to participate are not equivalent, in and of themselves, to a denial of meaningful participation or effective representation. In order to determine whether such measures conflict with s. 3, their nature must be identified and their impact must be weighed in the full context of the political system.

115 Dilution of some citizens' voting power as compared to that of others clearly has an adverse effect on the capacity of the disadvantaged citizens to participate in the political process. It does not prevent them from participating altogether, but it does impose a handicap on them. It is true, as my colleague points out, that the boundary drawing discussed in the *Saskatchewan Reference* enhanced the effective representation and the participatory rights of some citizens, those who belonged to remote, geographically defined or minority communities. But this arrangement also discounted the weight of urban citizens' votes in comparison to those of rural and northern citizens, and in that sense it interfered with the capacity of urban voters to participate.

116 It may be more precise to say that the electoral boundaries in the *Saskatchewan Reference* diminished one aspect of effective representation -- the representation of the urban voter as a single individual who should count equally with every other individual voter. On the other hand, because they enhanced another aspect of the effective representation of the northern voter, they resulted in more effective representation of that person as a member of a northern community. Without such measures, the northern voter's community identity would be under represented as compared to the city dweller's community identity, because force of numbers might drown out the interests of the numerically smaller community. Yet the two individuals would be more fairly represented, viewed as isolated individuals rather than as members of their respective communities, if their votes "counted" equally.

117 This Court recognized in the *Saskatchewan Reference* that some diminution of one aspect of effective representation (parity) can ultimately result in the provision of more effective representation. This acknowledgement suggests that effective representation is not reducible to any single value, but consists of many different components. Citizens may make political choices that represent their interests as individuals, or they may attach more importance to being represented as members of communities of interest both narrow and broad. The constitutional obligation to ensure that this complex matrix of interests is represented effectively allows for a fairly wide range of al-

ternatives, each combining or prioritizing the various elements at play in a different way. For example, if a province were to design its electoral districts to be as close to numerical equality as practically possible, this arrangement might (depending on the particular facts and context) be just as acceptable in terms of s. 3 as an electoral map designed to enhance the voting power of minority communities.

118 The concept of meaningful participation, like effective representation, comprises a number of different aspects. It can be just as meaningful -- sometimes, perhaps, more so -- to participate as a member of a community or a group (such as a political party) as it is to participate as an individual, and enhancing opportunities for the first kind of participation almost unavoidably entails some cost in terms of purely individualistic participatory values. The design of the electoral system involves striking an appropriate balance between the many different virtues that democratic systems can possess. Such choices are based on political value judgments which are the prerogative of the legislature, to the extent that they do not result in a denial of the opportunity for meaningful participation.

119 In order to identify such a denial, we must look at more than just the fact that there has been an adverse impact on a particular individual's capacity to participate. We must assess the severity of the impact, and make sure there is a good reason for it -- a good reason being one related to pragmatic exigencies, to the enhancement of other aspects of political participation, or to the overall provision of more effective representation. The question is not whether there is any dilution at all of the individual citizen's capacity to participate, but whether there is undue dilution. Undue dilution occurs when the impugned measure, considered in context and taking into account its effect on all aspects of participation, so constricts an individual citizen's opportunity to make free choices or to compete fairly in the political process that he or she no longer has a meaningful opportunity to participate.

D. *Competing Values and Proportional Analysis Within Section 3*

120 I am in complete agreement with Iacobucci J. that the impugned provisions of the *Canada Elections Act* interfere with the capacity of certain citizens to participate in the electoral process. The provisions at issue in this appeal confer benefits on parties that meet specified criteria, among them the requirement that they nominate candidates in at least 50 ridings. While the primary intention may be to enhance the effectiveness of registered parties to convey their message to the electorate and to represent their supporters' views, I agree with my colleague's reasoning that an inevitable consequence is to diminish the capacity of parties that fail to meet the threshold to do the same things. As Iacobucci J. explains, the reason for this is the competitive nature of elections. A measure designed to give certain players an advantage in the game necessarily imposes a disadvantage on the others; these two propositions are two sides of the same coin.

121 But the infringement analysis should not stop here. In my view, the unequal competitive position of parties under the 50-candidate rule is analogous to the unequal voting power of voters in numerically uneven districts. Having established the existence of an adverse impact on certain participants, we must go on to examine its severity and the reason for it. All the relevant contextual factors must be taken into account in the determination of whether meaningful participation has been denied.

122 A full and nuanced inquiry into the meaning of s. 3 and the scope of the protection it provides must, in my opinion, proceed along these lines. With due consideration given to the various

competing values within s. 3, the impugned measure should be carefully examined to ascertain whether the balance struck by the state in the particular case is consistent with s. 3 and with the concepts of meaningful participation and effective representation.

123 Such an inquiry naturally takes the form of a proportionality analysis; it involves identifying how the measure diminishes one or more aspects of participation in the democratic process, and weighing that detrimental effect against its benefits as a means of enhancing other aspects of participation. Because the form of this analysis resembles the framework used in connection with s. 1, it becomes necessary to respond to the assertion (at para. 31 of the majority opinion) that it is inappropriate to balance collective interests against individual rights in identifying an infringement of s. 3.

124 I agree that any balancing of collective interests against the rights protected by s. 3 should be confined to s. 1, but some form of balancing of competing values, or of proportional assessment, remains appropriate, at this stage of the inquiry into the nature of the protected rights, in defining what those rights are. This step in the analysis is prior to concluding that the individual rights enshrined in s. 3 have been violated. It is only after that question has been answered that the question of balancing collective interests against s. 3 rights arises.

125 The reasons of my colleague reject the proposition that values other than the purely individual are relevant in determining the scope of s. 3. It must be acknowledged that this position appears, at first, to be supported by previous pronouncements of this Court, but a closer analysis of the jurisprudence of our Court will lead to a different conclusion. In *Sauvé, supra*, the Chief Justice rejected the government's argument that legislation depriving federal prisoners of the right to vote could be consistent with s. 3, concluding, at para. 11, that "s. 3 must be construed as it reads, and its ambit should not be limited by countervailing collective concerns". In *Harvey, supra*, the government argued that a law disqualifying persons who had been convicted of offences involving corrupt practices from voting or being a member of the provincial legislature was consistent with limitations inherent to s. 3 itself, because the legislation helped to ensure the integrity of the political process and thus contributed to effective representation. Although La Forest J., writing for a majority of the Court, described these arguments as initially appearing persuasive, he rejected the government's position, both because it contradicted the clear language of s. 3 and because to accept it "would be to remove the balancing of interests from s. 1 and incorporate it in s. 3 of the *Charter*" (*Harvey*, at para. 29).

126 But *Sauvé* and *Harvey* can be distinguished from this case because they dealt with outright exclusion of certain citizens from voting or being candidates for election. Indeed, in *Harvey*, at para. 25, La Forest J. referred to the "contrast" between this Court's approach in the *Saskatchewan Reference* and its approach to "particular statutory disqualifications of voters". *Sauvé* and *Harvey* were cases in the latter group. This case is not. Government actions that affect the conditions under which citizens vote or run for election engage s. 3 without directly clashing with its plain language, as literal prohibitions do, and they call for a different kind of analysis. Ascertaining whether the right has been infringed requires us to acknowledge the need for an appropriate compromise between the competing forces that together define meaningful participation.

127 It is not unusual for such balancing to take place in defining the ambit of a *Charter* right. This kind of analysis has become familiar in connection with certain *Charter* rights -- particularly those described by Professor Hogg as "qualified rights", rights that "are by their own terms qualified

by notions of reasonableness or regularity" (P. W. Hogg, *Constitutional Law of Canada* (student ed. 2002), at p. 804).

128 Section 7 of the *Charter*, for example, provides that the interests it protects can be limited by state action that conforms to principles of fundamental justice. The phrase "the principles of fundamental justice" invokes competing principles that exist, in the words of Iacobucci J., in "dynamic tension" with each other (*R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, at para. 108). If a law is found to conflict with one of the principles of fundamental justice, the next step in the analysis is to identify any other, opposed principles that are enhanced by the law, and to consider the interplay between the various principles holistically in order to reach a final conclusion on whether the law is or is not consistent with s. 7.

129 Similarly, s. 8 protects the right to be free from "unreasonable" search and seizure. In working out what is "reasonable" in this context, courts customarily balance the individual's interest in being let alone against the government's interest in investigation and law enforcement (see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at pp. 159-60). McLachlin J. and Iacobucci J., in *R. v. Mills*, [1999] 3 S.C.R. 668, at para. 86, noted that "the appropriateness of the balance is assessed according to the nature of the interests at stake in a particular context, and the place of these interests within our legal and political traditions".

130 The content and scope of every *Charter* right, even when the text of the right in question does not include limiting words such as "reasonable", is determined with reference to its purpose. A right's purpose may be connected not only to purely individual interests but also to communitarian or group concerns. For example, the right to freedom of association protected by s. 2(*d*) of the *Charter* is defined "primarily as an instrument of self-fulfilment and realization of the individual" (*R. v. Advance Cutting & Coring Ltd.*, [2001] 3 S.C.R. 209, 2001 SCC 70, at para. 170), but this Court has also recognized its social and collective dimension by identifying its purpose as being "to protect the collective pursuit of common goals" (*Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 252). And the right to equality protected by s. 15 of the *Charter* is expressly an individual right, but the concept of freedom from discrimination is related (as the grounds of discrimination listed in s. 15(1) demonstrate) to the individual's membership in certain social groups and to the relationships between minority groups and Canadian society.

131 The jurisprudence I have referred to provides insights which are highly relevant to s. 3. Section 3 is not a "qualified" right as far as literal prohibitions on voting or running for office are concerned. But when we are dealing with the additional protections that must implicitly be included if the literal language of the section is to be given full effect, the situation changes. We identify this implicit content with qualified phrases: "effective representation" and "meaningful participation". Section 3 ensures that voters are "reasonably informed of all the possible choices" and that parties and candidates have "a reasonable opportunity to present their positions" (*Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 47 (emphasis added)). At its heart is "the right to play a meaningful role in the selection of elected representatives" (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1031 (emphasis added)). The fact that our Court routinely uses such modifying language in describing the scope of s. 3 indicates that the analysis appropriate for the expressly "qualified" rights also applies here, except when literal disqualifications are at issue.

132 To determine whether s. 3 has been infringed in a given case, we must be attentive to the fact that representation has different aspects and that some of its aspects are not easily reconciled. Iacobucci J.'s phrase "dynamic tension" is as apt in this context as it is in connection with s. 7. And

in s. 3, as in s. 8 of the *Charter*, the analysis is undertaken with awareness of our legal and political traditions.

133 Furthermore, s. 3, like s. 2(*d*) and s. 15, while it is ultimately a right of each individual citizen, cannot be understood without reference to its social and systemic context. The rights to vote and to be a candidate do not fit the classic model of a negative individual right to be free from government interference. Citizens cannot exercise s. 3 rights on their own, without the state's involvement. Rather, s. 3 imposes a positive obligation on the government to set up an electoral system which, in turn, provides for democratic government in accordance with the choices of Canadian voters. Measuring the system against the constitutional ideals of effective representation and meaningful participation requires assessing how well it represents both Canadian society as a whole, and the groups that make up our social fabric. Evaluating the fairness of the system involves looking at how each citizen fares in relation to others. Section 3 rights are individual rights, but their meaning is determined by their social and relational context.

134 Having determined that a legislative measure constrains the capacity of certain individuals to participate in the democratic process, we must then go on to examine whether as a result the electoral system fails to meet the constitutional standard of providing effective representation and meaningful participation, bearing in mind the countervailing values, including social and collective values, that are comprised within those phrases. I suggest that this inquiry must take the form of a proportionality analysis. I would not equate such an analysis with the balancing of collective interests and individual rights which should take place under s. 1. Rather, I would reiterate my view that the individual right to meaningful participation has many aspects, or comprises many competing principles. When a government measure exacts a cost in terms of one of those principles, its consistency with s. 3 depends on whether there are corresponding benefits related to other democratic values and whether, when costs and benefits are considered together, the end result is or is not a deprivation of meaningful participation.

135 For the reasons stated by Iacobucci J., I agree that the provisions at issue in this appeal do interfere with the capacity of some individual citizens to participate. The next step is to ask whether the legislation enhances any of the competing values which contribute to meaningful participation and effective representation.

E. *The Democratic Values Furthered by the Legislation*

136 Reserving certain privileges for parties that nominate 50 or more candidates in an election, generally speaking, gives an advantage in electoral competition to larger parties with a broader geographical base. While the adverse consequences to smaller parties and parties whose support is concentrated in relatively few ridings, and the costs in terms of fairness to their candidates and supporters must be acknowledged, nevertheless, the favourable treatment of more broadly based parties does further an aspect of effective representation that can validly be weighed in the balance against the value of individual participation.

137 The 50-candidate rule tends to channel voter support towards parties that engage in internal compromise and consensus building so as to emerge as mainstream, broadly based political movements. I would identify the value enhanced by this measure as the aggregation of political preferences, or the promotion of cohesion over fragmentation. The Alberta Court of Appeal alluded to this aspect of democratic representations in the *Alberta Reference, supra*, at p. 216, when it spoke of "shared representation" as encouraging "the mutual understanding and respect that is essential to a

healthy democratic life". This value is closely connected, in the context of this appeal, to the role of political parties in the Canadian electoral system.

F. *The Value of the Party System*

138 Political parties are key institutions in the Canadian system of representative and responsible government -- that is, government where laws are made by elected representatives of the people and where the executive is responsible to the legislature and enjoys the confidence of a majority of its members.

139 The Royal Commission on Electoral Reform and Party Financing (the "Lortie Commission") observed in its 1991 Report (*Reforming Electoral Democracy: Final Report*, vol. 1) that political parties have played a prominent role in Canadian politics since the struggle to attain responsible government in Canada in the first half of the nineteenth century, becoming deeply rooted in Canadian society -- in contrast to their British counterparts, which at that time were primarily parliamentary factions. By Confederation, parties had become "an essential component of the effective operation of responsible government and the central focus for the mobilization and participation of citizens in political life" (Report of the Lortie Commission, vol. 1, at p. 211).

140 As my colleague notes at para. 39 of his reasons, parties enhance representation by making the political participation of individuals more effective than it would be if those individuals acted alone, without the coordination, structure and cooperation that the party system provides. Parties keep voters informed of important issues and provide them with meaningful electoral choices.

141 Canada's form of responsible government also reflects the central role of political parties. The Constitution gives the Governor General the formal power of selecting the Prime Minister and Cabinet, but by convention she invariably appoints the leader of the party that has won the majority of seats in Parliament (assuming that there is one) as Prime Minister, and follows his recommendations in appointing the other ministers (see Hogg, *supra*, at p. 255; H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at pp. 374-79). The Lortie Commission commented on the party system as a foundation of responsible government, noting that the fundamental constitutional characteristics of our system "assume a structure of political representation in Parliament that makes it possible to form a government and hold it responsible to elected members", and that parties, by structuring electoral choice, help to enable voters to determine who forms the government (Report of the Lortie Commission, vol. 1, at p. 209).

142 The Lortie Commission devoted an entire chapter of its 1991 Report to a discussion of the function of political parties. The title of that chapter, "Political Parties as Primary Political Organizations", sums up the Commission's view of the crucial role played by political parties in our democratic system. The Commission described parties as "best suited to performing a host of activities essential to representative democracy" (Report of the Lortie Commission, vol. 1, at p. 207). It identified three key functions of political parties: structuring electoral choice so as to make the vote meaningful; providing mechanisms for political participation, thus enhancing democratic self-government; and organizing elected representation in Parliament, thus contributing to the effective operation of responsible government (vol. 1, at p. 209).

143 Parties are such important actors in our political system that, although they are private and voluntary organizations, they also possess some of the characteristics of a public institution. It is therefore to be expected that the identification and regulation of parties should have become one of

the functions of Canadian elections law; indeed, it is rather surprising that the existence of political parties was not recognized at all in federal election legislation until 1970. The formal recognition of parties in the *Canada Elections Act* came about in response to the recommendations of the Committee on Election Expenses (the "Barbeau Committee") in its Report issued in 1966 (*Report of the Committee on Election Expenses*).

144 As the Barbeau Committee noted, before the amendments to the *Canada Elections Act*, only the fundraising and spending of individual candidates were regulated, although parties played a very significant role in organizing political financing. This meant that election financing remained in effect virtually unregulated. The Committee saw the lack of effective public control over political financing as posing a serious threat to the proper functioning of the democratic system. It created opportunities for corruption and made it less likely that parties and legislators would act in conformity with the public interest.

145 Part of the Barbeau Committee's proposed solution to these problems was the creation of a formal registry of political parties. Registered parties would be held accountable for their actions, and in particular for disclosing the sources of their funding and how it was spent. To minimize the distorting effect of large private contributions, the Committee recommended public subsidies for basic campaign expenses. It also proposed the use of tax incentives for individual contributions to political parties so as to increase public participation by broadening the base of political contributions. The Committee recommended that candidates' affiliations to registered political parties appear on the ballot, thus providing voters with more complete information about the candidates. These benefits were to be made available only to parties that complied fully with registration requirements (see *Report of the Committee on Election Expenses*, at pp. 37-48). Many of the Barbeau Committee's recommendations were adopted in major amendments to the *Canada Elections Act* in 1970 and 1974.

146 Fielding at least 50 candidates in an election, as one of the requirements for party registration, is part of the framework for the recognition and regulation of political parties that was set up in response to the Barbeau Committee's proposals. The overall scheme of which it is a part has improved our electoral system and furthers the important democratic values of accountability, political communication, and grassroots participation. While the impugned provision cannot, of course, borrow its constitutional validity from the surrounding provisions of the *Canada Elections Act*, it should not be divorced from its context for the purposes of constitutional scrutiny.

G. *Competing in a Relatively High Number of Ridings as a Criterion for Registration*

147 Legal recognition of parties necessitates legal definition of what a party is. The criteria for registration in the *Canada Elections Act* are designed to ensure both that parties live up to their obligation to account for their income and expenditures, and also, perhaps more controversially, that the benefits of registered party status are reserved for those organizations that genuinely fulfil the functions of political parties in our electoral system. It is in this light that the requirement of nominating 50 candidates must be viewed.

148 Two main functions of political parties can be identified: affecting the development of policy by publicizing ideas and influencing the political agenda; and competing in elections to gain a position in the legislature. These functions are often intertwined, but it is really the second that marks out a political party as a party in distinction to other participants in political debate. As the

Lortie Commission noted, the first function is shared by interest groups -- organizations which communicate ideas to the public, and seek to shape the political agenda and influence government policy, often focussing on a single issue or cluster of issues, but do not compete for elected office (Report of the Lortie Commission, vol. 1, at pp. 222-23). The registration system and the public policy objectives it promotes are related to the role of parties as competitors in elections. Indeed, many of the benefits of registration are virtually meaningless outside the context of electoral competition -- although some, such as tax credits to contributors, could be attractive to groups that do not seriously intend to compete in elections. Making them available to such groups as well as genuine parties could undermine the purposes of the registration scheme.

149 For these reasons, in my opinion, a requirement of nominating at least one candidate, and perhaps more, in order to qualify for registration as a party would not raise any serious constitutional concerns. Official recognition of parties could hardly work without such a requirement. Nominating candidates and competing in the electoral process is fundamental to the nature of parties as opposed to other kinds of political associations, such as interest groups.

150 But although the objectives referred to by the Barbeau Committee provide the beginning of an explanation of the 50-candidate rule, they are not enough to explain fully why parties should be required to nominate candidates in a fairly large number of constituencies. Undoubtedly, this rule shuts out some parties which are genuine competitors in the electoral process (and not mere interest groups), but which for valid strategic reasons decide to concentrate their campaign resources in a small number of ridings. In other words, it would be possible to achieve the enhancement of democratic values that the Barbeau Committee saw in a system of party registration, without making the nomination of so large a number as 50 candidates a prerequisite for recognition as a party. The question, then, is whether this particular feature of the regime can be said to enhance effective representation in some way. To answer this question, I return to the value referred to earlier, that of aggregating political preferences.

151 Requiring that registered parties be committed to electoral competition in a fairly high number of ridings tends to tilt the system in favour of larger parties and parties whose support is geographically dispersed. The Lortie Commission saw the 50-candidate rule as an appropriate way of identifying parties that were equipped for electoral competition on a national scale (vol. 1, at p. 249):

> A political party that nominates candidates in 50 constituencies would demonstrate serious intent to engage in the rigours of electoral competition at a level that indicates relatively broad appeal for its program and ideas. Moreover, experience since 1974 shows that this level is neither unduly onerous nor too lenient for registration. We believe that this threshold should continue to serve as a benchmark in determining which parties may be registered under the *Canada Elections Act*.

Nomination of 50 candidates demonstrates two things about a party (as the Lortie Commission observed): a high level of commitment to electoral competition, and breadth of appeal. The rule therefore favours established parties with a broad basis of support. A system which benefits such parties has its drawbacks, in that it limits citizens' opportunities to support smaller parties whose platforms may correspond closely to their own particular political agendas. On the other hand, it furthers a

value which plays a part in defining effective representation in Canada, the aggregation of political will and the promotion of cohesiveness over factionalism.

H. *Aggregation of Political Preferences as a Value Manifested in our History and Political Institutions*

152 As the present Chief Justice observed in the *Saskatchewan Reference, supra*, at p. 185, "[t]he circumstances leading to the adoption of the *Charter* negate any intention to reject existing democratic institutions". I agree with McLachlin J.'s (as she then was) assertion in that case that inequities in the electoral system are not acceptable merely because they have historical precedent, and that institutions are not constitutional merely because they already exist. I also agree with her that we should look to past and present institutions as the soil in which the "living tree" that is the Canadian Constitution is rooted, while recognizing that the tree "must be capable of growth to meet the future" (*Saskatchewan Reference, supra*, at p. 180).

153 My conclusion that aggregation and cohesiveness form part of the many values that contribute to the meaning of democratic rights in Canada is supported by aspects of our history and existing institutions. Our political system is, and traditionally has been, characterized by other important features that correspond to this pattern of favouring political aggregation. On the spectrum of democratic political systems, from those that represent citizens in a more diverse and fragmented way to those where only a small number of mainstream parties has any significant presence in the political arena, the Canadian system is towards the latter end of the range. This has not come about by accident, but in part as a result of the deliberate design of our electoral infrastructure to confer advantages on mainstream political movements that are denied to parties on the political periphery.

154 Perhaps the most significant example is the structure of our system of voting. Canada is one of only a few major democracies to retain the Westminster first-past-the-post ("FPTP") system. Many other democratic states use proportional representation or some form of mixed system. In comparison with those systems, FPTP creates a bias in favour of mainstream parties that represent the aggregated views of a broad section of society, and against smaller parties which provide a vehicle for dissent, advocate particular issues, or may be the precursors of mainstream political movements of the future. It does not make it impossible for the latter to participate, but it makes it more difficult for them to compete. Of the electoral systems used in democratic countries, FPTP is the least "fair" or proportional, in that it distorts the translation of votes into seats in favour of the largest parties (H. MacIvor, "A Brief Introduction to Electoral Reform", in Milner, *Making Every Vote Count: Reassessing Canada's Electoral System* (1999), 19, at p. 21).

155 On the other hand, FPTP possesses other virtues that proportional or mixed systems exhibit to a lesser degree. Certain advantages flow from the fact that FPTP tends to exaggerate electoral majorities and so to produce majority governments. I recognize that, as my colleague notes, FPTP can produce coalition governments and has done so in this country on a number of occasions; nevertheless, it is more likely than other electoral systems to produce a majority government, while proportional representation almost invariably produces coalitions (MacIvor, *supra*, at pp. 28-29). Majority government is connected to the Canadian tradition of responsible government because a single party under a single identifiable leader is accountable for government policy (MacIvor, *supra*, at p. 29). Again, I would not suggest that responsible government is impossible when a minority or coalition government is elected, only that in our particular system majority governments may reasonably be seen as offering some advantage in this respect. Some observers also associate FPTP

and majority governments with greater stability as compared to the most purely proportional systems.

156 Under FPTP, the most successful parties are those that represent a broad alliance of different communities of interest. Our electoral system thus encourages coalition building within rather than between parties (by contrast, under proportional representation, coalitions are typically formed between parties in order to form a government after an election). One political scientist has argued that FPTP in combination with the special characteristics of the Canadian political landscape has fostered the development of "centrist, accommodative parties" that are particularly well-suited to representing a regionally, linguistically and culturally diverse country:

> The fight has been for the middle, drawing the principal parties there with policies and leadership that were aimed, if the party was serious about gaining or retaining office, more at accommodating regional rivalries and linguistic differences than exacerbating them or trying to turn them to electoral advantage.
>
> (J. C. Courtney, "Electoral Reform and Canada's Parties", in Milner, *supra*, 91, at p. 99)

157 The desirability of centrist, accommodative parties and the virtues of majority government are not truths universally acknowledged; the views I have referred to are value judgments on which there is vigorous debate. Many academics and political activists are critical of our electoral system and call for its reform. My point is simply that one can reasonably view FPTP as possessing the main virtue claimed for it, the virtue of fostering a strong political centre and reducing factionalism. And because our FPTP electoral system is one of Canada's core political institutions, it is reasonable to conclude that this virtue remains consistent with certain values of our democratic culture -- even if, bearing in mind that the Canadian concept of democracy embodies many competing values, it clashes with others. Certain aspects of the design of our political system appear to reflect a preference for the kind of party that has gained, in the words of the Lortie Commission, at p. 249, "relatively broad appeal for its program and ideas".

158 It should be emphasized that I do not intend to express any opinion about the consistency of our FPTP electoral system with s. 3 of the *Charter*. Any challenge to that system will have to be evaluated on its own merits. Nor would I wish to give the impression that I consider stability, majority governments or aggregation to be more important than fair participation. Nevertheless, within the boundaries set by the Constitution, it is the legislature's prerogative to choose whether to enhance these values over other democratic values, or not. Still less should I be taken as suggesting that FPTP or any feature of the electoral system that favours larger parties is constitutionally mandated. On the contrary, I would argue that the government has a fairly wide latitude in choosing how to design the electoral system and how to combine the various competing values at play.

159 The value of political aggregation runs through certain fundamental Canadian political institutions. As a result, it should be taken into account (although it should not, of course, be the only value taken into account) in determining the meaning of "effective representation" and the limits that s. 3 sets on the choices open to the government.

160 History and existing institutions help us to identify the philosophy underlying the development of the right to vote in this country (*Saskatchewan Reference, supra*, at p. 181). That philosophy appears to me to be one that comprises recognition of other values than individual participa-

tion -- including the value of aggregation of political will, which has been a hallmark of the Canadian political system for so long.

161 The right of each individual to meaningful participation sets the limit on what is permissible, but up to that limit, many options might reflect quite different, but equally acceptable, versions of democratic representation. Within constitutional limits, the choice among these options should be viewed as a matter of political and philosophical preference in which it is not this Court's role to intervene. The Constitution of Canada does not require a particular kind of democratic electoral system, whether it is one that emphasizes proportionality and the individual aspects of participation or one that places more emphasis on centrism and aggregation, to be frozen in place. It does require courts to be vigilant in ensuring that the system does not unduly compromise any of the values comprised within the concept of effective representation -- especially the primary value of individual participation in fair elections on a basis of relative equality.

I. *Regional Representation*

162 So far I have discussed two aspects of representation that are implicated by the provisions challenged in this appeal: individual participation, which the legislation undermines, and aggregation, which it tends to enhance. In my view, a third factor is also at play: regional representation.

163 On the basis of Canadian history, existing political institutions and certain statements of this Court, I would conclude that one component of effective representation is the interest of citizens in being represented as members of regionally or territorially defined communities. This argument may appear hard to reconcile with my position that aggregation of interests and alliance building between distinct communities is also a value that plays a part in defining Canadian democracy. I view this difficulty as an example of the complex and even somewhat paradoxical nature of the concept of meaningful participation, which represents a compromise between competing objectives. Regionally or geographically defined representation can also conflict with the value of individual participation on an equal footing, as is the case when some votes are given more weight than others so as to ensure that numerically smaller regions have an audible voice.

164 Perhaps the most significant manifestation of the importance of political representation of regional interests in Canada is our federalist system. Federalism was adopted at Confederation in spite of the push by some politicians for "legislative union" -- a single central government elected by a nationwide majority. The proponents of legislative union eventually accepted that neither Lower Canada nor the Maritime provinces would accept such an arrangement, in which the power of greater population might overwhelm and eradicate their distinct communities. During the Confederation Debates in Parliament, Sir John A. Macdonald stated that "any proposition which involved the absorption of the individuality of Lower Canada ... would not be received with favor by her people" and in the Maritime provinces, although they shared a language and a system of law with Upper Canada, "there was as great a disinclination ... to lose their individuality, as separate political organizations" (Speech of John A. Macdonald on Monday, February 6, 1865, cited in the *Parliamentary Debates on the subject of the Confederation* (1865), at p. 29).

165 Macdonald and the other Fathers of Confederation recognized that the very possibility of union depended on a compromise between rule by a national majority and preserving the "individuality" of the separate political communities that made up the new nation. Federalism was seen not just as a pragmatic solution but as necessary to ensure fairness to the various regional communities. In the *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*"), at para. 43,

this Court described the division of powers between federal and provincial levels of government as "a legal recognition of the diversity that existed among the initial members of Confederation", which "manifested a concern to accommodate that diversity within a single nation".

166 Another institution which embodies this principle of regional representation is the Senate, where seats are allocated between four regions of the country. And even in the House of Commons, regional interests play a part in the allocation of seats. The "Senator[ial] clause" (s. 51A), added in 1915 to the representation formula in the *Constitution Act, 1867*, ensures that no province will have fewer seats in the House of Commons than it has in the Senate (at the time this change had the effect of guaranteeing that Prince Edward Island would have four seats although its population would have given it only three under the old rules).

167 These features of Canada's history and political institutions indicate that fair democratic representation in this country includes representation of the distinctive interests of regional groups. I find support for this conclusion in some of this Court's statements on the relationship between federalism and democracy, particularly in the *Secession Reference, supra*. The Court portrayed the underlying principles of the Constitution, including federalism and democracy, as existing in symbiosis: "[n]o single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other" (para. 49). This suggests that federalism, with its concern for preserving the distinctive interests of regional groups, helps to define Canadian democracy.

168 In the *Charter* era, it has been suggested that the importance of regionalism and federalism has been attenuated by the affirmation of the sovereign worth of the individual and by the protection of minority communities defined by shared characteristics such as gender and race (see A. C. Cairns, "The Charter and the Constitution Act, 1982", in R. S. Blair and J. T. McLeod, eds., *The Canadian Political Tradition: Basic Readings* (2nd ed. 1993), 62). Nevertheless, federalism and regional representation remain important concepts in defining the nature of political rights in this country. The nature of the individual and democratic rights enshrined in the *Charter* cannot be understood without awareness of this aspect of the political culture in which those rights are rooted. As J.-F. Gaudreault-DesBiens observes ("La *Charte canadienne des droits et libertés* et le fédéralisme: quelques remarques sur les vingt premières années d'une relation ambiguë", [2003] *R. du B.* 271, at p. 297), [TRANSLATION] "Federalism plays a direct role in shaping the particular brand of democracy that exists in Canada. Its presence is in some sense encoded in the very idea of democracy referred to in s. 1 [and, I would add, by the democratic rights in s. 3] of the *Charter*."

169 These observations suggest that one of the components of the right to meaningful participation is the right to have one's voice heard as a member of the regional community to which one belongs. The constitutional guarantee of effective representation includes a right to a certain degree of recognition of the individual voter's interests as a Manitoban, or a Maritimer, or a Quebecker, and it suggests a floor of relative equality between the different provinces and regions of the country which cannot be completely cancelled out by a nationwide numerical majority. This aspect of effective representation is far from being an absolute right, and its weight should not be overstated at the risk of trumping core concerns such as fairness as between individual voters. But it is one of the values to be taken into account in defining meaningful representation and determining whether government action offends s. 3.

J. *Assessing the 50-Candidate Rule*

170 I now turn to the application of these principles to the legislation which is the subject of this constitutional challenge. Taking all the relevant factors into account, I would conclude that the requirement of nominating 50 or more candidates to gain access to the benefits at issue in this appeal compromises the competitive position of some candidates, and their supporters' freedom of choice, to such an extent that it denies those individuals the opportunity for meaningful participation.

171 Iacobucci J. has cogently demonstrated that this measure undermines the capacity of some individuals to participate in the political process. The penalties for failing to meet the 50-candidate threshold are quite severe, and they impose a considerable disadvantage on parties that lose their registered status. The respondent argues that it is relatively easy for parties to meet the threshold. Following legislative amendments in 2000, the deposit of $1,000 required for each candidate is now fully refundable on compliance with reporting requirements, so that a party would have to do no more than borrow $50,000 and collect the requisite number of signatures in order to nominate 50 candidates. In purely monetary terms, perhaps the obstacles are not difficult to surmount. But the 50-candidate requirement is a distraction and a burden for parties committed to running serious campaigns in a few ridings, because they have to field a slate of other candidates in constituencies where they have no intention of running a real campaign simply in order to secure a place on the registry.

172 On the other hand, by benefiting mainstream parties with a broad base of support, the legislation contributes to the important democratic value of aggregating political preferences. It also plays some part furthering the laudable objectives of the Barbeau Committee, by helping to identify authentic parties with a commitment to electoral competition and a substantial political agenda.

173 The 50-candidate rule is not, however, a perfect tool for these purposes. Generally speaking there is some relationship between a party's decision to run a candidate in a riding and its level of support there, but nominating a candidate is not necessarily an indication that a party has any support in the constituency. The rule is potentially subject to manipulation, and it can be both overinclusive and underinclusive. It has permitted the registration of parties that, at least for a number of citizens of Canada, would be viewed as far removed from the mainstream of Canadian politics or as single-issue movements. It is also capable of shutting out parties that do have a fully developed political platform and a genuine interest in electoral competition. The Communist Party of Canada, struck from the registry in 1993 (and reinstated in 2000), is an example: it has a long record of participation and even of some success in elections, and its platform, while certainly not in the Canadian mainstream, is based on what has been one of the world's major political philosophies.

174 Finally, the 50-candidate rule conflicts with the principle of regional representation because of its disparate impact on different provinces and regions of the country. As the appellant points out in his factum, the rule "encourages the formation of a Bloc Quebecois or Western Canada Concept, but effectively prevents a 'Bloc BC' or 'Atlantic Canada Concept'".

175 When the registration system was adopted, the government originally proposed a higher number of 75 candidates, on the grounds that registration was meant only for "national" parties (*House of Commons Debates*, vol. VIII, 2nd Sess., 28th Parl., June 23, 1970, at p. 8509, *per* Hon. Donald Macdonald). According to the Crown's expert Professor Aucoin, the government recognized that a party could meet this requirement by fielding candidates only in Ontario, but "was willing to accept this risk". A legislative committee proposed an amendment adopting a lower threshold of 10 per cent of constituencies, but ultimately an amendment was passed adopting the threshold of 50

candidates, which was a compromise between the two positions. As Professor Aucoin observes in his affidavit, the government's "willingness to compromise on 50 meant that it was willing to accept that a party could also be formed with candidates nominated only in Quebec".

176 Whatever the pragmatic considerations in favour of that compromise, it has created unfairness for the provinces other than Ontario and Quebec. A rule encouraging parties that represent a national perspective might, depending on its other effects, be an acceptable stricture. But a rule that makes a gesture towards reserving the privileges of registration for national parties, while in fact allowing registration of single-province parties only from the two most populous provinces, is at variance with the principle that a basic level of equality between the provinces and regions of the country is protected by the Constitution. Considering the matter from the perspective of (for example) a voter from one of the Maritime provinces, this measure might be perceived as a government-created advantage to central Canada, compounding the existing advantage of greater population, and so detrimental to that voter's political importance in comparison to a voter from Quebec or Ontario as in effect to deny his or her right to meaningful participation and effective representation.

177 For these reasons, I concur with my colleague's opinion that the legislation infringes s. 3. and I agree with the remedy he proposes.

K. *Justification and the Institutional Role of the Court*

178 In my view, the justifications advanced by the government for the 50-candidate rule are relevant to the infringement stage of the analysis, and I have given them due consideration in that context. As a result, little remains to be said in defence of the legislation in connection with s. 1. I would not rule out the possibility that in another case a non-literal infringement of s. 3 could be justified by pressing and substantial collective concerns. In this case, however, my finding that the legislation infringes s. 3 essentially amounts to a conclusion that it is inconsistent with the values of Canadian democracy. It is hard to see how it could nevertheless be shown to be "justified in a free and democratic society".

179 Were I to proceed with a full s. 1 analysis, however, I would see no reason to doubt that the government's objectives are pressing and substantial. In my view, this is not one of the rare class of cases where the very purpose of the law is contrary to constitutional or democratic norms.

180 I question the suggestion that favouring large parties with a broad base of support over marginal parties is discordant with, even antithetical to, the principles integral to a free and democratic society. As I have observed, our electoral system tends to reward parties that appeal to the political mainstream and whose support is spread out across the nation, and to penalize parties that appeal to more particularized interests. This is a feature of Canadian democracy which is apparent in the design of core political institutions. It has contributed to a tradition of centrism and coalition building within political parties, and this has facilitated the harmonious democratic governance of a highly diverse nation with no shortage of centrifugal political pressures. The values furthered by the legislation are consistent with some of the foundational principles on which our particular free and democratic society is based.

181 Furthermore, I have difficulty with the notion that the Crown should be required to demonstrate that the electoral system Parliament has adopted results in "substantially better governance" (Iacobucci J., at para. 89) than an alternative system. My concern is not only that it is hard to imagine how one could prove empirically that one form of government is better than another. More im-

portantly, the definition of "good" or "better" government is not something that should be fixed as a legal standard. It is a question on which vigorous disagreement between reasonable people may and does arise. Indeed, disagreement on this question is often one of the hallmarks of a democracy. My remarks are of course subject to the proviso that Canadians are committed, both as a matter of political tradition and constitutionally, to a democratic form of government. But within the category of democratic government, many variations may be found with quite different characteristics, and choosing one over another is a matter of choice between political values.

182 In suggesting that the motive behind the legislation may itself be illegitimate, the Court risks unduly expanding the scope of judicial review of the design of the electoral system. I would sound a note of caution against blurring the distinction between the respective roles of the Court and the legislature in dealing with a question which, while it certainly has legal dimensions, is also profoundly political. Within certain boundaries, which it is the responsibility of the judiciary to delineate, balancing competing democratic values and choosing between the various species of democratic electoral systems primarily fall within the domain of political debate and of the legislative process. Those boundaries should be viewed as fairly broad. They allow for a good deal of latitude within which the people, through their elected lawmakers, may choose rules and institutions that enhance certain aspects of the democratic right to meaningful participation and diminish others.

183 The *Charter* mandates that whatever system is adopted must respect the right of each individual to meaningful participation. But we should be circumspect about defining that right too inflexibly, lest legitimate political debate on the issues be impeded. The possibility of dialogue between courts and legislatures on the meaning of the right to vote may be unduly constrained if this Court declares that certain values, even though they have long been part of our political tradition, must be excluded from consideration in the interpretation and application of s. 3 of the *Charter*.

Solicitors:

Solicitors for the appellant: Roach, Schwartz & Associates, Toronto.

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

Solicitor for the intervener: Attorney General of Quebec, Sainte-Foy.

TAB 10

Indexed as:

Reference re Secession of Quebec

IN THE MATTER OF Section 53 of the Supreme Court Act, R.S.C., 1985, c. S-26
AND IN THE MATTER OF a Reference by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1497, dated the 30th day of September, 1996

[1998] 2 S.C.R. 217

[1998] 2 R.C.S. 217

[1998] S.C.J. No. 61

[1998] A.C.S. no 61

File No.: 25506.

Supreme Court of Canada

1998: February 16, 17, 18, 19 / 1998: August 20.

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

REFERENCE BY GOVERNOR IN COUNCIL

Constitutional law -- Supreme Court of Canada -- Reference jurisdiction -- Whether Supreme Court's reference jurisdiction constitutional -- Constitution Act, 1867, s. 101 -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Courts -- Supreme Court of Canada -- Reference jurisdiction -- Governor in Council referring to Supreme Court three questions relating to secession of Quebec from Canada -- Whether questions submitted fall outside scope of reference provision of Supreme Court Act -- Whether questions submitted justiciable -- Supreme Court Act, R.S.C., 1985, c. S-26, s. 53.

Constitutional law -- Secession of province -- Unilateral secession -- Whether Quebec can secede unilaterally from Canada under Constitution.

International law -- Secession of province of Canadian federation -- Right of self-determination -- Effectivity principle -- Whether international law gives Quebec right to secede unilaterally from Canada.

Pursuant to s. 53 of the Supreme Court Act, the Governor in Council referred the following questions to this Court:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?
3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

Issues regarding the Court's reference jurisdiction were raised by the amicus curiae. He argued that s. 53 of the Supreme Court Act was unconstitutional; that, even if the Court's reference jurisdiction was constitutionally valid, the questions submitted were outside the scope of s. 53; and, finally, that these questions were not justiciable.

Held: Section 53 of the Supreme Court Act is constitutional and the Court should answer the reference questions.

(1) Supreme Court's Reference Jurisdiction

Section 101 of the Constitution Act, 1867 gives Parliament the authority to grant this Court the reference jurisdiction provided for in s. 53 of the Supreme Court Act. The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. While, in most instances, this Court acts as the exclusive ultimate appellate court in the country, an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction. Even if there were any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal". A "general court of appeal" may also properly undertake other legal functions, such as the rendering of advisory opinions. There is no constitutional bar to this Court's receipt of jurisdiction to undertake an advisory role.

The reference questions are within the scope of s. 53 of the Supreme Court Act. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Questions 1 and 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are "important questions of law or fact concerning any matter" and thus come within s. 53(2). In answering Question 2, the Court is not exceeding its jurisdiction by purporting to act as an international tribunal. The Court is providing an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation. Further, Question 2 is not beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law. More importantly, Question 2 does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the legislature or government of Quebec, institutions that exist as part of the Canadian legal order. International law must be addressed since it has been invoked as a consideration in the context of this Reference.

The reference questions are justiciable and should be answered. They do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions, as interpreted by the Court, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. Since the reference questions may clearly be interpreted as directed to legal issues, the Court is in a position to answer them. The Court cannot exercise its discretion to refuse to answer the questions on a pragmatic basis. The questions raise issues of fundamental public importance and they are not too imprecise or ambiguous to permit a proper legal answer. Nor has the Court been provided with insufficient information regarding the present context in which the questions arise. Finally, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

(2) Question 1

The Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles animating the whole of the Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.

The Court in this Reference is required to consider whether Quebec has a right to unilateral secession. Arguments in support of the existence of such a right were primarily based on the principle of democracy. Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence

(economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted: the continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution" and not to usurp the prerogatives of the political forces that operate within that framework. The obligations identified by the Court are binding obligations under the Constitution. However, it will be for the political actors to determine what constitutes "a

clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

(3) Question 2

The Court was also required to consider whether a right to unilateral secession exists under international law. Some supporting an affirmative answer did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the "National Assembly, the legislature or the government of Quebec" do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

Although there is no right, under the Constitution or at international law, to unilateral secession, the possibility of an unconstitutional declaration of secession leading to a de facto secession is not ruled out. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Even if granted, such recognition would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

(4) Question 3

In view of the answers to Questions 1 and 2, there is no conflict between domestic and international

law to be addressed in the context of this Reference.

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REFERENCE by the Governor in Council, pursuant to s. 53 of the Supreme Court Act, concerning the secession of Quebec from Canada.

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Solicitor for the Attorney General of Canada: George Thomson, Ottawa. Solicitors appointed by the Court as amicus curiae: Joli-C(oe)ur Lacasse Lemieux Simard St-Pierre, Sainte-Foy. Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg. Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina. Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester. Solicitor for the intervener the Minister of Justice for the Government of the Yukon Territory: Stuart J. Whitley, Whitehorse. Solicitor for the intervener Kitigan Zibi Anishinabeg: Agnès Laporte,

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The following is the judgment delivered by

THE COURT:--

I. Introduction

1 This Reference requires us to consider momentous questions that go to the heart of our system of constitutional government. The observation we made more than a decade ago in Reference re Manitoba Language Rights, [1985] 1 S.C.R. 721 (Manitoba Language Rights Reference), at p. 728, applies with equal force here: as in that case, the present one "combines legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity". In our view, it is not possible to answer the questions that have been put to us without a consideration of a number of underlying principles. An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

2 The questions posed by the Governor in Council by way of Order in Council P.C. 1996-1497, dated September 30, 1996, read as follows:

1. Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?
2. Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from

Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

3. In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

3 Before turning to Question 1, as a preliminary matter, it is necessary to deal with the issues raised with regard to this Court's reference jurisdiction.

II. The Preliminary Objections to the Court's Reference Jurisdiction

4 The amicus curiae argued that s. 101 of the Constitution Act, 1867 does not give Parliament the authority to grant this Court the jurisdiction provided for in s. 53 of the Supreme Court Act, R.S.C., 1985, c. S-26. Alternatively, it is submitted that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the scope of that section should be interpreted to exclude the kinds of questions the Governor in Council has submitted in this Reference. In particular, it is contended that this Court cannot answer Question 2, since it is a question of "pure" international law over which this Court has no jurisdiction. Finally, even if this Court's reference jurisdiction is constitutionally valid, and even if the questions are within the purview of s. 53 of the Supreme Court Act, it is argued that the three questions referred to the Court are speculative, of a political nature, and, in any event, are not ripe for judicial decision, and therefore are not justiciable.

5 Notwithstanding certain formal objections by the Attorney General of Canada, it is our view that the amicus curiae was within his rights to make the preliminary objections, and that we should deal with them.

A. The Constitutional Validity of Section 53 of the Supreme Court Act

6 In Re References by Governor-General in Council (1910), 43 S.C.R. 536, affirmed on appeal to the Privy Council, [1912] A.C. 571 (sub nom. Attorney-General for Ontario v. Attorney-General for Canada), the constitutionality of this Court's special jurisdiction was twice upheld. The Court is asked to revisit these decisions. In light of the significant changes in the role of this Court since 1912, and the very important issues raised in this Reference, it is appropriate to reconsider briefly the constitutional validity of the Court's reference jurisdiction.

7 Section 3 of the Supreme Court Act establishes this Court both as a "general court of appeal" for Canada and as an "additional court for the better administration of the laws of Canada". These two roles reflect the two heads of power enumerated in s. 101 of the Constitution Act, 1867. However, the "laws of Canada" referred to in s. 101 consist only of federal law and statute: see Quebec North Shore Paper Co. v. Canadian Pacific Ltd., [1977] 2 S.C.R. 1054, at pp. 1065-66. As a

result, the phrase "additional courts" contained in s. 101 is an insufficient basis upon which to ground the special jurisdiction established in s. 53 of the Supreme Court Act, which clearly exceeds a consideration of federal law alone (see, e.g., s. 53(2)). Section 53 must therefore be taken as enacted pursuant to Parliament's power to create a "general court of appeal" for Canada.

8 Section 53 of the Supreme Court Act is intra vires Parliament's power under s. 101 if, in "pith and substance", it is legislation in relation to the constitution or organization of a "general court of appeal". Section 53 is defined by two leading characteristics -- it establishes an original jurisdiction in this Court and imposes a duty on the Court to render advisory opinions. Section 53 is therefore constitutionally valid only if (1) a "general court of appeal" may properly exercise an original jurisdiction; and (2) a "general court of appeal" may properly undertake other legal functions, such as the rendering of advisory opinions.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

9 The words "general court of appeal" in s. 101 denote the status of the Court within the national court structure and should not be taken as a restrictive definition of the Court's functions. In most instances, this Court acts as the exclusive ultimate appellate court in the country, and, as such, is properly constituted as the "general court of appeal" for Canada. Moreover, it is clear that an appellate court can receive, on an exceptional basis, original jurisdiction not incompatible with its appellate jurisdiction.

10 The English Court of Appeal, the U.S. Supreme Court and certain courts of appeal in Canada exercise an original jurisdiction in addition to their appellate functions. See De Demko v. Home Secretary, [1959] A.C. 654 (H.L.), at p. 660; Re Forest and Registrar of Court of Appeal of Manitoba (1977), 77 D.L.R. (3d) 445 (Man. C.A.), at p. 453; United States Constitution, art. III, sec. 2. Although these courts are not constituted under a head of power similar to s. 101, they certainly provide examples which suggest that there is nothing inherently self-contradictory about an appellate court exercising original jurisdiction on an exceptional basis.

11 It is also argued that this Court's original jurisdiction is unconstitutional because it conflicts with the original jurisdiction of the provincial superior courts and usurps the normal appellate process. However, Parliament's power to establish a general court of appeal pursuant to s. 101 is plenary, and takes priority over the province's power to control the administration of justice in s. 92(14). See Attorney-General for Ontario v. Attorney-General for Canada, [1947] A.C. 127 (P.C.). Thus, even if it could be said that there is any conflict between this Court's reference jurisdiction and the original jurisdiction of the provincial superior courts, any such conflict must be resolved in favour of Parliament's exercise of its plenary power to establish a "general court of appeal" provided, as discussed below, advisory functions are not to be considered inconsistent with the functions of a general court of appeal.

(2) May a Court of Appeal Undertake Advisory Functions?

12 The amicus curiae submits that

> [Translation] [e]ither this constitutional power [to give the highest court in the federation jurisdiction to give advisory opinions] is expressly provided for by the Constitution, as is the case in India (Constitution of India, art. 143), or it is not provided for therein and so it simply does not exist. This is what the Supreme Court of the United States has held. [Emphasis added.]

13 However, the U.S. Supreme Court did not conclude that it was unable to render advisory opinions because no such express power was included in the United States Constitution. Quite the contrary, it based this conclusion on the express limitation in art. III, sec. 2 restricting federal court jurisdiction to actual "cases" or "controversies". See, e.g., Muskrat v. United States, 219 U.S. 346 (1911), at p. 362. This section reflects the strict separation of powers in the American federal constitutional arrangement. Where the "case or controversy" limitation is missing from their respective state constitutions, some American state courts do undertake advisory functions (e.g., in at least two states -- Alabama and Delaware -- advisory opinions are authorized, in certain circumstances, by statute: see Ala. Code 1975 sec. 12-2-10; Del. Code Ann. tit. 10, sec. 141 (1996 Supp.)).

14 In addition, the judicial systems in several European countries (such as Germany, France, Italy, Spain, Portugal and Belgium) include courts dedicated to the review of constitutional claims; these tribunals do not require a concrete dispute involving individual rights to examine the constitutionality of a new law -- an "abstract or objective question" is sufficient. See L. Favoreu, "American and European Models of Constitutional Justice", in D. S. Clark, ed., Comparative and Private International Law (1990), 105, at p. 113. The European Court of Justice, the European Court of Human Rights, and the Inter-American Court of Human Rights also all enjoy explicit grants of jurisdiction to render advisory opinions. See Treaty establishing the European Community, Art. 228(6); Protocol No. 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 5, p. 36; Statute of the Inter-American Court of Human Rights, Art. 2. There is no plausible basis on which to conclude that a court is, by its nature, inherently precluded from undertaking another legal function in tandem with its judicial duties.

15 Moreover, the Canadian Constitution does not insist on a strict separation of powers. Parliament and the provincial legislatures may properly confer other legal functions on the courts, and may confer certain judicial functions on bodies that are not courts. The exception to this rule relates only to s. 96 courts. Thus, even though the rendering of advisory opinions is quite clearly done outside the framework of adversarial litigation, and such opinions are traditionally obtained by the executive from the law officers of the Crown, there is no constitutional bar to this Court's receipt of jurisdiction to undertake such an advisory role. The legislative grant of reference jurisdiction found in s. 53 of the Supreme Court Act is therefore constitutionally valid.

B. The Court's Jurisdiction Under Section 53

16 Section 53 provides in its relevant parts as follows:

> 53. (1) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning
>
> (a) the interpretation of the Constitution Acts;
>
> . . .
>
> (d) the powers of the Parliament of Canada, or of the legislatures of the provinces, or of the respective governments thereof, whether or not the particular power in question has been or is proposed to be exercised.
>
> (2) The Governor in Council may refer to the Court for hearing and consideration important questions of law or fact concerning any matter, whether or not in the opinion of the Court ejusdem generis with the enumerations contained in subsection (1), with reference to which the Governor in Council sees fit to submit any such question.
>
> (3) Any question concerning any of the matters mentioned in subsections (1) and (2), and referred to the Court by the Governor in Council, shall be conclusively deemed to be an important question.

17 It is argued that even if Parliament were entitled to enact s. 53 of the Supreme Court Act, the questions submitted by the Governor in Council fall outside the scope of that section.

18 This submission cannot be accepted. Question 1 is directed, at least in part, to the interpretation of the Constitution Acts, which are referred to in s. 53(1)(a). Both Question 1 and Question 2 fall within s. 53(1)(d), since they relate to the powers of the legislature or government of a Canadian province. Finally, all three questions are clearly "important questions of law or fact concerning any matter" so that they must come within s. 53(2).

19 However, the amicus curiae has also raised some specific concerns regarding this Court's jurisdiction to answer Question 2. The question, on its face, falls within the scope of s. 53, but the concern is a more general one with respect to the jurisdiction of this Court, as a domestic tribunal, to answer what is described as a question of "pure" international law.

20 The first contention is that in answering Question 2, the Court would be exceeding its jurisdiction by purporting to act as an international tribunal. The simple answer to this submission is that this Court would not, in providing an advisory opinion in the context of a reference, be

purporting to "act as" or substitute itself for an international tribunal. In accordance with well accepted principles of international law, this Court's answer to Question 2 would not purport to bind any other state or international tribunal that might subsequently consider a similar question. The Court nevertheless has jurisdiction to provide an advisory opinion to the Governor in Council in its capacity as a national court on legal questions touching and concerning the future of the Canadian federation.

21 Second, there is a concern that Question 2 is beyond the competence of this Court, as a domestic court, because it requires the Court to look at international law rather than domestic law.

22 This concern is groundless. In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system. For example, in Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences, [1943] S.C.R. 208, the Court was required to determine whether, taking into account the principles of international law with respect to diplomatic immunity, a municipal council had the power to levy rates on certain properties owned by foreign governments. In two subsequent references, this Court used international law to determine whether the federal government or a province possessed proprietary rights in certain portions of the territorial sea and continental shelf (Reference re Ownership of Offshore Mineral Rights of British Columbia, [1967] S.C.R. 792; Reference re Newfoundland Continental Shelf, [1984] 1 S.C.R. 86).

23 More importantly, Question 2 of this Reference does not ask an abstract question of "pure" international law but seeks to determine the legal rights and obligations of the National Assembly, legislature or government of Quebec, institutions that clearly exist as part of the Canadian legal order. As will be seen, the amicus curiae himself submitted that the success of any initiative on the part of Quebec to secede from the Canadian federation would be governed by international law. In these circumstances, a consideration of international law in the context of this Reference about the legal aspects of the unilateral secession of Quebec is not only permissible but unavoidable.

C. Justiciability

24 It is submitted that even if the Court has jurisdiction over the questions referred, the questions themselves are not justiciable. Three main arguments are raised in this regard:

(1) the questions are not justiciable because they are too "theoretical" or speculative;
(2) the questions are not justiciable because they are political in nature;
(3) the questions are not yet ripe for judicial consideration.

25 In the context of a reference, the Court, rather than acting in its traditional adjudicative function, is acting in an advisory capacity. The very fact that the Court may be asked hypothetical questions in a reference, such as the constitutionality of proposed legislation, engages the Court in an exercise it would never entertain in the context of litigation. No matter how closely the procedure

on a reference may mirror the litigation process, a reference does not engage the Court in a disposition of rights. For the same reason, the Court may deal on a reference with issues that might otherwise be considered not yet "ripe" for decision.

26 Though a reference differs from the Court's usual adjudicative function, the Court should not, even in the context of a reference, entertain questions that would be inappropriate to answer. However, given the very different nature of a reference, the question of the appropriateness of answering a question should not focus on whether the dispute is formally adversarial or whether it disposes of cognizable rights. Rather, it should consider whether the dispute is appropriately addressed by a court of law. As we stated in Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 545:

> While there may be many reasons why a question is non-justiciable, in this appeal the Attorney General of Canada submitted that to answer the questions would draw the Court into a political controversy and involve it in the legislative process. In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government. . . . In considering its appropriate role the Court must determine whether the question is purely political in nature and should, therefore, be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch. [Emphasis added.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

(i) if to do so would take the Court beyond its own assessment of its proper role in the constitutional framework of our democratic form of government or

(ii) if the Court could not give an answer that lies within its area of expertise: the interpretation of law.

27 As to the "proper role" of the Court, it is important to underline, contrary to the submission of the amicus curiae, that the questions posed in this Reference do not ask the Court to usurp any democratic decision that the people of Quebec may be called upon to make. The questions posed by the Governor in Council, as we interpret them, are strictly limited to aspects of the legal framework in which that democratic decision is to be taken. The attempted analogy to the U.S. "political questions" doctrine therefore has no application. The legal framework having been clarified, it will be for the population of Quebec, acting through the political process, to decide whether or not to pursue secession. As will be seen, the legal framework involves the rights and obligations of Canadians who live outside the province of Quebec, as well as those who live within Quebec.

28 As to the "legal" nature of the questions posed, if the Court is of the opinion that it is being asked a question with a significant extralegal component, it may interpret the question so as to

answer only its legal aspects; if this is not possible, the Court may decline to answer the question. In the present Reference the questions may clearly be interpreted as directed to legal issues, and, so interpreted, the Court is in a position to answer them.

29 Finally, we turn to the proposition that even though the questions referred to us are justiciable in the "reference" sense, the Court must still determine whether it should exercise its discretion to refuse to answer the questions on a pragmatic basis.

30 Generally, the instances in which the Court has exercised its discretion to refuse to answer a reference question that is otherwise justiciable can be broadly divided into two categories. First, where the question is too imprecise or ambiguous to permit a complete or accurate answer: see, e.g., McEvoy v. Attorney General for New Brunswick, [1983] 1 S.C.R. 704; Reference re Waters and Water-Powers, [1929] S.C.R. 200; Reference re Goods and Services Tax, [1992] 2 S.C.R. 445; Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island, [1997] 3 S.C.R. 3 (Provincial Judges Reference), at para. 256. Second, where the parties have not provided sufficient information to allow the Court to provide a complete or accurate answer: see, e.g., Reference re Education System in Island of Montreal, [1926] S.C.R. 246; Reference re Authority of Parliament in relation to the Upper House, [1980] 1 S.C.R. 54 (Senate Reference); Provincial Judges Reference, at para. 257.

31 There is no doubt that the questions posed in this Reference raise difficult issues and are susceptible to varying interpretations. However, rather than refusing to answer at all, the Court is guided by the approach advocated by the majority on the "conventions" issue in Reference re Resolution to Amend the Constitution, [1981] 1 S.C.R. 753 (Patriation Reference), at pp. 875-76:

> If the questions are thought to be ambiguous, this Court should not, in a constitutional reference, be in a worse position than that of a witness in a trial and feel compelled simply to answer yes or no. Should it find that a question might be misleading, or should it simply avoid the risk of misunderstanding, the Court is free either to interpret the question . . . or it may qualify both the question and the answer. . . .

The Reference questions raise issues of fundamental public importance. It cannot be said that the questions are too imprecise or ambiguous to permit a proper legal answer. Nor can it be said that the Court has been provided with insufficient information regarding the present context in which the questions arise. Thus, the Court is duty bound in the circumstances to provide its answers.

III. Reference Questions

A. Question 1

> Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?

(1) Introduction

32 As we confirmed in Reference re Objection by Quebec to a Resolution to amend the Constitution, [1982] 2 S.C.R. 793, at p. 806, "The Constitution Act, 1982 is now in force. Its legality is neither challenged nor assailable." The "Constitution of Canada" certainly includes the constitutional texts enumerated in s. 52(2) of the Constitution Act, 1982. Although these texts have a primary place in determining constitutional rules, they are not exhaustive. The Constitution also "embraces unwritten, as well as written rules", as we recently observed in the Provincial Judges Reference, supra, at para. 92. Finally, as was said in the Patriation Reference, supra, at p. 874, the Constitution of Canada includes

> the global system of rules and principles which govern the exercise of constitutional authority in the whole and in every part of the Canadian state.

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning. In our view, there are four fundamental and organizing principles of the Constitution which are relevant to addressing the question before us (although this enumeration is by no means exhaustive): federalism; democracy; constitutionalism and the rule of law; and respect for minorities. The foundation and substance of these principles are addressed in the following paragraphs. We will then turn to their specific application to the first reference question before us.

(2) Historical Context: The Significance of Confederation

33 In our constitutional tradition, legality and legitimacy are linked. The precise nature of this link will be discussed below. However, at this stage, we wish to emphasize only that our constitutional history demonstrates that our governing institutions have adapted and changed to reflect changing social and political values. This has generally been accomplished by methods that have ensured continuity, stability and legal order.

34 Because this Reference deals with questions fundamental to the nature of Canada, it should not be surprising that it is necessary to review the context in which the Canadian union has evolved. To this end, we will briefly describe the legal evolution of the Constitution and the foundational principles governing constitutional amendments. Our purpose is not to be exhaustive, but to highlight the features most relevant in the context of this Reference.

35 Confederation was an initiative of elected representatives of the people then living in the colonies scattered across part of what is now Canada. It was not initiated by Imperial fiat. In March 1864, a select committee of the Legislative Assembly of the Province of Canada, chaired by George Brown, began to explore prospects for constitutional reform. The committee's report, released in June 1864, recommended that a federal union encompassing Canada East and Canada West, and perhaps the other British North American colonies, be pursued. A group of Reformers from Canada West, led by Brown, joined with Étienne P. Taché and John A. Macdonald in a coalition government for the purpose of engaging in constitutional reform along the lines of the federal model proposed by the committee's report.

36 An opening to pursue federal union soon arose. The leaders of the maritime colonies had planned to meet at Charlottetown in the fall to discuss the perennial topic of maritime union. The Province of Canada secured invitations to send a Canadian delegation. On September 1, 1864, 23 delegates (five from New Brunswick, five from Nova Scotia, five from Prince Edward Island, and eight from the Province of Canada) met in Charlottetown. After five days of discussion, the delegates reached agreement on a plan for federal union.

37 The salient aspects of the agreement may be briefly outlined. There was to be a federal union featuring a bicameral central legislature. Representation in the Lower House was to be based on population, whereas in the Upper House it was to be based on regional equality, the regions comprising Canada East, Canada West and the Maritimes. The significance of the adoption of a federal form of government cannot be exaggerated. Without it, neither the agreement of the delegates from Canada East nor that of the delegates from the maritime colonies could have been obtained.

38 Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland to send a delegation to join them. The Quebec Conference began on October 10, 1864. Thirty-three delegates (two from Newfoundland, seven from New Brunswick, five from Nova Scotia, seven from Prince Edward Island, and twelve from the Province of Canada) met over a two and a half week period. Precise consideration of each aspect of the federal structure preoccupied the political agenda. The delegates approved 72 resolutions, addressing almost all of what subsequently made its way into the final text of the Constitution Act, 1867. These included guarantees to protect French language and culture, both directly (by making French an official language in Quebec and Canada as a whole) and indirectly (by allocating jurisdiction over education and "Property and Civil Rights in the Province" to the provinces). The protection of minorities was thus reaffirmed.

39 Legally, there remained only the requirement to have the Quebec Resolutions put into proper form and passed by the Imperial Parliament in London. However, politically, it was thought that more was required. Indeed, Resolution 70 provided that "The Sanction of the Imperial and Local Parliaments shall be sought for the Union of the Provinces, on the principles adopted by the Conference." (Cited in J. Pope, ed., Confederation: Being a Series of Hitherto Unpublished

Documents Bearing on the British North America Act (1895), at p. 52 (emphasis added).)

40 Confirmation of the Quebec Resolutions was achieved more smoothly in central Canada than in the Maritimes. In February and March 1865, the Quebec Resolutions were the subject of almost six weeks of sustained debate in both houses of the Canadian legislature. The Canadian Legislative Assembly approved the Quebec Resolutions in March 1865 with the support of a majority of members from both Canada East and Canada West. The governments of both Prince Edward Island and Newfoundland chose, in accordance with popular sentiment in both colonies, not to accede to the Quebec Resolutions. In New Brunswick, a general election was required before Premier Tilley's pro-Confederation party prevailed. In Nova Scotia, Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

41 Sixteen delegates (five from New Brunswick, five from Nova Scotia, and six from the Province of Canada) met in London in December 1866 to finalize the plan for Confederation. To this end, they agreed to some slight modifications and additions to the Quebec Resolutions. Minor changes were made to the distribution of powers, provision was made for the appointment of extra senators in the event of a deadlock between the House of Commons and the Senate, and certain religious minorities were given the right to appeal to the federal government where their denominational school rights were adversely affected by provincial legislation. The British North America Bill was drafted after the London Conference with the assistance of the Colonial Office, and was introduced into the House of Lords in February 1867. The Act passed third reading in the House of Commons on March 8, received royal assent on March 29, and was proclaimed on July 1, 1867. The Dominion of Canada thus became a reality.

42 There was an early attempt at secession. In the first Dominion election in September 1867, Premier Tupper's forces were decimated: members opposed to Confederation won 18 of Nova Scotia's 19 federal seats, and in the simultaneous provincial election, 36 of the 38 seats in the provincial legislature. Newly-elected Premier Joseph Howe led a delegation to the Imperial Parliament in London in an effort to undo the new constitutional arrangements, but it was too late. The Colonial Office rejected Premier Howe's plea to permit Nova Scotia to withdraw from Confederation. As the Colonial Secretary wrote in 1868:

> The neighbouring province of New Brunswick has entered into the union in reliance on having with it the sister province of Nova Scotia; and vast obligations, political and commercial, have already been contracted on the faith of a measure so long discussed and so solemnly adopted. . . . I trust that the Assembly and the people of Nova Scotia will not be surprised that the Queen's government feel that they would not be warranted in advising the reversal of a great measure of state, attended by so many extensive consequences already in operation. . . .

> (Quoted in H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997), 76 Can. Bar Rev. 155, at p. 168.)

The interdependence characterized by "vast obligations, political and commercial", referred to by the Colonial Secretary in 1868, has, of course, multiplied immeasurably in the last 130 years.

43 Federalism was a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today. At Confederation, political leaders told their respective communities that the Canadian union would be able to reconcile diversity with unity. It is pertinent, in the context of the present Reference, to mention the words of George-Étienne Cartier (cited in the Parliamentary Debates on the subject of the Confederation (1865), at p. 60):

> Now, when we [are] united together, if union [is] attained, we [shall] form a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere. It was lamented by some that we had this diversity of races, and hopes were expressed that this distinctive feature would cease. The idea of unity of races [is] utopian -- it [is] impossible. Distinctions of this kind [will] always exist. Dissimilarity, in fact, appear[s] to be the order of the physical world and of the moral world, as well as in the political world. But with regard to the objection based on this fact, to the effect that a great nation [can]not be formed because Lower Canada [is] in great part French and Catholic, and Upper Canada [is] British and Protestant, and the Lower Provinces [are] mixed, it [is] futile and worthless in the extreme. . . . In our own Federation we [will] have Catholic and Protestant, English, French, Irish and Scotch, and each by his efforts and his success [will] increase the prosperity and glory of the new Confederacy. . . . [W]e [are] of different races, not for the purpose of warring against each other, but in order to compete and emulate for the general welfare.

The federal-provincial division of powers was a legal recognition of the diversity that existed among the initial members of Confederation, and manifested a concern to accommodate that diversity within a single nation by granting significant powers to provincial governments. The Constitution Act, 1867 was an act of nation-building. It was the first step in the transition from colonies separately dependent on the Imperial Parliament for their governance to a unified and independent political state in which different peoples could resolve their disagreements and work together toward common goals and a common interest. Federalism was the political mechanism by which diversity could be reconciled with unity.

44 A federal-provincial division of powers necessitated a written constitution which circumscribed the powers of the new Dominion and Provinces of Canada. Despite its federal structure, the new Dominion was to have "a Constitution similar in Principle to that of the United Kingdom" (Constitution Act, 1867, preamble). Allowing for the obvious differences between the

governance of Canada and the United Kingdom, it was nevertheless thought important to thus emphasize the continuity of constitutional principles, including democratic institutions and the rule of law; and the continuity of the exercise of sovereign power transferred from Westminster to the federal and provincial capitals of Canada.

45 After 1867, the Canadian federation continued to evolve both territorially and politically. New territories were admitted to the union and new provinces were formed. In 1870, Rupert's Land and the Northwest Territories were admitted and Manitoba was formed as a province. British Columbia was admitted in 1871, Prince Edward Island in 1873, and the Arctic Islands were added in 1880. In 1898, the Yukon Territory and in 1905, the provinces of Alberta and Saskatchewan were formed from the Northwest Territories. Newfoundland was admitted in 1949 by an amendment to the Constitution Act, 1867. The new territory of Nunavut was carved out of the Northwest Territories in 1993 with the partition to become effective in April 1999.

46 Canada's evolution from colony to fully independent state was gradual. The Imperial Parliament's passage of the Statute of Westminster, 1931 (U.K.), 22 & 23 Geo. 5, c. 4, confirmed in law what had earlier been confirmed in fact by the Balfour Declaration of 1926, namely, that Canada was an independent country. Thereafter, Canadian law alone governed in Canada, except where Canada expressly consented to the continued application of Imperial legislation. Canada's independence from Britain was achieved through legal and political evolution with an adherence to the rule of law and stability. The proclamation of the Constitution Act, 1982 removed the last vestige of British authority over the Canadian Constitution and re-affirmed Canada's commitment to the protection of its minority, aboriginal, equality, legal and language rights, and fundamental freedoms as set out in the Canadian Charter of Rights and Freedoms.

47 Legal continuity, which requires an orderly transfer of authority, necessitated that the 1982 amendments be made by the Westminster Parliament, but the legitimacy as distinguished from the formal legality of the amendments derived from political decisions taken in Canada within a legal framework which this Court, in the Patriation Reference, had ruled was in accordance with our Constitution. It should be noted, parenthetically, that the 1982 amendments did not alter the basic division of powers in ss. 91 and 92 of the Constitution Act, 1867, which is the primary textual expression of the principle of federalism in our Constitution, agreed upon at Confederation. It did, however, have the important effect that, despite the refusal of the government of Quebec to join in its adoption, Quebec has become bound to the terms of a Constitution that is different from that which prevailed previously, particularly as regards provisions governing its amendment, and the Canadian Charter of Rights and Freedoms. As to the latter, to the extent that the scope of legislative powers was thereafter to be constrained by the Charter, the constraint operated as much against federal legislative powers as against provincial legislative powers. Moreover, it is to be remembered that s. 33, the "notwithstanding clause", gives Parliament and the provincial legislatures authority to legislate on matters within their jurisdiction in derogation of the fundamental freedoms (s. 2), legal rights (ss. 7 to 14) and equality rights (s. 15) provisions of the Charter.

48 We think it apparent from even this brief historical review that the evolution of our constitutional arrangements has been characterized by adherence to the rule of law, respect for democratic institutions, the accommodation of minorities, insistence that governments adhere to constitutional conduct and a desire for continuity and stability. We now turn to a discussion of the general constitutional principles that bear on the present Reference.

(3) Analysis of the Constitutional Principles

(a) Nature of the Principles

49 What are those underlying principles? Our Constitution is primarily a written one, the product of 131 years of evolution. Behind the written word is an historical lineage stretching back through the ages, which aids in the consideration of the underlying constitutional principles. These principles inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based. The following discussion addresses the four foundational constitutional principles that are most germane for resolution of this Reference: federalism, democracy, constitutionalism and the rule of law, and respect for minority rights. These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.

50 Our Constitution has an internal architecture, or what the majority of this Court in OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. As we recently emphasized in the Provincial Judges Reference, certain underlying principles infuse our Constitution and breathe life into it. Speaking of the rule of law principle in the Manitoba Language Rights Reference, supra, at p. 750, we held that "the principle is clearly implicit in the very nature of a Constitution". The same may be said of the other three constitutional principles we underscore today.

51 Although these underlying principles are not explicitly made part of the Constitution by any written provision, other than in some respects by the oblique reference in the preamble to the Constitution Act, 1867, it would be impossible to conceive of our constitutional structure without them. The principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood.

52 The principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree", to invoke the famous description in Edwards v. Attorney-General for Canada, [1930] A.C. 124 (P.C.), at p. 136. As this Court indicated in New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly), [1993] 1 S.C.R. 319, Canadians have long recognized the existence and importance

of unwritten constitutional principles in our system of government.

53 Given the existence of these underlying constitutional principles, what use may the Court make of them? In the Provincial Judges Reference, supra, at paras. 93 and 104, we cautioned that the recognition of these constitutional principles (the majority opinion referred to them as "organizing principles" and described one of them, judicial independence, as an "unwritten norm") could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary, we confirmed that there are compelling reasons to insist upon the primacy of our written constitution. A written constitution promotes legal certainty and predictability, and it provides a foundation and a touchstone for the exercise of constitutional judicial review. However, we also observed in the Provincial Judges Reference that the effect of the preamble to the Constitution Act, 1867 was to incorporate certain constitutional principles by reference, a point made earlier in Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455, at pp. 462-63. In the Provincial Judges Reference, at para. 104, we determined that the preamble "invites the courts to turn those principles into the premises of a constitutional argument that culminates in the filling of gaps in the express terms of the constitutional text".

54 Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in the Patriation Reference, supra, at p. 845), which constitute substantive limitations upon government action. These principles may give rise to very abstract and general obligations, or they may be more specific and precise in nature. The principles are not merely descriptive, but are also invested with a powerful normative force, and are binding upon both courts and governments. "In other words", as this Court confirmed in the Manitoba Language Rights Reference, supra, at p. 752, "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada". It is to a discussion of those underlying constitutional principles that we now turn.

(b) Federalism

55 It is undisputed that Canada is a federal state. Yet many commentators have observed that, according to the precise terms of the Constitution Act, 1867, the federal system was only partial. See, e.g., K. C. Wheare, Federal Government (4th ed. 1963), at pp. 18-20. This was so because, on paper, the federal government retained sweeping powers which threatened to undermine the autonomy of the provinces. Here again, however, a review of the written provisions of the Constitution does not provide the entire picture. Our political and constitutional practice has adhered to an underlying principle of federalism, and has interpreted the written provisions of the Constitution in this light. For example, although the federal power of disallowance was included in the Constitution Act, 1867, the underlying principle of federalism triumphed early. Many constitutional scholars contend that the federal power of disallowance has been abandoned (e.g., P. W. Hogg, Constitutional Law of Canada (4th ed. 1997), at p. 120).

56 In a federal system of government such as ours, political power is shared by two orders of government: the federal government on the one hand, and the provinces on the other. Each is assigned respective spheres of jurisdiction by the Constitution Act, 1867. See, e.g., Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick, [1892] A.C. 437 (P.C.), at pp. 441-42. It is up to the courts "to control the limits of the respective sovereignties": Northern Telecom Canada Ltd. v. Communication Workers of Canada, [1983] 1 S.C.R. 733, at p. 741. In interpreting our Constitution, the courts have always been concerned with the federalism principle, inherent in the structure of our constitutional arrangements, which has from the beginning been the lodestar by which the courts have been guided.

57 This underlying principle of federalism, then, has exercised a role of considerable importance in the interpretation of the written provisions of our Constitution. In the Patriation Reference, supra, at pp. 905-9, we confirmed that the principle of federalism runs through the political and legal systems of Canada. Indeed, Martland and Ritchie JJ., dissenting in the Patriation Reference, at p. 821, considered federalism to be "the dominant principle of Canadian constitutional law". With the enactment of the Charter, that proposition may have less force than it once did, but there can be little doubt that the principle of federalism remains a central organizational theme of our Constitution. Less obviously, perhaps, but certainly of equal importance, federalism is a political and legal response to underlying social and political realities.

58 The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity. The scheme of the Constitution Act, 1867, it was said in Re the Initiative and Referendum Act, [1919] A.C. 935 (P.C.), at p. 942, was

> not to weld the Provinces into one, nor to subordinate Provincial Governments to a central authority, but to establish a central government in which these Provinces should be represented, entrusted with exclusive authority only in affairs in which they had a common interest. Subject to this each Province was to retain its independence and autonomy and to be directly under the Crown as its head.

More recently, in Haig v. Canada, [1993] 2 S.C.R. 995, at p. 1047, the majority of this Court held that differences between provinces "are a rational part of the political reality in the federal process". It was referring to the differential application of federal law in individual provinces, but the point applies more generally. A unanimous Court expressed similar views in R. v. S. (S.), [1990] 2 S.C.R. 254, at pp. 287-88.

59 The principle of federalism facilitates the pursuit of collective goals by cultural and linguistic minorities which form the majority within a particular province. This is the case in Quebec, where

the majority of the population is French-speaking, and which possesses a distinct culture. This is not merely the result of chance. The social and demographic reality of Quebec explains the existence of the province of Quebec as a political unit and indeed, was one of the essential reasons for establishing a federal structure for the Canadian union in 1867. The experience of both Canada East and Canada West under the Union Act, 1840 (U.K.), 3-4 Vict., c. 35, had not been satisfactory. The federal structure adopted at Confederation enabled French-speaking Canadians to form a numerical majority in the province of Quebec, and so exercise the considerable provincial powers conferred by the Constitution Act, 1867 in such a way as to promote their language and culture. It also made provision for certain guaranteed representation within the federal Parliament itself.

60 Federalism was also welcomed by Nova Scotia and New Brunswick, both of which also affirmed their will to protect their individual cultures and their autonomy over local matters. All new provinces joining the federation sought to achieve similar objectives, which are no less vigorously pursued by the provinces and territories as we approach the new millennium.

(c) Democracy

61 Democracy is a fundamental value in our constitutional law and political culture. While it has both an institutional and an individual aspect, the democratic principle was also argued before us in the sense of the supremacy of the sovereign will of a people, in this case potentially to be expressed by Quebecers in support of unilateral secession. It is useful to explore in a summary way these different aspects of the democratic principle.

62 The principle of democracy has always informed the design of our constitutional structure, and continues to act as an essential interpretive consideration to this day. A majority of this Court in OPSEU v. Ontario, supra, at p. 57, confirmed that "the basic structure of our Constitution, as established by the Constitution Act, 1867, contemplates the existence of certain political institutions, including freely elected legislative bodies at the federal and provincial levels". As is apparent from an earlier line of decisions emanating from this Court, including Switzman v. Elbling, [1957] S.C.R. 285, Saumur v. City of Quebec, [1953] 2 S.C.R. 299, Boucher v. The King, [1951] S.C.R. 265, and Reference re Alberta Statutes, [1938] S.C.R. 100, the democracy principle can best be understood as a sort of baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated. It is perhaps for this reason that the principle was not explicitly identified in the text of the Constitution Act, 1867 itself. To have done so might have appeared redundant, even silly, to the framers. As explained in the Provincial Judges Reference, supra, at para. 100, it is evident that our Constitution contemplates that Canada shall be a constitutional democracy. Yet this merely demonstrates the importance of underlying constitutional principles that are nowhere explicitly described in our constitutional texts. The representative and democratic nature of our political institutions was simply assumed.

63 Democracy is commonly understood as being a political system of majority rule. It is essential to be clear what this means. The evolution of our democratic tradition can be traced back to the

Magna Carta (1215) and before, through the long struggle for Parliamentary supremacy which culminated in the English Bill of Rights of 1689, the emergence of representative political institutions in the colonial era, the development of responsible government in the 19th century, and eventually, the achievement of Confederation itself in 1867. "[T]he Canadian tradition", the majority of this Court held in Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, at p. 186, is "one of evolutionary democracy moving in uneven steps toward the goal of universal suffrage and more effective representation". Since Confederation, efforts to extend the franchise to those unjustly excluded from participation in our political system - such as women, minorities, and aboriginal peoples - have continued, with some success, to the present day.

64 Democracy is not simply concerned with the process of government. On the contrary, as suggested in Switzman v. Elbling, supra, at p. 306, democracy is fundamentally connected to substantive goals, most importantly, the promotion of self-government. Democracy accommodates cultural and group identities: Reference re Provincial Electoral Boundaries, at p. 188. Put another way, a sovereign people exercises its right to self-government through the democratic process. In considering the scope and purpose of the Charter, the Court in R. v. Oakes, [1986] 1 S.C.R. 103, articulated some of the values inherent in the notion of democracy (at p. 136):

> The Court must be guided by the values and principles essential to a free and democratic society which I believe to 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.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These legislatures, we have said, are "at the core of the system of representative government": New Brunswick Broadcasting, supra, at p. 387. In individual terms, the right to vote in elections to the House of Commons and the provincial legislatures, and to be candidates in those elections, is guaranteed to "Every citizen of Canada" by virtue of s. 3 of the Charter. Historically, this Court has interpreted democracy to mean the process of representative and responsible government and the right of citizens to participate in the political process as voters (Reference re Provincial Electoral Boundaries, supra) and as candidates (Harvey v. New Brunswick (Attorney General), [1996] 2 S.C.R. 876). In addition, the effect of s. 4 of the Charter is to oblige the House of Commons and the provincial legislatures to hold regular elections and to permit citizens to elect representatives to their political institutions. The democratic principle is affirmed with particular clarity in that s. 4 is not subject to the notwithstanding power contained in s. 33.

66 It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different

provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.

67 The consent of the governed is a value that is basic to our understanding of a free and democratic society. Yet democracy in any real sense of the word cannot exist without the rule of law. It is the law that creates the framework within which the "sovereign will" is to be ascertained and implemented. To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle. The system must be capable of reflecting the aspirations of the people. But there is more. Our law's claim to legitimacy also rests on an appeal to moral values, many of which are imbedded in our constitutional structure. It would be a grave mistake to equate legitimacy with the "sovereign will" or majority rule alone, to the exclusion of other constitutional values.

68 Finally, we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, "resting ultimately on public opinion reached by discussion and the interplay of ideas" (Saumur v. City of Quebec, supra, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to acknowledge and address those voices in the laws by which all in the community must live.

69 The Constitution Act, 1982 gives expression to this principle, by conferring a right to initiate constitutional change on each participant in Confederation. In our view, the existence of this right imposes a corresponding duty on the participants in Confederation to engage in constitutional discussions in order to acknowledge and address democratic expressions of a desire for change in other provinces. This duty is inherent in the democratic principle which is a fundamental predicate of our system of governance.

(d) Constitutionalism and the Rule of Law

70 The principles of constitutionalism and the rule of law lie at the root of our system of government. The rule of law, as observed in Roncarelli v. Duplessis, [1959] S.C.R. 121, at p. 142, is "a fundamental postulate of our constitutional structure". As we noted in the Patriation Reference, supra, at pp. 805-6, "[t]he 'rule of law' is a highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority". At its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action.

71 In the Manitoba Language Rights Reference, supra, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the Manitoba Language Rights Reference itself. A third aspect of the rule of law is, as recently confirmed in the Provincial Judges Reference, supra, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

72 The constitutionalism principle bears considerable similarity to the rule of law, although they are not identical. The essence of constitutionalism in Canada is embodied in s. 52(1) of the Constitution Act, 1982, which provides that "[t]he Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." Simply put, the constitutionalism principle requires that all government action comply with the Constitution. The rule of law principle requires that all government action must comply with the law, including the Constitution. This Court has noted on several occasions that with the adoption of the Charter, the Canadian system of government was transformed to a significant extent from a system of Parliamentary supremacy to one of constitutional supremacy. The Constitution binds all governments, both federal and provincial, including the executive branch (Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441, at p. 455). They may not transgress its provisions: indeed, their sole claim to exercise lawful authority rests in the powers allocated to them under the Constitution, and can come from no other source.

73 An understanding of the scope and importance of the principles of the rule of law and constitutionalism is aided by acknowledging explicitly why a constitution is entrenched beyond the reach of simple majority rule. There are three overlapping reasons.

74 First, a constitution may provide an added safeguard for fundamental human rights and individual freedoms which might otherwise be susceptible to government interference. Although

democratic government is generally solicitous of those rights, there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection. Second, a constitution may seek to ensure that vulnerable minority groups are endowed with the institutions and rights necessary to maintain and promote their identities against the assimilative pressures of the majority. And third, a constitution may provide for a division of political power that allocates political power amongst different levels of government. That purpose would be defeated if one of those democratically elected levels of government could usurp the powers of the other simply by exercising its legislative power to allocate additional political power to itself unilaterally.

75 The argument that the Constitution may be legitimately circumvented by resort to a majority vote in a province-wide referendum is superficially persuasive, in large measure because it seems to appeal to some of the same principles that underlie the legitimacy of the Constitution itself, namely, democracy and self-government. In short, it is suggested that as the notion of popular sovereignty underlies the legitimacy of our existing constitutional arrangements, so the same popular sovereignty that originally led to the present Constitution must (it is argued) also permit "the people" in their exercise of popular sovereignty to secede by majority vote alone. However, closer analysis reveals that this argument is unsound, because it misunderstands the meaning of popular sovereignty and the essence of a constitutional democracy.

76 Canadians have never accepted that ours is a system of simple majority rule. Our principle of democracy, taken in conjunction with the other constitutional principles discussed here, is richer. Constitutional government is necessarily predicated on the idea that the political representatives of the people of a province have the capacity and the power to commit the province to be bound into the future by the constitutional rules being adopted. These rules are "binding" not in the sense of frustrating the will of a majority of a province, but as defining the majority which must be consulted in order to alter the fundamental balances of political power (including the spheres of autonomy guaranteed by the principle of federalism), individual rights, and minority rights in our society. Of course, those constitutional rules are themselves amenable to amendment, but only through a process of negotiation which ensures that there is an opportunity for the constitutionally defined rights of all the parties to be respected and reconciled.

77 In this way, our belief in democracy may be harmonized with our belief in constitutionalism. Constitutional amendment often requires some form of substantial consensus precisely because the content of the underlying principles of our Constitution demand it. By requiring broad support in the form of an "enhanced majority" to achieve constitutional change, the Constitution ensures that minority interests must be addressed before proposed changes which would affect them may be enacted.

78 It might be objected, then, that constitutionalism is therefore incompatible with democratic government. This would be an erroneous view. Constitutionalism facilitates - indeed, makes

possible - a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy; rather, they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.

(e) Protection of Minorities

79 The fourth underlying constitutional principle we address here concerns the protection of minorities. There are a number of specific constitutional provisions protecting minority language, religion and education rights. Some of those provisions are, as we have recognized on a number of occasions, the product of historical compromises. As this Court observed in Reference re Bill 30, An Act to amend the Education Act (Ont.), [1987] 1 S.C.R. 1148, at p. 1173, and in Reference re Education Act (Que.), [1993] 2 S.C.R. 511, at pp. 529-30, the protection of minority religious education rights was a central consideration in the negotiations leading to Confederation. In the absence of such protection, it was felt that the minorities in what was then Canada East and Canada West would be submerged and assimilated. See also Greater Montreal Protestant School Board v. Quebec (Attorney General), [1989] 1 S.C.R. 377, at pp. 401-2, and Adler v. Ontario, [1996] 3 S.C.R. 609. Similar concerns animated the provisions protecting minority language rights, as noted in Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education, [1986] 1 S.C.R. 549, at p. 564.

80 However, we highlight that even though those provisions were the product of negotiation and political compromise, that does not render them unprincipled. Rather, such a concern reflects a broader principle related to the protection of minority rights. Undoubtedly, the three other constitutional principles inform the scope and operation of the specific provisions that protect the rights of minorities. We emphasize that the protection of minority rights is itself an independent principle underlying our constitutional order. The principle is clearly reflected in the Charter's provisions for the protection of minority rights. See, e.g., Reference re Public Schools Act (Man.), s. 79(3), (4) and (7), [1993] 1 S.C.R. 839, and Mahe v. Alberta, [1990] 1 S.C.R. 342.

81 The concern of our courts and governments to protect minorities has been prominent in recent years, particularly following the enactment of the Charter. Undoubtedly, one of the key considerations motivating the enactment of the Charter, and the process of constitutional judicial review that it entails, is the protection of minorities. However, it should not be forgotten that the protection of minority rights had a long history before the enactment of the Charter. Indeed, the protection of minority rights was clearly an essential consideration in the design of our constitutional structure even at the time of Confederation: Senate Reference, supra, at p. 71. Although Canada's record of upholding the rights of minorities is not a spotless one, that goal is one towards which Canadians have been striving since Confederation, and the process has not been without successes. The principle of protecting minority rights continues to exercise influence in the operation and interpretation of our Constitution.

82 Consistent with this long tradition of respect for minorities, which is at least as old as Canada itself, the framers of the Constitution Act, 1982 included in s. 35 explicit protection for existing aboriginal and treaty rights, and in s. 25, a non-derogation clause in favour of the rights of aboriginal peoples. The "promise" of s. 35, as it was termed in R. v. Sparrow, [1990] 1 S.C.R. 1075, at p. 1083, recognized not only the ancient occupation of land by aboriginal peoples, but their contribution to the building of Canada, and the special commitments made to them by successive governments. The protection of these rights, so recently and arduously achieved, whether looked at in their own right or as part of the larger concern with minorities, reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

83 Secession is the effort of a group or section of a state to withdraw itself from the political and constitutional authority of that state, with a view to achieving statehood for a new territorial unit on the international plane. In a federal state, secession typically takes the form of a territorial unit seeking to withdraw from the federation. Secession is a legal act as much as a political one. By the terms of Question 1 of this Reference, we are asked to rule on the legality of unilateral secession "[u]nder the Constitution of Canada". This is an appropriate question, as the legality of unilateral secession must be evaluated, at least in the first instance, from the perspective of the domestic legal order of the state from which the unit seeks to withdraw. As we shall see below, it is also argued that international law is a relevant standard by which the legality of a purported act of secession may be measured.

84 The secession of a province from Canada must be considered, in legal terms, to require an amendment to the Constitution, which perforce requires negotiation. The amendments necessary to achieve a secession could be radical and extensive. Some commentators have suggested that secession could be a change of such a magnitude that it could not be considered to be merely an amendment to the Constitution. We are not persuaded by this contention. It is of course true that the Constitution is silent as to the ability of a province to secede from Confederation but, although the Constitution neither expressly authorizes nor prohibits secession, an act of secession would purport to alter the governance of Canadian territory in a manner which undoubtedly is inconsistent with our current constitutional arrangements. The fact that those changes would be profound, or that they would purport to have a significance with respect to international law, does not negate their nature as amendments to the Constitution of Canada.

85 The Constitution is the expression of the sovereignty of the people of Canada. It lies within the power of the people of Canada, acting through their various governments duly elected and recognized under the Constitution, to effect whatever constitutional arrangements are desired within Canadian territory, including, should it be so desired, the secession of Quebec from Canada. As this Court held in the Manitoba Language Rights Reference, supra, at p. 745, "[t]he Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and

government". The manner in which such a political will could be formed and mobilized is a somewhat speculative exercise, though we are asked to assume the existence of such a political will for the purpose of answering the question before us. By the terms of this Reference, we have been asked to consider whether it would be constitutional in such a circumstance for the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally.

86 The "unilateral" nature of the act is of cardinal importance and we must be clear as to what is understood by this term. In one sense, any step towards a constitutional amendment initiated by a single actor on the constitutional stage is "unilateral". We do not believe that this is the meaning contemplated by Question 1, nor is this the sense in which the term has been used in argument before us. Rather, what is claimed by a right to secede "unilaterally" is the right to effectuate secession without prior negotiations with the other provinces and the federal government. At issue is not the legality of the first step but the legality of the final act of purported unilateral secession. The supposed juridical basis for such an act is said to be a clear expression of democratic will in a referendum in the province of Quebec. This claim requires us to examine the possible juridical impact, if any, of such a referendum on the functioning of our Constitution, and on the claimed legality of a unilateral act of secession.

87 Although the Constitution does not itself address the use of a referendum procedure, and the results of a referendum have no direct role or legal effect in our constitutional scheme, a referendum undoubtedly may provide a democratic method of ascertaining the views of the electorate on important political questions on a particular occasion. The democratic principle identified above would demand that considerable weight be given to a clear expression by the people of Quebec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession. Our political institutions are premised on the democratic principle, and so an expression of the democratic will of the people of a province carries weight, in that it would confer legitimacy on the efforts of the government of Quebec to initiate the Constitution's amendment process in order to secede by constitutional means. In this context, we refer to a "clear" majority as a qualitative evaluation. The referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.

88 The federalism principle, in conjunction with the democratic principle, dictates that the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire. The amendment of the Constitution begins with a political process undertaken pursuant to the Constitution itself. In Canada, the initiative for constitutional amendment is the responsibility of democratically elected representatives of the participants in Confederation. Those representatives may, of course, take their cue from a referendum, but in legal terms, constitution-making in Canada, as in many countries, is undertaken by the democratically elected representatives of the people. The corollary of a legitimate

attempt by one participant in Confederation to seek an amendment to the Constitution is an obligation on all parties to come to the negotiating table. The clear repudiation by the people of Quebec of the existing constitutional order would confer legitimacy on demands for secession, and place an obligation on the other provinces and the federal government to acknowledge and respect that expression of democratic will by entering into negotiations and conducting them in accordance with the underlying constitutional principles already discussed.

89 What is the content of this obligation to negotiate? At this juncture, we confront the difficult inter-relationship between substantive obligations flowing from the Constitution and questions of judicial competence and restraint in supervising or enforcing those obligations. This is mirrored by the distinction between the legality and the legitimacy of actions taken under the Constitution. We propose to focus first on the substantive obligations flowing from this obligation to negotiate; once the nature of those obligations has been described, it is easier to assess the appropriate means of enforcement of those obligations, and to comment on the distinction between legality and legitimacy.

90 The conduct of the parties in such negotiations would be governed by the same constitutional principles which give rise to the duty to negotiate: federalism, democracy, constitutionalism and the rule of law, and the protection of minorities. Those principles lead us to reject two absolutist propositions. One of those propositions is that there would be a legal obligation on the other provinces and federal government to accede to the secession of a province, subject only to negotiation of the logistical details of secession. This proposition is attributed either to the supposed implications of the democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

91 For both theoretical and practical reasons, we cannot accept this view. We hold that Quebec could not purport to invoke a right of self-determination such as to dictate the terms of a proposed secession to the other parties: that would not be a negotiation at all. As well, it would be naive to expect that the substantive goal of secession could readily be distinguished from the practical details of secession. The devil would be in the details. The democracy principle, as we have emphasized, cannot be invoked to trump the principles of federalism and rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.

92 However, we are equally unable to accept the reverse proposition, that a clear expression of self-determination by the people of Quebec would impose no obligations upon the other provinces or the federal government. The continued existence and operation of the Canadian constitutional order cannot remain indifferent to the clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. This would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of

Quebec. Such a proposition fails to give sufficient weight to the underlying constitutional principles that must inform the amendment process, including the principles of democracy and federalism. The rights of other provinces and the federal government cannot deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. Negotiations would be necessary to address the interests of the federal government, of Quebec and the other provinces, and other participants, as well as the rights of all Canadians both within and outside Quebec.

93 Is the rejection of both of these propositions reconcilable? Yes, once it is realized that none of the rights or principles under discussion is absolute to the exclusion of the others. This observation suggests that other parties cannot exercise their rights in such a way as to amount to an absolute denial of Quebec's rights, and similarly, that so long as Quebec exercises its rights while respecting the rights of others, it may propose secession and seek to achieve it through negotiation. The negotiation process precipitated by a decision of a clear majority of the population of Quebec on a clear question to pursue secession would require the reconciliation of various rights and obligations by the representatives of two legitimate majorities, namely, the clear majority of the population of Quebec, and the clear majority of Canada as a whole, whatever that may be. There can be no suggestion that either of these majorities "trumps" the other. A political majority that does not act in accordance with the underlying constitutional principles we have identified puts at risk the legitimacy of the exercise of its rights.

94 In such circumstances, the conduct of the parties assumes primary constitutional significance. The negotiation process must be conducted with an eye to the constitutional principles we have outlined, which must inform the actions of all the participants in the negotiation process.

95 Refusal of a party to conduct negotiations in a manner consistent with constitutional principles and values would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole. Those who quite legitimately insist upon the importance of upholding the rule of law cannot at the same time be oblivious to the need to act in conformity with constitutional principles and values, and so do their part to contribute to the maintenance and promotion of an environment in which the rule of law may flourish.

96 No one can predict the course that such negotiations might take. The possibility that they might not lead to an agreement amongst the parties must be recognized. Negotiations following a referendum vote in favour of seeking secession would inevitably address a wide range of issues, many of great import. After 131 years of Confederation, there exists, inevitably, a high level of integration in economic, political and social institutions across Canada. The vision of those who brought about Confederation was to create a unified country, not a loose alliance of autonomous provinces. Accordingly, while there are regional economic interests, which sometimes coincide with provincial boundaries, there are also national interests and enterprises (both public and private) that would face potential dismemberment. There is a national economy and a national debt. Arguments were raised before us regarding boundary issues. There are linguistic and cultural

minorities, including aboriginal peoples, unevenly distributed across the country who look to the Constitution of Canada for the protection of their rights. Of course, secession would give rise to many issues of great complexity and difficulty. These would have to be resolved within the overall framework of the rule of law, thereby assuring Canadians resident in Quebec and elsewhere a measure of stability in what would likely be a period of considerable upheaval and uncertainty. Nobody seriously suggests that our national existence, seamless in so many aspects, could be effortlessly separated along what are now the provincial boundaries of Quebec. As the Attorney General of Saskatchewan put it in his oral submission:

> A nation is built when the communities that comprise it make commitments to it, when they forego choices and opportunities on behalf of a nation, . . . when the communities that comprise it make compromises, when they offer each other guarantees, when they make transfers and perhaps most pointedly, when they receive from others the benefits of national solidarity. The threads of a thousand acts of accommodation are the fabric of a nation. . . .

97 In the circumstances, negotiations following such a referendum would undoubtedly be difficult. While the negotiators would have to contemplate the possibility of secession, there would be no absolute legal entitlement to it and no assumption that an agreement reconciling all relevant rights and obligations would actually be reached. It is foreseeable that even negotiations carried out in conformity with the underlying constitutional principles could reach an impasse. We need not speculate here as to what would then transpire. Under the Constitution, secession requires that an amendment be negotiated.

98 The respective roles of the courts and political actors in discharging the constitutional obligations we have identified follows ineluctably from the foregoing observations. In the Patriation Reference, a distinction was drawn between the law of the Constitution, which, generally speaking, will be enforced by the courts, and other constitutional rules, such as the conventions of the Constitution, which carry only political sanctions. It is also the case, however, that judicial intervention, even in relation to the law of the Constitution, is subject to the Court's appreciation of its proper role in the constitutional scheme.

99 The notion of justiciability is, as we earlier pointed out in dealing with the preliminary objection, linked to the notion of appropriate judicial restraint. We earlier made reference to the discussion of justiciability in Reference re Canada Assistance Plan, supra, at p. 545:

> In exercising its discretion whether to determine a matter that is alleged to be non-justiciable, the Court's primary concern is to retain its proper role within the constitutional framework of our democratic form of government.

In Operation Dismantle, supra, at p. 459, it was pointed out that justiciability is a "doctrine . . . founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes". An analogous doctrine of judicial restraint operates here. Also, as

observed in Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources), [1989] 2 S.C.R. 49 (the Auditor General's case), at p. 91:

> There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

100 The role of the Court in this Reference is limited to the identification of the relevant aspects of the Constitution in their broadest sense. We have interpreted the questions as relating to the constitutional framework within which political decisions may ultimately be made. Within that framework, the workings of the political process are complex and can only be resolved by means of political judgments and evaluations. The Court has no supervisory role over the political aspects of constitutional negotiations. Equally, the initial impetus for negotiation, namely a clear majority on a clear question in favour of secession, is subject only to political evaluation, and properly so. A right and a corresponding duty to negotiate secession cannot be built on an alleged expression of democratic will if the expression of democratic will is itself fraught with ambiguities. Only the political actors would have the information and expertise to make the appropriate judgment as to the point at which, and the circumstances in which, those ambiguities are resolved one way or the other.

101 If the circumstances giving rise to the duty to negotiate were to arise, the distinction between the strong defence of legitimate interests and the taking of positions which, in fact, ignore the legitimate interests of others is one that also defies legal analysis. The Court would not have access to all of the information available to the political actors, and the methods appropriate for the search for truth in a court of law are ill-suited to getting to the bottom of constitutional negotiations. To the extent that the questions are political in nature, it is not the role of the judiciary to interpose its own views on the different negotiating positions of the parties, even were it invited to do so. Rather, it is the obligation of the elected representatives to give concrete form to the discharge of their constitutional obligations which only they and their electors can ultimately assess. The reconciliation of the various legitimate constitutional interests outlined above is necessarily committed to the political rather than the judicial realm, precisely because that reconciliation can only be achieved through the give and take of the negotiation process. Having established the legal framework, it would be for the democratically elected leadership of the various participants to resolve their differences.

102 The non-justiciability of political issues that lack a legal component does not deprive the surrounding constitutional framework of its binding status, nor does this mean that constitutional obligations could be breached without incurring serious legal repercussions. Where there are legal rights there are remedies, but as we explained in the Auditor General's case, supra, at p. 90, and New Brunswick Broadcasting, supra, the appropriate recourse in some circumstances lies through the workings of the political process rather than the courts.

103 To the extent that a breach of the constitutional duty to negotiate in accordance with the principles described above undermines the legitimacy of a party's actions, it may have important ramifications at the international level. Thus, a failure of the duty to undertake negotiations and pursue them according to constitutional principles may undermine that government's claim to legitimacy which is generally a precondition for recognition by the international community. Conversely, violations of those principles by the federal or other provincial governments responding to the request for secession may undermine their legitimacy. Thus, a Quebec that had negotiated in conformity with constitutional principles and values in the face of unreasonable intransigence on the part of other participants at the federal or provincial level would be more likely to be recognized than a Quebec which did not itself act according to constitutional principles in the negotiation process. Both the legality of the acts of the parties to the negotiation process under Canadian law, and the perceived legitimacy of such action, would be important considerations in the recognition process. In this way, the adherence of the parties to the obligation to negotiate would be evaluated in an indirect manner on the international plane.

104 Accordingly, the secession of Quebec from Canada cannot be accomplished by the National Assembly, the legislature or government of Quebec unilaterally, that is to say, without principled negotiations, and be considered a lawful act. Any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order. However, the continued existence and operation of the Canadian constitutional order cannot remain unaffected by the unambiguous expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The primary means by which that expression is given effect is the constitutional duty to negotiate in accordance with the constitutional principles that we have described herein. In the event secession negotiations are initiated, our Constitution, no less than our history, would call on the participants to work to reconcile the rights, obligations and legitimate aspirations of all Canadians within a framework that emphasizes constitutional responsibilities as much as it does constitutional rights.

105 It will be noted that Question 1 does not ask how secession could be achieved in a constitutional manner, but addresses one form of secession only, namely unilateral secession. Although the applicability of various procedures to achieve lawful secession was raised in argument, each option would require us to assume the existence of facts that at this stage are unknown. In accordance with the usual rule of prudence in constitutional cases, we refrain from pronouncing on the applicability of any particular constitutional procedure to effect secession unless and until sufficiently clear facts exist to squarely raise an issue for judicial determination.

(5) Suggested Principle of Effectivity

106 In the foregoing discussion we have not overlooked the principle of effectivity, which was placed at the forefront in argument before us. For the reasons that follow, we do not think that the principle of effectivity has any application to the issues raised by Question 1. A distinction must be drawn between the right of a people to act, and their power to do so. They are not identical. A right

is recognized in law: mere physical ability is not necessarily given status as a right. The fact that an individual or group can act in a certain way says nothing at all about the legal status or consequences of the act. A power may be exercised even in the absence of a right to do so, but if it is, then it is exercised without legal foundation. Our Constitution does not address powers in this sense. On the contrary, the Constitution is concerned only with the rights and obligations of individuals, groups and governments, and the structure of our institutions. It was suggested before us that the National Assembly, legislature or government of Quebec could unilaterally effect the secession of that province from Canada, but it was not suggested that they might do so as a matter of law: rather, it was contended that they simply could do so as a matter of fact. Although under the Constitution there is no right to pursue secession unilaterally, that is secession without principled negotiation, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on effective control of a territory and recognition by the international community. The principles governing secession at international law are discussed in our answer to Question 2.

107 In our view, the alleged principle of effectivity has no constitutional or legal status in the sense that it does not provide an ex ante explanation or justification for an act. In essence, acceptance of a principle of effectivity would be tantamount to accepting that the National Assembly, legislature or government of Quebec may act without regard to the law, simply because it asserts the power to do so. So viewed, the suggestion is that the National Assembly, legislature or government of Quebec could purport to secede the province unilaterally from Canada in disregard of Canadian and international law. It is further suggested that if the secession bid was successful, a new legal order would be created in that province, which would then be considered an independent state.

108 Such a proposition is an assertion of fact, not a statement of law. It may or may not be true; in any event it is irrelevant to the questions of law before us. If, on the other hand, it is put forward as an assertion of law, then it simply amounts to the contention that the law may be broken as long as it can be broken successfully. Such a notion is contrary to the rule of law, and must be rejected.

B. Question 2

> Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?

109 For reasons already discussed, the Court does not accept the contention that Question 2 raises a question of "pure" international law which this Court has no jurisdiction to address. Question 2 is posed in the context of a Reference to address the existence or non-existence of a right of unilateral

secession by a province of Canada. The amicus curiae argues that this question ultimately falls to be determined under international law. In addressing this issue, the Court does not purport to act as an arbiter between sovereign states or more generally within the international community. The Court is engaged in rendering an advisory opinion on certain legal aspects of the continued existence of the Canadian federation. International law has been invoked as a consideration and it must therefore be addressed.

110 The argument before the Court on Question 2 has focused largely on determining whether, under international law, a positive legal right to unilateral secession exists in the factual circumstances assumed for the purpose of our response to Question 1. Arguments were also advanced to the effect that, regardless of the existence or non-existence of a positive right to unilateral secession, international law will in the end recognize effective political realities -- including the emergence of a new state -- as facts. While our response to Question 2 will address considerations raised by this alternative argument of "effectivity", it should first be noted that the existence of a positive legal entitlement is quite different from a prediction that the law will respond after the fact to a then existing political reality. These two concepts examine different points in time. The questions posed to the Court address legal rights in advance of a unilateral act of purported secession. While we touch below on the practice governing the international recognition of emerging states, the Court is as wary of entertaining speculation about the possible future conduct of sovereign states on the international level as it was under Question 1 to speculate about the possible future course of political negotiations among the participants in the Canadian federation. In both cases, the Reference questions are directed only to the legal framework within which the political actors discharge their various mandates.

(1) Secession at International Law

111 It is clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their "parent" state. This is acknowledged by the experts who provided their opinions on behalf of both the amicus curiae and the Attorney General of Canada. Given the lack of specific authorization for unilateral secession, proponents of the existence of such a right at international law are therefore left to attempt to found their argument (i) on the proposition that unilateral secession is not specifically prohibited and that what is not specifically prohibited is inferentially permitted; or (ii) on the implied duty of states to recognize the legitimacy of secession brought about by the exercise of the well-established international law right of "a people" to self-determination. The amicus curiae addressed the right of self-determination, but submitted that it was not applicable to the circumstances of Quebec within the Canadian federation, irrespective of the existence or non-existence of a referendum result in favour of secession. We agree on this point with the amicus curiae, for reasons that we will briefly develop.

(a) Absence of a Specific Prohibition

112 International law contains neither a right of unilateral secession nor the explicit denial of

such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people, discussed below. As will be seen, international law places great importance on the territorial integrity of nation states and, by and large, leaves the creation of a new state to be determined by the domestic law of the existing state of which the seceding entity presently forms a part (R. Y. Jennings, The Acquisition of Territory in International Law (1963), at pp. 8-9). Where, as here, unilateral secession would be incompatible with the domestic Constitution, international law is likely to accept that conclusion subject to the right of peoples to self-determination, a topic to which we now turn.

(b) The Right of a People to Self-determination

113 While international law generally regulates the conduct of nation states, it does, in some specific circumstances, also recognize the "rights" of entities other than nation states -- such as the right of a people to self-determination.

114 The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond "convention" and is considered a general principle of international law. (A. Cassese, Self-determination of peoples: A legal reappraisal (1995), at pp. 171-72; K. Doehring, "Self-Determination", in B. Simma, ed., The Charter of the United Nations: A Commentary (1994), at p. 70.)

115 Article 1 of the Charter of the United Nations, Can. T.S. 1945 No. 7, states in part that one of the purposes of the United Nations (U.N.) is:

Article 1

. . .

> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;

116 Article 55 of the U.N. Charter further states that the U.N. shall promote goals such as higher standards of living, full employment and human rights "[w]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".

117 This basic principle of self-determination has been carried forward and addressed in so many U.N. conventions and resolutions that, as noted by Doehring, supra, at p. 60:

> The sheer number of resolutions concerning the right of self-determination

makes their enumeration impossible.

118 For our purposes, reference to the following conventions and resolutions is sufficient. Article 1 of both the U.N.'s International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, and its International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, states:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

119 Similarly, the U.N. General Assembly's Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970 (Declaration on Friendly Relations), states:

> By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

120 In 1993, the U.N. World Conference on Human Rights adopted the Vienna Declaration and Programme of Action, A/CONF.157/24, 25 June 1993, that reaffirmed Article 1 of the two above-mentioned covenants. The U.N. General Assembly's Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, GA Res. 50/6, 9 November 1995, also emphasizes the right to self-determination by providing that the U.N.'s member states will:

> 1. . . .
>
> Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind. . . . [Emphasis added.]

121 The right to self-determination is also recognized in other international legal documents. For

example, the Final Act of the Conference on Security and Co-operation in Europe, 14 I.L.M. 1292 (1975) (Helsinki Final Act), states (in Part VIII):

> The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States.
>
> By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development. [Emphasis added.]

122 As will be seen, international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in the exceptional circumstances discussed below, a right of secession may arise.

(i) Defining "Peoples"

123 International law grants the right to self-determination to "peoples". Accordingly, access to the right requires the threshold step of characterizing as a people the group seeking self-determination. However, as the right to self-determination has developed by virtue of a combination of international agreements and conventions, coupled with state practice, with little formal elaboration of the definition of "peoples", the result has been that the precise meaning of the term "people" remains somewhat uncertain.

124 It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state". The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

125 While much of the Quebec population certainly shares many of the characteristics (such as a common language and culture) that would be considered in determining whether a specific group is a "people", as do other groups within Quebec and/or Canada, it is not necessary to explore this legal characterization to resolve Question 2 appropriately. Similarly, it is not necessary for the Court to determine whether, should a Quebec people exist within the definition of public international law,

such a people encompasses the entirety of the provincial population or just a portion thereof. Nor is it necessary to examine the position of the aboriginal population within Quebec. As the following discussion of the scope of the right to self-determination will make clear, whatever be the correct application of the definition of people(s) in this context, their right of self-determination cannot in the present circumstances be said to ground a right to unilateral secession.

(ii) Scope of the Right to Self-determination

126 The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances. External self-determination can be defined as in the following statement from the Declaration on Friendly Relations as

> [t]he establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. [Emphasis added.]

127 The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

128 The Declaration on Friendly Relations, the Vienna Declaration and the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations are specific. They state, immediately after affirming a people's right to determine political, economic, social and cultural issues, that such rights are not to

> be construed as authorizing or encouraging any action that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction. . . . [Emphasis added.]

129 Similarly, while the concluding document of the Vienna Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act again refers to peoples having the right to determine "their internal and external political status" (emphasis added), that statement is immediately followed by express recognition that the participating states will at all

times act, as stated in the Helsinki Final Act, "in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States" (emphasis added). Principle 5 of the concluding document states that the participating states (including Canada):

> . . . confirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. No actions or situations in contravention of this principle will be recognized as legal by the participating States. [Emphasis added.]

Accordingly, the reference in the Helsinki Final Act to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below. As noted by Cassese, supra, at p. 287, given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State".

130 While the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.

(iii) Colonial and Oppressed Peoples

131 Accordingly, the general state of international law with respect to the right to self-determination is that the right operates within the overriding protection granted to the territorial integrity of "parent" states. However, as noted by Cassese, supra, at p. 334, there are certain defined contexts within which the right to the self-determination of peoples does allow that right to be exercised "externally", which, in the context of this Reference, would potentially mean secession:

> . . . the right to external self-determination, which entails the possibility of choosing (or restoring) independence, has only been bestowed upon two classes of peoples (those under colonial rule or foreign occupation), based upon the assumption that both classes make up entities that are inherently distinct from the

> colonialist Power and the occupant Power and that their 'territorial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

132 The right of colonial peoples to exercise their right to self-determination by breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference.

133 The other clear case where a right to external self-determination accrues is where a people is subject to alien subjugation, domination or exploitation outside a colonial context. This recognition finds its roots in the Declaration on Friendly Relations:

> Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:
>
> (a) To promote friendly relations and co-operation among States; and
> (b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
>
> and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

134 A number of commentators have further asserted that the right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession. The Vienna Declaration requirement that governments represent "the whole people belonging to the territory without distinction of any kind" adds credence to the assertion that such a complete blockage may potentially give rise to a right of secession.

135 Clearly, such a circumstance parallels the other two recognized situations in that the ability of a people to exercise its right to self-determination internally is somehow being totally frustrated. While it remains unclear whether this third proposition actually reflects an established international law standard, it is unnecessary for present purposes to make that determination. Even assuming that the third circumstance is sufficient to create a right to unilateral secession under international law, the current Quebec context cannot be said to approach such a threshold. As stated by the amicus curiae, Addendum to the factum of the amicus curiae, at paras. 15-16:

> [Translation] 15. The Quebec people is not the victim of attacks on its physical

existence or integrity, or of a massive violation of its fundamental rights. The Quebec people is manifestly not, in the opinion of the amicus curiae, an oppressed people.

16. For close to 40 of the last 50 years, the Prime Minister of Canada has been a Quebecer. During this period, Quebecers have held from time to time all the most important positions in the federal Cabinet. During the 8 years prior to June 1997, the Prime Minister and the Leader of the Official Opposition in the House of Commons were both Quebecers. At present, the Prime Minister of Canada, the Right Honourable Chief Justice and two other members of the Court, the Chief of Staff of the Canadian Armed Forces and the Canadian ambassador to the United States, not to mention the Deputy Secretary-General of the United Nations, are all Quebecers. The international achievements of Quebecers in most fields of human endeavour are too numerous to list. Since the dynamism of the Quebec people has been directed toward the business sector, it has been clearly successful in Quebec, the rest of Canada and abroad.

136 The population of Quebec cannot plausibly be said to be denied access to government. Quebecers occupy prominent positions within the government of Canada. Residents of the province freely make political choices and pursue economic, social and cultural development within Quebec, across Canada, and throughout the world. The population of Quebec is equitably represented in legislative, executive and judicial institutions. In short, to reflect the phraseology of the international documents that address the right to self-determination of peoples, Canada is a "sovereign and independent state conducting itself in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction".

137 The continuing failure to reach agreement on amendments to the Constitution, while a matter of concern, does not amount to a denial of self-determination. In the absence of amendments to the Canadian Constitution, we must look at the constitutional arrangements presently in effect, and we cannot conclude under current circumstances that those arrangements place Quebecers in a disadvantaged position within the scope of the international law rule.

138 In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or

"peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.

139 We would not wish to leave this aspect of our answer to Question 2 without acknowledging the importance of the submissions made to us respecting the rights and concerns of aboriginal peoples in the event of a unilateral secession, as well as the appropriate means of defining the boundaries of a seceding Quebec with particular regard to the northern lands occupied largely by aboriginal peoples. However, the concern of aboriginal peoples is precipitated by the asserted right of Quebec to unilateral secession. In light of our finding that there is no such right applicable to the population of Quebec, either under the Constitution of Canada or at international law, but that on the contrary a clear democratic expression of support for secession would lead under the Constitution to negotiations in which aboriginal interests would be taken into account, it becomes unnecessary to explore further the concerns of the aboriginal peoples in this Reference.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

140 As stated, an argument advanced by the amicus curiae on this branch of the Reference was that, while international law may not ground a positive right to unilateral secession in the context of Quebec, international law equally does not prohibit secession and, in fact, international recognition would be conferred on such a political reality if it emerged, for example, via effective control of the territory of what is now the province of Quebec.

141 It is true that international law may well, depending on the circumstances, adapt to recognize a political and/or factual reality, regardless of the legality of the steps leading to its creation. However, as mentioned at the outset, effectivity, as such, does not have any real applicability to Question 2, which asks whether a right to unilateral secession exists.

142 No one doubts that legal consequences may flow from political facts, and that "sovereignty is a political fact for which no purely legal authority can be constituted . . .", H. W. R. Wade, "The Basis of Legal Sovereignty", [1955] Camb. L.J. 172, at p. 196. Secession of a province from Canada, if successful in the streets, might well lead to the creation of a new state. Although recognition by other states is not, at least as a matter of theory, necessary to achieve statehood, the viability of a would-be state in the international community depends, as a practical matter, upon recognition by other states. That process of recognition is guided by legal norms. However, international recognition is not alone constitutive of statehood and, critically, does not relate back to the date of secession to serve retroactively as a source of a "legal" right to secede in the first place. Recognition occurs only after a territorial unit has been successful, as a political fact, in achieving secession.

143 As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the de facto secession is, or was, being pursued. The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal

norms. See, e.g., European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition. The notion that what is not explicitly prohibited is implicitly permitted has little relevance where (as here) international law refers the legality of secession to the domestic law of the seceding state and the law of that state holds unilateral secession to be unconstitutional.

144 As a court of law, we are ultimately concerned only with legal claims. If the principle of "effectivity" is no more than that "successful revolution begets its own legality" (S. A. de Smith, "Constitutional Lawyers in Revolutionary Situations" (1968), 7 West. Ont. L. Rev. 93, at p. 96), it necessarily means that legality follows and does not precede the successful revolution. Ex hypothesi, the successful revolution took place outside the constitutional framework of the predecessor state, otherwise it would not be characterized as "a revolution". It may be that a unilateral secession by Quebec would eventually be accorded legal status by Canada and other states, and thus give rise to legal consequences; but this does not support the more radical contention that subsequent recognition of a state of affairs brought about by a unilateral declaration of independence could be taken to mean that secession was achieved under colour of a legal right.

145 An argument was made to analogize the principle of effectivity with the second aspect of the rule of law identified by this Court in the Manitoba Language Rights Reference, supra, at p. 753, namely, avoidance of a legal vacuum. In that Reference, it will be recalled, this Court declined to strike down all of Manitoba's legislation for its failure to comply with constitutional dictates, out of concern that this would leave the province in a state of chaos. In so doing, we recognized that the rule of law is a constitutional principle which permits the courts to address the practical consequences of their actions, particularly in constitutional cases. The similarity between that principle and the principle of effectivity, it was argued, is that both attempt to refashion the law to meet social reality. However, nothing of our concern in the Manitoba Language Rights Reference about the severe practical consequences of unconstitutionality affected our conclusion that, as a matter of law, all Manitoba legislation at issue in that case was unconstitutional. The Court's declaration of unconstitutionality was clear and unambiguous. The Court's concern with maintenance of the rule of law was directed in its relevant aspect to the appropriate remedy, which in that case was to suspend the declaration of invalidity to permit appropriate rectification to take place.

146 The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some later point be accorded some form of legal status. In the law of property, for example, it is well known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.

C. Question 3

> In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada?

147 In view of our answers to Questions 1 and 2, there is no conflict between domestic and international law to be addressed in the context of this Reference.

IV. Summary of Conclusions

148 As stated at the outset, this Reference has required us to consider momentous questions that go to the heart of our system of constitutional government. We have emphasized that the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution, including the principles of federalism, democracy, constitutionalism and the rule of law, and respect for minorities. Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event a clear majority of Quebecers votes on a clear question in favour of secession.

149 The Reference requires us to consider whether Quebec has a right to unilateral secession. Those who support the existence of such a right found their case primarily on the principle of democracy. Democracy, however, means more than simple majority rule. As reflected in our constitutional jurisprudence, democracy exists in the larger context of other constitutional values such as those already mentioned. In the 131 years since Confederation, the people of the provinces and territories have created close ties of interdependence (economically, socially, politically and culturally) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession

would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

150 The Constitution is not a straitjacket. Even a brief review of our constitutional history demonstrates periods of momentous and dramatic change. Our democratic institutions necessarily accommodate a continuous process of discussion and evolution, which is reflected in the constitutional right of each participant in the federation to initiate constitutional change. This right implies a reciprocal duty on the other participants to engage in discussions to address any legitimate initiative to change the constitutional order. While it is true that some attempts at constitutional amendment in recent years have faltered, a clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize.

151 Quebec could not, despite a clear referendum result, purport to invoke a right of self-determination to dictate the terms of a proposed secession to the other parties to the federation. The democratic vote, by however strong a majority, would have no legal effect on its own and could not push aside the principles of federalism and the rule of law, the rights of individuals and minorities, or the operation of democracy in the other provinces or in Canada as a whole. Democratic rights under the Constitution cannot be divorced from constitutional obligations. Nor, however, can the reverse proposition be accepted. The continued existence and operation of the Canadian constitutional order could not be indifferent to a clear expression of a clear majority of Quebecers that they no longer wish to remain in Canada. The other provinces and the federal government would have no basis to deny the right of the government of Quebec to pursue secession, should a clear majority of the people of Quebec choose that goal, so long as in doing so, Quebec respects the rights of others. The negotiations that followed such a vote would address the potential act of secession as well as its possible terms should in fact secession proceed. There would be no conclusions predetermined by law on any issue. Negotiations would need to address the interests of the other provinces, the federal government, Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities. No one suggests that it would be an easy set of negotiations.

152 The negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec, and that of Canada as a whole. A political majority at either level that does not act in accordance with the underlying constitutional principles we have mentioned puts at risk the legitimacy of its exercise of its rights, and the ultimate acceptance of the result by the international community.

153 The task of the Court has been to clarify the legal framework within which political decisions are to be taken "under the Constitution", not to usurp the prerogatives of the political forces that operate within that framework. The obligations we have identified are binding obligations under the

Constitution of Canada. However, it will be for the political actors to determine what constitutes "a clear majority on a clear question" in the circumstances under which a future referendum vote may be taken. Equally, in the event of demonstrated majority support for Quebec secession, the content and process of the negotiations will be for the political actors to settle. The reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm precisely because that reconciliation can only be achieved through the give and take of political negotiations. To the extent issues addressed in the course of negotiation are political, the courts, appreciating their proper role in the constitutional scheme, would have no supervisory role.

154 We have also considered whether a positive legal entitlement to secession exists under international law in the factual circumstances contemplated by Question 1, i.e., a clear democratic expression of support on a clear question for Quebec secession. Some of those who supported an affirmative answer to this question did so on the basis of the recognized right to self-determination that belongs to all "peoples". Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the "people" issue because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of peoples at international law where "a people" is governed as part of a colonial empire; where "a people" is subject to alien subjugation, domination or exploitation; and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. Quebec does not meet the threshold of a colonial people or an oppressed people, nor can it be suggested that Quebecers have been denied meaningful access to government to pursue their political, economic, cultural and social development. In the circumstances, the National Assembly, the legislature or the government of Quebec do not enjoy a right at international law to effect the secession of Quebec from Canada unilaterally.

155 Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a de facto secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of Quebec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.

156 The reference questions are answered accordingly.

TAB 11

** Preliminary Version **

Case Name:

Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)

Trial Lawyers Association of British Columbia and Canadian Bar Association -- British Columbia Branch, Appellants/Respondents on cross-appeal;
and
Attorney General of British Columbia, Respondent/Appellant on cross-appeal, and
Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of Alberta, Advocates' Society, West Coast Women's Legal Education and Action Fund and David Asper Centre for Constitutional Rights, Interveners.

[2014] S.C.J. No. 59

[2014] A.C.S. no 59

2014 SCC 59

[2014] 3 S.C.R. 31

[2014] 3 R.C.S. 31

[2014] 11 W.W.R. 213

244 A.C.W.S. (3d) 327

375 D.L.R. (4th) 599

320 C.R.R. (2d) 239

59 C.P.C. (7th) 1

62 B.C.L.R. (5th) 1

74 Admin. L.R. (5th) 181

51 R.F.L. (7th) 1

463 N.R. 336

2014 CarswellBC 2873

361 B.C.A.C. 1

2014EXP-2993

J.E. 2014-1710

EYB 2014-242606

File No.: 35315.

Supreme Court of Canada

Heard: April 14, 2014;
Judgment: October 2, 2014.

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

(117 paras.)

Appeal From:

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Civil litigation -- Civil procedure -- General principles -- Legislation -- Interpretation -- Rules -- Constitutional issues -- Federal v. provincial jurisdiction -- Canadian Charter of Rights and Freedoms -- Appeal by lawyers' associations from judgment of British Columbia Court of Appeal, allowed, and cross-appeal by Province on issue of constitutionality of hearing fees, dismissed -- Fees violated s. 96 of the Constitution Act, 1867 -- Provinces could impose hearing fees as part of administration of justice but could not prevent litigants from accessing courts -- Hearing fees had to be coupled with exemption that allowed judges to waive them for people who could not, for financial reasons, bring litigation to court -- Hearing fee scheme at issue here impeded right of British Columbians to bring legitimate cases to court -- Constitution Act, 1867, ss. 92(14) and 96.

Constitutional law -- Division of powers -- Federal jurisdiction -- Provincial jurisdiction -- Provincial powers (Constitution Act, 1867, s. 92) -- Administration of justice -- Appeal by lawyers' associations from judgment of British Columbia Court of Appeal, allowed, and cross-appeal by Province on issue of constitutionality of hearing fees, dismissed -- Fees violated s. 96 of the Constitution Act, 1867 -- Provinces could impose hearing fees as part of administration of justice but could not prevent litigants from accessing courts -- Hearing fees had to be coupled with exemption that allowed judges to waive them for people who could not, for financial reasons, bring litigation to court -- Hearing fee scheme at issue here impeded right of British Columbians to bring legitimate cases to court -- Constitution Act, 1867, ss. 92(14) and 96.

Appeal by the Trial Lawyers Association of British Columbia and the Canadian Bar Association from a judgment of the British Columbia Court of Appeal and cross-appeal by the Province of British Columbia on the issue of the constitutionality of hearing fees. The trial judge, upheld on appeal, concluded that the legislation imposing such fees was unconstitutional. The issue in this case was whether court hearing fees imposed by the Province that denied some people access to the courts were constitutional. This case began as a family action, Vilardell and Duham being in a dispute over the custody of their child. Vilardell went to court to have this issue resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Vilardell asked the judge to relieve her from paying the hearing fee based on the impoverishment exemption. The judge reserved his decision on this request until the end of the trial. The hearing fee amounted to some $3,600, which almost corresponded to the net monthly income of the family. After legal fees had depleted her savings, Vilardell could not afford the hearing fee. Aware that there was some authority for the proposition that hearing fees were unconstitutional, the judge held that the Attorney General should be given an opportunity to intervene and invited submissions from other organizations. He then stayed Vilardell's obligation to pay the hearing fee pending further order.

HELD: Appeal allowed and cross-appeal dismissed. Section 92(14) of the Constitution Act, 1867, gave the provinces the responsibility for the administration of justice. Although the bare words of s. 96 referred to the appointment of judges, its broader import was to guarantee the core jurisdiction of provincial superior courts. Legislating hearing fees that prevented people from accessing the courts infringed on the core jurisdiction of the superior courts. The s. 96 judicial function and the rule of law were inextricably intertwined. As access to justice was fundamental to the rule of law, and the rule of law was fostered by the continued existence of the s. 96 courts, it was only natural that s. 96 provide some degree of constitutional protection for access to justice. A hearing fee scheme that did not exempt impoverished people clearly overstepped the constitutional minimum. Further, a fee that was so high that it required litigants who were not impoverished to sacrifice reasonable expenses in order to bring a claim could, absent adequate exemptions, be unconstitutional because it subjected litigants to undue hardship, thereby effectively preventing access to the courts. Provinces could impose hearing fees as part of the administration of justice. However, this power did not extend to hearing fees that effectively prevented litigants from accessing the courts because they could not

afford the fees. Hearing fees had to be coupled with an exemption that allowed judges to waive the fees. In the present case, Vilardell was not "impoverished", and was therefore not caught by the exemption provision, but she could not afford the fee. The hearing fee scheme at issue in this case placed an undue hardship on litigants and impeded the right of British Columbians to bring legitimate cases to court. The proper remedy was to declare the hearing fee scheme as it stood unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they choose to do so. Vilardell was excused from paying the hearing fee.

Statutes, Regulations and Rules Cited:

A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [Statute of Henry VII],

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 1, s. 2, s. 7, s. 11d), s. 24(1), s. 33

Court Rules Act, R.S.B.C. 1996, c. 80,

Employment and Assistance Act, S.B.C. 2002, c. 40,

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41,

Constitution Act, 1867, R.S.C. 1985, App. II, No. 5, s. 92(14), s. 96

Supreme Court Civil Rules, B.C. Reg. 168/2009, Rule 14-1, Rule 20-5(1), Rule 20-5(3), Appendix C, sch. 1

Supreme Court Family Rules, B.C. Reg. 169/2009, Appendix C, sch. 1

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], Appendix C, sch. 1

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Constitutional law -- Courts -- Access to justice -- Court hearing fees -- Province enacting regulations establishing graduated court hearing fees -- Regulations containing exemption provision from fees for persons "indigent" or "impoverished" -- Whether province can establish hearing fee scheme under its administration of justice power pursuant to s. 92(14) of Constitution Act, 1867 -- Whether regulations imposing hearing fees denying some people access to courts

infringing core jurisdiction of s. 96 superior courts -- Whether provincial hearing fee scheme constitutionally valid -- Constitution Act, 1867, ss. 92(14) and 96 -- Court Rules Act, R.S.B.C. 1996, c. 80 -- Supreme Court Rules, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98 -- Supreme Court Civil Rules, B.C. Reg. 168/2009, r. 20-5(1).

Court Summary:

This case began as a family action. V and D were involved in a custody dispute. V went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, V asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial. The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee amounted to some $3,600.00 -- almost the net monthly income of the family. After legal fees had depleted her savings, V could not afford the hearing fee.

Aware that there was some authority for the proposition that hearing fees are unconstitutional, the judge invited submissions and interventions on the subject from outside parties and stayed V's obligation to pay the hearing fee. Ultimately, the B.C. branch of the Canadian Bar Association ("CBA"), the Trial Lawyers Association of British Columbia ("Trial Lawyers") and the Attorney General of British Columbia ("the Province") intervened.

The *Supreme Court Rules*, which were in place at the time this case began, were replaced in 2010 by the *Supreme Court Civil Rules*. The constitutionality of the hearing fees set out in both rules of court is challenged. The current hearing fees escalate from no fee for the first three days of trial, to five hundred dollars for days four to ten, to eight hundred dollars for each day over ten. Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees if the court finds that a person is "impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent".

The trial judge in this case ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster. The Trial Lawyers and CBA appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

Held (Rothstein J. dissenting): The appeal should be allowed and the cross-appeal dismissed.

*Per***McLachlin C.J.** and LeBel, Abella, Moldaver and Karakatsanis JJ.: Levying hearing fees is a permissible exercise of the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867*; however, that power is not unlimited. It must be exercised in a manner that is consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. Section 96 restricts the legislative competence of provincial legislatures and Parliament; neither level of government can enact legislation that removes part of the core or inherent jurisdiction of the

superior courts. The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basis judicial function. Therefore, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts and impermissibly impinge on s. 96 of the *Constitution Act, 1867*.

The connection between access to justice and s. 96 is further supported by considerations relating to the rule of law. The s. 96 function and the rule of law are inextricably intertwined. As access to justice is fundamental to the rule of law, it is natural that s. 96 provide some degree of constitutional protection for access to justice. Concerns about the rule of law in this case are not abstract or theoretical. If people cannot bring legitimate issues to court, laws will not be given effect, and the balance between the state's power to make and enforce laws and the courts' responsibility to rule on citizen challenges to them may be skewed.

Section 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96 of the *Constitution Act, 1867*.

Hearing fees are unconstitutional when they deprive litigants of access to the superior courts. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court. A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts. It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims.

The hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court and is unconstitutional. The current exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

V is excused from paying the hearing fee. The hearing fee scheme prevents access to the courts in a

manner inconsistent with s. 96 of the Constitution and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the Legislature or the Lieutenant Governor-in-Council to enact new provisions, should they choose to do so. "Reading in" is a remedy sparingly used, and available only where it is clear the legislature, faced with a ruling of unconstitutionality, would have made the change proposed. This condition is not met here. Further, modifying the exemption as suggested might still not cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

Per Cromwell J.: This case can be resolved on administrative law grounds and it is unnecessary to address the broader constitutional issues. There is a common law right of reasonable access to civil justice. This right of reasonable access may only be abrogated by clear statutory language. This common law right is preserved by the *Court Rules Act*. The common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary expenses and the magnitude of the fees. If the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*.

Here, the trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. The plain meaning of the exemption, referring to persons who are "impoverished" and "indigent" cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees. The hearing fees do not meet the common law standard preserved by the *Court Rules Act.* The exemptions under the *Court Rules Act* cannot be interpreted in a way that is consistent with the common law right of access to civil justice which is preserved by the *Court Rules Act*. Thus, the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act.*

Per Rothstein J. (dissenting): The British Columbia hearing fee scheme does not offend any constitutional right. There is no express constitutional right to access the civil courts without hearing fees. Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. It is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. Absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

The hearing fee scheme in this case cannot be struck down on the basis of a novel reading of s. 96 of the *Constitution Act, 1867*. Section 96 protects the core jurisdiction of superior courts that is integral to their operations; however, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. This Court has previously established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. The majority does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority significantly expands what is meant by the "core jurisdiction" of the superior courts beyond what is contemplated in the text or this Court's jurisprudence on the scope of s. 96. The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise.

The unwritten principle of the rule of law does not support the striking down of legislation otherwise properly within provincial jurisdiction. The majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. Section 96 requires that the existence and core jurisdiction of superior courts be preserved, but this does not, necessarily imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text. This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are not subject to s. 1 justification or the s. 33 notwithstanding clause.

This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation. To circumvent this caution, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme. Reading the unwritten principle of the rule of law too broadly would also render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers. Provisions such as ss. 11(*d*) and 24(1) of the *Charter* would be unnecessary if the Constitution already contained a more general right to access superior courts. The rule of law is a vague and fundamentally disputed concept. To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, it would not be unconstitutional. The majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or

eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

Cases Cited

By McLachlin C.J.

Distinguished: *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, rev'g 2005 BCCA 631, 262 D.L.R. (4th) 51; **applied:** *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; **referred to:** *Pleau v. Nova Scotia (Prothonotary)* (1998), 186 N.S.R. (2d) 1; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, aff'g 20 D.L.R. (4th) 399; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

By Cromwell J.

Referred to: *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132; *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810.

By Rothstein J. (dissenting)

OPSEU v. Ontario (Attorney General), [1987] 2 S.C.R. 2; *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873; *Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725; *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217; *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214; *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473; *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185; *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240; *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87; *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1.

Statutes and Regulations Cited

A Mean to help and speed poor Persons in their Suits (Eng.), 11 Hen. 7, c. 12 [*Statute of Henry VII*].

Canadian Charter of Rights and Freedoms, ss. 1, 2, 7, 11(*d*), 24(1), 33.

Constitution Act, 1867, ss. 92(14), 96.

Court Rules Act, R.S.B.C. 1996, c. 80.

Employment and Assistance Act, S.B.C. 2002, c. 40.

Employment and Assistance for Persons with Disabilities Act, S.B.C. 2002, c. 41.

Supreme Court Civil Rules, B.C. Reg. 168/2009, rr. 14-1, 20-5(1), (3), App. C, Sch. 1.

Supreme Court Family Rules, B.C. Reg. 169/2009, App. C, Sch. 1.

Supreme Court Rules, B.C. Reg. 221/90 [rep. 168/2009], App. C, Sch. 1 [rep. & sub. 10/96; *idem* 75/98].

History and Disposition:

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Donald, Chiasson and Garson JJ.A.), 2013 BCCA 65, 43 B.C.L.R. (5th) 217, 334 B.C.A.C. 71, 572 W.A.C. 71, 359 D.L.R. (4th) 524, [2013] 7 W.W.R. 478, 286 C.R.R. (2d) 26, [2013] B.C.J. No. 243 (QL), 2013 CarswellBC 354, setting aside a decision of McEwan J., 2012 BCSC 748, 260 C.R.R. (2d) 1, [2012] B.C.J. No. 1016 (QL), 2012 CarswellBC 1485. Appeal allowed and cross-appeal dismissed, Rothstein J. dissenting.

Counsel:

Darrell W. Roberts, *Q.C.*, and *Chantelle M. Rajotte*, for the appellant/respondent on cross-appeal the Trial Lawyers Association of British Columbia.

Sharon D. Matthews, *Q.C.*, *Melina Buckley* and *Michael Sobkin*, for the appellant/respondent on cross-appeal the Canadian Bar Association -- British Columbia Branch.

Bryant A. Mackey and *J. Gareth Morley*, for the respondent/appellant on cross-appeal.

Alain Préfontaine, for the intervener the Attorney General of Canada.

Rochelle Fox and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

Alain Gingras and *Dana Pescarus*, for the intervener the Attorney General of Quebec.

Donald Padget, for the intervener the Attorney General of Alberta.

Joseph J. Arvay, *Q.C.*, *Kelly D. Jordan* and *Tim Dickson*, for the intervener the Advocates' Society.

Francesca V. Marzari and *Kasari Govender*, for the intervener the West Coast Women's Legal Education and Action Fund.

Paul Schabas and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

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

McLACHLIN C.J.:--

I. Overview

1 The issue in this case is whether court hearing fees imposed by the Province of British Columbia that deny some people access to the courts are constitutional. The trial judge, upheld on appeal, held that the legislation imposing the fees was unconstitutional. I agree.

2 In my view, the fees at issue here violate s. 96 of the *Constitution Act, 1867*. Although the province can establish hearing fees under its power to administer justice under s. 92(14) of the *Constitution Act, 1867*, the exercise of that power must also comply with s. 96 of the *Constitution Act, 1867*, which constitutionally protects the core jurisdiction of the superior courts. For the reasons discussed below, the fees impermissibly infringe on that jurisdiction by, in effect, denying some people access to the courts.

II. Facts

3 This case began as a family action (2009 BCSC 434 (CanLII)). Ms. Vilardell and Mr. Dunham began a relationship in England and came to British Columbia, Canada, with their daughter. The relationship foundered, and the question arose -- who should have custody of the child? Ms. Vilardell wanted to return with the child to Spain, her country of origin. Mr. Dunham wanted to keep the child in British Columbia. Ms. Vilardell also claimed an interest in Mr. Dunham's house.

4 Ms. Vilardell went to court to have these issues resolved. In order to get a trial date, she had to undertake in advance to pay a court hearing fee. At the outset of the trial, Ms. Vilardell asked the judge to relieve her from paying the hearing fee. The judge reserved his decision on this request until the end of the trial, so he could address the question of ability to pay after hearing evidence respecting the parties' means, circumstances, and entitlement to property.

5 The parties were not represented by lawyers, and the hearing took 10 days. The hearing fee

amounted to some $3,600.00 -- almost the net monthly income of the family (2012 BCSC 748, 260 C.R.R. (2d) 1, at para. 396). Ms. Vilardell is not an "impoverished" person in the ordinary sense of the word. She is qualified as a veterinary surgeon in Europe. She was unemployed in the year leading up to the trial; the "family" income appears to have come mainly from her partner. She had some assets, including about $10,000 in savings in a Canadian bank account, $10,000 in a Barclays Investment Savings Account in the United Kingdom, and $4,500 in a registered retirement account in Spain. However, after legal fees had depleted her savings, she could not afford the hearing fee.

6 Aware that there was some authority for the proposition that hearing fees are unconstitutional (*Pleau v. Nova Scotia (Prothonotary)* (1998), 186 N.S.R. (2d) 1 (S.C.)), the judge held that the Attorney General should be given an opportunity to intervene on Ms. Vilardell's application. He also invited submissions from the Law Society of British Columbia and the B.C. branch of the Canadian Bar Association. The judge stayed Ms. Vilardell's obligation to pay the hearing fee pending further order.

7 Ultimately, the B.C. branch of the Canadian Bar Association and the Trial Lawyers Association of British Columbia intervened and challenged the hearing fee scheme as unconstitutional. They argued that people like Ms. Vilardell -- possessing some means but not able to pay the hearing fee -- have the right to have a court adjudicate their legal disputes, and that the hearing fee regime in British Columbia essentially denies them that right.

8 The trial judge ruled that the hearing fee provision was unconstitutional. The Court of Appeal agreed that the scheme could not stand as it is, but held that if the exemption provision were expanded by reading in the words "or in need", it would pass constitutional muster (2013 BCCA 65, 43 B.C.L.R. (5th) 217). The Trial Lawyers Association of British Columbia and the Canadian Bar Association -- British Columbia Branch appeal the remedy to this Court. The Province cross-appeals on the issue of the constitutionality of the hearing fees.

III. The Legislative Regime

9 The *Supreme Court Rules*, B.C. Reg. 221/90, as amended by B.C. Reg. 10/96 and B.C. Reg. 75/98, in place at the time this case began, were enacted as subordinate legislation under the *Court Rules Act*, R.S.B.C. 1996, c. 80. In 2010, the *Supreme Court Rules* were replaced by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009. The appellants challenge the constitutionality of the hearing fees set out in both rules of court.

10 The current hearing fees are set out in Schedule 1 of Appendix C of the *Supreme Court Civil Rules* and the *Supreme Court Family Rules*, B.C. Reg. 169/2009. The fees escalate from no fee for the first three days of trial, to five hundred dollars for days four to ten, to eight hundred dollars for each day over ten.

11 Rule 20-5(1) of the *Supreme Court Civil Rules* provides for an exemption from hearing fees:

> If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence
>
> (a) discloses no reasonable claim or defence, as the case may be,
> (b) is scandalous, frivolous or vexatious, or
> (c) is otherwise an abuse of the process of the court.

12 In B.C., the party that sets a case down for trial (usually the plaintiff) is required to undertake to pay the hearing fee -- regardless of whether the trial length is based on that party's estimate or the estimate of the other party or the court.

13 Applications for the impoverishment exemption are usually spoken to in court, often on an *ex parte* basis. The registry provides the applicant with an application form, a blank affidavit, and a draft order (r. 20-5(3)).

IV. Issues

14 This appeal raises the following issues:

(1) Is B.C.'s hearing fee scheme constitutionally valid?
(2) If not, what is the appropriate remedy?

15 The appellants challenge the Province's hearing fees on a number of grounds, including the rule of law and access to an independent judiciary.

16 The Province argues that the hearing fee scheme is a valid exercise of the provincial power over the administration of justice under s. 92(14) of the *Constitution Act, 1867*.

17 The question arises: What, if any, are the limits of the scope of provincial authority over the administration of justice under s. 92(14)? The authority is a wide one, but it must be exercised harmoniously with the core jurisdiction of provincial superior courts protected by s. 96. The issue in this case comes down to whether s. 96 is infringed by legislation that imposes hearing fees that deny some people access to the courts.

V. Analysis

A. *The Province Has the Power to Impose Hearing Fees*

18 The Province has the power to legislate with respect to the administration of justice under s. 92(14) of the *Constitution Act, 1867*. This includes the power to charge fees for court services.

19 Section 92(14) of the *Constitution Act, 1867* provides:

> **92.** In each Province the Legislature may exclusively make Laws in relation to ...
>
> ...
>
> 14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of the Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil matters in those Courts.

20 In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court said:

> The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. Therefore, *B.C.G.E.U.* cannot stand for the proposition that every limit on access to the courts is automatically unconstitutional. [Emphasis added; para. 17.]

21 Hearing fees fall squarely within the "administration of justice" and may be used to defray some of the cost of administering the justice system, to encourage the efficient use of court resources, and to discourage frivolous or inappropriate use of the courts.

22 It was argued that *all* hearing fees are unconstitutional; as courts are a "first charge on government", charging fees for time in court is as offensive to democracy as charging fees for voting. However, this argument is flawed because it focuses on the type of the fee, rather than the real problem -- using fees to deny certain people access to the courts. Moreover, the argument raises policy issues relating to how governments should generate revenue and allocate their funds. Hearing fees paid by litigants who *can* afford them may be a justifiable way of making resources available for the justice system and increasing access to justice overall.

23 I conclude that levying hearing fees is a permissible exercise of the Province's jurisdiction under s. 92(14) of the *Constitution Act, 1867*.

B. *The Provinces' Power to Impose Hearing Fees Is Not Unlimited*

24 On its face, s. 92(14) does not limit the powers of the provinces to impose hearing fees. However, that does not mean that the province can impose hearing fees in any fashion it chooses. Its power to impose hearing fees must be consistent with s. 96 of the *Constitution Act, 1867* and the requirements that flow by necessary implication from s. 96. This follows from two related tenets of constitutional interpretation.

25 First, particular constitutional grants of power must be read together with other grants of power so that the Constitution operates as an internally consistent harmonious whole. Thus s. 92(14) does not operate in isolation. Its ambit must be determined, not only by reference to its bare wording, but with respect to other powers conferred by the Constitution. In this case, this requires us to consider s. 96 of the *Constitution Act, 1867*.

26 Second, the interpretation of s. 92(14) must be consistent not only with other express terms of the Constitution, but with requirements that "flow by necessary implication from those terms": *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 66, *per* Major J. As this Court has recently stated, "the Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text": *Reference re Senate Reform*, 2014 SCC 32, [2014] 1 S.C.R. 704, at para. 26 (emphasis added).

27 It follows that in determining the power conferred on the province over the administration of justice, including the imposition of hearing fees, by s. 92(14), the Court must consider not only the written words of that provision, but how a particular interpretation fits with other constitutional powers and the assumptions that underlie the text.

28 In this case, the other constitutional grant of power that must be considered is s. 96 of the *Constitution Act, 1867*, which has been held to guarantee the core jurisdiction of provincial superior courts throughout the country.

29 While s. 92(14) gives the provinces the responsibility for the administration of justice, s. 96 gives the federal government the power to appoint judges to the superior, district and county courts in each province. Taken together, these sections have been held to provide a constitutional basis for a unified judicial presence throughout the country: *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, at paras. 11 and 52. Although the bare words of s. 96 refer to the appointment of judges, its broader import is to guarantee the core jurisdiction of provincial superior courts: Parliament and legislatures can create inferior courts and administrative tribunals, but "[t]he jurisdiction which forms this core cannot be removed from the superior courts by either level of government, without amending the Constitution" (*MacMillan Bloedel*, at para. 15). In this way, the Canadian Constitution "confers a special and inalienable status on what have come to be called the 'section 96 courts'" (*MacMillan Bloedel*, at para. 52).

30 Section 96 therefore restricts the legislative competence of provincial legislatures and Parliament -- neither level of government can enact legislation that abolishes the superior courts or removes part of their core or inherent jurisdiction: *MacMillan Bloedel*, at para. 37; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 88.

31 It is not suggested that legislating hearing fees that prevent people from accessing the courts

would abolish or destroy the existence of the courts. The question is rather whether legislating hearing fees that prevent people from accessing the courts infringes on the core jurisdiction of the superior courts.

32 The historic task of the superior courts is to resolve disputes between individuals and decide questions of private and public law. Measures that prevent people from coming to the courts to have those issues resolved are at odds with this basic judicial function. The resolution of these disputes and resulting determination of issues of private and public law, viewed in the institutional context of the Canadian justice system, are central to what the superior courts do. Indeed, it is their very book of business. To prevent this business being done strikes at the core of the jurisdiction of the superior courts protected by s. 96 of the *Constitution Act, 1867*. As a result, hearing fees that deny people access to the courts infringe the core jurisdiction of the superior courts.

33 The jurisprudence under s. 96 supports this conclusion. The cases decided under s. 96 have been concerned either with legislation that purports to transfer an aspect of the core jurisdiction of the superior court to another decision-making body or with privative clauses that would bar judicial review: *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714; *MacMillan Bloedel*; and *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220. The thread throughout these cases is that laws may impinge on the core jurisdiction of the superior courts by denying access to the powers traditionally exercised by those courts.

34 In *Residential Tenancies*, the law at issue unconstitutionally denied access to the superior courts by requiring that a certain class of cases be decided by an administrative tribunal. In *Crevier*, the law at issue unconstitutionally denied access to the superior courts by imposing a privative clause excluding the supervisory jurisdiction of the superior courts. In *MacMillan Bloedel*, the legislation at issue unconstitutionally barred access to the superior courts for a segment of society -- young persons -- by conferring an exclusive power on youth courts to try youths for contempt in the face of superior courts. This Court, *per* Lamer C.J., relied on *Crevier*, concluding that "[it] establishes ... that powers which are 'hallmarks of superior courts' cannot be removed from those courts" (*MacMillan Bloedel*, at para. 35).

35 Here, the legislation at issue bars access to the superior courts in yet another way -- by imposing hearing fees that prevent some individuals from having their private and public law disputes resolved by the courts of superior jurisdiction -- the hallmark of what superior courts exist to do. As in *MacMillan Bloedel*, a segment of society is effectively denied the ability to bring their matter before the superior court.

36 It follows that the province's power to impose hearing fees cannot deny people the right to have their disputes resolved in the superior courts. To do so would be to impermissibly impinge on s. 96 of the *Constitution Act, 1867*. Rather, the province's powers under s. 92(14) must be exercised in a manner that is consistent with the right of individuals to bring their cases to the superior courts and have them resolved there.

37 This is consistent with the approach adopted by Major J. in *Imperial Tobacco*. The legislation here at issue -- the imposition of hearing fees -- must conform not only to the express terms of the Constitution, but to the "requirements ... that flow by necessary implication from the express terms of the Constitution." The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the Constitution, as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts.

38 While this suffices to resolve the fundamental issue of principle in this appeal, the connection between s. 96 and access to justice is further supported by considerations relating to the rule of law. This Court affirmed that access to the courts is essential to the rule of law in *B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214. As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (p. 230). The Court adopted, at p. 230, the B.C. Court of Appeal's statement of the law ((1985), 20 D.L.R. (4th) 399, at p. 406):

> ... access to the courts is under the rule of law one of the foundational pillars protecting the rights and freedoms of our citizens... . Any action that interferes with such access by any person or groups of persons will rally the court's powers to ensure the citizen of his or her day in court. Here, the action causing interference happens to be picketing. As we have already indicated, interference from whatever source falls into the same category. [Emphasis added.]

As stated more recently in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, *per* Karakatsanis J., "without an accessible public forum for the adjudication of disputes, the rule of law is threatened and the development of the common law undermined" (para. 26).

39 The s. 96 judicial function and the rule of law are inextricably intertwined. As Lamer C.J. stated in *MacMillan Bloedel*, "[i]n the constitutional arrangements passed on to us by the British and recognized by the preamble to the *Constitution Act, 1867*, the provincial superior courts are the foundation of the rule of law itself" (para. 37). The very rationale for the provision is said to be "the maintenance of the rule of law through the protection of the judicial role": *Provincial Judges Reference*, at para. 88. As access to justice is fundamental to the rule of law, and the rule of law is fostered by the continued existence of the s. 96 courts, it is only natural that s. 96 provide some degree of constitutional protection for access to justice.

40 In the context of legislation which effectively denies people the right to take their cases to court, concerns about the maintenance of the rule of law are not abstract or theoretical. If people cannot challenge government actions in court, individuals cannot hold the state to account -- the government will be, or be seen to be, above the law. If people cannot bring legitimate issues to court, the creation and maintenance of positive laws will be hampered, as laws will not be given effect. And the balance between the state's power to make and enforce laws and the courts'

responsibility to rule on citizen challenges to them may be skewed: *Christie v. British Columbia (Attorney General)*, 2005 BCCA 631, 262 D.L.R. (4th) 51, at paras. 68-9, *per* Newbury J.A.

41 This Court's decision in *Christie* does not undermine the proposition that access to the courts is fundamental to our constitutional arrangements. The Court in *Christie* -- a case concerning a 7 percent surcharge on legal services -- proceeded on the premise of a fundamental right to access the courts, but held that not "every limit on access to the courts is automatically unconstitutional" (para. 17). In the present case, the hearing fee requirement has the potential to bar litigants with legitimate claims from the courts. The tax at issue in *Christie*, on the evidence and arguments adduced, was not shown to have a similar impact.

42 Nor does the argument that legislatures generally have the right to determine the cost of government services undermine the proposition that laws cannot prevent citizens from accessing the superior courts. (Indeed, the Attorney General does not assert such a proposition.) The right of the province to impose hearing fees is limited by constitutional constraints. In defining those constraints, the Court does not impermissibly venture into territory that is the exclusive turf of the legislature. Rather, the Court is ensuring that the Constitution is respected.

43 I conclude that s. 92(14), read in the context of the Constitution as a whole, does not give the provinces the power to administer justice in a way that denies the right of Canadians to access courts of superior jurisdiction. Any attempt to do so will run afoul of the constitutional protection for the superior courts found in s. 96.

C. *When Do Hearing Fees Become Unconstitutional?*

44 The remaining question is how to determine when hearing fees deny access to superior courts.

45 Litigants with ample resources will not be denied access to the superior courts by hearing fees. Even litigants with modest resources are often capable of arranging their finances so that, with reasonable sacrifices, they may access the courts. However, when hearing fees deprive litigants of access to the superior courts, they infringe the basic right of citizens to bring their cases to court. That point is reached when the hearing fees in question cause undue hardship to the litigant who seeks the adjudication of the superior court.

46 A hearing fee scheme that does not exempt impoverished people clearly oversteps the constitutional minimum -- as tacitly recognized by the exemption in the B.C. scheme at issue here. But providing exemptions only to the truly impoverished may set the access bar too high. A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts.

47 Of course, hearing fees that prevent litigants from bringing frivolous or vexatious claims do not offend the Constitution. There is no constitutional right to bring frivolous or vexatious cases,

and measures that deter such cases may actually increase efficiency and overall access to justice.

48 It is the role of the provincial legislatures to devise a constitutionally compliant hearing fee scheme. But as a general rule, hearing fees must be coupled with an exemption that allows judges to waive the fees for people who cannot, by reason of their financial situation, bring non-frivolous or non-vexatious litigation to court. A hearing fee scheme can include an exemption for the truly impoverished, but the hearing fees must be set at an amount such that anyone who is not impoverished can afford them. Higher fees must be coupled with enough judicial discretion to waive hearing fees in any case where they would effectively prevent access to the courts because they require litigants to forgo reasonable expenses in order to bring claims. This is in keeping with a long tradition in the common law of providing exemptions for classes of people who might be prevented from accessing the courts -- a tradition that goes back to the *Statute of Henry VII*, 11 Hen. 7, c. 12, 1495, which provided relief for people who could not afford court fees.

D. *Application to Hearing Fee at Issue*

49 To recap, provinces may impose hearing fees as part of the administration of justice. However, this power does not extend to hearing fees that effectively prevent litigants from accessing the courts because they cannot afford the fees.

50 On the findings of the trial judge, the hearing fee scheme at issue in this case places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court.

51 The trial judge held that the primary purpose of the hearing fee scheme is to provide an incentive for efficient use of court time and a disincentive for lengthy and inefficient trials (para. 309). The secondary purpose of the scheme is to provide sufficient revenue to offset the costs of providing civil justice in Provincial Court Small Claims matters, Supreme Court civil claims, and Supreme Court family claims (paras. 302-7). To put it in other words, the Province's aim is to establish a revenue-neutral trial service.

52 The trial judge, affirmed by the Court of Appeal, found that B.C.'s hearing fees go beyond these purposes and limit access to courts for litigants who are not indigent or impoverished (and therefore who do not fall under the exemption provision), but for whom the hearing fees are nonetheless unaffordable. This is supported by the evidence. At trial, the appellants filed a report by economist Robert Carson, who used a "Market Basket Measure" ("MBM") developed in 2003 by Human Resources Development Canada to measure poverty. Assuming that the test for the indigency exemption was based on an MBM measure of poverty, he concluded that a significant percentage of the population would not be exempted from hearing fees (because their income is above MBM), but would nonetheless have great difficulty affording the hearing fees for a 10-day trial, like the one in this case, because the fees would equal or exceed any income in excess of MBM. In other words, the effect of the fees is unconstitutional, because for many litigants, bringing a claim would require sacrificing reasonable expenses.

53 Mr. Carson's summary is as follows:

> In 2005 the median after tax income of couples households in B.C., without children, was $53,468. About 8.7% of couples without children had incomes below MBM which is, in my opinion, a conservative (that is, a relatively low) estimate of the line between poverty and income sufficient to meet people's basic needs. Adding $15,000 to MBM results in an estimate of 82,500 couples whose incomes were above MBM and therefore, too high to qualify for exemption from hearing fees, using an MBM based test, but still well below the median level. In this group, comprising one couple in five, incomes ranged from $21,745, the amount required simply to cover basic needs to $36,745, an amount sufficient to increase average daily expenditures per household member by about $20 above MBM. At the upper end of the income range in this group, fees for a ten day trial would equal the daily spendable income, in excess of MBM, for almost three months.
>
> Among couples households with children median income was $68,357 in 2005. MBM for B.C. couples with children was about $34,750 in that year. About 15% of couples with children had incomes below MBM. Adding $15,000 to MBM resulted in an estimate of 67,000 couples with relatively low incomes who would not meet an MBM based test for indigence. The addition of $15,000 to MBM income increased spendable income by about $11 per day per household member, in couples families with children. The number of couples with incomes exceeding MBM either marginally, or by as much as $15,000 per year, is about equal to the number of couples with incomes below MBM who could qualify for exemption. In other words, there are at least as many people who would not be exempt from fees, but who would be hard pressed to meet the cost of hearing fees, as there are who could claim exemption.
>
> Among female loan [*sic*] parent families in private households, median income in 2005 was $33,151. About four in ten such households would meet an MBM based test for indigence. Adding $15,000 to MBM results in an estimate of 31,600 families with incomes between MBM and $43,700. About one loan [*sic*] parent female headed family in four would not meet an MBM based test for indigence but would, at the outside, be able to spend $12 per day per family member more than MBM. Similar calculations, for loan [*sic*] parent families headed by males, adds about 7,000 families to those I would consider to be living on modest incomes, with similarly limited ability to bear the costs of hearing fees.

> Among single men median pre-tax income in 2005 was $28,175 and among single women, it was $22,833. About 28% of all singles had incomes below MBM and about one in five had incomes between MBM and the medians. Medians exceeded MBM by $12,645 (men) and $7,300 (women). It is my opinion that among single people in B.C. at least half either would either have to seek indigent status, or would find hearing fees to be a significant barrier to their access to a court.
>
> On the basis of fairly limited information with respect to income distribution and the extent and quality of participation in paid work among First Nations people, recent immigrants and the disabled it is my opinion that people in these groups are certain to be over-represented among those likely to qualify for indigent status, and among those with incomes that are too high to qualify for indigence, but low enough that hearing fees would represent a significant barrier to recourse to a court. [Emphasis added.]

54 Mr. Carson's evidence was based on the Province's previous hearing fee scheme, in place at the time this case began. However, in my view, it is equally relevant to the current hearing fee regime. Under the current *Supreme Court Civil Rules*, the fee for a 10-day trial is $3,500 -- almost the same as under the previous *Supreme Court Rules*.

55 Indeed, the effect of B.C.'s hearing fee scheme is illustrated in this case. Ms. Vilardell is not "impoverished", and is therefore not caught by the exemption provision. However, the fee for Ms. Vilardell's 10-day trial amounted to her family's net monthly income. This was on top of $23,000 already spent on lawyer fees. She could not afford the fee. That the fee arbitrarily was imposed only on Ms. Vilardell and escalated with the length of the trial -- even though she did not control the length of the trial -- worsened her situation.

56 The Province argues that the exemption provision for impoverished litigants should be interpreted broadly to allow a judge to waive the hearing fees in appropriate cases, thereby avoiding the potentially unconstitutional impact of the scheme. I cannot accept this submission.

57 The current exemption, cited above, provides an exemption for people receiving benefits under the *Employment and Assistance Act*, S.B.C. 2002, c. 40, and the *Employment and Assistance for Persons with Disabilities Act*, S.B.C. 2002, c. 41, or for persons who are "otherwise impoverished". The exemption in place at the time of the trial provided that a judge could waive all fees for a person who is "indigent". I conclude that these exemptions do not provide sufficient discretion to the trial judge to exempt litigants from having to pay hearing fees in appropriate circumstances.

58 I agree with the view of the trial judge that the plain meaning of the words "impoverished" and "indigent" does not cover people of modest means who are nonetheless prevented from having a

trial because of the hearing fees:

> The AGBC ... reconciles the principle that the courts are meant to be accessible by pointing to the indigency exemption. It is clear, however, that if indigency is not redefined to include those who would otherwise be described as middle class, many will be forced to forego the assertion of their rights and interests in a courtroom for lack of money. I again note that in this particular case the cost of hearing fees for 10 days approached the net income of the family for a month.
>
> ...
>
> ... The AGBC's answer dares the courts to redefine indigency -- while maintaining the label -- in a manner that would bring the whole exercise into disrepute. The courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them, without compromising the appearance of independence, and the fact of equality before the law, as the TLABC has noted: see para. 180 herein. The "indigency" remedy does not cure this obvious impediment to access to justice. [paras. 396 and 398]

59 Like the trial judge, I am of the view that the courts must read "impoverished" in its ordinary sense. A judge may waive fees for the very poor, and no one else. As the trial judge noted, while a person who cannot afford a fee of $100 or $200 may properly be described as "indigent" or "impoverished", it is awkward to use these terms to describe a middle class family's inability to pay a fee that amounts to a month's net salary. As the trial judge found, there "may be something at odds between the indigency test and the level of the fees" (para. 26).

60 Other objections to the exemption provision can be raised. Litigants are required to come before the court, explain why they are indigent and beg the court to publicly acknowledge this status and excuse the payment of fees. This is arguably an affront to dignity and imposes a significant burden on the potential litigant of adducing proof of impoverishment -- a burden she may be unable or unwilling to assume. This burden may further hamper access to the court. In clear cases of impoverishment, the task may be relatively straightforward. However, if "impoverished" were extended to the large group of additional people that the evidence indicates is prevented from going to court because of the current hearing fees, the task might be much more complex. In such circumstances, there is a practical concern the exemption application itself may contribute to hardship.

61 The contention that this hearing fee regime promotes proportionality and efficiency by weeding out unmeritorious cases and encouraging shorter trials, thereby actually increasing access to the courts, does not answer the findings of the trial judge that it unconstitutionally prevents access to the courts. Moreover, the trial judge held that it is "dubious" that the hearing fees at issue here increase efficacy and fairness (para. 310). They penalize long trials simply because they are

long, and do so by incremental leaps. But long trials are not necessarily inefficient. Prolonged trials may be caused by the nature of the case or the evidence. Litigants in long but efficient trials ought not to be penalized by hearing fees -- particularly fees that escalate with the length of the trial.

62 Moreover, the plaintiff who is required to pay the hearing fee may not control the length or efficiency of the trial -- the defendant may be responsible for prolonging the matter. The ability of the trial judge to make orders for costs against such a defendant does not address the real problem -- before being able to set a matter down for trial the plaintiff must undertake to pay hearing fees that may escalate through no fault of her own. If she cannot afford the prospective fees, she may reasonably conclude that she cannot bring her dispute to the court.

63 Most fundamentally, unlike cost awards, the imposition of the hearing fees at issue are not dependent on efficiency or the merit of one's claim. The hearing fees imposed by this scheme escalate to $800 per day after 10 days of trial -- the highest price tag in the country -- without any relationship to the efficiency of the proceeding. These hearing fees do not promote efficient use of court time; at best they promote *less* use of court time.

64 I conclude that the hearing fee scheme prevents access to the courts in a manner inconsistent with s. 96 of the Constitution and the underlying principle of the rule of law. It therefore falls outside the Province's jurisdiction under s. 92(14) to administer justice.

VI. What Is the Appropriate Remedy?

65 This leaves the question of the appropriate remedy. The trial judge struck down the scheme as unconstitutional. The Court of Appeal preferred the remedy of "reading in" the words "or in need" into the exemption provision.

66 "Reading in" is a remedy sparingly used, and available only where it is clear that the legislature, faced with a ruling of unconstitutionality, would have made the change proposed: *Schachter v. Canada*, [1992] 2 S.C.R. 679. I am not satisfied that this condition is met here. The legislature or Lieutenant Governor in Council has a number of options, from abandoning or modifying the hearing fee to changing the exemption provision. Moreover, any expansion of the exemption provision will be at odds with the legislative objective of deterring use of the courts. "Reading in" to cure the constitutional defect of the hearing fee scheme would defeat the purpose of the legislation.

67 I would also note that modifying the exemption as suggested by the Court of Appeal might still not cure the problem; it is not clear that the term "or in need" will cover all litigants who cannot afford the hearing fee and other provisions might be required in order to avoid the onerous or undignified process of proving that one falls within the exception.

68 The proper remedy is to declare the hearing fee scheme as it stands unconstitutional and leave it to the legislature or the Lieutenant Governor in Council to enact new provisions, should they

choose to do so.

VII. Conclusion

69 The appeal is allowed and the cross-appeal is dismissed, both without costs. I would affirm the declaration of unconstitutionality of the trial judge and set aside the order of the Court of Appeal expanding the exemption provision. Ms. Vilardell is excused from paying the hearing fee.

The following are the reasons delivered by

70 CROMWELL J. (concurring in result):-- I prefer to resolve this case on administrative law grounds and find that it is unnecessary to address the broader constitutional issues raised by the appellants. The submissions made by the Attorney General of British Columbia in my view make it desirable to follow this narrower route to the resolution of the appeal.

71 First, the Attorney General concedes that there is a common law right of reasonable access to civil justice: R.F., at para. 10. I agree. Courts in Canada and the United Kingdom have recognized the existence of this right: *Polewsky v. Home Hardware Stores Ltd.* (2003), 66 O.R. (3d) 600 (S.C.J.), at para. 60; *Fabrikant v. Canada*, 2014 FCA 89, 459 N.R. 163, at para. 7; *Toronto-Dominion Bank v. Beaton*, 2012 ABQB 125, 534 A.R. 132, at paras. 17-20; in the United Kingdom, see *R. v. Lord Chancellor, Ex parte Witham*, [1998] Q.B. 575, at p. 585; *R. v. Secretary of State for the Home Department, ex p. Saleem*, [2000] 4 All E.R. 814 (C.A.), at p. 820.

72 It is widely accepted, and the Attorney General agrees, that this right of reasonable access may only be abrogated by clear statutory language: *Polewsky*, at para. 60; *Witham*, at p. 585; *Saleem*, at p. 821. The Attorney General does not suggest that there is any such clear language in the *Court Rules Act*, R.S.B.C. 1996, c. 80. On the contrary, the Attorney General's position is that this common law right is *preserved* by the Act: R.F., at para. 10.

73 The Attorney General also rightly points out that since the hearing fees in dispute here are found in subordinate legislation made under the authority of the *Court Rules Act*, they should be reviewed for consistency with the Act. As I have said, the Attorney General's position, which I accept, is that the right is preserved, not abrogated by the Act: R.F., at paras. 10 and 12. It follows, as the Attorney General submits, that subordinate legislation purportedly adopted pursuant to the *Courts Rules Act* which is inconsistent with the common law right of access to civil justice is *ultra vires*: *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 24.

74 The Attorney General submits, and I agree, that the common law right of access to civil justice allows court fees, but only if there is an exemption to ensure that no person is prevented from making an arguable claim or defence because he or she lacks the resources to carry on the proceeding: R.F., at para. 71. This is a flexible standard: whether a person has the ability to pay the fees depends not only on wealth and income, but also on the amount of their reasonable, necessary

expenses and the magnitude of the fees: *ibid*., at para. 72.

75 Finally, the Attorney General submits, again in my view correctly, that if the hearing fee exemptions cannot be interpreted to ensure that the common law right of access is not defeated, then the fees are *ultra vires* the *Court Rules Act*: R.F., at para. 47.

76 The trial judge found as a fact that the hearing fees are unaffordable and therefore limit access for litigants who do not fall within the exemptions for the indigent and the impoverished. This finding and the evidentiary basis for it are reviewed in the Chief Justice's reasons, at paras. 52-55. Like the Chief Justice, I accept this key factual conclusion of the trial judge. It follows that the issue then becomes whether the exemptions under the *Court Rules Act* can be interpreted so that they are consistent with the common law right of access to civil justice, which is preserved, as the Attorney General submits, by the *Court Rules Act*.

77 On that question, I agree with the Chief Justice and the trial judge: the plain meaning of the exemption, referring to persons who are "impoverished" and "indigent" cannot be interpreted to cover people of modest means who are prevented from having a trial because of the hearing fees: trial judge's reasons, 2012 BCSC 748, 260 C.R.R. (2d) 1, at paras. 396-98; reasons of the Chief Justice, at para. 61.

78 In summary, the hearing fees do not meet the common law standard which the Attorney General correctly accepts is preserved by the *Court Rules Act*. The exemption cannot be interpreted in a way that would do so. It follows, in accordance with the Attorney General's submissions, that the fees are *ultra vires* the regulation-making authority conferred by the *Court Rules Act*.

79 I would therefore allow the appeal, dismiss the cross-appeal, set aside the order of the Court of Appeal and in its place declare that the hearing fees are *ultra vires* the *Court Rules Act*. Ms. Vilardell does not have to pay the hearing fee. It is not necessary for me to answer the constitutional question. I would make no order as to costs.

The following are the reasons delivered by

80 ROTHSTEIN J. (dissenting):-- Courts do not have free range to micromanage the policy choices of governments acting within the sphere of their constitutional powers. This appeal concerns the constitutionality of a hearing fee scheme contained in the British Columbia *Supreme Court Civil Rules*, B.C. Reg. 168/2009, to encourage the efficient use of courtroom time in civil courts and to recoup some of the costs for the provision of such time. The appellants submit that the imposition of hearing fees is unconstitutional. The majority finds that the hearing fees *do* fall within the powers of a province to make laws in relation to the administration of justice in the province but that they are nevertheless unconstitutional when they cause undue hardship to some litigants and effectively prevent their access to courts. In the majority's view, s. 96 of the *Constitution Act, 1867*, supported by the rule of law, provides a general right to access the courts. They find that this right is undermined by hearing fees that Canadians cannot afford.

81 In my respectful view, the British Columbia hearing fee scheme does not offend any constitutional right. The majority must base its finding on an overly broad reading of s. 96, with support from the unwritten constitutional principle of the rule of law, because there is no express constitutional right to access the civil courts without hearing fees.

82 In engaging, on professed constitutional grounds, the question of the affordability of government services to Canadians, the majority enters territory that is quintessentially that of the legislature. The majority looks at the question solely from the point of view of the party to litigation required to undertake to pay the hearing fee. It does not consider, and has no basis or evidence upon which to consider, the questions of the financing of court services or the impact of reduced revenues from reducing, abolishing, or expanding the exemption from paying hearing fees. Courts must respect the role and policy choices of democratically elected legislators. In the absence of a violation of a clear constitutional provision, the judiciary should defer to the policy choices of the government and legislature. How will the government deal with reduced revenues from hearing fees? Should it reduce the provision of court services? Should it reduce the provision of other government services? Should it raise taxes? Should it incur debt? These are all questions that are relevant but that the Court is not equipped to answer. I respectfully dissent.

VIII. Section 92(14) of the *Constitution Act, 1867*

83 Section 92(14) of the *Constitution Act, 1867* entrusts the administration of justice in the provinces to provincial legislatures. Legislatures must balance a number of important values, including providing access to courts and ensuring that those same courts are adequately funded. They are accountable to voters for the choices they make. In a constitutional democracy such as ours, courts must be wary of subverting democracy and its accountability mechanisms beneath an overly expansive vision of constitutionalism.

84 In *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, Beetz J. stated that unlike in a *Canadian Charter of Rights and Freedoms* case,

> in a distribution of powers case, once it is demonstrated that the enacting legislature is competent, the balancing of conflicting values depends on the political judgment of such legislature and cannot be reviewed by the courts without their passing upon the wisdom of the legislation. [p. 56]

Accordingly, absent a violation of the *Charter* and within the bounds of their constitutional jurisdiction, provincial legislatures have leeway to make policy decisions regarding the allocation of funding and the recovery of costs.

85 In this appeal, the majority does not dispute that the provinces are competent to prescribe hearing fees under s. 92(14) of the *Constitution Act, 1867*. Yet they nevertheless proceed to assess whether the hearing fees infringe a general right to access the courts, a right derived from an overly expansive understanding of both s. 96 of the *Constitution Act, 1867*, and the unwritten principle of

the rule of law. In my view, this inquiry unduly enlarges the role of courts and hampers the ability of legislatures to respond to complex legislative challenges.

86 I therefore take exception to the majority striking down the British Columbia hearing fee scheme on a novel reading of s. 96 and the rule of law. On the contrary: it is well established that provinces have the power under s. 92(14) to enact laws that prescribe conditions on access to the courts. In *British Columbia (Attorney General) v. Christie*, 2007 SCC 21, [2007] 1 S.C.R. 873, this Court expressly held:

> The legislature has the power to pass laws in relation to the administration of justice in the province under s. 92(14) of the *Constitution Act, 1867*. This implies the power of the province to impose at least some conditions on how and when people have a right to access the courts. [Emphasis added; para. 17.]

87 This is not to deny that universal, free (or at least affordable) access to courts is a laudable goal; it is merely to say that s. 96 and the unwritten principle of the rule of law cannot be used to force provincial governments to expend funds or forego cost recovery to bring this goal to fruition. As this Court recently found, "the allocation of resources between competing priorities remains a policy and economic question; it is a political decision and the legislature and the executive are accountable to the people for it" (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3, at para. 43, *per* Karakatsanis J.).

IX. Section 96 of the *Constitution Act, 1867*

88 The majority states that s. 96 of the *Constitution Act, 1867* limits the power of the provinces to administer justice under s. 92(14). It is true that s. 96 protects the core jurisdiction of superior courts that is integral to their operations. In *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725, this Court stated:

> Destroying part of the core jurisdiction would be tantamount to abolishing the superior courts of general jurisdiction, which is impermissible without constitutional amendment. [para. 37, *per* Lamer C.J.]

89 However, it does not follow that legislation that places conditions on access to superior courts removes or infringes upon an aspect of their core jurisdiction. In *Re Residential Tenancies Act, 1979*, [1981] 1 S.C.R. 714, Dickson J. (as he then was) established a three-part test for determining whether legislation impermissibly removes an aspect of the core jurisdiction of superior courts. This Court later affirmed and summarized the test as follows:

> The first branch of the test is an historical inquiry into "whether the power or jurisdiction conforms to the power or jurisdiction exercised by superior, district or county courts at the time of Confederation" (p. 734)... . The second step asks whether the function in question is "judicial" in its institutional setting, and

> [Dickson J.] contrasts "judicial" functions with policy making functions. The final branch of the test involves an assessment of the "tribunal's function as a whole in order to appraise the impugned function in its entire institutional context" (p. 735).

(*MacMillan Bloedel*, at para. 12, citing *Residential Tenancies*.)

90 But the majority on this appeal does not apply this test because no aspect of the core jurisdiction of superior courts is removed by legislation that merely places limits on access to superior courts. In the absence of any demonstrated destruction of the core powers of the superior courts, there is no such removal sufficient to find a violation of s. 96. Instead, the majority approach significantly expands what is meant by the "core jurisdiction" of the superior courts beyond what is contemplated in the text or this Court's jurisprudence on the scope of s. 96. The cases cited by the majority speak of the inability of governments to remove "core" or "inherent jurisdiction", as doing so "emasculates the court, making it something other than a superior court" (*MacMillan Bloedel*, at para. 30; see also *Residential Tenancies*; *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220). The British Columbia government's measures cannot be said to have "emasculated" B.C. courts or to have made them something "other than a superior court". The hearing fees are a financing mechanism and do not go to the very existence of the court as a judicial body or limit the types of powers it may exercise. The concept of core jurisdiction in s. 96 cannot justify striking down the regulations at issue in this appeal.

X. The Rule of Law

91 The majority reads the unwritten principle of the rule of law as supporting the striking down of legislation otherwise properly within provincial jurisdiction. It is true that this Court has, on occasion, turned to unwritten principles to fill in "gaps in the express terms of the constitutional text" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3, at para. 104). But there are no such gaps in the text of s. 92(14). With respect, gaps do not exist simply because the courts believe that the text should say something that it does not. This Court, in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, reiterated its earlier insistence on the primacy of the written constitutional text, stating that unwritten principles "could not be taken as an invitation to dispense with the written text of the Constitution" (para. 53, affirming *Re: Remuneration of Judges*, at paras. 93 and 104). The written constitutional provisions guide government action and provide the touchstone for judicial review, anchoring the authority of courts to invalidate non-compliant laws enacted by democratically elected governments.

92 There is no express right of general access to superior courts for civil disputes in the text of the Constitution. Rather, the Constitution specifies the particular instances in which access to courts is guaranteed. Section 24(1) of the *Charter* provides that persons whose *Charter* rights have been infringed or denied may apply to the courts for a remedy. It is in this sense that this Court, in

B.C.G.E.U. v. British Columbia (Attorney General), [1988] 2 S.C.R. 214, held that access to courts for the purpose of vindicating *Charter* rights is protected (pp. 228-29). Section 11(*d*) of the *Charter* guarantees persons charged with an offence the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal".

93 But the majority uses the rule of law to support reading a general constitutional right to access the superior courts into s. 96. This provision of the *Constitution Act, 1867* requires that the existence and core jurisdiction of superior courts be preserved, but this does not, for the reasons herein, *necessarily* imply the general right of access to superior courts described by the majority. So long as the courts maintain their character as judicial bodies and exercise the core functions of courts, the demands of the Constitution are satisfied. In using an unwritten principle to support expanding the ambit of s. 96 to such an extent, the majority subverts the structure of the Constitution and jeopardizes the primacy of the written text.

94 This purported constitutional right to access the courts circumvents the careful checks and balances built into the structure of the *Charter*. Unlike *Charter* rights, rights read into s. 96 are absolute. They are not subject to s. 1 justification or the s. 33 notwithstanding clause. These provisions reflect a recognition that, in certain circumstances, governments will be permitted to enact legislation or take action that places limits on *Charter* rights. Indeed, s. 33 contemplates and permits the legislative override of, among other things, the fundamental freedoms described in s. 2, the right to life, liberty and security of the person embodied by s. 7, and numerous rights applicable in the criminal context. The question my colleagues avoid answering is why access to superior courts for civil disputes warrants even stronger protection than those rights expressly enumerated in the *Charter*.

95 I now turn to the specific unwritten constitutional principle invoked by the majority.

96 The majority proposes to invalidate those provincial laws relating to the administration of justice that, in their view, are contrary to the rule of law. The unwritten principle of the rule of law, as defined by this Court, consists of three elements:

> (1) "[T]he law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power" (*Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, at p. 748);
> (2) The rule of law "requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" (*ibid.*, at p. 749); and
> (3) "[T]he exercise of all public power must find its ultimate source in a legal rule" (*Reference re Secession of Quebec*, at para. 71, quoting *Re: Remuneration of Judges*, at para. 10).

As this Court found in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, "none of the principles that the rule of law embraces speak directly to the terms of

legislation" (para. 59).

97 This Court has clearly and persuasively cautioned against using the rule of law to strike down legislation:

> So understood, it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content... .
>
> This does not mean that the rule of law as described by this Court has no normative force. As McLachlin C.J. stated in *Babcock*, at para. 54, "unwritten constitutional principles", including the rule of law, "are capable of limiting government actions". See also *Reference re Secession of Quebec*, at para. 54. But the government action constrained by the rule of law as understood in *Reference re Manitoba Language Rights* and *Reference re Secession of Quebec* is, by definition, usually that of the executive and judicial branches. Actions of the legislative branch are constrained too, but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed). [Emphasis added.]
>
> (*Imperial Tobacco*, at paras. 59-60)

98 To circumvent this caution against using the rule of law as a basis for striking down legislation, the majority characterizes the rule of law as a limitation on the jurisdiction of provinces under s. 92(14) of the *Constitution Act, 1867*. The majority acknowledges that imposing hearing fees is a permissible exercise of the province's jurisdiction according to the *written* constitutional text -- that is, s. 92(14) (para. 23). But they ultimately conclude that the hearing fees fall outside the province's jurisdiction in part because the fees are inconsistent with the *unwritten* principle of the rule of law (paras. 38-40). Dressing the rule of law in division-of-powers clothing does not disguise the fact that the rule of law, an unwritten principle, cannot be used to support striking down the hearing fee scheme.

99 In using the rule of law to support the striking down of legislation that is indisputably within the scope of s. 92(14) of the *Constitution Act, 1867*, without attention to this Court's entrenched understanding of the rule of law, the majority ignores this Court's caution in *Imperial Tobacco*:

> The rule of law is not an invitation to trivialize or supplant the Constitution's written terms. Nor is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text. [Emphasis added; para. 67.]

With respect, the rule of law does not demand that this Court invalidate the hearing fee scheme -- if anything, it demands that we uphold it.

100 The unwritten principles of our Constitution often work at cross purposes. Even if we were to accept that the rule of law favours striking down the hearing fees, the unwritten principle of democracy favours upholding legislation passed by democratically elected representatives which conforms to the express terms of the Constitution. As the Court stated in *Imperial Tobacco*, "in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66).

101 *Imperial Tobacco* offers yet another caution against reading the unwritten principle of the rule of law too broadly: it would "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (para. 65). As noted above, s. 11(*d*) of the *Charter* specifically includes a right of access to the courts for a person charged with an offence and s. 24(1) gives this right to those vindicating their *Charter* rights. These provisions would be unnecessary if the Constitution already contained a more general right to access superior courts.

102 In any event, the rule of law is a vague and fundamentally disputed concept. In *Imperial Tobacco*, this Court endorsed the observation of Strayer J.A. that "[a]dvocates tend to read into the principle of the rule of law anything which supports their particular view of what the law should be" (para. 62, citing *Singh v. Canada (Attorney General)*, [2000] 3 F.C. 185 (C.A.), at para. 33). To rely on this nebulous principle to invalidate legislation based on its content introduces uncertainty into constitutional law and undermines our system of positive law.

XI. The Hearing Fees Are Not Unconstitutional

103 Even if there were a constitutional basis upon which to challenge the British Columbia hearing fee scheme, I would not find the scheme to be unconstitutional.

104 The majority holds that the hearing fee scheme is unconstitutional because it "places an undue hardship on litigants and impedes the right of British Columbians to bring legitimate cases to court" (para. 50). The primary source of the violation appears to be the inadequacy of the impoverishment exemption (see paras. 55-59).

105 But the majority's approach to determining whether hearing fees prevent litigants from accessing the courts overlooks some important contextual considerations. In particular, the majority does not account for measures that offset the burden of hearing fees or eliminate them altogether. When these measures are taken into consideration, there is no indication that the hearing fees at issue would prevent litigants from bringing meritorious legal claims.

106 First, the so-called "indigency" exemption (applicable at trial) was replaced in 2010. Rule

20-5(1) now reads:

> **Court may determine impoverished status**
>
> (1) If the court, on application made in accordance with subrule (3) before or after the start of a proceeding, finds that a person receives benefits under the *Employment and Assistance Act* or the *Employment and Assistance for Persons with Disabilities Act* or is otherwise impoverished, the court may order that no fee is payable by the person to the government under Schedule 1 of Appendix C in relation to the proceeding unless the court considers that the claim or defence
> (a) discloses no reasonable claim or defence, as the case may be,
> (b) is scandalous, frivolous or vexatious, or
> (c) is otherwise an abuse of the process of the court.

107 In my view, the updated impoverishment exemption provides a measure of discretion to trial judges in determining its application. The term "may" establishes a foundational discretion. But the addition of the phrase "otherwise impoverished" indicates that a trial judge may exercise this discretion where the hearing fees themselves would be a source of impoverishment. This is the approach adopted by the British Columbia Court of Appeal (interpreting the indigency exemption in the British Columbia *Court of Appeal Rules*) in *De Fehr v. De Fehr*, 2001 BCCA 485, 156 B.C.A.C. 240:

> Although the applicant in this case has regular employment income, I am persuaded that after he meets the support obligations imposed in the trial court, along with his own expenses, he would effectively be denied access to the courts by reason of impecuniosity if he were required to pay the fees to the Crown. [para. 16]

108 However, while courts have discretion in applying the impoverishment exemption, it is not unlimited: it should be exercised only where a litigant is impoverished or, if not impoverished, would be rendered so if required to pay the hearing fees. In this regard, I agree with the trial judge's observation that the "courts simply do not engage in calling things what they are not, and could not be enlisted into an executive function by administering a more general form of means test to those who come before them" (2012 BCSC 748, 260 C.R.R. (2d) 1, at para. 398).

109 Second, the financial burden of hearing fees, a disbursement, may be reapportioned through both interim and final costs awards (Rule 14-1 of the British Columbia *Supreme Court Civil Rules*). Judges may consider factors such as the success of a party, the reasonableness of the positions taken, the importance of the case, and whether one party was responsible for an excessively lengthy hearing.

110 Third, and most importantly, judges have a key role to play in limiting hearing fees. Active judicial case management is critical to ensuring reasonable timelines in civil proceedings and efficient use of court resources, especially in the case of self-represented litigants. I agree with the trial judge that courts must be careful, in situations involving self-represented litigants, not to appear to refuse relevant evidence (para. 19). But judges must enforce the requirement for relevance so that evidence that does not bear directly on the issues will not prolong a trial. In this context, judges are entrusted with the obligation to manage the resources of the court in the interests of justice and, with respect to hearing fees, to have regard for the interests of the litigants. As this Court has recently noted in the context of summary judgment proceedings, "it is the motion judge, not counsel, who maintains control over the extent of the evidence to be led and the issues to which the evidence is to be directed" (*Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 61, quoting *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764, 108 O.R. (3d) 1, at para. 60). There is no reason to think that this case-management principle of *Hryniak* should not extend to all court proceedings, especially those involving self-represented parties.

111 Finally, my colleagues rely on the evidence of economist Robert Carson for their assessment of the affordability of hearing fees. Like Mr. Carson, they use the amount of hearing fees for a 10-day trial as the benchmark. The hearing fees, in their view, are unfair because the party "who is required to pay the hearing fee may not control the length or efficiency of the trial" (para. 62).

112 Yet characterizing 10-day trials as the norm skews the analysis. There is no reason to believe that a 10-day trial is standard. Under the British Columbia hearing fee scheme, the first three days are free, which incentivizes short, efficient trials (see Schedule 1 of Appendix C of the *Supreme Court Civil Rules*). And, as discussed above, judges have an obligation to ensure that trials do not consume unnecessarily lengthy periods.

113 I make two final observations regarding the "[o]ther objections" to the hearing fees raised by the majority at paras. 60-63.

114 First, my colleagues at once indicate that judges must have sufficient discretion in applying exemptions to fees (para. 48), and yet critique the very existence of the exemption provision on the basis that it requires litigants to apply to the court (para. 60). These two positions are irreconcilable: it is not possible in the same breath to provide for increased judicial discretion and eliminate the requirement that litigants apply to have such discretion exercised.

115 In any event, I question whether the application to be exempted from hearing fees is any more an "affront to dignity" than other applications made in court (majority reasons, at para. 60). As the majority acknowledges, such applications are usually made on an *ex parte* basis. And, in the family law context, the assets and liabilities of the parties are regularly exposed to courts charged with determining levels of spousal support.

116 Second, I do not agree that the "hearing fees do not promote efficient use of court time" (majority reasons, at para. 63). The comment of the trial judge that the efficacy of the hearing fees is

"dubious" (para. 310) is not a finding of fact. It is true that hearing fees incentivize parties to use less court time where possible. But this, in turn, encourages efficiency by promoting prioritization and dissuading excessive use of court time. Incentivizing efficient use of court time addresses the problem that excessive use of court time by one party may delay or deny access to other litigants.

XII. Conclusion

117 For the reasons above:

(a) I would answer the constitutional question stated in this appeal as follows:

Are the hearing fees set out in paragraph 14 of Appendix C, Schedule 1 (B.C. Reg. 10/96, as amended) and the hearing fees set out in paragraphs 9 and 10 of Appendix C, Schedule 1 (B.C. Reg. 168/2009, as amended), unconstitutional on the basis that they infringe a right of access to justice and thereby offend the rule of law?

No.

(b) I would dismiss the appeal from the Court of Appeal's order setting aside the trial judge's order striking down the hearing fees without costs;
(c) I would allow the appeal from the Court of Appeal's decision to read in "or in need" to the exemption provision without costs (2013 BCCA 65, 43 B.C.L.R. (5th) 217, at para. 41);
(d) I would allow the cross-appeal without costs;
(e) I would allow the appeal from the Court of Appeal's order relieving Ms. Vilardell from paying the hearing fees and remit this question to the trial judge for determination.

Appeal allowed and cross-appeal dismissed, ROTHSTEIN J. *dissenting.*

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Solicitors for the intervener the David Asper Centre for Constitutional Rights: Blake, Cassels & Graydon, Toronto; University of Toronto, Toronto.

TAB 12

Indexed as:

Libman v. Quebec (Attorney General)

Robert Libman Equality Party, appellant;
v.
The Attorney General of Quebec, respondent.

[1997] 3 S.C.R. 569

[1997] 3 R.C.S. 569

[1997] S.C.J. No. 85

[1997] A.C.S. no 85

File No.: 24960.

Supreme Court of Canada

1997: April 22 / 1997: October 9.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law -- Charter of Rights -- Freedom of expression -- Freedom of association -- Provincial referendum legislation -- Spending -- Referendum legislation placing restrictions on spending permitted during referendum campaign -- Spending by individuals or groups not wishing to or unable to join or affiliate themselves with one of national committees limited to unregulated expenses provided for in legislation -- Whether legislation infringes freedoms of expression and association -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d) -- Referendum Act, R.S.Q., c. C-64.1, ss. 402, 403, 404, 406 para. 3, 413, 414, 416, 417 of Appendix 2.

Elections -- Referendum -- Spending -- Freedoms of expression and association -- Provincial referendum legislation placing restrictions on spending permitted during referendum campaign -- Spending by individuals or groups not wishing to or unable to join or affiliate themselves with one

of national committees limited to unregulated expenses provided for in legislation -- Whether legislation infringes freedoms of expression and association -- If so, whether infringement justifiable -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b), (d) -- Referendum Act, R.S.Q., c. C-64.1, ss. 402, 403, 404, 406 para. 3, 413, 414, 416, 417 of Appendix 2.

The appellant challenges the constitutional validity of ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of Appendix 2 of the Referendum Act. That Act, which governs referendums in Quebec, provides that groups wishing to participate in a referendum campaign for a given option can either directly join the national committee supporting the same option or affiliate themselves with it. It also provides for the financing of the national committees and limits their expenses and those of the affiliated groups. The impugned provisions deal with the expenses that may be incurred during a referendum campaign. Sections 402 and 403 establish the principle of "regulated expenses". These expenses include the cost of any goods or services that promote or oppose, directly or indirectly, an option submitted to a referendum. Under ss. 406 para. 3 and 413, only an official agent of a national committee, or one of his or her representatives, may incur or authorize regulated expenses. Section 414 provides that such expenses may be paid only out of the referendum fund, which is available only to the national committees. Under s. 416, no person may accept or execute an order for regulated expenses unless they are incurred or authorized by the official agent of a national committee or by one of his or her representatives. Under s. 417, no person may receive a price different from the regular price for goods or services representing a regulated expense. Finally, s. 404 lists exceptions to regulated expenses. These exceptions, or unregulated expenses, comprise primarily forms of expression that do not require the disbursement of money or financial consideration. The only disbursement of money permitted is the maximum amount of $600 for organizing and holding a meeting. The appellant maintains that the impugned provisions infringe the freedoms of expression and association guaranteed by ss. 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms. He argues that if he wishes to conduct a referendum campaign independently of the national committees, his freedom of political expression will be limited to unregulated expenses. Conversely, if he wishes to be able to incur regulated expenses, he will have to join or affiliate himself with one of the national committees. In the courts below, the Superior Court and the Court of Appeal held that the impugned provisions infringed freedom of expression but that this infringement was justifiable under s. 1 of the Charter.

Held: The appeal should be allowed.

The freedom of expression protected by s. 2(b) of the Charter must be interpreted broadly. Unless the expression is communicated in a manner that excludes the protection, such as violence, any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b). The impugned provisions at issue here infringe freedom of expression. The appellant wishes to express his opinions on the referendum question and convey meaning independently of the national committees by means of "regulated expenses". This is a form of political expression

that is clearly protected by s. 2(b) -- political expression is at the very heart of the values sought to be protected by freedom of expression -- and the impugned provisions restrict that freedom. The expenses of persons who, either individually or as a group, do not wish to or cannot join or affiliate themselves with one of the national committees are limited to the unregulated expenses set out in s. 404. The Act accordingly places restrictions on such persons who, unlike the national committees, cannot incur regulated expenses during the referendum period in order to express their points of view. Since freedom of expression includes the right to employ any methods, other than violence, necessary for communication, this clearly infringes their freedom of political expression.

For similar reasons, the impugned provisions also infringe freedom of association. The protection provided for in s. 2(d) of the Charter includes the exercise in association of the constitutional rights and freedoms of individuals. In the present case, there are both individuals and groups whose freedom of expression is restricted by the impugned provisions. These groups therefore cannot freely exercise one of the rights protected by the Charter. Their freedom of association is accordingly infringed.

From the point of view of justification under s. 1 of the Charter, the basic objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting. In its egalitarian aspect, the Act is intended to prevent the referendum debate being dominated by the most affluent members of society. At the same time, the Act promotes an informed vote by ensuring that some points of view are not buried by others. This highly laudable objective, intended to ensure the fairness of a referendum on a question of public interest, is of pressing and substantial importance in a democratic society.

To attain its objective, the Act limits spending not only by the national committees, but also by independent individuals and groups, during the referendum period. There is clearly a rational connection between limits on independent spending and the legislature's objective. Limits on such spending are essential to maintain an equilibrium in financial resources and to guarantee the fairness of the referendum. The evidence shows that without such controls, any system for limiting the spending of the national committees would become futile. The limit on independent spending must also be stricter than that granted to the national committees, since it cannot be assumed that independent spending will be divided equally to support the various options.

With respect to the minimal impairment test, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to reconcile the democratic values of freedom of expression and referendum fairness. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. The impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view purely out of respect for democratic traditions. The structure set up

by the legislature enables the vast majority of the people or groups favouring one of the options to participate actively in the referendum campaign by joining or affiliating themselves with the national committee overseeing the option. The affiliation system therefore significantly relaxes the restriction imposed by the impugned provisions on the freedoms of expression and association of groups that wish to support one of the options submitted to a referendum but disagree with the strategy of the national committee representing the option they support. This relaxation is sufficient to conclude that the impairment of the freedoms of such groups is minimal. Affiliation makes it possible for such groups to conduct campaigns parallel to that of the national committee representing the option they wish to support and to incur regulated expenses out of the referendum fund. Individuals may also associate to form an affiliated group in order to conduct a parallel campaign.

However, the limits imposed under s. 404 cannot meet the minimal impairment test in the case of individuals and groups who can neither join nor affiliate themselves with the national committees and can therefore express their views only by means of unregulated expenses. The forms of expression provided for in that section are so restrictive that they come close to being a total ban. There are alternative solutions consistent with the Act's objective that are far better than the exceptions set out in s. 404. An exception to regulated expenses permitting citizens, either individually or in groups, to spend a certain amount on an entirely discretionary basis while prohibiting the pooling of such amounts would be far less intrusive than the s. 404 exceptions. By virtue of this exception, individuals and groups who can neither join nor affiliate themselves with the national committees would be entitled to a minimum amount that they would be able to spend as they saw fit in order to communicate their points of view. Since it is difficult to sever s. 404 from the rest of the impugned provisions, it must also be concluded that all the impugned provisions constitute an unjustified infringement of the freedoms of expression and association. Sections 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 are accordingly declared to be of no force or effect. In view of this declaration, the other provisions of the Referendum Act relating to control of referendum spending become pointless since practically all these provisions are based on the concept of "regulated expenses". It will be up to the legislature to make the appropriate amendments.

The result of the case would have been the same had it been resolved on the basis of the Quebec Charter of Human Rights and Freedoms.

Cases Cited

Disapproved: Somerville v. Canada (Attorney General) (1996), 136 D.L.R. (4th) 205; referred to: Reference re Alberta Statutes, [1938] S.C.R. 100; Boucher v. The King, [1951] S.C.R. 265; Switzman v. Elbling, [1957] S.C.R. 285; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; R. v. Keegstra, [1990] 3 S.C.R. 697; Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; R. v. Butler, [1992] 1 S.C.R. 452; R. v.

Zundel, [1992] 2 S.C.R. 731; Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367; Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; R. v. Oakes, [1986] 1 S.C.R. 103; Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835; RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199; Haig v. Canada, [1993] 2 S.C.R. 995; National Citizens' Coalition Inc. v. Canada (Attorney General) (1984), 11 D.L.R. (4th) 481; McKinney v. University of Guelph, [1990] 3 S.C.R. 229; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084; Schachter v. Canada, [1992] 2 S.C.R. 679.

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Charter of Human Rights and Freedoms, R.S.Q., c. C-12.
Constitution Act, 1982, s. 52.
Election Act, R.S.Q., c. E-3.3 [adapted by R.S.Q., c. C-64.1, App. 2 (am. 1992, c. 38, s. 93)], ss. 91 para. 1, 402, 403, 404, 405, 406 paras. 1, 2, 3, 412, 413, 414, 416, 417, 426, 427, 430.
Referendum Act, R.S.Q., c. C-64.1, ss. 1 "referendum period" [repl. 1981, c. 4, s. 5; am. 1984, c. 51, s. 530], 2 to 6, 7 [am. 1992, c. 38, s. 79], 13 [idem, s. 82], 22 [idem, s. 87], 23 paras. 1, 2, 3 [idem, s. 88], 24 [am. 1981, c. 4, s. 16], 25, 36, 37 [am. 1992, c. 38, s. 90], 38, 40 [am. 1982, c. 62, s. 143], 41 [am. 1981, c. 4, s. 11], 42 [idem, s. 12; am. 1984, c. 51, s. 542; am. 1989, c. 1, s. 591], 44 [am. 1989, c. 1, s. 593; am. 1995, c. 23, s. 55], 45 [am. 1992, c. 38, s. 92], App. 2 [idem, s. 93] amending ss. 91 para. 1, 402, 403, 404, 405, 406 paras. 1, 2, 3, 412, 413, 414, 416, 417, 426, 427, 430 of the Election Act, R.S.Q., c. E-3.3.

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APPEAL from a judgment of the Quebec Court of Appeal, [1995] R.J.Q. 2015, [1995] Q.J. No. 617 (QL), affirming a judgment of the Superior Court, [1992] R.J.Q. 2141, [1992] Q.J. No. 1206 (QL). Appeal allowed.

Julius H. Grey, Kim Mancini and Simon Ruel, for the appellant. Benoît Belleau and Jean-Yves Bernard, for the respondent.

Solicitors for the appellant: Grey Casgrain, Montréal. Solicitors for the respondent: Bernard, Roy & Associés, Montréal.

English version of the judgment delivered by

1 THE COURT:-- This appeal concerns the constitutional validity of certain provisions of Appendix 2 of the Referendum Act, R.S.Q., c. C-64.1, in light of ss. 2(b) and 2(d) of the Canadian Charter of Rights and Freedoms, which protect freedom of expression and freedom of association. The impugned provisions place limits on the expenses that may be incurred during a referendum campaign, inter alia by setting out what types of expenses are permitted and who may incur them.

I - Facts

2 The appellant, Robert Libman, was president of the Equality Party and a member of the National Assembly when, in 1992, he brought a motion in the Superior Court for a declaratory judgment in anticipation of the referendum on the Charlottetown Accord. The purpose of the motion, which was brought jointly with the Equality Party, was to have ss. 22, 25, 36, 37 and 38 of the Referendum Act and ss. 91 para. 1, 402, 403, 404, 405, 406 paras. 1, 2 and 3, 412, 413, 414, 416, 417, 426, 427 and 430 of Appendix 2 of that Act declared invalid and of no force or effect. In their motion, Mr. Libman and the Equality Party maintained that the impugned provisions infringed the freedom of expression, freedom of association, freedom of peaceful assembly and right to equality protected by the Canadian Charter and the Charter of Human Rights and Freedoms, R.S.Q., c. C-12. Mr. Libman and the Equality Party also asked the trial court to recognize their right to conduct an unrestricted referendum campaign and receive a fair share of the public funds available for such a campaign.

3 The Superior Court dismissed the motion: [1992] R.J.Q. 2141, [1992] Q.J. No. 1206 (QL). It held that while the impugned provisions infringed freedom of expression, the infringement had been

shown to meet the test of s. 1 of the Canadian Charter. Only Mr. Libman appealed the trial judgment. Furthermore, his challenge was now limited to the constitutional validity of ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of Appendix 2 of the Referendum Act, and to the infringement of freedom of expression and freedom of association. The majority of the Court of Appeal dismissed the appeal, affirming the trial judge's decision that the impugned provisions infringed freedom of expression but that the infringement could be justified under s. 1 of the Canadian Charter: [1995] R.J.Q. 2015, [1995] Q.J. No. 617 (QL). Brossard J.A., dissenting in part, would have allowed the appeal and declared certain of the impugned provisions to be of no force or effect. Mr. Libman appealed that judgment to this Court.

II -

Impugned Statutory Provisions and Operation of the Referendum Act

4 The Referendum Act governs referendums in Quebec. It lays down the general framework for the organizational structures necessary for the holding of any referendum. Section 44 reads as follows:

> 44. Except to the extent that this Act provides otherwise, every referendum shall be governed by the provisions of the Election Act (chapter E-3.3) that are in force at the time and that are enumerated in Appendix 2, with, where necessary, the amendments indicated therein.
>
> The regulations made under the Election Act and writs made under the said Act apply, mutatis mutandis, to a referendum.

5 Appendix 2 of the Referendum Act thus incorporates certain provisions of the Election Act, R.S.Q., c. E-3.3, amending them to adapt them to referendums. Section 45 of the Referendum Act provides that the chief electoral officer must cause a version of the Election Act, as amended by Appendix 2 of the Referendum Act, to be printed:

> 45. The chief electoral officer must cause a special version of the Election Act (chapter E-3.3) to be printed, striking out therefrom the sections not appearing in Appendix 2, incorporating therein the sections of the said Act appearing in the said Appendix and making the amendments indicated in the said Appendix.
>
> In preparing the special version, the chief electoral officer may amend the titles and subtitles of the said Act.
>
> The chief electoral officer shall also cause to be printed a special version of

the regulations made pursuant to sections 549 and 550 of the Election Act.

The chief electoral officer accordingly published the Special Version of the Election Act for the holding of a Referendum (hereinafter "Special Version"), which facilitates the use of Appendix 2 of the Referendum Act.

6 All the statutory provisions at issue here are provisions of the Election Act as amended by Appendix 2 of the Referendum Act, namely ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417. For ease of reference, we shall cite the impugned provisions as they appear in the Special Version:

> 402. The cost of any goods or services used during the referendum period to promote or oppose, directly or indirectly, an option submitted to a referendum is a regulated expense.
>
> 403. In the case of goods or services used both during and before a referendum period, the part of the cost thereof which constitutes a regulated expense shall be established according to a method based on the frequency of use during the referendum period compared to the frequency of use before and during the referendum period.
>
> 404. The following are not regulated expenses:
>
> (1) the cost of publishing articles, editorials, news, interviews, columns or letters to the editor in a newspaper, periodical or other publication, provided that they are published without payment, reward or promise of payment or reward, that the newspaper, periodical or other publication is not established for the purposes or in view of the referendum and that the circulation and frequency of publication are as what obtains outside the referendum period;
>
> (2) the cost at fair market value of producing, promoting and distributing a book that was planned to be put on sale at the prevailing market price regardless of the issue of the writ;
>
> (3) the cost of broadcasting by a radio or television station of a program of public affairs, news or commentary, provided that the program is broadcast without payment, reward or promise of payment or reward;
>
> (4) the reasonable expenses incurred by a person, out of his own money, for meals and lodging while travelling for referendum purposes, if the expenses are not reimbursed to him;

(5) the transportation costs of a person, paid out of his own money, if the costs are not reimbursed to him;

(6) the reasonable expenses incurred for the publication of explanatory commentaries on this Act and the regulations thereunder, provided the commentaries are strictly objective and contain no publicity of such a nature as to favour or oppose an option submitted to a referendum;

(7) the reasonable ordinary expenses incurred for the day-to-day operations of not more than two permanent offices of an authorized party the addresses of which are entered in the registers of the chief electoral officer;

(8) interest accrued from the beginning of the referendum period to the day occurring 90 days after polling day, on any loan lawfully granted to an official agent for regulated expenses, unless the official agent has declared them as regulated expenses in his return of regulated expenses;

(9) the costs of holding a meeting, which must not exceed $600, including the cost of renting a hall and of convening the participants, provided the meeting is not directly or indirectly organized on behalf of a national committee.

For the purposes of subparagraph 7 of the first paragraph, the permanent office of an authorized party is the office where the employees of the party or of a body associated with it for the purpose of attaining its objects and recognized by the leader of the party for such a purpose by a letter addressed to the chief electoral officer before the seventh day following the issue of the writ, work on a permanent basis, outside the referendum period, at ensuring the dissemination of the party's political program and coordinating the political action of the party members.

406. . . .

The official agent may authorize them [the deputies or the local agent of each electoral division whom he has appointed with the approval of the chairman of the national committee] to incur or authorize regulated expenses up to the amount he fixes in their deeds of appointment. The amount may be changed at

any time, in writing, by the official agent before he files his return of regulated expenses.

. . .

413. During a referendum period, only the official agent of a national committee, his deputy or a local agent may incur or authorize regulated expenses.

414. An official agent, his deputy or a local agent shall pay the cost of regulated expenses only out of a referendum fund.

416. No person may accept or execute an order for regulated expenses not given or authorized by the official agent of a national committee, his deputy, a local agent or authorized advertising agency.

417. No person may, for goods or services whose cost is wholly or partly a regulated expense, claim or receive a price different from the regular price for similar goods or services outside the referendum period nor may he accept a different remuneration or renounce payment.

A person may, however, contribute his personal services and the use of his vehicle without remuneration, provided that he does so freely and not as part of his work in the service of an employer.

7 As already mentioned, the Referendum Act read together with the Special Version sets out a series of measures relating to the organization of a referendum. The Act applies during a "referendum period", which is defined as "the period beginning on the day of the writ instituting the holding of a referendum and ending on polling day" (s. 1). The government's writ is issued after the National Assembly has approved the question or adopted the bill that is to be submitted to a referendum (ss. 7 and 13).

8 Chapter VIII of the Referendum Act concerns the organization of a referendum campaign. Upon the adoption by the National Assembly of a question or bill that is to be submitted to a referendum, the secretary general of the National Assembly must inform the chief electoral officer thereof and send every member of the National Assembly a notice to the effect that they may, within five days after the adoption of the question or bill, register with the chief electoral officer in favour of one of the options submitted to the referendum (s. 22). Members of the National Assembly who register for an option form the provisional committee for that option (s. 23 para. 1). If no members have registered in favour of one of the options within the prescribed time, the chief electoral officer invites electors to form a provisional committee for that option (s. 23 para. 2). The number of provisional committees is thus equal to the number of options submitted to the referendum. After the provisional committees have been formed, the chief electoral officer calls a meeting at which the members of each provisional committee are to establish the national committee in favour of their option, adopt the by-laws that will govern it and appoint its chairman

(s. 23 para. 3). The by-laws are adopted on a majority basis (s. 25).

9 Section 24 of the Referendum Act reads as follows:

> 24. The by-laws governing a national committee may determine any matter relating to its proper operation, including the name under which it is to be known and the manner in which it is to be established.
>
> Such by-laws may also provide for the setting up of local authorities of this committee in each electoral division, provided that each of these authorities is authorized by the chairman of the national committee.
>
> These by-laws must furthermore provide for the affiliation to the committee of groups which are favourable to the same option and see to the establishment of the norms, conditions and formalities governing the affiliation and financing of these groups.

This section thus provides, inter alia, that the by-laws adopted by the provisional committee govern all matters relating to the establishment and operation of the national committee. The third paragraph of s. 24 adds that the by-laws must provide for the affiliation of groups favourable to the same option and ensure the financing of such groups. Groups wishing to participate in a referendum campaign for a given option can therefore either directly join the national committee supporting the same option or affiliate themselves with it. Thus, a group that disagrees with the strategy proposed by the national committee advocating the same option as it does could affiliate itself with the national committee rather than joining it directly.

10 Division IV of Chapter VIII of the Referendum Act provides for the financing of the national committees and imposes limits on the amounts each national committee and its affiliated groups can spend. The national committees and their affiliated groups have a right to incur "regulated expenses" (this term will be defined infra), which must in all cases be paid out of a "referendum fund" (s. 36). The only amounts that can be paid into each national committee's referendum fund are: (a) the government subsidy provided for in s. 40; (b) any amounts transferred or loaned to the fund by the official representative of a political party authorized under Title III of the Election Act, provided that the total of these amounts from all parties does not exceed $0.50 per elector in the aggregate of the electoral divisions; and (c) any contributions directly paid by an elector out of his or her own property (s. 37). In the case of these last contributions, the maximum amount that each elector can contribute to each national committee in the same referendum is $3000 (s. 91 Special Version). Finally, regardless of the size of the referendum fund available to a national committee, the committee and its affiliated groups may not incur regulated expenses greater than the equivalent of $1 per elector (s. 426 Special Version). Thus, if there are 3 million electors in the province, the total of the regulated expenses incurred by each national committee and its affiliated groups may

not exceed $3 million. This is the "ceiling" on spending to which each committee is subject.

11 Regulated expenses are defined as "[t]he cost of any goods or services used during the referendum period to promote or oppose, directly or indirectly, an option submitted to a referendum" (s. 402 Special Version). Section 403 Special Version complements s. 402; it sets out how to calculate the part of the cost of goods or services used both during and before the referendum period that constitutes a regulated expense. Each national committee has an official agent to incur its regulated expenses (s. 405 Special Version) who is appointed by the chairman of the national committee. The official agent may authorize deputies or local agents he or she has appointed to incur or authorize regulated expenses up to the amount the official agent has fixed in their deeds of appointment (s. 406 paras. 2 and 3 Special Version). The official agent may change this amount at any time before filing his or her return of regulated expenses (s. 406 para. 3 Special Version). During the referendum period, only the official agent of a national committee or his or her deputies or local agents may incur or authorize regulated expenses (s. 413 Special Version); furthermore, these regulated expenses must necessarily be paid out of the national committee's referendum fund (s. 414 Special Version). No one may accept or execute an order for regulated expenses not given or authorized by a national committee's official agent, his or her deputy, a local agent or an authorized advertising agency (s. 416 Special Version). Nor may any one claim or receive a different price for goods or services whose cost is wholly or partly a regulated expense; however, a person may provide personal services and the use of his or her vehicle, provided that this is done without monetary consideration and freely, and not as part of his or her work in the service of an employer (s. 417 Special Version).

12 Section 404 Special Version sets out nine exceptions to the definition of regulated expenses. These exceptions constitute expenses that may be incurred without the approval of a national committee's official agent, his or her deputy or a local agent. These unregulated expenses include in particular: (1) the cost of publishing articles, editorials and certain other types of documents, provided that they are published without payment; (2) the cost of producing, promoting and distributing a book that was planned to be put on sale at the prevailing market price before the writ was issued; (3) the cost of broadcasting, by radio or television, of a program of public affairs, news or commentary, provided that the program is broadcast without payment; (4) reasonable expenses incurred by a person out of his or her own money for meals and lodging while travelling for referendum purposes together with his or her transportation costs, provided that these expenses and costs are not reimbursed to the person; and (5) the costs, to a maximum of $600, of holding a meeting, including the cost of renting a hall and of convening the participants, provided that the meeting is not directly or indirectly organized on behalf of a national committee.

13 Finally, the Referendum Act also provides for the establishment of a Conseil du référendum, which has exclusive jurisdiction to hear any judicial proceedings relating to a referendum and to the application of the Act (ss. 2 to 6). The Conseil is composed of three judges of the Court of Québec. Its decisions are final and without appeal, although an appeal lies to the Court of Appeal on a question of law from a decision rendered by the Conseil under s. 41 or 42.

III - Judgments in Appeal

Superior Court, [1992] R.J.Q. 2141

14 In the Superior Court, Mr. Libman and the Equality Party maintained that the impugned provisions infringe freedom of expression and freedom of association in three ways: first, by limiting contributions by individuals and referendum spending, second, by requiring that regulated expenses be incurred through a national committee, and third, by limiting groups or individuals wishing to participate without supporting either option (for example, by advocating abstention) to unregulated expenses.

15 With respect to the first ground, Michaud J. concluded that while the limits placed by the Act on referendum contributions and spending infringe freedom of expression, the infringement can be justified in a free and democratic society. In his view, these limits have a laudable objective, [Translation] "namely to try to give both options comparable means of expressing themselves and prevent the most powerful from obtaining a favourable outcome through a barrage of publicity" (p. 2147), and the impairment is minimal in relation to the resulting gains for democracy. The appellant subsequently abandoned this ground on appeal.

16 With respect to the second ground, Michaud J. concluded that the requirement that regulated expenses be incurred through the national committees does not infringe the freedoms of expression and association. He based this conclusion on the fact that the Act does not require groups wishing to promote one option to join the national committee representing that option, but also provides that such groups may affiliate themselves with the national committee if they disagree with the strategy it proposes. He pointed out that the court must assume that the by-laws on affiliation adopted by the national committees will be consistent with the rights conferred by the charters. He then added the following at p. 2152:

> [Translation] Should the by-laws adopted by the national committee with which the applicants wish to be affiliated prove to be unfair or inequitable for them, they can take the matter to the Conseil du référendum pursuant to ss. 2 and 3 of the Act.

17 Finally, concerning the third ground, Michaud J. pointed out that a group or individual wishing to campaign without supporting either option nevertheless indirectly promotes one of the two options. That is why the freedom of expression of that group or individual is limited to unregulated expenses. Michaud J. concluded that this infringement can be justified in a free and democratic society both because the Act does not absolutely prohibit all expressive activities but limits them to the exceptions set out in s. 404 Special Version and because a [Translation] "restriction on independent referendum spending seems necessary to maintain the balance between the opposing forces" (p. 2157). In his view, the limits imposed by s. 404 Special Version seemed acceptable, so it was not open to the court to substitute its own definition thereof for that of the legislature.

Court of Appeal, [1995] R.J.Q. 2015

18 In the Court of Appeal, Mr. Libman no longer challenged either the principle of national committees (operation and funding) or the need to limit referendum spending. All he sought was the right for any individual or group to campaign independently of the national committees on the same basis as them, that is, the right to receive funding and to incur regulated expenses within certain limits.

Bisson J.A.

19 Bisson J.A. concluded that the impugned provisions infringe the freedom of political expression, which is one of the most basic forms of freedom of expression. He did not see, however, how these provisions could infringe freedom of association, since [Translation] "the [only] constraints placed on [citizens] relate to the money they can invest and the vehicles they can use" (p. 2021).

20 In Bisson J.A.'s view, this infringement can be justified in a free and democratic society. He began by mentioning the extent of the work that led to the adoption of the Referendum Act and the need to give the legislature some leeway. He then acknowledged the importance of the objective of the impugned provisions, namely to ensure a balance in the financial resources available to the proponents of each option submitted for the referendum so as to promote the healthy exercise of democracy. He noted that s. 24 of the Referendum Act provides that affiliated groups may be formed that are parallel to the national committees and that s. 404 Special Version provides for certain forms of communication that every citizen is free to use. According to Bisson J.A., bearing the objective of the provisions in mind, there is no valid alternative to the present system that would warrant the intervention of the courts. He stated, at p. 2025: [Translation] "The present system seems to me to be the least disadvantageous for citizens."

Delisle J.A.

21 Delisle J.A. also concluded that the impugned provisions restrict the freedom of expression of individuals wishing to campaign independently of the national committees, since these provisions allow them to express their political ideas only by means of unregulated expenses (s. 404 Special Version). He added that the impugned provisions restrict political expression, which is the most important form of expression in a democracy. He then acknowledged that certain restrictions on this form of expression may be justified to ensure the proper functioning of democracy.

22 According to Delisle J.A., this infringement is justified under s. 1 of the Canadian Charter. He defined the objective of the Act as follows, at p. 2049:

> [Translation] The purpose of the Act is to promote participation by citizens in the governing of public affairs, in order to resolve certain major questions of political life. The Act also seeks to promote equality between the options

> submitted by the government.

To ensure this equality, Delisle J.A. considered it reasonable for the legislature to limit spending by third parties, at p. 2051:

> [Translation] If the legislature takes the trouble to regulate the spending and financing of the national committees to ensure that each is on an equal footing, it would be illogical to permit certain groups wishing to act on their own to conduct campaigns as they see fit. They would place one option at an advantage or a disadvantage by allowing more to be spent on its behalf.

There is thus a rational connection between the restrictions imposed and the objective of the Act. He added that it could be seen from the evidence that the legislature had made a genuine effort in good faith to find the measure that would impair freedom of expression as little as possible while respecting the objective of the Act. He noted that the expression of independent individuals and groups is not totally fettered, that the Act provides for a possibility of affiliation, that the court must assume that the rules relating to affiliation will be consistent with the charters and that the Act provides for recourse to the Conseil du référendum should difficulties arise. In his view, it can be concluded on the basis of these factors that there is a balance between the deleterious effects of the restrictions and the objective pursued by the legislature. He concluded by stating that the salutary effects of the restrictions outweigh their deleterious effects, since the provisions guarantee a balance in the information conveyed by the proponents of the different options, thus promoting an informed vote by the people.

> Brossard J.A. (dissenting in part)

23 According to Brossard J.A., the impugned provisions clearly restrict the [Translation] "freedom of political expression in its noblest aspect, in relation to the exercise of the most fundamental political right that exists in a democracy, namely the expression of a citizen's political choice when called to vote in a referendum" (p. 2027). He pointed out that the bipolar system established by the Act -- two committees representing the two options submitted to the referendum -- disregards a broad range of public opinion. He was also of the view that the independent third parties whose freedom of expression is limited to unregulated expenses include not only those wishing to participate, either individually or as a group, without supporting either option, but also, and especially, those who wish to support an option but cannot join the committee because they disagree with its strategy or cannot affiliate themselves with it because they are not members of a "group".

24 Like his colleagues, Brossard J.A. stressed the importance of the objective of the impugned provisions, namely to ensure that voting is both free and informed. He also recognized that there is a rational connection between the objective of the Act and [Translation] "the principle of the means chosen to attain it, namely the control and restriction of expenses incurred for advertising or promotional purposes during the 'referendum period'" (p. 2031). Although he recognized the need to

show a certain deference to the legislature's choice, Brossard J.A. concluded that the impugned provisions do not satisfy the minimal impairment test. He began by noting the importance of the freedom at issue and then added that it had not been shown that restrictions as severe as those imposed in s. 404 Special Version are necessary to attain the objective of the Act. He stated the following, at p. 2043:

> [Translation] In my view, the minimum acceptable limit or restriction, and the one most directly connected to the objective, would be one that merely imposes a reasonable and justifiable ceiling on regulated expenses incurred by independent third parties, who would then be free to express their opinions and points of view in accordance with rational standards concerning the expenses required to express those points of view and opinions.

Brossard J.A. added that in his view the deleterious effect of the impugned provisions outweighed the salutary effect, since it had not been shown that it would be impossible to monitor compliance with the ceilings imposed without an almost total prohibition on spending by independent third parties. He even questioned the effectiveness of the measures imposed in relation to the objective of the Act.

25 Brossard J.A. would have declared ss. 413, 414, 416 and 417 and the words "provided that they are published without payment, reward or promise of payment or reward" in s. 404(1), the words "provided that the program is broadcast without payment, reward or promise of payment or reward" in s. 404(3) and the words "submitted to a referendum" in s. 402 to be of no force or effect, and would have left it to the legislature to establish a ceiling it considered reasonable for independent individuals and groups.

IV - Constitutional Questions at Issue

26 On October 21, 1996, the following two constitutional questions were stated:

> (1) Do ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of the Election Act, R.S.Q., c. E-3.3, as amended by Appendix 2 of the Referendum Act, R.S.Q., c. C-64.1, adopted under s. 44 of the Referendum Act, violate in whole or in part s. 2(b) and/or s. 2(d) of the Canadian Charter of Rights and Freedoms?
>
> (2) If they do, do these sections or any of them constitute a reasonable limit prescribed by law under s. 1 of the Canadian Charter of Rights and Freedoms?

V - Analysis

A. Constitutional Infringements

27 The appellant submits that the impugned legislation infringes the freedom of political expression and the freedom of association guaranteed by the Canadian Charter. He argues that if he wishes to conduct a referendum campaign independently of the national committees, his freedom of political expression will be limited to unregulated expenses. Conversely, if he wishes to be able to incur regulated expenses, he will have to join or affiliate himself with one of the national committees.

28 The Court has consistently and frequently held that freedom of expression is of crucial importance in a democratic society (e.g., Reference re Alberta Statutes, [1938] S.C.R. 100; Boucher v. The King, [1951] S.C.R. 265; Switzman v. Elbling, [1957] S.C.R. 285; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; R. v. Keegstra, [1990] 3 S.C.R. 697; Committee for the Commonwealth of Canada v. Canada, [1991] 1 S.C.R. 139; R. v. Butler, [1992] 1 S.C.R. 452; R. v. Zundel, [1992] 2 S.C.R. 731). In Edmonton Journal, supra, at p. 1336, Cory J. wrote eloquently about how fundamental this freedom is in any democracy:

> It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized. No doubt that was the reason why the framers of the Charter set forth s. 2(b) in absolute terms which distinguishes it, for example, from s. 8 of the Charter which guarantees the qualified right to be secure from unreasonable search. It seems that the rights enshrined in s. 2(b) should therefore only be restricted in the clearest of circumstances. [Emphasis added.]

Freedom of expression was not created by the Canadian Charter but rather was entrenched in the Constitution in 1982 as one of the most fundamental values of our society (see, for example, Switzman v. Elbling, supra, at pp. 306-7).

29 In Keegstra, supra, at pp. 763-64, Dickson C.J. stressed the paramount importance for Canadian democracy of freedom of expression in the political realm:

> Moving on to a third strain of thought said to justify the protection of free expression, one's attention is brought specifically to the political realm. The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is

> open to all persons. Such open participation must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity. The state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all. [Emphasis added.]

Political 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. (See also Edmonton Journal, supra, at pp. 1355-56; Zundel, supra, at pp. 752-53.)

30 Irwin Toy, supra, laid down the tests for infringement of freedom of expression. The Court must ask, first, whether the form of expression at issue is protected by s. 2(b) and, second, whether the purpose or effect of the impugned legislation is to restrict that form of expression.

31 The appellant claims the right to conduct a referendum campaign independently of the national committees and with the same type of regulated expenses. Is this form of expression protected by s. 2(b)? The Court favours a very broad interpretation of freedom of expression in order to extend the guarantee under the Canadian Charter to as many expressive activities as possible. Unless the expression is communicated in a manner that excludes the protection, such as violence, the Court recognizes that any activity or communication that conveys or attempts to convey meaning is covered by the guarantee of s. 2(b) of the Canadian Charter (Irwin Toy, supra, at p. 970; Zundel, supra, at p. 753).

32 There is no doubt that the appellant is attempting to convey meaning through the form of communication at issue; he wishes to express his opinions on the referendum question independently of the national committees by means of expenses that are included in the definition of "regulated expenses". This is a form of political expression that is clearly protected by s. 2(b) of the Canadian Charter.

33 It remains to be determined whether the provisions challenged by the appellant restrict freedom of expression. Sections 402 and 403 Special Version establish the principle of "regulated expenses" during a referendum period. These expenses include the cost of any goods or services that promote or oppose, directly or indirectly, an option submitted to a referendum. Under s. 406 para. 3 and s. 413 Special Version, only an official agent of a national committee or one of his or her representatives may incur or authorize regulated expenses. Section 414 Special Version provides that regulated expenses may be paid only out of the referendum fund, which is available only to the national committees. Under s. 416 Special Version, no person may accept or execute an order for regulated expenses unless they are incurred or authorized by the official agent of a national committee or by one of his or her representatives. In s. 417 Special Version, the legislature has provided that no person may receive a price different from the regular price in payment of a regulated expense. Finally, s. 404 Special Version lists exceptions to regulated expenses, which are very restrictive. As has already been mentioned, the unregulated expenses listed in s. 404 comprise

primarily forms of expression that do not require the disbursement of money or financial consideration. The only disbursement of money permitted is the maximum amount of $600 for organizing and holding a meeting.

34 Thus, to be able to incur regulated expenses, the Act requires that a person belong either to one of the national committees or to a group affiliated with one of the committees. Since the definition of regulated expenses is very broad, most of the expenses incurred to campaign during a referendum period fall into this category reserved exclusively for the national committees or affiliated groups. Certain categories of persons therefore do not have access to regulated expenses during a referendum campaign, in particular:

(1) persons who, either individually or as a group, would like to support one of the options submitted to the referendum but who do not wish to join or affiliate themselves with the national committee supporting the same option as they do -- for a variety of reasons -- are limited to the unregulated expenses set out in s. 404 Special Version;

(2) individuals who, while supporting one of the options submitted to the referendum, cannot join the national committee campaigning for that option directly -- because they do not wish to identify their political ideas with those promoted by that committee or because they disagree with that committee's referendum strategy, for example -- cannot even affiliate themselves because the possibility of affiliation provided for in s. 24 of the Referendum Act is restricted to "groups". They are thus limited to the unregulated expenses provided for in s. 404 Special Version;

(3) persons who, either individually or as a group, wish to participate in the referendum campaign without supporting either of the options -- if they advocate abstention or are against the referendum question as worded, for example -- cannot directly join or affiliate themselves with one of the national committees. They are thus limited to the forms of communication set out in s. 404 Special Version, that is, to unregulated expenses.

35 The Act accordingly places restrictions on such persons who, unlike the national committees, cannot incur regulated expenses during the referendum period in order to express their opinions and points of view. This clearly infringes their freedom of political expression. There is no doubt that freedom of expression includes the right to employ any methods, other than violence, necessary for communication.

36 Freedom of association is also infringed for similar reasons. As was pointed out earlier, there are groups that cannot incur expenses independently of the national committees to promote or oppose, directly or indirectly, one of the options submitted to a referendum. The forms of expression available to these groups are restricted. In Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner), [1990] 2 S.C.R. 367, Sopinka J. stated, inter alia,

that the protection provided for in s. 2(d) includes the exercise in association of the constitutional rights and freedoms of individuals. He relied on the reasons of Le Dain and McIntyre JJ. in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313. Le Dain J. made the following connection between freedom of association and freedom of expression, at p. 391:

> Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion.

McIntyre J. stated the following, at p. 407:

> It is, I believe, equally clear that . . . freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others.

37 In the case at bar, there are both individuals and groups whose freedom of expression is restricted by the impugned legislation. These groups therefore cannot freely exercise one of the rights protected by the Canadian Charter, namely freedom of expression; their freedom of association is accordingly infringed. The infringement of freedom of association and the infringement of freedom of expression are closely related, and we shall analyse them together.

B. Justification for the Violation: Section 1 of the Canadian Charter

38 The analytical approach developed by the Court in R. v. Oakes, [1986] 1 S.C.R. 103, serves as a guide for determining whether an infringement can be justified in a free and democratic society. Certain clarifications were made regarding the third step of the proportionality test in Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835. Thus, the Court must first ask whether the objective the statutory restrictions seek to promote responds to pressing and substantial concerns in a democratic society, and then determine whether the means chosen by the government are proportional to that objective. The proportionality test involves three steps: the restrictive measures chosen must be rationally connected to the objective, they must constitute a minimal impairment of the violated right or freedom and there must be proportionality both between the objective and the deleterious effects of the statutory restrictions and between the deleterious and salutary effects of those restrictions.

39 The Attorney General must show that the statutory restrictions can be justified under s. 1 of the Canadian Charter. The standard of proof to be used is the civil standard, namely proof on a balance of probabilities (Oakes, supra, at p. 137). Scientific proof is not required to meet this standard: "the balance of probabilities may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view" (RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199, at p. 333). Referendum campaigns fall within the realm of social science, which does not lend itself to precise proof.

(1) Objective of the Act

40 The basic objective of the Act at issue is to guarantee the democratic nature of referendums by promoting equality between the options submitted by the government and seeking to promote free and informed voting. It provides for control of spending by the national committees during a referendum campaign, as well as control of spending by independent individuals or groups who do not wish to or who cannot join or affiliate themselves with either of the national committees, in order to promote a certain equality of access to media of expression. Professor Peter Aucoin, who was called by the Attorney General of Quebec to testify as an expert on the Canadian electoral and referendum system, explained the objective of the impugned provisions of the Referendum Act as follows:

> The purpose of spending limits in an election or a referenda [sic] campaign is to promote fairness as a primary value or objective of the democratic process. . . .
>
> Fairness is promoted in order to ensure that to the greatest extent possible that various sides in an election or a referenda [sic] have a reasonable equal opportunity to present their case to voters in the hopes that their case will influence the vote and that voters themselves will have a reasonable opportunity to hear the various views put forward by the participants before they cast their vote. [Case on Appeal, at pp. 28-29.]

41 Thus, the objective of the Act is, first, egalitarian in that it is intended to prevent the most affluent members of society from exerting a disproportionate influence by dominating the referendum debate through access to greater resources. What is sought is in a sense an equality of participation and influence between the proponents of each option. Second, from the voters' point of view, the system is designed to permit an informed choice to be made by ensuring that some positions are not buried by others. Finally, as a related point, the system is designed to preserve the confidence of the electorate in a democratic process that it knows will not be dominated by the power of money.

42 The appellant himself conceded that the objective of the impugned legislation is of pressing and substantial importance in a democratic society. In our view, the pursuit of an objective intended to ensure the fairness of an eminently democratic process, namely a referendum on a question of public interest, is a highly laudable one.

(2) Proportionality Test

(a) Rational Connection

43 The Court must determine whether there is a rational connection between the restrictions imposed by the legislature and the legislature's objective.

44 The Quebec legislature has provided for two means to attain its objective: first, limiting referendum spending in order to ensure that each option will be entitled to comparable financial resources and to prevent either option from unduly influencing the outcome because it has access to significantly greater financial resources than its adversaries; second, preventing unlimited spending by third parties in order to avoid an imbalance in the level of spending permitted for each option. It is this second means that the appellant is challenging in the name of the freedoms of expression and association. The appellant submits that independent individuals and groups who do not wish to or cannot join or affiliate themselves with one of the national committees are unjustifiably limited to the unregulated expenses provided for in the Act.

45 To better understand the rational connection between the objective of the Act and the statutory restrictions, it will be helpful to consider the 1991 report of the Royal Commission on Electoral Reform and Party Financing, which the Attorney General of Quebec adduced in evidence (Reforming Electoral Democracy: Final Report (1991), vol. 1). This federal Commission, better known as the Lortie Commission, was established in 1989 to inquire into the Canadian electoral system and customs. Its mandate was to present a series of recommendations aimed at improving and preserving the democratic character of federal elections in Canada.

46 Although the referendum system is different from the electoral system, in that the popular vote concerns a specific question and is not necessarily binding on the government whereas in an election the people vote to elect their political representatives for a specific mandate, the same principles underlying election legislation should in general be applicable to referendum legislation (see Cory J.'s comments on the subject in Haig v. Canada, [1993] 2 S.C.R. 995, at p. 1050). There are enough points of similarity between the two systems to draw such a parallel. Both involve setting up a procedural structure allowing for public discussion of political issues essential to governing the country or province and designed to ensure that the majority principle is adopted. In both elections and referendums, voters can freely express their choice after being informed of the issues during the election or referendum campaign, as the case may be.

47 The Lortie Commission pointed out that expenses incurred in an election campaign -- advertising, for example -- have a considerable impact on the outcome of the vote (Lortie Commission, supra, at pp. 324 and 339; testimony of Professor Peter Aucoin, Case on Appeal, at pp. 36-37, 94 and 131). It recognized that spending limits are essential to ensure the primacy of the principle of fairness in democratic elections. The principle of electoral fairness flows directly from a principle entrenched in the Constitution: that of the political equality of citizens. If the principle of fairness in the political sphere is to be preserved, it cannot be presumed that all persons have the same financial resources to communicate with the electorate (Lortie Commission, supra, at p. 324). To ensure a right of equal participation in democratic government, laws limiting spending are needed to preserve the equality of democratic rights and ensure that one person's exercise of the

freedom to spend does not hinder the communication opportunities of others. Owing to the competitive nature of elections, such spending limits are necessary to prevent the most affluent from monopolizing election discourse and consequently depriving their opponents of a reasonable opportunity to speak and be heard. Spending limits are also necessary to guarantee the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties. Thus, the principle of fairness presupposes that certain rights or freedoms can legitimately be restricted in the name of a healthy electoral democracy (Lortie Commission, supra, at p. 323). Elections are fair and equitable only if all citizens are reasonably informed of all the possible choices and if parties and candidates are given a reasonable opportunity to present their positions so that election discourse is not dominated by those with access to greater financial resources (Lortie Commission, supra, at p. 324). It should also be noted that 93 percent of the respondents to a national survey conducted by the Lortie Commission supported limits on spending by political parties (Lortie Commission, supra, at p. 334). This high percentage shows that the majority of Canadians agree with limiting election spending in order to promote fairness as a fundamental value of democracy.

48 For spending limits to be fully effective, they must apply to all possible election expenses, including those of independent individuals and groups. According to the Lortie Commission, the definition of election expenses must be sufficiently broad to include the cost of any goods and services used during an election campaign to promote or oppose, directly or indirectly, a candidate or political party (Lortie Commission, supra, at pp. 339-41). Thus, such expenses should include not only those incurred by political parties and candidates, but also those incurred by independent individuals and groups unrelated to the parties and candidates (Lortie Commission, supra, at p. 339).

49 The actions of independent individuals and groups can directly or indirectly support one of the parties or candidates, thereby resulting in an imbalance in the financial resources each candidate or political party is permitted. Such individuals or groups might either conduct a campaign parallel to that of one of the candidates or of a party and in so doing have a direct influence on the campaign of that candidate or party, or take a stand on a given issue and in so doing directly or indirectly promote a candidate or party identified with that issue. As the Lortie Commission pointed out in this regard, it is difficult to distinguish between partisan advocacy and advocacy by third parties in terms of influence on the vote; the objective of an election campaign is to influence the outcome of the vote, that is, the election of a candidate or of a political party. People do not vote for issues; nevertheless, the purpose or effect of the debate on the issues will be to influence the final vote. The Commission stated the following on this subject, at p. 340:

> Canadian and comparative experience also demonstrate that any attempt to distinguish between partisan advocacy and issue advocacy -- to prohibit spending on the former and to allow unregulated spending on the latter -- cannot be sustained. At elections, the advocacy of issue positions inevitably has consequences for election discourse and thus has partisan implications, either

> direct or indirect: voters cast their ballots for candidates and not for issues.

Independent spending could very well have the effect of directly or indirectly promoting one candidate or political party to the detriment of the others; the purpose of limits on spending by independent individuals and groups is to prevent their advertising or other expenditures from having a disproportionate influence on the vote (Lortie Commission, supra, at pp. 339-40 and 354).

50 It is also important to limit independent spending more strictly than spending by candidates or political parties. It cannot be presumed that equal numbers of individuals or groups will have equivalent financial resources to promote each candidate or political party, or to advocate the various stands taken on a single issue that will ultimately be associated with one of the candidates or political parties (Lortie Commission, supra, at pp. 337-38 and 351). While we recognize their right to participate in the electoral process, independent individuals and groups cannot be subject to the same financial rules as candidates or political parties and be allowed the same spending limits. Although what they have to say is important, it is the candidates and political parties that are running for election. Limits on independent spending must therefore be lower than those imposed on candidates or political parties. Otherwise, owing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate.

51 The 1988 federal election showed clearly how independent spending could influence the outcome of voting. During the 1988 election, there were no controls on independent spending. Elections Canada was not enforcing the provisions of the Canada Elections Act, R.S.C. 1970, c. 14 (1st Supp.), on spending limits for individuals and groups as a result of the decision in National Citizens' Coalition Inc. v. Canada (Attorney General) (1984), 11 D.L.R. (4th) 481 (Alta. Q.B.). In that case, the National Citizens' Coalition had challenged, inter alia, the limits on independent spending provided for in s. 70.1 of the Canada Elections Act (now s. 259). That section prohibited all independent spending to directly promote or oppose candidates or political parties during an election. Medhurst J. held that this provision was an unjustified restriction on the freedom of expression of individuals and groups during an election. The government decided not to appeal the decision (Lortie Commission, supra, at p. 328). As a result, this provision was not enforced during the 1984 and 1988 general elections. During the 1988 election, independent spending on advertising exceeded $4.7 million (Lortie Commission, supra, at p. 337). Most of these advertisements were directed at the issue of free trade. The statistics showed that four times as much money was spent to promote free trade as was spent to oppose it. Thus, even if this spending was not necessarily partisan, it clearly favoured the Progressive Conservative Party indirectly. That party was the only one to advocate free trade; it therefore benefited considerably from this "indirect" independent spending. The Lortie Commission drew the following conclusion from that experience, at pp. 337-38:

> The 1988 election experience clearly demonstrated that advertisements promoting an issue but not explicitly exhorting voters to vote for a particular candidate or party could themselves be grossly unfair because they can constitute

> an endorsement of a particular party, if one party can be clearly distinguished from others on the basis of its stand on a central election issue.

52 Limits on independent spending are essential to maintain an equilibrium in the financial resources available to candidates and political parties and thus ensure the fairness of elections (Lortie Commission, supra, at p. 327). Furthermore, according to another survey conducted in 1991, 75 percent of Canadians supported limits on spending by interest groups (Lortie Commission, supra, at p. 337). These statistics also show the importance of controlling spending in order to maintain public confidence in the electoral system.

53 In our view, the Lortie Commission's comments on the importance of limits on independent spending for preserving the fairness of the Canadian electoral system should apply, mutatis mutandis, to the Quebec referendum system. In a referendum, "options" are submitted to voters rather than candidates or political parties. The national committees are the principal structure set up by the Quebec legislature to promote each of these options. Spending by the national committees is subject to limits to ensure that equivalent financial resources are available to the proponents of each option for addressing the public. Referendum period spending limits are essential to guarantee the fairness of the referendum. The appellant does not contest this limit on the national committees.

54 However, the spending limit system would lose all its effectiveness if independent spending were not also limited. Spending by individuals or groups who do not wish to or cannot join or affiliate themselves with one of the national committees must be limited for the same reasons as underlie the limits on independent spending during an election campaign. Independent spending during a referendum campaign directly or indirectly favours one of the options over the others. Even independent individuals and groups advocating abstention indirectly favour one of the options over the others (testimony of Professor Aucoin, Case on Appeal, at p. 155). Independent spending must therefore be controlled to ensure that the promotion of one of the options does not benefit from far greater financial resources. The limit on independent spending must also be stricter than that granted to the national committees. Since it cannot be assumed that each option will benefit from the same amount of independent spending in its favour, such spending must be restricted to preserve a balance in the promotion of the options and favour an informed and truly free exercise of the right to vote. In this light, the regulation of referendum spending pursues one of the objectives underlying freedom of expression, namely the ability to make informed choices (Ford v. Quebec (Attorney General), supra, at p. 767).

55 The appellant relied on Somerville v. Canada (Attorney General) (1996), 136 D.L.R. (4th) 205, in support of his submissions concerning the unfairness of the limits on independent spending in the Referendum Act. In that case, the Alberta Court of Appeal declared certain provisions of the Canada Elections Act, R.S.C., 1985, c. E-2, relating to limits on independent spending similar to the ones at issue here to be unconstitutional. Among other things, these provisions allowed third parties to incur "advertising expenses" provided that they did not exceed $1000 and were not pooled. These advertising expenses included all expenses incurred "for the production, publication, broadcast and

distribution of any advertising for the purpose of [directly] promoting or opposing" a party or candidate during an election (s. 259). In the view of the Alberta Court of Appeal, the impugned legislation violated the freedoms of expression and association guaranteed by the Canadian Charter. It stressed that the objective of limiting third party spending was itself inconsistent with the Canadian Charter because it gave preferential treatment to the expression of candidates and political parties, to the detriment of third parties.

56 However, it is our view that the objective of Quebec's referendum legislation is highly laudable, as is that of the Canada Elections Act. We agree in this respect with the analysis of the Lortie Commission and of the expert witness P. Aucoin regarding the need to limit spending both by the principal parties (the national committees in the case of a referendum) and by independent individuals and groups in order to preserve the fairness of elections and, in the present case, referendums. The system set up by the legislature to ensure a certain equality of resources between the options submitted to a referendum and thereby enhance democratic expression would become ineffective if independent individuals and groups were allowed unlimited spending or spending with a ceiling similar to that of the national committees. As we pointed out earlier, it cannot be presumed that the same financial resources will be available to the different independent individuals or groups or that those resources will be divided equally to support the various options. The legislature's objective can only be achieved through stricter limits on independent spending, which are supported by a large majority of Canadians.

57 The evidence adduced by the Attorney General of Quebec demonstrates the need to prevent an unequal distribution of financial resources among the options that would undermine the fairness of the referendum process. The evidence also shows that unless independent spending is controlled, any system for limiting the spending of the national committees would become futile. In our view, there is clearly a rational connection between limits on independent spending and the legislature's objective.

(b) Minimal Impairment

58 In RJR-MacDonald, supra, McLachlin J. explained the application of the minimal impairment test as follows, at p. 342:

> [T]he government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. . . .

59 This Court has already pointed out on a number of occasions that in the social, economic and

political spheres, where the legislature must reconcile competing interests in choosing one policy among several that might be acceptable, the courts must accord great deference to the legislature's choice because it is in the best position to make such a choice. On the other hand, the courts will judge the legislature's choices more harshly in areas where the government plays the role of the "singular antagonist of the individual" -- primarily in criminal matters -- owing to their expertise in these areas (Irwin Toy, supra, at pp. 993-94; McKinney v. University of Guelph, [1990] 3 S.C.R. 229, at pp. 304-5; Stoffman v. Vancouver General Hospital, [1990] 3 S.C.R. 483, at p. 521; RJR-MacDonald, supra, at pp. 279 and 331-32). La Forest J.'s comment on the subject in RJR-MacDonald, supra, at p. 277, is perfectly apposite:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups.

60 The degree of constitutional protection may also vary depending on the nature of the expression at issue (Edmonton Journal, supra, at pp. 1355-56; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232, at pp. 246-47; Keegstra, supra, at p. 760; RJR-MacDonald, supra, at pp. 279-81 and 330). Since political expression is at the very heart of freedom of expression, it should normally benefit from a high degree of constitutional protection, that is, the courts should generally apply a high standard of justification to legislation that infringes the freedom of political expression.

61 What is the situation in the case at bar? In answering this question, the legislature's objective, namely to enhance the exercise of the right to vote, must be borne in mind. Thus, while the impugned provisions do in a way restrict one of the most basic forms of expression, namely political expression, the legislature must be accorded a certain deference to enable it to arbitrate between the democratic values of freedom of expression and referendum fairness. The latter is related to the very values the Canadian Charter seeks to protect, in particular the political equality of citizens that is at the heart of a free and democratic society. The impugned provisions impose a balance between the financial resources available to the proponents of each option in order to ensure that the vote by the people will be free and informed and that the discourse of each option can be heard. To attain this objective, the legislature had to try to strike a balance between absolute freedom of individual expression and equality among the different expressions for the benefit of all. From this point of view, the impugned provisions are therefore not purely restrictive of freedom of expression. Their primary purpose is to promote political expression by ensuring an equal dissemination of points of view and thereby truly respecting democratic traditions.

62 The role of the Court is to determine whether the means chosen by the legislature to attain this highly laudable objective are reasonable, while according it a considerable degree of deference since the latter is in the best position to make such choices. As Wilson J. stated in Lavigne v. Ontario Public Service Employees Union, [1991] 2 S.C.R. 211, at p. 296, a failure to satisfy the minimal impairment test will be found only if there are measures "clearly superior to the measures currently in use".

63 It can be seen from the evidence that the legislature went to considerable lengths, in good faith, in order to adopt means that would be as non-intrusive as possible while at the same time respecting the objective it had set. The Quebec government first published a White Paper entitled Consulting the People of Québec (August 1977), which set out the objectives the government hoped to attain through referendum legislation and proposed means to attain those objectives. The government explained the objectives of the regulation of referendum spending as follows, at p. 7:

> The Government hopes . . . to attain three objectives. The first is to ensure that the various factions have as close to equal chances as possible. The second is to see that referendum campaigns are based on personal financial contributions from the voters rather than from a handful of wealthy contributors. And the third is to guarantee that all the financial aspects of the campaign are made known to the public.

To do this, the government proposed a system similar to that which exists today: first, the establishment of umbrella committees for each option, which alone would be authorized to incur referendum expenses, second, the control of the spending and revenues of these committees, and, third, financial assistance provided by the government.

64 The proposal made in the White Paper on referendums was debated extensively before the Standing Committee of the President of the Council on the Constitution and Intergovernmental Affairs, when members of the National Assembly and numerous interveners submitted briefs and recommendations (see, inter alia: National Assembly, Journal des débats: Commissions parlementaires, Commission permanente de la présidence du conseil, de la constitution et des affaires intergouvernementales, Étude du livre blanc sur la consultation populaire (November and December 1977)). Following these debates, Robert Burns, the Minister of State for Electoral and Parliamentary Reform, tabled Bill 92, the Referendum Act, which was faithful to the original ideology, although the means to achieve it had been modified somewhat on the basis of certain recommendations. During second reading of Bill 92, Minister Burns made the following comments in the National Assembly, Journal des débats, April 5, 1978, vol. 20, No. 17, at pp. 708 and 710:

> [Translation] I would therefore like to mention here that in drafting this bill the government took into account the representations made to it in the fall when the White Paper on referendums was being studied by the Standing Committee of the President of the Council. The government took those representations

> seriously, as it provided, for example, for the creation of a Conseil du référendum at the request of the Union Nationale. At the request of the Official Opposition, it provided for a period of at least twenty days between adoption of the question by the National Assembly and issuance of the referendum writs. There are many other examples that could be given to show how the government, in drafting its bill, endeavoured to comply with the proposals made to it at the parliamentary committee stage by representatives of the different opposition parties and by those of various organizations, both federalist and nationalist.
>
> . . .
>
> In my opinion, the system of national committees is only one way to attain the objectives being pursued. If other systems consistent with the principles -- I lay great stress on this -- of equality of opportunity and respect for freedom of expression were to be proposed to me, I would be happy to submit them to my Cabinet colleagues and, eventually, to the National Assembly.

65 One of the most important recommendations debated was that of the Commission des droits de la personne concerning affiliation. In its comments on Bill 92 in June 1978 (National Assembly, Journal des Débats: Commissions parlementaires, Commission permanente de la présidence du conseil et de la constitution, Étude du projet de loi no 92 -- Loi sur la consultation populaire, June 7, 1978, No. 114, at pp. B-4505 to B-4509), it agreed with the bill's objectives and recognized that certain restrictions had to be imposed to attain them (at p. B-4507):

> [Translation] In the opinion of the Commission des droits de la personne, any infringement of the freedoms of expression and association that might result from [this obligation to belong to one of the national committees] should first be seen in light of the objective being pursued here, with which it is in complete agreement, namely to ensure that each of the options submitted to a referendum has an equal opportunity to explain its benefits. Ensuring equality of opportunity between the various options necessarily entails a degree of constraint and, until further notice, the Commission is only too pleased to accept it in principle.

It then pointed out that the bill severely restricted the freedoms of expression and association in requiring that groups wishing to participate in the referendum campaign join the national committees directly. To soften these restrictions, it proposed that the bill be amended to give groups a further possibility of affiliation (at p. B-4508):

> [Translation] So, to avoid boycotts of the national committees and a proliferation of groups working outside the umbrella organization, and to lessen substantially the constraint on the freedoms of association and of expression, the Commission proposes introducing a status of affiliate for individuals and groups not wishing to associate themselves with the overall strategy decided on by the

> national committee although they agree with its ultimate objective.
>
> In such a case, for such dissent relating not to the objectives but to the strategy to be meaningful, it would of course be necessary to ensure a proportional distribution of revenues between the majority group and the "affiliated" groups in accordance with criteria that might be set out in each national committee's by-laws.
>
> We would conclude by reminding the government that the by-laws governing the national committees will be subject to the Charter of human rights and freedoms and stressing the numerous pitfalls for human rights and freedoms, which necessarily means that there must be strict equality between the options. [Emphasis added.]

This proposal was adopted by the legislature, which amended its bill to add a third paragraph to s. 23 (now s. 24 of the Referendum Act) to the effect that the by-laws of the national committees must "provide for the affiliation to the committee of groups which are favourable to the same option and see to the establishment of the norms, conditions and formalities governing the affiliation and financing of these groups" (National Assembly, Journal des débats: Commissions parlementaires, Commission permanente de la présidence du conseil et de la constitution, Étude du projet de loi no 92 -- Loi sur la consultation populaire, June 12, 1978, No. 126, at pp. B-4930 to B-4941; June 16, 1978, No. 139, at pp. B-5506 to B-5520).

66 It should be mentioned at the outset that the appellant is not contesting the principle and operation of affiliation in this Court. Affiliation significantly relaxes the restriction imposed by the impugned provisions on the freedoms of expression and association of groups that wish to support one of the options submitted to a referendum but disagree with the strategy of the national committee representing the option they support. Affiliation makes it possible for groups to conduct campaigns parallel to that of the national committee representing the option they wish to support, that is, they can incur regulated expenses by means of an amount granted by the committee in question out of the referendum fund. Individuals may also associate to form an affiliated group in order to conduct a parallel campaign. Like that of the national committees, the spending of an affiliated group must be monitored by the committee's official agent or by one of his or her deputies or local agents. However, the role of these agents and deputies is confined to ensuring that the limit imposed on regulated expenses -- in the case of an affiliated group, this limit is in fact the amount granted by the national committee -- is complied with; they have no control over the discourse of either the national committees or the affiliated groups (see the testimony of Professor Peter Aucoin, Case on Appeal, at pp. 89-90).

67 Under s. 24 of the Referendum Act, the national committees are required to adopt by-laws

providing for the financing of affiliated groups. The Referendum Act does not set out a specific framework within which such by-laws must be adopted but gives the national committees complete freedom in respect of "the establishment of the norms, conditions and formalities governing the affiliation and financing of these groups". However, this discretion must be exercised in accordance with the Canadian Charter. Lamer J., as he then was, stated the following on the subject in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, at p. 1078:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied.

68 In the case at bar, the national committees do not have an express power to infringe the Canadian Charter in drafting the rules of affiliation. In our view, they do not have such a power by necessary implication either. It is the Referendum Act that expressly restricts the freedoms of expression and association of individuals. The objective of the by-laws on affiliation is instead to limit this infringement of the freedoms of expression and association as much as possible. The discretion conferred on the national committees in respect of affiliation must therefore not be used to restrict the freedoms of expression and association, but rather to extend those freedoms by promoting the broadest possible political expression.

69 Thus, the principle that must guide the national committees in drafting by-laws on affiliation is the promotion and spreading of the freedom of expression of groups wishing to affiliate. Assuming that requests for affiliation are made in good faith, in other words, that the groups seeking affiliation genuinely wish to promote the option represented by the committee, the committee cannot deny them affiliation on the basis of the content of the message they are seeking to disseminate.

70 As for the amounts to be granted to each of the affiliated groups, the committee must determine them in a fair and reasonable manner. It should be noted that each national committee has a limited amount to distribute. Each national committee and its affiliated groups cannot incur regulated expenses that exceed the limit imposed on them by the Act, namely the equivalent of $1 per elector (s. 426 Special Version). The first criterion that should be applied in determining the amount to be granted is the representativeness of the affiliated group. It is inherent in the democratic system that the representativeness of a point of view should have an effect on its dissemination. Since contributions are limited, a group, party or candidate with little support will receive that much less money to assert its point of view. Of course, the objective of this criterion is not to determine how many people will ultimately vote for the option based on the arguments put forward by the group; it is not a question of trying to conduct a pre-referendum referendum. However, the support each group has at the time of determination of the amount to be granted is quite clearly a criterion to be taken into consideration. Moreover, this is the position taken by Professor Aucoin in his

testimony, at p. 87 of the Case on Appeal:

> Secondly, it has this provisional committee make the bylaws. In the first instance, the bylaws are made by a majority rule. I think that accords with our understanding of democracy. Secondly, the law itself is very explicit, that is to accommodate those who want to affiliate. I would say it passes that test. Third, there is the assumption in terms of the way in which the law is structured, that the accommodation of the majority and the minority factions in a group will be proportional, will be proportion [sic] to who they represent, who they can argue they represent, what share they should get, the various criteria they might want to use to say: We have this fair share.

A second criterion to be taken into consideration is fairness. The committee must grant amounts that are sufficient to enable each group to make itself heard, although to varying degrees. It would be quite unfair for a small group to be granted such a small amount that it is in practice impossible for it to assert its point of view in any way whatsoever. That would go against the objective the national committees must pursue in respect of affiliation, namely the promotion and dissemination of the broadest possible range of views. One last criterion that could be taken into consideration in extreme cases is the need to take tactical considerations into account. This criterion could be used to exclude extremist groups advocating an approach that would objectively do real damage to the option and to the proper operation of the referendum process. Such cases will undoubtedly be exceptional, and the national committees will have to be careful not to try to use this criterion to make a general value judgment respecting the discourse its affiliated groups are seeking to deliver.

71 To ensure the proper operation of the Act, and in particular of the system of affiliation and of the fair and reasonable distribution of the available money between the national committee and the various affiliated groups, the Act provides for the establishment of a Conseil du référendum composed of three judges of the Court of Québec (see para. 13). Thus, should any group consider itself wronged by a national committee in the affiliation procedure, it could always take its case to the Conseil du référendum. That body's role is, inter alia, to ensure that all the groups are treated fairly, and in accordance with the charters. In his testimony, Professor Aucoin stressed the importance of the Conseil du référendum and its role in the operation of the Act (Case on Appeal, at pp. 61-62). Moreover, as Professor Aucoin mentioned, the potential media impact of a decision by the Conseil du référendum concluding that a committee has treated a group trying to affiliate with it unfairly is clearly a further incentive for the national committees (at p. 96 of the Case on Appeal):

> In this system, the people on the majority have an obligation to be fair to the people in minority situation. They have a deterrent of the council, which can pass judgement on them and say that: You have not been fair in the fairness of the allocation of money. And, of course, that will not be private, that will go public. And so there's another deterrent.

72 The advantage of the affiliation system is that it ensures compliance with the objectives pursued by the legislature in the impugned provisions. Since the affiliated groups receive their money out of the maximum amount of expenses granted to the national committee, the equality of financial resources available to promote the options submitted to the referendum is not infringed by the presence of affiliated groups; each option retains the same spending limit. This system removes the temptation for the proponents of the various options to divide into small groups in order to increase the total amount spent to promote their option in order to circumvent the limit imposed on the national committees and thus improve their option's visibility within the community. Another significant advantage of this system is that it allows the affiliated groups to receive their share of the subsidy paid by the government into the referendum fund pursuant to s. 40 of the Referendum Act. Thus, while their affiliation imposes some restrictions, it also entails the advantage of government financial support for groups that might otherwise lack resources. From this point of view, it is not obvious that the affiliation system should be regarded as restricting political expression. (On the advantages of the affiliation system, see also: Professor Aucoin's report, Case on Appeal, at pp. 269-72, and his testimony, Case on Appeal, at pp. 61-63 and 87-91.)

73 Thus, for groups that wish to support one of the options submitted to a referendum but do not wish to join the national committee because they disagree with its strategy, the affiliation system -- which, it should be noted, the appellant is not contesting -- relaxes the restriction imposed on these groups by the impugned provisions sufficiently for us to conclude that the impairment is minimal. The structure set up by the legislature enables the vast majority of the people or groups favouring one of the options to participate actively in the referendum campaign by joining or affiliating themselves with the national committee overseeing the option. Furthermore, individuals who disagree with the committee's strategy could join an affiliated group that agrees with their position. They could thus participate actively in the referendum campaign through this affiliated group.

74 Nonetheless, there are still a certain number of individuals and groups who cannot join or affiliate themselves with the committee and who accordingly can express their views only by means of unregulated expenses: on the one hand, individuals who support one of the options but cannot join the national committee or one of its affiliated groups because they disagree with their respective strategies and for whom affiliation is not possible because it is reserved for groups, and on the other hand, individuals or groups wishing to participate in the referendum campaign without directly supporting one of the options (in particular, abstentionists).

75 While it is true that the impugned provisions do not totally prohibit the freedom of expression of these individuals and groups, which should normally make the infringement easier to justify (see: Ramsden v. Peterborough (City), [1993] 2 S.C.R. 1084, at pp. 1105-6; RJR-MacDonald, at pp. 343-44 and 353), the forms of expression provided for in s. 404 Special Version are so restrictive that they come close to being a total ban. While ss. 404(1) and (3) authorize expression by means of the print, radio or television media, they require that the opinion be circulated or broadcast "without payment, reward or promise of payment or reward". The ability to express a point of view through these media thus depends on a third party, which limits the effectiveness of this exception to

regulated expenses considerably. Since not the slightest amount may be spent, it will ultimately be the radio or television broadcaster or the print publisher who will decide whether the opinion will be disseminated. Section 404(2) provides for the possibility of publishing a book during the referendum campaign provided that the publication was planned before the campaign began. This exception is also very limited, since in most cases it will be much more appropriate to write a book during the referendum campaign, and after having read the referendum question, than before. Furthermore, writing a book requires substantial resources that are not available to all those who would like to present their points of view in the referendum debate. Sections 404(4) and (5) provide that a person may pay, out of his or her own money, any expenses he or she incurs for transportation, meals and lodging while travelling "for referendum purposes", if these expenses are not reimbursed. However, it is not sufficient to permit people to pay their travelling expenses, as they still have to be able to pay to have their point of view heard once they reach their destination. The final relevant exception is found in s. 404(9), which authorizes incurring up to $600 in costs to hold a meeting, including the cost of renting a hall and convening the participants. Without ruling on the reasonableness of the amount in question, it must be recognized that this exception, like the others, is very restrictive, as it is limited to the organization of a meeting.

76 Thus, as regards the exceptions set out in s. 404 Special Version, groups and individuals who cannot join or affiliate themselves directly with the national committees are allotted no money whatsoever to spend as they see fit in order to make their positions known. It is therefore impossible, for example, for them to pay to have flyers, pamphlets or posters printed that present their points of view. This Court has already pointed out the importance of these forms of communication, which are generally used by the least affluent members of our society (Ramsden v. Peterborough (City), supra; Committee for the Commonwealth of Canada v. Canada, supra). In our view, this example suffices to illustrate the seriousness of the restriction imposed in s. 404 Special Version on individuals and groups who can neither join nor affiliate themselves with the national committees.

77 As we mentioned in the rational connection analysis, limits on spending by third parties in addition to the limits imposed on the national committees are necessary and must be far stricter than those on spending by the national committees in order to ensure that the system of limits and a balance in resources is effective (para. 54). Nonetheless, we are of the view that the limits imposed under s. 404 cannot meet the minimal impairment test in the case of individuals and groups who can neither join the national committees nor participate in the affiliation system. In our view, there are alternative solutions far better than the limits imposed under s. 404 Special Version that are consistent with the legislature's highly landable objective. The Lortie Commission's recommendation on third party expenses is one possible solution.

78 To guarantee the operation of the system of election spending limits, the Lortie Commission recommended, inter alia, that groups and individuals not connected with a political party or candidate (independents) be prohibited from incurring election expenses exceeding $1000 and from pooling these amounts (Lortie Commission, supra, at pp. 350-56). This recommendation made it

possible for all practical purposes to ensure that the balance in the financial resources of the parties and candidates was respected without radically restricting the freedom of expression of independents. By allowing a certain amount without limits on how it was to be used, the Commission ensured that independents would be able to assert their points of view and that they would have some leeway in choosing forms of expression. Furthermore, by allowing a relatively low amount and prohibiting pooling, the Commission removed the temptation for parties or organizations of candidates to split into small groups in order to multiply and thus increase the limits imposed on their campaigns by the Canada Elections Act. In this way, the Commission ensured that the impact of its infringement of the principle of limiting election spending by parties and candidates would be minimal enough for the system to remain effective. It wrote the following in this regard at p. 355 of its report:

> While it is possible that, in certain circumstances, a $1000 spending limit might jeopardize the effectiveness of candidate and party spending limits, the risk that fairness would be compromised by spending at this level would not be so significant as to justify a lower limit, provided that individuals or groups not be permitted to combine resources to augment the spending limit. The regulation of independent expenditure thus must include an explicit restriction against individuals or groups pooling their financial resources to overcome the spending limit. Without such a restriction, the effectiveness of spending limits on individuals and groups could easily be destroyed.

79 Parliament adopted this recommendation and enacted the following in ss. 259.1 and 259.2 of the Canada Elections Act, R.S.C., 1985, c. E-2:

> 259.1 (1) Every person who incurs advertising expenses in excess of one thousand dollars between the date of the issue of the writ and the day immediately following polling day is guilty of an offence.
>
> (2) Subsection (1) does not apply to
>
> (a) a candidate, official agent or any other person acting on behalf of a candidate with the candidate's actual knowledge and consent; or
> (b) a registered agent of a registered party acting within the scope of the registered agent's authority or other person acting on behalf of a registered party with the actual knowledge and consent of an officer of the registered party.
>
> 259.2 (1) Every person who sponsors or conducts advertising without identifying the name of the sponsor and indicating that it was authorized by that

sponsor is guilty of an offence.

(2) For the purposes of section 259.1, no person shall incur an advertising expense in combination with one or more other persons if the aggregate amount of the advertising expenses incurred exceeds one thousand dollars.

In Somerville v. Canada (Attorney General), supra, the Alberta Court of Appeal declared these provisions to be unconstitutional. With respect, we have already mentioned that we cannot accept the Alberta Court of Appeal's point of view because we disagree with its conclusion regarding the legitimacy of the objective of the provisions (para. 55).

80 In our view, an exception to regulated expenses similar to that recommended by the Lortie Commission would be far less intrusive than those currently applicable under s. 404 Special Version. The Act could permit citizens, either individually or in groups, to spend a certain amount on an entirely discretionary basis while prohibiting the pooling of such amounts. To limit the scope of this exception and prevent abuse, the legislature could also be at liberty to exclude from its application certain individuals or groups who already have platforms from which to express their views, such as the national committees, affiliated groups and individuals or groups belonging to the national committees or affiliated groups.

81 By virtue of this exception, individuals and groups who can neither join nor affiliate themselves with the national committees would be entitled to a minimum amount that they would be able to spend as they saw fit in order to communicate their positions. In our view, this alternative would result in a more acceptable balance between absolute individual freedom of expression and equality of expression between proponents of the various options. It is not up to this Court to decide what amount should be allowed. Should the legislature adopt this alternative, it will have to set the amount. Nevertheless, it might be thought that the amount of $1000 proposed by the Lortie Commission in the Canadian election context is not necessarily appropriate in the context of a Quebec referendum. The appropriate amount will have to be fair while being small enough to be consistent with the objective of the Act.

82 Although s. 404 Special Version is the only provision that is really problematic, it is difficult to sever it from the rest of the impugned provisions. Section 404 Special Version provides for exceptions to "regulated expenses", which are defined, and the persons entitled to incur them are described, in ss. 402, 403, 406 para. 3, 413, 414, 416 and 417 of the Special Version. Without further exceptions to the regulated expenses, the effect of severance would be a total ban on referendum spending by third parties except through the national committees. The Act would itself be unconstitutional were s. 404 alone to be severed. Since all the impugned provisions form a closely interrelated whole and s. 404 Special Version does not meet the minimal impairment test, all the impugned provisions fall with it, like a house of cards.

(c) Deleterious and salutary effects

83 Having concluded that the system set up by the Referendum Act does not meet the requirements of the minimal impairment test, it is in principle unnecessary to consider the final test, namely proportionality between the deleterious and salutary effects of the system.

84 A decision cannot be made in the abstract, and until the legislature has altered its system, it will clearly be impossible to determine whether the system's benefits outweigh its deleterious effects on the freedoms of expression and association. However, it is clear from our analysis that protecting the fairness of referendum campaigns is a laudable objective that will necessarily involve certain restrictions on freedom of expression. Freedom of political expression, so dear to our democratic tradition, would lose much value if it could only be exercised in a context in which the economic power of the most affluent members of society constituted the ultimate guidepost of our political choices. Nor would it be much better served by a system that undermined the confidence of citizens in the referendum process.

VI - Disposition and Remedy

85 For the reasons given, the constitutional questions must be answered as follows:

Question:

Do ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of the Election Act, R.S.Q., c. E-3.3, as amended by Appendix 2 of the Referendum Act, R.S.Q., c. C-64.1, adopted under s. 44 of the Referendum Act, violate in whole or in part s. 2(b) and/or s. 2(d) of the Canadian Charter of Rights and Freedoms?

Answer:

Yes.

Question:

If they do, do these sections or any of them constitute a reasonable limit prescribed by law under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: These sections do not constitute a reasonable limit within the meaning of s. 1.

86 The appropriate remedy remains to be determined. The appellant is asking the Court to declare all the impugned provisions unconstitutional and of no force or effect. It is impossible in the case at bar to resort to the techniques of reading in and severance, since they would require us to make choices within the domain of the legislature (Schachter v. Canada, [1992] 2 S.C.R. 679; Rocket v. Royal College of Dental Surgeons of Ontario, supra, at p. 252). Consequently, having concluded that the provisions as a whole constitute an unjustified infringement of freedom of expression and freedom of association, we declare ss. 402, 403, 404, 406 para. 3, 413, 414, 416 and 417 of the Special Version to be of no force or effect under s. 52 of the Constitution Act, 1982. We are aware of the major impact of this conclusion on the provisions of the Referendum Act and of the Special

Version relating to control of referendum spending. Since practically all the provisions concerning referendum spending are based on the concept of "regulated expenses", they become pointless owing to the declaration that the impugned provisions are of no force or effect. It will be up to the legislature to make the appropriate amendments. We would have arrived at the same result had the case been resolved on the basis of the Quebec Charter of Human Rights and Freedoms.

87 We would allow the appeal with costs to the appellant.

TAB 13

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.

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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.

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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.

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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 14

Case Name:

Milani v. Vaughan (City)

IN THE MATTER OF subsection 222(4) of the Municipal Act, 2001, S.O. 2001, c. 25, as amended
Application by: Lucia Milani
Subject: Application to restructure the existing ward structure -- Appeal of By-law 89-2009
Municipality: City of Vaughan

[2009] O.M.B.D. No. 932

63 O.M.B.R. 257

66 M.P.L.R. (4th) 141

2009 CarswellOnt 7420

OMB Case No.: MM090024, OMB File No.: MM090024

Ontario Municipal Board

Panel: M.C. Denhez, Member

Decision: November 24, 2009.

(87 paras.)

Appearances:

City of Vaughan: N. Salerno, counsel.

Lucia Milani: D. Bronskill, counsel.

Participants

York Region Catholic School Board: T. Ciaravella, agent.

York Region District School Board: A. DeBartolo, agent.

Kleinburg and Area Residents Association Inc.: R. Klein, agent.

Maplewood Ravines Community Association Inc.: F. Stadler, agent.

J. Fedele.

F. Greco.

A. Kay.

Rev. J. Keenan.

C. Liddy.

R. Lorello.

D. Schulte.

DECISION DELIVERED BY M.C. DENHEZ
AND ORDER OF THE BOARD

1. INTRODUCTION

1 In May, 2009, City Council in Vaughan (the City), in the Region of York (the Region), adopted By-law 89-2009 (By-law), redrawing boundaries for its five wards. It was the fourth ward redraft in fifteen years, intended to set ground rules for a decade, for municipal elections in 2010, 2014 and 2018.

2 Resident Lucia Milani (the Appellant) disagreed with both the process and outcome, and appealed the By-law. Other participants also came forward. At the seven-day hearing, the Appellant was represented by Counsel and called two experts, who were critical of process and outcome. The City, also represented by Counsel, did not call outside experts but relied on opinions of staff, who had never participated in a ward review before. The participants' role is described later.

3 The Board has carefully considered all the evidence, the decision of Council, the supporting information/material thereto, and the able submissions. The Board finds, on the expert evidence, that the City failed to do the analysis required by the Supreme Court of Canada for such redrafting. The Board also finds, however, that parts of the By-law were never in dispute. The following aspects of the By-law are amended:

- The northern boundary of Ward 4 is herein set at the Urban Boundary, instead of the City limits (thereby reuniting the rural area); and

- The boundary between Wards 4 and 5 is herein set along Highway 407, as illustrated in the City Clerk's recommended Scenario 5B.

The appeal is therefore allowed in part. The details and reasons are set out below.

2. PROCEDURAL MATTERS AND THE GROUP OF SIX

4 Pre-hearing Conferences saw disputes over the status of Issues, parties and participants. By Decision Issued on September 14, 2009, the Board stated:

> Should (a participant) wish to make further submissions to justify a change in status, it should do so by way of a motion in accordance with the Board's Rules of Practice and Procedure... Any motions, in that regard should be made at the earliest possible opportunity and no later than October 2, 2009.

5 Participant Carrie Liddy, seeking party status, obtained a Board letter saying she could make a Motion for same at the start of the hearing. She served her Motion on October 13, 2009, but did not attend the start of the hearing on October 22; her e-mail said she was ill, and that participant Frank Greco would present her Motion. He outlined three propositions not in the Motion materials. First, he asked that six participants be recognized as parties acting jointly (Ms Liddy, Ms Schulte, Ms Fedele, Mr. Lorello, Mr. Stadler and himself); he and another participant would be both witnesses and co-agents for the group. Second, although part of the rationale of Ms Liddy's Motion was "to request an adjournment due to improper notice", Mr. Greco instead emphasized that party status would protect their right to continue, if the Appellant withdrew. Third, he emphasized that although all six shared the Appellant's misgivings about By-law 89-2009, two of the six wished to advance a different ward boundary option called Public Submission #1 (PS1); so they wanted to pursue their own focus, independent of the Appellant. That prospect was opposed by Counsel for both the City and the Appellant.

6 The Board dismissed the Motion. Aside from the intrinsic awkwardness for two participants to become parties/witnesses/co-agents simultaneously, the Board found no grounds to adjourn, no prospect of the Appellant withdrawing, and no necessity for an independent line of inquiry on the merits of PS1. Existing witnesses could be expected, in any event, to have some views on alternate ward scenarios; if and when the Chair considered it appropriate, participants could ask for further elucidation.

3. CONTEXT

7 The City was created by a 1970 amalgamation. One City map (Exhibit 5, Tab 17) describes six

geographic communities: Kleinburg-Nashville, Woodbridge, Vellore Village, Maple, Carville Village, and Thornhill, plus an area called the Woodbridge Expansion Area. Vaughan is now a city of 280,000 people on Toronto's north border. Highway 400 separates its east and west sides.

8 City Council has 9 members: one from each of 5 existing wards, plus the Mayor and Regional Councillors, elected at large (two Regional Councillors prior to 1988, now three). Though population quintupled since 1982, there have always been 5 ward Councillors during that time (from 3 wards 1982-1994, and 5 wards 1994-present). "Members of Vaughan Council", said one City report, "represent considerably more residents per Council member than those of comparable municipalities" -- 47,693 people, compared to an average of 27,873 among "neighbouring councils". However, as participant Deborah Schulte noted, any imbalance may be felt less urgently in Vaughan: with 4 members of Council elected at large (the Mayor and three Regional Councillors), residents may feel they have no less than 5 members of Council on whom to call as "their" representative (those 4 members, plus their ward Councillor).

9 The five existing wards are:

> **Ward 1:** The entire north half of the city. It includes a large rural area, the urban-rural interface, plus the two longstanding communities of Kleinburg and Maple, 7-8 kilometres apart. The other four wards, in contrast, are entirely within the urban boundary, lined up along the southern edge of the city.
>
> **Ward 2:** The Woodbridge area west of the Boyd Conservation Area.
>
> **Ward 3:** Woodbridge, east of the Boyd Conservation Area, and west of Highway 400.
>
> **Ward 4:** The "Concord" area east of Highway 400, between Maple and Highway 407, plus an area south of Highway 407 with neighbourhoods including Glenshields, Brownridge, and Beverley Glen.
>
> **Ward 5:** The longstanding community of Thornhill, at the southeast corner of the city.

10 The Board takes notice that Vaughan has been called the fastest-growing municipality in Canada (though Milton and Barrie are competitors). City Clerk Jeffrey Abrams said if Vaughan is not the fastest, it is near the top. This put pressure on ward configuration: boundaries were changed in 1994, 2000 and 2005. The City now proposed to change them again for the 2010 election; and Council also decided to ask the electorate about possibly another revision for the 2014 election

(Exhibit 5, page 245). If that 2014 change were to proceed, it would be the fifth in twenty years.

11 Although there had recently been major growth west of Highway 400 (e.g. the Woodbridge Expansion Area and most of Vellore Village), much future development would be to the east, around Carville Village. This meant population pressures in Wards 1 and 4, while Ward 5 stayed relatively constant. In 2006, Ward 1 had some 58,000 people, whereas Ward 5 had 36,700 (a variation from average size of 22% more and 23% less, respectively). By 2018, without changes in boundaries, the City said Ward 1 would then have a population of 117,200 (85% above the then average ward size) whereas Ward 5 would have 37,900 (40% below). Hence the need for adjustments.

4. METHOD

12 In summer 2008, the City Clerk was assigned to address boundaries. The Board was not shown his Terms of Reference, but was told he was expected to produce boundaries usable in the municipal elections of 2010, 2014 and 2018, i.e. for a decade.

13 The Clerk formed an in-house team composed of himself, Todd Coles (planner), and Joseph Chiarelli (Manager of Special Projects). None had participated in ward reviews before. No consultants were retained. The team, said the Clerk, looked at applicable jurisprudence, and materials from the previous ward review (2005). There were no arrangements to vet the work (by outside experts) at any time.

14 Their methodology was to start with 2006 Census data, then consider factors other than population. As of a City meeting on September 22, 2008, there were five factors, of which population was of "the utmost importance":

> - No population variances greater than 15% based on the average populations between the wards as of the date of the 2018 census [*sic*].

Four other factors followed, said to be in no particular order:

- The maintenance of distinct communities.

- Acknowledgment of natural or built boundaries between communities.

- Use of easily identifiable boundaries.

- Accommodation of future growth.

15 However, although the City later said that "City Council has agreed" to these criteria (differently worded), the Board was shown no Council Resolution doing so. Indeed, the team's ward scenarios and maps were prepared before criteria were even submitted for approval.

16 As of September, staff also had in hand two other key categories of information:

Actual Ward Scenarios: - "Staff have prepared preliminary ward boundary options for 5, 6 and 7 ward configurations, though it is recommended that only the configurations for 5 and 6 wards be presented for public consultation" (there was stated concern about the cost of more ward Councillors).

- However, the City decided not to show these "options" or maps to the public, at least not initially; consultation would focus instead on "the importance of the ward boundary *criteria* to the citizens". Maps were distributed only months later. "The (Council Committee of the Whole) wanted to take an approach which ensured that the public consultation process was not prejudiced by the presentation of concrete options".

Population Projections: - These were by planner Todd Coles in August. He said "assumptions" in his methodology relied on 2006 Census data, combined with "major areas for development outlined in OPA 600" (Official Plan Amendment No. 600).

- His projections did *not* rely on other planning instruments.

17 For example, Mr. Coles made only limited use of the Region's new draft Official Plan (OP), the City's own draft OP (*Vaughan Tomorrow*), and the Growth Plan for the Greater Golden Horseshoe. Because the Region's population forecasts were not broken down by neighbourhood, he called them "virtually unusable when trying to project ward boundaries". There were also methodological differences. Whereas other instruments called for intensification specifically in built-up areas, Mr. Coles' assumption was for intensification *evenly* distributed throughout the city (including rural areas, and the Oak Ridges Moraine), cancelling out any *relative* population growth specific to intensification in any one area; and by discounting development under other instruments, he attributed relative population growth to only seven of 42 areas in the city (Exhibit 5, page 164). Elsewhere, he said, "developments will balance out at the end of the day".

18 He did not count, for example, approved new development in the Steeles Corridor (11,000 people) or the approved Vaughan Metropolitan Centre (27,745 people). Cumulatively, Mr. Coles'

prediction was for a 2018 city population of 317,018 -- whereas the Regional OP predicted that two years *earlier*, in 2016, it would already have reached 329,100 (the City's Senior Planner, Mr. Robinson, testified that the City had a record of routinely exceeding even *those* OP growth estimates).

19 Mr. Coles did not vet his projections with anyone outside the City, nor update any of those projections since September, 2008. He did discuss them with Mr. Robinson; but Mr. Robinson's own work would not rely on Mr. Coles' projections.

20 After the September meeting, the next methodological step was on November 24, 2009. The City reiterated the September criteria, and undertook a "survey" (Questionnaire) for the general public. That Questionnaire, in turn, was described in a City News Release, and distributed to ratepayers' associations and to 3775 addresses on the City's e-mail list. The Questionnaire presented the criteria differently from the September document -- four factors instead of five, and in different language:

> City Council has agreed that subject to the overriding principle of "effective representation", the Ward Boundary Review should have regards for the following principles, in no particular order:
>
> - Consideration of representation by population,
>
> - Protection of communities of interest and neighbourhoods,
>
> - Consideration of present and future population trends, and,
>
> - Consideration of physical features as natural boundaries.

21 The Questionnaire also invited input on how "to *rank* each of the above criteria" -- though it appears the City never did any further ranking.

22 In this city of 280,000 residents, only 93 responses were received. Of that 93, 17% of respondents did not know which ward they lived in now.

23 In December, however, the City received input from the York Region District School Board. School boards also use City ward boundaries for trustee elections. It asked that another criterion be considered, namely "the distribution of the number of schools allocated between trustees in the new ward alignments". It offered examples, including an "Option 1" which would extend Ward 4 to include Carville Village northward to the Urban Boundary along Teston Road (Exhibit 33).

24 On February 2, 2009, the Clerk reported on public consultation. He referred to the same five criteria as in September and November (not the four criteria in the Questionnaire, or the extra criterion requested by the School Board). This time, his report included the maps, with six scenarios -- with population projections for 2010, 2014 and 2018: three scenarios at five wards each (called 5A, 5B and 5C) and three at six wards each (6A, 6B and 6C). 5A's boundary changes were modest; but In 5B and 5C, Ward 3 disappeared (split between Wards 1 and 2; a new ward would be created east of Highway 400). The six-ward scenarios, would also have various impacts on existing boundaries.

25 On February 24, matters were considered again. Members of Council added six new proposals (called Councillor Submissions), with two more added shortly thereafter.

26 On March 9, an "Open House" meeting was held, with a profusion of scenarios on display (the existing wards, the six scenarios from the Clerk, and 6-8 Councillor Submissions). Although the multiple options were posted, there was no summary. Less than 20 members of the public attended. Mr. Coles told the hearing that "the public was involved", and that this was a "reasonable turnout at the Open House".

27 At the Open House, the City also received a preliminary alternative proposal (authored primarily by Mr. Greco), later committed to writing as Public Submission #1 (PS1). The Clerk called it a "minor variation" on his Scenario 5B.

28 PS1 and the other fifteen options were before Council's Committee of the Whole on March 31. The Clerk formally recommended that Council select either:

- (In the case on five wards) his Scenario 5B, or

- (In the case of six wards) Councillor Submission #2A.

29 The Minutes reiterated criteria -- now changed, without explanation: (a) they now appeared in different order; (b) for the first time in five reports, reference to a "2018 Census" was deleted (there is no Census in 2018); and (c) there was now the addition of a new criterion, namely "recognition of communities of interest".

30 On April 14, 2009, the decision was deferred; but the Committee of the Whole formally recommended the following:

> That staff prepare a report on a clear, concise and neutral question to be placed on the ballot for the 2010 General Municipal Election, seeking the opinion of the electors on whether the City of Vaughan should increase its number of wards to six for the 2014 Municipal Election...

31 At about the same time, Regional Councillors (elected at large, and hence unaffected by ward boundaries) chose to intervene. On April 8, in what she called "a significant change", Regional Councillor Joyce Frustaglio presented a proposal with some resemblance to 5C, though Ward 4 would look quite different. This was called Scenario 5D. Then on April 16, Regional Councillor Mario Ferri submitted his own adaptation of Councillor Frustaglio's scenario. This was labelled 5E.

32 City staff did mapping and population projections, but did not otherwise comment. The Clerk explained that staff had not been asked to. "There was no need for me to separately recite a recommendation".

33 School boards also intervened:

- On April 8, 2009, the Director of Education of the York Region District School Board wrote: "The Board supports Public Submission #1".

- On the other hand, on April 29, two trustees of the York Catholic District School Board wrote with three options to adjust the boundaries in Councillor Ferri's Scenario 5E, near one of its schools. These three options became known as Scenarios 5F, 5G and 5H.

There is no record of any response to the public board. The views of the Catholic board, on the other hand, were cited in the Clerk's memo to Council on May 4.

34 Council met on May 5. Aside from the normal Notice of Meeting, and the ongoing list of various scenarios on the City Website, there was no specific notice to the public either of the final scenario for consideration, or that a decision was immediately pending. Council adopted Scenario 5G, in By-law 89-2009. The Appellant appealed to this Board, under Section 222(4) of the *Municipal Act.*

35 The ward changes under the By-law were summarized at Exhibit 14:

Ward 1:	It would lose the rural area east of Keele Street to Ward 4, and would no longer contain the entirety of the rural-urban interface (that area south of Teston Road is already within the Urban Boundary, but the area north of Teston Road is not).
	By the same token, it would lose the urban area east of Keele Street and south of Teston Road (the rapidly-developing Carville Village area).
	Between Highway 400 and Pine Valley Drive, it would lose the area south of Teston Road to Ward 3.
	It would retain the communities of Kleinburg and Maple in their entirety.
	It would gain the Sherwood area, a small residential enclave south of Rutherford Road, treated as an extension of Maple.
Ward 2:	This Woodbridge ward, west of Boyd Conservation Area, was unchanged.
Ward 3:	This Woodbridge area, east of Boyd Conservation Area, and west of Highway 400, would be projected directly northward to Teston Road, acquiring a rectangle of land previously in Ward 1.
Ward 4:	This ward would become complicated: It would gain the Carville Village area from Ward 1, east of the CNR railway track and north of Rutherford Road to MacNaughton Road.
	Beyond MacNaughton Road, it would gain the area east of Keele Street from Ward 1, including not only the urban area to the Urban Boundary, but also the rural area north of Teston Road, to the edge of the Township of King.
	It would lose the small Sherwood area to Ward 1.
	It would retain the Glenshields and Brownridge areas south of Highway 407, and south of Centre Street in Thornhill, but west of New Westminster Drive.
	It would lose part of an area called Thornhill Woods, east of Thornhill Woods Drive, to Ward 5.
	It would lose the Beverley Glen area south of Highway 407 and north of Centre Street, again to Ward 5.
Ward 5:	Ward 5 would expand – but not to the entire area south of Highway 407. Instead, it would expand northwest of Centre Street and New Westminster Drive (the Beverley Glen area, *between* the rest of Ward 4 and the Glenshields/Brownridge areas in Ward 4, isolating the latter from other residential areas in that ward).
	Ward 5 would also hop Highway 407 into Ward 4, absorbing part of Thornhill Woods east of Thornhill Woods Drive.

4. CRITERIA

36 The Board's jurisdiction, in ward boundary matters, is set out at Section 222 of the *Municipal Act*:

> 222(1) Without limiting sections 9, 10 and 11, those sections authorize a municipality to divide or redivide the municipality into wards or to dissolve the existing wards.
>
> 222(4) Within 45 days after a by-law described in subsection (1) is passed, the Minister or any other person or agency may appeal to the Ontario Municipal Board by filing a notice of appeal with the municipality setting out the objections to the by-law and the reasons in support of the objections.
>
> 222(7) The Board shall hear the appeal and may, despite any Act, make an order affirming, amending or repealing the by-law.

37 This language appears unrestricted. In ***Savage et al. v. City of Niagara Falls*** **[2002] O.M.B.D. No. 1074**, the Board noted criteria which had existed in previous legislation, when then Section 13(5) of the *Municipal Act* required Council to give notice of its intention to pass the by-law redrawing boundaries, and to hold at least one public meeting to consider same. Section 13(6) added that there could also be Ministerial "prescribed criteria". Subsequent amendments specified neither notice, nor a public meeting; and though they continued to refer to prescribed criteria, no such criteria were ever prescribed. The Board concluded:

> 1. (The *Act*) contains no criteria to govern a municipal council's decision to pass by-laws changing its system of electoral representation...
>
> 2. There has been no regulation... by the Minister to prescribe the criteria...

38 But though there are no Provincial criteria, there is jurisprudence. There was no dispute that the leading case was ***Re Provincial Electoral Boundaries (Sask.)*** **[1991] 2 S.C.R. 158** (the *Carter* case), where the Supreme Court of Canada considered the fundamentals of electoral rights, and systems of representation. The right to vote is set out at Section 3 of the *Canadian Charter of Rights and Freedoms*; and although the *Charter* specifies elections for the House of Commons and legislative assemblies (not municipal elections), the Board adopted this approach at the municipal level, notably in two Ottawa Decisions, ***Ottawa (City) v. Osgoode Rural Community Association*** **(2003), 45 O.M.B.R. 129** and ***Kilrea et al. v. City of Ottawa*** **[2005] O.M.B.D. 1243**.

39 In *Carter*, Madame Justice McLachlin (as she then was) stated:

> 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 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"...

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... The result will be uneven and unfair representation.

But parity of voting power, though of prime importance, is not the only factor... in ensuring effective representation...

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. First, absolute parity is impossible. It is impossible to draw boundary lines which guarantee exactly the same number of voters in each district...

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.

It emerges therefore that the 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, 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".

... The process (in this case), 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...
>
> ... It may be useful to mention some of the factors other than equality of voting power which figure in the analysis. One of the most important is the fact that it is more difficult to represent rural ridings than urban... Thus the goal of effective representation may justify somewhat lower voter populations in rural areas. Another factor... is geographic boundaries... Yet another factor is growth projections. Given that the boundaries will govern for a number of years,... projected population changes within that period may justify a deviation from strict equality at the time the boundaries are drawn.

40 In ***Ottawa (City) v. Osgoode etc.*** **(2003),** the Board followed Carter, as follows:

> The reasoning of Madame Justice McLachlin in *Carter*, has been adopted in previous decisions of this Board where municipal ward boundaries were being reviewed. The Board must be satisfied in such a review that a change to ward boundaries will not run the risk (of) providing inadequate representation to different interests, localities and communities within the City.

In the subsequent ***Kilrea et al. v. Ottawa*** **(2005),** the Board reaffirmed that it "must consider the common law as particularly set out in the *Carter* decision". *Carter* has also been repeatedly applied in other Board Decisions, e.g. ***Gatward et al. v. County of Brant,*** **[2005] O.M.B.D. 1417,** and ***Lauer v. City of Oshawa,*** **[2005] O.M.B.D. 1416.**

5. POSITIONS

41 There were competing preferences. The following chart summarizes aspects of the four options most discussed:

- The status quo ante (i.e., prior to adoption of the By-law under appeal),
- The Clerk's recommended five-ward Scenario 5B,
- The City's adopted By-law 89-2009, and
- Scenario PS1, advanced by some participants, and supported by the

District School Board.

The aspects illustrated in the chart below are drawn from the City's stated criteria. They were those most in contention, as described later in this section. This Decision does not discuss options with more than five wards -- not because Council opposed the expense of adding another ward Councillor (at least for now), but because that prospect was not seriously pursued by anyone at the hearing. Councillor Frustaglio expressed concern about further ward reviews also being "expensive and time-consuming", though the Board will return to that question later. Population variances are based on the City's projections, except for PS1, which is based on the proponents' calculation (Exhibit 26),

Criteria	Status quo ante	Scenario 5B	By-Law 89-2009	Scenario PS1
Population variance greater than 15%	In 2010 election, variance in 2 wards reaches 47% and 30%, and grows worse thereafter	In 2010 election, variances in 3 wards reach 25%, 22% and 17%, but grow better thereafter	In 2010 election, all variances are under 5%, but grow larger thereafter	In 2010 election, variances in 3 wards reach 30%, 22% and 17%, but grow better thereafter
Maintenance of distinct communities, and recognition of communities of interest	The rural area, and the urban-rural interface, united in a single ward	Rural area split	Rural area split	Rural area split
	Maple united	Maple split	Maple united	Maple united
	Maplewood Ravines united with Maple	Maplewood Ravines united with Maple	Maplewood Ravines split from Maple	Maplewood Ravines united with Maple
	East-West halves of Woodbridge split	East-West halves of Woodbridge united;	East-West halves of Woodbridge split;	East-West halves of Woodbridge united
	Woodbridge Extension Area split from Kleinburg	Woodbridge Extension Area united with Kleinburg	Woodbridge Extension Area split from Kleinburg	Woodbridge Extension Area united with Kleinburg
Criteria	**Status quo ante**	**Scenario 5B**	**By-Law 89-2009**	**Scenario PS1**
Acknowledgment of natural or built boundaries between communities, and use of easily identifiable boundaries	Residential area south of Hwy 407 split between Concord and Thornhill	Residential area south of Hwy 407 united (Ward 5)	Residential area south of Hwy 407 split between Concord and Thornhill	Residential area south of Highway 407 united (Ward 5)
	Residential area southeast of Maple and north of Hwy 407 united	Residential area southeast of Maple and north of Hwy 407 united	Residential area southeast of Maple and north of Hwy 407 split	Residential area southeast of Maple and north of Hwy 407 united
	Ward 4 hops Hwy 407		Both Wards 4 and 5 hop Hwy 407	
Accommodation of future growth	Ward populations already out of balance. With future growth, they were projected to be more imbalanced by 2014, and dramatically so by 2018, where variances in 3 wards reach 85%, 40% and 18%.	By 2014 election, all variances drop to under 15%, and drop further in 2018	By 2018, variances in 3 wards reach 32%, 18% and 15%.. Ward 4 projections, of 32% excess population, do not include Vaughan Metropolitan Centre	By 2014 election, all variances drop to under 12%, and drop slightly in 2018

42 The City asked that By-law 89-2009 be upheld. It called maintenance of the status quo ante "unconscionable". At the hearing, the City called its staff to explain its methodology, but called no outside experts to corroborate it.

43 The Appellant argued the By-law should simply be repealed, on the grounds that the process was flawed, and that the new boundaries were arbitrary. This would return to the status quo ante. The Appellant relied on two experts, Dr. Ronald Landes and Dr. Robert Williams. Both have doctorates in Political Science, advise other governments on boundary issues, and were highly critical of process and outcome.

44 Participants C. Liddy and J. Fedele also called for simple repeal. So did F. Stadler, of the Maplewood Ravines Community Association; he added that his rural area, east of Keele Street, should not have been split from Maple.

45 Participants F. Greco and D. Schulte argued that instead of simple repeal, the Board should exercise its jurisdiction under Section 222(7) of the *Municipal Act*, to *amend* the By-law in accordance with Public Submission #1 (PS1).

46 Ms T. Chiaralla, trustee for the York Catholic District School Board, had no objection to the By-law. She had learned of proposed boundary changes -- affecting her own trustee election -- by surfing the net; but she was satisfied that when she and another trustee requested changes, their suggestions were heeded. Ms A. DeBartolo, trustee for the York Region District School Board, said her board had a different message about the "lack of consultation": "We are usually neglected". Although her board preferred PS1, it would accept the new By-law -- because almost anything was an improvement over the "unmanageable" status quo.

47 Participant A. Kay, President of the unincorporated Maple Village Ratepayers Association, drew attention to the Sherwood area -- a manifest residential extension of Maple, south of Rutherford Road. For some reason, it had been orphaned in a sea of industrial land in neighbouring Ward 4 -- under the status quo, the Clerk's Scenario 5B, and Scenario PS1. It was reunited with Maple under By-law 89-2009.

48 Participant R. Klein, of the Kleinburg and Area Residents Association, supported Council and opposed spending on more ward Councillors: "The current economic situation does not support additional costs... The public are not prepared to support any additional government costs". He added that his ward's separation from Woodbridge should be at Major Mackenzie Road, not Rutherford Road. Reverend Keenan also supported Council, arguing that the new By-law "does more good than harm", and that its process was both fair, and "above and beyond normal public participation". "To go back and spend any more money would be inappropriate".

49 There were questions about good faith, in terms of both optics and substance. Dr. Williams said ward scenarios should not be generated by people mindful of their own "electoral possibilities" (or those of their "friends"). "The electoral hen-house is in the hands of the foxes". Participant

Greco suggested it was more than coincidence that Council rejected the Clerk's recommended Scenario 5B (to which PS1 was, in the Clerk's words, a "minor variation"), because it eliminated Ward 3, meaning two incumbents might have to run against each other. Participant R. Lorello produced calculations (Exhibit 31) on how By-law 89-2009 allowed incumbents to jettison weak polls in their wards. The City's planner, Mr. Coles, replied (Exhibit 40) that in the rural area being removed from Ward 1, the incumbent had polled 31% of the vote.

50 The Board, however, is circumspect: bad faith is never presumed. In any event, the Board is satisfied that matters can be resolved on more objective grounds.

6. OBSERVATIONS AND FINDINGS

6.1 Introduction

51 Electoral boundaries are not to be taken lightly. Public allegiance toward a given geographic area is among the underpinnings of democracy. One of the Appellant's experts, Dr. Landes, agreed that too many revisions to boundaries can be "disruptive". Furthermore, as the Board was told repeatedly, changes can cost money.

52 It was common ground, however, that voting is a constitutional right, with all that this entails. It is also the focus of increasing concern, as turnout rates at all electoral levels continue to drop. Instilling confidence in the municipal democratic process, and inspiring the public to participate, is as urgent a challenge in Vaughan as elsewhere: turnout in the last local election was 38%.

53 In ***Gatward v. Brant***, the Board said "the determination of ward boundaries is anything but a simple arithmetic calculation". In the words of Dr. Landes, "when you draw boundaries, it's a judgment call. It's a matter of nuance". Nonetheless, it is a process with parameters defined by the Courts, notably in *Carter*. However, before addressing whether the *outcome* of By-law 2009 complied with those requirements, the first question raised by the Appellant was whether the *process* complied.

6.2 Process

54 There was eloquent debate over procedural requirements for ward review. Counsel for the Appellant argued that some were necessarily inferred from *Carter*. He pointed to the Prince Edward Island Supreme Court judgment in ***Charlottetown (City) v. Prince Edward Island*, (1996) 142 D.L.R. (4th) 343:** "Following the dicta of McLachlin J., one must go a step further and determine if the process was fair". Counsel for the City countered, however, that the *Municipal Act* imposes almost no such requirements; indeed, she said, the Legislature *removed* various requirements subsequent to cases cited, and one should not reinsert conditions which the Legislature discarded.

55 In the Board's view, it is imprudent to overcomplicate the process. For example,

- The fact that the ward review did not cite *Carter* by name, or use its language in defining criteria, is not decisive. That does not prove that *Carter* was ignored. The City's criteria appear, to the Board, to be a plausible paraphrase. Indeed, paraphrasing appears to have been a common practice: the City even paraphrased itself, when it produced the Questionnaire, with its *own* criteria expressed in different words.

- Notwithstanding Dr. Williams' complaint that "the electoral hen-house is in the hands of the foxes", there is no formal prerequisite that a ward review be completely at arm's length from Council. In *Carter*, McLachlin J. said: "The fact that the Legislature was involved in the readjustment does not in itself render the process arbitrary or unfair". Inversely, retaining outside consultants and undertaking an "elaborate" process is no guarantee that the process will be upheld, as witnessed in ***Ottawa v. Osgoode etc.***

- The fact that Council did not re-circulate its final preferred option, for another round of debate before adopting it, is not decisive. In ***Gatward v. Brant***, notwithstanding stricter legislation at the time, the Board said:

The appellants argue that when the Council, after hearing submissions at the formal public hearing, amended the ward structure, it should have convened another public hearing. If one follows the logic of this argument to its ultimate conclusion, there would be no finality to the matter.

- The fact that Council ultimately did not rely on staff's recommendation is also not decisive. In ***Lauer v. Oshawa,*** the Board said:

Local democracy as set out in the *Municipal Act*... requires voting on a By-law by elected representatives who may or may not accept staff advice... The Board has not been convinced by the Appellant that the Council has reached an unreasonable position. The Council has engaged in a full public process, with proper advice as to guiding principles, and with a result that improves effective representation

56 However, *Lauer's* references to "a full public process" and to "proper advice as to guiding principles" raise other questions that cannot be discounted so easily. The jurisprudence suggests that the process requirements can be divided into two categories: (a) political/consultative, and (b)

analytical/methodological.

57 Those of a political/consultative nature are the least defined; but it is clear that there is a minimum below which one does not descend. Board decisions on ward boundaries have typically delved into that aspect of process, and made a finding concerning its propriety; *Carter* also included a finding that the "process was fair". Those findings would have been unnecessary if the fairness of the process were irrelevant. In this case, the experts pursued a similar enquiry. For example,

> - They took issue with the approach of asking the public to *rank* criteria, but without disclosing maps until months into the project.
>
> - Dr. Landes argued that the role for the public, in this consultative process, was not to answer philosophical questions about ranking "criteria", but to provide helpful information on the configuration of communities of interest. Dr. Williams added that the initial question was "fruitless". "Abstract concepts won't get the public turned on".
>
> - Inversely, they said the Open House went to the opposite extreme. Dr. Williams called the multiple options "another formula for confusion... People are overwhelmed". Dr. Landes added that the public was given no advance preparation time to assess actual options; only in that way, he said, could the public meeting itself have performed its rightful role of considering them.
>
> - In particular, the public should have been shown the final preferred scenario before adoption: "Present them with an option -- *one* option".

58 In describing the entire exercise, Dr. Landes' used terms like "pseudo-democracy" and "joke". The City called no independent witnesses in rebuttal. Indeed, aside from the politicians (who were called by the Appellant under summons), none of the City's witnesses had undertaken a ward boundary review.

59 The experts' harsh assessment is difficult to evaluate, given the scant wording in the jurisprudence about the *extent* of political/consultative requirements. Jurisprudential requirements of an analytical/methodological nature, however, are clearer, based not only on *Lauer*, but on *Carter* itself, where McLachlin J. said that there were "factors other than equality of voting power which figure in the analysis". That statement clearly presupposes that such analysis exists.

60 Essential "factors" which figure in that analysis are also clear. Aside from "parity of voting power" ("of prime importance"), *Carter* identified "geography, community history, community

interests and minority representation", along with "projected population changes", though "the list is not closed".

61 So where is the evidence of that analysis in Vaughan? The Board was never shown any document indicating what terms of reference, at the outset of the review, had been assigned to the review team (Messrs Abrams, Coles and Chiarelli), before they started their projections, scenarios and maps. Indeed, criteria were submitted for official approval in September, 2008, only *after* the team had already prepared its projections, scenarios, and maps.

62 However, the problem is not just that the options were prepared before the guiding criteria were even submitted for approval. The larger issue is whether the factors itemized in *Carter* were *ever* analysed:

- Though the Board was shown nine Clerk reports on the criteria (reproduced at Exhibit 5 for September 22, 2008; November 24, 2008; February 2, 2009; February 24, 2009; March 31, 2009; April 14, 2009; April 20, 2009; May 5, 2009; plus the Open House presentation of March 9, 2009),

- And although they all *assert* that the scenarios were prepared "having regard to the criteria" (with extensive references to population, and curt references to man-made boundaries and to the geographic communities like Maple and Woodbridge),

- The Board was not shown a single sentence of analysis, indicating *how* any factor had been considered, other than population.

63 Dr. Williams argued that "a process that is so crucial to electoral democracy cannot be done in a way that is so casual". Dr. Landes was particularly pointed about the absence of memoranda on the *use* of the criteria, notably pertaining to distinct communities and the urban-rural interface. When Mr. Coles was questioned about the urban-rural aspect at the hearing, he replied: "Nobody asked for a rural ward".

64 That does not explain the absence of visible analysis. In ***Ottawa v. Osgoode etc***., despite the "elaborate" process, the outcome was struck down. As the Board later explained in ***Kilrea v. Ottawa***,

> The terms of reference for the review were flawed resulting in a flawed conclusion. The terms of reference precluded the option to increase the number of wards, and the direction to staff was that little change would occur in the inner city wards... The Board found that the task force put too much emphasis on the

> principle of representation by population instead of the principle of effective representation...

Specifically, the Board concluded in ***Ottawa v. Osgoode etc***., that there had been insufficient attention devoted to one important community of interest (also described in *Carter*) -- namely the rural community:

> The Board is loath to interfere with a decision made by a duly elected Council unless of course there are clear and compelling reasons to do so. In this case, however, the Board finds that the system established to alter the boundaries of some of the wards was flawed from the beginning in that the terms of reference as well as the process utilized by the Citizens' Task Force did not properly take into consideration the concerns of the rural community and the protection of the communities of interest that exist within that segment of the City.

65 The evidence in Vaughan was that such analysis was neither supplied nor requested. The Board was shown no documentation on how Council's own rationale complied with the City's criteria, let alone with criteria in *Carter.* The Clerk's own advice was not solicited by Council: when the Clerk was asked on cross-examination whether any Councillor had asked for additional information, the answer was no.

66 That is problematic. Although Board appeals often involve claims that City preparation was inadequate or inaccurate (often a matter of interpretation), it is another matter when the evidence of regard is altogether non-existent. In this case, the concern is not that the public record on relevant analysis (in light of *Carter*) was perfunctory, but that under most headings, it was blank.

67 Even in the City's one area of detailed analysis -- population -- the process left unanswered questions. How reliable were Mr. Coles' projections? Why would projections omit approved projects with over 37,000 people? Why would they assume intensification in the Oak Ridges Moraine? How attentive was the analysis, if it apparently took five meetings before anyone realized that the criteria overtly relied on a "2018 Census" which did not exist? And if the City's own Senior Planner would not rely on Mr. Coles' projections, why would the public? Or, for that matter, the Board?

68 That is not to suggest that the research for a ward review must be encyclopaedic. However, it cannot turn its back on *Carter* altogether. In this case, on the evidence, the Board is unable to find that the City met the minimum standard of analysis required.

6.3 Content

69 One now turns from the question of process to that of outcome.

70 This outcome was supposed to apply to elections in 2010, 2014, and 2018. In fairness to the

City Clerk and his team, that was a near-impossible task, assigned to a team with no relevant experience let alone expertise, and essentially no resources.

71 The virtual impossibility of the stated mandate was clear from the public record. The City professed to undertake ward allocation to last a decade -- but there was nothing in the City's experience to suggest this was feasible. At no point, in the last two decades, had it introduced boundaries that lasted three elections; it had trouble producing boundaries that lasted two. That was the predictable corollary of its galloping growth. Indeed, it is not clear what Council itself expected: at the very time that staff was still doing population calculations to last at least until 2018, Councillors were preparing to float an entirely new arrangement on the ballot for 2014.

72 The Board has outlined its methodological concerns about the population projections into the future. The Board finds no proper evidence on which to even attempt speculating about the appropriateness of the City's ward arrangement for 2014, let alone 2018. That leaves, however, the immediate question of 2010, for which at least the population calculations are less disputed.

73 Counsel for the Appellant conceded that for the 2010 election, By-law 89-2009 produced favourable figures for voter parity (variances all under 5%), a significant improvement over the status quo ante. He argued, however, that the failures of process invalidated the review, and that the Board should therefore repeal the By-law entirely -- thereby reinstituting the status quo ante, so that the process could start over properly. To allow the City to "stumble" into a new electoral arrangement, he said, would be improper, whatever its virtues. Counsel for the City replied that it was the return to the unbalanced status quo ante that would be unconscionable for voters.

74 But what -- *physically* -- was in dispute at the hearing?

	Physical Change	Treatment at Hearing
Ward 1:	It would lose the rural area east of Keele Street, and no longer contain the entirety of the rural-urban interface .	Criticized by the experts for splitting the rural area without due analysis.
	It would lose the urban area east of Keele Street and south of Teston Road (Carville Village area).	There was no comment.
	Between Highway 400 and Pine Valley Drive, it would lose the area south of Teston Road to Ward 3.	There was no comment.
	It would gain the Sherwood area.	Apparently general approval.
Ward 2:	None.	
Ward 3:	East of Boyd Conservation Area, and west of Highway 400, it would be projected directly northward to Teston Road.	There was no comment.
Ward 4:	It would gain the Carville Village area, east of the CNR railway track and north of Rutherford Road to MacNaughton Road.	There was no comment, except concerns about eventual excessive population (even before counting projects like the Metropolitan Centre and Steeles Corridor).
	Beyond MacNaughton Road, it would gain the area east of Keele Street, including the urban area to the Urban Boundary at Teston Road.	
	East of Keele Street, it would also extend beyond the Urban Boundary to include the rural area north of Teston Road, to the edge of the Township of King.	Criticized by the experts for splitting the rural area without due analysis, and assimilating it to urban areas extending to the Steeles Corridor.
	It would lose the small Sherwood area to Ward 1.	This appeared to have general approval.
	It would lose the Beverley Glen area south of Highway 407 and north of Centre Street.	There was no comment.
	North of Highway 407, it would lose part of Thornhill Woods, east of Thornhill Woods Drive, but it would retain the Glenshields and Brownridge areas south of Highway 407, and south of Beverley Glen.	This arrangement was criticized for disregarding the natural boundary of Highway 407. There was no explanation why ward boundaries that zig-zagged across Highway 407 would be any more logical than a boundary that did likewise across Highway 400.
Ward 5:	Ward 5 would absorb Beverley Glen, *between* the Glenshields/Brownridge areas and the rest of Ward 4.	
	It would also hop Highway 407 into Thornhill Woods, east of Thornhill Woods Drive.	

75 Dr. Williams described the outcome as "contrived": "These are not boundaries that will be helpful to the community".

76 However, were *all* those boundary changes similarly unhelpful? That is not what the testimony at the hearing disclosed. Indeed, on closer analysis, the only *physical* changes that elicited significant debate at the hearing were:

- The removal of the rural area, east of Keele Street, from Ward 1; and

- The counterintuitive boundary between Wards 4 and 5, weaving back and forth across Highway 407.

There was no visible objection, at the hearing, to the substantive outcome of any of the other changes.

77 That raises the following question. On one hand, the Board has found significant shortcomings in the City's analysis; that problem would often result in the repeal of the By-law, and a return to the status quo ante. On the other hand, should that rollback extend to changes that were never in visible substantive dispute in the first place?

78 In other matters, the Board does not normally intervene in the absence of dispute. Indeed, there are instances where other legislation formally directs that selected matters under the Board's jurisdiction be segregated, between items in dispute and those not, whereupon the latter are deemed approved. In the Board's view there is no legal or pragmatic objection to using the same longstanding approach here.

79 A legal objection would exist if there were some residual ground for concern, like some compromise on voters' constitutional rights, under *Carter* or otherwise; but in the undisputed areas here, no such compromise on their rights is apparent. There would also be a legal concern, if the Board's enabling legislation authorized it only to affirm or repeal the By-law in its entirety; but the *Municipal Act* clearly authorizes the Board to affirm a By-law in part only, by way of amendment.

80 Normally, however, there would be compelling pragmatic reasons against that approach. First, as the Board said in ***Wagar v. London (City),* [2005] O.M.B.D. 1329**, "the Board is loath to amend the map itself because of the level of detail required". Furthermore, there is usually a shortage of evidence available to the Board on possible ramifications, notably for population projections.

81 Fortuitously, those pragmatic concerns are less serious in this specific case. The maps have already been done. Furthermore,

- The population effects of a rollback, to reintegrate the rural area east of Keele Street and north of the Urban Boundary with Ward 1, are not only

known, from the data on rural polls at Exhibit 37; but that data also indicates that the affected population figures are modest. The Board notes, in passing, that this reintegration is coincidentally what the District School Board described in its "Option 1" map, recommended in its correspondence of December 16, 2008 (Exhibit 33).

- As for the boundary between Wards 4 and 5, the effects (on population alone) of using the natural boundary of Highway 407 are also known to be acceptable. That boundary was used in Scenario PS1; more importantly, a similar boundary (with only slight modifications for neighbouring lands, but no difference in population) was used in the Clerk's Scenario 5B.

82 The boundary between Wards 4 and 5, in the Clerk's Scenario 5B ("5 Ward B"), was drawn along the natural boundary of Highway 407, with slight modifications here and there to include selected industrial lands. Among five-ward scenarios, it was his preferred choice for population distribution.

83 Should the Board therefore allow the substantively undisputed provisions of the By-law to proceed -- subject to the joint caveat of reintegrating the rural area, and of adopting the Clerk's recommended boundary between Wards 4 and 5?

84 That solution is manifestly imperfect. It is potentially open to the criticism that it represents little improvement, in terms of in-depth analysis, beyond the flawed process of which the City was accused. The Board, however, has no option but to proceed on the basis of the evidence before it. If that evidence had identified objections to this outcome, in a *Carter* analysis, then matters would be different. As it is, however, among a range of problematic alternatives which are a challenge to effective representation, this outcome appears to be the one which best respects *Carter*, at least at this time.

85 Finally, the Board notes that the City originally purported to be producing boundaries that could last beyond the election of 2018. The Board makes no similar claim for the outcome of this Decision. Indeed, Counsel for the Appellant expressed the hope that there would be a new process launched after the 2010 election, and the Board shares that hope. Councillor Ferri said that "if (boundaries) are changed later, that's up to the Council of the day... The next set of Councillors who come in will have to review it". Although the Board decided in ***Kilrea v. Ottawa*** that it would not order a sunset provision to terminate a ward arrangement at a certain date, it can express its expectation that the matter will be revisited, that the task will be done properly, and (to use the phrase in ***Wagar v. London***) that "the parties make their best efforts to amend (the By-law) to capture the real successes" of the public process.

7. DECISION

86 The Board Orders that the appeal is allowed in part. By-law 89-2009 of the City of Vaughan is hereby amended as follows:

> **1.** The boundaries of Ward 1 are amended, to reintegrate into Ward 1 the lands bounded on the west by the centre line of Keele Street, on the north and east by the City limits, and on the south by the Urban Boundary.
>
> **2.** The boundary between Wards 4 and 5 is amended, to follow roughly the natural boundary of Highway 407, corresponding to the boundary as illustrated at "Scenario 5 Ward 'B'", prepared by the City Clerk, as it appears at Exhibit 5.

87 The appeal is otherwise dismissed. This is the Order of the Board.

M.C. DENHEZ
MEMBER

TAB 15

Update Week 2005-48

Planning

Case Name:

Teno v. Lakeshore (Town)

Richard Teno has applied to the Ontario Municipal Board under section 223 of the Municipal Act, S.O. 2001 c. 25, resulting from a petition to redivide the Corporation of the Town of Lakeshore to change the composition of each ward to have nearly the same number of eligible voters
O.M.B. File No. M050092

[2005] O.M.B.D. No. 1245

51 O.M.B.R. 473

File Nos. PL050678, M050092

Ontario Municipal Board

S.D. Rogers (Member)

November 2, 2005.

(50 paras.)

COUNSEL:

J. Renick, for Town of Lakeshore.

R. Teno, on his own behalf.

DECISION DELIVERED BY S.D. ROGERS AND ORDER OF THE BOARD:--

The Nature of the Hearing

1 This is a hearing pursuant to an application under Section 223 of the Municipal Act, S.O. 2001, c. 25. That section provides that the electors of a municipality representing 1 per cent of the electors in the municipality or 500 electors, whichever is less, may present a petition to the council asking the council to pass a by-law dividing or redividing the municipality into Wards or dissolving the existing wards.

2 Should the Council of the municipality not pass a by-law in accordance with the petition within 30 days after receiving the petition, any of the electors who signed the petition may apply to the Ontario Municipal Board to have the municipality divided or redivided into wards or to have the existing wards dissolved.

History

3 This is the second such petition and subsequent Board hearing in the past 3 years in this municipality. In the summer of 2002 a petition was submitted to council asking for a dissolution of the existing ward boundaries, an election of Councillors at large and a reduction in the number of Council members. An application was subsequently made to the Ontario Municipal Board to dissolve the wards. That application was denied. (Decision 1770/2002, December 19, 2002).

4 The history of the current petition is as follows. In July 2004, Mr. R. Teno submitted a petition to Council for the Township of Lakeshore requesting that the ward boundaries be redivided to more fairly and equally represent the Township's population. At the meeting at which the petition was presented, Mr. Teno suggested that there be approximately 4,000 voters per elected official, thereby creating six wards with one representative each and a Mayor to be elected at large. The Deputy Mayor would be appointed from within the newly elected Council. This system, Mr Teno asserts, would provide for a more democratic and representative Council.

5 The present ward boundary system generally reflects the boundaries of the 5 townships which were amalgamated in 1999; the Township of Rochester, the Town of Belle River, the Township of Maidstone, and the Townships of North Tilbury and West Tilbury. The number of electors as of 2002 was as follows:

Ward 1 (Maidstone)	10,198	3 Councillors

Ward 2 (Belle River)	3,668	1 Councillor
Ward 3 (Rochester)	3,791	1 Councillor
Ward 4 (Tilbury North)	3,206	1 Councillor
Ward 5 (Tilbury West)	1,478	1 Councillor

Mayor and Deputy Mayor elected at large.

6 However, since 2002, the population of the northwest portion of the Town has increased substantially with a great deal of residential development east and west of Belle River along the shoreline. The evidence was that presently, Ward 1 has some 13,000 electors based on developments that are approved and have been built. Ward 5, on the other hand has experienced no population growth. More residential and industrial development is expected in the coming years in Ward 1, with an expectation that in 2010 there will be somewhere in the vicinity of 16,000 electors.

7 The petition by Mr. Teno was certified by the Town Clerk and on November 9, 2004, Council directed staff to prepare a report to redivide the municipality into wards including a recommendation on the appropriate size of Council in the redivided scenario.

8 In May of 2005, after 6 months of study, which included a review of literature and reports on different municipal electoral models and a survey of 148 municipalities across Ontario having approximately the same population as the Town of Lakeshore, staff presented a report to the Council recommending a 6 ward system, with one Councillor being elected from each of the six wards, and the Mayor elected at large. The report further recommended that the Deputy Mayor be appointed by the Council from among the members of Council.

9 After some discussion, Council directed staff to host two public meetings on June 27 and June 28, 2005 to present three models for ward boundary adjustments, consisting of 5 ward representatives, and the Mayor and Deputy Mayor elected at large. Thus there was a direction that the staff bring to the public a 7 member Council model. Mr. Phipps advised the Board that staff viewed the council direction as a rejection of the 6 ward model.

10 Staff therefore prepared 3 options for presentation to the public which would reduce the number of Council members to 7, with the Mayor and Deputy Mayor elected at large. Option 1 provided for 3 wards with 2 wards being represented by 2 Councillors. Option 2 provided for 5

wards, with 1 Councillor per ward. Option 3 provided for 2 wards, with one having 3 Councillors and one ward having 2 Councillors. The public meetings were duly publicized and held. The Town received submissions at those meetings and via petition, mail and email. There were other suggested ward boundary divisions by members,of the public.

11 The date for the OMB hearing of the application on this matter was settled on September 23, 2005. On October 12, 2005, Council received a report which reviewed the comments and other proposals received during the time allowed for public comment. The staff recommended that Council adopt Option 2 providing for 5 wards. Generally, the report concluded that each of the models suggested by members of the public resulted in a substantial inequality in electoral representation for at least one of the wards. Council deferred the consideration of ward boundary adjustment until Thursday, October 20, 2005, a date five days before the commencement date of this hearing.

12 At the meeting of October 20, 2005, a motion for a redivided 6 ward system was defeated, as was a motion for a redivided 5 ward system as proposed in staffs Option 2. As well a motion to reduce the number of Council members from 9 members to 7 members was defeated. A motion to retain the current system of representation with the same number of Councillors and wards was passed.

The Hearing

13 At the commencement of the hearing, the Board was advised that both sides of the issue, the Town and Mr. Teno representing the petitioning electors, would rely on one witness, Mr. M. Phipps, the Chief Administrative Officer for the Town and the author of the reports and studies that were presented to Council on this issue. The reports prepared by Mr. Phipps had recommended, in the first instance, a 6 ward model, and in the second instance, a 5 ward model.

14 The Board was also advised that Mr. Teno supported the 6 ward boundary model originally proposed by staff in May of 2005. Counsel for the City advised that it was, in accordance with the decision of Council on October 20, 2005, supporting the status quo, but that it would be presenting no evidence in support of that position. The Board expressed some concern about the lack of evidence to be presented by the Town.

15 Counsel for the Town also advised the Board that it was the Town's position that the Board had no authority to direct a change in the composition of Council, but only had authority to re-divide the wards or dissolve the wards. A reading of the Municipal Act confirmed this. The Board advised Mr. Teno, the petitioner, that it had no jurisdiction to make a decision with respect to the number of Councillors or the composition of Council. Thus it would appear that if the Board was to be persuaded that a redivision of the wards was merited, it is Council who must then determine how the 9 individuals it has determined should be on Council, would represent those wards. Therefore the Board must be sensitive to the fact that it will be a 9 member council, and ensure that any ward redivision can work, in light of the number of council members.

16 There was only one professional witness before the Board; Mr. M. Phipps, Chief Administrative Officer for the Town of Lakeshore. He has had some 40 years of experience in municipal administration - with 24 years as CAO of the Township of Hardwick and 39 years as the General Manager of Strategic Planning and Development in Chatham-Kent. In his previous positions, he was involved with issues related to ward boundaries and has participated in research on ward boundary matters in these positions. He is knowledgeable and well-qualified in the area of municipal administration and in the area of electoral boundary adjustment.

17 Mr. Phipps gave evidence as to the history of the matter which has been recited by the Board previously in this decision. A review of each of his reports on this matter, indicate that the reports were well-researched, thoroughly considered, and well reasoned. He demonstrated an exceptional grasp of the principles of electoral representation and how they should and could be applied in this municipality.

18 Under questioning by the Board, he gave his opinion on the preferred models of governance, given the decision by Council to keep a 9 member council. He supported each of his preferred options with reference to considerations of equality of population, of future anticipated and confirmed population growth, and with reference to the nuances of representing communities of interest. The Board will rely heavily on Mr. Phipp's evidence in its decision.

19 The Board also heard from Mr. Bob Miner who supported the existing ward boundaries, but with Ward 1, the larger of the wards, being subdivided into three wards. It was his position that the historic communities should be preserved at all costs, and expressed his fear that a redivision of ward boundaries as proposed by Mr. Phipps would operate to eliminate the historic communities.

20 The Board heard from Ms. Joanne Rhoads who indicated that she felt there should be more public education and consideration than there had been, and submitted a concern that there may be some communities of interest who would not be represented. The Board heard from Mr. Robert Seguin, who gave his opinion that the current system was not representative and should be changed to more fairly represent the larger population of the more urban lakeshore communities.

21 After consideration of the Board's concerns at the commencement of the hearing, counsel for the Town elected to re-call Mr. Phipps to give his opinion on the existing ward boundary system. He also called the Mayor of the Town who gave evidence as to his view of the lack of public support for a redivision of ward boundaries. The Mayor also testified that, in his view the Council functions well, and that the electors are well-represented, and that the decision of the Council not to make any changes to the electoral boundaries was the right one.

Operative Principles

22 The Board has reviewed the OMB cases on ward boundaries referred to it by counsel for the Town, as well as the case by the Supreme Court of Canada which outlines the principles of electoral boundary creation. From this review, the Board will outline the principles on which it will rely in

making it's decision.

23 In the seminal case on effective electoral representation, The Attorney General for Saskatchewan v. Roger Carter et al. [1991] 2 S.C.R. 158, the Supreme Court of Canada ruled on whether variances can be tolerated in the size of voter populations among constituencies and the distribution of those constituencies among urban, rural and northern areas for provincial electoral districts.

24 In that case, Mrs. Justice McLaughlin determined that Section 3 of the Charter of Rights, which establishes that every citizen has the right to vote in an election of federal or provincial members of parliament establishes the right to "effective representation". Effective 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".

25 The Court held that the first condition of effective representation is relative parity of voting power. The Court states at page 183:

> " ... A system which dilutes one citizen's vote unduly as compared with another citizens' vote runs the risk of providing inadequate representation to the citizen whose vote is diluted. The legislative power of the 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 ...
>
> 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.
>
> 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.
>
> 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 representations, the list is not closed.

> It emerges therefore that deviations from absolute voter parity my 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." (Emphasis added)

26 The concept of effective representation has been adopted by municipalities and by this Board in various ways in considering the question of an appropriate electoral model for ward boundaries. In the hearing before the Board, the parties relied on the following criteria in determining the ward boundary model which would deliver effective representation:

1. Does it equitably distribute the population and the electors?
2. Does it respect identifiable communities of interest?
3. Does it utilize natural, physical boundaries that are locally recognized?
4. Does it serve the larger public interest of all electors of the municipality in contrast to the interest of a small group?
5. Does it have a broad public support?

27 Other communities have suggested that the guiding principles be 1) representation by population; 2) representation of communities; 3) recognition of distinct geographic and infrastructure elements; 4) recognition of future population growth.

28 As well from the cases, the Board notes that there are various views on the tolerance factor for a deviation in the principle of equality of vote (meaning electoral boundaries which divide the population evenly). In the cases presented to the Board, a factor of 25% to 33% has been suggested as tolerable, if supportive of more effective representation.

29 The Board finds that in assessing whether ward boundaries should be redivided, the overriding principle is voter parity as cited by the Supreme Court of Canada. Any deviations from voter parity must be justified based on the other factors referred to by the Supreme Court and by this Board, in a manner which supports the notion that in the absence of this deviation, there would be a loss of effective representation. Thus any deviation factor whether it be 1% or 33% must be supportive of a more effective representation of the electors and their interests.

30 The Board also finds that the criteria of "broad public support" is not a relevant criteria for the Board in assessing whether there should be a redivision of ward boundaries. While this may have been a consideration in some previous Board decisions on these matters, the idea originated from decisions made prior to the recent amendments to the Municipal Act, and prior to the decision of the Supreme Court determining how electoral boundaries must conform with the provisions of the Charter of Rights.

31 The Board has few means for assessing whether there exists broad public support for any position coming before it. Petitions, and testimony from politicians and citizens are not reliable ways of determining whether there is broad public support for an electoral boundary change.

Referendum results, depending on the wording of the question might be of more assistance to the Board but even those results must be tempered by the overriding principle of effective representation.

32 Most importantly, the concept of broad public support cannot be considered a reason to deviate from the primary principle of voter parity. An amorphous "public opinion", as filtered and interpreted by a few interested individuals is not helpful in assessing whether there exists effective representation as defined by the Supreme Court of Canada. "Public opinion" should never override effective representation.

33 Counsel for the Town, in supporting the Town's decision not to amend the ward boundaries, relied entirely on the fact that the currently elected representatives of the people had determined, from their assessment of the public mood, that there should be no change. He relied on cases which indicate that the Board prefers local solutions to the issue of electoral boundary reform, rather than a solution imposed by this Board. He therefore asserted that Council's decision should, on its own, be sufficient for the Board not to interfere in this matter. He further submitted that Council is the best judge of the public mood, and that without a strong public initiative for change, there should be none.

34 The Board agrees that this Board does prefer local solutions. However, the Board must assume that there is a reason the legislation provides for an application to this Board when a petition to redivide electoral boundaries is not acted on by the municipality. The legislation anticipates that the various positions of the interested parties can be presented to the Board and that the Board can make a decision that ensures that any decision on electoral boundaries that is made, is made in accordance with the principles set down by the Supreme Court, in interpreting the Charter of Rights. Anything else would be a derogation of the Board's duties in this regard.

35 As Mr. Yao stated in Electors of Niagara v. Niagara Falls [1996] O.M.B.D. No. 1852, when he allowed a petition to redraw ward boundaries:

> " ... The government has put in place a tribunal whereby outside persons may arbitrate disputes that are difficult to settle at the local level. This is not because the tribunal has superior wisdom, but because local interests are at an impasse."

36 Thus, this Board accepts that there must be clear and compelling reasons for the Board to interfere in a municipal council's decision on these matters, and that it may have to be demonstrated that a municipal council has acted unfairly or unreasonably in making a decision on these issues. However, if the evidence demonstrates that the decision of the municipality operates to diverge from the overriding principle of voter equity and effective representation, then the Board can only conclude that the Council has acted unreasonably. Where however, the issues are not so clear cut, then it may be that the Board may accord deference to the decision of the municipal council.

37 As Mr. Beccarea and Mr. Drury stated in Re: Niagara Falls By-law No. 2002-097 [2002]

O.M.B.D. No. 1074:

> "This Board should not lightly interfere with that decision unless there are very clear and compelling reasons to do so. The Board should be satisfied that city council acted fairly and reasonably. If the Board is so satisfied, deference should be accorded to ..... council, who are in a better position than the Board to determine what is the appropriate electoral system to provide fair and effective representation to its constituents ....
>
> The Board must be satisfied that a change to the current system will not run the risk of providing inadequate representation to different interest, localities and communities within the city. It is important that the electoral system imposed not dilute unduly a citizen's right to vote ...."

Decision and Reasons

38 In making its decision, the Board is relying on the very cogent evidence of Mr. Phipps, the only witness who has concrete experience in these matters and who has researched this particular matter extensively.

39 Mr. Phipps voiced his concern that the new citizens of this municipality, who are locating in Ward 1 in the northwest of the Town, are currently seriously under-represented on Council. He also expressed the concern that the situation would grow increasingly dire with the population growth he anticipates, after reviewing newly approved and proposed development applications.

40 Mr. Phipps reviewed a proposed new six ward, and five ward model, as well as the existing ward model. With respect to the two proposed systems, he indicated that the systems met all of the criteria on which he relied, although he was unsure about the issue of broad public support.

41 The Board has found that broad public support is not a relevant factor in these matters. However, the Board finds that there is clearly some support for a redivision of the ward boundaries by virtue of the petition that was filed and brought to this Board, and by virtue of the comments made at the public meetings held in respect to this matter.

42 Counsel for the Town asked Mr. Phipps to comment about the existing ward boundary system in terms of the four criteria. Mr. Phipps indicated that he did not feel that the existing system equitably represents the population, nor does it serve the larger public interest of all electors in the municipality. It was his view that newer citizens to the community were not being as equitably represented as the longer-term residents of the community. In that sense the present system was not serving the larger public interest, nor was it achieving the principle of voter parity.

43 In respect to the issue of communities of interest, Mr. Phipps indicated that the municipality

could be divided in a myriad of ways into small areas representing communities of interest. It was his view that the more wards, the more communities of interest that could be represented. He explained to the Board how the five ward and six ward systems represented various communities of interest, including historic communities, the residential sector, the burgeoning industrial sector, and the rural/agricultural sector.

44 Mr. Phipps indicated that his preference for an electoral model was a mixed model where there is one councillor representing each ward, with the Mayor and some other councillors elected at large. It was his view that this model achieved a good balance between representing the broader interest of the community as a whole and the specific interests of the communities within the municipality. Thus, either a five or six ward system would work with a 9 member council, with one Councillor per ward and the Mayor and two or three other councillors elected at large.

45 Based on the evidence of Mr. Phipps, and based on an analysis of the disparities in voter representation that now exist and which will continue to worsen, particularly between Ward 1 and Ward 5, the Board finds that it is untenable, and contrary to the principles set by the Supreme Court of Canada to allow the current system to continue. While it may please the long term residents of the municipality to maintain the existing ward boundaries, which reflect the historic townships which have been amalgamated, it is clearly doing a disservice to the new residents of this community, and is unfairly diluting the rights of these new citizens to voter parity.

46 Thus the Board finds that there is clear and compelling evidence to support a redivision of the ward boundaries, and that the municipality, while always acting fairly and in a way which they viewed as representing the public interest, acted unreasonably in deciding to maintain the current electoral boundary system, in the face of the information and recommendations made to them by their staff.

47 Given the evidence of Mr. Phipps with respect to how the ward boundaries reflect communities of interest, the Board finds that the six ward system originally recommended by Mr. Phipps in his report of May 3, 2005 best represents the communities of interest, both existing, and anticipated in the near future. This is the system favoured by the petitioner, Mr. Teno.

48 The Board finds that the six ward system accords with the overriding principle of effective representation. It provides a more fair and equitable representation to all citizens of the municipality; best reflects sectoral and historic communities of interest; anticipates future population growth; uses identifiable physical and geographic boundaries; and is sensitive to the size of ward that a particular councillor would be required to cover in his duties.

49 The Board therefore orders that the ward boundaries for the Town of Lakeshore be redivided in accordance with the recommended six ward boundary map contained in the report to Council for the Town of Lakeshore of the Town's Chief Administrative Officer, dated May 3, 2005 and shown in Tab 16 of Exhibit 1, at page 73.

50 This is the order of the Board.

S.D. ROGERS, Member

TAB 16

Case Name:

Natale v. Toronto (City)

RE: Anthony Natale and Justin Di Ciano, Moving Parties, and City of Toronto, Kevin Wiener, Brian Graff, Giorgio Mammoliti, James Gordon Smith and Lakeshore Planning Council Corporation, Responding Parties

[2018] O.J. No. 1180

2018 ONSC 1475

289 A.C.W.S. (3d) 843

71 M.P.L.R. (5th) 265

2018 CarswellOnt 3319

Divisional Court File No.: 41/18

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

K.E. Swinton J.

Heard: March 2, 2018.
Judgment: March 6, 2018.

(15 paras.)

Counsel:

Bruce Engell and Sylvain Rouleau, for the Moving Parties.

Glenn K.L. Chu, Diana Dimmer, Brendan O'Callaghan and Matt Schuman, for the City of Toronto, Responding Party.

Kevin Wiener, self-represented, Responding Party.

ENDORSEMENT

1 K.E. SWINTON J.:-- The moving parties Anthony Natale and Justin Di Ciano seek leave to appeal the decision of the Ontario Municipal Board (the "Board") dated December 15, 2017 that approved By-laws 267-2017 and 464-2017 of the City of Toronto with one slight change. These by-laws approved a 47 ward system for municipal elections and are intended by the City for use in the October 22, 2018 election and elections in 2022, 2026 and possibly 2030.

2 For the reasons that follow, I would dismiss the motion for leave to appeal. Accordingly, I need not address the City's alternative argument that no appeal lies to the Divisional Court pursuant to s. 96(1) of the *Ontario Municipal Board Act*, R.S.O. 1990, c. O.28 ("*OMB Act*") with respect to a decision relating to ward boundaries.

3 This motion for leave to appeal was heard at the same time as an application brought by the City for certain declarations. That application is a separate proceeding, in which I am sitting as a Superior Court judge rather than as a judge of the Divisional Court. The reasons in that application will be issued separately and at a later date.

4 An appeal lies to the Divisional Court from a decision of the Board only with leave and only on a question of law (s. 96(1), *OMB Act*). In determining whether to grant leave, the first question to be asked is whether there is some reason to doubt the correctness of the Board's decision on a question of law -- in other words, is the decision open to serious debate (*Vaughan (City) v. Rizmi Holdings Ltd.*, 2003 CarswellOnt 2907 at para. 8)? While some leave decisions consider the impact of the standard of reasonableness in answering that question, I need not enter into a consideration of whether the Board's decision would ultimately be reviewed on a reasonableness or correctness standard. In my view, there is no good reason to doubt the correctness of the Board's decision on what the moving parties described as the "conventional legal issues".

5 The moving parties concede that the Board enunciated the correct legal test to be applied in determining ward boundaries. The Board set out the principles from the Supreme Court of Canada's decision in *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 (referred to as *Carter*). The primary consideration in drawing electoral boundaries is "effective representation", which requires consideration of relative parity of voting power as well as other factors, such as geography, communities of interest, and capacity to represent (*Carter*, pp. 183-85).

6 The Board also cited its past jurisprudence holding that there should be deference to the decision of a City Council on ward boundaries, and the Board should intervene only if there are clear and compelling reasons to do so -- for example, because the City Council acted unfairly or unreasonably. While the moving parties suggested in oral argument that there should be no

deference, the Board's approach is consistent with that of the Supreme Court in *Carter*, where the majority stated that there should not be intervention with respect to an electoral map adopted by the legislature unless the boundaries are unreasonable (at p. 189).

7 The moving parties argue that the Board erred in the application of these legal principles. They submit that voter parity is the primary consideration in drawing ward boundaries, and the Board should depart from voter parity only if it can point to another factor, such as preservation of communities. They argue that the Board did not justify departing from voter parity in its reasons, and it therefore erred when it approved the new 47 ward by-law rather than their preferred option, using the 25 federal electoral ridings.

8 In this case, the City adopted their consultants' proposed ward size of 61,000, with a variance of +/- 15% deemed acceptable. The moving parties take the position that the ward boundaries should reflect the 25 federal riding boundaries, because this provides better voter parity for the 2018 election than the 47 wards that were approved. The 47 ward proposal, they submit, does not achieve voter parity until 2026.

9 I see no reason to doubt the correctness of the Board's application of the governing legal principles. The moving parties and the dissenting opinion in the Board decision see voter parity as the primary factor in setting ward boundaries. However, the Supreme Court of Canada in *Carter* emphasized that primary concern is "effective representation" (at p. 183). Relative parity is important, but so, too, are factors such as "geography, community history, community interests and minority representation", as well as other factors (at p. 184). The Supreme Court also held that growth projection can be a relevant factor, and boundaries may be drawn with a view to population growth in the future, even if that results in a departure from parity at the outset (at p. 195).

10 Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure (at para. 36). It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent" (at para. 36). The Board considered the evidence respecting voter parity and "finds that the difference between the FEDS and the 47-ward structure is not significant and will not result in an unfair election in 2018", particularly taking into account all the *Carter* criteria, including the protection of communities of interest (at para. 39). The Board found that the 47 ward structure achieves the goal of effective representation (at para. 40). It also found that the City's consultants engaged in adequate public consultation.

11 The moving parties have failed to show any arguable legal error by the Board. The moving parties are really taking issue with the Board's findings of fact, its preference for certain evidence and its weighing of the various factors that go into a finding with respect to "effective representation." There is no basis for intervention by the Divisional Court with respect to the

Board's decision to approve the by-laws.

12 The moving parties also asked for leave to appeal a "novel" question. They submit that the Board erred in law in putting in place a 47 ward structure in time to take effect in the 2018 election without ensuring that City Council passed a corresponding by-law to change the composition of Council from the present 44 councillors to 47.

13 No party asked the Board to deal with this issue. Indeed, in an appeal pursuant to s. 128 of the *City of Toronto Act*, S.O. 2006, c. 11, Sch. A ("*COTA*"), the Board's task is to determine the acceptability of ward boundaries. It does not have jurisdiction to determine the composition of council. That is the task of council itself in accordance with s. 135 of *COTA*.

14 My task, on this leave motion, is to determine whether there is reason to doubt the correctness of the Board's decision on a question of law. There is no basis to intervene on the "novel" issue, where the Board was not asked to deal with this question.

15 Accordingly, the motion for leave to appeal is dismissed. The parties have agreed that there will be no order as to costs.

K.E. SWINTON J.

TAB 17

Indexed as:

Irwin Toy Ltd. v. Québec (Attorney General)

The Attorney General of Quebec, appellant;
v.
Irwin Toy Limited, respondent;
and
Gilles Moreau in his capacity as President of the Office de la protection du consommateur, intervener;
and
The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General of British Columbia, the Attorney General for Saskatchewan, Pathonic Communications Inc., Réseau Pathonic Inc., and the Coalition contre le retour de la publicité destinée aux enfants, interveners.

[1989] 1 S.C.R. 927

[1989] 1 R.C.S. 927

[1989] S.C.J. No. 36

[1989] A.C.S. no 36

File No.: 20074.

Supreme Court of Canada

1987: November 19, 20 / 1989: April 27.

Present: Dickson C.J. and Beetz, Estey *, McIntyre, Lamer, Wilson and Le Dain * JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

* Estey and Le Dain JJ. took no part in the judgement.

Constitutional law -- Distribution of legislative powers -- Commercial advertising -- Provincial

legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation intra vires the provincial legislature -- Colourable legislation -- Impairment of federal undertakings -- Conflict with federal legislation -- Criminal law -- Constitution Act, 1867, ss. 91, 92 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Broadcasting Act, R.S.C. 1970, c. B-11, s. 3(c).

Constitutional law -- Charter of Rights -- Application -- Exception where express declaration -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation protected from the application of s. 2(b) of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision -- Canadian Charter of Rights and Freedoms, [page928] s. 33 -- Consumer Protection Act, R.S.Q., c. C-40.1, ss. 248, 249, 364 -- Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, ss. 1, 7.

Constitutional law -- Charter of Rights -- Freedom of expression -- Commercial advertising -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Scope of freedom of expression -- Whether provincial legislation infringes the guarantee of freedom of expression -- Whether limit imposed by the provincial legislation on freedom of expression justifiable under s. 1 of the Canadian Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 2(b) -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, ss. 87 to 91.

Constitutional law -- Charter of Rights -- Reasonable limits --Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Whether provincial legislation too vague to constitute a limit prescribed by law -- Whether only evidence of legislative objective contemporary with the adoption of the provincial legislation relevant to justifying provincial legislation as a reasonable limit upon freedom of expression -- Canadian Charter of Rights and Freedoms, s. 1 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249.

Constitutional law -- Charter of Rights -- Fundamental justice -- Life, liberty and security of person -- Whether corporations may invoke the protection of s. 7 of the Canadian Charter of Rights and Freedoms -- Meaning of the word "Everyone" in s. 7.

Civil rights -- Provincial human rights legislation -- Freedom of expression -- Commercial advertising -- Provincial legislation prohibiting commercial advertising directed at persons under thirteen years of age -- Scope of freedom of expression -- Whether provincial legislation infringes the guarantee of freedom of expression -- Whether limit imposed by the provincial legislation on freedom of expression justifiable under s. 9.1 of the Quebec Charter -- Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 3, 9.1 -- Consumer Protection Act, R.S.Q., c. P-40.1, ss. 248, 249 -- Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, ss. 87 to 91.

In November 1980, the respondent sought a declaration from the Superior Court that ss. 248 and

249 of the Consumer Protection Act, R.S.Q., c. P-40.1, which prohibited commercial advertising directed at persons under [page929] thirteen years of age, were ultra vires the Quebec legislature and, subsidiarily, that they infringed the Quebec Charter of Human Rights and Freedoms. The Superior Court dismissed the action. On appeal, the respondent also invoked the Canadian Charter of Rights and Freedoms which entered into force after the judgment of the Superior Court. The Court of Appeal allowed the appeal holding that the challenged provisions infringed s. 2(b) of the Canadian Charter and that the limit imposed on freedom of expression by ss. 248 and 249 was not justified under s. 1. This appeal is to determine (1) whether ss. 248 and 249 are ultra vires the Quebec legislature or rendered inoperative by conflict with s. 3 of Broadcasting Act, R.S.C. 1970, c. B-11; (2) whether they are protected from the application of the Canadian Charter by a valid and subsisting override provision; (3) whether they infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter; and if so, (4) whether the limit imposed by ss. 248 and 249 is justifiable under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter; and (5) whether they infringed s. 7 of the Canadian Charter.

Held (Beetz and McIntyre JJ. dissenting): The appeal should be allowed.

(1) Sections 248 and 249 of the Consumer Protection Act are not ultra vires the provincial legislature nor deprived of effect under s. 3 of the Broadcasting Act.
(2) The override provision in s. 364 of the Consumer Protection Act expired on June 23, 1987.
(3) Sections 248 and 249 infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.
(4) Per Dickson C.J. and Lamer and Wilson JJ. (Beetz and McIntyre JJ. dissenting): Section 248 and 249 are justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.
(5) Section 7 of the Canadian Charter cannot be invoked by the respondent.
(1) Constitution Act, 1867

Sections 248 and 249 of the Consumer Protection Act, as modified by or completed by the regulations, are, like in the Kellogg's case, legislation of general application enacted in relation to consumer protection and are not a colourable attempt, under the guise of a law of general application, to legislate in relation to television advertising. The dominant aspect of the law for purposes [page930] of characterization is the regulation of all forms of advertising directed at persons under thirteen years of age rather than the prohibition of television advertising which cannot be said to be the exclusive or even primary aim of the legislation. The relative importance of television advertising and the other forms of children's advertising subject to exemption and prohibition is not a sufficient basis for a finding of colourability.

Sections 248 and 249 do not purport to apply to television broadcast undertakings. Read together with s. 252 of the Consumer Protection Act, it is clear that ss. 248 and 249 apply to the acts of an advertiser, not to the acts of a broadcaster. The challenged provisions, therefore, do not trench on

exclusive federal jurisdiction by purporting to apply to a federal undertaking and, in so doing, affecting a vital part of its operation. Further, the importance of advertising revenues in the operation of a television broadcast undertaking and the fact that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs do not form a sufficient basis on which to conclude that the effect of the provisions was to impair the operation of the undertaking, in the sense that the undertaking was "sterilized in all its functions and activities". The most that can be said is that the provisions "may, incidentally, affect the revenue of one or more television stations".

Sections 248 and 249 are not in conflict with s. 3(c) of the Broadcasting Act. This section does not purport to prevent provincial laws of general application from having an incidental effect on broadcasting undertakings. There is also no conflict or functional incompatibility between the federal regulatory regime applicable to broadcasters adopted by the CRTC and the provincial consumer protection legislation applicable to advertisers. Both schemes have been designed to exist side by side. Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it, no conflict between the standards ever arises. It is only if advertisers seek to comply only with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is, therefore, no occasion to invoke the doctrine of paramountcy.

Finally, having found that ss. 248 and 249 were enacted pursuant to a valid provincial objective and that [page931] they do not conflict with federal regulation, it cannot be said that because there are sanctions against a breach of these sections, they are best characterized as being, in pith and substance, legislation relating to criminal law. The province has, under s. 92(15) of the Constitution Act, 1867, jurisdiction to enact penal sanctions in relation to otherwise valid provincial objectives.

(2) Application of Canadian Charter

For the reasons given in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, s. 364 of the Consumer Protection Act -- the standard override provision enacted by s. 1 of the Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21 -- came into force on June 23, 1982 and ceased to have effect on June 23, 1987. Since s. 364 was not re-enacted pursuant to s. 33(4) of the Canadian Charter, it follows that ss. 248 and 249 of the Consumer Protection Act are no longer protected from the application of the Canadian Charter by a valid and subsisting override provision.

(3) Freedom of Expression

Per Dickson C.J. and Lamer and Wilson JJ.: When faced with an alleged violation of the guarantee of freedom of expression, the first step is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression, or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity

falls within the protected sphere of conduct, the second step is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make [page932] this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing. Here, respondent's activity is not excluded from the sphere of conduct protected by freedom of expression. The government's purpose in enacting ss. 248 and 249 of the Consumer Protection Act and in promulgating ss. 87 to 91 of the Regulation respecting the application of the Consumer Protection Act was to prohibit particular content of expression in the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.

Per Beetz and McIntyre JJ.: Sections 248 and 249 of the Consumer Protection Act, which prohibit advertising aimed at children, infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter. Sections 248 and 249 restrict a form of expression -- commercial expression -- protected by s. 2(b) and s. 3.

(4) Reasonable Limits

Per Dickson C.J. and Lamer and Wilson JJ.: Sections 248 and 249, read together, are not too vague to constitute a limit prescribed by law. Section 249 can be given a sensible construction, producing no contradiction or confusion with respect to s. 248. Further, ss. 248 and 249 do not leave the courts with an inordinately wide discretion. According to s. 248, the advertisement must have commercial content and it must be aimed at those under thirteen years of age, and s. 249 directs the judge to weigh three factors relating to the context in which the advertisement was presented. Sections 248 and 249, therefore, do provide the courts with an intelligible standard to be applied in determining whether an advertisement is subject to restriction.

In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place. However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective. It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes

demonstrably pressing and substantial with the passing of time and the [page933] changing of circumstances. In this case, the question is whether the evidence submitted by the government establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. Studies subsequent to the enactment of the legislation can be used for this purpose.

Based on the s. 1 and s. 9.1 materials, ss. 248 and 249 constitute a reasonable limit upon freedom of expression and are justifiable under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter. The objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation -- to protect a group that is most vulnerable to commercial manipulation. Children are not as equipped as adults to evaluate the persuasive force of advertising. The legislature reasonably concluded that advertisers should not be able to capitalize upon children's credulity. The s. 1 and s. 9.1 materials demonstrate, on the balance of probabilities, that children up to the age of thirteen are manipulated by commercial advertising and that the objective of protecting all children in this age group is predicated on a pressing and substantial concern.

The means chosen by the government were also proportional to the objective. First, there is no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising. The government measure aims precisely at the problem identified in the s. 1 and s. 9.1 materials. It is important to note that there is no general ban on the advertising of children's products, but simply a prohibition against directing advertisements to those unaware of their persuasive intent. Commercial advertisements may clearly be directed at the true purchasers -- parents or other adults. Indeed, non-commercial educational advertising aimed at children is permitted. Second, the evidence adduced sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. Where the government is best characterized as the singular antagonist of the individual whose right has been infringed, the courts can assess with a high degree of certainty whether the least intrusive means have been chosen to achieve the government's objective. On the other hand, where the government is best characterized as mediating between the [page934] claims of competing individuals and groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources which cannot be evaluated by the courts with the same degree of certainty. Thus, while evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions. Third, there was no suggestion here that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective. Advertisers are always free to direct their message at parents and other adults. They are also free to participate in educational advertising. The real concern animating the challenge to the legislation is

that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products.

Per Beetz and McIntyre JJ. (dissenting): Sections 248 and 249 of the Consumer Protection Act are not justified under s. 1 of the Canadian Charter or s. 9(1) of the Quebec Charter. The promotion of the welfare of children is certainly an objective of pressing and substantial concern for any government, but it has not been shown in this case that their welfare was at risk because of advertising directed at them. Further, the means chosen were not proportional to the objective. A total prohibition of advertising on television aimed at children below an arbitrarily fixed age makes no attempt to achieve of proportionality.

Freedom of expression is too important a principle to be lightly cast aside or limited. Whether political, religious, artistic or commercial, freedom of expression should not be suppressed except where urgent and compelling reasons exist and then only to the extent and for [page935] the time necessary for the protection of the community. This is not such a case.

(5) Fundamental Justice

Respondent's contention that ss. 248 and 249 of the Consumer Protection Act infringe s. 7 of the Canadian Charter cannot be entertained. The proceedings in this case are brought only against the company and not against any individuals. A corporation, unlike its officers, cannot avail itself of the protection offered by s. 7. The word "Everyone" in s. 7, read in light of the rest of the section, excludes corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and includes only human beings.

Cases Cited

By the majority

Applied: Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211; R. v. Oakes, [1986] 1 S.C.R. 103; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; considered: Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail), [1988] 1 S.C.R. 749; Attorney-General for Manitoba v. Attorney-General for Canada, [1929] A.C. 260; Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161; referred to: Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767; Carnation Co. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238; Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819; Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141; Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662; Mann v. The Queen, [1966] S.C.R. 238; Smith v. The Queen, [1960] S.C.R. 776; Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460; Palko v. Connecticut, 302 U.S. 319 (1937); Switzman v. Elbling, [1957] S.C.R. 285; Eur. Court H. R., Handyside case, decision of 29 April

1976, Series A No. 24; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; R. v. Thomsen, [1988] 1 S.C.R. 640; R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713; Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Alliance des professeurs de Montréal v. Procureur général du Québec, [1985] C.A. 376; F.H. Hayhurst Co. v. Langlois, [1984] C.A. 74; Saumur v. City of Quebec, [1953] 2 S.C.R. 299.

[page936]

By the minority

Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Palko v. Connecticut, 302 U.S. 319 (1937); Switzman v. Elbling, [1957] S.C.R. 285; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573.

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Civil Code of Lower Canada, arts. 987, 1001 to 1011.
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APPEAL from a judgment of the Quebec Court of Appeal, [1986] R.J.Q. 2441, 32 D.L.R. (4th) 641, 3 Q.A.C. 285, 26 C.R.R. 193, setting aside a judgment of the Superior Court, [1982] C.S. 96. Appeal allowed, Beetz and McIntyre JJ. dissenting.

Yves de Montigny and Richard Tardif, for the appellant. Yvan Bolduc, Michel Robert, Q.C., Luc Martineau and Marie-Josée Hogue, for the respondent. Pierre Valois and Gilberte Bechara, for the intervener Gilles Moreau. Lorraine E. Weinrib, for the intervener the Attorney General for Ontario. [page938] Grant S. Garneau, for the intervener the Attorney General for New Brunswick. Joseph J. Arvay and Jennifer Button, for the intervener the Attorney General of British Columbia. Robert G. Richards, for the intervener the Attorney General for Saskatchewan. Louis-Yves Fortier, Q.C., and Michel Sylvestre, for the interveners Pathonic Communications Inc. and Réseau Pathonic Inc. Marc Legros and Diane Lajoie, for the intervener the Coalition contre le retour de la publicité destinée aux enfants.

Solicitors for the appellant: Jean-K. Samson and Yves de Montigny, Ste-Foy. Solicitors for the respondent: Heenan, Blaikie, Montréal; Robert, Dansereau, Barré, Marchessault & Lauzon,

Montréal. Solicitors for the intervener Gilles Moreau: Valois & Associés, Montréal. Solicitor for the intervener the Attorney General for Ontario: Richard F. Chaloner, Toronto. Solicitor for the intervener the Attorney General for New Brunswick: Gordon F. Gregory, Fredericton. Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria. Solicitor for the intervener the Attorney General for Saskatchewan: Brian Barrington-Foote, Regina. Solicitors for the interveners Pathonic Communications Inc. and Réseau Pathonic Inc.: Ogilvy, Renault, Montréal. Solicitors for the intervener the Coalition contre le retour de la publicité destinée aux enfants: Legros & Lajoie, Anjou.

The judgment of Dickson C.J. and Lamer and Wilson JJ. was delivered by

1 **THE CHIEF JUSTICE AND LAMER AND WILSON JJ.**:-- This appeal raises questions concerning the constitutionality, under ss. 91 and 92 of the Constitution Act, 1867, and ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, of ss. 248 and 249 of the Quebec Consumer Protection Act, R.S.Q., c. P-40.1, respecting the prohibition of television advertising directed at persons under thirteen years of age.

2 The appeal is by leave of this Court from the judgment of the Quebec Court of Appeal (Kaufman and Jacques JJ.A.; Vallerand J.A. dissenting) on September 18, 1986, [1986] R.J.Q. 2441, 32 D.L.R. (4th) 641, 3 Q.A.C. 285, 26 C.R.R. 193, allowing an appeal from the judgment of Hugessen A.C.J. of the Superior Court for the District of Montreal on January 8, 1982, [1982] C.S. 96, which dismissed the respondent's action for a declaration that ss. 248 and 249 of the Consumer Protection Act were ultra vires the legislature of the province of Quebec and subsidiarily that they were inoperative as infringing the Quebec Charter of Human Rights and Freedoms, R.S.Q. c. C-12.

[page939]

I - The Relevant Legislative and Constitutional Provisions

3 The relevant provisions of the Consumer Protection Act are ss. 248, 249 and 252, which provide:

> 248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.
>
> 249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of

(a) the nature and intended purpose of the goods advertised;
(b) the manner of presenting such advertisement;
(c) the time and place it is shown.

The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age.

252. For the purposes of sections 231, 246, 247, 248 and 250, "to advertise" or "to make use of advertising" means to prepare, utilize, distribute, publish or broadcast an advertisement, or to cause it to be distributed, published or broadcast.

4 The relevant provisions of the Regulation respecting the application of the Consumer Protection Act, R.R.Q., c. P-40.1, r. 1, are ss. 87 to 91 in Division II of Chapter VII, entitled "Advertising directed at children", which provide:

87. For the purposes of this Division, the word "child" means a person under 13 years of age.
88. An advertisement directed at children is exempt from the application of section 248 of the Act, under the following conditions:

(a) it must appear in a magazine or insert directed at children;

(b) the magazine or insert must be for sale or inserted in a publication which is for sale;

(c) the magazine or insert must be published at intervals of not more than 3 months; and [page940] (d) the advertisement must meet the requirements of section 91.

89. An advertisement directed at children is exempted from the application of section 248 of the Act if its purpose is to announce a programme or show

directed at them, provided that the advertisement is in conformity with the requirements of section 91.

90. An advertisement directed at children is exempt from the application of section 248 of the Act, if it is constituted by a store window, a display, a container, a wrapping or a label or if it appears therein, provided that the requirements of paragraphs a to g, j, k, o and p of section 91 are met.

91. For the purposes of applying sections 88, 89 and 90, an advertisement directed at children may not:

(a) exaggerate the nature, characteristics, performance or duration of goods or services;

(b) minimize the degree of skill, strength or dexterity or the age necessary to use goods or services;

(c) use a superlative to describe the characteristics of goods or services or a diminutive to indicate its cost;

(d) use a comparative or establish a comparison with the goods or services advertised;

(e) directly incite a child to buy or to urge another person to buy goods or services or to seek information about it;

(f) portray reprehensible social or family lifestyles;

(g) advertise goods or services that, because of their nature, quality or ordinary use, should not be used by children;

(h) advertise a drug or patent medicine;

(i) advertise vitamin in liquid, powdered or tablet form;

(j) portray a person acting in an imprudent manner;

(k) portray goods or services in a way that suggests an improper or dangerous use thereof;

(l) portray a person or character known to children to promote goods or services, except:

i. in the case of an artist, actor or professional announcer who does not appear in a publication or programme directed at children; [page941] ii. in the case provided for in section 89 where he is illustrated as a participant in a show directed at children.

For the purposes of this paragraph, a character created expressly to advertise goods or services is not considered a character known to children if it is used for advertising alone;

(m) use an animated cartoon process except to advertise a cartoon show directed at children;

(n) use a comic strip except to advertise a comic book directed at children;

(o) suggest that owning or using a product will develop in a child a physical, social or psychological advantage over other children of his age, or that being without the product will have the opposite effect;

(p) advertise goods in a manner misleading a child into thinking that, for the regular price of those goods, he can obtain goods other than those advertised.

Sections 3 and 9.1 of the Quebec Charter of Human Rights and Freedoms provide:

3. Every person is the possessor of the fundamental freedoms, including freedom of conscience, freedom of religion, freedom of opinion, freedom of expression, freedom of peaceful assembly and freedom of association.

9.1. In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of

the citizens of Québec.

In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

Sections 1, 2(b) and 7 of the Canadian Charter of Rights and Freedoms provide:

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

2. Everyone has the following fundamental freedoms:

. . .

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; [page942]
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice.

II -

The Respondent's Declaratory Action and the Judgments of the Superior Court and the Court of Appeal

5 In the fall of 1980 the respondent broadcast advertising messages which the Office de la protection du consommateur claimed were in contravention of ss. 248 and 249 of the Consumer Protection Act. On November 21, 1980, following several warnings from the Office, the respondent instituted an action seeking a declaration that ss. 248 and 249 of the Act were ultra vires or alternatively inoperative. In December of that year some 188 charges of contravention of the Act were laid against the respondent. According to the respondent the charges were ultimately disposed of on the basis that the court which was seized of them lacked jurisdiction: F.H. Hayhurst Co. v. Langlois, [1984] C.A. 74. An interlocutory injunction was granted against the respondent on June 26, 1981 by Landry J. of the Superior Court. That order was appealed. A motion to suspend the injunction pending the appeal was dismissed. A motion for contempt against the respondent and its vice-president was dismissed on the ground that the injunction order was too vague. The penal, injunction and contempt proceedings are not really relevant to the issues in the appeal but they serve to indicate the extent to which the respondent has become embroiled in the application of the challenged provisions and its interest in bringing its action for a declaration.

6 As appears from the judgment of Hugessen A.C.J. (as he then was), the principal contention of

the respondent was that ss. 248 and 249 of the Consumer Protection Act were colourable legislation in that, while purporting to apply generally to commercial advertising directed to persons under thirteen [page943] years of age, their true purpose or object, as indicated by the regulations and the evidence of the nature of children's advertising at the time the provisions were adopted, was to prohibit television advertising directed to persons under thirteen years of age. Hugessen A.C.J. expressed the respondent's contention as follows at p. 97: "The principal thrust of the plaintiff's [i.e. Irwin Toy's] attack is that this is colourable legislation. While the prohibition appears to be aimed at all forms of advertising directed to children, the exemptions granted by the regulations and the realities of commercial practice together result in the legislation having for principal, and indeed almost for exclusive purpose the prohibition of televised advertisements directed to children." In the Superior Court the respondent Irwin Toy adduced evidence to show that at the time the challenged provisions were adopted television was by a very large margin the advertising medium most used for children's advertising; that most of the other media used for children's advertising, such as magazines and inserts, were the subject of exemptions under ss. 87-91 of the regulations; and that the other media used for children's advertising that are not exempted from the prohibition in s. 248 of the Act are of such marginal and relatively little significance in practice as to make the prohibition in s. 248 essentially one, for all practical purposes, of television advertising alone. Hugessen A.C.J. conceded that if this were indeed the fact the legislation would be a colourable attempt to prohibit television advertising, but he took the view, acting on judicial notice of other forms of children's advertising, that the challenged provisions of the Act, as modified by the regulations, were not aimed exclusively at television advertising. Because of the submissions that were made in this Court with respect to his reasoning and findings on this issue we quote the pertinent passages of his reasons at p. 97 in full:

> There can be equally no doubt that the attacked legislation affects and is intended to affect television advertising. The words of section 249, quoted above, make this quite plain. Under the regulations, a number of other forms of advertising, notably that appearing in magazines specifically directed on children, are exempted from the prohibition. Plaintiff points out that television and children's magazines are the two principal vehicles which it uses for advertising aimed at children and that the exemption of the latter means that the [page944] legislation is directed solely at the former. Plaintiff also points out that insofar as its business is concerned, there are no other practical advertising vehicles and that it does not use radio, billboards, direct mail or any of the various other possible supports for its publicity.
>
> The argument is ingenious but seems to me to be based on a fallacious generalisation drawn from plaintiff's particular situation and practice. While it is no doubt true that plaintiff and other toy manufacturers have made heavy use of television for their advertising, it is certainly not the case that all advertising directed at children employs this medium. There is evidence before me of other

> vehicles being employed by other manufacturers who have a particular interest in the children's market and, even in the absence of such evidence, I believe I could take judicial notice of the fact that sporting goods, candy bars, breakfast cereals, fast foods, soft drinks and a whole range of other goods and services are promoted by means of advertisements directed wholly or largely at children. The vehicles employed can range all the way from billboards in hockey rinks or sports stadiums to giveaways in the form of hats or cards with pictures of athletes, to competitions or colouring books. With very few exceptions, all are covered by the prohibition in the legislation and are not exempted by the regulations. Hence the impugned sections are not aimed exclusively at television advertising.

7 Hugessen A.C.J. held that the purpose of the sections of the Act dealing with advertising, including the challenged provisions, was a valid one of consumer protection falling within provincial legislative jurisdiction under heads 13 and 16 of s. 92 of the Constitution Act, 1867. He indicated the relationship of the challenged provisions to the general purpose of the provisions respecting advertising in Title II as follows at p. 97:

> As its name implies, the Consumer Protection Act has for its purpose the protection of the consumer against questionable business practices. Amongst such practices are misleading, deceptive or unfair advertising. The whole of Title II of the Act, comprising almost forty sections including the two presently under attack, deals with this subject. The evident aim and purpose is to make it more difficult for consumers to be led into making unwise bargains or to be subjected to undue pressures. It is not unreasonable for the Legislature to view children as being a particularly vulnerable target in [page945] this respect either as purchasers and consumers in their own right or as the means through which advertisers can bring pressure to bear upon their parents. Legislation aimed at regulating and controlling such advertising has a perfectly proper provincial purpose and is within the powers assigned to the Legislature under section 92 paragr. 13 and paragr. 16 of the B.N.A. Act.

8 With respect to the contention that the challenged provisions were inoperative because they had the effect of preventing the plaintiff from advertising by means of television, a matter within exclusive federal jurisdiction, Hugessen A.C.J., referring to the distinction between the message and the medium, applied the judgment of this Court in Attorney General of Quebec v. Kellogg's Co. of Canada, [1978] 2 S.C.R. 211, in which the Court distinguished between a regulation of television advertising applied to an advertiser and one applied to a television station or broadcast undertaking. Hugessen A.C.J. found it unnecessary to deal with the contention raised in the pleadings but not pressed in argument before him that the challenged provisions infringed the Quebec Charter of Human Rights and Freedoms. He also summarily rejected a contention that the challenged provisions infringed the respondent's right to "commercial speech".

9 The respondent inscribed in appeal on January 14, 1982 from the judgment of the Superior Court dismissing its action for a declaration. On November 6, 1984, it applied to the Court of Appeal for leave to amend its declaration and inscription in appeal to invoke the Canadian Charter of Rights and Freedoms, which entered into force after the judgment of the Superior Court, and to seek, in addition to the declaration already prayed for, a declaration that ss. 248 and 249 of the Consumer Protection Act were inoperative as infringing the freedom of expression guaranteed by s. 2(b) of the Charter and a declaration that the standard override provision in s. 364 of the Consumer Protection Act, purporting to exclude the application of ss. 2 and 7 to 15 of the Charter, was ultra vires, as not being in conformity with the authority conferred [page946] by s. 33 of the Charter. Leave to amend was granted by the Court of Appeal, and on December 13, 1984 the respondent's declaration was amended accordingly. The Court of Appeal also invited the parties to submit material that would be relevant to the question of justification under s. 1 of the Charter, should the challenged provisions be found to infringe s. 2(b) thereof, and this was done.

10 Like the Superior Court, the Court of Appeal disposed of the issue of validity under the division of powers on the basis of the judgment of this Court in Kellogg's, holding, without elaboration, that the case at bar was indistinguishable from Kellogg's. On the issue of validity of the override provision in s. 364 of the Consumer Protection Act, the Court applied its judgment in Alliance des professeurs de Montréal v. Procureur général du Québec, [1985] C.A. 376, in which it had held that the standard override provision enacted by An Act respecting the Constitution Act, 1982, and subsequent statutes and purporting to exclude the application of s. 2 and ss. 7 to 15 of the Canadian Charter of Rights and Freedoms was ultra vires as not being in conformity with the authority conferred by s. 33 of the Charter. On the question of the alleged limitation of the freedom of expression guaranteed by s. 2(b) of the Charter the Court held that freedom of expression extended to commercial expression, that ss. 248 and 249 of the Consumer Protection Act infringed freedom of expression and that the limit imposed on freedom of expression by these provisions was not justified under s. 1 of the Charter. It was on this last point that the members of the Court of Appeal differed. The majority (Kaufman and Jacques JJ.A.) were of the view that the s. 1 materials did not show, in respect of television advertising directed at children between the ages of six and thirteen, a sufficiently important legislative purpose to justify an interference with a guaranteed freedom. While they accepted that the materials established that advertising had a harmful effect on children of six years of age and under, they were of the opinion that it was not shown to have any harmful effect on other children within the contemplated age group so long as the product advertised was not [page947] injurious and the advertising was fair. Vallerand J.A., dissenting on this issue, agreed with his colleagues that the s. 1 materials did not clearly establish the allegedly harmful effect of television advertising directed at persons under 13 years of age but he was of the view that there were grounds for a serious concern about the possibility of such harm and that this concern made the legislative purpose behind the challenged provisions of sufficient importance to meet the first branch of the test under s. 1 laid down in R. v. Oakes, [1986] 1 S.C.R. 103. Vallerand J.A. was further of the view that the means chosen -- the total prohibition of television advertising directed at persons under thirteen years of age -- was the only effective means of dealing with the problem and that it was proportionate to the purpose served. Vallerand J.A. further rejected the

contention that the challenged provisions were void for vagueness. In the result, the appeal from the judgment of the Superior Court was allowed and ss. 248 and 249 of the Consumer Protection Act declared to be inoperative.

III -

The Constitutional Questions and the Issues in the Appeal

11 On the appeal to this Court the following constitutional questions were stated by Beetz J. in his order of January 30, 1987:

1. Is s. 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added by s. 1 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, inconsistent with the provisions of s. 33 of the Constitution Act, 1982 and so ultra vires and of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the latter Act?
2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?
[page948]
3. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec, or are they to some degree of no force or effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?

12 The issues in the appeal in the order in which we propose to address them, to the extent necessary for the disposition of the appeal, may be summarized as follows:

1. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec or rendered inoperative by conflict with s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?
2. Are ss. 248 and 249 protected from the application of the Canadian Charter of Rights and Freedoms by a valid and subsisting override provision enacted pursuant to s. 33 of the Charter?
3. Do ss. 248 and 249 infringe the freedom of expression guaranteed by s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter of Human Rights and Freedoms?
4. If so, is the limit imposed by ss. 248 and 249 on freedom of expression justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter?
5. Do ss. 248 and 249 infringe s. 7 of the Canadian Charter by creating a liability to deprivation of liberty in terms which are impermissibly vague,

contrary to a principle of fundamental justice and to s. 1 of the Charter?

13 This appeal was heard at the same time as the appeals in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, and Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790. The issues respecting the validity of the standard override provision and whether freedom of expression extends to commercial expression are common to the three appeals. It is convenient, however, in this [page949] appeal to begin with consideration of the question of the validity or operative effect of ss. 248 and 249 of the Consumer Protection Act under the division of powers because that issue logically precedes a consideration of whether the challenged provisions infringe the Canadian Charter of Rights and Freedoms. It was the issue before the Superior Court and the issue that was disposed of first in the Court of Appeal. It was the issue on which the television broadcast interveners Pathonic Communications Inc. and Réseau Pathonic Inc. (hereinafter referred to as "Pathonic") were granted leave to intervene. While the disposition of this issue by the Court of Appeal was not, of course, a ground of appeal by the Attorney General of Quebec, he addressed submissions to this issue, as did the respondent and the interveners.

IV - Whether ss. 248 and 249 are ultra vires the Legislature of the Province of Quebec

14 Four separate issues emerge from the argument in this Court with respect to the validity or operative effect of ss. 248 and 249 of the Consumer Protection Act: (a) whether these provisions are distinguishable, in so far as their constitutional characterization is concerned, from the challenged provision of the advertising regulations under the Consumer Protection Act that was characterized by this Court in Kellogg's, supra, as having a valid provincial purpose; (b) whether, as contended by Pathonic, their effect on a television broadcast undertaking is such as to render them, despite the judgment of the Court in Kellogg's, inoperative in so far as television advertising is concerned; (c) whether they are practically and functionally incompatible with the regulatory scheme put into place by the Canadian Radio-Television and Telecommunications Commission (CRTC) pursuant to the Broadcasting Act, R.S.C. 1970, c. B-11; and (d) whether they amount to an invasion of the federal criminal law power. We discuss each of these issues in turn.

A. The Constitutional Characterization of ss. 248 and 249

15 In Kellogg's, the challenged provision was s. 11.53 of Division XI-A, entitled "Advertising [page950] intended for children", of the General Regulations adopted pursuant to the authority conferred on the Lieutenant-Governor in Council by s. 102(o) of the Consumer Protection Act to make regulations "to determine standards for advertising goods, whether or not they are the object of a contract, or credit, especially all advertising intended for children". Section 11.53 of the regulations provided:

> 11.53 No one shall prepare, use, publish or cause to be published in Quebec advertising intended for children which:

. . .

(n) employs cartoons;

16 The Kellogg companies were charged with breaches of this provision in connection with certain television advertisements and an injunction was sought against them to restrain further infractions. An injunction was granted by the Superior Court, [1974] C.S. 498, but an appeal from this judgment was allowed by a majority of the Court of Appeal (Tremblay C.J. and Montgomery J.A.), [1975] C.A. 518, who held that since the content of television broadcasting fell within exclusive federal jurisdiction provincial legislation with respect to such content was inoperative, citing the judgment of this Court in Commission du salaire minimum v. Bell Telephone Co. of Canada, [1966] S.C.R. 767, in support of this conclusion. Turgeon J.A., dissenting, applied the distinction between legislation in relation to a matter and legislation incidentally affecting a matter. He held the challenged regulation and the law under which it was adopted to be within provincial jurisdiction although it might incidentally affect a matter within federal jurisdiction.

17 Martland J., with whom Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ. concurred, held that the challenged provision validly applied to television advertising because it was part of a general regulation of advertising for children that had a valid provincial purpose and its effect on a television broadcast undertaking was a merely incidental one. Laskin C.J., dissenting, with whom Judson and Spence JJ. concurred, was of the view that the challenged provision could not validly [page951] apply to prevent an advertiser from advertising its products on television because in such application it encroached on a matter within exclusive federal jurisdiction, the content of television broadcasting.

18 Like Turgeon J.A. in the Court of Appeal, Martland J. applied the distinction between legislation in relation to a matter and legislation which incidentally affects a matter, citing the judgment of the Court in Carnation Co. v. Quebec Agricultural Marketing Board, [1968] S.C.R. 238, as an analogous application of this distinction. He held that the challenged provision was aimed at certain kinds of advertising by advertisers and not at the operation of a television broadcast undertaking. He said at p. 225:

> In my opinion this regulation does not seek to regulate or to interfere with the operation of a broadcast undertaking. In relation to the facts of this case it seeks to prevent Kellogg from using a certain kind of advertising by any means. It aims at controlling the commercial activity of Kellogg. The fact that Kellogg is precluded from using televised advertising may, incidentally, affect the revenue of one or more television stations but it does not change the true nature of the regulation. In this connection the case of Carnation Company Ltd. v. The Quebec Agricultural Marketing Board is analogous.

Martland J. stressed the fact that the regulation was being applied and the injunction sought against Kellogg and not against a television station. He reserved his opinion as to whether the regulation

could be validly applied against a television station. He said at p. 225: "Whether the regulation could be applied to the television station itself or whether an injunction against Kellogg would bind such station does not arise in this case and I prefer to express no opinion with respect to it."

19 The disputed regulation in Kellogg's, as Martland J. observed, sought to prevent the advertiser "from using a certain kind of advertising by any means." It was concerned with a certain kind of advertising content but it applied to all advertising media employing such content. Moreover, it had a limited application to advertising content, merely [page952] prohibiting the use of cartoons, but otherwise permitting children's advertising. It was thus a provision of general application in pursuit of the legislative object which Martland J. characterized as "to protect children in Quebec from the harmful effect of the kinds of advertising therein prohibited" (p. 223). It was aimed at all children's advertising employing cartoons, not at television advertising as such nor at the television broadcaster. The implication of the distinction emphasized by Martland J. between application to the advertiser and application to a broadcast undertaking is that provincial legislation of general application with respect to advertising content would only be considered to encroach on exclusive federal jurisdiction with respect to broadcast content to the extent it was applied to a broadcast undertaking, that is, to the control over content exercised by such an undertaking rather than by an advertiser.

20 In the case at bar the respondent contended that the challenged provision of the Consumer Protection Act, when read together with the regulations to which they are made expressly subject and considered in the light of the evidence of their practical effect, exhibit a different purpose or object from that of the regulation that was in issue in Kellogg's. The respondent contends that when the challenged provisions are seen in the context of the regulations and the evidence it is clear that they are aimed essentially and primarily at television as a medium of children's advertising, a matter within exclusive federal jurisdiction. In support of this contention the respondent emphasizes the relative importance of the prohibition of television advertising directed to persons under thirteen years of age, as indicated by the evidence and the extent of the exemptions provided by the regulations for other forms of children's advertising. The respondent contends that the trial judge was in error in taking judicial notice of the existence and relative importance of other forms of children's advertising. There is no doubt that the evidence adduced by the respondent at trial and the s. 1 and s. 9.1 materials submitted by the [page953] Attorney General of Quebec show that television advertising is by any measure the most important form of children's advertising. It is indisputably, however, not the only form as the exemptions indicate. Moreover, the genuine concern with the other forms of children's advertising is indicated by the extent to which the exempted forms are made subject to the content requirements of s. 91 of the regulations. The Attorney General of Quebec submitted that television advertising, because of its massive penetration and ease of access for children, did not lend itself to as precise regulation as other forms of communication and must therefore be the subject of a particular regime. The respondent argued that this was an admission that the prohibition in s. 248 of the Act was primarily directed at television advertising. We take it to have been in justification of a prohibition in the case of television advertising rather than a concession that the challenged provisions as modified by the regulations are aimed primarily at such

advertising. The Attorney General of Quebec noted that there are other forms of children's advertising subject to the prohibition. On the whole, despite the fact that the relative impact on television advertising is much greater than it was in Kellogg's, we are of the opinion that ss. 248 and 249 of the Act, as modified by or completed by the regulations, can also be said to be legislation of general application enacted in relation to consumer protection, as in Kellogg's, rather than a colourable attempt, under the guise of a law of general application, to legislate in relation to television advertising. In other words, the dominant aspect of the law for purposes of characterization is the regulation of all forms of advertising directed at persons under thirteen years of age rather than the prohibition of television advertising which cannot be said to be the exclusive or even primary aim of the legislation. In effect, we agree with Hugessen A.C.J. on the general significance, for the purposes of characterization of the legislation, of the fact that other forms of advertising directed to persons under thirteen years, whatever be their relative importance, are not exempted from the prohibition. The existence of such other forms of children's advertising was not seriously challenged but rather their [page954] significance from the constitutional point of view in attempting to ascertain the dominant aspect of the legislation. The existence of such other forms of children's advertising did not rest entirely on the judicial notice taken by the trial judge, who said that even if there was not evidence of such other forms he would be prepared to take judicial notice of them. The relative importance of television advertising and the other forms of children's advertising subject to exemption and prohibition is not in our opinion a sufficient basis for a finding of colourability. There is no suggestion that the legislative or regulatory concern with these other forms of children's advertising is a mere pretence or façade for a primary, if not exclusive, purpose of regulating television advertising. It is not the relative importance of these other forms of advertising but the bona fide nature of the legislative concern with them that is in issue on the question of colourability.

B. The Effect of ss. 248 and 249 on Broadcasting Undertakings

21 The interveners Pathonic, as we understood their argument, did not contend, as did the respondent, that the challenged provisions of the Consumer Protection Act were distinguishable on their face in respect of the characterization of their purpose or object from the provision of the regulations that was considered in Kellogg's. They contended that the challenged provisions were rendered ultra vires or inoperative because of their effect on a television broadcast undertaking. They submitted that the prohibition of television advertising affected a vital part of the operation of such an undertaking and impaired the undertaking. The interveners suggested that what distinguished Kellogg's from the case at bar was the presence of a television undertaking in the proceedings. The presence of the interveners in the proceedings does not, of course, make the challenged provisions ones that are being applied to a television undertaking. [page955] What the interveners really suggest is that had a television broadcast undertaking been represented in Kellogg's to establish the effect of a regulation of television advertising on such an undertaking the Court might have come to a different conclusion.

22 Recently, in Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail),

[1988] 1 S.C.R. 749 (Bell Canada 1988), Beetz J., writing for the Court, reviewed the principles of constitutional interpretation applicable to the regulation of federal undertakings. He distinguished between situations in which (1) a provincial law would, if applied to a federal undertaking, affect a vital part of its operations and (2) the effect of the provincial law on a federal undertaking, whether applied to it directly or not, would impair its operations (at pp. 859-60):

> The impairment test is not necessary in cases in which, without going so far as to impair the federal undertaking, the application of the provincial law affects a vital part of the undertaking ....
>
> In order for the inapplicability of provincial legislation rule to be given effect, it is sufficient that the provincial statute which purports to apply to the federal undertaking affects a vital or essential part of that undertaking, without necessarily going as far as impairing or paralysing it.

The federal government has exclusive jurisdiction as regards "essential and vital elements" of a federal undertaking, including the management of such an undertaking, because those matters form the "basic, minimum and unassailable content" of the head of power created by operation of s. 91(29) and the exceptions in s. 92(10) of the Constitution Act, 1867. No provincial law touching on those matters can apply to a federal undertaking. However, where provincial legislation does not purport to apply to a federal undertaking, its incidental effect, even upon a vital part of the operation of the undertaking, will not normally render the provincial legislation ultra vires.

23 The case of Attorney-General for Manitoba v. Attorney-General for Canada, [1929] A.C. 260 [page956] (P.C.), upon which Pathonic relied a great deal in its submissions, provides a counter-example to this last statement and illustrates the doctrine of impairment. The legislation there in issue, the Manitoba Municipal and Public Utility Board Act, S.M. 1926, c. 33, s. 162, provided that: "No person, firm, or corporation shall sell, or offer or agree to sell, or directly or indirectly attempt to sell, in Manitoba, any shares, stocks, bonds or other securities of or issued by any company unless the company has first been approved by the Board as one the securities of which are permitted to be sold in Manitoba and a certificate to that effect ... [is] issued by the Board." The Act exempted block sales of securities by companies to brokers but did regulate the sale of those securities by brokers to the public. In this sense, as Pathonic submitted, s. 162 did not apply to the companies themselves but applied, rather, to brokers. The issue before the Privy Council was whether s. 162 was ultra vires the province in so far as it purported to apply to the sale of the shares of a federally incorporated company.

24 In concluding that the province did not have jurisdiction to enact s. 162, Viscount Sumner, who delivered the judgment of their Lordships, considered the effect of the provision on federal incorporated companies (at pp. 266-67):

> An artificial person, incorporated under the powers of the Dominion with certain

> objects, invested by these powers with capacities to trade in pursuit of those objects and with the status and capacities of a Dominion incorporation, is ... liable in the most ordinary course of business to be stillborn from the moment of incorporation, sterilized in all its functions and activities, thwarted and interfered with in its first and essential endeavours to enter on the beneficial and active employment of its powers, by the necessity of applying to a Provincial executive for permission to begin to act and to raise its necessary capital, a permission which may be subjected to conditions or refused altogether according to the view, which in their discretion that executive may take of the plans, promises and prospects of a creation of the Dominion.

Despite the fact that s. 162 did not apply to federally incorporated companies, it succeeded, indirectly, [page957] in impairing their operation. That consequence was sufficient to render the provision ultra vires the province of Manitoba.

25 Although the impairment doctrine was developed in cases concerning the federal power to incorporate companies, Beetz J., in Bell Canada 1988, identified the relevance of this doctrine to the regulation of federal undertakings (at p. 862):

> [T]he transposition of the concept of impairment from the field of federally incorporated companies to that of federal undertakings may be valid in cases in which the application of provincial legislation to federal undertakings in fact impairs the latter, paralyses them or destroys them.

As the Attorney-General for Manitoba case makes clear, the concept of impairment extends not only to the direct application of provincial legislation but also to the indirect effect of that legislation. Thus, where provincial legislation applied to a federal undertaking affects a vital part of that undertaking or, though not applied directly to a federal undertaking, has the effect of impairing its operation, the legislation in question is ultra vires.

26 There is no doubt that television advertising is a vital part of the operation of a television broadcast undertaking. The advertising services of these undertakings therefore fall within exclusive federal legislative jurisdiction. It is well established that such jurisdiction extends to the content of broadcasting: Re C.F.R.B. and Attorney-General for Canada, [1973] 3 O.R. 819 (C.A.); Capital Cities Communications Inc. v. Canadian Radio-Television Commission, [1978] 2 S.C.R. 141, and advertising forms a part of such content. However, ss. 248 and 249 of the Consumer Protection Act do not purport to apply to television broadcast undertakings. Read together with s. 252, it is clear that ss. 248 and 249 apply to the acts of an advertiser, not to the acts of a broadcaster. Nor did Pathonic contend that ss. 248 and 249 applied to television broadcasters. Indeed, it went so far as to submit that the province of Quebec was unable to regulate the advertising practices of television broadcasters because signals coming from outside the province and received directly by the public or re-distributed [page958] by a cable company could not be subject to the standards of the

Consumer Protection Act. While this submission demonstrates that the Quebec government can only achieve partial success in controlling commercial advertising aimed at children, it also demonstrates that a province can aim to regulate provincial advertisers without applying its regulations to television broadcasters situate in the province. Therefore, the provisions in question do not trench on exclusive federal jurisdiction by purporting to apply to a federal undertaking and, in so doing, affecting a vital part of its operation.

27 Do the provisions nevertheless have the effect of impairing the operation of a federal undertaking? The interveners adduced evidence showing the importance of advertising revenues in the operation of a television broadcast undertaking and that the prohibition of commercial advertising directed to persons under thirteen years of age affected the capacity to provide children's programs. This is not a sufficient basis on which to conclude that the effect of the provisions was to impair the operation of the undertaking, in the sense that the undertaking was "sterilized in all its functions and activities". The most that can be said, as in Kellogg's (at p. 225), is that the provisions "may, incidentally, affect the revenue of one or more television stations". Nor can it be said that the provisions have the potential to impair the operation of a broadcast undertaking. Interpreted strictly, as under the Application Guide for Sections 248 and 249 (Advertising Intended for Children Under 13 Years of Age) produced by the Office de la protection du consommateur (October 8, 1980), products and services aimed exclusively at children "may not, for all practical purposes, be advertised during children's programs (unless the message is presented so that it cannot, in any way, arouse a child's interest)." Even if it were true, as Pathonic submitted, that applied this way, the provisions prevent the production of programs aimed at children since they remove potential funding for those programs -- a contention which was denied by the Attorney General of Quebec, who insisted that advertisers were always free to aim their message [page959] at adults rather than children, and which must also be considered in light of the explicit acceptance in the Application Guide for Sections 248 and 249 (at p. 9) of educational advertising aimed at children produced by private companies -- this would only demonstrate that the legislation constrains business decisions both for those who produce advertisements and for those who carry them. It should also be noted that Pathonic is subject to a parallel, though somewhat less stringent, requirement under the terms of the Broadcast Code for Advertising to Children, which Code is incorporated by reference as a condition of Pathonic's licence to carry on a broadcasting transmitting undertaking granted by the CRTC (at p. 3):

> Pre-schoolers
>
> Children of pre-school age often are unable to distinguish between program content and actual promotions. Therefore, any commercials scheduled for viewing during the school-day morning hours must be directed to the family, parent, or an adult, rather than to children.

Pathonic did not claim that such a limit on the conduct of its business had or could have the effect

of disrupting its operations. Nor do we find that ss. 248 and 249 have or could have that effect.

C. The Compatibility of ss. 248 and 249 with Federal Regulation

28 Irwin Toy submitted that even if the effect of ss. 248 and 249 was not to impair the operation of a federal undertaking, these provisions conflicted with the declaration found in s. 3(c) of the Broadcasting Act, R.S.C. 1970, c. B-11 (now R.S.C., 1985, c. B-9), which reads:

> Broadcasting Policy for Canada
>
> 3. It is hereby declared that
>
> . . .
>
> (c) all persons licensed to carry on broadcasting undertakings have a responsibility for programs they broadcast but the right to freedom of expression and the right of persons to receive programs, subject only [page960] to generally applicable statutes and regulations, is unquestioned;

The respondent argued that the only federal regulation restricting public access to television programming were the Television Broadcasting Regulations, C.R.C. 1978, c. 381. Because these regulations do not restrict advertising aimed at children, and because s. 3 of the Broadcasting Act enshrines the right to freedom of expression subject only to generally applicable statutes or regulations, Irwin Toy submitted that the scheme of the Broadcasting Act provided legislative protection for their advertising activities. Under the doctrine of paramountcy, ss. 248 and 249, to the extent they purported to apply to television advertising, were therefore of no force or effect.

29 This argument cannot succeed. It is based, in part, on a misunderstanding of the Interpretation Act, R.S.C. 1970, c. I-23 (now R.S.C., 1985, c. I-21). The respondent concluded from ss. 2 and 3 of the Interpretation Act that the word "loi" in the French text of s. 3 of the Broadcasting Act refers only to federal laws of general application. Therefore, no provincial law of general application could restrict advertising. In fact, s. 2 of the Interpretation Act sets out the definition of various terms, including "loi" and the corresponding English term, "Act", as those terms are to be interpreted "in this Act", not as those terms are to be interpreted in every federal Act. Section 2 simply makes clear that the kind of Act or "loi" to which the Interpretation Act applies is a federal Act, not a provincial Act. That does not imply that whenever the word "loi" appears in a federal statute, it can only refer to a federal Act. Furthermore, the English text of s. 3 of the Broadcasting Act refers to "statutes", not "Acts". Thus, the definition of "Act" or "loi" in s. 2 of the Interpretation Act is simply not relevant. Even assuming that it could have that effect, the general declaration found in s. 3(c) of the Broadcasting Act does not purport to prevent provincial laws of general application from having an incidental effect on broadcasting undertakings.

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30 More significantly, perhaps, the interveners, Pathonic, drew attention to a condition of its licence imposed by the CRTC pursuant to s. 17(1)(a) of the Broadcasting Act and typical of one of the conditions imposed on private television broadcasters:

> It is a condition of this licence that the licensee shall adhere to the provisions of the Broadcast Code for Advertising to Children published by the Canadian Association of Broadcasters and to any amendment or amendments which may from time-to-time be made thereto.

As we understood their argument, Pathonic contended that such a condition of licence constituted regulatory action by the CRTC occupying the field as concerns television advertising aimed at children.

31 To address this argument, one must first outline the nature of the Broadcast Code for Advertising to Children and the manner in which it functions as an instrument of CRTC policy. According to Section A of the Code (revised, 1984):

> The Broadcast Code for Advertising to Children has been designed to complement the general principles for ethical advertising outlined in the Canadian Code of Advertising Standards which applies to all advertising. Both Codes are supplementary to all federal and provincial laws and regulations governing advertising, including those regulations and procedures established by the Canadian Radio-Television and Telecommunications Commission, the Department of Consumer and Corporate Affairs and Health and Welfare Canada.

The Code goes on to establish detailed guidelines which are in substance quite similar to the content standards established in the Regulation respecting the application of the Consumer Protection Act (albeit with respect to advertising not carried on television) and are in many cases more specific and demanding. The Code does, however, contemplate that advertisements which meet the requirements set out therein can aim at children. Indeed, it establishes a procedure for pre-clearance of advertisements by the "Children's Section of the Advertising Standards Council". Nevertheless, the Code is explicitly designed to supplement provincial and [page962] federal laws and does not purport to constitute the sole regulatory mechanism applicable to children's advertising.

32 While the Code is published by the Canadian Association of Broadcasters and is thus an instrument of self-regulation, it has been subject to formal consideration by the CRTC. On August 21, 1974, the CRTC issued a public announcement entitled "Broadcast Advertising to Children and Children's Programming" commenting on the Broadcast Code of Advertising and its relationship to CRTC policy (Broadcast Advertising Handbook (1978), at p. 11):

> Concern expressed to the Commission has indicated that even though the self-regulatory procedures of the Code have proven effective, further assurances were required to ensure adherence to the Code by legally enforceable procedures.

> The House of Commons Standing Committee on Broadcasting, Films and Assistance to the Arts, in its report on children's advertising, indicated that regardless of how excellent the procedures of self-regulation through the Broadcast Code might be, a stronger enforcement system would be desirable.
>
> The Commission, in conformity with its previous undertaking to ensure the effectiveness of the Code and to meet the expressed concerns, hereby gives notice
>
> 1. to all holders of licences to carry on broadcasting transmitting undertakings in Canada and all applicants for such licences, that adherence to the provisions of the Broadcast Code for Advertising to Children will be made a specific condition of each licence; and
> 2. that a representative of the CRTC will formally represent the Commission at all deliberations of the Children's Advertising Sections of the Advertising Standards Council/Conseil des normes de la publicité which have the responsibility for pre-clearing all children's commercials.

Thus, by requiring, as a condition of licence, that television broadcasters adhere to the Code, and by participating in the pre-clearance deliberations respecting advertisements aimed at children, the CRTC has transformed the Code into more than an instrument of industry self-regulation; it has become the federal regulatory regime applicable to private television broadcasters.

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33 The regulatory regime put into place through the vehicle of the Code is designed to apply both to television broadcasters and to advertisers. However, as concerns advertisers, the CRTC does not claim to exercise any mandatory control. Conditions of licence apply only to broadcasters. The Code itself refers to the fact (at p. 6) that the Association of Canadian Advertisers, Inc. and the Canadian Toy Manufacturers Association have agreed to abide by the Code. But the Code does not purport to have the force of law with regard to them.

34 Consequently, can it be said that there is a conflict between a federal and provincial regulatory regime such that the doctrine of paramountcy must be invoked? It bears repeating that the federal conditions of licence on the one hand and provincial consumer protection legislation on the other apply to different actors: television broadcasters and advertisers. From a functional standpoint, however, any standard applied to television broadcasters will necessarily restrict the content of what advertisers produce for television, just as any standard applied to advertisers will necessarily restrict the content of what broadcasters show on television. Thus, if there is a "practical and functional

incompatibility" (Bell Canada 1988, supra, at p. 867) between the standards applied to television advertisers and those applied to television broadcasters, the doctrine of paramountcy will come into play. If the two sets of standards are compatible, however, there is no need to invoke paramountcy. In Multiple Access Ltd. v. McCutcheon, [1982] 2 S.C.R. 161, Dickson J. (as he then was), writing for the majority, made the following observation in this regard (at p. 191):

> In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other.

35 Had the CRTC adopted the Broadcast Code for Advertising to Children not as "supplementary to all federal and provincial laws and regulations [page964] governing advertising", but rather as the sole and minimum standard to be applied, the question of conflict and functional incompatibility might have been a real one. But the federal and provincial schemes have been designed to exist side by side. Pre-clearance by the Children's Section of the Advertising Standards Council supplements a parallel evaluation system overseen by the Comité sur l'application des articles 248 et 249 de la Loi sur la protection du consommateur (see the Application Guide for Sections 248 and 249, op. cit., at p. 1). Neither television broadcasters nor advertisers are put into a position of defying one set of standards by complying with the other. If each group complies with the standards applicable to it, no conflict between the standards ever arises. It is only if advertisers seek to comply only with the lower threshold applicable to television broadcasters that a conflict arises. Absent an attempt by the federal government to make that lower standard the sole governing standard, there is no occasion to invoke the doctrine of paramountcy.

D. Sections 248 and 249 and the Criminal Law Power

36 Irwin Toy's final submission concerning the division of powers was that the provisions in issue encroached on the criminal law power conferred on Parliament by s. 91(27) of the Constitution Act, 1867. Section 278 of the Consumer Protection Act provides penalties, including fines and possible imprisonment, for those who are "guilty of an offence constituting a prohibited practice". Section 215 defines "prohibited practice" as "[a]ny practice contemplated in sections 219 to 251", and while the definition applies to Title II on business practices, there is no other definition of the term to explain its use in s. 278. However, s. 278 does not constitute the only sanction that can be applied against a breach of s. 248. Indeed, as we have already mentioned, the Office de la protection du consommateur at one stage sought an injunction ordering Irwin Toy to cease using commercial advertising aimed at children. Section 316 of the Act empowers the President of the Office to seek [page965] injunctions against persons engaged in prohibited practices.

37 Having found that ss. 248 and 249 were enacted pursuant to a valid provincial objective and that they do not conflict with federal regulation, it cannot be said that because there are sanctions against a breach of these sections, they are best characterized as being, in pith and substance,

legislation relating to criminal law. Subsection 92(15) of the Constitution Act, 1867 provides that each provincial legislature may make laws respecting:

> 15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

This Court has on numerous occasions upheld provincial penal laws enacted in relation to otherwise valid provincial objectives: Nova Scotia Board of Censors v. McNeil, [1978] 2 S.C.R. 662; Mann v. The Queen, [1966] S.C.R. 238, and Smith v. The Queen, [1960] S.C.R. 776. The legislation here in issue is no different.

V - Whether ss. 248 and 249 Are Protected from the Application of the Canadian Charter by a Valid and Subsisting Override Provision

38 Section 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added to that Act by s. 1 of the Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, reads as follows:

> This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom).

Section 364 ceased to have effect by operation of s. 33(3) of the Canadian Charter of Rights and Freedoms five years after it came into force, and it was not re-enacted pursuant to s. 33(4) of the Charter. The legislation enacting s. 364 came into [page966] force on June 23, 1982. As this Court decided in Ford, to the extent that s. 7 of the enacting legislation attempted to give retrospective effect to the override provisions it was of no force or effect. The result of this is that the standard override provisions enacted by s. 1 of that Act came into force on June 23, 1982 in accordance with the first paragraph of s. 7 and not on April 17, 1982 as the portion of s. 7 purporting to give retrospective effect to s. 1 envisaged. This means that s. 364 ceased to have effect on June 23, 1987 and that ss. 248 and 249 of the Consumer Protection Act are no longer protected from the application of the Canadian Charter by a valid and subsisting override provision. As was stated in Ford (at p. 734), "on an application for a declaratory judgment in a case of this kind the Court should declare the law as it exists at the time of its judgment." We will thus proceed on the basis that ss. 248 and 249 are subject to the provisions of both the Quebec Charter of Human Rights and Freedoms and the Canadian Charter of Rights and Freedoms.

VI - Whether ss. 248 and 249 Limits Freedom of Expression as Guaranteed by the Canadian and Quebec Charters

A. The Ford and Devine Appeals

39 Although the issue relating to freedom of expression in this appeal was argued together with the Ford and Devine appeals, it is important to emphasize that, unlike in the present case, the two latter cases involved government measures restricting one's choice of language. As the Court stated in Ford (at p. 748):

> Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.

Having determined that freedom of expression prevents prohibitions against using the language of one's choice, the question became whether, in the Court's words (at p. 766) "a commercial purpose removes the expression ... from the scope of protected [page967] freedom." Thus, while choice of language was the principal matter in those appeals, the commercial element to the expression in issue raised an ancillary question. As the Court made clear at the end of its discussion concerning freedom of expression (at p. 767):

> Although the expression in this case has a commercial element, it should be noted that the focus here is on choice of language and on a law which prohibits the use of a language. We are not asked in this case to deal with the distinct issue of the permissible scope of regulation of advertising (for example to protect consumers) where different governmental interests come into play, particularly when assessing the reasonableness of limits on such commercial expression pursuant to s. 1 of the Canadian Charter or to s. 9.1 of the Quebec Charter.

The instant case concerns the regulation of advertising aimed at children and thus raises squarely the issues which were not treated in Ford. Whereas it was sufficient in Ford to reject the submission that the guarantee of freedom of expression does not extend to signs having a commercial message, this case requires a determination whether regulations aimed solely at commercial advertising limit that guarantee. This, in turn, requires an elaboration of the conclusion already reached in Ford that there is no sound basis on which to exclude commercial expression, as a category of expression, from the sphere of activity protected by s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.

B. The First Step: Was the Plaintiff's Activity Within the Sphere of Conduct Protected by Freedom of Expression?

40 Does advertising aimed at children fall within the scope of freedom of expression? This question must be put even before deciding whether there has been a limitation of the guarantee. Clearly, not all activity is protected by freedom of expression, and governmental action restricting this form of advertising only limits the guarantee if the activity in issue was protected in the first

place. Thus, for example, in Reference Re Public Service [page968] Employee Relations Act (Alta.), [1987] 1 S.C.R. 313; PSAC v. Canada, [1987] 1 S.C.R. 424; and RWDSU v. Saskatchewan, [1987] 1 S.C.R. 460, the majority of the Court found that freedom of association did not include the right to strike. The activity itself was not within the sphere protected by s. 2(d); therefore the government action in restricting it was not contrary to the Charter. The same procedure must be followed with respect to an analysis of freedom of expression; the first step to be taken in an inquiry of this kind is to discover whether the activity which the plaintiff wishes to pursue may properly be characterized as falling within "freedom of expression". If the activity is not within s. 2(b), the government action obviously cannot be challenged under that section.

41 The necessity of this first step has been described, with reference to the narrower concept of "freedom of speech", by Frederick Schauer in his work entitled Free Speech: A Philosophical Enquiry (Cambridge, 1982) at p. 91:

> We are attempting to identify those things that one is free (or at least more free) to do when a Free Speech Principle is accepted. What activities justify an appeal to the concept of freedom of speech? These activities are clearly something less than the totality of human conduct and ... something more than merely moving one's tongue, mouth and vocal chords to make linguistic noises.

"Expression" has both a content and a form, and the two can be inextricably connected. Activity is expressive if it attempts to convey meaning. That meaning is its content. Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual. Free expression was for Cardozo J. of the United States Supreme Court "the matrix, the indispensable condition of nearly every other form of freedom" (Palko v. [page969] Connecticut, 302 U.S. 319 (1937), at p. 327); for Rand J. of the Supreme Court of Canada, it was "little less vital to man's mind and spirit than breathing is to his physical existence" (Switzman v. Elbling, [1957] S.C.R. 285, at p. 306). And as the European Court stated in the Handyside case, Eur. Court H. R., decision of 29 April 1976, Series A No. 24, at p. 23, freedom of expression:

> ... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society".

We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis

of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the s. 2(b) challenge would proceed.

42 The content of expression can be conveyed through an infinite variety of forms of expression: [page970] for example, the written or spoken word, the arts, and even physical gestures or acts. While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen. As McIntyre J., writing for the majority in RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, observed in the course of discussing whether picketing fell within the scope of s. 2(b), at p. 588:

> Action on the part of the picketers will, of course, always accompany the expression, but not every action on the part of the picketers will be such as to alter the nature of the whole transaction and remove it from Charter protection for freedom of expression. That freedom, of course, would not extend to protect threats of violence or acts of violence.

Indeed, freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure.

43 The broad, inclusive approach to the protected sphere of free expression here outlined is consonant with that suggested by some leading theorists. Thomas Emerson, in his article entitled "Toward a General Theory of the First Amendment" (1963), 72 Yale L.J. 877, notes (at p. 886) that:

> ... the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited. It is put forward as a prescription for attaining a creative, progressive,

> exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, skepticism, reason and initiative, will allow man to realize his full potentialities. It spurns the alternative of [page971] a society that is tyrannical, conformist, irrational and stagnant.

44 D.F.B. Tucker in his book Law, Liberalism and Free Speech (1985) describes what he calls a "deontological approach" to freedom of expression as one in which "the protected sphere of liberty is delineated by interpreting an understanding of the democratic commitment" (p. 35). It is upon precisely this enterprise that we have embarked.

45 Thus, the first question remains: Does the advertising aimed at children fall within the scope of freedom of expression? Surely it aims to convey a meaning, and cannot be excluded as having no expressive content. Nor is there any basis for excluding the form of expression chosen from the sphere of protected activity. As we stated in Ford, supra, at pp. 766-67:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter.

Consequently, we must proceed to the second step of the inquiry and ask whether the purpose or effect of the government action in question was to restrict freedom of expression.

46 It bears repeating that in Ford, the discussion of commercial expression ended at this first stage. The Court had already found that the aim of ss. 58 and 69 of the Charter of the French Language was to prohibit the use of one's language of choice. The centrality of choice of language to freedom of expression transcends any significance that the context in which the expression is intended to be used might have. It was therefore unnecessary in that case to inquire further whether the restriction of commercial expression limited freedom of expression.

C. The Second Step: Was the Purpose or Effect of the Government Action to Restrict Freedom of Expression?

47 Having found that the plaintiff's activity does fall within the scope of guaranteed free expression, [page972] it must next be determined whether the purpose or effect of the impugned governmental action was to control attempts to convey meaning through that activity. The importance of focussing at this stage on the purpose and effect of the legislation is nowhere more clearly stated than in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at pp. 331-32 where Dickson J. (as he then was), speaking for the majority, observed:

> In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to

> achieve. This object is realized through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity.
>
> Moreover, consideration of the object of legislation is vital if rights are to be fully protected. The assessment by the courts of legislative purpose focuses scrutiny upon the aims and objectives of the legislature and ensures they are consonant with the guarantees enshrined in the Charter. The declaration that certain objects lie outside the legislature's power checks governmental action at the first stage of unconstitutional conduct. Further, it will provide more ready and more vigorous protection of constitutional rights by obviating the individual litigant's need to prove effects violative of Charter rights. It will also allow courts to dispose of cases where the object is clearly improper, without inquiring into the legislation's actual impact.

Dickson J. went on to specify how this inquiry into purpose and effects should be carried out (at p. 334):

> In short, I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test. If the legislation fails the purpose test, there is no need to consider further its effects, since it has already been demonstrated to be invalid. Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability [page973] and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

If the government's purpose, then, was to restrict attempts to convey a meaning, there has been a limitation by law of s. 2(b) and a s. 1 analysis is required to determine whether the law is inconsistent with the provisions of the Constitution. If, however, this was not the government's purpose, the court must move on to an analysis of the effects of the government action.

a. Purpose

48 When applying the purpose test to the guarantee of free expression, one must beware of drifting to either of two extremes. On the one hand, the greatest part of human activity has an expressive element and so one might find, on an objective test, that an aspect of the government's purpose is virtually always to restrict expression. On the other hand, the government can almost

always claim that its subjective purpose was to address some real or purported social need, not to restrict expression. To avoid both extremes, the government's purpose must be assessed from the standpoint of the guarantee in question. Just as the division of powers jurisprudence of this Court measures the purpose of government action against the ambit of the heads of power established under the Constitution Act, 1867, so too, in cases involving the rights and freedoms guaranteed by the Canadian Charter, the purpose of government action must be measured against the ambit of the relevant guarantee. It is important, of course, to heed Dickson J.'s warning against a "theory of shifting purpose" (Big M Drug Mart, supra, at p. 335): "Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable." This is not to say that the degree to which a purpose remains or becomes pressing and substantial cannot change over time. In Big M Drug Mart, Dickson J.'s principal concern was to avoid characterizing purposes in a way that shifted over time. But it is equally true that the government cannot have had [page974] one purpose as concerns the division of powers, a different purpose as concerns the guaranteed right or freedom, and a different purpose again as concerns reasonable and justified limits to that guarantee. Nevertheless, the same purpose can be assessed from different standpoints when interpreting the division of powers, limitation of a guarantee, or reasonable limits to that guarantee.

49 If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (Freedom of Expression (1981), at pp. 59-60):

> The bold line ... between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content", even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails [page975] restricting its content. By contrast, a rule against littering is not a restriction "tied to content". It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead

inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. For example, in Saumur v. City of Quebec, [1953] 2 S.C.R. 299, a municipal by-law forbidding distribution of pamphlets without prior authorization from the Chief of Police was a colourable attempt to restrict expression.

50 If the government is to assert successfully that its purpose was to control a harmful consequence of the particular conduct in question, it must not have aimed to avoid, in Thomas Scanlon's words ("A Theory of Freedom of Expression", in Dworkin, ed., The Philosophy of Law (1977), at p. 161):

> a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

In each of Scanlon's two categories, the government's purpose is to regulate thoughts, opinions, beliefs or particular meanings. That is the mischief in view. On the other hand, where the harm caused by the expression in issue is direct, without the intervening element of thought, opinion, belief, or a particular meaning, the regulation does aim at a harmful physical consequence, not the content or form of expression.

51 In sum, the characterization of government purpose must proceed from the standpoint of the [page976] guarantee in issue. With regard to freedom of expression, if the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.

b. Effects

52 Even if the government's purpose was not to control or restrict attempts to convey a meaning, the Court must still decide whether the effect of the government action was to restrict the plaintiff's free expression. Here, the burden is on the plaintiff to demonstrate that such an effect occurred. In order so to demonstrate, a plaintiff must state her claim with reference to the principles and values underlying the freedom.

53 We have already discussed the nature of the principles and values underlying the vigilant protection of free expression in a society such as ours. They were also discussed by the Court in

Ford (at pp. 765-67), and can be summarized as follows: (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action [page977] to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

c. Sections 248 and 249

54 There is no question but that the purpose of ss. 248 and 249 of the Consumer Protection Act was to restrict both a particular range of content and certain forms of expression in the name of protecting children. Section 248 prohibits, subject to regulation, attempts to communicate a commercial message to persons under thirteen years of age. Section 249 identifies factors to be considered in deciding whether the commercial message in fact has that prohibited content. At first blush, the regulations exempting certain advertisements transform the prohibition into a "time, place or manner" restriction aiming only at the form of expression. According to ss. 88 to 90 of the Regulation respecting the application of the Consumer Protection Act, an advertisement can be aimed at children if: (1) it appears in certain magazines or inserts directed at children; (2) it announces a programme or show directed at children; or (3) it appears in or on a store window, display, container, wrapping, or label. Yet, even if all advertising aimed at children were permitted to appear in the manner specified, the restriction would be tied to content because it aims to restrict access to the particular message being conveyed. However, the regulations in question do more than just restrict the manner in which a particular content must be expressed. They also restrict content directly. Section 91 provides that even where advertisements directed at children are permitted, such advertisements must not, for example "use a superlative to describe the characteristics of goods or services" or [page978] "directly incite a child to buy or to urge another person to buy goods or services or to seek information about it". Furthermore, it is clear from the substantial body of material submitted by the Attorney General of Quebec as well as by the intervener, Gilles Moreau, president of the Office de la protection du consommateur, that the purported mischief at which the Act and regulations were directed was the harm caused by the message itself. In combination, therefore, the Act and the regulations prohibit particular content of expression. Such a prohibition can only be justified if it meets the test under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

D. Summary and Conclusion

55 When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no content of expression or (2) which conveys a meaning but through a violent form of expression, is not within the protected sphere of conduct. If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still [page979] claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.

56 In the instant case, the plaintiff's activity is not excluded from the sphere of conduct protected by freedom of expression. The government's purpose in enacting ss. 248 and 249 of the Consumer Protection Act and in promulgating ss. 87 to 91 of the Regulation respecting the application of the Consumer Protection Act was to prohibit particular content of expression in the name of protecting children. These provisions therefore constitute limitations to s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter. They fall to be justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

VII - Whether the Limit on Freedom of Expression Imposed by ss. 248 and 249 Is Justified Under s. 9.1 of the Quebec Charter or s. 1 of the Canadian Charter

57 The issues raised in this part are as follows: (a) whether the meaning, role and effect of s. 9.1 of the Quebec Charter are essentially different from that of s. 1 of the Canadian Charter; (b) whether the scheme put into place by ss. 248 and 249 is so vague as not to constitute a "limit prescribed by law"; (c) whether the materials (hereinafter referred to as the s. 1 and s. 9.1 materials) relied on by the Attorney General of Quebec are relevant to justifying ss. 248 and 249 as a reasonable limit upon freedom of expression; and (d) whether the s. 1 and s. 9.1 materials justify banning commercial advertising directed at persons under thirteen years of age.

[page980]

A. The Meaning of s. 9.1 of the Quebec Charter of Human Rights and Freedoms

58 The respondent, Irwin Toy, argued that s. 3 of the Quebec Charter provides an absolute guarantee of free expression. On the respondent's submission, absent legislation declaring that these provisions apply notwithstanding the Quebec Charter, it was not open to the Attorney General to argue that ss. 248 and 249 constitute a reasonable limit to the s. 3 guarantee. However, in Ford, supra, this Court drew the following conclusion about s. 9.1 of the Quebec Charter (at pp. 769-70):

> In the case at bar the Superior Court and the Court of Appeal held that s. 9.1 was a justificatory provision corresponding to s. 1 of the Canadian Charter and that it was subject, in its application, to a similar test of rational connection and proportionality. This Court agrees with that conclusion.

Since the test of rational connection and proportionality under s. 9.1 of the Quebec Charter is essentially the same as the test under s. 1 of the Canadian Charter, the two tests will be considered together.

B. Whether ss. 248 and 249 Are too Vague to Constitute a Limit Prescribed by Law

59 The respondent contended that ss. 248 and 249 were insufficiently precise to constitute a limit prescribed by law. For convenience, the two provisions are reproduced here:

> 248. Subject to what is provided in the regulations, no person may make use of commercial advertising directed at persons under thirteen years of age.
>
> 249. To determine whether or not an advertisement is directed at persons under thirteen years of age, account must be taken of the context of its presentation, and in particular of
>
> (a) the nature and intended purpose of the goods advertised;
> (b) the manner of presenting such advertisement;
> (c) the time and place it is shown.
>
> The fact that such advertisement may be contained in printed matter intended for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over, or that it may be broadcast during air time intended [page981] for persons thirteen years of age and over or intended both for persons under thirteen years of age and for persons thirteen years of age and over does not create a presumption that it is not directed at persons under thirteen years of age.

The respondent's attack on the vagueness of these provisions was threefold: (1) ss. 248 and 249,

read together, are confusing if not contradictory; (2) the courts are given insufficient guidance respecting how to interpret the ban on commercial advertising directed at children; and (3) there is too much scope for discretion to promulgate regulations. The third argument need not be addressed because this Court has already concluded that a limit is "prescribed by law within the meaning of s. 1 if it is expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements" (R. v. Thomsen, [1988] 1 S.C.R. 640, at pp. 650-51 per Le Dain J. for the Court). (Emphasis added.) A regulation promulgated pursuant to the statutory discretion such as the one here impugned can itself constitute a limit prescribed by law. Thus, only the first two arguments will be addressed.

a. Confusion and Contradiction

60 The respondent alleged that the last paragraph of s. 249 makes it all but impossible for the manufacturer of a children's product to know whether an advertisement of that product will run afoul of s. 248. One author has commented on the paragraph to the same effect (Martin, "Business Practices -- Title II of the Quebec Consumer Protection Act" in Meredith Memorial Lectures 1979, The New Consumer Protection Act of Quebec (1980), at p. 222):

> When this provision is read carefully, it seems that printed materials or broadcast time aimed only at adults are both covered, and this would appear to take away from the original provisions of this section in which it is said that account must be taken of the context of the presentation of the advertisement. When this section is read as a whole, it would seem that the fact that the advertisement appeared in the Atlantic Monthly, or the like, cannot be invoked as creating any presumption that an advertisement was not directed to children. On the [page982] other hand, this fact could be taken into account as part of the context of the presentation of the advertisement. There is, in short, a contradiction in terms in the article and some redrafting appears required.

61 We conclude that s. 249 can be given a sensible construction. The narrow purpose of the last paragraph is to ensure that the three factors to be weighed by the judge, viz. the nature and intended purpose of the goods advertised, the manner of presenting the advertisement, and the time and place it is shown, are always weighed together. The last paragraph addresses only the third factor -- time and place. It makes clear that children's product advertising, if presented in a manner aimed to attract children, is not permitted even if adults form the largest part of the public likely to see the advertisement. Of course if, in assessing "manner of presentation", the judge concludes that no children were likely to see the advertisement, it is also unlikely that the means chosen were designed to attract children. But the factors must all be weighed according to the balance of probabilities. No presumption is to be drawn by considering the third factor alone. Read this way, there is nothing inherently confusing or contradictory about ss. 248 and 249.

b. Judicial Discretion

62 The respondent contended that the test set out in ss. 248 and 249 leaves an inordinately wide discretion in the judge to determine whether a commercial advertisement was aimed at children. It cites the Introduction to the Application Guide for Sections 248 and 249, which comments on the prohibition against commercial advertising directed at children:

> [T]he terms of the law can lend to different interpretations, thus allowing for some discretion in its application. This discretion is evident, for instance, in the determination of precisely what is meant by "intended for children". Therefore, the Office considers it important to make public the standards it has set to determine whether or not a given advertisement is permitted under the Act.

[page983]

The respondent suggested that this reference to "discretion" made by the very agency charged with administering the statute demonstrates that ss. 248 and 249 are imprecise.

63 Absolute precision in the law exists rarely, if at all. The question is whether the legislature has provided an intelligible standard according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies. On the other hand, where there is no intelligible standard and where the legislature has given a plenary discretion to do whatever seems best in a wide set of circumstances, there is no "limit prescribed by law".

64 Sections 248 and 249 do provide an intelligible standard to be applied in determining whether an advertisement is subject to restriction. According to s. 248, the advertisement must have commercial content and it must be aimed at those under thirteen years of age. As explained above, s. 249 directs the judge to weigh three factors relating to the context in which the advertisement was presented. The courts are not simply given a discretion to ban whichever advertisements they please. In order to help advertisers comply with the ss. 248 and 249 standards, the Office de la protection du consommateur developed a more detailed series of guidelines which are not binding on the courts. One cannot infer from the existence of the guidelines that the courts have no intelligible standard to apply. One can only infer that the Office found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism allowing advertisers in most cases to substitute administrative decision-making for judicial decision-making.

C. The Relevance of the s. 1 and s. 9.1 Materials

65 The respondent contended that only evidence of legislative objective contemporary with the adoption [page984] of ss. 248 and 249 was relevant to deciding whether these sections constitute a reasonable limit to freedom of expression. It therefore attacked the relevance of studies post-dating the enactment of the Consumer Protection Act and upon which the government did not rely in adopting the legislation.

66 Where the basis for its legislation is not obvious, the government must bring forward cogent and persuasive evidence demonstrating that the provisions in issue are justified having regard to the constituent elements of the s. 1 or 9.1 inquiry (see R. v. Oakes, supra, at p. 138). In showing that the legislation pursues a pressing and substantial objective, it is not open to the government to assert post facto a purpose which did not animate the legislation in the first place (see R. v. Big M Drug Mart Ltd., supra, at p. 335). However, in proving that the original objective remains pressing and substantial, the government surely can and should draw upon the best evidence currently available. The same is true as regards proof that the measure is proportional to its objective (see R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713, at p. 769). It is equally possible that a purpose which was not demonstrably pressing and substantial at the time of the legislative enactment becomes demonstrably pressing and substantial with the passing of time and the changing of circumstances.

67 The respondent claimed that the legislative debates provide no evidence of the intention of the government in enacting ss. 248 and 249 and therefore argued that all other evidence is superfluous. Yet, the following statement of the Minister responsible for the legislation, commenting on why the government chose the thirteen-year-old age limit, gives an adequate sense of the general purpose underlying the legislation (Journal des débats, Commissions parlementaires, 3e sess., 31e Lég., Commission permanente des consommateurs, coopératives et institutions financières, Étude du projet de loi no 72 -- Loi sur la protection du consommateur (10), December 12, 1978 -- No. 226, at p. B-9501):

[page985]

> [TRANSLATION] Ms. Payette: What we wished to avoid at all costs -- I think in response to an observation by the Office concerning the messages currently broadcast -- was not actually reaching children. The proposal that pre-school age children be covered by the Bill did not seem adequate in the circumstances. It seemed to us that thirteen years of age was a good limit. It is possible that certain children are able to draw distinctions and make choices by the age of twelve. Certainly from the age of fourteen they are generally able to do so. So it seemed to us that thirteen, though arbitrary, was fair.
>
> And since we have relied upon a regulatory framework which has been in place for a number of years and which uses the age of thirteen as a cut-off, we adopted that age, on the basis of our experience to date.

The question becomes whether the evidence submitted by the government establishes that children under 13 are unable to make choices and distinctions respecting products advertised and whether this in turn justifies the restriction on advertising put into place. Studies subsequent to the enactment of the legislation can be used for this purpose.

68 One might wonder why the Attorney General did not tender in evidence certain reports and

studies that were used by the government both in enacting the legislation and subsequently in reviewing its operation. Nor did the Attorney General rely upon the deliberations of the two legislative committees, one convened in 1976 and the other in 1978, which held hearings concerning revisions to the Consumer Protection Act. In her testimony before the 1978 committee, the Minister made repeated reference to studies conducted for the government and, in particular, to a document tabled with the committee and prepared by the Office de la protection du consommateur respecting the proposed legislation on children's advertising. None of these materials were filed. In September 1985, the Federal-Provincial Committee on Advertising Intended for Children prepared a report entitled The Effects of Quebec's Legislation Prohibiting Advertising Intended for Children. The Attorney General did not see fit to put this report before the Court. We are left to assess the [page986] constitutionality of the legislation on the basis of the material that was filed.

D. Whether the s. 1 and s. 9.1 Materials Justify Banning Commercial Advertising Directed at Persons Under Thirteen Years of Age

69 It is now well established that the onus of justifying the limitation of a right or freedom rests with the party seeking to uphold the limitation, in this case the Attorney General of Quebec, and that the analysis to be conducted is that set forth by Dickson C.J. in R. v. Oakes, supra.

a. Pressing and Substantial Objective

70 The first part of the test involves asking whether the objective sought to be achieved by the impugned legislation relates to concerns which are "pressing and substantial in a free and democratic society". Dickson C.J. explained this requirement in Oakes at pp. 138-39:

> First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Because we have already found that the plaintiff's activity falls within the sphere of conduct protected by freedom of expression and that the purpose of the legislation is to prohibit particular content of expression in the name of protecting children, it is far from onerous to require that the concern underlying the restrictive legislation be a pressing and substantial one. Without such a high standard of justification, enshrined rights and freedoms would be stripped of most of their value.

[page987]

71 In our view, the Attorney General of Quebec has demonstrated that the concern which

prompted the enactment of the impugned legislation is pressing and substantial and that the purpose of the legislation is one of great importance. The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney General of Quebec, [TRANSLATION] "Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct." The material given in evidence before this Court is indicative of a generalized concern in Western societies with the impact of media, and particularly but not solely televised advertising, on the development and perceptions of young children. (For example: Canadian Radio-Television and Telecommunications Commission, Decision CRTC 79-320, April 30, 1979, Renewal of the Canadian Broadcasting Corporation's Television and Radio Network Licences, (1979) 113 Can. Gaz., Part I, 3082; Canadian Association of Broadcasters, Broadcast Code for Advertising to Children, op. cit.; Canadian Broadcasting Corporation, Commercial Acceptance Policy Guideline, see in particular "The CBC and Children's Advertising"; National Association of Broadcasters, Television Code (21st ed. 1980), see in particular "Responsibility Towards Children"; Organization for Economic Cooperation and Development (OECD), Advertising Directed at Children: Endorsements in Advertising (1982); and J.J. Boddewyn, Advertising to Children: Regulation and Self-regulation in 40 Countries (1984)). Broadly speaking, the concerns which have motivated both legislative and voluntary regulation in this area are the particular susceptibility of young children to media manipulation, their inability to differentiate between reality and fiction and to grasp the persuasive intention behind the message, and the secondary effects of exterior influences on the family and parental authority. Responses to the perceived problems are as varied as the agencies and governments which have promulgated them. However the consensus of concern is high.

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72 In establishing the factual basis for this generally identified concern, the Attorney General relied heavily upon the U.S. Federal Trade Commission (FTC) Final Staff Report and Recommendation, In the Matter of Children's Advertising, which contains a thorough review of the scientific evidence on the subject as at 1981. The Report emerged from a rulemaking proceeding initiated by the FTC. The Report's assessment both of children's cognitive ability to evaluate television advertising directed at them and of the possible remedies to mitigate the adverse effects of such advertising are relevant here. One of its principal conclusions is that young children (2-6) cannot distinguish fact from fiction or programming from advertising and are completely credulous when presented with advertising messages (at pp. 34-35):

> In summary, the rulemaking record establishes that the specific cognitive abilities of young children lead to their inability to fully understand child-oriented television advertising, even if they grasp some aspects of it. They place indiscriminate trust in the selling message. They do not correctly perceive persuasive bias in advertising, and their life experience is insufficient to help them counter-argue. Finally, the content, placement and various techniques used

> in child-oriented television commercials attract children and enhance the advertising and the product. As a result, children are not able to evaluate adequately child-oriented advertising.

The Report thus provides a sound basis on which to conclude that television advertising directed at young children is per se manipulative. Such advertising aims to promote products by convincing those who will always believe.

73 It is reasonable to extend this conclusion in two ways. First, it can be extended to advertising in other media. For example, the OECD Report, op. cit., discusses children's advertising in all media including television, although the greatest body of evidence focusses on the persuasive force of television advertising. Second, it can be extended to advertising aimed at older children (7-13). The Attorney General filed a number of studies reaching [page989] somewhat different conclusions about the age at which children generally develop the cognitive ability to recognize the persuasive nature of advertising and to evaluate its comparative worth. The studies suggest that at some point between age seven and adolescence, children become as capable as adults of understanding and responding to advertisements. The majority in the Court of Appeal interpreted this evidence narrowly and found that it only justified the objective of regulating advertising aimed at children six or younger, not the regulation of advertising aimed at children between the ages of seven and thirteen. They concluded, and we agree, that the evidence was strongest with respect to the younger age category. Opinion is more divided when children in the older age category are involved. But the legislature was not obliged to confine itself solely to protecting the most clearly vulnerable group. It was only required to exercise a reasonable judgment in specifying the vulnerable group.

74 As Dickson C.J. noted in R. v. Edwards Books and Art Ltd., supra, at pp. 781-82, commenting on the legislative decision to exempt businesses having seven or fewer employees from a Sunday closing rule:

> I might add that I do not believe there is any magic in the number seven as distinct from, say, five, ten, or fifteen employees as a cut-off point for eligibility for the exemption. In balancing the interests of retail employees to a holiday in common with their family and friends against the s. 2(a) interests of those affected the Legislature engaged in the process envisaged by s. 1 of the Charter. A "reasonable limit" is one which, having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

The same can be said of evaluating competing credible scientific evidence and choosing thirteen, as opposed to ten or seven, as the upper age limit [page990] for the protected group here in issue. Where the legislature mediates between the competing claims of different groups in the community, it will inevitably be called upon to draw a line marking where one set of claims legitimately begins

and the other fades away without access to complete knowledge as to its precise location. If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another. In dealing with inherently heterogeneous groups defined in terms of age or a characteristic analogous to age, evidence showing that a clear majority of the group requires the protection which the government has identified can help to establish that the group was defined reasonably. Here, the legislature has mediated between the claims of advertisers and those seeking commercial information on the one hand, and the claims of children and parents on the other. There is sufficient evidence to warrant drawing a line at age thirteen, and we would not presume to re-draw the line. We note that in Ford, supra, at pp. 777-79, the Court also recognized that the government was afforded a margin of appreciation to form legitimate objectives based on somewhat inconclusive social science evidence.

75 In sum, the objective of regulating commercial advertising directed at children accords with a general goal of consumer protection legislation, viz. to protect a group that is most vulnerable to commercial manipulation. Indeed, that goal is reflected in general contract doctrine (see, for example, Civil Code of Lower Canada, arts. 987 and 1001 to 1011 respecting contracts with minors). Children are not as equipped as adults to evaluate the persuasive force of advertising and advertisements directed at children would take advantage of this. The legislature reasonably concluded that advertisers should be precluded from taking advantage of children both by inciting them to [page991] make purchases and by inciting them to have their parents make purchases. Either way, the advertiser would not be able to capitalize upon children's credulity. The s. 1 and s. 9.1 materials demonstrate, on the balance of probabilities, that children up to the age of thirteen are manipulated by commercial advertising and that the objective of protecting all children in this age group is predicated on a pressing and substantial concern. We thus conclude that the Attorney General has discharged the onus under the first part of the Oakes test.

b. Means Proportional to the Ends

76 The second part of the s. 1 and s. 9.1 test involves balancing a number of factors to determine whether the means chosen by the government are proportional to its objective. As Dickson C.J. stated in Edwards Books and Art Ltd., supra, at p. 768:

> Second, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely trench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgement of rights.

i. Rational Connection

77 There can be no doubt that a ban on advertising directed to children is rationally connected to the objective of protecting children from advertising. The government measure aims precisely at the problem identified in the s. 1 and s. 9.1 materials. It is important to note that there is no general ban on the advertising of children's products, but simply a prohibition against directing advertisements to those unaware of their persuasive intent. Commercial advertisements may clearly be directed at the true purchasers -- parents or other adults. Indeed, non-commercial educational advertising aimed at children is permitted. Simply put, advertisers [page992] are prevented from capitalizing on the inability of children either to differentiate between fact and fiction or to acknowledge and thereby resist or treat with some skepticism the persuasive intent behind the advertisement. In the present case, we are of the opinion that the evidence does establish the necessary rational connection between means and objective. In Ford, by contrast, no rational connection was established between excluding all languages other than French from signs in Quebec and having the reality of Quebec society communicated through the "visage linguistique".

ii. Minimal Impairment

78 We turn now to the requirement that "the means, even if rationally connected to the objective ... should impair 'as little as possible' the right or freedom in question": Oakes, supra, at p. 139. We would note that in this context, the standard of proof is the civil standard, that is, proof on the balance of probabilities. Furthermore, as Dickson C.J. observed in Oakes, supra, at p. 137:

> Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974), at p. 385. As Lord Denning explained in Bater v. Bater, [1950] 2 All E.R. 458 (C.A.), at p. 459:
>
> > The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.
>
> [page993]

This observation is particularly relevant to the "minimal impairment" branch of the Oakes proportionality test. The party seeking to uphold the limit must demonstrate on a balance of probabilities that the means chosen impair the freedom or right in question as little as possible.

What will be "as little as possible" will of course vary depending on the government objective and on the means available to achieve it. As the Chief Justice wrote in Oakes, supra, at p. 139:

> Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.

79 Thus, in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck. Vulnerable groups will claim the need for protection by the government whereas other groups and individuals will assert that the government should not intrude. In Edwards Books and Art Ltd., supra, Dickson C.J. expressed an important concern about the situation of vulnerable groups (at p. 779):

> In interpreting and applying the Charter I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it [page994] is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (Edwards Books and Art Ltd., supra, at p. 772).

80 In other cases, however, rather than mediating between different groups, the government is best characterized as the singular antagonist of the individual whose right has been infringed. For example, in justifying an infringement of legal rights enshrined in ss. 7 to 14 of the Charter, the state, on behalf of the whole community, typically will assert its responsibility for prosecuting crime whereas the individual will assert the paramountcy of principles of fundamental justice. There might not be any further competing claims among different groups. In such circumstances, and indeed whenever the government's purpose relates to maintaining the authority and impartiality of the judicial system, the courts can assess with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions: see Sunday Times v. United Kingdom (1979), 2 E.H.R.R. 245, at p. 276. The same degree of certainty may not be achievable in cases involving the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources.

81 In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective.

82 The strongest evidence for the proposition that this ban impairs freedom of expression as little as possible comes from the FTC Report. Because the [page995] Report found that children are not equipped to identify the persuasive intent of advertising, content regulation could not address the problem. The Report concluded that the only effective means for dealing with advertising directed at children would be a ban on all such advertising because "[a]n informational remedy would not eliminate nor overcome the cognitive limitations that prevent young children from understanding advertising" (p. 36). However, the Report also concluded that such a ban could not be implemented either on the basis of audience composition data or on the basis of a definition of "advertising directed at children". It thus counselled against a ban (at p. 2):

> [T]he record establishes that the only effective remedy would be a ban on all advertisements oriented toward young children, and such a ban, as a practical matter, cannot be implemented.

83 The Report gave two reasons why a ban could not be implemented on the basis of audience composition data. First, according to the Report, viewing audiences were not so sufficiently segmented that one could implement a total ban on advertising during time periods when, on the basis of television ratings, programming is directed at young children. Only one network program was identified as attracting a viewing audience composed, over 30 per cent, by young children. Second, if the percentage were relaxed to, say, 20 per cent, a total ban on advertising would catch too many non-children and would still fail to catch all programs frequently watched by young children (at pp. 39-41):

> The data indicate that if either a 50% or a 30% audience cutoff figure is used (i.e. when young children constitute 50% or 30% of the actual viewing audience), advertising on only one network program (Captain Kangaroo) would be affected. Advertising on more programs would be included in a ban only if the cutoff figure were lowered to 20%. However, the staff believes that utilizing a 20% cutoff figure would not be advisable because the use of such a low cutoff figure would affect the viewing of the 80% of the audience who are not young [page996] children and who do not have their cognitive limitations ....
>
> Staff believes that implementing a ban utilizing a 20% figure would not be advisable because the ban's scope would still be underinclusive from the standpoint of advertising affected and the proportion of the child's total television

> viewing affected ... Further analysis of viewing data for young children (two to five) indicates more specifically that if a 20% cutoff figure were used, advertising on only 24 network programs would be affected, 22 of which are shown on Saturday or Sunday mornings. The use of a 20% figure would not include advertising on child-oriented programs shown during other time periods. Only 13% of a young child's weekly viewing of television occurs on weekend mornings.

84 Because the FTC Report focussed on the effect of advertising aimed at young children (2-6) and proceeded on the basis that advertising directed at older children (7-13) did not pose a problem, it concluded, reasonably enough, that no definition could distinguish adequately between advertising directed at young children and advertising directed at older children (at pp. 44-45):

> [The preliminary] Staff Report suggested a definition of "advertising directed to children" based on program design. A remedy based on this definition would ban advertising "in or adjacent to programs that have been designated as children's programs using some a priori judgments." The major and inherent drawback to this definition is that it does not distinguish between programs designed for younger children and those designed for older children ....
>
> The lack of specificity in categorizing children's programs as being primarily for two- to six-year-olds appears to coincide with the industry's practice of not directing advertisements solely to young children. For instance, CBS stated: "while certain advertisers who use television may wish to address young viewers, they rarely, if ever, limit their appeal to the young children alone."

85 Sections 248 and 249 preserve the rationale for a ban contained in the FTC Report at the same time as overcoming the practical limitations suggested [page997] therein. The sections contemplate a larger age group than that envisaged by the FTC Report, and always allow advertising aimed at adults, thereby avoiding the difficulties identified in the Report both with a ban based on audience composition and with a ban based on the definition of "advertising directed to children". The Application Guide for Sections 248 and 249 helps to illustrate this. It specifies a number of time periods during the day when, based on Bureau of Broadcast Measurement (BBM) statistics, over 15 per cent of the audience is made up of children aged 2 to 11. It was possible to arrive at these time periods despite the FTC's arguments precisely because a larger target group was specified. Furthermore, using this larger target group, it was possible for the Office de la protection du consommateur to identify products and advertising methods aimed at children. In this way, the 15 per cent cut-off does not serve to justify a ban on all advertising (as the 20 per cent cut-off discussed by the FTC was designed to do). By specifying categories of (1) products, (2) advertisements and (3) audience, the Guide allows for a sophisticated appraisal of when an advertisement is aimed at

children. These three categories are drawn directly from s. 249 and their elaboration by the Office is an attempt to perform the same balancing test required of the courts. Three categories of products are specified: (1) those aimed exclusively at children (toys, and certain candies and foods); (2) those having a large attraction for children (certain cereals, desserts and games); and (3) those aimed at adults. Four categories of advertisements are specified: (1) those not likely to interest children; (2) those not designed to interest children; (3) those directed only partly to children; and (4) those aimed mainly at children. Three categories of audience are specified: (1) children compose over 15 per cent; (2) children compose between 5 per cent and 15 per cent; and (3) children compose less than 5 per cent. On this basis, the Guide sets forth a table according to which different kinds of advertisements for the various product categories will be permitted depending upon audience composition. There is a system of pre-clearance run by a committee of the Office which helps advertisers to [page998] determine whether any given commercial is subject to the ban.

86 While ss. 248 and 249 do not incorporate all the details included in the Guide, they do put into place the framework for a practicable ban on advertising directed at children. The courts, rather than the Office de la protection du consommateur, are left with the final word as to whether, for example, the strictest limit on advertising should apply where children compose over 15 per cent of the audience rather than, for example, 20 per cent. But if a ban is the only effective means to achieve the legislative objective, and if such a ban can only be implemented using a flexible balancing test, the legislature cannot be faulted for leaving that balancing to the courts. Indeed, this should help to ensure that minimal impairment of free expression is a constant factor in the application of the law.

87 Of course, despite the FTC Report's conclusions to the contrary, the respondent argued that a ban was not the only effective means for dealing with the problem posed by children's advertising. In particular, it pointed to the self-regulation mechanism provided by the Broadcast Code for Advertising to Children as an obvious alternative and emphasized that Quebec was unique among industrialized countries in banning advertising aimed at children (see Boddewyn, op. cit.) The latter assertion must be qualified in two respects. First, as of 1984, Belgium, Denmark, Norway and Sweden did not allow any commercials on television and radio. Second, throughout Canada, as in Italy, the public network does not accept children's commercials (except, in the case of the CBC, during "family programs"). Consequently, Quebec's ban on advertising aimed at children is not out of proportion [page999] to measures taken in other jurisdictions. Nor is legislative action to protect vulnerable groups necessarily restricted to the least common denominator of actions taken elsewhere. Based on narrower objectives than those pursued by Quebec, some governments might reasonably conclude that self-regulation is an adequate mechanism for addressing the problem of children's advertising. But having identified advertising aimed at persons under thirteen as per se manipulative, the legislature of Quebec could conclude, just as reasonably, that the only effective statutory response was to ban such advertising.

88 In sum, the evidence sustains the reasonableness of the legislature's conclusion that a ban on commercial advertising directed to children was the minimal impairment of free expression

consistent with the pressing and substantial goal of protecting children against manipulation through such advertising. While evidence exists that other less intrusive options reflecting more modest objectives were available to the government, there is evidence establishing the necessity of a ban to meet the objectives the government had reasonably set. This Court will not, in the name of minimal impairment, take a restrictive approach to social science evidence and require legislatures to choose the least ambitious means to protect vulnerable groups. There must nevertheless be a sound evidentiary basis for the government's conclusions. In Ford, there was no evidence of any kind introduced to show that the exclusion of all languages other than French was necessary to achieve the objective of protecting the French language and reflecting the reality of Quebec society. What evidence was introduced established, at most, that a marked preponderance for the French language in the "visage linguistique" was proportional to that objective. The Court was prepared to allow a margin of appreciation to the government despite the fact that less intrusive measures, such as requiring equal prominence for the French language, were available. But there still had to be an [page1000] evidentiary basis for concluding that the means chosen were proportional to the ends and impaired freedom of expression as little as possible. In Ford, that evidentiary basis did not exist.

iii. Deleterious Effects

89 There is no suggestion here that the effects of the ban are so severe as to outweigh the government's pressing and substantial objective. Advertisers are always free to direct their message at parents and other adults. They are also free to participate in educational advertising. The real concern animating the challenge to the legislation is that revenues are in some degree affected. This only implies that advertisers will have to develop new marketing strategies for children's products. Thus, there is no prospect that "because of the severity of the deleterious effects of [the] measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve" (Oakes, at p. 140). The final component of the proportionality test is easily satisfied. In Ford, by contrast, the Attorney General of Quebec underscored the importance of the "visage linguistique" for francophone identity and culture and yet the effect of the measure taken was to prohibit the public manifestation of the identity and culture of non-francophones.

c. Conclusion

90 Based on the s. 1 and s. 9.1 materials, we conclude that ss. 248 and 249 constitute a reasonable limit upon freedom of expression and would accordingly uphold the legislation under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter.

[page1001]

VIII - Whether ss. 248 and 249 Violate s. 7 of the Canadian Charter

91 One issue remains to be considered. The respondent alleges that ss. 248 and 249 of the

Consumer Protection Act infringe s. 7 of the Charter. The legislation contemplates a possible restriction to liberty which could occur, so the argument goes, in a manner not in accordance with the principles of fundamental justice. The respondent submits that s. 278 of the Consumer Protection Act, read together with ss. 248 and 249, provides for penal sanctions based on a prohibition which is impermissibly vague. The appellant takes no position on the question of whether the principles of fundamental justice give rise to "vagueness doctrine". Its submission is simply that the law is not vague -- a submission which was accepted by Vallerand J.A., the only justice in the court below to deal with the question.

92 We have determined in the context of the s. 1 discussion that ss. 248 and 249 are not vague in terms of either confusion and contradiction or judicial discretion. Thus, there could only be a further challenge under s. 7 if a stricter vagueness test were applied to the penal sanction.

93 There is, however, an issue logically prior to that of vagueness, namely whether corporations can invoke s. 7 of the Charter in their aid. In order to properly understand the submissions of the respondent in this regard, we reproduce here the statutory scheme of penalties against contraventions of ss. 248 and 249.

> 278. Every person other than a corporation who is guilty of an offence constituting a prohibited practice or who infringes paragraph b, c, d, e or f of section 277 is liable
>
> (a) for the first offence, to a fine of two hundred dollars to five thousand dollars;
>
> (b) for a subsequent offence to the same provision of this act or a regulation committed within a period of two years, to a fine of four hundred dollars to ten thousand dollars, to imprisonment for not more than six months, or to both a fine and imprisonment. [page1002] A corporation guilty of an offence contemplated in the preceding paragraph is liable to a minimum fine five times greater and to a maximum fine ten times greater than those provided for in the preceding paragraph.

Section 215 establishes that ss. 248 and 249 constitute "prohibited practices" within the meaning of the above section:

> 215. Any practice contemplated in sections 219 to 251 constitutes a prohibited practice for the purposes of this title.
>
> 282. Where a corporation is guilty of an offence against this act or any regulation, every director or representative of such corporation who had knowledge of the said offence is deemed to be a party to the offence and is liable to the penalty

> provided for in section 278 or 279 for a person other than a corporation, unless he establishes to the satisfaction of the court that he did not acquiesce in the commission of such offence.

Imprisonment is clearly one of the penalties envisioned for contravention of, inter alia, ss. 248 and 249 of the Act. A corporation is not, for obvious reasons, subject to imprisonment. By virtue of s. 282 of the Act, directors of corporations are deemed to be parties to offences committed by the corporation and are therefore liable to the penalties listed above. It is, therefore, the directors and representatives of corporations who risk, pursuant to the Act, a restriction of liberty of the kind envisioned in Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486. In the present case, proceedings are brought only against the company and not against any individuals. In the context of physical restriction to liberty, it would be left to officers of a company whose conduct was impugned pursuant to s. 282 of the Act to raise a s. 7 argument in terms of vagueness or imputation of corporate liability to individuals. This circumstance does not arise in the present case.

94 In order to put forward a s. 7 argument in a case of this kind where the officers of the corporation are not named as parties to the proceedings, the corporation would have to urge that its own life, liberty or security of the person was being deprived in a manner not in accordance with the principles of fundamental justice. In our opinion, a corporation cannot avail itself of the protection offered by [page1003] s. 7 of the Charter. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition. The only remaining argument is that corporations are protected against deprivations of some sort of "economic liberty".

95 There are several reasons why we are of the view that this argument can not succeed. It is useful to reproduce s. 7, which reads as follows:

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

What is immediately striking about this section is the inclusion of "security of the person" as opposed to "property". This stands in contrast to the classic liberal formulation, adopted, for example, in the Fifth and Fourteenth Amendments in the American Bill of Rights, which provide that no person shall be deprived "of life, liberty or property, without due process of law". The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad

spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of Charter interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the [page1004] same ilk as corporate-commercial economic rights. In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.

96 That is, read as a whole, it appears to us that this section was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. In this regard, the case of R. v. Big M Drug Mart Ltd., supra, is of no application. There are no penal proceedings pending in the case at hand, so the principle articulated in Big M Drug Mart is not involved.

IX - Disposition and Answers to Constitutional Questions

97 For these reasons the appeal is allowed with costs and the constitutional questions are answered as follows:

1. Is s. 364 of the Consumer Protection Act, R.S.Q., c. P-40.1, added by s. 1 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21, inconsistent with the provisions of s. 33 of the Constitution Act, 1982 and so ultra vires and of no force or effect to the extent of the inconsistency pursuant to s. 52(1) of the latter Act?

Answer: No, except in so far as section 364 is given retrospective effect by section 7 of An Act respecting the Constitution Act, 1982, S.Q. 1982, c. 21. However, because s. 364 expired on June 23, 1987, there is [page1005] no valid and subsisting override provision.

2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Sections 248 and 249 infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter but are justified under s. 1 of the Canadian Charter and s. 9.1 of the Quebec Charter. Section 7 of the Canadian Charter cannot be invoked by the respondent.

3. Are ss. 248 and 249 of the Consumer Protection Act ultra vires the legislature of the province of Quebec, or are they to some degree of no force or effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11?

Answer: No.

The reasons of Beetz and McIntyre JJ. were delivered by

98 McINTYRE J. (dissenting):-- I have had the advantage of reading the reasons for judgment prepared in this appeal by the majority. They have set out the facts and the statutory provisions and regulations which are under consideration here and I need not repeat them. They have also set out the constitutional questions that were settled by Beetz J. which frame the issues arising in this case.

99 I would agree with my colleagues in their answer to the first question, to the effect that because of the expiration of s. 364 of the Consumer Protection Act, R.S.Q. c. P-40.1 there is no valid and subsisting override provision affecting the disposition of this case. I would agree as well with the answer to Question 3, to the effect that ss. 248 and 249 of the Consumer Protection Act are not ultra vires the legislature of Quebec nor deprived of effect under s. 3 of the Broadcasting Act, R.S.C. 1970, c. B-11. My point of disagreement with my colleagues arises from their answer to the second question. While I agree with them [page1006] that ss. 248 and 249 of the Consumer Protection Act infringe s. 2(b) of the Canadian Charter of Rights and Freedoms and s. 3 of the Quebec Charter, I do not agree that they may be justified under s. 1 of the Canadian Charter or s. 9(1) of the Quebec Charter.

100 I would not wish in these reasons to attempt to set out the limits of the application of s. 2(b) of the Charter and to define in general terms the extent of the protected activity under s. 2(b). I would content myself by observing that this Court in Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712, has held that commercial expression has the protection of s. 2(b). At pages 766-67, it was said:

> Given the earlier pronouncements of this Court to the effect that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter. It is worth noting that the

> courts below applied a similar generous and broad interpretation to include commercial expression within the protection of freedom of expression contained in s. 3 of the Quebec Charter. Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The Court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.

It is evident then that ss. 248 and 249 of the Consumer Protection Act restrict forms of expression which fall within the protection of s. 2(b). Since I agree that the two sections in their prohibition of advertising aimed at children infringe the s. 2(b) right, the only question in issue is whether the sections can be justified as reasonable limits under s. 1 of the Charter.

[page1007]

The Importance of Freedom of Expression

101 Freedom of expression under s. 2(b) is guaranteed as a fundamental freedom. Its importance and its value are surely beyond question. My colleagues have recognized this and referred to various authorities which recognize the importance of the principle. They have referred to the words of Cardozo J. in Palko v. Connecticut, 302 U.S. 319 (1937), at p. 327, which describe the concept as "the matrix, the indispensable condition of nearly every other form of freedom" and, as well, to those of Rand J. in Switzman v. Elbling, [1957] S.C.R. 285, at p. 306, that it was "little less vital to man's mind and spirit than breathing is to his physical existence". They referred to other authorities on the subject. I would observe, as well, that freedom of expression has long been recognized in Canada as a principle of fundamental importance and even before the adoption of the Charter, the courts of this country had elevated the principle to virtual constitutional status (see RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at pp. 584-86).

Section 1

102 It is settled that to override a constitutional guarantee a government supporting a limitation imposed by law must show a purpose or objective of pressing and substantial importance. Certainly, the promotion of the welfare of children is an objective of pressing and substantial concern for any government.

103 Can it be said that the welfare of children is at risk because of advertising directed at them? I am not satisfied that any case has been shown that it is. There was evidence that small children are incapable of distinguishing fact from fiction in advertising. This is hardly surprising: many adults have the same problem. Children, however, do not remain children. They grow up and, while advertising directed at children may well be a source of irritation to parents, no case has been shown

here that children suffer harm. Children live in a world of fiction, imagination and make believe. Children's literature is based upon these concepts. As they mature, they make adjustments and can be [page1008] expected to pass beyond the range of any ill which might be caused by advertising. In my view, no case has been made that children are at risk. Furthermore, even if I could reach another conclusion, I would be of the view that the restriction fails on the issue of proportionality. A total prohibition of advertising aimed at children below an arbitrarily fixed age makes no attempt at the achievement of proportionality.

104 In conclusion, I would say that freedom of expression is too important to be lightly cast aside or limited. It is ironic that most attempts to limit freedom of expression and hence freedom of knowledge and information are justified on the basis that the limitation is for the benefit of those whose rights will be limited. It was this proposition that motivated the early church in restricting access to information, even to prohibiting the promulgation and reading of the scriptures in a language understood by the people. The argument that freedom of expression was dangerous was used to oppose and restrict public education in earlier times. The education of women was greatly retarded on the basis that wider knowledge would only make them dissatisfied with their role in society. I do not suggest that the limitations imposed by ss. 248 and 249 are so earth shaking or that if sustained they will cause irremediable damage. I do say, however, that these limitations represent a small abandonment of a principle of vital importance in a free and democratic society and, therefore, even if it could be shown that some child or children have been adversely affected by advertising of the kind prohibited, I would still be of the opinion that the restriction should not be sustained. Our concern should be to recognize that in this century we have seen whole societies utterly corrupted by the suppression of free expression. We should not lightly take a step in that direction, even a small one.

[page1009]

105 It must be recognized that freedom of expression despite its singular importance is, like all rights, subject to limitations. It is not absolute. We have all heard the familiar statement that nobody has a right to shout "fire" in a crowded theatre. It illustrates the extreme and obvious case, but there will, of course, be other cases where limitations on the right may well be necessary and therefore justifiable. This, however, in my view, is not such a case. Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community.

106 In my view, no justification can be found under s. 1 of the Charter for these sections, and I would dismiss the appeal and answer constitutional Question No. 2 as follows:

> 2. If question 1 is answered in the affirmative, do ss. 248 and 249 of the Consumer Protection Act infringe the rights, freedoms and guarantees contained in ss. 2(b) and 7 of the Canadian Charter of Rights and

Freedoms, and if so, can those sections be justified under s. 1 of the Canadian Charter of Rights and Freedoms?

Answer: Sections 248 and 249 of the Consumer Protection Act infringe s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter and are not justified under s. 1 of the of the Canadian Charter and s. 9.1 of the Quebec Charter. In agreement with the majority, s. 7 of the Canadian Charter cannot be invoked by the respondent.

TAB 18

Indexed as:

Haig v. Canada; Haig v. Canada (Chief Electoral Officer)

Graham Haig, John Doe and Jane Doe, appellants;
v.
The Chief Electoral Officer, respondent, and
The Attorney General of Canada, respondent, and
The Attorney General of Quebec, intervener.

[1993] 2 S.C.R. 995

[1993] 2 R.C.S. 995

[1993] S.C.J. No. 84

[1993] A.C.S. no 84

1993 CanLII 58

File No.: 23223

Supreme Court of Canada

1993: March 4 / 1993: September 2.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (161 paras.)

Constitutional law -- Charter of Rights -- Right to vote -- Federal referendum held everywhere in Canada except Quebec -- Quebec separate referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation -- Whether appellant's exclusion from federal referendum infringing s. 3 of Canadian Charter of Rights and Freedoms -- Referendum Act, S.C. 1992, c. 30 -- Canada Elections Act, R.S.C., 1985, c. E-2.

Constitutional law -- Charter of Rights -- Freedom of expression -- Federal referendum held everywhere in Canada except Quebec -- Quebec referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation -- Whether appellant's exclusion from federal referendum infringing s. 2(b) of Canadian Charter of Rights and Freedoms -- [page996] Whether s. 2(b) includes a positive right to be provided with a specific means of expression -- Referendum Act, S.C. 1992, c. 30 -- Canada Elections Act, R.S.C., 1985, c. E-2.

Constitutional law -- Charter of Rights -- Equality rights -- Equal benefit of the law -- New residents of a province -- Province of residence -- Federal referendum held everywhere in Canada except Quebec -- Quebec referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation -- Whether appellant's exclusion or Quebec's exclusion from federal referendum infringing s. 15(1) of Canadian Charter of Rights and Freedoms -- Referendum Act, S.C. 1992, c. 30 -- Canada Elections Act, R.S.C., 1985, c. E-2.

Elections -- Federal referendum -- Interpretation of federal referendum legislation -- Powers of Chief Electoral Officer -- Federal referendum held everywhere in Canada except Quebec -- Quebec referendum subject to provincial legislation -- Appellant who moved from Ontario to Quebec unable to vote in federal or Quebec referendum because of different residency requirements in federal and provincial legislation -- Whether federal referendum legislation may be interpreted to extend entitlement to vote in federal referendum to appellant -- Whether Chief Electoral Officer had power to adapt Canada Elections Act so as to extend entitlement to vote in federal referendum to appellant -- Referendum Act, S.C. 1992, c. 30, ss. 3(1), 7(3) -- Canada Elections Act, R.S.C., 1985, c. E-2, ss. 9(1), 53, 55(5) -- Regulation Adapting the Canada Elections Act, SOR/92-430.

In September 1992, the federal government directed that a referendum be held on October 26, 1992 on a question relating to the Constitution of Canada in all provinces and territories, except Quebec. Quebec was to hold a separate referendum on the same date and on the same question but in accordance with the provincial legislation. As a result of the different requirements as to residency in the federal and provincial legislation, the appellant Haig, who had moved from Ontario to Quebec in August 1992, was not qualified to vote in the Quebec referendum because he had not resided in that province for six months prior to the referendum, or to vote in the federal referendum because, on the enumeration date, he [page997] was not ordinarily resident within one of the polling divisions established for the federal referendum. The appellant brought an application in the Federal Court, seeking a declaration that s. 3 of the federal Referendum Act included a resident who was ordinarily resident in a province at any time in the six-month period prior to the referendum; or, in the alternative, a declaration that denying him a vote in the federal referendum violated his rights under ss. 3, 2(b) and 15(1) of the Canadian Charter of Rights and Freedoms. He also sought a mandamus requiring the Chief Electoral Officer to make reasonable provisions to allow him and

others in his situation to be enumerated. The court dismissed the application and the majority of the Federal Court of Appeal affirmed the judgment.

Held (Lamer C.J. and Iacobucci J. dissenting): The appeal should be dismissed. The federal Referendum Act and the Canada Elections Act are constitutional. The appellant's exclusion from the federal referendum did not violate his rights under ss. 2(b), 3 and 15(1) of the Charter.

Per La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ.: The federal Referendum Act and the Canada Elections Act did not grant the appellant an entitlement to vote in the federal referendum. The purpose of the Referendum Act is not to obtain the opinion of electors in all Canadian provinces at all times. Section 3(1) of that Act expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. The appellant was ordinarily resident in Quebec on the enumeration date set for the federal referendum and since Quebec was not one of the provinces listed in the federal proclamation, no polling divisions were established in that province for the federal referendum. Therefore, while the appellant came within the definition of a qualified voter, he was not on the enumeration date ordinarily resident in an established polling division and had no entitlement to vote in the federal referendum. The appellant did not retain a right to vote in Ontario by virtue of s. 55(5) of the Canada Elections Act. This section merely states that a person cannot be without an ordinary residence and cannot be construed as meaning that the appellant could not lose his ordinary residence in Ontario for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legislation. [page998] Such an interpretation would go not only against the wording but also against the spirit of the federal Referendum Act, which clearly extends an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation.

The Chief Electoral Officer did not have the power to extend the entitlement to vote in the federal referendum to the appellant. Though s. 7(3) of the federal Referendum Act gives the Chief Electoral Officer a discretionary power to adapt the Canada Elections Act in such a manner as he considers necessary for the purposes of applying that Act in respect of a referendum, this power does not extend to authorize a fundamental departure from the scheme of the Referendum Act. Residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation and the Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. The discretionary power of the Chief Electoral Officer could not be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Section 9(1) of the Canada Elections Act only contemplates situations where the provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforeseen circumstance". The appellant's situation does not fall within these terms. The exclusion of electors not resident in the provinces in question on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. Further, s. 9(1) is also restricted to adaptations designed to facilitate the execution of the intent of the Canada Elections Act. The object of this Act, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote.

Section 3 of the Charter does not guarantee Canadians a constitutional right to vote in a referendum. The wording of s. 3 is clear and unambiguous and guarantees only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. The purpose of s. 3 is to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives. Since a referendum is in no way such a selection -- a referendum is basically a consultative process --, the Canadian citizens cannot claim a constitutional right to vote in a referendum under s. 3. The appellant's s. 3 Charter rights were therefore not infringed.

[page999]

In the context of the 1992 federal referendum, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Though a referendum is undoubtedly a platform for expression, s. 2(b) of the Charter does not impose upon a government any positive obligation to consult its citizens through the particular mechanism of a referendum, nor does it confer upon all citizens the right to express their opinions in a referendum. In an other context, however, s. 2(b) could impose a positive governmental action. A referendum as a platform of expression is a matter of legislative policy and not of constitutional law. While s. 2(b) does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. Here, the federal government did not violate s. 2(b) either in holding its referendum or in holding it in less than all provinces and territories. The appellant was unable to vote simply because, on the enumeration date, he was not ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellant's freedom of expression as guaranteed in the Charter.

In providing a platform of expression to less than all Canadians, the federal government did not infringe the appellant's s. 15(1) Charter guarantee of equal benefit of the law. The new residents of a province do not constitute a disadvantaged group within the contemplation of s. 15(1). People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to vote in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". As well, the exclusion of one province from the federal referendum legislation does not violate s. 15(1). The decision of the Governor in Council to hold a referendum only in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under s. 3(1) of the federal Referendum Act. Both the decision to hold a referendum and the decision as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. In a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1), while prohibiting discrimination, does not alter the division of powers between governments, [page1000] nor does it require that all federal legislation must always have uniform application to all provinces.

Per McLachlin J.: The reasons of L'Heureux-Dubé J. were generally agreed with. Parliament's decision to hold a referendum in only some areas of Canada, and thus to exclude the residents

outside these areas from the federal referendum, is not contrary to the Charter. However, had the law enacted a truly national referendum, the appellant's freedom of expression would have been violated. But even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible in every situation where that result could be attained without infringing the law, there was no legal basis upon which the Chief Electoral Officer could have registered a Quebec resident in a referendum which by its terms excluded Quebec.

Per Cory J.: The right to vote is of fundamental importance to Canadians and to our democracy. In all enfranchising statutes, the provisions granting the right to vote should be given a broad and liberal interpretation and restrictions on that right should be narrowly construed. Every effort should be made to interpret the statute to enfranchise the voter. These principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in a referendum. The Chief Electoral Officer thus has a duty to insure that as many Canadians as possible are enfranchised in every situation where that result can be attained without infringing the law. Flexibility must be given to the concept of residence, particularly in enfranchising statutes. The concept of residence as a requirement of exercising the right to vote was designed to facilitate the attainment of the principle of one person one vote and should not be used as a means of depriving a person of this right. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote. There is no reason for departing from this approach and practice under the federal Referendum Act. Here, under the requisite flexible test of residency, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling [page1001] division outside Quebec. Unfortunately, the appellant did not apply to be enumerated in his former riding and it is impossible to determine on the facts presented if there was a sufficient connection to a riding within the federal referendum to warrant his addition to the voter's list. Since the referendum is now long past, this is not a proper case in which to grant declaratory relief.

Per Iacobucci J. (dissenting): The appellant was entitled to vote in the federal referendum. The referendum contemplated by the federal Referendum Act was aimed at all Canadians citizens entitled to vote in a federal election; to accomplish that end, the federal referendum was coordinated with the Quebec referendum. While, in a formal sense, two referenda were held, to focus on the technicalities of separate referenda can only obscure the national character of the referendum. Appellant's right to express his political views by participating in a national referendum is guaranteed by s. 2(b) of the Charter. The right to express opinions in social and political decision-making is clearly protected by s. 2(b). The referendum was an important expressive activity relating to constitutional change in this country and Parliament was apparently under a political obligation to follow the referendum's results. The effect of the federal Referendum Act, however, was to deprive the appellant and other recently arrived in Quebec of their rights to participate in the referendum. Accordingly, their s. 2(b) rights were violated. In the absence of any evidence on s. 1 of the Charter, the violation of the appellant's s. 2(b) rights has not been justified. The proper remedy would have been to expand the definition of "elector" in s. 3(1) of the

Referendum Act. The Chief Electoral Officer, relying on s. 7(3) of the Referendum Act, could have used s. 9(1) of the Canada Elections Act to permit the appellant to vote.

Per Lamer C.J. (dissenting): Cory J.'s approach to the definition of residency for voting purposes and Iacobucci J.'s reasons concerning s. 2(b) of the Charter were agreed with.

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By Cory J.

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By Iacobucci J. (dissenting)

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APPEAL from a judgment of the Federal Court of Appeal, [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71, dismissing the appellants' appeal from an order of Denault J. (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64, and dismissing their appeal (except on a procedural point) from an order of Joyal J., [1992] 3 F.C. 602, 57 F.T.R. 6. Appeal dismissed, Lamer C.J. and Iacobucci J. dissenting.

Philippa Lawson, for the appellants.

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N. J. Schultz and H. McManus, for the respondent the Chief Electoral Officer. Jean-Marc Aubry, Q.C., and Richard Morneau, for the respondent the Attorney General of Canada. Jean-François Jobin and Dominique A. Jobin, for the intervener.

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

The following are the reasons delivered by

1 **LAMER C.J.** (dissenting):-- I agree with Cory J. with respect to the proper approach to the definition of residency for voting purposes. I also agree with Iacobucci J. concerning s. 2(b) of the Canadian Charter of Rights and Freedoms and with respect to his proposed disposition of this appeal. I would, therefore, dispose of the appeal as proposed by Iacobucci J.

The judgment of La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Major JJ. was delivered by

2 L'HEUREUX-DUBÉ J.:-- On October 26, 1992, two referenda were held in Canada, each concerning proposed amendments to the Canadian Constitution. Graham Haig was not able to cast a ballot in either. This was unfortunate. The only issue in the present appeal is this: Was Graham Haig entitled to cast a ballot in the federal referendum?

3 At that specific moment in Canadian history, there was a confluence of political pressures, concerns and events. Among these was the ongoing and often politically heated constitutional dialogue. In order to seek the views of Canadians on this crucial issue of constitutional change, the federal government and the provincial governments who so desired had available a variety of options: commissions, surveys, opinion polls, referenda, etc. Quebec had legally bound itself to hold a referendum on sovereignty, while British Columbia and Alberta had articulated the possibility that they would hold provincial referenda dealing with constitutional change, and that they would consider themselves bound by the results. It was in this context [page1006] that the federal government undertook to hold a referendum in those provinces where a provincial referendum would not otherwise be held. This choice was in accord with the desire and the authority of the provinces to consult their own electors as they saw fit.

4 In the end, only two referenda were held: one in Quebec pursuant to Quebec's provincial referendum legislation, the other in the rest of Canada pursuant to the federal referendum legislation. The model chosen by the federal government was one which was open to them under the relevant legislation, which specifically allowed for referenda to be conducted in one or more provinces. The model chosen was, at the time, thought to be politically sound by both the federal and the provincial governments.

5 The mechanics of the two referenda were governed by the elections legislation of each government. The federal and the Quebec elections legislation, though similar in certain respects, are not mirror images of each other, but contain different provisions on a number of issues including: the preparation of electoral lists, methods of voting, financing, referendum publicity and spending, the roles and functions of the Chief Electoral Officers and their staff, and residency requirements. The residency provisions of the Quebec elections legislation, in particular, diverge from those in the federal legislation by requiring six months residency in order to be eligible to vote. It was this residency requirement which resulted in some Quebec residents, Mr. Haig in particular, not being able to cast their vote, and which is at the heart of this case.

6 Were the Quebec residents who were not entitled to vote in the Quebec referendum nonetheless

entitled to vote in the federal referendum? To answer this question, it is essential to more fully refer to the political events and legislative context leading up to October 26, 1992.

[page1007]

Facts

7 On April 17, 1982, the Constitution Act, 1982 was proclaimed into force. The Meech Lake Accord, which proposed certain amendments to the Constitution Act, 1982, was not ratified by all provincial legislatures within the allotted time period, and failed on June 23, 1990. As a result of these events, Bill 150, An Act respecting the process for determining the political and constitutional future of Québec, S.Q. 1991, c. 34, s. 32, came into force on June 20, 1991. According to Chapter I of this Bill, the Government of Quebec was required to hold a referendum on the sovereignty of Quebec no later than October 26, 1992.

8 On June 23, 1992, the Referendum Act, S.C. 1992, c. 30, came into force. This Act provided a mechanism for the federal government to obtain the opinion of the electors of Canada, or the electors of one or more provinces, on issues related to the Canadian Constitution.

9 On August 28, 1992, the Prime Minister of Canada, the ten provincial premiers, the leaders of the territorial governments and representatives of four aboriginal associations, came to an agreement which has become known as the "Charlottetown Accord". This agreement proposed substantial amendments to the Constitution of Canada.

10 On September 3, 1992, as a direct result of the Charlottetown Accord, Bill 44, An Act to amend the Act respecting the process for determining the political and constitutional future of Québec, S.Q. 1992, c. 47, was introduced into the Quebec National Assembly. This Bill, which came into force on September 8, 1992, amended Bill 150 so that the Government of Quebec was still obligated to hold a referendum on October 26, 1992, but the subject of the referendum would be the Charlottetown Accord, rather than Quebec sovereignty. Similarly, on September 8, 1992, the Prime Minister of Canada announced that a referendum would [page1008] be held on October 26, 1992, the subject of which would also be the Charlottetown Accord.

11 On September 9, the Premier of Quebec, pursuant to s. 8 of the Referendum Act, R.S.Q., c. C-64.1, put before the National Assembly the proposed text of the question to be the subject of the October 26, 1992 Quebec referendum. The same day, pursuant to s. 5(1) of the Referendum Act (Canada), the proposed text of the question which was to be the subject of the federal referendum was put before the House of Commons. Both questions were identical. The House of Commons approved the text of the federal referendum question on September 10, and the Senate approved the text on September 15. The National Assembly, pursuant to ss. 8 and 9 of the Referendum Act (Quebec) approved the text of the Quebec referendum question on September 16.

12 On September 17, 1992, pursuant to s. 3(1) of the Referendum Act (Canada), a proclamation

was issued by Order-in-Council P.C. 1992-2045 directing that a referendum be held to obtain the opinion of the electors of "the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta, Newfoundland, the Yukon Territory and the Northwest Territories" on a question relating to the Constitution of Canada. The referendum was to be held October 26, 1992, its conduct to be governed by the Canada Elections Act, R.S.C., 1985, c. E-2, as adapted for the purposes of the referendum. One of these provisions states that any Canadian citizen of 18 years of age who, on the enumeration date, was ordinarily resident within one of the polling divisions established for the referendum, would be entitled to cast a ballot.

13 On September 27, 1992, pursuant to s. 13 of the Referendum Act (Quebec), the Government of Quebec ordered Quebec's Chief Electoral Officer to hold a referendum on October 26, 1992, to be conducted in accordance with the provisions of the Election Act, R.S.Q., E-3.3, as adapted for the purposes of the referendum. According to one of [page1009] these provisions, any Canadian citizen of 18 years of age who, on the polling day, had been domiciled in Quebec for six months, would be entitled to cast a ballot.

14 In August of 1992, Graham Haig moved from Ontario to Quebec. On the enumeration day for the federal referendum, Mr. Haig was no longer ordinarily resident in a polling division established for the federal referendum, and so, pursuant to the provisions of the Canada Elections Act, he was not included on the list of voters entitled to vote in the federal referendum. At the same time, having been domiciled in Quebec for less than six months, he did not meet the eligibility requirements under the Election Act (Quebec), and so was not included on the list of voters eligible to vote in the Quebec referendum. The result was, of course, that Mr. Haig was not enumerated and consequently could not vote in either referendum.

Proceedings

15 On September 30, 1992, Mr. Haig instituted proceedings in the Federal Court, Trial Division, filing an originating notice of motion under s. 18.1 of the Federal Court Act, R.S.C., 1985, c. F-7. On behalf of himself and un-named others (represented by John Doe and Jane Doe), an application was brought against Her Majesty the Queen and the Chief Electoral Officer, seeking a declaration that s. 3 of the Referendum Act (Canada) included the applicants, and mandamus, requiring the respondents to make reasonable provisions to allow for the enumeration of the applicants. Notice was given to the Attorney General of Canada that the constitutional validity of the federal Order-in-Council would be challenged.

16 On October 7, 1992, counsel for Her Majesty the Queen made a preliminary application before Denault J. in the Federal Court, Trial Division, to have Her Majesty the Queen struck as a respondent on the basis that the court had no jurisdiction under s. 18.1 of the Federal Court Act to grant the remedies requested against the Queen. Denault J. granted the application, striking the Queen as [page1010] respondent: (1992), 57 F.T.R. 1, 97 D.L.R. (4th) 64. The applicants then

brought an additional application to add the Attorney General of Canada as respondent. Both applications were heard before and dismissed by Joyal J. in the Federal Court, Trial Division: [1992] 3 F.C. 602, 57 F.T.R. 6.

17 The appellants appealed the orders of Denault J. and Joyal J., and the respondent Chief Electoral Officer cross-appealed. The appeals and cross-appeal were joined and heard on October 19, 1992 before the Federal Court of Appeal, which added the Attorney General as a party, dismissed the appeal from the order of Denault J. as moot, dismissed the Chief Electoral Officer's cross-appeal, and also dismissed the original application on its merits: [1992] 3 F.C. 611, 145 N.R. 233, 97 D.L.R. (4th) 71. The appellants now appeal to this Court. The Chief Electoral Officer initially cross-appealed on an issue of jurisdiction related to parliamentary privilege, but that cross-appeal was discontinued on February 25, 1993.

Relevant Legislation

Referendum Act, R.S.Q., c. C-64.1

18

> 7. The Government may order that the electors be consulted by referendum
>
> (a) on a question approved by the National Assembly in accordance with sections 8 and 9, or
>
> (b) on a bill adopted by the National Assembly in accordance with section 10.
>
> As soon as the National Assembly is informed of the question or bill contemplated in the first paragraph, the Secretary General of the National Assembly shall notify the chief electoral officer thereof in writing.
>
> The chief electoral officer shall send a copy of the notice to the returning officer of each electoral division.
>
> 16. The lists of electors shall be established within the eighteen days following the day on which the National [page1011] Assembly was informed of the question or bill comtemplated in section 7.

Election Act, R.S.Q., c. E-3.3 (as adapted pursuant to ss. 44 to 47 of the Referendum Act, R.S.Q., c.

C-64.1)

1. Every person who

(1) has attained eighteen years of age;
(2) is a Canadian citizen;

(3) has been domiciled in Québec for six months or, in the case of an elector outside Québec, for twelve months;

(4) is not under curatorship; and

(5) is not deprived of election rights, pursuant to section 568, is a qualified elector.

Every person registered in the registry of electors outside Québec is deemed to be domiciled in Québec.

2. To exercise his right to vote, a person must be a qualified elector on polling day and be registered on the list of electors of the polling subdivision where his domicile is situated on the day of the notification provided for in section 7 of the Referendum Act, or be registered in the registry of electors outside Québec.

Referendum Act, S.C. 1992, c. 30

3. (1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the question to the electors of Canada or of one or more provinces specified in the proclamation at a referendum called for that purpose.

...

6. (1) On the issue of a proclamation, the Chief Electoral Officer shall, in accordance with the proclamation, issue writs of referendum in the form set out in Schedule I for all electoral districts in Canada or in the province or provinces specified in the proclamation.

...

7. (1) Subject to this Act, the Canada Elections Act, as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, [page1012] the issue of writs of referendum shall be deemed to be the issue of writs for a general election.

(2) The provisions of the Canada Elections Act referred to in Schedule II do not apply in respect of a referendum.

(3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the Canada Elections Act in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

(4) The Chief Electoral Officer may make regulations

(a) respecting the conduct of a referendum; and
(b) generally for carrying out the purposes and provisions of this Act.

Canada Elections Act, R.S.C., 1985, c. E-2 (as adapted for the purposes of a referendum, SOR/92-430)

9. (1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation.

50. (1) Every person who

(a) has attained the age of eighteen years, and
(b) is a Canadian citizen,

is qualified as an elector.

...

53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration [page1013] date for the referendum and to vote at the polling station established therein.

...

55. (1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expressions "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

Order-in-Council P.C. 1992-2045, dated September 17, 1992

WHEREAS, pursuant to subsection 3(1) of the Referendum Act, the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on the question hereinafter set out relating to the Constitution of Canada;

WHEREAS, pursuant to section 4 of that Act, no proclamation may be

issued before the text of the referendum question has been approved under section 5 of that Act;

AND WHEREAS the text of the referendum question hereinafter set out was approved by the House of Commons under section 5 of that Act of September 10, 1992 and was concurred in thereunder by the Senate on September 15, 1992;

THEREFORE, HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL, on the recommendation of the Prime Minister, pursuant to subsection 3(1) of the Referendum Act, is pleased hereby to order that a [page1014] proclamation do issue directing that the opinion of electors be obtained by putting to the electors of the provinces of Ontario, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Saskatchewan, Alberta Newfoundland, the Yukon Territory and the Northwest Territories, at a referendum called for that purpose, the following question relating to the Constitution of Canada:

"Do you agree that the Constitution of Canada should be renewed on the basis of the agreement reached on August 28, 1992?

____ ____"
Yes No

Judgments

Federal Court, Trial Division (Denault J.)

19 On the application by the respondent Her Majesty the Queen for an order striking her from the originating notice, Denault J. refused to hear the merits of the case, emphasising that the mandatory notice period for constitutional questions had not yet expired, and dealt only with the procedural issues.

20 Finding s. 18 of the Federal Court Act available only where the relief sought arises from a decision of a "federal board, commission or other tribunal", he held that the Crown does not come within the definition of "federal board, commission or other tribunal" set out in s. 2 of the Federal Court Act and, in addition, that the s. 18 procedure is not appropriate where the issues to be resolved are of a serious and complex nature. He concluded that ss. 17 and 48 applied and that an action against the Queen had to be commenced by statement of claim. As such, Denault J. granted

the respondent's motion, and struck Her Majesty the Queen from the originating notice.

Federal Court, Trial Division (Joyal J.), [1992] 3 F.C. 602

21 At the hearing on the amended Originating Notice, the Crown (appearing in an institutional capacity and not as a party respondent) argued that [page1015] since the real issue was the constitutional validity of a federal statute, the court lacked any jurisdiction to consider the matter under s. 18 of the Federal Court Act. In view of the peculiar circumstances and in spite of the earlier order of Denault J., Joyal J. took the jurisdictional questions under advisement, and allowed the case to proceed on the merits.

22 In Joyal J.'s view, the right to vote embodied in s. 3 of the Canadian Charter of Rights and Freedoms relates only to elections to the federal Parliament and legislative assemblies, and does not include a right to vote in any other instance. Since the federal Order-in-Council did not include Quebec, the question of whether or not Quebec should have been included was a policy decision and not a justiciable issue. He concluded that the applicants had no right to vote in the federal referendum, and that their only recourse, if any, might be to resort to the Quebec courts. In his opinion, at p. 608, the predicament facing the applicants was one

> which is often found when the political structure of a community is based on a federal system where both levels of authority enjoy their respective and exclusive jurisdictions.

23 While concluding that he had jurisdiction under s. 18 of the Federal Court Act, Joyal J. dismissed the applicants' Charter arguments, finding no violation of freedom of expression under s. 2(b), of mobility rights under s. 6, nor of equality rights under s. 15(1). Given this conclusion on the merits, he dismissed the application to add the Attorney General as a party.

Federal Court of Appeal, [1992] 3 F.C. 616 (Hugessen and Stone JJ.A., and Décary J.A. (dissenting))

24 On the jurisdictional question, Hugessen J.A., for the majority, found that the Chief Electoral Officer fell within the definition of 'federal board, commission or other tribunal'. The appellants' [page1016] complaint was that the Chief Electoral Officer had failed to exercise his power and jurisdiction to correctly apply and adapt the Canada Elections Act to the referendum. Such an allegation properly comes under s. 18 of the Federal Court Act, and the Attorney General of Canada is expressly authorized to be made a party to such proceedings. Since, in the context of a Charter challenge to federal legislation, the Attorney General is also a necessary party, the majority found that Joyal J. should have allowed the application to add the Attorney General of Canada.

25 The appeal from the decision of Joyal J. on the procedural point having been allowed, the appeal from Denault J.'s order on the related point was declared moot and quashed. With respect to the Chief Electoral Officer's cross-appeal, Hugessen J.A. observed that, though courts have

traditionally acted with restraint in matters relating to the conduct of elections, a Chief Electoral Officer has no historical privilege or statutory immunity against claims which are founded in the Charter. The cross-appeal was accordingly dismissed.

26 On the merits, the majority held that Joyal J. had reached the right conclusion, finding that if there was any denial of the appellants' rights, it flowed exclusively from the operation of the provincial legislation (at p. 616):

> While it is no doubt true that it is the federal order in council restricting the federal referendum to all provinces and territories other than Quebec which has created the background for the appellant's present situation, it remains that it is the Quebec legislation alone which is at the root of his complaint. He does not now reside in any province in which the federal referendum is being held and the federal legislation does not affect him one way or the other. As a resident of Quebec he is subject to that province's referendum legislation and it is solely that legislation which denies him the right to vote.

27 Commenting that the very scheme of the Referendum Act (Canada) and the Canada Elections Act [page1017] is based upon questions of geography, the majority found no constitutional impropriety in the Order-in-Council which limited the number of provinces in which the federal referendum would be held (at p. 617):

> ... because a referendum is limited to constitutional questions, and because the amending formula (and indeed the Constitution itself) envisages processes and substantive rules which may differ according to the province or number of provinces involved, it is entirely normal that different questions may be put to the electors in one or more provinces or that a question may be put to the electors in some provinces but not others. [Footnote omitted.]

28 Décary J.A., dissenting, agreed that the Federal Court of Appeal had jurisdiction under s. 18 of the Federal Court Act, and that the Attorney General of Canada and the Chief Electoral Officer were properly made parties to the proceedings. However, he disagreed with the majority's conclusion on the merits. Taking judicial notice of "political realities", Décary J.A. was of the view that the federal referendum, though not being held in all ten provinces, was in reality a national referendum, and that Parliament had not intended that any citizen of Canada would be disenfranchised with respect to this important issue.

29 He asserted that if the appellants were denied the right to participate in the referendum, their freedom of expression guaranteed by s. 2(b) of the Charter would be infringed. He also found that their rights to the equal benefit of the law guaranteed in s. 15(1) of the Charter would be infringed, finding that in the circumstances of this case, province of residence could be a personal characteristic capable of constituting a ground of discrimination. Décary J.A. further commented at p. 622 that:

> The source of the infringement, should the appellant be denied his rights, would not be the Quebec legislation but, rather, the federal legislation which would have failed to take into account for the purposes of a national [page1018] referendum the existing differences in provincial legislation with respect to electors' qualifications.

30 Since Parliament is presumed to act in conformity with the Charter, Décary J.A. determined that the issue could be resolved through statutory interpretation without placing the holding of the referendum itself in jeopardy. He concluded at p. 623 that the term "elector of a province" could be interpreted to include:

> in a particular province electors who are ordinarily resident of that given province on enumeration date and who do not qualify under the residency requirements of the latter, but who were ordinarily resident in that particular province at any time in the six-month period prior to the referendum... .

He recognized that his interpretation was "somewhat stretched", but would have granted the declaratory relief sought on the ground that the Federal Court of Appeal was the "next-to-last" resort of people in the appellants' position.

Constitutional Questions

31 The following constitutional questions were phrased by the Chief Justice:

1. If the Referendum Act, S.C. 1992, c. 30, and the Canada Elections Act, R.S.C., 1985, c. E-2, exclude from voting at the federal referendum Canadian electors who have moved to Quebec but who failed to meet Quebec's six months residency requirements for voting in the provincial referendum, do these Acts, in whole or in part, violate ss. 2(b), 3 or 15(1) of the Canadian Charter of Rights and Freedoms?
2. If the answer to the first constitutional question stated herein is in the affirmative, is such infringement justified under s. 1 of the Canadian Charter of Rights and Freedoms as a reasonable limit, demonstrably justified in a free and democratic society?
3. Does Order-in-Council P.C. 1992-2045, enacted pursuant to s. 3(1) of the Referendum Act, S.C. 1992, c. 30, infringe the rights or freedoms guaranteed the applicants under ss. 2(b), 3 or 15(1) of the Canadian Charter of Rights and Freedoms?

[page1019]

4. If the answer to the second constitutional question stated herein is in the affirmative, is such infringement justified under s. 1 of the Canadian Charter of

> Rights and Freedoms as a reasonable limit, demonstrably justified in a free and democratic society?

Issues

32 The constitutional questions formulated above raise but one central issue: Did Mr. Haig and those persons in a similar situation have the right to cast a ballot in the federal referendum held on October 26, 1992, either as a matter of statutory interpretation, or due to the operation of the Charter? I would answer this question by examining the following issues:

1. The proper interpretation of the federal referendum legislation, in particular, s. 3(1) of the Referendum Act (Canada), and ss. 53 and 55 of the Canada Elections Act.
2. The powers of the Chief Electoral Officer under s. 7(3) of the Referendum Act (Canada) and s. 9(1) of the Canada Elections Act to modify the provisions of the Canada Elections Act.
3. The constitutionality of the Referendum Act (Canada) and the Order-in-Council made thereunder, with respect to alleged violations of ss. 3, 2(b) and 15(1) of the Charter.

Statutory Interpretation of the Referendum Legislation

33 The first question is whether the federal referendum legislation is capable of bearing an interpretation that would allow the appellants to vote in the federal referendum. The answer to this question lies in the scope that can be given to the phrase "electors of ... one or more provinces specified in the proclamation" in s. 3(1) of the Referendum Act (Canada).

34 The appellants suggest that the Court should take a broad and purposive approach to this interpretative task. I agree. Following a number of authorities on the subject, the words of Dickson C.J. in Canadian National Railway Co. v. Canada [page1020] (Canadian Human Rights Commission), [1987] 1 S.C.R. 1114, at p. 1134, support this proposition:

> Although it may seem commonplace, it may be wise to remind ourselves of the statutory guidance given by the federal Interpretation Act which asserts that statutes are deemed to be remedial and are thus to be given such fair, large and liberal interpretation as will best ensure that their objects are attained.

35 The purpose, then, of the Referendum Act (Canada) is encapsulated in s. 3(1) of that Act:

> 3. (1) Where the Governor in Council considers that it is in the public interest to obtain by means of a referendum the opinion of electors on any question relating to the Constitution of Canada, the Governor in Council may, by proclamation, direct that the opinion of electors be obtained by putting the

> question to the electors of Canada or of one or more provinces specified in that proclamation at a referendum called for that purpose.

Section 3(1) expressly provides that consultation by referendum may be carried out on a national, provincial or multi-provincial basis. Clearly, the purpose is not to obtain the opinion of electors in all Canadian provinces at all times. There could not be clearer language. In order to achieve its purpose, the Referendum Act (Canada) fashions a mechanism for obtaining the opinion of electors on questions relating to the Constitution of Canada.

36 Section 7(1) of the Referendum Act (Canada) adopts the Canada Elections Act (as adapted) as the model to be used in seeking the opinion of electors, a model in conformity with the purpose of the Order-in-Council. In order to be qualified as an elector under this model, s. 50 specifies that a person must be 18 years of age and a Canadian citizen. Aside from this preliminary question of qualification, the Canada Elections Act model is one which is essentially founded on notions of geography. Once a referendum has been proclaimed, s. 6(1) of the Referendum Act (Canada) directs the Chief Electoral Officer to issue writs of referendum for the provinces specified in the proclamation. Writs are issued for these provinces, these [page1021] provinces are divided into electoral districts, and the electoral districts are further divided into polling divisions. The entitlement to vote under this model is contingent upon a person being ordinarily resident in one of these established polling divisions. This entitlement is clearly is set out in s. 53(1), which bears repetition:

> 53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein. [Emphasis added.]

37 In short, in order to vote in a federal referendum, a person must be both qualified as an elector, and be ordinarily resident in an established polling division in one of the provinces or territories where the referendum is held. Mr. Haig, as a Canadian citizen over the age of 18 years, comes within the definition of a qualified voter under s. 50 of the Canada Elections Act. Did he also qualify, on the enumeration date, as "ordinarily resident" in one of the polling divisions established under the federal referendum legislation?

38 The interpretation of the expression "ordinarily resident" is governed by the rules set out in ss. 55 to 59 and 62 of the Canada Elections Act. The general rule is that a person is ordinarily resident in the location where that person makes his or her home. Making that determination can be complex, but s. 55(2), reproduced earlier, provides required flexibility, stating that a person's ordinary residence is to "be determined by reference to all the facts of the case".

39 In the case before the Court, however, that determination was simple. Mr. Haig's undisputed affidavit evidence is that he ceased to be ordinarily resident in Ontario in August of 1992, and was

ordinarily resident in Quebec on the enumeration date set for the federal referendum. Since Quebec was not one of the provinces listed in the federal proclamation, no writ was issued, and no polling [page1022] divisions were established in Quebec for the federal referendum. On the enumeration date, Mr. Haig was not ordinarily resident in an established polling division, and he thus had no entitlement to vote in the federal referendum. This would appear to be sufficient to dispose of the matter as far as the statutory interpretation of the Referendum Act (Canada) and the Canada Elections Act are concerned. Both the purpose and the language of the legislation are clear and unambiguous, and the facts are not contested.

40 Mr. Haig submits, however, that despite being a resident of Quebec on the federal enumeration date, he retained the right to vote in Ontario, relying on s. 55(5) of the Canada Elections Act which states:

> 55. ...
>
> (5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

He argues that, according to this section, he could not lose his ordinary residence for the purpose of voting in the federal referendum until he had qualified as an elector in Quebec, under the relevant Quebec legislation. In my view, s. 55(5) cannot by any stretch of the imagination bear this meaning.

41 First, such an interpretation simply cannot be sustained on the wording of the section. Section 55(5) is clear, stating merely that a person cannot be without an ordinary residence. There was no allegation that Mr. Haig was without an ordinary residence at any time. On the contrary, and by his own admission, he had an ordinary residence, and that was in the province of Quebec. What he complains of is not that he lacked an ordinary residence. His complaint is that, though resident in Quebec, he had not yet met the six-month residency requirement set out in s. 1 of the Election Act (Quebec), and so was not entitled to vote in the Quebec referendum. Neither was he entitled to cast a ballot in the federal referendum held in Ontario, as he was no longer ordinarily resident in that province. Whether one adopts a plain or purposive [page1023] reading, s. 55(5) of the Canada Elections Act provides no assistance to Mr. Haig.

42 Second, the interpretation proposed goes not only against the wording, but also against the spirit of the Referendum Act (Canada), which expressly allows for a consultation of less than all Canadians. Accordingly, the appellants rely on the incorrect assumption that all Canadians were entitled to vote in this federal referendum, and that the question of where one actually casts one's ballot was a purely technical matter. This is clearly not so. Two distinct referenda were held. The federal referendum was held in nine provinces, and two territories. The entitlement to vote in this referendum was tied to ordinary residence in one of these jurisdictions on the enumeration date. The spirit of the Act was clearly to extend an entitlement to vote only to those people ordinarily resident in a jurisdiction specified by proclamation. It would go directly against this spirit and intent to find

otherwise.

43 It is critical to appreciate that residency is not a purely technical matter, but is a fundamental aspect of the referendum scheme itself. This is so for a number of reasons, not the least of which is the sheer mechanics of holding a referendum. The enumeration scheme provided for under the Canada Elections Act involves scrutineers going to the ordinary residence of each voter to place his or her name on the electoral roll. In order to apply this statutory structure to the appellants, the Chief Electoral Officer would have had two choices. The first would be to send enumerators into Quebec to find and enumerate those residents of Quebec who were not yet entitled to vote in the provincial referendum. In addition to the time and expense incurred in enumerating those residents who have been in Quebec for less than six months, this option would also require enumerators to operate extra-territorially in a province for which no federal referendum writ was issued. The second [page1024] choice would be to attempt to enumerate the persons who had recently moved to Quebec in the polling division they left behind. Besides involving similar issues of time, difficulty and expense, this option leaves unanswered the question of how these people would even be located. It goes without saying that both of these options expressly conflict with the requirements of s. 53(1), by allowing for the enumeration of people who are not ordinarily resident in an established polling division. In addition to the difficulties involved in the mechanics of enumeration, there would also have been difficulties related to the mechanics of how these non-residents would be able to vote. It is clear that the interpretation proposed by the appellants would require a highly crafted administrative system, a system that is notably absent from the legislation. In my view, the interpretation of s. 55(5) proposed by the appellants would simply be unworkable, and it cannot be presumed that such an interpretation or result could have been foreseen, let alone intended, by Parliament.

44 Finally, I must add that the interpretative approach proposed by the appellants is one which would do violence to all cannons of interpretation as well as to legislative integrity. The appellants are asking the Court to conclude that ordinary residence under the Referendum Act (Canada) cannot be lost until one is entitled to vote under the Referendum Act (Quebec). To arrive at such a conclusion, the Court would be required to alter the clear meaning of provisions drafted by the federal government in order to accommodate exigencies arising from provisions drafted by a completely different legislative body, one over which the federal legislator has no authority whatsoever. To do this would be to cut away at the authority of legislative bodies to draft statutory instruments that they feel best reflect their specific purposes and goals. Such a conclusion would strike a blow at the autonomy and independence of legislative bodies in a federal system. It is clear that, carried in different settings, such [page1025] an interpretative approach would have incredible and untenable consequences.

45 I conclude that the Referendum Act (Canada) and the Canada Elections Act could not properly be interpreted to extend an entitlement to vote to those Canadian citizens who, on the enumeration day, were not ordinarily resident in one of the jurisdictions where, pursuant to the Order-in-Council, the federal government held its referendum.

Powers of the Chief Electoral Officer

46 It was argued and it is the minority's view that, notwithstanding the clear and unambiguous terms of the legislation, the Chief Electoral Officer had, pursuant to s. 7(3) of the Referendum Act (Canada) and s. 9(1) of the Canada Elections Act, the discretion to adapt or interpret the Canada Elections Act so as to assist the appellants. Do these sections, then, confer upon the Chief Electoral Officer the authority to treat residents of Quebec as if they were residents of another province in order to enable them to vote in the federal referendum? In my view, they do not.

47 According to s. 7(3) of the Referendum Act (Canada), the Chief Electoral Officer may "adapt the Canada Elections Act in such a manner as [he] considers necessary for the purposes of applying that Act in respect of a referendum". Clearly, the discretion accorded the Chief Electoral Officer may be exercised only where adaptations of the Canada Elections Act are deemed necessary to facilitate the holding of a specific referendum. Though the Chief Electoral Officer is given a discretionary power to adapt the legislation, this power does not extend to authorize a fundamental departure from the scheme of the Referendum Act (Canada). In exercising his discretion, he must remain within the parameters of the legislative scheme.

[page1026]

48 As noted above, residence is a pivotal feature of the referendum scheme as captured in both pieces of federal legislation. The Order-in-Council directed that a referendum be held in a number of clearly specified jurisdictions. Where electors were not ordinarily resident in those jurisdictions, they had no entitlement to vote in that referendum. The discretionary power of the Chief Electoral Officer cannot be exercised to extend the entitlement to vote beyond the parameters established in the Order-in-Council. Were he to adapt the legislation in a manner that extended the reach of the underlying Order-in-Council, the Chief Electoral Officer would exceed the boundaries of his jurisdiction and, in my view, he would be exposed to having his decision quashed upon judicial review.

49 It was suggested that s. 9(1) of the Canada Elections Act, referred to earlier, provides more expansive remedial powers. This section bears repetition here:

> 9. (1) Where, during the course of a referendum, it appears to the Chief Electoral Officer that, by reason of any mistake, miscalculation, emergency or unusual or unforeseen circumstance, any of the provisions of this Act do not accord with the exigencies of the situation, the Chief Electoral Officer may, by particular or general instructions extend the time for doing any act, increase the number of referendum officers or polling stations or otherwise adapt any of the provisions of this Act to the execution of its intent, to such extent as he considers necessary to meet the exigencies of the situation. [Emphasis added.]

50 Although the text of this section seems very broad, it only contemplates situations where the

provisions of the legislation do not accord with particular needs arising out of any "mistake, miscalculation, emergency or unusual or unforeseen circumstance". The appellants argue that their situation, falling in the gap between the provisions of a provincial and a federal referendum, was just such an unusual and unforeseen occurrence. Clearly, it could not fall within the terms "mistake, miscalculation [or] emergency". In my view, Mr. Haig's situation is neither an unusual nor an unforeseen circumstance. The Referendum Act (Canada) expressly states that a referendum may [page1027] be directed at the electors of specific provinces. The exclusion of electors not resident in those provinces on the enumeration date is the clear and unambiguous consequence of the legislative scheme adopted. It is entirely foreseeable and in no way unusual that those people who do not meet the minimal requirements set out in the legislation will not be entitled to vote, whether in a referendum or in an election.

51 Section 9(1) of the Canada Elections Act is also restricted to adaptations designed to facilitate the "execution of its intent". The object of the Canada Elections Act, as adapted for the referendum, is to ensure that those who are entitled to vote are given an opportunity to do so. The object is not to enfranchise those who are not entitled to vote. To invoke s. 9(1) in aid of the appellants would distort the fundamental voting scheme, in a manner contrary to the intent of both the Canada Elections Act and the Referendum Act (Canada). In my opinion, the conditions necessary for the exercise of the remedial discretion accorded the Chief Electoral Officer in s. 9(1) of the Canada Elections Act were simply not present in this case.

52 However, even if I were to conclude that the Chief Electoral Officer had the statutory authority to make arrangements to allow for the enumeration of the appellants, he was not required to make such arrangements. The power given the Chief Electoral Officer in s. 9(1) of the Canada Elections Act is a discretionary power. In the absence of a Charter violation, this discretion remained to be exercised by the Chief Electoral Officer as he saw fit, and he cannot be compelled by a court to exercise it in a specific fashion, unless, of course, such discretion was not exercised judicially, which is not the case here.

53 In short, I find that the Chief Electoral Officer could not, without acting outside his jurisdiction under the Order-in-Council, accommodate Mr. Haig's circumstances and in no way was he [page1028] remiss in his duty on the basis that he neglected to use the discretionary and remedial powers accorded to him by s. 7(3) of the Referendum Act (Canada) and s. 9(1) of the Canada Elections Act. These provisions did not entitle nor require him to supersede or extend the purpose and intent, expressed in clear and unambiguous terms, of the legislation. The appellants' argument in this connection must fail.

54 After writing these reasons, I have had the opportunity to read the reasons of my colleague Cory J. and must emphasize that I find myself in total agreement with the principles he advances, particularly as to the importance to Canadians of the right to vote, in elections as well as referenda. I also agree that the Referendum Act (Canada) "encourages a very broad view of residence" (p. 1056).

55 Since, however, Mr. Haig, in this case, never alleged nor even argued before us that he had an Ontario residence or any connection whatsoever to the province of Ontario on the enumeration date in Ontario, the question of the discretionary power of the Chief Electoral Officer to allow him to vote in the federal referendum on that basis was never raised. The only question raised in this appeal, as far as the Chief Electoral Officer is concerned, was his power to extend the federal referendum residing requirements to persons who were not residents on the enumeration date in a province or territory where the federal referendum was held. This, in my view, the Chief Electoral Officer has no power to do.

56 As my colleague suggests, however, had Mr. Haig, and others in the same position, applied to the Chief Electoral Officer for a determination of his right to vote in Ontario on the basis of a substantial connection with Ontario on the enumeration date, it would have been up to the Chief Electoral Officer to exercise his discretionary power. This, of course, would be a different case.

[page1029]

Constitutionality

57 It should be emphasized at this point that, though the Quebec referendum legislation did not allow the appellants to vote in the Quebec referendum, the Quebec legislation was never challenged by the appellants. This is hardly surprising since, in Canada's constitutional system, the provinces have and retain authority to establish rules governing voting within the province. Territorial exigencies, such as those present in the northern territories, may justify a host of rules particular to a given province, and the possibility of such divergence is woven into the very fabric of Canadian federalism itself. No one has challenged the residency requirements established in the Quebec legislation, nor argued that they are in any way unconstitutional.

58 The only enactments challenged are the Referendum Act (Canada), the Canada Elections Act and the Order-in-Council as infringing upon the Charter rights of the appellants. The appellants submit that, to the extent that they were unable to participate in the federal referendum, they were deprived of their constitutional right to vote (s. 3), of their freedom of expression (s. 2(b)), and of their right to equal benefit of the law (s. 15(1)). They set out two alternative sources of this Charter violation: first, they challenge the provisions of the Referendum Act (Canada) and the Canada Elections Act as constitutionally under-inclusive to the extent that they failed to make provision for the enumeration of the appellants in a "national" referendum; alternatively, they submit that the Order-in-Council itself violated the Charter by failing to include the province of Quebec.

59 Leaving aside for the moment the Charter issues, I am of the view that neither of these alternative arguments has any merit. I would make only the following two comments at this juncture. First, the argument that the legislation is constitutionally under-inclusive received some support in the dissenting reasons of Décary J.A. However, the argument rests upon the flawed fundamental assumption that there was a "national" referendum. There [page1030] was in fact no such "national" federal referendum. There were two referenda held on October 26, 1992, both, it is

true, concerning the Charlottetown Accord, but pursuant to separate and distinct legislative schemes. Though the federal government may well have taken note of the results of the Quebec referendum, it would be unfounded in law to suggest that the federal government "allowed" Quebec to administer part of what was really a "national" referendum. Quebec did not need the authorization of the federal government to hold its referendum, and the Quebec referendum legislation was not within federal control or authority. Had the federal government wished to hold a "national" referendum, it could have included Quebec in the proclamation. Though it had every right to do so, it chose not to, as it also had the right to do.

60 Second, the appellants challenge the constitutionality of the federal Order-in-Council itself. In this regard, I fully agree with Hugessen J.A. that "there is no constitutional impropriety in a federal order in council requiring a referendum to be held in some but not all of the provinces". In fact, there is nothing in the Canadian Constitution which relates to referenda, let alone anything that mandates or prevents this type of consultation by either the federal or provincial governments. The propositions of the appellants to the contrary simply cannot be sustained. The decision to hold a federal referendum in nine provinces and two territories was a constitutionally permissible one. It was a political choice, a choice open under the legislation, and a choice consistent with principles of federalism. What is left to consider, then, is whether this choice was also consistent with the obligations of the federal government under the Charter. It is to that issue that I now turn.

Section 3:

The Right to Vote

61 Does s. 3 of the Charter guarantee to every citizen of Canada the right to participate in a federal referendum, independently of the terms of the federal referendum legislation? Section 3 of the Charter reads as follows:

[page1031]

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The wording of the section, as is immediately apparent, is quite narrow, guaranteeing only the right to vote in elections of representatives of the federal and the provincial legislative assemblies. As Professor Peter Hogg notes in Constitutional Law of Canada (3rd ed. 1992), vol. 2, at p. 42-2, the right does not extend to municipal elections or referenda.

62 In Reference re Provincial Electoral Boundaries (Sask.), [1991] 2 S.C.R. 158, this Court had occasion to more fully consider the content of s. 3 of the Charter. Writing in the context of a provincial election, Cory J., dissenting but not on this point, articulated at p. 165 that "[t]he right to vote is synonymous with democracy". Clearly, in a democratic society, the right to vote as

expressed in s. 3 must be given a content commensurate with those values embodied in a democratic state. For the majority of the Court, McLachlin J. concluded at p. 183 that it is the Canadian system of effective representation that is at the centre of the guarantee:

> ... the purpose of the right to vote enshrined in s. 3 of the Charter is not equality of voting power per se, but the right to "effective representation". Ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative. [Emphasis in original.]

63 The purpose of s. 3 of the Charter is, then, to grant every citizen of this country the right to play a meaningful role in the selection of elected representatives who, in turn, will be responsible for making decisions embodied in legislation for which they will be accountable to their electorate.

64 The democratic rights contained in ss. 3, 4 and 5 of the Charter are quite explicitly articulated. In his discussion in "Democratic Rights", in G.-A. Beaudoin and E. Ratushny, eds., The Canadian [page1032] Charter of Rights and Freedoms (2nd ed. 1989), 265, Professor Beaudoin summarizes these rights at p. 266 as:

> The right to choose the government, the right to seek public office, the right to vote periodically, freely and in secret and the right for those elected to sit regularly are the bases of democratic rights.

The democratic rights guaranteed in the Charter are also positive ones. Federal and provincial governments have a mandate to hold regular elections to allow citizens to select their representatives. The failure to hold such regular elections would violate the Charter, would open the government to account for such constitutional infringements, and would undoubtedly provoke a constitutional crisis. Since the results of an election are clearly binding upon citizens in a democratic society, failure to act upon such results would entail a serious constitutional breach.

65 A referendum, on the other hand, is basically a consultative process, a device for the gathering of opinions. Voting in a referendum differs significantly from voting in an election. First, unless it legislatively binds itself to do so, a government is under no obligation to consult its citizens through the mechanism of a referendum. It may, as did Quebec under Bill 150, bind itself to conduct a specific referendum but, in the absence of such legislation, there is no obligation to hold this type of consultation. Second, though a referendum may carry great political weight and a government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act on the basis of the results obtained. In the absence of binding legislation, the citizens of this country would not be entitled to a legal remedy in the event of non-compliance with the results. Were a government to hold a referendum and then ignore the results, the remedy would be in the political and not the legal arena. These differences provide

further evidence that the constitutionally guaranteed right to vote does not contemplate the right to vote in a referendum.

[page1033]

66 Section 3 of the Charter is clear and unambiguous as is its purpose: it is limited to the elections of provincial and federal representatives. Consequently, since a referendum is in no way such a selection, the citizens of this country cannot claim a constitutional right to vote in a referendum under s. 3 of the Charter. Accordingly, Mr. Haig's s. 3 Charter rights were not infringed because he could not cast his ballot in the federal referendum.

Section 2(b):

Freedom of Expression

67 Mr. Haig also claims that the fact that he could not vote in the federal referendum infringed his freedom of expression. Expressing one's opinion on the Charlottetown Accord, according to Mr. Haig, is an attempt to convey meaning, the content of which relates to political discourse, which is at the core of s. 2(b) of the Charter and enjoys the highest degree of protection. The content of this expression, he says, cannot be meaningfully examined apart from its form, namely, participation in the referendum itself. Consequently, he urges the Court to find that the actual casting of a ballot in a federal referendum is a protected form of expression, asserting that s. 2(b) of the Charter mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression.

68 The Court has, on many occasions, considered the freedom of expression guaranteed in s. 2(b) of the Charter. (See RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; BCGEU v. British Columbia (Attorney General), [1988] 2 S.C.R. 214; Ford v. Quebec (Attorney General), [1988] 2 S.C.R. 712; Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790; Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038; Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326; Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.), [1990] 1 S.C.R. 1123; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; R. v. Keegstra, [1990] 3 S.C.R. 697; Canada [page1034] (Human Rights Commission) v. Taylor, [1990] 3 S.C.R. 892; R. v. Butler, [1992] 1 S.C.R. 452; R. v. Zundel, [1992] 2 S.C.R. 731). Both Canadian society and the courts have at all times recognized that freedom of expression is a fundamental value in Canada. This Court has abundantly discussed the values underlying freedom of expression, and since those values are not in dispute here, it is not necessary to delve into them at great length. Nor is it in dispute that the activity of casting a ballot is an expressive one. As Dickson C.J. and Lamer and Wilson JJ. noted in Irwin Toy, supra, at p. 968, "'Expression' has both a content and a form, and the two can be inextricably connected". Referenda are in fact an illustration of this phenomenon, and in this context, it would be artificial to separate the form of expression from its content. The casting of a

ballot in a referendum is undoubtedly a means of expression, but again, this is not in dispute here.

69 At issue is whether s. 2(b) of the Charter guarantees to all Canadians the right to vote in a referendum. In failing to ensure that each Canadian was provided with the opportunity to vote in the federal referendum, did the federal government infringe upon their freedom of expression guaranteed in s. 2(b) of the Charter? Does freedom of expression include a positive right to be provided with specific means of expression?

70 As a starting point, I would note that case law and doctrinal writings have generally conceptualized freedom of expression in terms of negative rather than positive entitlements. In The System of Freedom of Expression (1970), T. I. Emerson, speaking of the United States Bill of Rights whose First Amendment provision is even more stringent than its Canadian Charter counterpart, observes at p. 627:

> The traditional premises of the system [of freedom of expression] are essentially laissez-faire in character. They envisage an open marketplace of ideas, with all persons and points of view having equal access to the means of communications. In supporting this system, the [page1035] First Amendment has played a largely negative role: it has operated to protect the system against interference from the government. Thus the issues have turned for the most part upon reconciling freedom of expression with other special interests that the government seeks to safeguard. The development of legal doctrine has been primarily in the evolution of a series of negative commands. [Emphasis added.]

71 Like its United States First Amendment counterpart, the Canadian s. 2(b) Charter jurisprudence has been shaped by these same foundational premises, focusing mainly on attempts by governments to place limitations on what can be expressed. The traditional question before courts has been: to what extent can freedom of expression be justifiably limited? The answer has been that individuals can expect to be free from government action the purpose or effect of which is to deny or abridge freedom of expression, unless the restraint is one that can be justified in a free and democratic society in accordance with s. 1 of the Charter.

72 It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(b) of the Charter to provide a particular platform to facilitate the exercise of freedom of expression. The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones. A case on point is Re Allman and Commissioner of the Northwest Territories (1983), 144 D.L.R. (3d) 467 (N.W.T.S.C.), aff'd (1983), 8 D.L.R. (4th) 230 (C.A.), leave to appeal to S.C.C. denied, [1984] 1 S.C.R. v. Mr. Allman challenged the constitutionality of a three-year residency requirement contained in a territorial Plebiscite Ordinance that prevented him from voting [page1036] in an upcoming referendum. The trial judge made the following observation at p. 479:

> The "freedom of thought, belief, opinion and expression" referred to in

> para. 2(b) of the Charter, on which the applicants rely, is therefore to be understood as recognition of a claim which anyone may make against the state ... to non-interference in matters of thought, belief, opinion and expression... .
>
> The applicants' complaint in these proceedings ... falls instead into the class of a "demand for state intervention" to provide access to the means of expression available to those designated as voters by the Ordinance... .

The trial judge concluded that no such entitlement existed, and that Mr. Allman did not have a right to be provided with access to a specific means of expression. The Court of Appeal agreed with that conclusion at p. 236:

> ... the expression of opinion sought by a plebiscite under the Plebiscite Ordinance has nothing at all to do with the fundamental freedom of expression guaranteed by the Canadian Charter. It does not abridge or abrogate the fundamental freedom of expression previously enjoyed by the applicants as a guaranteed birthright. It is a supplementary forum created by the territorial government for its own information purposes. The fact that the applicants were denied the opportunity to participate in a public opinion poll did not detract from their fundamental right to speak out and express their views on the subject-matter, whether individually or through the media. [Emphasis added.]

73 The approach followed in Allman, supra, rests firmly on the traditional foundational premises outlined above. However, it is these very premises that are being challenged by the appellants. While the basic theoretical framework underlying freedom of expression has remained unchanged over the past two hundred years, the appellants point out that the political, economic and social conditions under which the theory must be applied have changed significantly. They urge that true freedom of expression must be broader than simply the right to be free from interference, referring to [page1037] Emerson's claim in The System of Freedom of Expression, supra, at p. 4, that the state "has a more affirmative role to play in the maintenance of a system of free expression in modern society".

74 I would agree, and it is well understood, that a philosophy of non-interference may not in all circumstances guarantee the optimal functioning of the marketplace of ideas. Clare Beckton notes in "Freedom of Expression" in W. S. Tarnopolsky and G.-A. Beaudoin, eds., The Canadian Charter of Rights and Freedoms: Commentary (1982), 75, at p. 76:

> Generally the fundamental freedoms are guaranteed by placing limitations on the state's ability to abrogate or abridge them. While this can ensure that the state will not erode these guarantees, it does not ensure that freedom of expression will be fostered.

Owen M. Fiss, for his part, in "Free Speech and Social Structure" in J. Lobel, ed., A Less Than Perfect Union: Alternative Perspectives on the U.S. Constitution (1988), 346 at p. 352, writes that in modern society, freedom of expression "depends on the resources at one's disposal, and it reminds us that more is required these days than a soapbox, a good voice, and the talent to hold an audience." As he points out, speech often takes place under conditions of scarcity. Both the resources and the very opportunities for speech may tend to be limited, whether by time, lack of money, unavailability of space, or even by our capacity to digest and process information.

75 Does this inevitably lead to the conclusion that the constitutional guarantees of freedom of expression may import more than the absence of government interference? Some people have suggested that it might. Jean Jacques Blais, in "Freedom of Expression and Public Administration" in D. Schneiderman, ed., Freedom of Expression and the Charter (1991), 446, expresses the view that, for example, the concentration of media ownership in Canada may not be in the public interest, and [page1038] that there may be a more positive role for government to play in diffusing ownership to ensure a more vigorous exercise of freedom of expression amongst the mass media. Along the same lines, Allan C. Hutchinson, in "Money Talk: Against Constitutionalizing (Commercial) Speech" (1990), 17 Can. Bus. L.J. 2, at pp. 31 and 33, observes that literature produced by striking Molson workers could not gain wide dissemination due to restrictions set by the mass media. Yves de Montigny, in "The Difficult Relationship Between Freedom of Expression and Its Reasonable Limits" (1992), 55 Law & Contemp. Probs. 35 expresses a similar view at p. 40:

> While it is accurate to claim that government interference is very often inconsistent with individual freedom, it is equally accurate to say that genuine autonomy presupposes the legislature's active intervention if necessary.

76 In Reference re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, a case dealing with the boundaries of freedom of association, Dickson C.J. (dissenting) addressed this same concern at p. 361:

> Section 2 of the Charter protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (e.g., regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). [Emphasis added.]

77 Although that case did not involve a request for government action, but dealt rather with

legislative action alleged to interfere with a freedom, Dickson C.J. seems to imply that fundamental freedoms [page1039] might, in some situations, impose affirmative duties on a state.

78 At this point, it is important to emphasize that, in talking about freedom of expression, a variety of vocabularies have been employed. People have sometimes used the language of negative and positive entitlements, sometimes focusing on distinctions between rights and freedoms, other times on distinctions between "liberty to" and "liberty of". (For example, see I. Berlin, "Two Concepts of Liberty", in Four Essays on Liberty (1969), at pp. 118-72; A. W. Mackay, Freedom of Expression: Is It All Just Talk?" (1989), 68 Can. Bar Rev. 713; and W. R. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms" (1985), 11 Queen's L.J. 1). There may be value to these conceptual distinctions as they provide frameworks which can assist in an analysis of the issues, interests and values that shape a conclusion that a right has or has not been violated.

79 However, as Dickson C.J. rightly observed, this language cannot be used in a dogmatic fashion. The distinctions between "freedoms" and "rights", and between positive and negative entitlements, are not always clearly made, nor are they always helpful. One must not depart from the context of the purposive approach articulated by this Court in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295. Under this approach, a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.

80 In the proper context, these may perhaps be relevant considerations leading a court to conclude that positive governmental action is required. However, these considerations do not arise in our [page1040] case. The context here is a referendum whose legality and legitimacy have been recognized. First, the provisions of the Referendum Act (Canada) allow for a referendum to be held in some provinces and not others, and that is what was done here. Second, as discussed earlier, s. 3 of the Charter does not guarantee Canadians a constitutional right to vote in a referendum. Third, the referendum itself, far from stifling expression, provided a particular forum for such expression.

81 The observations of Le Dain J. (Beetz and La Forest JJ. concurring) in Reference re Public Service Employee Relations Act (Alta.), supra, provide some insight. In the context of s. 2(d) of the Charter, he commented at p. 391:

> What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to s. 2(d) of the Charter, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought -- the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer are --

> not fundamental rights or freedoms. They are the creation of legislation... . [Emphasis added.]

82 These comments find application to the issue before us. As I stated at the outset, there is no dispute concerning the importance of freedom of expression. Nor is it disputed that voting is a form of expression. Further, in the context of legislative elections, it is clear that voting as a means of expression is constitutionally entrenched in s. 3 of the Charter. However, there is just as clearly no constitutionally entrenched right to vote in a referendum.

83 A referendum is a creation of legislation. Independent of the legislation giving genesis to a referendum, there is no right of participation. The right to vote in a referendum is a right accorded by statute, [page1041] and the statute governs the terms and conditions of participation. The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the Charter does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law.

84 The following caveat is, however, in order here. While s. 2(b) of the Charter does not include the right to any particular means of expression, where a government chooses to provide one, it must do so in a fashion that is consistent with the Constitution. The traditional rules of Charter scrutiny continue to apply. Thus, while the government may extend such a benefit to a limited number of persons, it may not do so in a discriminatory fashion, and particularly not on ground prohibited under s. 15 of the Charter.

85 I would add that issues of expression may on occasion be strongly linked to issues of equality. In Schachter v. Canada, [1992] 2 S.C.R. 679, the Court said that s. 15 of the Charter is indeed a hybrid of positive and negative protection, and that a government may be required to take positive steps to ensure the equality of people or groups who come within the scope of s. 15. It might well be that, in the context of a particular equality claim, those positive steps may involve the provision of means of expression to certain groups or individuals. However, despite obvious links between various provisions of the Charter, I believe that, should such situations arise, it would be preferable to address them within the boundaries [page1042] of s. 15, without unduly blurring the distinctions between different Charter guarantees.

86 In short, I am of the view that, in the context of the federal referendum held in this case, freedom of expression did not include a constitutional right for all Canadians to be provided with a specific means of expression. Accordingly, the federal government did not violate s. 2(b) of the Charter either in holding its referendum or in holding it in less than all provinces and territories. The appellants were unable to cast their ballot simply because, on the enumeration date, they were not

ordinarily resident in a province where the federal referendum was held, a limitation which does not infringe the appellants' freedom of expression as guaranteed in the Charter.

87 This leads us to the third alleged Charter violation. In providing a platform of expression to less than all Canadians, did the government infringe the appellants' s. 15(1) guarantee to the equal benefit of the law?

Section 15(1):

Equality

88 Section 15(1) of the Charter guarantees the right to equality in the following terms:

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

89 To the extent that they were unable to vote in the federal referendum, the appellants allege that they were denied the equal benefit of the law. In their opinion, once the federal government decided to hold a "national" referendum on the Charlottetown Accord, it was compelled by s. 15(1) of the Charter to afford every qualified Canadian citizen the opportunity to participate in that vote. Since the appellants were not given this opportunity, they forward the proposition that the differential treatment [page1043] they received was based on a prohibited ground of discrimination. They advance two arguments in this regard: first, that they were improperly denied equal benefit of the law as new residents of a province; alternatively, that all residents of Quebec were improperly denied equal benefit of the law as a result of the failure to include Quebec in the Order-in-Council.

90 At the outset, I would reiterate the earlier observation that there was in fact no "national" referendum. The appellants were not afforded an opportunity to vote in the federal referendum simply because they were not ordinarily resident in a polling division established under the Referendum Act (Canada). However, was this distinction, one made between the appellants and those Canadians who were ordinarily resident in one of those polling divisions, a distinction which was based on a prohibited ground of discrimination?

91 In Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, McIntyre J. at p. 174 defined prohibited discrimination under s. 15(1) as:

> ... a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society.

He also noted that not all distinctions and differentiations are discriminatory. A complainant under s. 15(1) must establish that he or she is a member of a discrete and insular minority group, that the group is defined by characteristics analogous to the enumerated grounds of discrimination set out in s. 15(1), and that the law has a negative impact. In determining whether a group is analogous to those that are enumerated within s. 15(1) of the Charter, Wilson J. in R. v. Turpin, [1989] 1 S.C.R. 1296, at p. 1333, focused on the larger context by searching for indicia of discrimination such as "stereotyping, [page1044] historical disadvantage or vulnerability to political and social prejudice".

92 Against this background, the appellants submit that a person's place of residence may be a personal characteristic which is analogous to those prohibited grounds listed in s. 15(1). Though this may well be true in a proper case, this case is not such a case. It would require a serious stretch of the imagination to find that persons moving to Quebec less than six months before a referendum date are analogous to persons suffering discrimination on the basis of race, religion or gender. People moving to Quebec less than six months before a referendum date do not suffer from stereotyping, or social prejudice. Though its members were unable to cast a ballot in the Quebec referendum, the group is not one which has suffered historical disadvantage, or political prejudice. Nor does the group appear to be "discrete and insular". Membership in the group is highly fluid, with people constantly flowing in or out once they meet Quebec's residency requirements. As they do not exhibit any of the traditional indicia of discrimination, I cannot find that new residents of a province constitute a group which merits the creation of a new s. 15(1) category.

93 The appellants' alternative argument was that not simply new residents, but rather all residents of Quebec suffered discrimination. That is, they state that the federal government discriminated against all residents of the province of Quebec by failing to include Quebec in the proclamation. It is clear that at the base of the appellants' complaint is the existence of a scheme which allows for one province to be exempted from the scope of federal legislation. Even had the appellants been entitled to vote in the Quebec referendum, the central question would remain: Does the exclusion of one province from a piece of federal legislation violate s. 15(1) of the Charter?

[page1045]

94 The appellants contend that the differential application of federal law to the provinces can only be tolerated if it is "legitimate" and advances the values of a federal system. In their view, the decision to hold a referendum in only nine provinces did not advance these values. The appellants thus ask the Court to assess the legitimacy of the political decision not to include Quebec in the federal referendum, and to find that this decision was based on the prohibited ground of province of residence, and that it thus violated the s. 15(1) rights of all citizens of Quebec to the equal benefit of the law.

95 In Turpin, supra, the Court considered a provision in the Criminal Code which allowed for murder trials by judge alone only in the province of Alberta. An accused outside of Alberta who wanted a trial by judge alone argued that his equality rights were violated. Wilson J., finding that

province of residence did not form the basis of a claim in the case before her, clearly left open that possibility that in some situations it might. Residence based equality rights were more fully articulated by Dickson C.J. in R. v. S. (S.), [1990] 2 S.C.R. 254. In that case, the Young Offenders Act permitted provinces to set up "alternative measures" programs to deal with young offenders. The Attorney General for Ontario made the decision not to implement such a program. The Court held that this was not a violation of s. 15(1), emphasizing at p. 285 the discretion of the Attorney General to implement such federal programs:

> Once it is determined that there is no duty on the Attorney General for Ontario to implement a program of alternative measures, the non-exercise of discretion cannot be constitutionally attacked simply because it creates differences as between provinces. To find otherwise [page1046] would potentially open to Charter scrutiny every jurisdictionally permissible exercise of power by a province, solely on the basis that it creates a distinction in how individuals are treated in different provinces. The Attorney General for Ontario was under no legal obligation to implement a program and, in my opinion, the decision is unimpeachable because, for the purposes of a constitutional challenge on the basis of s. 15(1) of the Charter, "the law" is s. 4, which grants the discretion. [Emphasis added.]

96 Dickson C.J. added at p. 286 his opinion that the result "would be no different had s. 4 of the Young Offenders Act been challenged directly".

97 These comments are apposite here. Section 3(1) of the Referendum Act (Canada) confers upon the Governor in Council a discretionary power to direct that a referendum be held in any number of provinces. Nowhere in the Canadian Constitution is there mention of an obligation on the Governor in Council to hold a referendum, or to see that a referendum is held in all provinces. Both the decision to hold a referendum, and the decision as to the number of provinces in which a referendum will be held are policy decisions left entirely to governments and legislatures. They involve matters of political consideration. Besides, the Governor in Council is not required to justify the reasons for any particular exercise of his discretion. As Dickson J. said in Thorne's Hardware Ltd. v. The Queen, [1983] 1 S.C.R. 106, at pp. 112-13:

> Governments do not publish reasons for their decisions; governments may be moved by any number of political, economic, social or partisan considerations.

98 Clearly, in a federal system, province-based distinctions do not automatically give rise to a presumption of discrimination. Section 15(1) of the Charter, while prohibiting discrimination, does not alter the division of powers between governments, [page1047] nor does it require that all federal legislation must always have uniform application to all provinces. It is worth emphasizing that, as Dickson C.J. commented in R. v. S. (S.), supra, at pp. 289-92, differential application of federal law in different provinces can be a legitimate means of promoting and advancing the values of a federal

system. Differences between provinces are a rational part of the political reality in the federal process. Difference and discrimination are two different concepts and the presence of a difference will not automatically entail discrimination.

99 The motives which might have guided the decision of the Governor in Council to hold a referendum are not here in dispute, and it is not the task of courts to second-guess the legislature on its political judgment. The decision to hold a referendum in a specific number of provinces is a constitutionally permissible exercise of the discretion accorded to the government under s. 3(1) of the Referendum Act (Canada). The fact that the legislature decided not to hold a referendum in the province of Quebec did not violate the constitutional guarantees contained in s. 15(1) of the Charter. The appellants had no constitutional right to an Order-in-Council directing that a federal referendum be held in all Canadian provinces and territories.

100 In conclusion, the provisions of the Referendum Act (Canada) and the Canada Elections Act are constitutionally valid and, properly interpreted, they did not grant the appellants an entitlement to vote in the federal referendum. In not enumerating the appellants, the Chief Electoral Officer did not err in the exercise of the discretionary and remedial powers accorded him by s. 7(3) of the Referendum Act (Canada) and s. 9(1) of the Canada Elections Act. Finally, the exclusion of the appellants from the federal referendum did not violate the appellants' constitutional rights under ss. 3, 2(b) or 15(1) of the Charter. In light of these findings, I would dismiss the appeal and answer the [page1048] constitutional questions articulated by the Chief Justice as follows:

1. No.
2. Not necessary to answer.
3. No.
4. Not necessary to answer.

101 As in the courts below, I will make no order as to costs.

The following are the reasons delivered by

102 CORY J.:-- I have read with great interest the excellent reasons of Justice L'Heureux-Dubé. However, with respect to residency requirements, I differ from her with regard to the authority, the duties and the nature of the role of the Chief Electoral Officer.

103 In this appeal consideration must be given to the nature of the right to vote and how statutes which enact that right should be interpreted.

The Approach to the Interpretation of Statutory Franchise Provisions

104 All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is the mark of distinction of citizens of a democracy. It is a proud badge of freedom. While the Canadian Charter of Rights and Freedoms

guarantees certain electoral rights, the right to vote is generally granted and defined by statute. That statutory right is so fundamental that a broad and liberal interpretation must be given to it. Every reasonable effort should be made to enfranchise citizens. Conversely, every care should be taken to guard against disenfranchisement.

105 The principle was captured by J. P. Boyer in Election Law in Canada: The Law and Procedure [page1049] of Federal, Provincial and Territorial Elections (1987), vol. 1, at p. 383:

> Drawing two short lines to form an "X" is the simplest act imaginable. Yet the right to so mark a ballot is as profound as the act is simple. Such marks, systematically compiled, are transformed by our beliefs and our laws into the most eloquent voice the people have.
>
> ...
>
> The right to cast a vote for those seeking public office is encircled by procedures and laws designed not to make the exercise of this right difficult (although someone frustrated at not being able to vote for a technical reason may feel this is the case), but rather to ensure that it cannot be easily swept away.

106 The courts have always recognized the fundamental importance of the vote and the necessity to give a broad interpretation to the statutes which provide for it. This traditional approach is not only sound it is essential for the preservation of democratic rights. The principle was well expressed in Cawley v. Branchflower (1884), 1 B.C.R. (Pt. II) 35 (S.C.). There Crease J. wrote at p. 37:

> The law is very jealous of the franchise, and will not take it away from a voter if the Act has been reasonably complied with... . It looks to realities, not technicalities or mere formalities, unless where forms are by law, especially criminal law, essential, or affect the subject-matter under dispute. [Emphasis added.]

107 To the same effect in Re Lincoln Election (1876), 2 O.A.R. 316, Blake V.C. stated (at p. 323):

> The Court is anxious to allow the person who claims it the right to exercise the franchise, in every case in which there has been a reasonable compliance with the statute which gives him the right he seeks to avail himself of. No merely formal or immaterial matter should be allowed to interfere with the voter exercising the franchise ... .

It can be seen that enfranchising statutes have been interpreted with the aim and object of providing [page1050] citizens with the opportunity of exercising this basic democratic right. Conversely restrictions on that right should be narrowly interpreted and strictly limited.

The Importance of the Right to Vote on the Referendum

108 During the course of the hearing an argument was advanced that a referendum was distinct from and less important than an election. It was argued that, as a result, the generous principles applicable to the right to vote in elections should not apply with the same force to a referendum. I cannot accept that contention. A vast amount of public study, effort and time was expended in drafting the terms of the Charlottetown Accord. Every effort was made to advise Canadians of the importance of the referendum pertaining to it and the significance of the vote of every citizen. The number of voters exercising their franchise in the referendum was comparable to the turnout in federal elections. In the minds of most Canadians, the referendum was every bit as important as an election. If it was not, then Canadians would be clearly justified in wondering what all the fuss was about. The same principles applicable to the right to vote in elections should be applied in the same manner to the right to vote in a referendum.

Residency Requirements and the Interpretation of "ordinarily resident"

109 It follows that it was the duty of the Chief Electoral Officer to insure that as many Canadians as possible were enfranchised in every situation where that result could be attained without infringing the law.

110 Let us review the legislation governing the referendum and the right to vote in that referendum.

111 Section 7 of the Referendum Act, S.C. 1992, c. 30, provides in part:

[page1051]

> 7. (1) Subject to this Act, the Canada Elections Act, as adapted pursuant to subsection (3), applies in respect of a referendum, and, for the purposes of that application, the issue of writs of referendum shall be deemed to be the issue of writs for a general election.
>
> ...
>
> (3) Subject to this Act, the Chief Electoral Officer may, by regulation, adapt the Canada Elections Act in such manner as the Chief Electoral Officer considers necessary for the purposes of applying that Act in respect of a referendum.

112 Sections 50(1), 53(1) and 55(1) to (5) of the Canada Elections Act, R.S.C., 1985, c. E-2 (as adapted for the purposes of a referendum by SOR/92-430) read:

> 50. (1) Every person who

(a) has attained the age of eighteen years, and

(b) is a Canadian citizen,

is qualified as an elector.

53. (1) Subject to this Act, every person who is qualified as an elector is entitled to have his name included in the list of electors for the polling division in which that person is ordinarily resident on the enumeration date for the referendum and to vote at the polling station established therein.

55. (1) The rules in this section and sections 56 to 59 and 62 apply to the interpretation of the expressions "ordinarily resident" and "ordinarily resided" in any section of this Act in which those expressions are used with respect to the right of a voter to vote.

(2) Subject to this section and sections 56 to 59 and 62, the question as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case.

(3) The place or ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

[page1052]

(4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

(5) A person can have only one place of ordinary residence and it cannot be lost until another is gained.

113 Haig deposed that he resided in Ottawa from June 18, 1989 until August 1992 when he moved to Hull, Quebec. Thus he did not qualify to vote in the Quebec referendum because he had not been a resident of that province for the requisite statutory period of six months. It must be

remembered that Haig did not seek to challenge the validity of the Quebec legislation. Rather he sought to be enfranchised pursuant to the provisions of the federal Act.

114 My colleague takes the position that Haig, when he moved to Hull, lost his Ontario residency for voting purposes. With respect, I think the Chief Electoral Officer could well have come to a different conclusion.

115 At the outset, it must be remembered that originally the right to vote was tied to ownership of property. A person owning property in several ridings could cast a vote in each of them. The provisions pertaining to residency were aimed at preventing "plural voting" by prohibiting property owners from voting in more than one riding. The residency requirement was designed to facilitate the attainment of the principle of one person one vote. It should not be used too readily as a means of depriving a person of any right to vote.

116 The residential requirement was considered in In Re Provincial Elections Act (1903), 10 B.C.R. 114 (S.C. en banc). This case was concerned with persons who were temporarily outside the province but who nonetheless wished to be sworn as voters. Walkem J. stated (at pp. 120-21):

> It is a rule that franchise Acts should be liberally construed. The object of the Elections Act is to enfranchise and not disfranchise, persons who possess the necessary [page1053] qualifications for being placed on the Voters' List; and hence the Act should, if possible, be so construed as to forward that object... .

This approach had been earlier affirmed by the Ontario Court of Appeal in Re Voters' List of the Township of Seymour (1899), 2 Ont. Elec. 69 where, with respect to harvesters, MacLennan J.A. held: "... temporary absence, even of very considerable duration, is not inconsistent with continuous residence, where the franchise is concerned" (pp. 74-75).

117 This repetition of the principle of enfranchisement coupled with a recollection of the historical object of the residency requirement provides a useful point of commencement for considering the key phrase "ordinarily resident". The Canada Elections Act deals specifically with various specific aspects of residency as well as the general rule to be applied in determining a voter's residence. For example, the residence of summer residents is determined by s. 57; that of students and migrant workers in s. 58; those in charitable missions by s. 59 and members of Parliament by s. 60. The general residency rule is expressed under s. 55(2). It provides that the ordinary residence of a voter "shall be determined by reference to all the facts of the case". Subsections 3 and 4 of the same section provide:

> (3) The place of ordinary residence of a person is, generally, the place that has always been, or that the person has adopted as, the place of his habitation or home, and to which he intends to return when he is away from it.

> (4) Where a person usually sleeps in one place and has his meals or is employed in another place, the place of his ordinary residence is where the person sleeps.

Subsection 3 uses the word "generally" and subs. 4 uses the word "usually". By the use of these words, it can be seen that the framers of the legislation expected that there would be exceptions to the usual residency rule. Human existence itself is transitory. The residence of human beings is even [page1054] more so. It is seldom that a Canadian can now be referred to as "a lifetime resident of such and such a district". Ours is now a highly mobile society whose members will frequently move about the country. This mobility does not mean that the right to vote should be considered any less important than it was in earlier times. Indeed if a modern democracy is to function effectively the right is even more precious than before. Our whole concept of residency must be more flexible than ever before. It follows that the term "ordinarily resident" in an enfranchising statute should be interpreted broadly in the context of today's mobile society and in the light of the vital importance of the right to vote.

118 The case which in my view demonstrates the proper approach that should be taken to residency as it pertains to the right to vote is Hipperson v. Newbury District Electoral Registration Officer, [1985] Q.B. 1060 (C.A.). In that case the English Court of Appeal determined that the nuclear protesters who were camped outside the Greenham Common air base were residents of that district. The court came to this conclusion despite the obviously temporary nature of this town of tents. Sir John Donaldson M.R. found that the issue of the permanence of a settlement was a question of fact and degree. At page 1073 he wrote:

> Permanence, like most aspects of residence, is a question of fact and degree... . All human affairs have a degree of impermanence, the precise degree being best forecast in the light of experience.

119 Another example of the flexibility which must be given to the concept of residence is presented by the much older case of Re Fitzmartin and Village of Newburgh (1911), 24 O.L.R. 102 (Div. Ct.). Fitzmartin lived on a farm. The farm was located partly in one municipality while the farmhouse was in another. Middleton J. sensibly held (at p. 104):

> "Residence" is a word of very elastic meaning... . the "residence" required by the statute is not governed by such narrow considerations, but is such a residence [page1055] as can be fairly regarded as giving the voter the right to be recognised as a citizen of the municipality in question. [Emphasis added.]

120 Turning to more recent Canadian cases, Tenold v. Chapman (1981), 9 Sask. R. 278 (Q.B.), held that a person who had been living in Ottawa since 1974, first as an M.P. for a Saskatchewan riding and subsequently as a senatorial assistant was, for voting purposes, to be deemed ordinarily resident in Saskatchewan. The court balanced the facts presented. For example, although the applicant rented and maintained a small apartment in Ottawa, had a bank account in that city and

obtained and used a province of Ontario health card, his relationship to Saskatchewan was such that he could properly be found to be ordinarily resident in that province.

121 In the case of Fells v. Spence, [1984] N.W.T.R. 123 (S.C.), the term "ordinarily resident" for electoral purposes was again considered. An application was brought to strike Spence as a candidate on the grounds that he did not meet the residency requirements. Spence had moved to the Territory with his family when he was ten years old. However he left to attend university, travel and work. In 1976 he declared himself a resident of Kingston, Ontario, in order to run for mayor. Later he worked as an assistant to a cabinet minister in Ottawa for three years. However he frequently travelled to Yellowknife and stayed with his parents on those occasions. He expressed the intention of returning to live permanently to Yellowknife. He held a territorial driver's licence and health insurance card. In those circumstances it was held that he complied with the residential requirement. Marshall J. appropriately held (at p. 130):

> In my view, "ordinarily resident" under the Elections Ordinance of the Northwest Territories ought to be generously interpreted... .
>
> [page1056]
>
> If a man or woman can reasonably, on all the facts, fit within the statute, then let that person run. Democracy wants candidates.

These cases demonstrate the appropriate approach that courts should take to the concept of residence as a requirement of exercising the right to vote.

122 I note as well that it has been very sagely written that any scheme of enumerating voters should be drawn up with a view to insuring that the right to vote is given to the greatest possible number of eligible voters. T. H. Qualter in The Election Process in Canada (1970), at p. 21, observed that an ideal enumeration scheme is one administered so as to maximize eligibility. In Canada, the Chief Electoral Officer has been remarkably successful in this regard. In parliamentary elections approximately 98 percent of the eligible voters are registered and there would appear to be very little if any administrative disenfranchisement (Boyer, supra, at p. 426). I can see no reason for departing from this approach and practice under the Referendum Act.

123 The very nature of the Referendum Act encourages a very broad view of residence. In a parliamentary election, the location of votes can make a substantial difference in the election of a candidate in each riding. That is not true of a federal referendum where the exact location of any ballot is much less important. Further, the argument made in favour of residential requirements as providing an indication that the voter is reasonably acquainted with local issues and candidates is obviously not present in a referendum where all Canadians are called upon to vote on a question that transcends riding boundaries.

[page1057]

124 In my view, it would be wrong to automatically hold that those who had moved to Quebec before the referendum enumeration date could, on that basis alone, be denied the right to vote in a federal polling division outside Quebec. They could still properly exercise this franchise if it could possibly be said that they retained a substantial connection to a polling division within the federal referendum area. They could well be found to be "ordinarily resident" for the purpose of voting depending on the factual evidence placed before electoral officials. It can never be forgotten that the term "ordinarily resident" must be given a broad and liberal interpretation with a view to enfranchising the voter. It would be completely contrary to the objects of the Canada Elections Act and our concept of democratic government if rigid rules were applied too quickly and disenfranchised Canadians desirous of voting in a referendum without real justification. The connections of Haig to an Ottawa riding or any other riding within the federal referendum area should have been explored in this case. His move to Hull should not have had the automatic result of depriving him of his right to vote. However, it is impossible to determine the exact policy of the Chief Electoral Officer on this issue. The appellant chose to move directly before the courts without first seeking to be enumerated in a polling division within the federal referendum area where it could well have been found that he retained sufficient ties to enable him to vote.

125 The Referendum Act, through its incorporation of the provisions of the Canada Elections Act, provides that once an initial voter's list is drawn up citizens can then seek to have their names added to it. It is significant that this first list is referred to as "preliminary" (see s. 65(1)). The revision of the list takes place before a "revising officer" acting as a justice of the peace (s. 68 and Sch. IV, r. 42 et seq.). At this stage a person may apply to be [page1058] included. The appellant did not avail himself of this procedure.

126 He undoubtedly took this course because of his intention to seek a ruling that would treat all persons who had moved to Quebec within six months of the referendum voting date as a class of voters entitled to enfranchisement. Unfortunately, this makes it impossible for the Court to determine whether, under the requisite flexible test of residency, the appellant was qualified to cast his vote in the federal referendum area. There is simply no evidence upon which a finding could be made that he retained the necessary connection to a federal polling division to enable him to vote. Had the referendum not been held it might have been appropriate to remit the matter to a revising officer for an examination of the facts. This no longer can be done.

127 Nor should declaratory relief be granted. It is true that often the judicial interpretation of a statute can lead to the granting of a declaratory order by the Court. Nonetheless, declaratory relief is a matter of discretion which should only be exercised in a clear case. The referendum is now long past and in the circumstances presented in this case declaratory relief should not be granted.

Summary

128 The following principles emerge from a consideration of the right to vote and the interpretation of the statutes providing that right, here the Canada Elections Act and the Referendum

Act.

129 The right to vote is of fundamental importance to Canadians and to our Canadian democracy.

130 In the interpretation of all enfranchising statutes the provisions granting the right to vote should be given a broad and liberal interpretation. Every effort should be made to interpret the statute to enfranchise the voter.

[page1059]

131 Conversely every effort should be made to limit the scope of provisions which tend to disenfranchise the voter.

132 The concept of residency must be interpreted broadly in our mobile society. The term must be given a particularly broad and flexible meaning in statutes granting the right to vote. These statutes must be interpreted with the aim of enfranchising as many voters as possible. Further support for this approach can be derived from the historical purpose of enacting residency requirements which was to prohibit land owners from voting in each riding where they owned property. They were not enacted to completely deprive a person of the right to vote.

133 It follows that the specific term "ordinarily resident" should be interpreted broadly with a view to enfranchising as many voters as possible and to disenfranchising as few as possible.

134 There is still a further basis for giving the words "ordinarily resident" a very wide meaning in a referendum. Voting on a national question diminishes the strength of any argument that establishing the residence of a voter will give some indication of a voter's knowledge of local issues and candidates. As well, the exact location of each vote is less important than in a riding-by-riding parliamentary election.

135 A consideration of these principles could very well have led and perhaps should have led to his enfranchisement had Haig applied to be added to the list of voters in his former riding. Unfortunately, he did not seek to make such an application and it is impossible to determine on the facts presented if there was a sufficient connection to a riding to warrant his addition to the voter's list.

136 This is not a proper situation in which to grant declaratory relief.

[page1060]

Disposition

137 On the evidence presented, I find that I must come to the same result as Justice L'Heureux-Dubé but for different reasons. I would therefore dismiss the appeal and answer the constitutional questions in the manner suggested by my colleague.

The following are the reasons delivered by

138 McLACHLIN J.:-- I have had the benefit of reading the reasons of L'Heureux-Dubé J., Cory J. and Iacobucci J. While I am in general agreement with L'Heureux-Dubé J.'s disposition of this appeal, I wish to add the following comments.

139 I agree with Iacobucci J. that the debates of the House of Commons evince an intent that the referendum include all eligible Canadian voters. The problem, as I see it, is that the proclamation which resulted did not provide for a referendum including all Canadian voters. It provided a referendum for nine provinces and two territories, excluding Quebec. The province of Quebec was already committed to a provincial referendum on the same day, posing the same question. Doubtless it would have seemed overzealous, for lack of a better word, for Parliament to overlap the federal referendum with the previously set Quebec referendum.

140 The appellants' case is that it is the legislative acts of Parliament which violated their rights under the Canadian Charter of Rights and Freedoms. Accordingly, it is to the acts of Parliament and not to the expressed intention of its members that we must look. The act impugned is the act of providing for a referendum in areas of Canada other than Quebec, without providing a means for persons recently resident in Quebec to vote in their referendum. It is not contrary to the Charter that Parliament should decide to hold a referendum in only some areas of Canada. Having chosen to do so, it is not contrary to the Charter that voters outside [page1061] those areas be excluded. So the legal breach is not made out.

141 In order to carry though its expressed intention of holding a national referendum, Parliament should have made provision for persons such as Mr. Haig who, although Quebec residents, were ineligible to vote in Quebec because they had recently moved there. While, as discussed by L'Heureux-Dubé J., an enumeration of all such persons might have been difficult and costly, alternatives such as advertisements requesting such persons to step forward might have been attempted. But Parliament made no such provision. Instead it confined the right to vote in the federal referendum to the residents of provinces and territories other than Quebec, and failed to provide for the registration in its referendum of recently arrived Quebec residents. Had the law, as opposed to the speeches in Parliament, enacted a truly national referendum, then I would agree with Iacobucci J. that the result here violated the appellants' freedom of expression. The problem is that the law did not do this. Even with a broad and liberal reading of residency requirements aimed at enfranchising as many Canadians as possible "in every situation where that result could be attained without infringing the law" (per Cory J., at p. 1050), there was simply no legal basis upon which the Chief Electoral Officer could have registered Mr. Haig, a Quebec resident, in a referendum which by its terms excluded Quebec.

142 In the result, while I see much force in the contentions of my colleagues Iacobucci J. and Cory J., I would dismiss the appeal for essentially the reasons given by L'Heureux-Dubé J.

[page1062]

The following are the reasons delivered by

143 IACOBUCCI J. (dissenting):-- I have read the reasons of my colleagues, L'Heureux-Dubé J. and Cory J., and find myself in respectful disagreement with them, although my colleagues make many points with which I fully agree. My principal disagreement is that, in my view, the appellant's rights under s. 2(b) of the Canadian Charter of Rights and Freedoms were violated by the effect of the Referendum Act, S.C. 1992, c. 30 ("Referendum Act"), and such violation cannot, in the absence of evidence on the point, be saved under s. 1 of the Charter. In the result, I would allow the appeal.

144 In a technical or formal sense, it is correct to observe, as L'Heureux-Dubé J. does, that two referenda were held in the circumstances of this case: one by the province of Quebec and one by the federal government in the rest of Canada. Moreover, both British Columbia and Alberta require, under their legislation, that referenda be held in their respective provinces prior to the authorization of amendments to the Constitution of Canada. See the Referendum Act, S.B.C. 1990, c. 68, and the Constitutional Amendment Approval Act, S.B.C. 1991, c. 2; and the Constitutional Referendum Act, S.A. 1992, c. C-22.25 (as amended by S.A. 1992, c. 36). It appears that the federal referendum was to serve the purpose of a provincial referendum in those provinces. See the Constitutional Referendum Amendment Act, 1992, S.A. 1992, c. 36, s. 2. Technically, therefore, there were some four referenda being conducted: the federal referendum in nine provinces and two territories, the Quebec referendum, the federal referendum as applied to British Columbia, and the federal referendum as applied to Alberta.

145 In my opinion, focusing on the technicalities of separate referenda obscures the national character of the referendum. I agree with Décary J.A. that the reality was that Parliament intended the country to have a national referendum which would be conducted by the holding of a federal referendum [page1063] in conjunction with one or more provincial referenda, and in which the federal referendum could be treated as a provincial referendum in certain provinces, as apparently was the case in British Columbia and Alberta.

146 That a national referendum involving all Canadians was intended is shown by the statement of Mr. Jim Edwards, then Parliamentary Secretary to the Minister of State and Leader of the Government in the House of Commons, speaking on the second reading of Bill C-81 (the Referendum Act (Canada)):

> We would consult all Canadians in a national referendum. This referendum would be fair and give everyone an opportunity to express their opinion. It would be the culmination of the most extensive consultation exercise ever undertaken by a Canadian government.
>
> (House of Commons Debates, vol. 132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10889.)

147 In addition, then Prime Minister, the Right Honourable Brian Mulroney, P.C., in moving receipt of the Consensus Report on the Constitution, Charlottetown, August 28, 1992, stated:

> This constitutional package provides a framework within which we are able to move ahead as a united nation, diverse and different it is true, yet one nation. And now the referendum ensures that every person of voting age in Canada will have an opportunity to express his or her preference.
>
> (House of Commons Debates, vol. 132, No. 165, 3rd sess., 34th Parl., September 8, 1992, at p. 12732.)

148 It is also interesting to note that the Honourable Marcel Danis, then Minister of Labour, in describing the referendum emphasized the importance of adopting a process that was fair, democratic and consonant with the Charter:

> The government's purpose in tabling this bill is also to ensure that the rules of the game for any consultation that takes place will be fair, open and transparent, in [page1064] accordance with our democratic traditions and the Canadian Charter of Rights and Freedoms.
>
> What are those rules, Mr. Speaker? Basically, they would be the same as for a general election. The referendum would be supervised by the Chief Electoral Officer and be subject to the provisions of the Canada Elections Act, already a guarantee of a fair process. Furthermore, the "yes" and "no" sides would have equal access to free air time, as determined by the arbitrator. The CRTC would also supervise the purchase of air time on radio and television networks for advertising purposes.
>
> However, there are some differences because of the very nature of this kind of consultation and the implications of the Charter. First of all, the bill does not make so-called umbrella committees mandatory. Any obligation to take part in the referendum campaign under the aegis of such committees would be contrary to the Charter of Rights, according to the legal opinions we have received so far. In fact, such an obligation would not only be likely to violate freedom of expression, it would also force groups that may be for or against the question for entirely different reasons to operate under the same umbrella.
>
> (House of Commons Debates, vol. 132, No. 144, 3rd sess., 34th Parl., May 19, 1992, at p. 10854.)

149 I would therefore conclude that the federal referendum contemplated by the Referendum Act was aimed at all Canadians entitled to vote in a federal election.

150 The majority of the Federal Court of Appeal, [1992] 3 F.C. 611, was of the view that, when the appellant Haig moved from Ottawa to Hull, he exempted himself from the scope of the Referendum Act by virtue of being a non-resident of every province and territory to which the Referendum Act applied. Therefore, Haig could not challenge the Referendum Act because it did not apply to him. Consequently, the only legislation that Haig could attack was the Quebec legislation which lies outside the jurisdiction of the Federal Court of Canada.

[page1065]

151 The trouble with this approach is that it ignores the very purpose of the Referendum Act as stated above: to permit those Canadians entitled to vote in a federal election to accept or reject the Charlottetown Accord. The Referendum Act sought to coordinate a national referendum with the Quebec referendum, for which the underlying legislation had already been enacted. The aim of the Referendum Act was to include all Canadian citizens. If as a result of the requirements of the Quebec legislation, someone in the position of the appellant Haig was left out of the process he could, for the sake of argument, have launched a claim against two possible defendants: the province of Quebec and the federal government. I say no more about whatever rights he may have had against the province of Quebec because they are irrelevant to this appeal.

152 I agree with the appellant's submission that the federal legislation was aimed at a national referendum; to accomplish that end, it was coordinated with the Quebec referendum. As my colleague L'Heureux-Dubé J. observes, the appellant unfortunately fell between the legislative cracks and was neither able to participate in the national referendum directly, nor was he able to participate indirectly through the Quebec referendum.

153 The question which then arises is whether his inability to participate in the referendum process amounts to a violation of his rights under the Charter, and it is to that question I now turn.

154 I agree with the view that the federal government is not legally obligated to hold referenda, nor is it legally bound by the results of any referenda it conducts. However, if the government chooses to conduct a referendum, it must do so in compliance with the Charter. The Referendum Act provided a legislative framework to allow Canadian citizens to express their political opinions. The referendum was an important expressive activity relating to constitutional change in this country.

[page1066]

155 The importance of the expressive activity in question was clearly evidenced by the statement of the Right Honourable Joe Clark, P.C., in moving the constitutional question to be put to Canadians in the referendum:

> Three major steps remain. The first is to invite the judgement of the Canadian people in a national referendum on October 26. If Canadians vote yes, Parliament and legislatures would then act immediately to debate and, I expect, adopt the specific resolutions. Then we would seek the unanimous agreement of the provinces to shorten the period of final ratification, in a way that could have these major constitutional changes approved and ratified and effective in law within a matter of months. [Emphasis added.]
>
> (House of Commons Debates, vol. 132, No. 166A, 3rd sess., 34th Parl., September 9, 1992, at p. 12786.)

156 Although Parliament was under no legal obligation to follow the results of the referendum, apparently a political obligation to do so had been assumed. Despite the absence of such a legal obligation, nevertheless, the referendum was exceedingly important expressive activity that is worthy of Charter protection, as was acknowledged by Minister Danis in his comments quoted above.

157 The right to express opinions in social and political decision-making clearly attracts the protection of s. 2(b) (R. v. Zundel, [1992] 2 S.C.R. 731, and Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 S.C.R. 927, at p. 976). In Native Women's Assn. v. Canada, [1992] 3 F.C. 192, Mahoney J.A. succinctly stated: "[c]ommunicating one's constitutional views to the public and to governments is unquestionably an expressive activity protected by paragraph 2(b)" (p. 211). I would agree. Casting a referendum ballot is an important form of expression which is worthy of constitutional protection. In my view, the appellant Haig's right to express his political views by participating in the referendum was guaranteed by s. 2(b) of the Charter. He was [page1067] denied the right to participate and thus his s. 2(b) rights were violated.

158 Although the appellant Haig was free to express his views as he wished on the Charlottetown Accord prior to the vote, he was denied the ability to participate in the most important expressive activity, that of voting in the referendum. While the purpose of the Referendum Act was to include all voters, the effect was to deprive those residents of Quebec who were ordinarily resident in another province in the six-month period prior to the referendum of the ability to participate in expressive activity which is clearly protected under the Charter.

159 As the respondent Attorney General of Canada did not introduce any evidence on s. 1, the violation of the appellant's s. 2(b) rights has not been justified under s. 1.

160 Under the circumstances, as the referendum has already taken place, any remedy is more theoretical than real. However, like Décary J.A., I would have sought to expand the definition of "elector" in s. 3(1) of the Referendum Act. Relying on s. 7(3) of the Referendum Act, which states that the Canada Elections Act, R.S.C., 1985, c. E-2, may be adapted "in such manner as the Chief Electoral Officer considers necessary for the purpose of applying that Act in respect of a

referendum", the Chief Electoral Officer could have used s. 9(1) of the Canada Elections Act to permit the appellant Haig to vote as Décary J.A. outlined. Hopefully, the Canada Elections Act or the Referendum Act provisions will be clarified if Parliament decides to hold a referendum in the future.

161 In sum, I would allow the appeal with costs here and in the courts below, set aside the order of the Federal Court of Appeal, and substitute therefor an order declaring that the appellant was entitled to vote in the October 26, 1992 federal referendum as outlined by Décary J.A. in the court below.

[page1068]

Solicitor for the appellants: Philippa Lawson, Ottawa. Solicitors for the respondent the Chief Electoral Officer: Fraser & Beatty, Ottawa; Jacques Girard, Ottawa. Solicitor for the respondent the Attorney General of Canada: John C. Tait, Ottawa. Solicitor for the intervener: The Department of Justice, Ste-Foy.

TAB 19

Indexed as:

R. v. Oakes

**Her Majesty The Queen, appellant; and
David Edwin Oakes, respondent.**

[1986] 1 S.C.R. 103

[1986] 1 R.C.S. 103

[1986] S.C.J. No. 7

[1986] A.C.S. no 7

File No.: 17550.

Supreme Court of Canada

1985: March 12 / 1986: February 28.

**Present: Dickson C.J. and Estey, McIntyre, Chouinard, Lamer,
Wilson and Le Dain JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law -- Charter of Rights -- Presumption of innocence (s. 11(d)) -- Reverse onus clause -- Accused presumed to be trafficker on finding of possession of illicit drug -- Onus on accused to rebut presumption -- Whether or not reverse onus in violation of s. 11(d) of the Charter -- Whether or not reverse onus a reasonable limit to s. 11(d) and justified in a free and democratic society -- Canadian Charter of Rights and Freedoms, ss. 1, 11(d) -- Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3(1), (2), 4(1), (2), (3), 8.

Criminal law -- Presumption of innocence -- Reverse onus -- Accused presumed to be trafficker on finding of possession of illicit drug -- Onus on accused to rebut presumption -- Whether or not constitutional guarantee of presumption of innocence (s. 11(d) of the Charter) violated.

Respondent was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act, but was convicted only of unlawful possession. After the trial judge made a finding that it was beyond a reasonable doubt that respondent was in posses-

sion of a narcotic, respondent brought a motion challenging the constitutional validity of s. 8 of the Narcotic Control Act. That section provides that if the Court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking and that, absent the accused's establishing the contrary, he must be convicted of trafficking. The Ontario Court of Appeal, on an appeal brought by the Crown, found that this provision constituted a "reverse onus" clause and held it to be unconstitutional because it violated the presumption of innocence now entrenched in s. 11(d) of the Canadian Charter of Rights and Freedoms. The Crown appealed and a constitutional question was stated as to whether [page104] s. 8 of the Narcotic Control Act violated s. 11(d) of the Charter and was therefore of no force and effect. Inherent in this question, given a finding that s. 11(d) of the Charter had been violated, was the issue of whether or not s. 8 of the Narcotic Control Act was a reasonable limit prescribed by law and demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter.

Held: The appeal should be dismissed and the constitutional question answered in the affirmative.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ: Pursuant to s. 8 of the Narcotic Control Act, the accused, upon a finding beyond a reasonable doubt of possession of a narcotic, has the legal burden of proving on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. On proof of possession, a mandatory presumption arises against the accused that he intended to traffic and the accused will be found guilty unless he can rebut this presumption on a balance of probabilities.

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(d) of the Charter and inferentially by the s. 7 right to life, liberty and security of the person. This presumption has enjoyed longstanding recognition at common law and has gained widespread acceptance as evidenced from its inclusion in major international human rights documents. In light of these sources, the right to be presumed innocent until proven guilty requires, at a minimum, that: (1) an individual be proven guilty beyond a reasonable doubt; (2) the State must bear the burden of proof; and (3) criminal prosecutions must be carried out in accordance with lawful procedures and fairness.

A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). The fact that the standard required on rebuttal is only a balance of probabilities does not render a reverse onus clause constitutional.

Section 8 of the Narcotic Control Act infringes the presumption of innocence in s. 11(d) of the Charter by [page105] requiring the accused to prove he is not guilty of trafficking once the basic fact of possession is proven.

The rational connection test -- the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision -- does not apply to the interpretation of s. 11(d). A basic fact may rationally tend to prove a presumed fact, but still not prove its existence beyond a reasonable doubt, which is an important aspect of the presumption of innocence. The appropriate stage for invoking the rational connection test is under s. 1 of the Charter.

Section 1 of the Charter has two functions: First, it guarantees the rights and freedoms set out in the provisions which follow it; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitutional Act, 1982) against which limitations on those rights and freedoms may be measured.

The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited.

The standard of proof under s. 1 is a preponderance of probabilities. Proof beyond a reasonable doubt would be unduly onerous on the party seeking to limit the right because concepts such as "reasonableness", "justifiability", and "free and democratic society" are not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be [page106] characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern that drug trafficking be decreased was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a constitutionally protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey and McIntyre JJ: Concurred in the reasons of Dickson C.J. with respect to the relationship between s. 11(d) and s. 1 of the Charter but the reasons of Martin J.A. in the court below were adopted for the disposition of all other issues.

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R. v. Shelley, [1981] 2 S.C.R. 196; R. v. Carroll (1983), 147 D.L.R. (3d) 92; R. v. Cook (1983), 4 C.C.C. (3d) 419; R. v. Stanger (1983), 7 C.C.C. (3d) 337; R. v. Appleby, [1972] S.C.R. 303; Woolmington v. Director of Public Prosecutions, [1935] A.C. 462, considered; Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648, distinguished; R. v. Babcock and Auld, [1967] 2 C.C.C. 235; R. v. O'Day (1983), 5 C.C.C. (3d) 227; R. v. Landry [1983] C.A. 408, 7 C.C.C. (3d) 555; R. v. Therrien (1982), 67 C.C.C. (2d) 31; R. v. Fraser (1982), 138 D.L.R. (3d) 488; R. v. Kupczyniski, [1982] O.J. No. 626 (Ont. Co. Ct., June 23, 1982; R. v. Sharpe (1961), 131 C.C.C. 75; R. v. Silk, [1970] 3 C.C.C. 1; R. v. Erdman (1971), 24 C.R.N.S. 216; Public Prosecutor v. Yuvaraj, [1970] 2 W.L.R. 226; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486; Manchuk v. [page107] The King, [1938] S.C.R. 341; R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299; Dubois v. The Queen, [1985] 2 S.C.R. 350; Singh v. Minister of Employment

and Immigration, [1985] 1 S.C.R. 177; R. v. Therens, [1985] 1 S.C.R. 613; R. v. Stock (1983), 10 C.C.C. (3d) 319; Re Anson and The Queen (1983), 146 D.L.R. (3d) 661; R. v. Holmes (1983), 41 O.R. (2d) 250; R. v. Whyte (1983), 10 C.C.C. (3d) 277; R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539; R. v. T. (1985), 18 C.C.C. (3d) 125; R. v. Kowalczuk (1983), 5 C.C.C. (3d) 25; R. v. Schwartz (1983), 10 C.C.C. (3d) 34; Re Boyle and The Queen (1983), 41 O.R. (2d) 713; Tot v. United States, 319 U.S. 463 (1943); Leary v. United States, 395 U.S. 6 (1969); County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979); In Re Winship, 397 U.S. 358 (1970); Pfunders Case (Austria v. Italy) (1963), 6 Yearbook E.C.H.R. 740; X against the United Kingdom, Appl'n No. 5124/71, Collection of Decisions, E.C.H.R., 135; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357; Bater v. Bater, [1950] 2 All E.R. 458; Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154; Smith v. Smith, [1952] 2 S.C.R. 312, referred to.

Statutes and Regulations Cited

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(f).
Canadian Charter of Rights and Freedoms, ss. 1, 11(d).
Constitution Act, 1982, s. 33.
Constitution of the United States of American, 5th and 14th Amendments.
Criminal Code, R.S.C. 1970, c. C-34, s. 224A(1)(a) (now s. 237(1)(a)).
Food and Drugs Act, R.S.C. 1970, c. F-27, s. 35 (formerly s. 33 en. by 1960-61 (Can.), c. 37, s. 1).
International Covenant on Civil and Political Rights, 1966, art. 14(2).
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Opium and Narcotic Drug Act, R.S.C. 1952, c. 201.
Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium.
Single Convention on Narcotic Drugs, 1961.
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Jacobs, Francis. The European Convention on Human Rights, Oxford, Clarendon Press, 1975.
MacKay, A. Wayne and T. A. Cromwell. "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, 221-235.
Sopinka, John and Sidney N. Lederman. The Law of Evidence in Civil Cases, Toronto, Butterworths, 1974.

APPEAL from a judgment of the Ontario Court of Appeal (1983), 145 D.L.R. (3d) 123, 2 C.C.C. (3d) 339, dismissing an appeal of the Crown from a judgment of Walker Prov. Ct. J. convicting the accused of simple possession on a charge of possessing narcotics for the purposes of trafficking contrary to s. 4(2) of the Narcotic Control Act. Appeal dismissed.

Julius Isaac, Q.C., Michael R. Dambrot and Donna C. McGillis, for the appellant. Geoffrey A. Beasley, for the respondent.

Solicitor for the appellant: Roger Tassé, Ottawa. Solicitors for the respondent: Cockburn, Foster, Cudmore and Kitely, London.

The judgment of Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ. was delivered by

1 **DICKSON C.J.**:-- This appeal concerns the constitutionality of s. 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1. The section provides, in brief, that if the Court finds the accused in possession of a narcotic, he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(d) of the Canadian Charter of Rights and Freedoms. The Crown has appealed.

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I

Statutory and Constitutional Provisions

2 Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

> Narcotic Control Act, R.S.C. 1970, c. N-1
>
> 3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
>
> (2) Every person who violates subsection (1) is guilty of an indictable offence and is liable
>
> (a) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one year or to both fine and imprisonment; or
> (b) upon conviction on indictment, to imprisonment for seven years.

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) No person shall have in his possession a narcotic for the purpose of trafficking.

(3) Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life.

8. In any prosecution for a violation of subsection 4(2), if the accused does not plead guilty, the trial shall proceed as if it were a prosecution for an offence under section 3, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence as charged but he shall be [page110] convicted of an offence under section 3 and sentenced accordingly; and if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly.

(Emphasis added.)

Canadian Charter of Rights and Freedoms

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

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

II

Facts

3 The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act. He elected trial by magis-

trate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight one gram vials of cannabis resin in the form of hashish oil. Upon a further search conducted at the police station, $619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for $150 for his own use, and that the $619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the Narcotic Control Act, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

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4 Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the Narcotic Control Act, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(d) of the Charter.

III

Judgments

(a) Ontario Provincial Court (R. v. Oakes (1982), 38 O.R. (2d) 598)

5 At trial, Walker Prov. Ct. J. borrowed the words of Laskin C.J. in R. v. Shelley, [1981] 2 S.C.R. 196, at p. 202, and found there was no rational or necessary connection between the fact proved, i.e., possession of the drug, and the conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. Ct. J. held that, to the extent that s. 8 of the Narcotic Control Act requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(d) of the Charter.

6 Walker Prov. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b) Ontario Court of Appeal (R. v. Oakes (1983), 145 D.L.R. (3d) 123)

7 Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the Narcotic Control Act unconstitutional.

8 Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the [page112] accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

9 To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test which he explained as follows, at p. 146:

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in

> relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

10 If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (e.g., possession) must rationally tend to prove the presumed fact (e.g., an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

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11 In considering s. 8 of the Narcotic Control Act, Martin J.A. focused primarily on the second test at p. 147:

> I have reached the conclusion that s. 8 of the Narcotic Control Act is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic). ... Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

12 Martin J.A. added that it is not for courts to attempt to re-write s. 8 by applying it on a case by case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as "where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion". There would not, therefore, be any need for a statutory presumption.

13 One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s. 11(d) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(d).

IV

The Issues

14 The constitutional question in this appeal is stated as follows:

> Is s. 8 of the Narcotic Control Act inconsistent with s. 11(d) of the Canadian Charter of Rights and Freedoms and thus of no force and effect?

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Two specific questions are raised by this general question: (1) does s. 8 of the Narcotic Control Act violate s. 11(d) of the Charter; and, (2) if it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter? If the answer to (1) is affirmative and the answer to (2) negative, then the constitutional question must be answered in the affirmative.

V

Does s. 8 of the Narcotic Control Act violate s. 11(d) of the Charter?

(a) The Meaning of s. 8

15 Before examining the presumption of innocence contained in s. 11(d) of the Charter, it is necessary to clarify the meaning of s. 8 of the Narcotic Control Act. The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in R. v. Babcock and Auld, [1967] 2 C.C.C. 235 (B.C.C.A.), at p. 247:

> (A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.
>
> (B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug. ...
>
> (C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession. ...
>
> (D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).
>
> (E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.
>
> (F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking...

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> (G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.
>
> (H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic. ...
>
> (I) If the accused does not so establish he must then be convicted of the full offence as charged.

Mr. Justice Branca then added at pp. 247-48:

> It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

16 Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

> 8. ... if the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged. ...

17 In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions without basic facts and presumptions with basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact (see Cross On Evidence, 5th ed., at pp. 122-23).

18 Basic fact presumptions can be further categorized into permissive and mandatory presumptions. [page116] A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

19 Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact.

Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

20 Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (Cross on Evidence, supra, at p. 124) while the former involve actual legal rules.

21 To return to s. 8 of the Narcotic Control Act, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: R. v. Carroll (1983), 147 D.L.R. (3d) 92 (P.E.I.S.C. in banco); R. v. Cook (1983), 4 C.C.C. (3d) 419 (N.S.C.A.); R. v. O'Day (1983), 5 C.C.C. (3d) 227 (N.B.C.A.); R. v. Landry [1983] C.A. 408, 7 C.C.C. (3d) 555 (Que. C.A.); R. v. Stanger (1983), 7 C.C.C. (3d) 337 (Alta. C.A.)

22 In some decisions it has been held that s. 8 of the Narcotic Control Act is constitutional because [page117] it places only an evidentiary burden rather than a legal burden on the accused. The ultimate legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended. (R. v. Therrien (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.); R. v. Fraser (1982), 138 D.L.R. (3d) 488 (Sask. Q.B.); R. v. Kupczyniski, [1982] O.J. No. 626 (June 23, 1982, Ont. Co. Ct.))

23 This same approach was relied on in R. v. Sharpe (1961), 131 C.C.C. 75 (Ont. C.A.), a Canadian Bill of Rights decision on the presumption of innocence. In that case, a provision in the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, similar to s. 8 of the Narcotic Control Act, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In R. v. Silk, [1970] 3 C.C.C. 1 (B.C.C.A.), the British Columbia Court of Appeal held that s. 2(f) of the Canadian Bill of Rights had not been infringed because s. 33 of the Food and Drugs Act, (now R.S.C. 1970, c. F-27, s. 35) required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in R. v. Appleby, [1972] S.C.R. 303, nor in R. v. Erdman (1971), 24 C.R.N.S. 216 (B.C.C.A.)

24 Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the Narcotic Control Act. As Ritchie J. found in R. v. Appleby, supra, (though addressing a different statutory provision) the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word "establish" in s. 8 of the Narcotic Control Act, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the [page118] narcotic for the purpose of trafficking, he shall be convicted of the offence as charged".

25 In the Appleby case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, inter alia, upon the following passage from the House of Lords' decision in Public Prosecutor v. Yuvaraj, [1970] 2 W.L.R. 226, at p. 232:

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being "disproved" there can be no grounds in public policy for requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

26 I conclude that s. 8 of the Narcotic Control Act contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the Narcotic Control Act offends the right to be "presumed innocent until proven guilty" as guaranteed by s. 11(d) of the Charter.

[page119]

(b) The Presumption of Innocence and s. 11(d) of the Charter

27 Section 11(d) of the Charter constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

> 11. Any person charged with an offence has the right
>
> ...
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

28 To interpret the meaning of s. 11(d), it is important to adopt a purposive approach. As this Court stated in R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, at p. 344:

> The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> 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....

To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

29 The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter (see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486, per Lamer J.) The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to [page120] social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

30 The presumption of innocence has enjoyed longstanding recognition at common law. In the leading case, Woolmington v. Director of Public Prosecutions, [1935] A.C. 462 (H.L.), Viscount Sankey wrote at pp. 481-82:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the Woolmington principle with approval (see, for example, Manchuk v. The King, [1938] S.C.R. 341, at p. 349; R. v. City of Sault Ste. Marie, [1978] 2 S.C.R. 1299, at p. 1316).

31 Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(1) of the Universal Declaration of Human Rights, adopted December 10, 1948 by the General Assembly of the United Nations, provides:

[page121]

> Article 11.
>
> I. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the International Covenant on Civil and Political Rights, 1966, art. 14(2) states:

> Article 14.
>
> 2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this Covenant, and the Optional Protocol which sets up machinery for implementing the Covenant, on May 19, 1976. Both came into effect on August 19, 1976.

32 In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(d) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the State which must bear the burden of proof. As Lamer J. stated in Dubois v. The Queen, [1985] 2 S.C.R. 350, at p. 357:

> Section 11(d) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(d), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

33 Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

[page122]

(i) The Canadian Bill of Rights Jurisprudence

34 Section 2(f) of the Canadian Bill of Rights, which safeguards the presumption of innocence, provides:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> ...
>
> (f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal.

The wording of this section closely parallels that of s. 11(d). For this reason, one of the Crown's primary contentions is that the Canadian Bill of Rights jurisprudence should be determinative of the outcome of the present appeal.

35 The leading case decided under s. 2(f) of the Canadian Bill of Rights and relied on by the Crown, is R. v. Appleby, supra. In that case, the accused had challenged s. 224A(1)(a) (now s. 237(1)(a)) of the Criminal Code, R.S.C. 1970, c. C-34, which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This Court rejected the arguments of the accused that s. 2(f) had been violated; it relied on the Woolmington case which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

> It seems to me, therefore, that if Woolmington's case is to be accepted, the words "presumed innocent until proved guilty according to law ..." as they appear in [page123] s. 2(f) of the Bill of Rights, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

36 In a concurring opinion, Laskin J. (as he then was) put forward an alternative test. He chose not to follow Ritchie J.' s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(f) of the Canadian Bill of Rights, and said at p. 317:

> I do not construe s. 2(f) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(f) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(f) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see Coffin v. U.S. (1895), 156 U.S. 432 at p. 452.

Nevertheless, Laskin J. went on to hold that the presumption of innocence is not violated by "any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown" (p. 318). The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

37 In a subsequent case, R. v. Shelley, supra, involving a reverse onus provision regarding [page124] unlawful importation, Laskin C.J. discussed further the views he had articulated in Appleby at p. 200:

> This Court held in R. v. Appleby that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(f). It would of course, be clearly incompatible with s. 2(f) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no farther than to require an accused to prove a essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

In addition, Laskin C.J. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, i.e. possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

38 Although there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter. As this Court held in R. v. Big M Drug Mart Ltd., supra, the Charter, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights, which was interpreted as simply recognizing and declaring existing rights. (See also Singh v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 per Wilson J.; R. v. Therens, [1985] 1 S.C.R. 613, per Le Dain J.) In rejecting the Canadian Bill of Rights religion cases as determinative of the meaning of freedom of religion under the [page125] Charter in R. v. Big M Drug Mart Ltd., the Court had occasion to say at pp. 343-44:

> I agree with the submission of the respondent that the Charter is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the Charter. For this reason, Robertson and Rosetanni, supra, cannot be determinative of the meaning of "freedom of conscience and religion" under the Charter. We must look rather, to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

39 With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(d) of the Charter the statutory exceptions acknowledged in Woolmington and in Appleby. The Woolmington case was decided in the context of a legal system with no constitutionally entrenched human rights document. In Canada, we have tempered parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey's statutory exception proviso is clearly not applicable in this context and would subvert the very pur-

pose of the entrenchment of the presumption of innocence in the Charter. I do not, therefore, feel constrained in this case by the interpretation of s. 2(f) of the Canadian Bill of Rights presented in the majority judgment in Appleby. Section 8 of the Narcotic Control Act is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) Canadian Charter Jurisprudence

40 In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of innocence contained in s. 11(d). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts, in addition to the Ontario Court of Appeal, have held [page126] that s. 8 of the Narcotic Control Act violates the Charter: R. v. Carroll, supra; R. v. Cook, supra; R. v. O'Day, supra; R. v. Stanger, supra; R. v. Landry, supra; R. v. Stock (1983), 10 C.C.C. (3d) 319 (B.C.C.A.)

41 Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (in banco) rendered its decision in R. v. Carroll, supra. Writing for the majority, MacDonald J. held at p. 105:

> Unless a provision falls within s. 1 of the Charter, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In a concurring judgment, Mitchell J. commented at pp. 107-08:

> Section 11(d) gives an accused person the right to be presumed innocent until proven guilty. It follows that if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the Narcotic Control Act, the Court held that s. 11(d) had been violated. As Mitchell J. stated at p. 108:

> Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

42 The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(d) presumption of innocence in its decision in R. v. Cook, supra. After reviewing R. v. Oakes, supra, and R. v. Carroll, supra, Hart J.A. concluded at pp. 435-36:

[page127]

> Section 8 of the Narcotic Control Act is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a

> reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(d) of the Charter as being proof "according to law". ... I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

Although concurring in result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(d).

> The test of reasonableness should be available in considering the secondary question under s. 1 of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(d) of the Charter is demonstrably justified in a free and democratic society. (p. 439)

43 In R. v. O'Day, supra, the New Brunswick Court of Appeal struck down s. 8 of the Narcotic Control Act and registered its agreement with the three earlier provincial appellate level courts.

44 The Alberta Court of Appeal in R. v. Stanger, supra, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(d), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in Oakes and stated at p. 351 that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Mr. Justice Stevenson also cited MacDonald J.'s comment in Carroll that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing [page128] guilt, on any element of the offence charged, beyond a reasonable doubt" (supra, p. 98).

45 I should add that the majority, in Stanger, correctly rejected the applicability of the Privy Council decision in Ong Ah Chuan v. Public Prosecutor, [1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the Charter; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the Constitution of Singapore.

46 In R. v. Landry, supra, the Quebec Court of Appeal invalidated s. 8 of the Narcotic Control Act and extended its conclusions to s. 2(f) of the Canadian Bill of Rights. As Malouf J.A. stated at p. 561:

> Both the Bill of Rights and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

47 Finally, in a very brief judgment, R. v. Stock, supra, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in Oakes. An earlier British Columbia Court of Appeal opinion, Re Anson and The Queen (1983), 146 D.L.R. (3d) 661 (B.C.C.A.), had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the Narcotic Control Act; however, the basis for the

denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

48 There have also been a number of cases in which the meaning of s. 11(d) has been considered in [page129] relation to other legislative provisions; see, for example, R. v. Holmes (1983), 41 O.R. (2d) 250 (Ont. C.A.); R. v. Whyte (1983), 10 C.C.C. (3d) 277 (B.C.C.A.), leave to appeal to S.C.C. granted; R. v. Lee's Poultry Ltd. (1985), 17 C.C.C. (3d) 539 (Ont. C.A.); R. v. T. (1985), 18 C.C.C. (3d) 125 (N.S.C.A.); R. v. Kowalczuk (1983), 5 C.C.C. (3d) 25 (Man. C.A.); R. v. Schwartz (1983), 10 C.C.C. (3d) 34 (Man. C.A.); Re Boyle and The Queen (1983), 41 O.R. (2d) 713 (Ont. C.A.)

49 To summarize, the Canadian Charter jurisprudence on the presumption of innocence in s. 11(d) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the Charter, they are reasonable and demonstrably justified in a free and democratic society.

(iii) United States Jurisprudence

50 In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions of the American Bill of Rights contained in the Fifth and Fourteenth Amendments of the Constitution of the United States of America. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will, therefore, merely highlight the major jurisprudential developments.

51 In Tot v. United States, 319 U.S. 463 (1943), Roberts J. outlined the following test at pp. 467-68:

> ... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn, [page130] from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudicial reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

52 In Leary v. United States, 395 U.S. 6 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

> ... a criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted that since the statutory presumption was invalid under the above test, "we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use" (footnote 64)

53 The United States Supreme Court did answer this question in County Court of Ulster County, New York v. Allen, 442 U.S. 140 (1979). It held that where a mandatory criminal presumption was imposed by statute, the State may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The [page131] rationale for this is well stated by Brennan J. in In Re Winship, 397 U.S. 358 (1970), at pp. 363-64:

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(iv) European Convention on Human Rights Jurisprudence

54 As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on The European Convention on Human Rights includes a consideration of the legitimacy of reverse onus provisions. Section 6(2) of The European Convention on Human Rights reads:

> Article 6
>
> 2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The meaning of s. 6(2) was clarified in the Pfunders Case (Austria v. Italy) (1963), 6 Yearbook E.C.H.R. 740, at p. 782 and p. 784:

> This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

[page132]

55 Although the Commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the Commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise (X against the United Kingdom, Appl'n. No. 5124/71, Collection of Decisions, E.C.H.R., 135). The Commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

> The statutory presumption in the present case is restrictively worded. ... The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

(See discussion in Francis Jacobs, The European Convention on Human Rights (Oxford: 1975), pp. 113-14).

(d) Conclusion Regarding s. 11(d) of the Charter and s. 8 of the Narcotic Control Act

56 This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(d). We can then proceed to apply these principles to the particulars of s. 8 of the Narcotic Control Act.

57 In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact, which is an important element of the offence in question, violates the presumption of innocence in s. 11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a [page133] reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

58 The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the Rede Lectures, "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at pp. 11-13:

> It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt. ... The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

59 As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(d), however, the following question arises: if we apply the rational connection test to the consideration of whether s. 11(d) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "Oakes: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

> The rational connection test approves a provision that forces the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitutional [page134] right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

60 I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(d) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the Charter. This consideration did not arise under the Canadian Bill of Rights because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(d) and s. 1 to overcome the limitations of the Canadian Bill of Rights jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(d) analytically distinct. Separating the analysis into two components is consistent with the approach this Court has taken to the Charter to date (see R. v. Big M Drug Mart Ltd., supra; Hunter v. Southam Inc., [1984] 2 S.C.R. 145; Law Society of Upper Canada v. Skapinker, [1984] 1 S.C.R. 357).

61 To return to s. 8 of the Narcotic Control Act, I am in no doubt whatsoever that it violates s. 11(d) of the Charter by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove he is not guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which [page135] we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(d). Let us turn now to s. 1 of the Charter.

V

Is s. 8 of the Narcotic Control Act a Reasonable and Demonstrably Justified Limit Pursuant to s. 1 of the Charter?

62 The Crown submits that even if s. 8 of the Narcotic Control Act violates s. 11(d) of the Charter, it can still be upheld as a reasonable limit under s. 1 which, as has been mentioned, provides:

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

The question whether the limit is "prescribed by law" is not contentious in the present case since s. 8 of the Narcotic Control Act is a duly enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(d) of the Charter, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the Charter, and thereby saved from inconsistency with the Constitution.

63 It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms -- rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in Singh et al. v. Minister of Employment and Immigration, supra, at p. 218: "... it is important to remember that the courts are conducting this inquiry in light of a [page136] commitment to uphold the rights and freedoms set out in the other sections of the Charter."

64 A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

65 The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter. These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society.

66 The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic [page137] society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably" which clearly indicates that the onus of justification is on the party seeking to limit: Hunter v. Southam Inc., supra.

67 The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability"

and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto: 1974), at p. 385. As Lord Denning explained in Bater v. Bater, [1950] 2 All E.R. 458 (C.A.), at p. 459:

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

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This passage was cited with approval in Hanes v. Wawanesa Mutual Insurance Co., [1963] S.C.R. 154, at p. 161. A similar approach was put forward by Cartwright J. in Smith v. Smith [1952] 2 S.C.R. 312, at pp. 331-32:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences....

68 Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Lord Denning, "commensurate with the occasion". Where evidence is required in order to prove the consituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit. See: Law Society of Upper Canada v. Skapinker, supra, at p. 384; Singh et al. v. Minister of Employment and Immigration, supra, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

69 To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": R. v. Big M Drug Mart Ltd., supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial [page139] in a free and democratic society before it can be characterized as sufficiently important.

70 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form

of proportionality test": R. v. Big M Drug Mart Ltd., supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: R. v. Big M Drug Mart Ltd., supra, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

71 With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic [page140] society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

72 Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the Narcotic Control Act. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

73 The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the Narcotic Control Act. According to the Crown, s. 8 of the Narcotic Control Act is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950's at which time there was already considerable concern. (See Report of the Special Committee on Traffic in Narcotic Drugs, Appendix to Debates of the Senate, Canada, Session 1955, pp. 690-700; see also Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs (Ottawa, 1973).) Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

74 At the international level, on June 23, 1953, the Protocol for Limiting and Regulating the Cultivation [page141] of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The Single Convention on Narcotic Drugs, 1961, was acceded to in New York on March 30, 1961. This treaty was signed by Canada on March 30, 1961. It entered into force on December 13, 1964. As stated in the Preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,..."

75 At the national level, statutory provisions have been enacted by numerous countries which, inter alia, attempt to deter drug trafficking by imposing criminal sanctions (see, for example, Misuse of Drugs Act 1975, 1975 (N.Z.), No. 116; Misuse of Drugs Act 1971, 1971 (U.K.), c. 38).

76 The objective of protecting our society from the grave ills associated with drug trafficking, is, in my view, one of sufficient importance to warrant overriding a constitutionally protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1, to a large extent, self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

77 The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: is the reverse onus clause in s. 8 rationally related to the objective of curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise, the reverse onus clause could give rise to unjustified and erroneous [page142] convictions for drug trafficking of persons guilty only of possession of narcotics.

78 In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the Narcotic Control Act is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

79 Having concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI

Conclusion

80 The Ontario Court of Appeal was correct in holding that s. 8 of the Narcotic Control Act violates the Canadian Charter of Rights and Freedoms and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(d) of the Charter which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

> Question:
>
> Is s. 8 of the Narcotic Control Act inconsistent with s. 11(d) of the Canadian Charter of Rights and Freedoms and thus of no force and effect?
>
> Answer: Yes.
>
> I would, therefore, dismiss the appeal.

[page143]

The reasons of Estey and McIntyre JJ. were delivered by

81 ESTEY J.:-- I would dismiss this appeal. I agree with the conclusions of Dickson C.J. with reference to the relationship between s. 11(d) and s. 1 of the Canadian Charter of Rights and Freedoms. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

TAB 20

Indexed as:

Schachter v. Canada

Her Majesty The Queen and Canada Employment and Immigration Commission, appellants;
v.
Shalom Schachter, respondent, and Women's Legal Education and Action Fund, respondent, and Attorney General for Ontario, Attorney General of Quebec, Attorney General for New Brunswick, Attorney General of British Columbia, Attorney General for Saskatchewan, Attorney General for Alberta, Attorney General of Newfoundland and Minority Advocacy Rights Council, interveners.

[1992] 2 S.C.R. 679

[1992] 2 R.C.S. 679

[1992] S.C.J. No. 68

[1992] A.C.S. no 68

File No.: 21889.

Supreme Court of Canada

1991: December 12 / 1992: July 9.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL (110 paras.)

Constitutional law -- Charter of Rights -- Equality rights -- Remedies -- Underinclusive benefit -- Natural parents not given same benefits as adoptive parents under Unemployment Insurance Act, 1971 -- Whether or not s. 52(1) of Constitution Act, 1982 required court to declare offending section of no force or effect -- Whether or not s. 24 of Charter enabled court to order natural parents entitled to same benefits as adoptive parents -- Constitution Act, 1982, s. 52(1) -- Canadian Charter

of Rights and Freedoms, ss. 1, 7, 15(1), 24(1) -- Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, s. 32.

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Constitutional law -- Charter of Rights -- Enforcement -- Appropriate remedy -- Underinclusive benefit -- Natural parents not given same benefits as adoptive parents under Unemployment Insurance Act, 1971 -- Whether or not s. 52(1) of Constitution Act, 1982 required court to declare offending section of no force or effect -- Whether or not s. 24 of Charter enabled court to order natural parents entitled to same benefits as adoptive parents.

Respondent's spouse received 15 weeks of maternity benefits in 1985 under s. 30 of the Unemployment Insurance Act, 1971. Although respondent had intended to stay home with the newborn as soon as his spouse was able to return to work after the birth, he ultimately took three weeks off without pay. He had first applied for benefits under s. 30 in respect of the time he had to take off work, but, since s. 30 was limited to maternity benefits, modified his application to one under s. 32 for "paternity benefits". Section 32 provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues. The trial judge found a violation of s. 15 of the Canadian Charter of Rights and Freedoms in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1) of the Charter and extended the same benefits to natural parents as were granted to adoptive parents under s. 32. The violation of s. 15 was subsequently ceded by appellants. The Federal Court of Appeal upheld the trial judge's decision.

The impugned provision was since amended to extend parental benefits to natural parents on the same [page681] footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

The constitutional questions stated in this Court queried: (1) whether s. 52(1) of the Constitution Act, 1982 required that s. 32 of the Unemployment Insurance Act, 1971, given an unequal benefit contrary to s. 15(1) of the Charter, be declared of no force or effect, and (2) whether s. 24(1) of the Charter conferred on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32.

Held: The appeal should be allowed. The first constitutional question should be answered in the affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter

rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Per Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ.: Generally speaking, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down.

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Section 52 of the Constitution Act, 1982 does not restrict the court to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 declares the law, and not the words expressing that law, to be of no force or effect to the extent of any inconsistency with the Constitution. The inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

The purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature. In some cases, of course, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. There reading in would not be appropriate. Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the Charter. Reading in therefore is a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter.

The first step in choosing a remedial course under s. 52 is to define the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination.

In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the Oakes test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a Charter right. Where the purpose of the legislation is itself unconstitutional, the legislation should almost always be struck down in its entirety.

Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test. It matters not how pressing or substantial the objective [page683] of the legislation may be; if the means used to achieve the objective are not rationally connected to it, the objective will not be furthered by somehow upholding the legislation as it stands. Where the

second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met.

Having determined the extent of the inconsistency, the means of dealing with it, whether by way of severance, reading in, or striking down legislation in its entirety, must be considered.

One important distinction exists between severing and reading in. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This is not always the case with reading in. In cases where the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis, the legislature and not the courts must fill in the gaps.

In determining whether reading in is appropriate, the question is not whether courts can make decisions that impact on budgetary policy but rather to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to change the nature of the legislative scheme in question is clearly inappropriate. The court should consider whether the significance of the part which would remain is substantially changed when the offending part is excised. The problem with striking down only the inconsistent portion is that the significance of the remaining portion may change so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. The assumption that the legislature would have enacted the benefit is more often sound where the group [page684] to be added is smaller than the group originally benefitted. This assumption, however, is not necessarily safe when the group to be added is much larger than the group originally benefitted. This is not because of the numbers per se. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion.

It is sensible to consider the significance of the remaining portion when asking whether it is safe to assume that the legislature would have enacted the remaining portion. If the remaining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended. A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. The question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the Constitution Act, 1982. Delayed declarations of nullity should not be seen as preferable to reading in cases where reading in is appropriate. The question whether to delay the application of a declaration of nullity should turn not on considerations of the role of the courts and the legislature but rather on considerations relating to the effect of an immediate declaration on the public.

Where s. 52 is not engaged, a remedy under s. 24(1) of the Charter may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's Charter rights. Section 24(1) would there provide for an individual remedy for the person whose rights have been so infringed.

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An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available.

The right which was determined to be violated here is a positive right: the right to equal benefit of the law. This benefit was monetary and not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament is obliged to do, by virtue of the conceded s. 15 violation, is to equalize the provision of that benefit if it is to be provided at all. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provision into line with constitutional requirements.

Without a mandate based on a clear legislative objective, reading the excluded group into the legislation would be imprudent. A consideration of the benefit and size of the group and of the budgetary implications of such a course of action underlined this conclusion. The appropriate action was to declare the provision invalid and suspend that declaration to allow the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements. Significantly, Parliament did amend the impugned provision after this action was launched and the amendment was not the one that reading in would have imposed.

Per La Forest and L'Heureux-Dubé JJ.: The legislation concerned concededly violates the Canadian Charter of Rights and Freedoms and does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being the obvious intention of the legislature. There is a long tradition of reading down legislation and, where it substantially amounts to the same thing, reading in is possible. These devices, however, should only be employed in the clearest of cases. In light of Parliament's subsequent action, there was no [page686] reason to declare the impugned legislation invalid and then suspend that declaration.

Further dimensions to the issue of reading in and reading down require qualifications to the propositions set down as guidelines by Lamer C.J. The process of reading down or reading in should not be closely tied with the checklist set forth in R. v. Oakes because that might encourage a mechanistic approach rather than an examination of more fundamental issues going well beyond the factual context.

Cases Cited

By Lamer C.J.

Considered: Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143; Attorney-General of Nova Scotia v. Phillips (1986), 34 D.L.R. (4th) 633; Hunter v. Southam Inc., [1984] 2 S.C.R.

145; Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232; Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69; R. v. Seaboyer, [1991] 2 S.C.R. 577; R. v. Swain, [1991] 1 S.C.R. 933; referred to: Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503; Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356; R. v. Oakes, [1986] 1 S.C.R. 103; R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; R. v. Morgentaler, [1988] 1 S.C.R. 30; Tétrault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790; R. v. Hebb (1989), 69 C.R. (3d) 1; Russow v. B.C. (A.G.) (1989), 35 B.C.L.R. (2d) 29; Welsh v. United States, 398 U.S. 333 (1970); Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513; Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721; Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038.

By La Forest J.

Referred to: R. v. Wong, [1990] 3 S.C.R. 36; Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22; R. v. Oakes, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42.
Canadian Charter of Rights and Freedoms, ss. 1, 7, 15(1), 24(1).

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Constitution Act, 1982, s. 52(1).
Criminal Code, R.S.C. 1970, c. C-34, s. 542(2).
Criminal Code, R.S.C., 1985, c. C.-46, s. 276.
Federal Court Rules, C.R.C., C. 663, Rule 341A [ad. SOR/79-57, s. 8].
Human Rights Code, 1981, S.O. 1981, c. 53, ss. 1, 19.
Lord's Day Act, R.S.C. 1970, c. L-13.
Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, ss. 30 [am. by S.C. 1980-81-82-83, c. 150, s. 4], 32(1) [am. by S.C. 1980-81-82-83, c. 150, s. 5].

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Caminker, Evan. "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 Yale L.J. 1185.
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Lajoie, Andrée. "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 McGill L.J. 1338.
Rogerson, Carol. "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness". In R. Sharpe, ed., Charter Litigation. Toronto: Butterworths, 1987.

APPEAL from a judgment of the Federal Court of Appeal, [1990] 2 F.C. 129, 66 D.L.R. (4th) 635, 3 C.R.R. (2d) 337, 29 C.C.E.L. 113, 90 C.L.L.C. para. 14,005, 108 N.R. 123, dismissing an appeal from a judgment of Strayer J., [1988] 3 F.C. 515, 52 D.L.R. (4th) 525, 20 C.C.E.L. 301, 88 C.L.L.C. para. 14,021. Appeal allowed. The first constitutional question should be answered in the

affirmative, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. The second constitutional question should be answered in the negative. Section 24(1) of the Charter provides an individual remedy for actions taken under a law which violate an individual's Charter rights. A limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

[page688]

David Sgayias, Q.C., and Roslyn J. Levine, for the appellants. Brian G. Morgan and Lawrence E. Ritchie, for the respondent, Shalom Schachter. Mary A. Eberts and Jenifer Aitken, for the respondent, the Women's Legal Education and Action Fund. Elizabeth Goldberg and Lori Sterling, for the intervener, the Attorney General for Ontario. Jean-Yves Bernard and Madeleine Aubé, for the intervener, the Attorney General of Quebec. Gabriel Bourgeois, for the intervener, the Attorney General for New Brunswick. George H. Copley, for the intervener, the Attorney General of British Columbia. Ross Macnab, for the intervener, the Attorney General for Saskatchewan. Stanley H. Rutwind, for the intervener, the Attorney General for Alberta. B. Gale Welsh, for the intervener, the Attorney General of Newfoundland. Emilio S. Binavince, for the intervener, the Minority Advocacy and Rights Council.

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

The judgment of Lamer C.J. and Sopinka, Gonthier, Cory and McLachlin JJ. was delivered by

LAMER C.J.:--

Facts

1 The respondent, Shalom Schachter, and his wife, Marcia Gilbert, were expecting their second child in the summer of 1985. The respondent intended to stay home with the newborn as soon after the birth as his wife was able to return to work. Ultimately, he took three weeks off work without pay.

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2 Marcia Gilbert received fifteen weeks of maternity benefits under s. 30 of the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, as am. by S.C. 1980-81-82-83, c. 150, s. 4. The respondent first applied for benefits under s. 30 in respect of the time he had to take off work, but ultimately modified an application under s. 32, as am. by S.C. 1980-81-82-83, c. 150, s. 5, for "paternity benefits". This is a section which provides for parental benefits for adoptive parents for 15 weeks following the placement of their child with them. These benefits are to be shared between the two parents in accordance with their wishes. The respondent's application was denied on the basis that he was "not available for work", a ground of disentitlement for all applicants except those applying for maternity benefits or adoption benefits.

3 The respondent appealed the decision to a Board of Referees. The appeal was dismissed and the respondent made a further appeal to an Umpire. This appeal was never heard as the respondent made known his intention to raise constitutional issues and it was agreed by the parties that the Federal Court, Trial Division was a better forum for resolving the constitutional issues.

4 The matter proceeded before Strayer J. in the Federal Court, Trial Division. In written reasons, [1988] 3 F.C. 515, Strayer J. found a violation of s. 15 of the Canadian Charter of Rights and Freedoms in that s. 32 discriminated between natural parents and adoptive parents with respect to parental leave. He granted declaratory relief under s. 24(1), extending to natural parents the same benefits as were granted to adoptive parents under s. 32.

5 The appellants appealed to the Federal Court of Appeal. In written reasons dated February 16, 1990, [1990] 2 F.C. 129, the Court upheld the Trial Division's decision, Mahoney J.A. dissenting. The appeal was dismissed.

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6 On November 15, 1990, the appellants were granted leave to appeal to this Court.

7 It should be noted that the impugned provision has since been amended by Parliament to extend parental benefits to natural parents on the same footing as they are provided to adoptive parents for a period totalling 10 weeks rather than the original 15.

Relevant Statutory and Constitutional Provisions

8 The relevant provision of the Unemployment Insurance Act, 1971, reads as follows:

> 32. (1) Notwithstanding section 25 but subject to this section, initial benefit is payable to a major attachment claimant who proves that it is reasonable for that claimant to remain at home by reason of the placement with that claimant of one or more children for the purpose of adoption pursuant to the laws governing adoption in the province in which that claimant resides.

9 The relevant provisions of the Canadian Charter of Rights and Freedoms read as follows:

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

10 The relevant provision of the Constitution Act, 1982 reads as follows:

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> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Judgments Below

Federal Court, Trial Division (Strayer J.)

11 Strayer J. held that s. 32 denied equal benefit of the law with discrimination on the basis of parental status, thereby infringing the s. 15 rights of the respondent. No s. 1 analysis was undertaken. Having decided that there was an infringement, Strayer J. went on to consider the appropriate remedy. In his view, at p. 543, two options were available:

> I could either declare section 32 to be invalid in its present form, thus denying benefits to those already within it, or I could simply declare the entitlement of natural parents to benefits equal to those now provided to adoptive parents under section 32. Counsel for the plaintiff [respondent] and for the intervenor [LEAF] argued for the latter approach, while counsel for the defendants [appellants] argued that I must, if I concluded there was unequal benefit of the law, strike down the existing benefits in section 32.

12 Given that Strayer J. found s. 32 to be defective, not because it provided prohibited benefits but because it was "underinclusive", he did not consider it appropriate to deprive those persons already qualified under s. 32 of their benefits. Rather, he decided to make a declaration that other persons in similar circumstances were entitled to the same benefits, until such time as Parliament amended the legislation in a way which met the requirements of s. 15. Further, he ordered that the respondent's application for benefits be reconsidered on the basis that if, apart from his status as a natural parent, he met the requirements of the section, he was entitled to benefits. Pursuant to Rule 341A (Federal Court Rules, C.R.C., c. 663, ad. [page692] SOR/79-57, s. 8), Strayer J. suspended the operation of his judgment pending appeal.

Court of Appeal (Heald J.A. for the majority)

13 Since the parties conceded at the outset that s. 15(1) of the Charter had been violated, the Court of Appeal dealt only with the jurisdiction of the trial judge to accord the remedy sought by the respondent.

14 Heald J.A. noted at the outset that the appellants had conceded that, had the Trial Division had the jurisdiction to grant the remedy it did, the order was "just and appropriate in the circumstances". Heald J.A. determined that the trial judge did have the jurisdiction to grant a remedy under s. 24(1) of the Charter. He did not accept the appellants' argument that the only option which was open to the trial judge in the circumstances was to strike down the impugned provision pursuant to s. 52 of the Constitution Act, 1982. He found, at p. 137, the distinction made by the trial judge between legislation which "is unconstitutional because of what it provides and legislation which is unconstitutional because of what it omits" to be an apt one. He held that here it was permissible to have recourse to s. 24 because the impugned provision was unconstitutional solely because it was

not sufficiently broad in scope. "It is the omission in this case that is unconstitutional, not the legislation itself." Therefore, in his opinion, s. 52 was not engaged.

15 Heald J.A. further considered the "interface" between ss. 24 and 52 when a violation of s. 15 has been found. He held, at p. 142, that:

> A mere declaration of invalidity is inadequate in the circumstances at bar, because it would not guarantee the positive right conferred pursuant to subsection 15(1). That positive right can only be guaranteed by the fashioning of a positive remedy. That is precisely what the Trial Judge attempted to do in the decision a quo.
>
> [page693]

16 Heald J.A. was of the view that, as the consequences of a declaration that the legislation was inoperative would be to deprive adoptive parents of the benefits granted to them by s. 32 of the Unemployment Insurance Act, 1971, this would be as much an amendment of legislation as the remedy granted by the trial judge. Heald J.A. concluded that where legislation is "underinclusive", positive relief is both warranted and constitutionally permitted through the vehicle of s. 24.

17 Heald J.A. was not persuaded that the jurisprudence supported the appellants' contention that the order was an appropriation of public funds for a purpose not authorized by Parliament.

18 Heald J.A. dismissed the appeal, upholding the judgment of the trial judge. He suspended the operation of that judgment pending appeal.

Mahoney J.A. (dissenting)

19 Mahoney J.A. held that the remedy granted by the trial judge was outside his jurisdiction because he had in effect amended the legislation where, by virtue of the Constitution, the sole power to legislate is reserved to Parliament.

20 With regard to the issue of the appropriation of funds, Mahoney J.A. was of the view that the remedy fashioned by the trial judge amounted to an appropriation of money by a court which is not permitted by the provisions of the preamble to the Constitution Act, 1867. He concluded, at p. 164:

> Even if the power of a court to legislate by way of a subsection 24(1) remedy were found to exist in circumstances which do not entail the appropriation of public monies, no such power can be found to exist where the remedy appropriates monies from the Consolidated Revenue Fund for a purpose not authorized by Parliament. A purposive approach to remedies under subsection 24(1) cannot take a court that far.
>
> [page694]
>
> In my opinion, the appellants are correct: the Constitution of Canada does not permit the remedy crafted by the learned Trial Judge. Having found that section 32 of the Unemployment Insurance Act, 1971 was inconsistent with a provision of the Constitution of Canada, the learned Trial Judge was bound to find it

> to be of no force and effect. Had that finding been made, the absence of any conflict between subsections 24(1) and 52(1) would be apparent. There is no offending legislation and, therefore, no subsection 24(1) remedy called for.
>
> In my opinion, subsection 52(1) does not provide a "remedy" in any real sense of that word. It states a constitutional fact which no court can ignore when it is invoked in a proceeding and found to apply.

21 Mahoney J.A. would have allowed the appeal and issued a declaration pursuant to s. 52(1) that s. 32 of the Unemployment Insurance Act, 1971, was of no force or effect by reason of its inconsistency with the Charter. He could see no compelling reason to order a stay of execution of that judgment to permit remedial legislative action.

Issues

22 By order dated March 14, 1991 the following constitutional questions were stated by the Chief Justice:

> 1. Is the Federal Court Trial Division, having found that s. 32 of the Unemployment Insurance Act, 1971(subsequently s. 20 of the Unemployment Insurance Act, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the Constitution Act, 1982 to declare that s. 32 is of no force and effect?
> 2. Does s. 24(1) of the Charter confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

[page695]

Analysis

23 I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that Andrews v. Law Society of British Columbia, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

24 All of the above essentially leaves the Court in a factual vacuum with respect to the nature and extent of the violation, and certainly with respect to the legislative objective embodied in the impugned provision. This puts the Court in a difficult position in attempting to determine what remedy is appropriate in the present context.

I. Reading in as a Remedial Option under Section 52

25 A court has flexibility in determining what course of action to take following a violation of the Charter which does not survive s. 1 scrutiny. Section 52 of the Constitution Act, 1982 mandates the striking down of any law that is inconsistent with the provisions of the Constitution, but only "to the extent of the inconsistency". Depending upon the circumstances, a court may simply strike down, it may strike down and temporarily suspend the declaration of invalidity, or it may resort to the techniques of reading down or reading in. In addition, s. 24 of the Charter extends to any court of competent jurisdiction the power to grant an "appropriate and just" remedy to "[a]nyone whose [Charter] rights and freedoms ... have been infringed or denied". In choosing how to apply s. 52 or s. 24 a [page696] court will determine its course of action with reference to the nature of the violation and the context of the specific legislation under consideration.

A. The Doctrine of Severance

26 The flexibility of the language of s. 52 is not a new development in Canadian constitutional law. The courts have always struck down laws only to the extent of the inconsistency using of the doctrine of severance or "reading down". Severance is used by the courts so as to interfere with the laws adopted by the legislature as little as possible. Generally speaking, when only a part of a statute or provision violates the Constitution, it is common sense that only the offending portion should be declared to be of no force or effect, and the rest should be spared.

27 Far from being an unusual technique, severance is an ordinary and everyday part of constitutional adjudication. For instance if a single section of a statute violates the Constitution, normally that section may be severed from the rest of the statute so that the whole statute need not be struck down. To refuse to sever the offending part, and therefore declare inoperative parts of a legislative enactment which do not themselves violate the Constitution, is surely the more difficult course to justify.

28 Furthermore, as Rogerson has pointed out (in "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe, ed., Charter Litigation (1987) at pp. 250-52), it is logical to expect that severance would be a more prominent technique under the Charter than it has been in division of powers cases. In division of powers cases the question of constitutional validity often turns on an overall examination of the pith and substance of the legislation rather than on an examination of the effects of particular portions of the legislation on individual rights. Where a statute violates the division of powers, it tends to do so as a whole. This is [page697] not so of violations of the Charter where the offending portion tends to be more limited.

29 Where the offending portion of a statute can be defined in a limited manner it is consistent with legal principles to declare inoperative only that limited portion. In that way, as much of the legislative purpose as possible may be realized. However, there are some cases in which to sever the offending portion would actually be more intrusive to the legislative purpose than the alternate course of striking down provisions which are not themselves offensive but which are closely connected with those that are. This concern is reflected in the classic statement of the test for severance in Attorney-General for Alberta v. Attorney-General for Canada, [1947] A.C. 503, at p. 518:

> The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be as-

> sumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.

30 This test recognizes that the seemingly laudable purpose of retaining the parts of the legislative scheme which do not offend the Constitution rests on an assumption that the legislature would have passed the constitutionally sound part of the scheme without the unsound part. In some cases this assumption will not be a safe one. In those cases it will be necessary to go further and declare inoperative portions of the legislation which are not themselves unsound.

31 Therefore, the doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.

[page698]

B. Reading In as akin to Severance

32 This same approach should be applied to the question of reading in since extension by way of reading in is closely akin to the practice of severance. The difference is the manner in which the extent of the inconsistency is defined. In the usual case of severance the inconsistency is defined as something improperly included in the statute which can be severed and struck down. In the case of reading in the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. This has the effect of extending the reach of the statute by way of reading in rather than reading down.

33 A statute may be worded in such a way that it gives a benefit or right to one group (inclusive wording) or it may be worded to give a right or benefit to everyone except a certain group (exclusive wording). It would be an arbitrary distinction to treat inclusively and exclusively worded statutes differently. To do so would create a situation where the style of drafting would be the single critical factor in the determination of a remedy. This is entirely inappropriate. Rowles J. made this point in Knodel v. British Columbia (Medical Services Commission) (1991), 58 B.C.L.R. (2d) 356 (B.C.S.C.), at p. 388:

> As stated previously, once a person has demonstrated that a particular law infringes his or her Charter rights, the manner in which the law is drafted or stated ought to be irrelevant for the purposes of a constitutional remedy. To hold otherwise would result in a statutory provision dictating the interpretation of the Constitution. Further, where B's Charter right to a[n equal] benefit is demonstrated, it is immaterial whether the subject law states : (1) A benefits; or (2) Everyone benefits except B.
>
> The first example would require the court to "read in" the words "and B," while the second example would [page699] require the court to "strike out" the words "except B." In each case, the result would be identical.

> Accordingly, whether a court "reads in" or "strikes out" words from a challenged law, the focus of the court should be on the appropriate remedy in the circumstances and not on the label used to arrive at the result.

34 There is nothing in s. 52 of the Constitution Act, 1982 to suggest that the court should be restricted to the verbal formula employed by the legislature in defining the inconsistency between a statute and the Constitution. Section 52 does not say that the words expressing a law are of no force or effect to the extent that they are inconsistent with the Constitution. It says that a law is of no force or effect to the extent of the inconsistency. Therefore, the inconsistency can be defined as what is left out of the verbal formula as well as what is wrongly included.

35 This Court implicitly recognized that the extent of the inconsistency can be defined in substantive, rather than merely verbal, terms in Andrews v. Law Society of British Columbia, supra. In Andrews the statute (Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, s. 42) dictated that only Canadian citizens could become lawyers in the following words:

> 42. The benchers may call to the Bar of the Province and admit as solicitor of the Supreme Court
>
> (a) a Canadian citizen with respect to whom they are satisfied that he ... .

36 The Court found that the exclusion of non-citizens violated the right to equality. Instead of striking down the entire section so that everyone would be equally prevented from becoming a lawyer, only the requirement of Canadian citizenship was declared inoperative. However, the section does not make any sense if the words "a Canadian citizen" are deleted and there is, in fact, no way of simply deleting words that would make the section conform to the requirements of the Charter. [page700] Instead of focusing on these verbal formulae, the Court nullified the substantive citizenship requirement which could be said to amount to extending the statute to cover non-Canadians. Thus, Andrews is already an example of a case in which the extent of the inconsistency was defined conceptually without being limited to the manner in which the statute was drafted.

C. The Purposes of Reading In and Severance

(i) Respect for the Role of the Legislature

37 The logical parallels between reading in and severance are mirrored by their parallel purposes. Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature. Rogerson makes this observation at p. 288:

> Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purposes should be minimized and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated. Legislation which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.

38 Of course, reading in will not always constitute the lesser intrusion for the same reason that severance sometimes does not. In some cases, it will not be a safe assumption that the legislature would have enacted the constitutionally permissible part of its enactment without the impermissible part. For example, in a benefits case, it may not be a safe assumption that the legislature would have enacted a benefits scheme if it were impermissible to exclude particular parties from entitlement under that scheme.

[page701]

(ii) Respect for the Purposes of the Charter

39 Just as reading in is sometimes required in order to respect the purposes of the legislature, it is also sometimes required in order to respect the purposes of the Charter. The absolute unavailability of reading in would mean that the standards developed under the Charter would have to be applied in certain cases in ways which would derogate from the deeper social purposes of the Charter. This point has been made well by Duclos' and Roach's article "Constitutional Remedies as 'Constitutional Hints': A Comment on R. v. Schachter" (1991), 36 McGill L.J. 1, and by Caminker's article "A Norm-Based Remedial Model for Underinclusive Statutes" (1986), 95 Yale L.J. 1185. Their argument is that even in situations where the standards of the Charter allow for more than one remedial response, the purposes of the Charter may encourage one kind of response more strongly than another.

40 This is best illustrated by the case of Attorney-General of Nova Scotia v. Phillips (1986), 34 D.L.R. (4th) 633 (N.S.C.A.). In that case, a form of welfare benefit was available to single mothers but not single fathers. This was held to violate s. 15 of the Charter since benefits should be available to single mothers and single fathers equally. However, the court held that s. 15 merely required equal benefit, so that the Charter would be equally satisfied whether the benefit was available to both mothers and fathers or to neither. Given this and the court's conclusion that it could not extend benefits, the only available course was to nullify the benefits to single mothers. The irony of this result is obvious.

41 Perhaps in some cases s. 15 does simply require relative equality and is just as satisfied with equal graveyards as equal vineyards, as it has sometimes been put (see Caminker, at p. 1186). Yet the nullification [page702] of benefits to single mothers does not sit well with the overall purpose of s. 15 of the Charter and for s. 15 to have such a result clearly amounts to "equality with a vengeance," as LEAF, one of the interveners in this case, has suggested. While s. 15 may not absolutely require that benefits be available to single mothers, surely it at least encourages such action to relieve the disadvantaged position of persons in those circumstances. In cases of this kind, reading in allows the court to act in a manner more consistent with the basic purposes of the Charter.

42 Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter.

II. Choice of Remedial Options under Section 52

A. Defining the Extent of the Inconsistency

43 The first step in choosing a remedial course under s. 52 is defining the extent of the inconsistency which must be struck down. Usually, the manner in which the law violates the Charter and the manner in which it fails to be justified under s. 1 will be critical to this determination. In this case, as noted earlier, this Court is hampered by the lack of an opportunity to assess the nature of the violation and the absence of s. 1 evidence.

44 It is useful at this point to set out the two stage s. 1 test developed by this Court in R. v. Oakes, [1986] 1 S.C.R. 103:

[page703]

(1) Is the legislative objective which the measures limiting an individual's rights or freedoms are designed to serve sufficiently pressing and substantial to justify the limitation of those rights or freedoms?
(2) Are the measures chosen to serve that objective proportional to it, that is:

(a) Are the measures rationally connected to the objective?
(b) Do the measures impair as little as possible the right and freedom in question? and,
(c) Are the effects of the measures proportional to the objective identified above?

(i) The Purpose Test

45 In some circumstances, s. 52(1) mandates defining the inconsistent portion which must be struck down very broadly. This will almost always be the case where the legislation or legislative provision does not meet the first part of the Oakes test, in that the purpose is not sufficiently pressing or substantial to warrant overriding a Charter right. Although it predates Oakes, supra, R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, provides a clear example. There Dickson C.J. found that the purpose of the Lord's Day Act, R.S.C. 1970, c. L-13, was itself inimical to the values of a free and democratic society. The case stands as authority for the proposition that, where the purpose of the legislation is itself unconstitutional, the legislation should be struck down in its entirety. Indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely.

(ii) The Rational Connection Test

46 Where the purpose of the legislation or legislative provision is deemed to be pressing and substantial, but the means used to achieve this objective are found not to be rationally connected to it, the inconsistency to be struck down will generally be the whole of the portion of the legislation which fails the rational connection test.

[page704]

47 This Court's decision in Andrews, supra, can be taken to support this position. Again, this Court held there that the citizenship requirement for admission to the British Columbia bar violated the equality guarantee enshrined in s. 15 of the Charter. While the citizenship requirement was held to have a valid purpose (the objectives argued were that lawyers be familiar with Canadian institutions and customs and that they display a commitment to them), the Court determined that the re-

quirement did not meet the proportionality test. The majority on this issue concluded that the means were probably not rationally connected to the objectives put forward, in that citizenship does not ensure familiarity with or commitment to Canadian society and, conversely, non-citizenship does not necessarily point to a lack of familiarity or commitment. The requirement was struck down.

48 It is logical that in most such cases the appropriate remedial choice will be to strike down the entire portion of the legislation that fails on this element of the proportionality test. It matters not how pressing or substantial the objective of the legislation may be; if the means used to achieve the objective are not rationally connected to it, then the objective will not be furthered by somehow upholding the legislation as it stands.

(iii) The Minimal Impairment/Effects Test

49 Where the second and/or third elements of the proportionality test are not met, there is more flexibility in defining the extent of the inconsistency. For instance, if the legislative provision fails because it is not carefully tailored to be a minimal intrusion, or because it has effects disproportionate to its purpose, the inconsistency could be defined as being the provisions left out of the legislation which would carefully tailor it, or would avoid a disproportionate effect. According to the logic outlined above, such an inconsistency could be [page705] declared inoperative with the result that the statute was extended by way of reading in.

50 Striking down, severing or reading in may be appropriate in cases where the second and/or third elements of the proportionality test are not met. The choice of remedy will be guided by the following considerations.

B. Deciding whether Severance or Reading In is Appropriate

51 Having determined what the extent of the inconsistency is, the next question is whether that inconsistency may be dealt with by way of severance, or in some cases reading in, or whether an impugned provision must be struck down in its entirety.

(i) Remedial Precision

52 While reading in is the logical counterpart of severance, and serves the same purposes, there is one important distinction between the two practices which must be kept in mind. In the case of severance, the inconsistent part of the statutory provision can be defined with some precision on the basis of the requirements of the Constitution. This will not always be so in the case of reading in. In some cases, the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis. In such a case, it is the legislature's role to fill in the gaps, not the court's. This point is made most clearly in Hunter v. Southam Inc., [1984] 2 S.C.R. 145, at p. 169:

> While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's [page706] requirements. It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.

53 In Hunter, the Court decided that the scheme for authorizing searches under the relevant legislation did not withstand Charter scrutiny. In such a circumstance, it would theoretically be possible to characterize the "extent of the inconsistency" as the absence of certain safeguards. Thus, in the abstract, the absence of appropriate safeguards could have been declared of no force or effect, which would have led to the establishment of the appropriate safeguards. However, this approach would have been inappropriate because this would have required establishing a new scheme, the details of which would have been up to the Court to determine.

54 Hunter has been applied recently by Justice McLachlin in Rocket v. Royal College of Dental Surgeons of Ontario, [1990] 2 S.C.R. 232. The issue in that case was the prohibition of advertising by the members of a professional association, with certain exceptions. McLachlin J. found that the regulation of advertising violated the Charter and extended too far to be justified under s. 1. However, some prohibition of advertising would be justifiable if additional exceptions were added. The question then arose whether the Court ought to supply those additional exemptions itself, or simply strike down the prohibition.

55 McLachlin J. noted, at p. 253, that the drafting of rules which would allow only legitimate advertising would be a difficult and complex endeavour that did not flow with precision from the requirements of the Charter:

> I am conscious of the difficulties involved in drafting prohibitions on advertising which will catch misleading, deceptive and unprofessional advertising while permitting legitimate advertising.

Since the exemptions could not be defined with sufficient precision, the section itself had to be struck down (at p. 252):

[page707]

> Because the section is cast in the form of limited exclusions to a general prohibition, the Court would be required to supply further exceptions. To my mind, this is for the legislators.

56 These cases stand for the proposition that the court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the Constitution. In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature, not the courts.

(ii) Interference with the Legislative Objective

57 The primary importance of legislative objective quickly emerges from decisions of this Court wherein the possibility of reading down or in has been considered and determined inappropriate.

58 In Osborne v. Canada (Treasury Board), [1991] 2 S.C.R. 69, at p. 104, Justice Sopinka emphasized that it is necessary in fashioning a remedy for a Charter violation to both "apply the measures which will best vindicate the values expressed in the Charter" and "refrain from intruding into the legislative sphere beyond what is necessary". He determined that reading down was not ap-

propriate in that case but concluded, at p. 104: "Reading down may in some cases be the remedy that achieves the objectives to which I have alluded while at the same time constituting the lesser intrusion into the role of the legislature."

59 The degree to which a particular remedy intrudes into the legislative sphere can only be determined by giving careful attention to the objective embodied in the legislation in question. This objective may, as suggested above, be obvious from the very text of the provision. In other cases, it may only be illuminated through the evidence put forward under the s. 1 analysis, the failure [page708] of which would precede this inquiry. A second level of legislative intention may be manifest in the means chosen to pursue that objective.

60 In R. v. Seaboyer, [1991] 2 S.C.R. 577, this Court struck down s. 276, the rape shield provision, of the Criminal Code, R.S.C., 1985, c. C-46. The majority of the Court held that it violated the accused's Charter right to a fair trial. The provision failed the Oakes test because of its overbreadth. It could not meet the minimal impairment element of the proportionality test. In considering the question of remedy, McLachlin J. canvassed the possibility of declaring the legislation valid in part through techniques such as reading down and constitutional exemption, but concluded that neither technique was appropriate in the case before her. McLachlin J. arrived at this conclusion because to take either approach would necessitate importing an element into the provision -- judicial discretion -- that the legislature specifically chose to exclude. She stated, at p. 628: "Where the effect is to change the law so substantially, one may question whether it is useful or appropriate to apply the doctrine of constitutional exemption". Without question, the same is true of extension by way of reading in.

61 This Court's decision in R. v. Swain, [1991] 1 S.C.R. 933, is instructive as to the second level of legislative intention referred to above. There, it was held that s. 542(2) of the Criminal Code, R.S.C. 1970, c. C-34, which provides for the automatic detention at the pleasure of the Lieutenant Governor of an insanity acquittee, was in violation of s. 7 of the Charter in that it deprived the appellant of his right to liberty without meeting the requirements of procedural fairness that attach to the principles of fundamental justice. In my judgment, I rejected the argument that the requirements of procedural fairness could just be read into the legislation as it stood because it was clear that, to achieve its objectives, Parliament had deliberately chosen the means which ultimately failed the minimal impairment element of the proportionality test under s. 1. Where the choice of means is unequivocal, [page709] to further the objective of the legislative scheme through different means would constitute an unwarranted intrusion into the legislative domain.

62 Even where extension by way of reading in can be used to further the legislative objective through the very means the legislature has chosen, to do so may, in some cases, involve an intrusion into budgetary decisions which cannot be supported. This Court has held, and rightly so, that budgetary considerations cannot be used to justify a violation under s. 1. However, such considerations are clearly relevant once a violation which does not survive s. 1 has been established, s. 52 is determined to have been engaged and the Court turns its attention to what action should be taken thereunder.

63 Any remedy granted by a court will have some budgetary repercussions whether it be a saving of money or an expenditure of money. Striking down or severance may well lead to an expenditure of money. The respondent in this case pointed out that this Court's decision in Tétrault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22, wherein an exclusion under the Unemployment Insurance Act, 1971, S.C. 1970-71-72, c. 48, based

on age was found to contravene the Charter, necessarily led to an expenditure of government funds in that persons previously not entitled to benefits were thereafter free to apply for them. It has also been pointed out that a wide variety of court orders have had the effect of causing expenditures (see Lajoie, "De l'interventionnisme judiciaire comme apport à l'émergence des droits sociaux" (1991), 36 McGill L.J. 1338, at pp. 1344-45). In determining whether reading in is appropriate then, the question is not whether courts can make decisions that impact on budgetary policy; it is to what degree they can appropriately do so. A remedy which entails an intrusion into this sphere so substantial as to [page710] change the nature of the legislative scheme in question is clearly inappropriate.

(iii) The Change in Significance of the Remaining Portion

64 Another way of asking whether to read in or sever would be an illegitimate intrusion into the legislative sphere is to ask whether the significance of the part which would remain is substantially changed when the offending part is excised. For instance, in Devine v. Quebec (Attorney General), [1988] 2 S.C.R. 790, this Court found that certain statutory requirements respecting the use of the French language were unconstitutional because they were more stringent than necessary. By way of exception, the statute provided for less stringent requirements in certain circumstances. These less stringent requirements were not in themselves unconstitutional, and it would therefore have been possible to sever them and in that way to implement as much of the legislative intent as possible. However, the Court noted that to do so would really turn the legislative scheme on its head. The exceptions were meant to allow more lenient treatment of persons in certain situations, but if they were upheld while the main provisions were struck down, they would have precisely the opposite effect of dealing more stringently with those persons. This led to the conclusion, at p. 816, that the exceptions were "necessarily connected" to the offending provision, so that even though the exceptions were not themselves impermissible, they must be struck down as well:

> A single scheme is being dealt with, and once the parent section which institutes that scheme has been found unconstitutional, the Court must proceed to strike down those exceptions which are necessarily connected to the general rule. In that way, distortions and inconsistencies of legislative intention do not result from finding the major component of a comprehensive legislative regime contrary to the Constitution.

65 This built on the comments of Dickson C.J. in R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 80, [page711] where he observed that the prohibition of abortions must fall with the procedural exceptions which violated the Charter, since merely to eliminate the exceptions would be to re-draft a comprehensive code:

> Having found that this "comprehensive code" infringes the Charter, it is not the role of the Court to pick and choose among the various aspects of s. 251 so as effectively to re-draft the section.

66 In both these cases, the significance of the non-offending provision was so markedly changed in the absence of the offending provision that the assumption that the legislature would have passed it was unsafe. The problem with striking down only the inconsistent portion is that the significance of the remaining portion changes so markedly without the inconsistent portion that the assumption that the legislature would have enacted it is unsafe.

67 In cases where the issue is whether to extend benefits to a group not included in the statute, the question of the change in significance of the remaining portion sometimes focuses on the relative size of the two relevant groups. For instance, in Knodel, supra, Rowles J. extended the provision of benefits to spouses to include same-sex spouses. She considered this course to be far less intrusive to the intention of the legislature than striking down the benefits to heterosexual spouses since the group to be added was much smaller than the group already benefitted (at p. 391):

> In the present case, it would clearly be far more intrusive to strike the legislation and deny the benefits to the individuals receiving them than it would be to extend the benefits to the small minority who demonstrated their entitlement to them.

68 In Tétrault-Gadoury v. Canada (Employment and Immigration Commission), supra, this Court decided that persons over 65 should be able to receive benefits that had been explicitly restricted to persons under 65. This is also a case in which [page712] the group to be added was much smaller than the group already benefitted.

69 Where the group to be added is smaller than the group originally benefitted, this is an indication that the assumption that the legislature would have enacted the benefit in any case is a sound one. When the group to be added is much larger than the group originally benefitted, this could indicate that the assumption is not safe. This is not because of the numbers per se. Rather, the numbers may indicate that for budgetary reasons, or simply because it constitutes a marked change in the thrust of the original program, it cannot be assumed that the legislature would have passed the benefit without the exclusion. In some contexts, the fact that the group to be added is much larger than the original group will not lead to these conclusions. R. v. Hebb (1989), 69 C.R. (3d) 1 (N.S.T.D.), is an example of this.

(iv) The Significance of the Remaining Portion

70 Other cases have focused on the significance or long-standing nature of the remaining portion. This sort of analysis is most apparent in Russow v. B.C. (A.G.) (1989), 35 B.C.L.R. (2d) 29 (S.C.). The court examined the various versions of the relevant provision which had been in force in the province from the time of Confederation to the present, and noted that the permissible portion had been invariably present. This helped the court to come to the conclusion that it was safe to assume that the legislature would have enacted the permissible portion without the impermissible portion (at pp. 33-35).

71 This consideration was also highlighted by Harlan J. in Welsh v. United States, 398 U.S. 333 (1970), at p. 366:

> When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though [page713] they entail, not simply eliminating an offending section, but rather building upon it.

72 It is sensible to consider the significance of the remaining portion when asking whether the assumption that the legislature would have enacted the remaining portion is a safe one. If the re-

maining portion is very significant, or of a long standing nature, it strengthens the assumption that it would have been enacted without the impermissible portion.

73 The significance of the remaining portion may be enhanced where the Constitution specifically encourages that sort of provision. Earlier I referred to the articles by Duclos and Roach, and Caminker, which point out that the Constitution may encourage particular kinds of remedies even if it does not directly mandate them. This aspect of remedial choice was specifically relied on in R. v. Hebb, supra. In that case the court considered a provision which required the court to consider the means of accused to pay a fine before incarceration upon default. This provision only applied to persons aged 18 to 22. The court found that this constituted discrimination on the basis of age. The question then was whether the limitation to ages 18 to 22 could be severed from the rest of the provision.

74 The court observed that either course, severance or nullification, would interfere with the intention of Parliament to some extent. That is, severance would expand the protection of the provision to a group Parliament had not intended to benefit by it, and nullification would remove protection from the group Parliament had intended to have it. The court, at p. 21, then found it important that the protection in question was "constitutionally encouraged," and thought that this was a good reason to favour expansion of the provision rather than nullification:

> To sever the age-related phrase provides protection to persons of all ages who are charged with a crime, in that they cannot be incarcerated for failure to pay a fine until a judicial review of their situation is held. On the other [page714] hand, by severing the complete s. 646(10), this protection is removed for all persons, including the age group which Parliament determined were worthy of that special protection.
>
> It is important that the courts not unjustifiably invade the domain which is properly that of the legislature. In following either of the alternatives above, the court will be interfering to some extent with the efforts of the legislators of the enactment. Where the result is the removing of a protection that is constitutionally encouraged--that is, judicial consideration before incarceration--as opposed to the enlarging of such a protection, it is submitted that the court should favour a result that would expand the group of persons protected rather than remove that protection completely.

75 This reasoning is sensible given our knowledge of how legislatures act generally. The fact that the permissible part of a provision is encouraged by the purposes of the Constitution, even if not mandated by it, strengthens the assumption that the legislature would have enacted it without the impermissible portion.

76 This factor may have been important in a case which dealt specifically with human rights statutes. In Re Blainey and Ontario Hockey Association (1986), 54 O.R. (2d) 513 (C.A.), the statute (Human Rights Code, 1981, S.O. 1981, c. 53) provided, in s. 1, a right to equal treatment without discrimination on the basis of, inter alia, sex. Section 19, however, provided that s. 1 was not violated when athletic activities were restricted on the basis of sex. The court found that s. 19 violated the guarantee of equality under the Charter. It was argued by the Hockey Association that s. 19 was not severable from s. 1, since it could not be assumed that the legislature would have passed s. 1

without s. 19. It was said that this meant that s. 19 should not be struck down, even though it violated the Charter. In fact, if it were true that s. 19 was inextricably linked to s. 1, then the result would be not that s. 19 was saved, but rather that s. 1 would be lost, even though there was nothing impermissible about it, considered in isolation. However, it is clear that it is safe to assume that the legislature would have passed the general prohibition on discrimination [page715] even if it could not limit its application in the area of athletics.

(v) Conclusion

77 It should be apparent from this analysis that there is no easy formula by which a court may decide whether severance or reading in is appropriate in a given case. While respect for the role of the legislature and the purposes of the Charter are the twin guiding principles, these principles can only be fulfilled with respect to the variety of considerations set out above which require careful attention in each case.

C. Whether to Temporarily Suspend the Declaration of Invalidity

78 Having identified the extent of the inconsistency, and having determined whether that inconsistency should be dealt with by way of striking down, severance or reading in, the court has identified what portion must be struck down. The final step is to determine whether the declaration of invalidity of that portion should be temporarily suspended.

79 A court may strike down legislation or a legislative provision but suspend the effect of that declaration until Parliament or the provincial legislature has had an opportunity to fill the void. This approach is clearly appropriate where the striking down of a provision poses a potential danger to the public (R. v. Swain, supra) or otherwise threatens the rule of law (Reference Re Manitoba Language Rights, [1985] 1 S.C.R. 721). It may also be appropriate in cases of underinclusiveness as opposed to overbreadth. For example, in this case some of the interveners argued that in cases where a denial of equal benefit of the law is alleged, the legislation in question is not usually problematic in and of itself. It is its underinclusiveness that is problematic so striking down the law immediately would deprive deserving persons of benefits without providing [page716] them to the applicant. At the same time, if there is no obligation on the government to provide the benefits in the first place, it may be inappropriate to go ahead and extend them. The logical remedy is to strike down but suspend the declaration of invalidity to allow the government to determine whether to cancel or extend the benefits.

80 I would emphasize that the question of whether to delay the effect of a declaration is an entirely separate question from whether reading in or nullification is the appropriate route under s. 52 of the Constitution Act, 1982. While delayed declarations are appropriate in some cases, they are not a panacea for the problem of interference with the institution of the legislature under s. 52.

81 A delayed declaration is a serious matter from the point of view of the enforcement of the Charter. A delayed declaration allows a state of affairs which has been found to violate standards embodied in the Charter to persist for a time despite the violation. There may be good pragmatic reasons to allow this in particular cases. However, reading in is much preferable where it is appropriate, since it immediately reconciles the legislation in question with the requirements of the Charter.

82 Furthermore, the fact that the court's declaration is delayed is not really relevant to the question of which course of action, reading in or nullification, is less intrusive upon the institution of the legislature. By deciding upon nullification or reading in, the court has already chosen the less intrusive path. If reading in is less intrusive than nullification in a particular case, then there is no reason to think that a delayed nullification would be any better. To delay nullification forces the matter back onto the legislative agenda at a time not of the choosing of the legislature, and within time limits under which [page717] the legislature would not normally be forced to act. This is a serious interference in itself with the institution of the legislature. Where reading in is appropriate, the legislature may consider the issue in its own good time and take whatever action it wishes. Thus delayed declarations of nullity should not be seen as preferable to reading in in cases where reading in is appropriate.

83 The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the courts and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

D. Summary

84 It is valuable to summarize the above propositions with respect to the operation of s. 52 of the Constitution Act, 1982 before turning to the question of the independent availability of remedies pursuant to s. 24(1) of the Charter. Section 52 is engaged when a law is itself held to be unconstitutional, as opposed to simply a particular action taken under it. Once s. 52 is engaged, three questions must be answered. First, what is the extent of the inconsistency? Second, can that inconsistency be dealt with alone, by way of severance or reading in, or are other parts of the legislation inextricably linked to it? Third, should the declaration of invalidity be temporarily suspended? The factors to be considered can be summarized as follows:

(i) The Extent of the Inconsistency

85 The extent of the inconsistency should be defined:

[page718]

A. broadly where the legislation in question fails the first branch of the Oakes test in that its purpose is held not to be sufficiently pressing or substantial to justify infringing a Charter right or, indeed, if the purpose is itself held to be unconstitutional -- perhaps the legislation in its entirety;
B. more narrowly where the purpose is held to be sufficiently pressing and substantial, but the legislation fails the first element of the proportionality branch of the Oakes test in that the means used to achieve that purpose are held not to be rationally connected to it -- generally limited to the particular portion which fails the rational connection test; or,
C. flexibly where the legislation fails the second or third element of the proportionality branch of the Oakes test.

(ii) Severance/Reading In

Severance or reading in will be warranted only in the clearest of cases, that is, where each of the following criteria is met:

A. the legislative objective is obvious, or it is revealed through the evidence offered pursuant to the failed s. 1 argument, and severance or reading in would further that objective, or constitute a lesser interference with that objective than would striking down;
B. the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and,
C. severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

[page719]

(iii) Temporarily Suspending the Declaration of Invalidity

Temporarily suspending the declaration of invalidity to give Parliament or the provincial legislature in question an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted even where striking down has been deemed the most appropriate option on the basis of one of the above criteria if:

A. striking down the legislation without enacting something in its place would pose a danger to the public;
B. striking down the legislation without enacting something in its place would threaten the rule of law; or,
C. the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

86 I should emphasize before I move on that the above propositions are intended as guidelines to assist courts in determining what action under s. 52 is most appropriate in a given case, not as hard and fast rules to be applied regardless of factual context.

III. Section 24(1)

A. Section 24(1) Alone

87 Where s. 52 of the Constitution Act, 1982 is not engaged, a remedy under s. 24(1) of the Charter may nonetheless be available. This will be the case where the statute or provision in question is not in and of itself unconstitutional, but some action taken under it infringes a person's Charter rights. Section 24(1) would there provide for an individual [page720] remedy for the person whose rights have been so infringed.

88 This course of action has been described as "reading down as an interpretive technique", but it is not reading down in any real sense and ought not to be confused with the practice of reading down as referred to above. It is, rather, founded upon a presumption of constitutionality. It comes into play when the text of the provision in question supports a constitutional interpretation and the violative action taken under it thereby falls outside the jurisdiction conferred by the provision. I held that this was the case in Slaight Communications Inc. v. Davidson, [1989] 1 S.C.R. 1038, when

I determined that a provision which provided a labour adjudicator with discretion to make a range of orders could not have been intended to provide him with the discretion to make unconstitutional orders. The legislation itself was not unconstitutional and s. 52 was not engaged, but the aggrieved party was clearly entitled to an individual remedy under s. 24(1).

B. Section 24(1) in Conjunction with Section 52

89 An individual remedy under s. 24(1) of the Charter will rarely be available in conjunction with action under s. 52 of the Constitution Act, 1982. Ordinarily, where a provision is declared unconstitutional and immediately struck down pursuant to s. 52, that will be the end of the matter. No retroactive s. 24 remedy will be available. It follows that where the declaration of invalidity is temporarily suspended, a s. 24 remedy will not often be available either. To allow for s. 24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect. Finally, if a court takes the course of reading down or in, a s. 24 remedy would probably only duplicate the relief flowing from the action that court has already taken.

[page721]

IV. Remedial Options Appropriate to this Case

A. The Nature of the Right Involved

90 The right which was determined to be violated here is a positive right: the right to equal benefit of the law. Positive rights by their very nature tend to carry with them special considerations in the remedial context. It will be a rare occasion when a benefit conferring scheme is found to have an unconstitutional purpose. Cases involving positive rights are more likely to fall into the remedial classifications of reading down/reading in or striking down and suspending the operation of the declaration of invalidity than to mandate an immediate striking down. Indeed, if the benefit which is being conferred is itself constitutionally guaranteed (for example, the right to vote), reading in may be mandatory. For a court to deprive persons of a constitutionally guaranteed right by striking down underinclusive legislation would be absurd. Certainly the intrusion into the legislative sphere of extending a constitutionally guaranteed benefit is warranted when the benefit was itself guaranteed by the legislature through constitutional amendment.

91 Other rights will be more in the nature of "negative" rights, which merely restrict the government. However, even in those cases, the rights may have certain positive aspects. For instance, the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the "fundamental principles of justice" may provide a basis for characterizing s. 7 as a positive right in some circumstances. Similarly, the equality right is a hybrid of sorts since it is neither purely positive nor purely negative. In some contexts it will be proper to characterize s. 15 as providing positive rights.

92 The benefit with which we are concerned here is a monetary benefit for parents under the Unemployment Insurance Act, 1971, not one which Parliament is constitutionally obliged to provide to the included group or the excluded group. What Parliament [page722] is obliged to do, by virtue of the conceded s. 15 violation, is equalize the provision of that benefit. The benefit itself is not constitutionally prohibited; it is simply underinclusive. Thus striking down the provision immediately would be inappropriate as such a course of action would deprive eligible persons of a benefit without providing any relief to the respondent. Such a situation demands, at the very least, that the operation of any declaration of invalidity be suspended to allow Parliament time to bring the provi-

sion into line with constitutional requirements. All of the intervening provincial Attorneys General agreed with this proposition, although, for the most part, they intervened on behalf of the appellants. The question which remains is whether this is a case in which it is appropriate to go further and read the excluded group into the legislation. This question must be answered with reference to the specific legislation under consideration.

B. The Context of the Unemployment Insurance Act, 1971

93 It is not difficult to discern the legislative objective of this scheme as a whole. The following overall objective emerges from Justice La Forest's judgment concerning the same legislative scheme in Tétreault-Gadoury, supra, at p. 41:

> ... to create a social insurance plan to compensate unemployed workers for loss of income from their employment and to provide them with economic and social security for a time, thus assisting them in returning to the labour market.

94 It is, however, not as simple to discern the objective of the particular provision. It is not clear on the text of the provision alone that the purpose of it is to extend benefits to parents of newborns caring for them at home, a purpose which reading in the excluded group would further. Indeed, on the express language of the provision, one could quickly conclude that the benefits were only intended to be conferred on adoptive parents and that natural parents were deliberately excluded. One could postulate that the provision was specifically aimed at responding to circumstances peculiar to adoptive parents. Certainly this possibility [page723] cannot be ruled out on the basis of the text of the provision alone, and we have not been provided with the further assistance of a s. 1 argument here or in the courts below.

95 Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in Tétreault-Gadoury, supra. There, the budgetary implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.

96 Given the nature of the benefit and the size of the group to whom it is sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislative domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the legislative body in question [page724] to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

97 I think it significant and worthy of mention that in this case Parliament did amend the impugned provision following the launching of this action, and that that amendment was not the one

that reading in would have imposed. Parliament equalized the benefits given to adoptive parents and natural parents but not on the same terms as they were originally conferred by s. 32. The two groups now receive equal benefits for ten weeks rather than the original fifteen. This situation provides a valuable illustration of the dangers associated with reading in when legislative intention with respect to budgetary issues is not clear. In this case, reading in would not necessarily further the legislative objective and it would definitely interfere with budgetary decisions in that it would mandate the expenditure of a greater sum of money than Parliament is willing or able to allocate to the program in question.

The Constitutional Questions

98 Following from the above analysis, I would answer the constitutional questions as follows:

> 1. Is the Federal Court Trial Division, having found that s. 32 of the Unemployment Insurance Act, 1971 (subsequently s. 20 of the Unemployment Insurance Act, R.S.C., 1985, c. U-1) creates unequal benefit contrary to s. 15(1) of the Canadian Charter of Rights and Freedoms, by making a distinction between the benefits available to natural and adoptive parents, required by s. 52(1) of the Constitution Act, 1982 to declare that s. 32 is of no force and effect?

99 The answer to question one is, in the present circumstances, yes, leaving open the option of suspending the declaration of invalidity for a period of time to allow Parliament to amend the legislation in a way which meets its constitutional obligations. This is not to say that s. 52 does not provide the flexibility to stop short of striking out an unconstitutional provision in its entirety. Given the [page725] appropriate circumstances, a court may choose the options of severance or reading in by which to bring the provision in line with the Charter. These options should be exercised only in the clearest of cases, keeping in mind the principles articulated above relating to the nature of the right and the specific context of the legislation.

> 2. Does s. 24(1) of the Charter confer on the Federal Court Trial Division the power to order that natural parents are entitled to benefits on the same terms as benefits are available to adoptive parents under s. 32 (subsequently s. 20) of that Act?

100 The answer to question two is no. Section 24(1) provides an individual remedy for actions taken under a law which violate an individual's Charter rights. Again, however, a limited power to extend legislation is available to courts in appropriate circumstances by way of the power to read in derived from s. 52 of the Constitution Act, 1982.

Disposition

101 In the result, the appeal is allowed and the judgment of the trial judge set aside. Normally, I would order that s. 32 of the Unemployment Insurance Act, 1971 (subsequently s. 20 of the Unemployment Insurance Act, 1985) be struck down pursuant to s. 52 and be declared to be of no force or effect, and I would further suspend the operation of this declaration to allow Parliament to amend the legislation to bring it into line with its constitutional obligations. There is, however, no need for a declaration of invalidity or a suspension thereof at this stage of this matter given the November 1990 repeal and replacement of the impugned provision.

102 Further, this is not a case in which extending a remedy, for example damages, under s. 24(1) to the respondent would be appropriate. The classic doctrine of damages is that the plaintiff is to be put in the position he or she would have occupied had there been no wrong. In the present case, there are two possible positions the plaintiff could have [page726] been in had there been no wrong. The plaintiff could have received the benefit equally with the original beneficiaries, or there could have been no benefit at all, for the plaintiff or the original beneficiaries. The remedial choice under s. 24 thus rests on an assumption about which position the plaintiff would have been in. However, I have already determined which assumption should be made in the analysis under s. 52, and have determined that it cannot be assumed that the legislature would have enacted the benefit to include the plaintiff. Therefore, the plaintiff is in no worse position now than had there been no wrong.

103 Despite the fact that the respondent has lost in this Court, I do not feel it appropriate that he should bear the costs. He did win with respect to the s. 15 issue at trial and the subsequent litigation has, upon the concession of the appellants, centred only on choice of remedy. According to this concession, the respondent by his claim brought a deficiency to the attention of Parliament which has since been remedied by the repeal and replacement of the impugned provision. He should not be penalized now because of a dispute solely with respect to remedy. I therefore award the respondent his solicitor-client costs.

The reasons of La Forest and L'Heureux-Dubé JJ. were delivered by

104 LA FOREST J.:-- I have had the benefit of reading the reasons of the Chief Justice and I agree with his proposed disposition and answers to the constitutional questions. I take this approach on the simple basis that the legislation concerned concededly violates the Canadian Charter of Rights and Freedoms and that it does not fall within the very narrow type of cases where only a portion of the legislation may be read down or corrected by reading in material as being obviously intended by the legislature in any event. As the Chief Justice points out, there is a long tradition of reading down legislation, [page727] and I see no reason, where it substantially amounts to the same thing, why reading in should not also be done. I note that the Chief Justice states, and I agree, that these devices should only be employed in the clearest of cases. The courts are not in the business of rewriting legislation. I also agree that there is little point in light of Parliament's subsequent action to declare the impugned legislation invalid and then suspend that declaration.

105 That is sufficient to dispose of the case, and I find it unnecessary to elaborate further. In limiting my reasons in this way, however, I would not wish it to be thought that I fundamentally disagree with what the Chief Justice has to say regarding the means for assessing when the techniques of reading down or reading in should be adopted. Indeed, I find his reasons very helpful in this regard. Rather I take this narrow approach because the unsatisfactory manner in which this case has been presented to us makes it necessary to respond to the issues in the abstract, which leads to the risk of misleading or insufficiently qualified pronouncements.

106 To begin with, I am by no means sure there was a violation of the Charter in this case. At first sight (and the Chief Justice alludes to this) it does not seem wholly unreasonable that Parliament might have good reason to encourage adoptive parents as a group, and the effect of the judicial intervention has been to divert from that group some of the monies intended to meet the problem Parliament may have had in contemplation. This Court has repeatedly stated that Parliament may constitutionally attack one problem, or part of a problem, at a time. But the manner in which the case was presented requires us to assume constitutional invalidity in the absence of any evidence as

to context, which I would have thought was essential to a consideration of the extent of inconsistency with the Charter.

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107 Ordinarily, a case is dealt with in light of facts that define the scope of the Court's pronouncement. Here we are forced to deal with the tests for reading down or reading in in a manner that may give the impression that they are of universal application. But it must be underlined that the case is one involving a scheme of social assistance which may dictate a quite different approach from that which one would follow in other areas. Thus this Court has repeatedly stated in cases like R. v. Wong, [1990] 3 S.C.R. 36, for example, that it was not the business of the courts to invent schemes that had the effect of increasing police powers (at pp. 56-57). The rationale for this was not so much the complexity of possible schemes (as the Chief Justice appears to suggest at one stage), but rather that this could distract the courts from their fundamental duty under the Charter to protect the rights guaranteed to the individual.

108 The simple fact is, as I noted before, that it is for Parliament and the legislatures to make laws. It is the duty of the courts to see that those laws conform to constitutional norms and declare them invalid if they do not. This imposes pressure on legislative bodies to stay within the confines of their constitutional powers from the outset. Reliance should not be placed on the courts to repair invalid laws. In social assistance schemes, there is perhaps more room (and certainly more temptation) for judicial intervention, in cases like Tétreault-Gadoury v. Canada (Employment and Immigration Commission), [1991] 2 S.C.R. 22, for example, where the remedy is obvious and Parliament would clearly enact it rather than have the whole scheme fail. But when one is dealing with laws that impinge on the liberty of the subject, the judicial stance should be one that does not encourage the legislature to overreach, and the courts should be slow indeed to provide a corrective.

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109 I have added these comments to underline that there are further dimensions (and I have mentioned only a few) to the issue of reading in and reading down that will require qualifications to the propositions set down by the Chief Justice. I note that he has wisely indicated that these propositions are intended as guidelines to assist the courts and not as hard and fast rules to be applied regardless of factual context.

110 Where I am most doubtful about the Chief Justice's reasons is in closely tying the process of reading down or reading in with the checklist set forth in R. v. Oakes, [1986] 1 S.C.R. 103. Though this may be useful at times, it may, I fear, encourage a mechanistic approach to the process, rather than encourage examination of more fundamental issues, such as those to which I have referred above, issues that go well beyond the factual context.

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B E T W E E N:

CITY OF TORONTO
Applicant

and

ATTORNEY GENERAL OF ONTARIO
Respondent

Court File No. CV-18-00603797-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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