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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

CITY OF TORONTO

Applicant
(Respondent in Appeal – Responding Party)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

AND BETWEEN:

ROCCO ACHAMPONG

Applicant
(Respondent in Appeal – Responding Party)

and

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

Respondent
(Appellant – Moving Party)

and

CITY OF TORONTO

Respondent

(Respondent in Appeal – Responding Party)

(Title of Proceedings Continued on p. 2)

BOOK OF AUTHORITES OF THE INTERVENORS JENNIFER HOLLETT et al. (RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

AND BETWEEN:

CHRIS MOISE, ISH ADERONMU, and PRABJA KHOSLA, on her own behalf and on behalf of all members of WOMEN WIN TO

Applicants
(Respondent in Appeal – Responding Parties)

and

ATTORNEY GENERAL OF ONTARIO

Respondent
(Appellant – Moving Party)

and

JENNIFER HOLLETT, LILY CHENG, SUSAN DEXTER, GEOGGREY KETTEL, AND DYANOOSH YOUSSEFI

Intervenors

(Respondent in Appeal – Responding Parties)

BOOK OF AUTHORITES OF THE JENNIFER HOLLETT et al.
(RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

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Tab 1

CITATION: City of Toronto et al v. Ontario (Attorney General), 2018 ONSC 5151
COURT FILES NO.: CV-18-603797
CV-18-602494
CV-18-603633
DATE: 20180910

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CITY OF TORONTO

Applicant

and

ATTORNEY GENERAL OF ONTARIO

Respondent

AND BETWEEN:

ROCCO ACHAMPONG

Applicant

and

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

Respondents

AND BETWEEN:

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

Applicants

and

ATTORNEY GENERAL OF ONTARIO

Respondent

INTERVENORS

- **Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi,** supporting the Applicants
- **Toronto District School Board**, supporting the Applicants
- **Canadian Taxpayers Federation**, supporting the Province

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Diana W. Dimmer, Glenn K.L. Chu and Philip Chan* for the City of Toronto

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Howard Goldblatt, Steven M. Barrett, Christine Davies, Heather Ann McConnell and Geetha Philipupillai for Applicants Chris Moise, Ish Aderonmu and Prabha Khosla on her own behalf and on behalf of Women Win TO

Robin Basu, Yashoda Ranganathan and Audra Ranalli for the Respondent Attorney General of Ontario

Donald K. Eady. Caroline V. (Nini) Jones and Jodi Martin for Intervenors Jennifer Hollett, Lily Cheng, Susan Dexter, Geoffrey Kettel and Dyanoosh Youssefi

Derek Bell and Ashley Boyes for Intervenor Canadian Taxpayer Federation

Patrick Cotter for Intervenor Toronto District School Board

HEARD: August 31, 2018

Challenge to Provincial Bill 5 - Better Local Government Act, 2018

Reasons for Decision

Justice Edward P. Belobaba:

[1] These applications, brought on an urgent basis, challenge the constitutional validity of Bill 5, also known as the *Better Local Government Act, 2018.*[1] For ease of reference, I will refer to the impugned provincial enactment as Bill 5 and I will refer to the provisions that are being challenged - that is, the provisions that change the number of wards and councillors from 47 to 25 - as the Impugned Provisions.

[2] Given the pressing need for a timely decision, I will forego a detailed analysis of every legal issue raised in this proceeding or the case law that pertains to these issues. I will focus primarily on the issues and authorities that, in my view, are the most determinative.

The unprecedented nature of the case before me

[3] The matter before me is unprecedented. The provincial legislature enacted Bill 5, radically redrawing the City of Toronto's electoral districts, in the middle of the City's election.

[4] The election period for Toronto City Council began on May 1, 2018 and was based on a 47-ward structure. Election day is October 22, 2018. At the end of July, shortly after taking power, the newly elected Ontario government announced that it would enact legislation directed primarily at the City of Toronto, reducing the number of City wards and councillors from 47 to 25 and *de facto* doubling the ward populations from an average of 61,000 to 111,000.

[5] Bill 5 received first reading on July 30, second reading on August 2, 7 and 8 and Royal Assent on August 14, 2018. Bill 5 took immediate effect in the middle of August, by which point some 509 candidates for the October 22 election had been certified, the candidates were in the midst of their campaigns and the City Clerk's preparations for a 47-ward election were well underway.

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[1] S.O. 2018, c. 11.

[6] The enactment of provincial legislation radically changing the number and size of a city's electoral districts in the middle of the city's election is without parallel in Canadian history. Here is how the City of Toronto put it in the opening line of its factum:

> Never before has a Canadian government meddled with democracy like the Province of Ontario did when, without notice, it fundamentally altered the City of Toronto's governance structure in the middle of the City's election.

[7] Most people would agree that changing the rules in the middle of the game is profoundly unfair. The question for the court, however, is not whether Bill 5 is unfair. The question is whether the enactment of Bill 5 is unconstitutional.

Decision

[8] I am acutely aware of the appropriate role of the court in reviewing duly enacted federal or provincial legislation and the importance of judges exercising judicial deference and restraint. It is only when a democratically elected government has clearly crossed the line that the "judicial umpire" should intervene.

[9] The Province has clearly crossed the line.

[10] For the reasons set out below, I find that the Impugned Provisions of Bill 5 substantially interfered with both the candidate's and the voter's right to freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*. I further find, on the evidence before me, that these breaches cannot be saved or justified under section 1.[2]

[11] The Impugned Provisions are unconstitutional and are set aside under s. 52 of the *Constitution Act, 1982*. The October 22 election shall proceed as scheduled but on the basis of 47 wards, not 25. If the Province wishes to enact another Bill 5-type law at some future date to affect future City elections, it may certainly attempt to do so. As things now

[2] I make no ruling in relation to the provisions in Bill 5 that change the selection process for the regional chairs in York, Peel, Niagara and Muskoka from election to appointment. I recognize that Mr. Achampong included a challenge to these provisions in his application and filed a supporting affidavit from the campaign manager of a candidate in York Region. However, the Achampong application asks that Bill 5 be "stayed", a remedy that was not requested by any other applicant and is not being granted here because it requires a very different legal analysis: see *Manitoba (A.G.) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110. A more complete legal and evidentiary basis would be needed before this court could comfortably consider a challenge to the provisions in Bill 5 that deal with the appointment of the four regional chairs.

stand – and until a constitutionally valid provincial law says otherwise - the City has 47 wards.

Arguments other than s. 2(b) of the Charter

[12] The applicants and intervenors advanced a number of Charter and non-Charter arguments in addition to s. 2(b), namely that the Impugned Provisions breached association and equality rights under ss. 2(d) and 15(1) of the Charter, and the unwritten constitutional principles of the rule of law and democracy.

[13] I am inclined to agree with the Province that none of these additional submissions can prevail on the facts herein. However, I make no actual finding in this regard. The ss. 2(d) and 15(1) submissions, together with the rule of law and democracy submissions, may live another day, perhaps to be litigated in another court. It is sufficient for my decision today to focus only on s. 2(b) of the Charter and the guarantee of freedom of expression.

Analysis

[14] Several preliminary points should be made clear before I explain why the Impugned Provisions infringe s. 2(b) of the Charter.

[15] First, there is no dispute that the Province has plenary authority under s. 92(8) of the *Constitution Act, 1867* to pass laws in relation to "Municipal Institutions in the Province". Assuming the law falls under s. 92(8), or indeed any other provincial head of power, the Province can pass a law that is wrong-headed, unfair or even "draconian."[3]

[16] The only proviso, and it is an important one, is that any such legislation must comply with the Charter (and, arguably, any applicable unwritten constitutional norms and principles). As long as a statute is "neither *ultra vires* nor contrary to the [Charter], courts have no role to supervise the exercise of legislative power."[4] The remedy for bad laws that are otherwise *intra vires* and Charter-compliant is the ballot box, not judicial review.[5]

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[3] *Babcock v Canada (Attorney General)*, [2002] 3 S.C.R. 3, at para. 57.

[4] *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525, at para. 85.

[5] *British Columbia v. Imperial Tobacco Canada Ltd.*, [2005] 2 S.C.R. 473 at para. 66. Also see *East York v. Ontario (Attorney General)*, [1997] O.J. No. 4100 at para. 12: "[C]ourts can only provide remedies for the public grievances

[17] Second, a federal or provincial legislature is sovereign and cannot bind itself. The provincial legislature can over-rule or contradict a previously enacted law. A subsequent enactment that is inconsistent with an earlier enactment is deemed to impliedly repeal the earlier enactment to the extent of the inconsistency.[6] Thus, the argument that the *City of Toronto Act*[7] somehow imposed an immutable obligation to consult cannot succeed. The Province was entitled to enact Bill 5 and ignore completely the promise to consult that was set out in the previous law.

[18] Third, speaking broadly and again absent a constitutional issue, the provincial legislature has no obligation to consult and no obligation of procedural fairness.[8] The doctrine of legitimate expectations, an aspect of procedural fairness, does not apply to legislative enactments.[9]

[19] At first glance, Bill 5 although controversial in content appears to fall squarely within the province's legislative competence. Upon closer examination of the surrounding circumstances, however, one discovers at least two constitutional deficiencies that cannot be justified in a free and democratic society. The first relates to the timing of the law and its impact on candidates; the second to its content and its impact on voters.

[20] As I explain in more detail below, the Impugned Provisions breach s. 2(b) of the Charter in two ways: (i) because the Bill was enacted in the middle of an ongoing election campaign, it breached the municipal candidate's freedom of expression and (ii) because Bill 5 almost doubled the population size of City wards from an average of 61,000 to an average of 111,000, it breached the municipal voter's right to cast a vote that can result in effective representation.

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if those grievances violate legal as opposed to political proprieties. What is politically controversial is not necessarily constitutionally impermissible."

[6] Sullivan, *Sullivan on the Construction of Statutes*, (6th ed.) at para 11.64.

[7] S.O. 2006, c. 11, Sch. A., ss. 6(1) and (2). Also see s. 6 of the Toronto-Ontario Cooperation and Consultation Agreement which provides that Ontario shall consult with the City on, among other things, "[a]ny proposed change in legislation or regulation that, in Ontario's opinion, will have a significant … impact on the City". However, s. 14 of the same Agreement provides that a failure to abide by any of its terms does not give rise to any legal remedy.

[8] The obligation of procedural fairness materializes at the level of subordinate legislation and in the judicial review of the administrative actions of agencies and tribunals – not at the level of primary legislation such as Bill 5 herein.

[9] *Old St Boniface Residents Assn Inc v Winnipeg (City)*, [1990] 3 S.C.R. 1170 at para 74; *Canada (A.G.) v Mavi*, [2011] 2 S.C.R. 504 at paras 44, 68-69; and *Reference re Canada Assistance Plan, supra*, note 4, at paras 58-61.

[21] Either breach by itself is sufficient to support a court order declaring that the Impugned Provisions are of no force or effect.

(1) Breach of the candidate's freedom of expression

[22] Section 2(b) of the Charter guarantees "freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication." Although set out in the Charter, the Supreme Court has made clear that freedom of expression did not originate in the Charter but was entrenched in the Constitution in 1982 as "one of the most fundamental values of our society."[10]

[23] The Supreme Court has frequently and consistently held that freedom of expression is of crucial importance in a democratic society.[11] All the more so when freedom of expression is engaged in the political realm. 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 Charter.[12] Here is how the Court put it in *Keegstra*:

> 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.[13]

[24] The Supreme Court has encouraged a broad interpretation of freedom of expression that extends the guarantee to as many expressive activities as possible. The Court has made clear that any activity or communication that conveys or attempts to convey meaning (and does not involve violence) is covered by the guarantee in s. 2(b) of the Charter.[14]

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[10] *Libman v Quebec (Attorney General),* [1997] 3 S.C.R. 569, at para. 28.

[11] *Ibid.*

[12] *Ibid* at para. 29.

[13] *R. v. Keegstra,* [1990] 3 S.C.R. 697 at 763-64.

[14] *Libman, supra,* note 10, at para. 29.

[25] It follows from this that the freedom of expression guarantee extends not only to candidates but to every participant in a political election campaign, including volunteers, financial supporters and voters.[15] Each of them would have a genuine s. 2(b) issue with Bill 5. However, for ease of understanding, I will focus only on the candidates.

[26] In a section 2(b) claim, the Court asks two questions: first, whether the activity in question falls within the scope of freedom of expression, and secondly, whether the purpose or *effect* of the legislation is to interfere with that expression.[16]

[27] The expressive activity of candidates competing in the City's ongoing election obviously falls within the scope of s. 2(b). The more pertinent question is whether their freedom of expression has been infringed by the enactment of Bill 5. That is, whether the enactment of Bill 5 changing the electoral districts in the middle of the City's election campaign substantially interfered with the candidate's right to freedom of expression.[17]

[28] Perhaps the better question is "How could it not?"

[29] The evidence is that the candidates began the election campaign on or about May 1, 2018 on the basis of a 47-ward structure and on the reasonable assumption that the 47-ward structure would not be changed mid-stream. The 47-ward structure informed their decision about where to run, what to say, how to raise money and how to publicize their views. When Bill 5 took effect on August 14, mid-way through the election campaign, most of the candidates had already produced campaign material such as websites and pamphlets that were expressly tied to the ward in which they were running. A great deal of the candidate's time and money had been invested within the boundaries of a particular ward when the ward numbers and sizes were suddenly changed.

[30] Bill 5 radically altered the City's electoral districts, in most cases doubling both their physical size and the number of potential voters. The immediate impact of Bill 5

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[15] *Harper v Canada (Attorney General)*, 2004 SCC 33 at paras 15 and 20; *Vancouver Sun (Re)*, 2004 SCC 43 at para. 26; *Taman v Canada (Attorney General)*, 2015 FC 1155 at para 41.

[16] *Irwin Toy Ltd. V. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at 978.

[17] The case law is clear that the *Charter* cannot be subdivided into two kinds of guarantees - freedoms and rights. The freedom to do a thing, when guaranteed by the Constitution and interpreted purposively, implies a right to do it. Hence, I say "the right to freedom of expression". See *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3, at para. 67.

was wide-spread confusion and uncertainty. There was confusion about where to run, how to best refashion one's political message and reorganize one's campaign, how to attract additional financial support, and what to do about all the wasted campaign literature and other material. There was uncertainty flowing from the court challenge, the possibility that the court challenge might succeed and the consequences for all concerned if this were to happen.

[31] The evidence is that the candidates spent more time on doorsteps addressing the confusing state of affairs with potential voters than discussing relevant political issues. The candidates' efforts to convey their political message about the issues in their particular ward were severely frustrated and disrupted. Some candidates persevered; others dropped out of the race entirely.

[32] There can be no doubt on the evidence before the court that Bill 5 substantially interfered with the candidate's ability to effectively communicate his or her political message to the relevant voters.

[33] This is not a situation where a provincial law changing the number and size of the City's electoral districts was enacted say six months before the start of the City's election period. Had this happened, the law would not have interfered with any candidate's freedom of expression and no candidate could have alleged otherwise. The Province is right to say that s. 2(b) of the Charter does not guarantee a 47-ward election platform.

[34] Here, the law changing the City's electoral districts was enacted in the middle of the City's election. This mid-stream legislative intervention not only interfered with the candidate's freedom of expression, it undermined an otherwise fair and equitable election process.

[35] Electoral fairness is a fundamental value of democracy.[18] As the Court noted in *Libman,*[19] the principle of electoral fairness flows directly from a principle entrenched in the Constitution: the political equality of citizens. Elections are fair and equitable only if candidates are given a reasonable opportunity to present their positions.[20]

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[18] *Figueroa v. Canada (Attorney General),* 2003 SCC 37, at para. 50.

[19] *Libman, supra*, note 10.

[20] *Ibid* at para 47; *Figueroa, supra*, note 18, at para 51.

[36] Here, as already noted, because Bill 5 took effect in the middle of the City's election, candidates were not given a reasonable opportunity to present their positions. The enactment and imposition of Bill 5, radically redrawing the electoral districts in the middle of the electoral process undermined the very notion of a "fair and equitable" election.

[37] Once the Province has entered the field and provided an electoral process, it may not suddenly and in the middle of this electoral process impose new rules that undermine an otherwise fair election and substantially interfere with the candidates' freedom of expression. Indeed, as the Supreme Court's decision in *Libman*[21] makes clear, where a democratic platform is provided (in that case a referendum, here a 47-ward election structure), and the election has begun, expressive activity in connection with that platform is protected against legislative interference under the traditional *Irwin Toy* analysis which focuses on substantial interference.[22]

[38] I have no difficulty finding on the evidence before me that the enactment of Bill 5 changing the number and size of the electoral districts in the middle of the election campaign substantially interfered with the candidate's freedom of expression. A breach of the municipal candidate's right to freedom of expression under s. 2(b) of the Charter has been established.

[39] I now turn to the municipal voter's right under the same provision of the Charter.

(2) Breach of the municipal voter's right to freedom of expression

[40] I begin with three propositions that are not in dispute. First, the most fundamental of our rights in a democratic society is the right to vote.[23] Absent a right to vote, democracy cannot exist.[24] Second, voting is an expressive activity, indeed the "most important expressive activity" [25] and is fully protected under s. 2(b) of the Charter. Third, the right to vote is, in essence, the right to "effective representation" and not just voter parity.

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[21] *Libman*, *supra*, note 10.

[22] *Ibid* at paras. 28 to 37. Also see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815 and *Fraser*, *supra*, note 17, at paras 46 and 69-70.

[23] *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158 at para. 1.

[24] *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995, at para. 104.

[25] *Ibid* at para. 158.

[41] As the Supreme Court concluded in the *Saskatchewan Reference*:[26]

> [T]he 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 … elected representatives function in two roles - legislative and what has been termed the "ombudsman role".

[42] City councillors obviously function in both roles, legislative and ombudsman – in the former role when debating and passing bylaws or other resolutions; and in the latter role when handling the myriad of constituents' grievances and concerns that find their way to their desks.

[43] The important legal issue is whether the comments by the Supreme Court about effective representation, made in the context of s. 3 of the Charter (which guarantees every citizen's right to vote in a federal or provincial election, but not a municipal election), can also apply in the context of a municipal election. Can the concept of effective representation inform this court's analysis of the municipal voter's rights under s. 2(b) of the Charter?

[44] In my view it can, for the following reasons.

[45] The concept of effective representation is not rooted in s. 3 of the Charter. Its origins can be traced back to Canada's founding fathers and the early debates about the appropriate design of electoral districts. As the Supreme Court explained in the *Saskatchewan Reference*:

> [P]arity 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)):

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[26] *Saskatchewan Reference, supra,* note 23, at para. 49.

> [I]t 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. [27]

[46] Even if the concept of effective representation is found to have its origins in s. 3 of the Charter, there is no principled reason why in an appropriate case the "effective representation" value cannot inform other related Charter provisions such as the voter's right to freedom of expression under s. 2(b). The Charter of Rights is not comprised of watertight compartments. As the Supreme Court noted in *Baier v. Alberta,*[28] "Charter rights overlap and cannot be pigeonholed."[29] And, as this court noted in *DeJong,*[30] the rights enshrined in s. 3 "have a close relationship to freedom of expression and to the communication of ideas … there is an affinity between ss. 3 and 2(b) (freedom of expression) of the Charter."[31]

[47] If voting is indeed one of the most important expressive activities in a free and democratic society, then it follows that any judicial analysis of its scope and content under the freedom of expression guarantee should acknowledge and accommodate voting's core purpose, namely effective representation. That is, the voter's freedom of expression must include her right to cast a vote that can result in meaningful and effective representation.

[48] The following caution from the Supreme Court in *Haig*[32] has direct application on the facts herein:

> While s. 2(b) of the Charter does not include any 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.[33]

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[27] *Ibid* at para. 51.

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

[29] *Ibid* at para. 58.

[30] *De Jong v. The Attorney General of Ontario*, (2007) 88 O.R. (3d) 335 (S.C.J.)

[31] *Ibid* at para. 25. Also see *Baier, supra,* note 28, at para. 57.

[32] *Haig, supra*, note 24.

[49] In other words, even though s. 2(b) does not guarantee a right to vote in municipal elections, if such an expressive right has been provided by the provincial government, then the right so provided must be consistent with and not in breach of the Constitution.

[50] Here, the Province has statutorily provided for a resident's right to vote in municipal elections, including the upcoming election in the City of Toronto.[34] This right, having been provided, must be provided "in a fashion that is consistent with the Constitution."[35] And where it is not, a municipal voter is entitled to allege constitutional infringement, including an infringement of s. 2(b) based on the denial of her right to cast a vote that can result in effective representation.

[51] A finding that Bill 5 has infringed the municipal voter's freedom of expression by abridging her right to cast a vote that can result in effective representation does not constitutionalize a third level of government. Nor does it constitutionalize a right to vote at the municipal level. The finding of Charter infringement flows from the application of the Supreme Court's caution in *Haig*[36] to the facts of this case – once provided, a right to vote in a municipal must comply with the Charter, and in particular s. 2(b).

[52] This very approach was taken by the Court of Appeal in the "mega-city" amalgamation case.[37] The amalgamation legislation was challenged on the ground that the resulting voter/councillor ratios were too high and denied meaningful access to one's elected representative. The applicants' challenge was based in part on s. 2(b) of the Charter. The Court of Appeal noted that it was "mindful"[38] of the caution in *Haig*[39] and proceeded to consider the s. 2(b) argument. The Court of Appeal found no breach of s. 2(b) because in that case there was no suggestion of "any curtailment of the right to vote"

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[33] *Ibid* at para 84.

[34] *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, s. 135(2) and *Municipal Elections Act, 1996*, S.O. 1996, c. 32, s. 17(2).

[35] *Haig, supra*, note 24, at para. 84.

[36] *Ibid.*

[37] *East York, supra*, note 5.

[38] *Ibid* at para. 2.

[39] *Haig, supra*, note 24, at para. 84.

and no "evidence" that the size of the electoral districts post-amalgamation infringed the concept of effective representation.[40]

[53] Here, however, the applicants before this court allege a clear curtailment of the right to vote and have filed extensive evidence about effective representation. I refer, of course, to the findings and conclusions of the Toronto Ward Boundary Review.

[54] The TWBR began in 2013 and concluded in 2017. Over the course of the almost four-year review, the TWBR conducted research, held public hearings, and consulted widely. The TWBR considered the "effective representation" requirement and the ward size that would best accomplish this objective. The option of reducing and redesigning the number of wards to mirror the 25 Federal Election Districts was squarely addressed and rejected by the TWBR. City Council's decision in 2017 to increase the number of wards from 44 to 47 was directly based on the findings and conclusions of the TWBR, which in turn were affirmed on appeal to the Ontario Municipal Board and the Divisional Court.[41]

[55] Put simply, the 25 FEDs option was considered by the TWBR and rejected because, at the current 61,000 average ward size,[42] city councillors were already having difficulty providing effective representation.

[56] Local government is the level of government that is closest to its residents. It is the level of government that most affects them on a daily basis. City councillors receive and respond to literally thousands of individual complaints on an annual basis across a wide range of topics - from public transit, high rise developments and policing to neighbourhood zoning issues, building permits and speed bumps.

[57] Recall what the Supreme Court said in *Saskatchewan Reference* about how effective representation includes "the right to bring one's grievances and concerns to the attention of one's government representative."[43] This right must obviously be a meaningful right.

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[40] *East York, supra,* note 5. at paras. 4 and 8.

[41] With the exception of a minor change in one ward boundary. Leave to appeal the decision of the OMB, (now known as the Local Planning Appeal Tribunal) in *Di Ciano v Toronto (City)*, 2017 CanLII 85757 (ON LPAT), was denied by the Divisional Court: *Natale v City of Toronto*, 2018 ONSC 1475.

[42] The average ward size in other Ontario cities is 32,600.

[43] *Saskatchewan Reference, supra*, note 23, at para. 49.

This is particularly relevant in the context of the councillor's role in a mega-city like Toronto.

[58] The evidence before this court supports the conclusion that if the 25 FEDs option was adopted, City councillors would not have the capacity to respond in a timely fashion to the "grievances and concerns" of their constituents. Professor Davidson, who filed an affidavit in this proceeding, and also participated in the TWBR as a consultant, provided the following expert evidence:

> It is the unique role of municipal councillors that distinguishes municipal wards from provincial and federal ridings. Boundaries that create electoral districts of 110,000 may be appropriate for higher orders of government, but because councillors have a more involved legislative role, interact more intimately with their constituents and are more involved in resolving local issues, municipal wards of such a large size would impede individual councillor's capacity to represent their constituents.
>
> It is my professional opinion that the unique role of councillors, as well as the public feedback received by the TWBR, and comparison with ward-size in other municipalities, demonstrates that a ward size of approximately 61,000 people provides councillors with capacity to provide their constituents with effective representation and that ward sizes of approximately 110,000 do not.

[59] On the basis of the evidence before me, I find that the Impugned Provisions (that impose a 25-ward structure with an average population size of 111,000) infringe the municipal voter's right under s. 2(b) of the Charter to cast a vote that can result in meaningful and effective representation. Once the Province has provided for a right to vote in a municipal election, that right must comply with the Charter.

[60] In sum, I have found two distinct breaches of s. 2(b) – the first, that the Impugned Provisions substantially interfered with the candidate's right to freedom of expression when it changed the City's electoral districts in the middle of the election campaign; the second, that the Impugned Provisions substantially interfered with the voter's right to freedom of expression when it doubled the ward population size from a 61,000 average to a 111,000 average, effectively denying the voter's right to cast a vote that can result in effective representation.

[61] I further find, for the reasons that follow, that neither of these breaches can be justified or "saved" under s. 1 of the Charter.

Breaches of s. 2(b) not saved under s. 1

[62] Section 1 of the Charter provides that the rights and freedoms guaranteed therein are subject to "such reasonable limits … as can be demonstrably justified in a free and democratic society."

[63] The analytic approach that a court must take under s. 1 has been repeated and refined in numerous Supreme Court decisions since it was first set out in *Oakes*.[44] Here is the prevailing articulation:

> [T]he 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.[45]

[64] The onus of justification under s. 1 is on the government. The standard of proof is the civil standard, namely proof on a balance of probabilities.[46] Normally, the defending government files extensive evidence attempting to provide a justification for the breach under s. 1 of the Charter. Here, either because of time constraints or because there was little in the way of supporting evidence, the Province only filed one news release and some excerpts from *Hansard* setting out what was said by the Premier and others when Bill 5 was debated in the legislature.

[65] The news release that was issued by the Premier's office on July 27, 2018 provided two rationales for Bill 5, improved efficiency and overall cost savings. The Premier observed that Toronto City Council "has become increasingly dysfunctional and inefficient through a combination of entrenched incumbency and established special interests" and that Bill 5 would create an effective municipal government that saves taxpayers money.

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[44] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[45] *Libman, supra*, note 10, at para. 38.

[46] *Ibid* at para. 39.

[66] On August 2, 2018 at the second reading of Bill 5, the Minister of Municipal Affairs and Housing set out three objectives for the legislation:

> First, they [councillors in support of a 25-ward model] agree that a smaller council will lead to better decision-making at Toronto city hall, which would benefit Torontonians as a whole. They gave an example of the current 44-member council having 10-hour debates on issues that would end with the vast majority of councillors voting the same as they would have at the beginning of the debate. …
>
> Second, they point out that it will save money …
>
> Third, it would result in a fair vote for residents, which was the very reason Toronto itself undertook a review of its ward boundaries. The Toronto councillors I referred to earlier reminded everyone that the Supreme Court of Canada said that voter parity is a prime condition of effective representation. They gave examples of the current ward system, where there are more than 80,000 residents in one ward and 35,000 in another. They acknowledge that this voter disparity is the result of self-interest, and that the federal and provincial electoral district process is better because it is an independent process which should apply to Toronto as well. … The wards we are proposing are arrived at through an independent process.

[67] It is important to note that, in the debate that followed, the Premier and the MPPs who spoke in support focused on two rationales for Bill 5: improved efficiency and cost savings, and did not refer to voter parity. The Premier added some anecdotal evidence from his days as a City councillor:

> I can tell you that I was there numerous times for a 10-hour debate on getting Mrs. Jones' cat out of the tree. We would sit there and debate about anything for 10 hours. After 10 hours and thousands of pieces of paper going around, nothing got done. Nothing got done. And guess what. At the end of 10 hours, we all agreed to go get Mrs. Jones's cat out of the tree. That's a waste of time … That is why it is time to reduce the size and cost of municipal government.

[68] During the debate on second reading, the MPPs who spoke in support of Bill 5 focused on two objectives – improved efficiency and saving taxpayers money. Other than the brief reference by the Minister (in the excerpt set out above) nothing more was said about voter parity. The Province has indicated to the court that it does not rely on the costs saving objective for the s. 1 analysis. This leaves two objectives: improved efficiency ("better decision-making", a "more streamlined" City Council) and voter parity (barely mentioned).

[69] The Supreme Court noted in *Health Services*[47] that it can be useful in the context of the s. 1 analysis to ask whether the government considered other options or engaged in consultation with the affected parties before enacting the challenged legislation:

> Legislators are not bound to consult with affected parties before passing legislation. On the other hand, it may be useful to consider, in the course of the s. 1 justification analysis, whether the government considered other options or engaged in consultation with the affected parties, in choosing to adopt its preferred approach. The Court has looked at pre-legislative considerations in the past in the context of minimal impairment. This is simply evidence going to whether other options, in a range of possible options, were explored.[48]

[70] Here, there is no evidence that any other options or approaches were considered or that any consultation ever took place. It appears that Bill 5 was hurriedly enacted to take effect in the middle of the City's election without much thought at all, more out of pique than principle.

[71] In any event, the constitutional problem here is two-fold: (i) there is no evidence (other than anecdotal evidence) that a 47-seat City Council is in fact "dysfunctional" or that more effective representation can be achieved by moving from a 47-ward to a 25-ward structure; and (ii) even if there was such evidence, there is no evidence of any urgency that required Bill 5 to take effect in the middle of the City's election.

[72] In my view, the Province's justification of the Impugned Provisions in Bill 5 fails at the first step of the s. 1 analysis. There is simply no evidence that the two objectives in question were so pressing and substantial that Bill 5 had to take effect in the middle of the City's election.

[73] The Supreme Court has stated time and again that "preserving the integrity of the election process is a pressing and substantial concern in a free and democratic society."[49] Passing a law that changes the City's electoral districts in the middle of its election and undermines the overall fairness of the election is antithetical to the core principles of our democracy.

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[47] *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27.

[48] *Ibid* at para. 157.

[49] *Figueroa, supra*, note 18, at para. 72.

[74] Even if the Province could establish that the two rationales that were provided to explain Bill 5 were so pressing and substantial as to justify its enactment in the middle of the City's election, the Province could not establish proportionality, and in particular minimal impairment. As the Supreme Court noted in *RJR-MacDonald,*[50] "[I]f the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."[51]

[75] Dealing with the first objective, improved efficiency in City Council debates, the Province has not shown why a significantly less intrusive and equally effective measure was not chosen, such for example, imposing time limits on debate, or more to the point, delaying the coming into force of the City Council restructuring law until *after* the City's election.

[76] Dealing with the second objective, voter parity, and giving the Minister the benefit of the doubt that he understood that the primary concern is not voter parity but effective representation, there is no evidence of minimal impairment. The Province's rationale for moving to a 25-ward structure had been carefully considered and rejected by the TWBR and by City Council just over a year ago. If there was a concern about the large size of some of the City's wards (by my count, six wards had populations ranging from 70,000 to 97,000) why not deal with these six wards specifically? Why impose a solution (increasing all ward sizes to 111,000) that is far worse, in terms of achieving effective representation, than the original problem? And, again, why do so in the middle of the City's election?

[77] Crickets.

[78] I am therefore obliged to find on the evidence before me that the breaches of s. 2(b) of the Charter as found above cannot be demonstrably justified in a free and democratic society and cannot be saved as reasonable limits under s. 1.

Is it too late to return to the 47-ward structure?

[79] The Province's final submission is that it's too late to return to the 47-ward structure. The Province points to the City Clerk's candid admission at the August 20, 2018 council meeting that she is not "confident" that the City could now return to the 47-ward structure.

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[50] *RJR-MacDonald Inc. v Canada (Attorney General),* [1995] 3 S.C.R. 199.

[51] *Ibid* at para. 160.

[80] The City Clerk may not feel confident about a 47-ward election but she is not saying that the hurdles are insurmountable. In any event, the City itself is asking explicitly for a return to the 47-ward structure and it is entitled to do so. I must assume that the City has considered the attendant logistical challenges and has concluded that an October 22 election based on the 47-ward structure can indeed be achieved in the short time that remains.

Conclusions

[81] I find that the Province's enactment of Bill 5 in the middle of the City's election substantially interfered with the municipal candidate's freedom of expression that is guaranteed under s. 2(b) of the Charter of Rights.

[82] I find that the reduction from 47 to 25 in the number of City wards and the corresponding increase in ward-size population from an average of about 61,000 to 111, 000 substantially interfered with the municipal voter's freedom of expression under s. 2(b) of the Charter of Rights, and in particular her right to cast a vote that can result in effective representation.

[83] I further find on the evidence filed by the parties that these breaches of s. 2(b) cannot be demonstrably justified in a free and democratic society and cannot be saved as reasonable limits under s. 1 of the Charter of Rights.

Disposition

[84] The applications filed by the City of Toronto, Rocco Achampong, Chris Moise, Ish Aderonmu and Prabha Khosla (on her own behalf and on behalf of Women Win TO) asking this Court to set aside the Impugned Provisions in Bill 5 that purport to reduce the number of wards from 47 to 25 are granted.

[85] The Impugned Provisions have no force and effect and are set aside immediately.

[86] It follows from this decision that the City's election on October 22, 2018 shall proceed as scheduled but on the basis of 47 wards and not 25 wards. If the provincial government wishes to enact another Bill 5-type law at some future date to affect future City elections, it may certainly attempt to do so. As things now stand - and until a constitutionally valid provincial law says otherwise - the City has 47 wards.

[87] I shall remain seized of this matter to fashion the appropriate draft Order, including any related remedies being sought by the Toronto District School Board with regard to TDSB school board elections and recently enacted provincial regulations.

[88] If the parties cannot agree on costs, they may forward brief submissions to my attention. The applicants shall file their costs submissions within 21 days and the Province within 21 days thereafter.

[89] I am very much obliged to all counsel for their co-operation and assistance.

Justice Edward P. Belobaba

Date: September 10, 2018

Tab 2

RJR — MacDonald Inc. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

and between

Imperial Tobacco Ltd. *Applicant*

v.

The Attorney General of Canada *Respondent*

and

The Attorney General of Quebec *Mis-en-cause*

and

The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada *Interveners on the application for interlocutory relief*

RJR — MacDonald Inc. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

et entre

Imperial Tobacco Ltd. *Requérante*

c.

Le procureur général du Canada *Intimé*

et

Le procureur général du Québec *Mis en cause*

et

La Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé, et Médecins pour un Canada sans fumée *Intervenants dans la demande de redressement interlocutoire*

INDEXED AS: RJR — MACDONALD INC. v. CANADA (ATTORNEY GENERAL)

File Nos.: 23460, 23490.

1993: October 4; 1994: March 3.

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

APPLICATIONS FOR INTERLOCUTORY RELIEF

Practice — Interlocutory motions to stay implementation of regulations pending final decision on appeals and to delay implementation if appeals dismissed — Leave to appeal granted shortly after applications to stay heard — Whether the applications for relief from compliance with regulations should be granted — Tobacco Products Control Act, S.C. 1988, c. 20, ss. 3, 4 to 8, 9, 11 to 16, 17(f), 18 — Tobacco Products Control Regulations, amendment, SOR/93-389 — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 24(1) — Rules of the Supreme Court of Canada, SOR/83-74, s. 27 — Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1.

The *Tobacco Products Control Act* regulates the advertisement of tobacco products and the health warnings which must be placed upon those products. Both applicants successfully challenged the Act's constitutional validity in the Quebec Superior Court on the grounds that it was *ultra vires* Parliament and that it violates the right to freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. The Court of Appeal ordered the suspension of enforcement until judgment was rendered on the Act's validity but declined to order a stay of the coming into effect of the Act until 60 days following a judgment validating the Act. The majority ultimately found the legislation constitutional.

The *Tobacco Products Control Regulations, amendment*, would cause the applicants to incur major expense in altering their packaging and these expenses would be irrecoverable should the legislation be found unconstitutional. Before a decision on applicants' leave applications to this Court in the main actions had been made, the applicants brought these motions for stay pursuant to s. 65.1 of the *Supreme Court Act*, or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*. In effect, the applicants sought to be released from any obligation to comply with the new packaging requirements until the disposi-

RÉPERTORIÉ: RJR — MACDONALD INC. c. CANADA (PROCUREUR GÉNÉRAL)

Nos du greffe: 23460, 23490.

1993: 4 octobre; 1994: 3 mars.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci et Major.

DEMANDES DE REDRESSEMENT INTERLOCUTOIRE

Pratique — Demandes interlocutoires visant à surseoir à l'application d'un règlement en attendant la décision finale sur des appels et à en retarder la mise en œuvre si les appels sont rejetés — Autorisations d'appel accordées peu après l'audition des demandes de sursis — Les demandes de dispense de l'application du règlement devraient-elles être accordées? — Loi réglementant les produits du tabac, L.C. 1988, ch. 20, art. 3, 4 à 8, 9, 11 à 16, 17f), 18 — Règlement sur les produits du tabac—Modification, DORS/93-389 — Charte canadienne des droits et libertés, art. 1, 2b), 24(1) — Règles de la Cour suprême du Canada, DORS/83-74, art. 27 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1.

La *Loi réglementant les produits du tabac* vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur ces produits. Les deux requérantes ont eu gain de cause devant la Cour supérieure du Québec lorsqu'elles ont contesté la constitutionnalité de la Loi au motif qu'elle était *ultra vires* du Parlement et contrevenait à l'al. 2*b*) de la *Charte canadienne des droits et libertés*. La Cour d'appel a ordonné la suspension du contrôle d'application jusqu'à ce que jugement soit rendu sur la validité de la Loi, mais elle a refusé de suspendre l'application de la Loi pendant une période de 60 jours suivant un jugement déclarant la Loi valide. La Cour d'appel à la majorité a ultérieurement déclaré la loi constitutionnelle.

Le *Règlement sur les produits du tabac — Modification* obligerait les requérantes à engager des dépenses considérables pour modifier leurs emballages, et ces dépenses ne seraient pas recouvrables si la législation était déclarée inconstitutionnelle. Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême* ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*. En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer

tion of the main actions. They also requested that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act*.

This Court heard applicants' motions on October 4 and granted leave to appeal the main action on October 14. At issue here was whether the applications for relief from compliance with the *Tobacco Products Control Regulations, amendment* should be granted. A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants.

Held: The applications should be dismissed.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court of Canada Act* and r. 27 of the *Rules of the Supreme Court of Canada.*

The words "other relief" in r. 27 of the *Supreme Court Rules* are broad enough to permit the Court to defer enforcement of regulations that were not in existence when the appeal judgment was rendered. It can apply even though leave to appeal may not yet be granted. In interpreting the language of the rule, regard should be had to its purpose: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal.

Section 65.1 of the *Supreme Court Act* was adopted not to limit the Court's powers under r. 27 but to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. It should be interpreted as conferring the same broad powers as are included in r. 27. The Court, pursuant to both s. 65.1 and r. 27, can not only grant a stay of execution and of proceedings in the traditional sense but also make any order that preserves matters between the parties in a state that will, as far as possible, prevent prejudice pending resolution by the Court of the controversy, so as to enable the Court to

aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles ont aussi demandé que le sursis soit accordé pour une période de 12 mois à compter d'un refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac.*

Notre Cour a entendu les demandes des requérantes le 4 octobre et a accordé, le 14 octobre, les autorisations d'appel relativement aux actions principales. La question est de savoir si les demandes visant à obtenir une dispense de l'application du *Règlement sur les produits du tabac — Modification* devraient être accordées. Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes.

Arrêt: Les demandes sont rejetées.

Les pouvoirs de la Cour suprême du Canada d'accorder un redressement dans des procédures de ce genre sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême du Canada* et à l'art. 27 des *Règles de la Cour suprême du Canada.*

L'expression «autre redressement» à l'art. 27 des *Règles de la Cour suprême du Canada* est suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait pas au moment où la cour d'appel a rendu son jugement. La règle peut s'appliquer même si l'autorisation d'appel n'a pas encore été accordée. Dans l'interprétation du libellé de la règle, il faut en examiner l'objet: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet de l'appel.

L'adoption de l'art. 65.1 de la *Loi sur la Cour suprême* ne visait pas à restreindre les pouvoirs de notre Cour en vertu de l'art. 27, mais à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. Il faut l'interpréter comme conférant les mêmes pouvoirs généraux que ceux de l'art. 27. La Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure

render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. The Court therefore must have jurisdiction to enjoin conduct on the part of a party acting in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court.

Jurisdiction to grant the relief requested by the applicants exists even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* which established that the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established. If jurisdiction under s. 65.1 of the Act and r. 27 were wanting, jurisdiction would be found in s. 24(1) of the *Canadian Charter of Rights and Freedoms*. A *Charter* remedy should not be defeated because of a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation into the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the

du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Notre Cour doit donc posséder la compétence d'interdire à une partie d'accomplir tout acte fondé sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour.

Notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une «exemption» de son application. Une conclusion différente sur ce point irait à l'encontre de l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, selon lequel la distinction entre les cas de «suspension» et d'«exemption» ne se fait qu'après que la compétence a été par ailleurs établie. Si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, le fondement de cette compétence pourrait être le par. 24(1) de la *Charte canadienne des droits et des libertés*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

Le critère en trois étapes de l'arrêt *American Cyanamid* (adopté au Canada dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*) devrait s'appliquer aux demandes d'injonction interlocutoire et de suspension d'instance, tant en droit privé que dans des cas relevant de la *Charte*.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer s'il est satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue une considération pertinente et importante, de même que tout jugement rendu sur le fond, mais ni l'un ni l'autre n'est concluant sur ce point. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la demande est futile ou

statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

At the second stage the applicant is required to demonstrate that irreparable harm will result if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

The third branch of the test, requiring an assessment of the balance of inconvenience to the parties, will normally determine the result in applications involving *Charter* rights. A consideration of the public interest must be taken into account in assessing the inconvenience which it is alleged will be suffered by both parties. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation has in fact this effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

As a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

Here, the application of these principles to the facts required that the applications for stay be dismissed.

The observation of the Quebec Court of Appeal that the case raised serious constitutional issues and this Court's decision to grant leave to appeal clearly indicated that these cases raise serious questions of law.

vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête doit en général procéder à l'examen des deuxième et troisième étapes du critère de l'arrêt *Metropolitan Stores*.

À la deuxième étape, le requérant doit établir qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

La troisième étape du critère, l'appréciation de la prépondérance des inconvénients, permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. Il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

En règle générale, les mêmes principes s'appliquent lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

En l'espèce, l'application de ces principes aux faits aboutit au rejet des demandes de sursis.

L'observation de la Cour d'appel du Québec que l'affaire soulève des questions constitutionnelles sérieuses, ainsi que les autorisations d'appel accordées par notre Cour, indiquent clairement que l'affaire soulève des questions de droit sérieuses.

Although compliance with the regulations would require a significant expenditure and, in the event of their being found unconstitutional, reversion to the original packaging would require another significant outlay, monetary loss of this nature will not usually amount to irreparable harm in private law cases. However, where the government is the unsuccessful party in a constitutional claim, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies. Although the required expenditure would impose economic hardship on the companies, the economic loss or inconvenience can be avoided by passing it on to purchasers of tobacco products. Further, the applications, since they were brought by two of the three companies controlling the Canadian tobacco industry, were in actual fact for a suspension of the legislation, rather than for an exemption from its operation. The public interest normally carries greater weight in favour of compliance with existing legislation. The weight given is in part a function of the nature of the legislation and in part a function of the purposes of the legislation under attack. The government passed these regulations with the intention of protecting public health and furthering the public good. When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. The applicants, rather, must offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation. The only possible public interest in the continued application of the current packaging requirements, however, was that the price of cigarettes for smokers would not increase. Any such increase would not be excessive and cannot carry much weight when balanced against the undeniable importance of the public interest in health

Bien que l'application du règlement obligerait les requérantes à faire des dépenses importantes et, si ce règlement était déclaré inconstitutionnel, à engager d'autres dépenses considérables pour revenir à leurs méthodes actuelles d'emballage, une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses nécessitées par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les demandes sont rejetées, mais les actions principales accueillies en appel.

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen de la nature du redressement demandé et du préjudice invoqué par les parties, de la nature de la loi contestée et de l'intérêt public. Les dépenses nécessaires imposeraient un fardeau économique aux sociétés, mais la perte ou les inconvénients économiques peuvent être reportés sur les acheteurs des produits du tabac. Par ailleurs, puisqu'elles sont présentées par deux des trois sociétés qui contrôlent l'industrie canadienne du tabac, les demandes constituent en réalité un cas de suspension plutôt qu'un cas d'exemption de l'application de la législation. L'intérêt public pèse habituellement plus en faveur du respect de la législation existante. Le poids accordé aux préoccupations d'intérêt public dépend en partie de la nature de la loi et en partie de l'objet de la loi contestée. Le gouvernement a adopté le règlement dans l'intention de protéger la santé publique et donc de promouvoir le bien public. Si le gouvernement déclare qu'il adopte une loi pour protéger et favoriser la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public. Pour ce qui est du maintien de l'application des exigences actuelles en matière d'emballage, seule la non-majoration du prix des cigarettes pour les fumeurs pourrait être dans l'intérêt du public. Une telle majoration ne serait vraisemblablement pas excessive et ne peut avoir beaucoup de poids face à l'importance incontestable de l'intérêt public dans la protection de la santé

and in the prevention of the widespread and serious medical problems directly attributable to smoking.

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et la prévention de problèmes médicaux répandus et graves directement attribuables à la cigarette.

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APPLICATIONS for interlocutory relief ancillary to constitutional challenge of enabling legislation following judgment of the Quebec Court of Appeal, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, allowing an appeal from a judgment of Chabot J., [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, granting the application. Applications dismissed.

Colin K. Irving, for the applicant RJR — MacDonald Inc.

Simon V. Potter, for the applicant Imperial Tobacco Inc.

Claude Joyal and *Yves Lebœuf*, for the respondent.

W. Ian C. Binnie, Q.C., and *Colin Baxter*, for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by

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Cassels, Jamie. «An Inconvenient Balance: The Injunction as a Charter Remedy». In Jeffrey Berryman, ed. *Remedies: Issues and Perspectives*. Scarborough, Ont.: Carswell, 1991, 271.
Sharpe, Robert J. *Injunctions and Specific Performance*, 2nd ed. Aurora, Ont.: Canada Law Book, 1992 (feuilles mobiles).

DEMANDES de redressement interlocutoire faisant partie d'une contestation de la constitutionnalité d'une loi habilitante à la suite d'un arrêt de la Cour d'appel du Québec, [1993] R.J.Q. 375, 53 Q.A.C. 79, 102 D.L.R. (4th) 289, 48 C.P.R. (3d) 417, qui a accueilli un appel de la décision du juge Chabot, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, 37 C.P.R. (3d) 193, qui avait fait droit à la demande. Demandes rejetées.

Colin K. Irving, pour la requérante RJR — MacDonald Inc.

Simon V. Potter, pour la requérante Imperial Tobacco Inc.

Claude Joyal et *Yves Lebœuf*, pour l'intimé.

W. Ian C. Binnie, c.r., et *Colin Baxter*, pour la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée.

Version française du jugement de la Cour sur des demandes de redressement interlocutoire rendu par

SOPINKA AND CORY JJ. —

I. Factual Background

These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment*, SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

The *Tobacco Products Control Act*, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

The first part of the *Tobacco Products Control Act*, particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the

LES JUGES SOPINKA ET CORY —

I. Le contexte factuel

Les présentes demandes interlocutoires visant à obtenir une dispense de l'application de certaines dispositions du *Règlement sur les produits du tabac — Modification*, DORS/93-389 font partie d'une contestation plus large de la loi réglementante que notre Cour entendra sous peu.

La *Loi réglementant les produits du tabac*, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, est entrée en vigueur le 1er janvier 1989. Cette loi vise à réglementer la publicité des produits du tabac et les mises en garde qui doivent être apposées sur les produits du tabac.

La première partie de la *Loi réglementant les produits du tabac*, plus particulièrement ses art. 4 à 8, interdisent la publicité en faveur des produits du tabac et toute autre activité destinée à en encourager la vente. L'article 9 réglemente l'étiquetage des produits du tabac et prévoit que tout emballage d'un produit du tabac doit comporter des messages relatifs à la santé, conformément au règlement d'application de la Loi.

Les articles 11 à 16 de la Loi portent sur le contrôle d'application et prévoient la désignation d'inspecteurs des produits du tabac auxquels sont conférés des pouvoirs de perquisition et de saisie. L'article 17 autorise le gouverneur en conseil à prendre des règlements en vertu de la Loi. L'alinéa 17*f*) autorise le gouverneur en conseil à adopter des règlements fixant «la teneur, la présentation, l'emplacement, les dimensions et la mise en évidence» des messages obligatoires relatifs à la santé. L'alinéa 18(1)*b*) de la Loi indique que des contraventions peuvent donner lieu à des poursuites pour acte criminel, et que leur auteur encourt sur déclaration de culpabilité une amende maximale de 100 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Chacune des requérantes a contesté la constitutionnalité de la *Loi réglementant les produits du tabac* au motif qu'elle est *ultra vires* du Parlement du Canada et non valide en ce qu'elle contrevient à

Canadian Charter of Rights and Freedoms. The two cases were heard together and decided on common evidence.

On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter*. The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act*. However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter*. Brossard J.A. agreed

l'al. 2*b*) de la *Charte canadienne des droits et libertés*. Les deux affaires ont été entendues ensemble et tranchées sur preuve commune.

Le 26 juillet 1991, le juge Chabot de la Cour supérieure du Québec a fait droit aux requêtes des requérantes, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449, et conclu que la Loi était *ultra vires* du Parlement du Canada et qu'elle contrevenait à la *Charte*. L'intimé a interjeté appel devant la Cour d'appel du Québec. Avant que la Cour d'appel ne rende son jugement, les requérantes ont demandé à cette cour un redressement interlocutoire de la nature d'une ordonnance déclarant qu'elles n'auraient pas à se conformer à certaines dispositions de la Loi pendant une période de 60 jours suivant le jugement de la Cour d'appel.

Jusqu'à ce moment, les requérantes avaient respecté toutes les dispositions de la *Loi réglementant les produits du tabac*. Cependant, en vertu de la Loi, l'interdiction absolue de publicité à tous les points de vente ne devait entrer en vigueur que le 31 décembre 1992. Les requérantes estimaient qu'elles auraient besoin de 60 jours environ pour démonter tous les supports publicitaires dans les magasins. Fortes du jugement de la Cour supérieure qui avait déclaré la Loi inconstitutionnelle, les requérantes soutenaient qu'elles ne devraient pas être tenues de démonter leurs étalages tant que la Cour d'appel n'aurait pas déclaré la loi valide. En réponse à la requête, la Cour d'appel a statué que les peines pour contravention à l'interdiction de publicité aux points de vente ne pouvaient être appliquées contre les requérantes avant qu'elle se soit prononcée sur le fond. Toutefois, la cour a refusé de suspendre l'application des dispositions pendant une période de 60 jours suivant un jugement déclarant la Loi valide.

Le 15 janvier 1993, la Cour d'appel du Québec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289, a accueilli l'appel de l'intimé; le juge Brossard était dissident en partie. La cour a statué, à l'unanimité, que la Loi n'était pas *ultra vires* du gouvernement du Canada. La Cour d'appel a reconnu que la Loi contrevenait à l'al. 2*b*) de la *Charte*, mais a statué que cette contravention se justifiait en vertu de l'article premier de la *Charte*, le juge Brossard

with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter*. The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment,* SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada*, SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a

étant dissident sur ce dernier point. Le juge Brossard a souscrit à l'opinion de la majorité relativement à la nécessité de mises en garde non attribuées sur les emballages (c'est-à-dire que les mises en garde ne devaient pas être attribuées au gouvernement fédéral), mais a conclu que l'interdiction de publicité ne pouvait se justifier en vertu de l'article premier de la *Charte*. Les requérantes ont déposé des demandes d'autorisation d'appel relativement à la décision de la Cour d'appel du Québec.

Le 11 août 1993, le gouverneur en conseil a publié des modifications du règlement datées du 21 juillet 1993 et prises en application de la Loi: *Règlement sur les produits du tabac—Modification*, DORS/93-389. Ces modifications imposent l'obligation d'apposer des mises en garde plus visibles et plus grandes sur tous les emballages des produits du tabac et de ne plus les attribuer à Santé et Bien-être Canada. Une période d'un an est allouée pour modifier les emballages.

Selon les affidavits déposés à l'appui de la requête, le respect du nouveau règlement exigerait de l'industrie du tabac de reconcevoir totalement les emballages et d'acheter des milliers de cylindres de rotogravure et de matrices de gaufrage. L'industrie aurait besoin de près d'un an pour procéder à ces changements, moyennant un coût d'environ 30 000 000 $.

Avant la décision relative aux autorisations de pourvoi dans les actions principales, les requérantes ont demandé un sursis d'exécution en vertu de l'art. 65.1 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26 (aj. L.C. 1990, ch. 8, art. 40) ou, dans l'éventualité où les autorisations d'appel seraient accordées, en vertu de l'art. 27 des *Règles de la Cour suprême du Canada*, DORS/83-74. Les requérantes demandent un sursis à l'exécution du [TRADUCTION] «jugement de la Cour d'appel du Québec rendu le 15 janvier 1993», mais «seulement dans la mesure où ce jugement valide les art. 3, 4, 5, 6, 7 et 10 du [nouveau règlement]». En réalité, les requérantes demandent d'être libérées de toute obligation de se conformer aux nouvelles exigences en matière d'emballage jusqu'aux décisions sur les actions principales. Elles demandent

decision of this Court confirming the validity of *Tobacco Products Control Act*.

The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

également que le sursis soit accordé pour une période de 12 mois à compter du refus des autorisations d'appel ou d'un arrêt de notre Cour confirmant la validité de la *Loi réglementant les produits du tabac*.

Les requérantes soutiennent qu'elles doivent obtenir le sursis demandé pour ne pas avoir à engager des dépenses considérables et non recouvrables par suite de l'application du nouveau règlement, et ce, même si notre Cour pouvait en fin de compte déclarer inconstitutionnelle la loi habilitante.

Notre Cour a entendu les demandes des requérantes le 4 octobre. Le 14 octobre, elle accordait les autorisations d'appel relativement aux actions principales.

II. Les textes législatifs pertinents

Loi réglementant les produits du tabac, L.R.C. (1985), ch. 14 (4e suppl.), L.C. 1988, ch. 20, art. 3:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 65.1 (aj. L.C. 1990, ch. 8, art. 40):

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

Chabot J. found that, with respect to s. 2(*b*) of the *Charter*, the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver-

Règles de la Cour suprême du Canada, DORS/83-74, art. 27:

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

III. Les tribunaux d'instance inférieure

Pour situer les demandes de sursis d'exécution dans leur contexte, il faut examiner brièvement les décisions des tribunaux d'instance inférieure.

La Cour supérieure, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

Le juge Chabot a conclu que la caractéristique dominante de la *Loi réglementant les produits du tabac* était le contrôle de la publicité du tabac et que la protection de la santé publique n'était qu'un objectif indirect de la Loi. Le juge Chabot a qualifié la *Loi réglementant les produits du tabac* comme étant une loi visant à réglementer la publicité d'un produit particulier, ce qui est une question relevant de la compétence législative provinciale.

En ce qui concerne l'al. 2*b*) de la *Charte*, le juge Chabot a conclu que l'activité interdite par la Loi est une activité protégée et que les avis exigés par le règlement vont à l'encontre de l'al. 2*b*) de la *Charte*. Il a conclu aussi que la preuve établissait, d'une part, que l'objectif de réduction de la consommation des produits du tabac était suffisamment important pour justifier l'adoption d'une loi restreignant la liberté d'expression et, d'autre part, que les objectifs législatifs identifiés par le Parlement aux fins de la réduction de l'utilisation du tabac, répondaient à un problème urgent et réel dans une société libre et démocratique.

Cependant, selon le juge Chabot, la Loi ne constituait pas une atteinte minimale à la liberté d'expression, en ce qu'elle ne visait pas seulement à protéger les jeunes contre les incitations à la consommation du tabac, ou ne se limitait pas à la publicité dite de style de vie. Le juge Chabot a

tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a valid act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of valid legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under Sec. 5 after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it

conclu que la preuve présentée par l'intimé selon laquelle l'interdiction totale de la publicité diminuait la consommation n'était pas fiable et n'avait aucune valeur probante parce qu'elle n'établissait pas que l'interdiction de la publicité entraînerait une diminution du tabagisme. En conséquence, l'intimé n'avait pas démontré que l'interdiction de la publicité portait le moins possible atteinte à la liberté d'expression. Le juge Chabot a conclu aussi que la preuve d'un lien rationnel entre la prohibition de la publicité au Canada et l'objectif de réduction du tabagisme était insuffisante, voire inexistante. Il a conclu que la Loi constituait en fait une forme de censure et d'ingérence sociale incompatible avec l'essence même d'une société libre et démocratique, qui ne pouvait être justifiée.

La Cour d'appel (relativement au sursis d'exécution du jugement)

En décidant si elle devait exercer son vaste pouvoir en vertu de l'art. 523 du *Code de procédure civile du Québec* de «rendre toutes ordonnances propres à sauvegarder les droits des parties», la Cour d'appel a fait l'observation suivante relativement à la nature du redressement demandé:

> [TRADUCTION] Toutefois, ce qui est en cause en l'espèce (si la Loi est déclarée valide du point de vue constitutionnel) est, d'une part, la suspension de l'effet juridique d'une partie de la Loi et de l'obligation de s'y conformer pendant une période de 60 jours et, d'autre part, la suspension du pouvoir des autorités publiques responsables d'en assurer l'application. C'est une question sérieuse que de suspendre ou de retarder l'effet ou l'exécution d'une loi valide adoptée par la législature, notamment une loi portant sur la protection de la santé ou de la sécurité du public. Les tribunaux ne devraient pas limiter ou retarder à la légère l'application ou l'exécution d'une loi valide si la législature a procédé à sa mise en vigueur. Le faire aurait pour effet d'empiéter dans les sphères législative et exécutive. [Souligné dans l'original.]

La cour a fait droit en partie au redressement demandé:

> [TRADUCTION] Puisque les lettres du ministère de la Santé et du Bien-être et la contestation des appelantes laissent entendre qu'il existe une possibilité que les requérantes soient poursuivies en vertu de l'art. 5 de la Loi après le 31 décembre 1992, peu importe que le juge-

seems reasonable to order the suspension of enforcement under Sec. 5 of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.

We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.

. . .

Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter*. LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the

ment sur le fond ait alors été rendu ou non, il est approprié d'ordonner la suspension de l'application de l'art. 5 jusqu'à ce que le jugement sur le fond soit rendu. Il existe après tout une question sérieuse à juger relativement à la validité de la Loi, et il serait injustement onéreux d'exiger des requérantes qu'elles engagent des dépenses considérables pour démonter les supports publicitaires aux points de vente jusqu'à ce que nous ayons tranché la question.

Cependant, il n'est aucunement justifié, à notre avis, d'ordonner une suspension de l'entrée en vigueur de la Loi pendant une période de 60 jours suivant notre jugement dans ces appels.

. . .

En fait, compte tenu de l'intérêt public de cette Loi, qui vise à protéger la santé publique, dans l'éventualité où la Loi serait déclarée valide, il y a d'excellentes raisons de ne pas suspendre son effet et sa mise en application (*Manitoba (Procureur Général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110, aux pp. 127 et 135). [Souligné dans l'original.]

La Cour d'appel (relativement à la validité de la loi), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. Le juge LeBel (au nom de la majorité)

Le juge LeBel a qualifié la *Loi réglementant les produits du tabac* de loi relative à la santé publique. Il a affirmé que la loi était valide en tant que loi adoptée pour la paix, l'ordre et le bon gouvernement.

Le juge LeBel a appliqué le critère formulé dans l'arrêt *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, et il a conclu que la Loi satisfaisait au critère de la «théorie de l'intérêt national» et qu'elle pouvait reposer sur un lien purement théorique non prouvé entre la publicité du tabac et sa consommation globale.

Souscrivant à l'opinion du juge Brossard, le juge LeBel a affirmé que la Loi contrevenait à la liberté d'expression garantie par l'al. 2*b*) de la *Charte*, mais il a conclu que cette contravention pouvait se justifier en vertu de l'article premier. Le juge LeBel a conclu que le juge Chabot avait commis une erreur dans ses conclusions de fait en omettant de reconnaître que les volets du lien

Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [TRANSLATION] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued

rationnel et de l'atteinte minimale, du critère formulé dans l'arrêt *Oakes*, avaient été assouplis dans des arrêts ultérieurs de la Cour suprême du Canada. Il a conclu que le critère exigé par l'article premier était satisfait puisqu'il se peut que l'interdiction de la publicité sur le tabac entraîne une réduction de la consommation du tabac, d'après l'existence même d'un «corps d'opinions» favorables à l'adoption d'une telle interdiction. Par ailleurs, il a conclu que la Loi paraît conforme au critère de l'atteinte minimale en ce qu'elle n'interdît pas la consommation, n'interdît pas la publicité étrangère et n'écarte pas la possibilité d'obtenir de l'information sur les produits du tabac.

2. Le juge Brossard (dissident en partie)

Le juge Brossard a souscrit à l'opinion du juge LeBel que la *Loi réglementant les produits du tabac* devrait être qualifiée de loi visant le domaine de la santé publique et qu'elle satisfait au volet de «la dimension nationale» du pouvoir de légiférer pour la paix, l'ordre et le bon gouvernement.

Cependant, le juge Brossard n'était pas d'avis que la violation de l'al. 2*b*) de la *Charte* pouvait se justifier. Il a examiné la preuve et affirmé qu'elle n'établissait pas l'existence d'un lien, ou même l'existence d'une probabilité de lien, entre l'interdiction de publicité et la consommation des produits du tabac. À son avis, il faut établir, selon une prépondérance des probabilités, qu'il est tout au moins possible que les buts visés soient atteints. Il n'a pas souscrit à l'opinion que la Loi satisfaisait au critère de l'atteinte minimale puisque, selon lui, les objectifs de la Loi pourraient être atteints par une restriction de la publicité sans qu'il soit nécessaire d'imposer une prohibition totale.

IV. Compétence

Une question préliminaire a été soulevée relativement à la compétence de notre Cour d'accorder le redressement demandé par les requérantes. Le procureur général du Canada et les intervenants dans les demandes de sursis, (plusieurs organisations de santé dont la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et

that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter*. Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada*.

Médecins pour un Canada sans fumée) ont soutenu que notre Cour n'avait pas compétence pour ordonner un sursis d'exécution ou une suspension d'instance qui libérerait les requérantes de l'obligation de se conformer au nouveau règlement. Plusieurs moyens ont été invoqués à l'appui de cette position.

Premièrement, le procureur général soutient que les dispositions concernant les messages relatifs à la santé prévus dans l'ancien ou le nouveau règlement n'ont pas été contestées devant les tribunaux d'instance inférieure et, partant, que les requérantes se trouvent en fait à demander à notre Cour d'exercer une compétence de première instance sur la question. Deuxièmement, ils soutiennent que le jugement de la Cour d'appel du Québec ne peut être exécuté puisqu'il ne fait que déclarer que la Loi est *intra vires* de l'art. 91 de la *Loi constitutionnelle de 1867*, et qu'elle est justifiable en vertu de l'article premier de la *Charte*. Parce que la décision de l'instance inférieure équivaut à un jugement déclaratoire, il n'existe en conséquence aucune «procédure» qui pourrait faire l'objet d'un sursis. Enfin, selon le procureur général, les demandes des requérantes reviennent à demander une suspension par anticipation du délai de 12 mois avant la mise en application du règlement, pour leur permettre de continuer de vendre des produits du tabac dans les emballages comportant les mises en garde exigées par le règlement actuel. Il soutient que notre Cour n'a pas compétence pour suspendre l'application du nouveau règlement.

Les intervenants ont appuyé et étayé ces arguments. Ils ont aussi soutenu que l'art. 27 ne pouvait s'appliquer parce que l'autorisation d'appel n'avait pas été accordée. Quoi qu'il en soit, ils ont soutenu que l'expression «ou un autre redressement» n'est pas suffisamment générale pour permettre à notre Cour de retarder l'application d'un règlement qui n'existait même pas au moment du jugement rendu par la Cour d'appel.

Les pouvoirs de la Cour suprême du Canada en cette matière sont prévus à l'art. 65.1 de la *Loi sur la Cour suprême*, et à l'art. 27 des *Règles de la Cour suprême du Canada*.

Supreme Court Act

65.1 The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada*, 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

97. . . .

(*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are

Loi sur la Cour suprême

65.1 La Cour ou un juge peut, à la demande d'une partie qui a déposé l'avis de la demande d'autorisation d'appel, ordonner, aux conditions que l'une ou l'autre estime indiquées, le sursis d'exécution du jugement objet de la demande.

Règles de la Cour suprême du Canada

27. La partie contre laquelle la Cour ou un autre tribunal a rendu un jugement ou une ordonnance peut demander à la Cour un sursis à l'exécution de ce jugement ou de cette ordonnance ou un autre redressement, et la Cour peut accéder à cette demande aux conditions qu'elle juge appropriées.

Le libellé de l'art. 27 et de celui qui le précédait n'a pratiquement pas été modifié depuis au moins 1888 (voir les *Règles de la Cour suprême du Canada*, 1888, Ordonnance générale nº 85(17)). Son libellé général correspond au libellé de l'art. 97 de la Loi duquel notre Cour tire son pouvoir de réglementation. L'alinéa (1)*a*) de cette disposition prévoit que des règles peuvent être adoptées pour:

97. . . .

a) réglementer la procédure à la Cour et les modalités de recours devant elle contre les décisions de juridictions inférieures ou autres et prendre les mesures nécessaires à l'application de la présente loi;

Bien qu'il s'agisse maintenant d'une question théorique, les autorisations de pourvoi ayant été accordées, nous ne sommes pas disposés à admettre que cette règle inclut les restrictions proposées par les intervenants. À notre avis, ni le libellé de la règle ni celui de l'art. 97 ne renferment de telles restrictions. À notre avis, dans l'interprétation du libellé de la règle, il faut en examiner l'objet, lequel est clairement exprimé dans la disposition habilitante: faciliter les «recours» devant la Cour et «prendre les mesures nécessaires à l'application de la présente loi». Pour réaliser son objet, la règle ne peut être limitée aux cas où l'autorisation d'appel a déjà été accordée ni recevoir une interprétation restrictive de façon à s'appliquer seulement à une ordonnance qui suspend ou arrête l'exécution des procédures de la Cour par une tierce partie ou encore qui bloque l'exécution du jugement objet

contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135. The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new

de l'appel. Des exemples des premiers cas, traditionnellement qualifiés de sursis d'exécution, sont prévus à l'art. 65 de la Loi que l'on a interprété comme visant à empêcher l'intervention d'une tierce partie comme un shérif, mais non l'exécution d'une ordonnance visant une partie. Voir l'arrêt *Keable c. Procureur général (Can.)*, [1978] 2 R.C.S. 135. L'arrêt ou le blocage de toutes les procédures est généralement appelé une suspension d'instance. Voir l'arrêt *Battle Creek Toasted Corn Flake Co. c. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.). Un tel redressement peut être accordé conformément aux pouvoirs que l'art. 27 ou l'art. 65.1 de la Loi confèrent à notre Cour.

Par ailleurs, nous ne pouvons souscrire à l'opinion que l'adoption de l'art. 65.1 en 1992 (L.C. 1990, ch. 8, art. 40) visait à restreindre les pouvoirs de notre Cour en vertu de l'art. 27. La modification visait à permettre à un seul juge d'exercer la compétence d'accorder un sursis dans les cas où, avant la modification, c'était la Cour qui pouvait accorder un sursis. En conséquence, l'art. 65.1 doit être interprété de façon à conférer les mêmes pouvoirs généraux que ceux inclus dans l'art. 27.

Compte tenu de ce qui précède et du libellé même de l'art. 97 de la Loi, nous sommes d'avis que, contrairement aux deux premiers points soulevés par le procureur général, notre Cour peut faire droit aux demandes de sursis des requérantes. Nous sommes d'avis que la Cour est habilitée, tant en vertu de l'art. 65.1 que de l'art. 27, non seulement à accorder un sursis d'exécution et une suspension d'instance dans le sens traditionnel, mais aussi à rendre toute ordonnance visant à maintenir les parties dans une situation qui, dans la mesure du possible, ne sera pas cause de préjudice en attendant le règlement du différend par la Cour, de façon que cette dernière puisse rendre une décision qui ne sera pas dénuée de sens et d'efficacité. Notre Cour doit être en mesure d'intervenir non seulement à l'égard des termes mêmes du jugement, mais aussi à l'égard de ses effets. Cela signifie que notre Cour doit posséder la compétence d'interdire à une partie d'accomplir tout acte fondé

regulations constitute conduct under a law that has been declared constitutional by the lower courts.

This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594. The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there is certainly an order against the appellant. Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court. I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory

sur le jugement, qui, s'il était accompli, tendrait à annuler ou à diminuer l'effet de la décision de notre Cour. En l'espèce, le nouveau règlement est un acte pris en application d'une loi qui a été déclarée constitutionnelle par les tribunaux d'instance inférieure.

À notre avis, c'est l'opinion même que notre Cour avait exprimée dans l'arrêt *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 594. Dans cette affaire, l'appelante Labatt, dans des circonstances semblables à celles de l'espèce, demandait à notre Cour d'ordonner un sursis à l'application du règlement qu'elle attaquait dans une action visant à obtenir un jugement déclarant que le règlement était inapplicable au produit de Labatt. La Cour d'appel fédérale a infirmé la décision que le tribunal de première instance avait rendue en faveur de Labatt. Labatt a demandé le sursis des procédures jusqu'à ce que notre Cour rende jugement. Bien que les parties eussent apparemment accepté les conditions d'une ordonnance visant la suspension de toute autre procédure, le juge en chef Laskin a examiné la question de compétence, que l'on aurait apparemment contestée malgré l'entente entre les parties. Le Juge en chef, s'exprimant au nom de la Cour, a déterminé que notre Cour était habilitée à rendre une ordonnance visant à suspendre l'application du règlement attaqué par le ministère de la Consommation et des Corporations. Voici comment le juge en chef Laskin a répondu aux arguments soulevés relativement à la conception traditionnelle du pouvoir d'accorder un sursis (p. 600):

On prétend que cette règle s'applique aux jugements ou ordonnances de cette Cour et non aux jugements ou ordonnances de la cour dont on interjette appel. Le texte de la règle me paraît inconciliable avec une pareille interprétation. En outre, la thèse de l'intimé selon laquelle il n'existe aucun jugement dont l'exécution puisse être suspendue me semble intenable et, même si c'était le cas, il est clair qu'une ordonnance a été rendue contre l'appelante. De plus, la règle 126, qui autorise cette Cour à accorder un redressement contre une ordonnance, ne doit pas être interprétée de façon à permettre à la Cour d'intervenir uniquement contre l'ordonnance et non contre son effet s'il y a pourvoi contre cette ordonnance devant cette Cour. En conséquence, l'appelante a le droit de demander un redressement interlocutoire

action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

visant le sursis d'exécution de l'ordonnance qui rejette son action déclaratoire et cette Cour a le pouvoir d'accorder un redressement aux conditions qu'elle estime équitables. [Nous soulignons.]

Bien que ce passage paraisse répondre à l'argument des intimés en l'espèce qu'il faut faire une distinction avec l'arrêt *Labatt* parce que notre Cour devait se prononcer sur une ordonnance convenue par les parties, les commentaires ajoutés par le juge en chef Laskin dissipent tout doute sur cette question, à la p. 601:

> Même si j'estime que la règle 126 s'applique et permet le prononcé d'une ordonnance de la nature de celle convenue par les avocats des parties, cela ne signifie pas que cette Cour n'a pas, en d'autres circonstances, le pouvoir d'éviter que des procédures en instance devant elle avortent par suite de l'action unilatérale d'une des parties avant la décision finale.

En fait, il ressort des mémoires déposés par les parties à la requête dans l'arrêt *Labatt* que les parties avaient convenu de faire trancher leur différend par un jugement déclaratoire, mais non de faire surseoir à l'exécution du règlement en attendant la résolution du différend.

À notre avis, notre Cour possède la compétence d'accorder le redressement demandé par les requérantes, même si les requérantes demandent une «suspension» du règlement plutôt qu'une exemption de son application. Prétendre le contraire irait à l'encontre de la conclusion de notre Cour dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, [1987] 1 R.C.S. 110. Selon cet arrêt, la distinction entre les cas de «suspension» et les cas d'«exemption» se fait seulement après que la compétence est par ailleurs établie et quand la question de l'intérêt public est soupesée par rapport aux intérêts de la personne qui demande la suspension d'instance. Si le pouvoir de «suspension d'instance» doit être exercé, comme nous l'avons déjà mentionné, avec modération, on y parvient par l'application de critères formulés dans l'arrêt *Metropolitan Stores* et non par une interprétation restrictive de la compétence de notre Cour. En conséquence, le dernier argument soulevé par le procureur général relativement à la question de compétence échoue également.

Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter*. A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

The applicants rely upon the following grounds:

1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act*, S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms*.

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

   (i) There is a serious constitutional issue to be determined.

   (ii) Compliance with the new regulations will cause irreparable harm.

Enfin, si la compétence de notre Cour ne pouvait reposer sur l'art. 65.1 de la Loi et l'art. 27 des Règles, nous sommes d'avis que le fondement de cette compétence pourrait être le par. 24(1) de la *Charte*. Une lacune dans les pouvoirs accessoires de notre Cour en matière de procédure permettant de préserver les droits des parties en attendant le règlement final d'un différend touchant des droits constitutionnels ne devrait pas faire obstacle à une réparation fondée sur la *Charte*.

V. Motifs de suspension d'instance

Les requérantes se fondent sur les moyens suivants:

1. Le *Règlement sur les produits du tabac—Modification*, qui est contesté, a été pris conformément aux art. 9 et 17 de la *Loi réglementant les produits du tabac*, L.C. 1988, ch. 20.

2. Les requérantes ont présenté à notre Cour une demande d'autorisation d'appel contre un jugement de la Cour d'appel du Québec, rendu le 15 janvier 1993. La Cour d'appel a infirmé une décision de la Cour supérieure du Québec déclarant que certaines dispositions de la Loi outrepassaient les pouvoirs du Parlement du Canada et constituaient une violation injustifiable de la *Charte canadienne des droits et libertés*.

3. L'effet du nouveau règlement est tel que les requérantes devront engager des dépenses non recouvrables considérables pour procéder à une nouvelle conception de leurs emballages avant que notre Cour ne se soit prononcée sur la validité constitutionnelle de la loi habilitante et, advenant le cas où notre Cour rétablirait la décision de la Cour supérieure, d'engager les mêmes dépenses une deuxième fois si elles désirent revenir à l'emballage actuel.

4. Les critères applicables à une suspension d'instance sont satisfaits:

   (i) Il existe une question constitutionnelle sérieuse à juger.

   (ii) Le respect du nouveau règlement causera un préjudice irréparable.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra.* If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. *Interlocutory Injunctions, Stays of Proceedings and the Charter*

The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

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

On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the

(iii) La prépondérance des inconvénients, compte tenu de l'intérêt public, favorise le maintien du statu quo jusqu'à ce que notre Cour ait réglé les questions juridiques.

VI. Analyse

La principale question soulevée dans les présentes demandes est de savoir s'il faut accorder aux requérantes le redressement interlocutoire sollicité. Elles y ont droit seulement si elles satisfont aux critères formulés dans *Manitoba (Procureur général) c. Metropolitan Stores (MTS) Ltd.*, précité. Dans la négative, les requérantes devront se conformer au nouveau règlement, au moins jusqu'à ce qu'une décision soit rendue relativement aux actions principales.

A. *Les injonctions interlocutoires, la suspension d'instance et la Charte*

Les requérantes demandent à notre Cour de retarder l'effet juridique d'un règlement qui a déjà été adopté et d'empêcher les autorités publiques d'en assurer l'application. Elles demandent également d'être protégées contre le contrôle d'application du règlement pendant une période de 12 mois même si, ultérieurement, la loi habilitante devait être déclarée valide du point de vue constitutionnel. Le redressement demandé est important et ses effets sont d'une portée considérable. Il faut procéder à un processus de pondération soigneux.

D'une part, les tribunaux doivent être prudents et attentifs quand on leur demande de prendre des décisions qui privent de son effet une loi adoptée par des représentants élus.

D'autre part, la *Charte* impose aux tribunaux la responsabilité de sauvegarder les droits fondamentaux. Si les tribunaux exigeaient strictement que toutes les lois soient observées à la lettre jusqu'à ce qu'elles soient déclarées inopérantes pour motif d'inconstitutionnalité, ils se trouveraient dans certains cas à fermer les yeux sur les violations les plus flagrantes des droits garantis par la *Charte*. Une telle pratique contredirait l'esprit et l'objet de la *Charte* et pourrait encourager un gouvernement

Charter and might encourage a government to prolong unduly final resolution of the dispute.

Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores*, at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

à prolonger indûment le règlement final des différends.

Existe-t-il alors des considérations ou des critères spéciaux que les tribunaux doivent appliquer quand on allègue la violation de la *Charte* et que le redressement provisoire demandé touche l'exécution et l'applicabilité de la loi?

Généralement, un tribunal devrait appliquer les mêmes principes, que le redressement demandé soit une injonction ou une suspension d'instance. Dans l'arrêt *Metropolitan Stores*, le juge Beetz exprime ainsi cette position (p. 127):

> La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires.

Nous ajouterons seulement que les requérantes en l'espèce demandent à la fois un redressement interlocutoire (en attendant le règlement du pourvoi) et provisoire (pendant une période d'une année suivant le jugement). Nous utiliserons l'expression générale «redressement interlocutoire» pour décrire le caractère mixte du redressement demandé. Les mêmes principes régissent les deux types de redressements.

L'arrêt *Metropolitan Stores* établit une analyse en trois étapes que les tribunaux doivent appliquer quand ils examinent une demande de suspension d'instance ou d'injonction interlocutoire. Premièrement, une étude préliminaire du fond du litige doit établir qu'il y a une question sérieuse à juger. Deuxièmement, il faut déterminer si le requérant subirait un préjudice irréparable si sa demande était rejetée. Enfin, il faut déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse le redressement en attendant une décision sur le fond. Il peut être utile d'examiner chaque aspect du critère et de l'appliquer ensuite aux faits en l'espèce.

B. *The Strength of the Plaintiff's Case*

Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid*, however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

In *Metropolitan Stores*, Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269, at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits.

B. *La force de l'argumentation du requérant*

Avant la décision de la Chambre des lords *American Cyanamid Co. c. Ethicon Ltd.*, [1975] A.C. 396, la personne qui demandait une injonction interlocutoire devait établir une [TRADUCTION] «forte apparence de droit» quant au fond de l'affaire pour satisfaire au premier critère. Toutefois, dans *American Cyanamid*, lord Diplock avait précisé que le requérant n'avait plus à établir une forte apparence de droit et qu'il lui suffisait de convaincre le tribunal que [TRADUCTION] «la demande n'est ni futile ni vexatoire, ou, en d'autres termes, que la question à trancher est sérieuse». Le critère formulé dans *American Cyanamid* est maintenant généralement accepté par les tribunaux canadiens qui, toutefois, reviennent à l'occasion à un critère plus strict: voir Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), aux pp. 2-13 à 2-20.

Dans *Metropolitan Stores*, le juge Beetz a énoncé plusieurs raisons pour lesquelles, dans un cas relevant de la *Charte*, le critère formulé dans *American Cyanamid* convient mieux qu'un examen plus rigoureux du fond. Il a notamment parlé des difficultés à trancher des questions factuelles et juridiques complexes à partir d'éléments de preuve limités dans une procédure interlocutoire, des difficultés pratiques à procéder à une analyse fondée sur l'article premier à ce stade, et de la possibilité qu'une décision provisoire sur le fond soit rendue en l'absence de plaidoiries complètes ou avant qu'un avis soit donné aux procureurs généraux.

L'intimé a soulevé la possibilité que, compte tenu de l'état actuel de l'action principale, les requérantes soient tenues de démontrer davantage que l'existence «d'une question sérieuse à juger». L'intimé se fonde sur l'opinion incidente de notre Cour dans *Laboratoire Pentagone Ltée c. Parke, Davis & Co.*, [1968] R.C.S. 269, à la p. 272:

> [TRADUCTION] La charge imposée à l'appelante est beaucoup plus lourde que s'il s'agissait d'une injonction interlocutoire. Dans un tel cas, le tribunal doit examiner la prépondérance des inconvénients entre les parties parce que le procès n'a pas encore eu lieu. En l'espèce, on nous demande de suspendre l'exécution d'un jugement de la Cour d'appel, rendu après examen complet

It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

sur le fond. Pour justifier une telle ordonnance, il ne suffit pas d'affirmer que l'incidence de l'injonction sur l'appelante sera plus importante que celle d'une suspension d'instance sur l'intimée.

Le juge Kelly a fait des commentaires au même effet dans *Adrian Messenger Services c. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.), à la p. 620:

> [TRADUCTION] Contrairement à la situation antérieure au procès, lorsque les prétentions opposées des parties ne sont pas encore réglées, dans le cas d'une demande d'injonction interlocutoire en attendant un appel contre le rejet de l'action, le défendeur est fort du jugement que la cour a rendu en sa faveur. Même en reconnaissant la possibilité omniprésente que ce jugement soit infirmé en appel, il est, à mon avis, relativement rare que la cour d'appel intervienne pour conférer à un demandeur, même de façon provisoire, le droit même qui lui a été refusé par le tribunal de première instance.

Plus récemment, le juge Philp affirmait dans *Bear Island Foundation c. Ontario* (1989), 70 O.R. (2d) 574 (H.C.), à la p. 576:

> [TRADUCTION] Bien que je reconnaisse que la question du titre de ces terres soit une question sérieuse, elle a été réglée en première instance et en appel. La raison pour laquelle la Cour suprême du Canada a accordé une autorisation de pourvoi est inconnue et continuera de l'être tant que la Cour n'aura pas procédé à l'audition et rendu jugement. Je ne suis pas en l'espèce saisi d'une question sérieuse à juger. Il y a déjà eu un procès et un appel sur cette question. Les demanderesses en l'espèce n'ont jamais tenté d'arrêter la récolte avant le procès, ni avant l'appel à la Cour d'appel de l'Ontario. La question ne constitue plus une question en litige.

D'après l'intimé, de telles affirmations laissent entendre que, dès qu'une décision est rendue sur le fond au procès, le requérant d'un redressement interlocutoire a un fardeau plus lourd ou ne peut plus obtenir le redressement. Bien qu'il soit possible d'établir en l'espèce une distinction par rapport aux décisions citées, puisque le juge de première instance a accepté la position de la requérante, il n'est pas nécessaire de le faire. Que ces affirmations traduisent ou non l'état du droit applicable aux demandes de redressement interlocutoire à caractère privé, question qui demeure sujette à débat, elles ne sont pas applicables aux cas relevant de la *Charte*.

The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores*, at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

La *Charte* protège les libertés et droits fondamentaux. Compte tenu de l'importance des intérêts auxquels, selon la requête, il a été porté atteinte, tout tribunal appelé à se prononcer sur une violation de la *Charte* doit procéder à un examen soigneux de la question. Tel est le cas même lorsque d'autres tribunaux ont conclu qu'il n'y avait pas eu violation de la *Charte*. Par ailleurs, compte tenu du caractère complexe de la plupart des droits garantis par la Constitution, le tribunal saisi d'une requête aura rarement le temps de faire l'analyse approfondie requise du fond de la demande du requérant. Ceci est vrai pour toute demande de redressement interlocutoire, que le procès ait eu lieu ou non. Nous sommes donc pleinement d'accord avec la conclusion du juge Beetz dans l'arrêt *Metropolitan Stores*, à la p. 128: «la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse» suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients.»

What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores*, *supra*, at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

Quels sont les indicateurs d'une «question sérieuse à juger»? Il n'existe pas d'exigences particulières à remplir pour satisfaire à ce critère. Les exigences minimales ne sont pas élevées. Le juge saisi de la requête doit faire un examen préliminaire du fond de l'affaire. La décision sur le fond que rend le juge de première instance relativement à la *Charte* est une indication pertinente, mais pas nécessairement concluante que les questions soulevées en appel constituent des questions sérieuses: voir *Metropolitan Stores*, précité, à la p. 150. De même, l'autorisation d'appel sur le fond qu'une cour d'appel accorde constitue une indication que des questions sérieuses sont soulevées, mais un refus d'autorisation dans un cas qui soulève les mêmes questions n'indique pas automatiquement que les questions de fond ne sont pas sérieuses.

Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely

Une fois convaincu qu'une réclamation n'est ni futile ni vexatoire, le juge de la requête devrait examiner les deuxième et troisième critères, même s'il est d'avis que le demandeur sera probablement

to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294, at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.), the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

débouté au procès. Il n'est en général ni nécessaire ni souhaitable de faire un examen prolongé du fond de l'affaire.

Il existe deux exceptions à la règle générale selon laquelle un juge ne devrait pas procéder à un examen approfondi sur le fond. La première est le cas où le résultat de la demande interlocutoire équivaudra en fait au règlement final de l'action. Ce sera le cas, d'une part, si le droit que le requérant cherche à protéger est un droit qui ne peut être exercé qu'immédiatement ou pas du tout, ou, d'autre part, si le résultat de la demande aura pour effet d'imposer à une partie un tel préjudice qu'il n'existe plus d'avantage possible à tirer d'un procès. En fait, dans l'arrêt *N.W.L. Ltd. c. Woods*, [1979] 1 W.L.R. 1294, à la p. 1307, lord Diplock a modifié le principe formulé dans l'arrêt *American Cyanamid*:

> [TRADUCTION] Toutefois, lorsque l'octroi ou le refus d'une injonction interlocutoire aura comme répercussion pratique de mettre fin à l'action parce que le préjudice déjà subi par la partie perdante est complet et du type qui ne peut donner lieu à un dédommagement, la probabilité que le demandeur réussirait à établir son droit à une injonction, si l'affaire s'était rendue à procès, constitue un facteur dont le juge doit tenir compte lorsqu'il fait l'appréciation des risques d'injustice possibles selon qu'il tranche d'une façon plutôt que de l'autre.

Cette exception pourrait bien englober les cas où un requérant cherche à faire interdire le piquetage. Plusieurs décisions indiquent que cette exception est déjà appliquée dans une certaine mesure au Canada.

Dans l'arrêt *Trieger c. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (H.C. Ont.), le chef du Parti Vert avait demandé une ordonnance interlocutoire visant à lui permettre de participer à un débat télévisé des chefs de partis devant avoir lieu peu de jours après l'audition. Le requérant était seulement intéressé à participer au débat et non à obtenir une déclaration ultérieure de ses droits. Le juge Campbell a refusé la demande en ces termes à la p. 152:

This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried in the sense of a case with enough legal merit to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores*, at p. 133:

There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

[TRADUCTION] Il ne s'agit pas du type de redressement qui devrait être accordé dans le cadre d'une demande interlocutoire de cette nature. Les questions juridiques en cause sont complexes et je ne suis pas convaincu que le requérant a démontré l'existence d'une question sérieuse à juger au sens d'une affaire dont le fond juridique est suffisant pour justifier l'intervention extraordinaire de la cour sans aucun procès. [Nous soulignons.]

Dans l'arrêt *Tremblay c. Daigle*, [1989] 2 R.C.S. 530, l'appelante Daigle interjetait appel contre une injonction interlocutoire rendue par la Cour supérieure du Québec lui interdisant de se faire avorter. Compte tenu de l'état avancé de la grossesse de l'appelante, notre Cour est allée au-delà de la question de l'injonction interlocutoire et a rendu immédiatement une décision sur le fond de l'affaire.

Les circonstances justifiant l'application de cette exception sont rares. Lorsqu'elle s'applique, le tribunal doit procéder à un examen plus approfondi du fond de l'affaire. Puis, au moment de l'application des deuxième et troisième étapes de l'analyse, il doit tenir compte des résultats prévus quant au fond.

La deuxième exception à l'interdiction, formulée dans l'arrêt *American Cyanamid*, de procéder à un examen approfondi du fond d'une affaire, vise le cas où la question de constitutionnalité se présente uniquement sous la forme d'une pure question de droit. Le juge Beetz l'a reconnu dans l'arrêt *Metropolitan Stores*, à la p. 133:

Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.), at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. *Irreparable Harm*

Beetz J. determined in *Metropolitan Stores*, at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted,

Un juge appelé à trancher une demande s'inscrivant dans les limites très étroites de la deuxième exception n'a pas à examiner les deuxième ou troisième critères puisque l'existence du préjudice irréparable ou la prépondérance des inconvénients ne sont pas pertinentes dans la mesure où la question constitutionnelle est tranchée de façon définitive et rend inutile le sursis.

Dans le contexte du droit privé, on a soutenu qu'il faudrait reconnaître une troisième exception au critère de «la question sérieuse à juger», formulé dans l'affaire *American Cyanamid*, lorsque le dossier factuel est en grande partie réglé avant le dépôt de la demande. Ainsi, dans l'affaire *Dialadex Communications Inc. c. Crammond* (1987), 34 D.L.R. (4th) 392 (H.C. Ont.), à la p. 396, on a conclu:

> [TRADUCTION] Lorsque les faits ne sont pas vraiment contestés, les demandeurs doivent être en mesure d'établir qu'il existe une forte apparence de droit et qu'ils subiront un préjudice irréparable si l'injonction est refusée. Si les faits sont contestés, le critère à satisfaire est moins exigeant. Dans ce cas, les demandeurs doivent établir que leur action n'est pas futile et qu'il existe une question sérieuse à juger, et que, selon la prépondérance des inconvénients, une injonction devrait être accordée.

Si cette exception existe, elle ne devrait pas s'appliquer aux cas relevant de la *Charte*. Même si les faits qui fondent l'allégation de violation de la *Charte* ne sont pas contestés, le tribunal des requêtes pourrait bien ne pas avoir devant lui tous les éléments de preuve requis pour un examen fondé sur l'article premier. Par ailleurs, à cette étape, une cour d'appel n'aura habituellement pas le temps d'examiner suffisamment même un dossier factuel complet. Il s'ensuit qu'un tribunal des requêtes ne devrait pas tenter de procéder à l'analyse approfondie que nécessite un examen de l'article premier dans le cadre d'une procédure interlocutoire.

C. *Le préjudice irréparable*

Le juge Beetz a affirmé dans l'arrêt *Metropolitan Stores* (à la p. 128) que «[l]e deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était

suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

pas accordée, un préjudice irréparable». Certains tribunaux ont examiné, à cette étape, le préjudice que l'intimé risque de subir si le redressement demandé est accordé. Nous sommes d'avis qu'il est plus approprié de le faire à la troisième étape de l'analyse. Le préjudice allégué à l'intérêt public devrait également être examiné à cette étape.

À la présente étape, la seule question est de savoir si le refus du redressement pourrait être si défavorable à l'intérêt du requérant que le préjudice ne pourrait pas faire l'objet d'une réparation, en cas de divergence entre la décision sur le fond et l'issue de la demande interlocutoire.

Le terme «irréparable» a trait à la nature du préjudice subi plutôt qu'à son étendue. C'est un préjudice qui ne peut être quantifié du point de vue monétaire ou un préjudice auquel il ne peut être remédié, en général parce qu'une partie ne peut être dédommagée par l'autre. Des exemples du premier type sont le cas où la décision du tribunal aura pour effet de faire perdre à une partie son entreprise (*R.L. Crain Inc. c. Hendry* (1988), 48 D.L.R. (4th) 228 (B.R. Sask.)); le cas où une partie peut subir une perte commerciale permanente ou un préjudice irrémédiable à sa réputation commerciale (*American Cyanamid*, précité); ou encore le cas où une partie peut subir une perte permanente de ressources naturelles lorsqu'une activité contestée n'est pas interdite (*MacMillan Bloedel Ltd. c. Mullin*, [1985] 3 W.W.R. 577 (C.A.C.-B.)). Le fait qu'une partie soit impécunieuse n'entraîne pas automatiquement l'acceptation de la requête de l'autre partie qui ne sera pas en mesure de percevoir ultérieurement des dommages-intérêts, mais ce peut être une considération pertinente (*Hubbard c. Pitt*, [1976] Q.B. 142 (C.A.)).

L'appréciation du préjudice irréparable dans le cas de demandes interlocutoires concernant des droits garantis par la *Charte* est une tâche qui sera habituellement plus difficile qu'une appréciation comparable dans le cas d'une demande en matière de droit privé. Une des raisons en est que la notion de préjudice irréparable est étroitement liée à la réparation que sont les dommages-intérêts, lesquels ne constituent pas la principale réparation dans les cas relevant de la *Charte*.

This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863, at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170, at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter*. In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. *The Balance of Inconvenience and Public Interest Considerations*

The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid*, Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

À plusieurs reprises, notre Cour a accepté le principe que des dommages-intérêts peuvent être accordés relativement à une violation des droits garantis par la *Charte*: (voir par exemple *Mills c. La Reine*, [1986] 1 R.C.S. 863, aux pp. 883, 886, 943 et 971; *Nelles c. Ontario*, [1989] 2 R.C.S. 170, à la p. 196). Toutefois, il n'existe pas encore de théorie juridique relative aux principes susceptibles de régir l'octroi de dommages-intérêts en vertu du par. 24(1) de la *Charte*. Compte tenu de l'incertitude du droit quant à la condamnation à des dommages-intérêts en cas de violation de la *Charte*, il sera dans la plupart des cas impossible pour un juge saisi d'une demande interlocutoire de déterminer si un dédommagement adéquat pourrait être obtenu au procès. En conséquence, jusqu'à ce que le droit soit clarifié en cette matière, on peut supposer que le préjudice financier, même quantifiable, qu'un refus de redressement causera au requérant constitue un préjudice irréparable.

D. *La prépondérance des inconvénients et l'intérêt public*

Dans l'arrêt *Metropolitan Stores*, le juge Beetz décrit, à la p. 129, le troisième critère applicable à une demande de redressement interlocutoire comme un critère qui consiste «à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond». Compte tenu des exigences minimales relativement peu élevées du premier critère et des difficultés d'application du critère du préjudice irréparable dans des cas relevant de la *Charte*, c'est à ce stade que seront décidées de nombreuses procédures interlocutoires.

Il y a de nombreux facteurs à examiner dans l'appréciation de la «prépondérance des inconvénients» et ils varient d'un cas à l'autre. Dans l'arrêt *American Cyanamid*, lord Diplock fait la mise en garde suivante (à la p. 408):

> [TRADUCTION] [i]l serait peu sage de tenter ne serait-ce que d'énumérer tous les éléments variés qui pourraient demander à être pris en considération au moment du choix de la décision la plus convenable, encore moins de proposer le poids relatif à accorder à chacun de ces éléments. En la matière, chaque cas est un cas d'espèce.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

The decision in *Metropolitan Stores*, at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores*. A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives*, 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores*. The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to

Il ajoute, à la p. 409: [TRADUCTION] «Il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.»

L'arrêt *Metropolitan Stores*, établit clairement que, dans tous les litiges de nature constitutionnelle, l'intérêt public est un «élément particulier» à considérer dans l'appréciation de la prépondérance des inconvénients, et qui doit recevoir «l'importance qu'il mérite» (à la p. 149). C'est la démarche qui a été correctement suivie par le juge Blair de la Division générale de la Cour de l'Ontario dans l'affaire *Ainsley Financial Corp. c. Ontario Securities Commission* (1993), 14 O.R. (3d) 280, aux pp. 303 et 304:

> [TRADUCTION] Une injonction interlocutoire comportant une contestation de la validité constitutionnelle d'une loi ou de l'autorité d'un organisme chargé de l'application de la loi diffère des litiges ordinaires dans lesquels les demandes de redressement opposent des plaideurs privés. Il faut tenir compte des intérêts du public, que l'organisme a comme mandat de protéger, et en faire l'appréciation par rapport à l'intérêt des plaideurs privés.

1. L'intérêt public

Dans *Metropolitan Stores*, le juge Beetz a formulé des directives générales quant aux méthodes à utiliser dans l'appréciation de la prépondérance des inconvénients. On peut y apporter quelques précisions. C'est le caractère «polycentrique» de la *Charte* qui exige un examen de l'intérêt public dans l'appréciation de la prépondérance des inconvénients: voir Jamie Cassels, «An Inconvenient Balance: The Injunction as a Charter Remedy» dans J. Berryman, dir., *Remedies: Issues and Perspectives*, 1991, 271, aux pp. 301 à 305. Toutefois, le gouvernement n'a pas le monopole de l'intérêt public. Comme le fait ressortir Cassels, à la p. 303:

> [TRADUCTION] Bien qu'il soit fort important de tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients, l'intérêt public dans les cas relevant de la *Charte* n'est pas sans équivoque ou asymétrique comme le laisse entendre l'arrêt *Metropolitan Stores*. Le procureur général n'est pas le représentant exclusif d'un public «monolithe» dans les litiges sur la *Charte*, et le requérant ne présente pas toujours une

represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.), per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants*, which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the

revendication individualisée. La plupart du temps, le requérant peut également affirmer qu'il représente une vision de «l'intérêt public». De même, il se peut que l'intérêt public ne milite pas toujours en faveur de l'application d'une loi existante.

À notre avis, il convient d'autoriser les deux parties à une procédure interlocutoire relevant de la *Charte* à invoquer des considérations d'intérêt public. Chaque partie a droit de faire connaître au tribunal le préjudice qu'elle pourrait subir avant la décision sur le fond. En outre, le requérant ou l'intimé peut faire pencher la balance des inconvénients en sa faveur en démontrant au tribunal que l'intérêt public commande l'octroi ou le refus du redressement demandé. «L'intérêt public» comprend à la fois les intérêts de l'ensemble de la société et les intérêts particuliers de groupes identifiables.

En conséquence, nous sommes d'avis qu'il faut rejeter une méthode d'analyse qui exclut l'examen d'un préjudice non directement subi par une partie à la requête. Telle était la position adoptée par le juge de première instance dans l'affaire *Morgentaler c. Ackroyd* (1983), 150 D.L.R. (3d) 59 (H.C. Ont.). Le juge Linden conclut à la p. 66:

> [TRADUCTION] Les requérants fondent principalement leur argumentation sur le préjudice irréparable que risquent de subir leurs patientes éventuelles qui ne pourront obtenir un avortement si la clinique n'est pas autorisée à les faire. Même s'il était établi que *ces femmes* subiraient un préjudice irréparable, une telle preuve n'indiquerait pas que les requérants en l'espèce subiraient un préjudice irréparable, justifiant la cour de délivrer une injonction à leur demande. [En italique dans l'original.]

Lorsqu'un particulier soutient qu'un préjudice est causé à l'intérêt public, ce préjudice doit être prouvé puisqu'on présume ordinairement qu'un particulier poursuit son propre intérêt et non celui de l'ensemble du public. Dans l'examen de la prépondérance des inconvénients et de l'intérêt public, il n'est pas utile à un requérant de soutenir qu'une autorité gouvernementale donnée ne représente pas l'intérêt public. Il faut plutôt que le

court of the public interest benefits which will flow from the granting of the relief sought.

Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

(b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304.

A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub-

requérant convainque le tribunal des avantages, pour l'intérêt public, qui découleront de l'octroi du redressement demandé.

Cette question de l'atteinte à l'intérêt public invoquée par une autorité publique a été abordée de diverses façons par les tribunaux. D'un côté, on trouve le point de vue exprimé par la Cour d'appel fédérale dans l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, qui a infirmé la décision de la Division de première instance d'accorder une injonction empêchant des fonctionnaires des pêcheries de mettre en œuvre un plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, ch. F-14. Parmi d'autres motifs, la cour a souligné celui-ci (à la p. 795):

b) le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable.

Le juge Beetz a approuvé avec réserve ces remarques dans l'arrêt *Metropolitan Stores* (à la p. 139). Elles ont été appliquées par la Division de première instance de la Cour fédérale dans *Esquimalt Anglers' Association c. Canada (Ministre des pêches et océans)* (1988), 21 F.T.R. 304.

Un point de vue contraire a été exprimé par le juge McQuaid de la Cour d'appel de l'Île-du-Prince-Édouard dans *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158, qui, en autorisant un sursis d'exécution d'une ordonnance de la Public Utilities Commission porté en appel, a affirmé, à la p. 164:

[TRADUCTION] Je ne vois aucune circonstance susceptible de causer un inconvénient à la Commission s'il y a sursis d'exécution en attendant l'appel. En tant qu'organisme de réglementation, la Commission ne possède aucun intérêt acquis quant à l'issue de l'appel. En fait, on peut concevoir qu'elle soit favorable à un appel qui porte tout particulièrement sur sa compétence, car elle se trouve à recevoir des directives claires pour l'avenir

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

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law than when the application of the law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General*

relativement à des situations où il aurait pu exister des doutes. De la même manière, un appel sert également bien l'intérêt public . . .

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

En règle générale, un tribunal ne devrait pas tenter de déterminer si l'interdiction demandée entraînerait un préjudice réel. Le faire amènerait en réalité le tribunal à examiner si le gouvernement gouverne bien, puisque l'on se trouverait implicitement à laisser entendre que l'action gouvernementale n'a pas pour effet de favoriser l'intérêt public et que l'interdiction ne causerait donc aucun préjudice à l'intérêt public. La *Charte* autorise les tribunaux non pas à évaluer l'efficacité des mesures prises par le gouvernement, mais seulement à empêcher celui-ci d'empiéter sur les garanties fondamentales.

L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité. Voir les affaires *Black c. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439; *Vancouver General Hospital c. Stoffman*

Hospital v. Stoffman (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix.

Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.), the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

In the course of discussing the balance of convenience in *American Cyanamid*, Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to . . . preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. *Summary*

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

As indicated in *Metropolitan Stores*, the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

(1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix.

Par ailleurs, même dans les cas de suspension, un tribunal peut être en mesure d'offrir quelque redressement s'il arrive à suffisamment circonscrire la demande de redressement du requérant de façon à ne pas modifier l'application continue de la loi que commande l'intérêt public général. Ainsi, dans la décision *Ontario Jockey Club c. Smith* (1922), 22 O.W.N. 373 (H.C.), le tribunal a restreint à l'égard du requérant l'application d'une loi fiscale contestée, mais lui a ordonné de consigner à la cour la somme correspondant aux taxes exigées, en attendant le règlement de l'action principale.

2. Le statu quo

Dans le cadre de l'examen de la prépondérance des inconvénients dans l'affaire *American Cyanamid*, lord Diplock a affirmé que, toutes choses demeurant égales, [TRADUCTION] «il sera plus prudent d'adopter les mesures propres à maintenir le statu quo» (p. 408). Cette méthode semble être d'une utilité restreinte dans les litiges de droit privé; quoiqu'il puisse y avoir des exceptions, en règle générale, l'application de cette méthode n'est pas fondée comme telle lorsqu'on invoque la violation de droits fondamentaux. L'une des fonctions de la *Charte* est de fournir aux particuliers un moyen de contester l'ordre actuel des choses ou le statu quo. Les diverses questions doivent être pondérées de la façon décrite dans les présents motifs.

E. *Sommaire*

Il est utile à ce stade de résumer les facteurs à examiner dans le cas d'une demande de redressement interlocutoire dans un cas relevant de la *Charte*.

Comme l'indique *Metropolitan Stores* l'analyse en trois étapes d'*American Cyanamid* devrait s'appliquer aux demandes d'injonctions interlocutoires et de suspensions d'instance, tant en droit privé que dans les affaires relevant de la *Charte*.

At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

À la première étape, le requérant d'un redressement interlocutoire dans un cas relevant de la *Charte* doit établir l'existence d'une question sérieuse à juger. Le juge de la requête doit déterminer si le requérant a satisfait au critère, en se fondant sur le bon sens et un examen extrêmement restreint du fond de l'affaire. Le fait qu'une cour d'appel a accordé une autorisation d'appel relativement à l'action principale constitue certes une considération pertinente et importante, de même que tout jugement rendu sur le fond; toutefois, ni l'une ni l'autre de ces considérations n'est concluante. Le tribunal saisi de la requête ne devrait aller au-delà d'un examen préliminaire du fond de l'affaire que lorsque le résultat de la requête interlocutoire équivaudra en fait à un règlement final de l'action, ou que la question de constitutionnalité d'une loi se présente comme une pure question de droit. Les cas de ce genre sont extrêmement rares. Sauf lorsque la réclamation est futile ou vexatoire ou que la question de la constitutionnalité d'une loi se présente comme une pure question de droit, le juge de la requête devrait procéder à l'examen des deuxième et troisième étapes de l'analyse décrite dans l'arrêt *Metropolitan Stores*.

At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

À la deuxième étape, le requérant doit convaincre la cour qu'il subira un préjudice irréparable en cas de refus du redressement. Le terme «irréparable» a trait à la nature du préjudice et non à son étendue. Dans les cas relevant de la *Charte*, même une perte financière quantifiable, invoquée à l'appui d'une demande, peut être considérée comme un préjudice irréparable s'il n'est pas évident qu'il pourrait y avoir recouvrement au moment de la décision sur le fond.

The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases. When the nature and declared purpose of legislation is to

C'est la troisième étape du critère, celle de l'appréciation de la prépondérance des inconvénients, qui permettra habituellement de trancher les demandes concernant des droits garantis par la *Charte*. En plus du préjudice que chaque partie prétend qu'elle subira, il faut tenir compte de l'intérêt public. L'effet qu'une décision sur la demande aura sur l'intérêt public peut être invoqué par l'une ou l'autre partie. Les considérations d'intérêt public auront moins de poids dans les cas d'exemption que dans les cas de suspension. Si la

promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. *A Serious Question to be Tried*

The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter*. The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103, to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious

nature et l'objet affirmé de la loi sont de promouvoir l'intérêt public, le tribunal des requêtes ne devrait pas se demander si la loi a réellement cet effet. Il faut supposer que tel est le cas. Pour arriver à contrer le supposé avantage de l'application continue de la loi que commande l'intérêt public, le requérant qui invoque l'intérêt public doit établir que la suspension de l'application de la loi serait elle-même à l'avantage du public.

Enfin, en règle générale, les mêmes principes s'appliqueraient lorsqu'un organisme gouvernemental présente une demande de redressement interlocutoire. Cependant, c'est à la deuxième étape que sera examinée la question de l'intérêt public, en tant qu'aspect du préjudice irréparable causé aux intérêts du gouvernement. Cette question sera de nouveau examinée à la troisième étape lorsque le préjudice du requérant est examiné par rapport à celui de l'intimé, y compris le préjudice que ce dernier aura établi du point de vue de l'intérêt public.

VII. Application des principes en l'espèce

A. *Une question sérieuse à juger*

Les requérantes soutiennent que les présentes affaires soulèvent plusieurs questions sérieuses à juger, dont celle de l'application des critères du lien rationnel et de l'atteinte minimale, qui servent à justifier l'atteinte à la liberté d'expression entraînée par l'interdiction générale de la publicité sur les produits du tabac. Sur ce point, le juge Chabot de la Cour supérieure du Québec et le juge Brossard, dissident, de la Cour d'appel ont conclu que le gouvernement n'avait pas satisfait à ces critères et que l'interdiction ne pouvait se justifier en vertu de l'article premier de la *Charte*. La Cour d'appel à la majorité a statué que l'interdiction pouvait se justifier. Ces divergences d'opinions résultent d'interprétations différentes de la portée de l'assouplissement à la théorie du fardeau imposé au ministère public dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, lorsqu'il veut justifier son intervention dans le domaine du bien-être public. Notre Cour a accordé les autorisations de pourvoi sur le fond. Relativement à des requêtes distinctes de redressement interlocutoire en l'espèce, la Cour d'appel du

constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. *Irreparable Harm*

The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. *Balance of Inconvenience*

Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as

Québec a affirmé que: [TRADUCTION] «[q]uelle que soit l'issue de ces appels, ils soulèvent clairement des questions constitutionnelles sérieuses.» Cette observation de la Cour d'appel du Québec et les autorisations d'appel données par notre Cour indiquent clairement que les présentes affaires soulèvent des questions de droit sérieuses.

B. *Le préjudice irréparable*

Les requérantes soutiennent que si elles n'obtiennent pas le redressement interlocutoire, elles seront immédiatement forcées de faire des dépenses très importantes pour se conformer au règlement et que, advenant le cas où notre Cour accueillerait les pourvois des requérantes, elles ne seront pas en mesure de recouvrer du gouvernement les coûts subis ou de revenir à leurs méthodes actuelles d'emballage sans engager de nouveau les mêmes dépenses.

Une perte monétaire de cette nature n'équivaudra habituellement pas à un préjudice irréparable dans des affaires de droit privé. Toutefois, lorsque le gouvernement est la partie qui échoue dans une affaire de nature constitutionnelle, un demandeur aura beaucoup plus de difficulté à établir la responsabilité constitutionnelle et à obtenir une réparation monétaire. Les dépenses requises par le nouveau règlement causeront donc un préjudice irréparable aux requérantes si les présentes demandes sont refusées, mais les actions principales accueillies en appel.

C. *La prépondérance des inconvénients*

Pour déterminer lequel de l'octroi ou du refus du redressement interlocutoire occasionnerait le plus d'inconvénients, il faut notamment procéder à l'examen des facteurs suivants: la nature du redressement demandé et du préjudice invoqué par les parties, la nature de la loi contestée et l'intérêt public.

Les pertes que subiraient les requérantes, en cas de refus du redressement, sont de nature strictement financière. Les dépenses nécessaires sont importantes et imposeraient certainement un fardeau économique considérable aux deux sociétés.

pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act*. On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores*. However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores*:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo-

Néanmoins, comme l'a fait ressortir l'intimé, les requérantes sont des sociétés importantes et prospères, dont les revenus annuels dépassent les 50 millions de dollars. Elles peuvent absorber des pertes plus facilement que des entreprises plus petites. De plus, si l'on présume que, pour les cigarettes, la demande ne dépend pas uniquement du prix, ces sociétés peuvent reporter tout accroissement des dépenses sur leurs clients par le biais de majorations de prix. En conséquence, bien que le préjudice subi puisse être irréparable, il n'aura pas d'incidence à long terme sur la viabilité des entreprises requérantes.

Deuxièmement, les requérantes sont deux sociétés qui veulent être exemptées de l'application des dernières modifications du règlement pris en vertu de la *Loi réglementant les produits du tabac*. Au vu du dossier, le litige paraît être un «cas d'exemption» au sens où cette expression a été employée par le juge Beetz dans *Metropolitan Stores*. Toutefois, puisqu'il n'existe que trois sociétés de production de tabac au Canada, les demandes constituent en réalité une sorte de «cas de suspension». Les requérantes ont admis au cours des débats qu'elles cherchaient en fait à faire suspendre l'application du nouveau règlement à l'égard de toutes les sociétés de production de tabac au Canada pendant une période d'un an suivant le jugement de notre Cour sur le fond. La décision rendue relativement aux demandes aura donc des répercussions sur l'ensemble de l'industrie canadienne du tabac. Par ailleurs, les dispositions attaquées sont de nature générale. Il convient donc de considérer ces demandes comme un cas de suspension et, en conséquence, comme un cas où «l'intérêt public commande normalement davantage le respect de la législation existante» (p. 147).

L'importance accordée aux préoccupations d'intérêt public dépend en partie de la nature de la loi en général et en partie de l'objet de la loi contestée. Comme le juge Beetz l'explique, à la p. 135 de l'arrêt *Metropolitan Stores*:

> Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont

cratically-elected legislatures and are generally passed for the common good, for instance: . . . the protection of public health . . . . It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

3. The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,

(*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;

(*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and

(*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

The Regulatory Impact Analysis Statement, in the *Canada Gazette*, Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: [. . .] protéger la santé [. . .] Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun. [Nous soulignons.]

Le règlement attaqué a été adopté conformément à l'art. 3 de la *Loi réglementant les produits du tabac* qui prévoit:

3. La présente loi a pour objet de s'attaquer, sur le plan législatif, à un problème qui, dans le domaine de la santé publique, est grave, urgent et d'envergure nationale et, plus particulièrement:

a) de protéger la santé des Canadiennes et des Canadiens compte tenu des preuves établissant de façon indiscutable un lien entre l'usage du tabac et de nombreuses maladies débilitantes ou mortelles;

b) de préserver notamment les jeunes, autant que faire se peut dans une société libre et démocratique, des incitations à la consommation du tabac et du tabagisme qui peut en résulter;

c) de mieux sensibiliser les Canadiennes et les Canadiens aux méfaits du tabac par la diffusion efficace de l'information utile aux consommateurs de celui-ci.

Le Résumé de l'étude d'impact de la réglementation (*Gazette du Canada*, partie II, vol. 127, nº 16, p. 3284, à la p. 3285, qui accompagne le règlement précise:

L'augmentation du nombre des messages relatifs à la santé et la modification de la présentation de ces messages témoignent du consensus profond auquel sont parvenus les responsables de la santé publique, à savoir qu'il faut faire connaître de façon plus complète et plus efficace aux consommateurs les graves dangers de l'usage du tabac sur la santé. Des appuis pour les modifications réglementaires ont été exprimés dans des centaines de lettres et dans un certain nombre de mémoires présentés par des groupes du secteur de la santé publique, qui ont critiqué les premiers règlements adoptés en application de la loi, ainsi que dans un certain nombre d'études ministérielles soulignant la nécessité de ces modifications.

These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre-

Ce qui a été cité indique clairement que le gouvernement a adopté le règlement en cause dans l'intention de protéger la santé publique et donc pour promouvoir le bien public. Par ailleurs, les deux parties ont reconnu que des études réalisées dans le passé ont démontré que les mises en garde apposées sur les emballages de produits du tabac produisent des résultats en ce qu'ils sensibilisent davantage le public aux dangers du tabagisme et contribuent à réduire l'usage général du tabac dans notre société. Toutefois, les requérantes ont soutenu avec vigueur que le gouvernement n'a pas établi et qu'il ne peut établir que les exigences spécifiques imposées par le règlement attaqué présentent des avantages pour le public. À notre avis, cet argument ne vient pas en aide aux requérantes à ce stade interlocutoire.

Si le gouvernement déclare qu'il adopte une loi pour protéger et promouvoir la santé publique et s'il est établi que les limites qu'il veut imposer à l'industrie sont de même nature que celles qui, dans le passé, ont eu des avantages concrets pour le public, il n'appartient pas à un tribunal saisi d'une requête interlocutoire d'évaluer les véritables avantages qui découleront des exigences particulières de la loi. Cela est d'autant plus vrai en l'espèce qu'il s'agit de l'une des questions principales à trancher en appel. Les requérantes doivent plutôt faire contrepoids à ces considérations d'intérêt public en établissant que la suspension de l'application de la loi serait davantage dans l'intérêt public.

En l'espèce, les requérantes n'ont pas tenté de faire valoir que l'intérêt public commande l'application continue des exigences actuelles en matière d'emballage plutôt que des nouvelles exigences. Il n'y a que la non-majoration du prix d'un paquet de cigarettes pour les fumeurs qui pourrait être dans l'intérêt public. Une telle majoration des prix ne sera vraisemblablement pas excessive et sera de nature purement économique. En conséquence, l'argument qu'il existe un intérêt pour le public à maintenir le prix actuel des produits du tabac ne peut avoir beaucoup de poids. Cela est tout particulièrement vrai lorsque ce facteur est examiné par rapport à l'importance incontestable de l'intérêt du

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

The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors for the applicant RJR — MacDonald Inc.: Mackenzie, Gervais, Montreal.

Solicitors for the applicant Imperial Tobacco Inc.: Ogilvy, Renault, Montreal.

Solicitors for the respondent: Côté & Ouellet, Montreal.

Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: McCarthy, Tétrault, Toronto.

public dans la protection de la santé et la prévention de problèmes médicaux répandus et graves, directement attribuables à la cigarette.

La prépondérance des inconvénients est fortement en faveur de l'intimé et n'est pas contrebalancée par le préjudice irréparable que pourraient subir les requérantes si le redressement est refusé. L'intérêt public dans le domaine de la santé revêt une importance si impérieuse que les demandes de sursis doivent être rejetées avec dépens adjugés à la partie qui aura gain de cause en appel.

Demandes rejetées.

Procureurs de la requérante RJR — MacDonald Inc.: Mackenzie, Gervais, Montréal.

Procureurs de la requérante Imperial Tobacco Inc.: Ogilvy, Renault, Montréal.

Procureurs de l'intimé: Côté & Ouellet, Montréal.

Procureurs des intervenants dans la demande de redressement interlocutoire la Fondation des maladies du cœur du Canada, la Société canadienne du cancer, le Conseil canadien sur le tabagisme et la santé et Médecins pour un Canada sans fumée: McCarthy, Tétrault, Toronto.

Tab 3

Attorney General of Manitoba *Appellant*

v.

Metropolitan Stores (MTS) Ltd. *Respondent*

and

Manitoba Food and Commercial Workers, Local 832 *Respondent*

and

The Manitoba Labour Board *Respondent*

INDEXED AS: MANITOBA (ATTORNEY GENERAL) *v.* METROPOLITAN STORES LTD.

File No.: 19609.

1986: June 20; 1987: March 5.

Present: Beetz, McIntyre, Lamer, Le Dain and La Forest JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA

Courts — Procedure — Stay of proceedings and interlocutory injunctions — Constitutional validity of legislation challenged — Board proposing to act pursuant to challenged legislation — Motion to stay Board's proceedings until determination of constitutional validity of legislation — Decision to deny motion overturned by Court of Appeal — Principle governing judge's discretionary power to grant stay — Appropriateness of Court of Appeal's intervention in motion judge's discretion — Labour Relations Act, C.C.S.M., c. L10, s. 75.1.

Constitutional law — Charter of Rights — Currency of impugned legislation — Whether or not presumption of constitutionality when legislation challenged under Charter.

The Manitoba Labour Board was empowered by *The Labour Relations Act* to impose a first collective agreement. When the union applied to have the Board impose a first contract, the employer commenced proceedings in the Manitoba Court of Queen's Bench to have that power declared invalid as contravening the *Canadian Charter of Rights and Freedoms*. Within the framework of this action, the employer applied by way of motion in the Court of Queen's Bench for an order to stay The Manitoba Labour Board until the issue of the legislation's validity had been heard. The motion was denied. The Board, unfettered by a stay order, indicated that a

Procureur général du Manitoba *Appelant*

c.

Metropolitan Stores (MTS) Ltd. *Intimée*

et

Manitoba Food and Commercial Workers, section locale 832 *Intimé*

et

The Manitoba Labour Board *Intimée*

RÉPERTORIÉ: MANITOBA (PROCUREUR GÉNÉRAL) *c.* METROPOLITAN STORES LTD.

N° du greffe: 19609.

1986: 20 juin; 1987: 5 mars.

Présents: Les juges Beetz, McIntyre, Lamer, Le Dain et La Forest.

EN APPEL DE LA COUR D'APPEL DU MANITOBA

Tribunaux — Procédure — Suspension d'instance et injonctions interlocutoires — Contestation de la constitutionnalité d'une loi — Commission qui se propose d'agir en vertu de la loi contestée — Requête en suspension des procédures devant la Commission jusqu'à la détermination de la constitutionnalité de la loi — Décision rejetant la requête infirmée par la Cour d'appel — Principe régissant le pouvoir discrétionnaire du juge d'accorder la suspension d'instance — Est-il approprié pour la Cour d'appel d'intervenir dans le pouvoir discrétionnaire du juge de première instance? — Labour Relations Act, C.C.S.M., chap. L10, art. 75.1.

Droit constitutionnel — Charte des droits — Application de la loi attaquée — Existe-t-il une présomption de constitutionnalité lorsqu'une loi est contestée en vertu de la Charte?

The Manitoba Labour Board (la Commission) était habilitée par *The Labour Relations Act* à imposer une première convention collective. Quand le syndicat a demandé à la Commission d'imposer une première convention collective, l'employeur a engagé devant la Cour du Banc de la Reine du Manitoba des procédures visant à faire déclarer la disposition conférant ce pouvoir invalide parce qu'elle contrevenait à la *Charte canadienne des droits et libertés*. Dans le cadre de cette action, l'employeur a saisi la Cour du Banc de la Reine d'une requête pour obtenir une suspension des procédures devant la Commission en attendant que la question de la

collective agreement would be imposed if the parties failed to reach an agreement. The Manitoba Court of Appeal allowed the employer's appeal from the decision denying the stay order and granted a stay. At issue here are: (1) whether the Court of Appeal erred in failing to recognize a presumption of constitutional validity where legislation is challenged under the *Charter*; (2) what principles govern the exercise of a Superior Court Judge's discretionary power to order a stay of proceedings until the constitutionality of impugned legislation has been determined; and (3) whether the Court of Appeal's intervention in the motion judge's discretion was appropriate.

Held: The appeal should be allowed.

The innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the presumption of constitutional validity in its literal meaning—that a legislative provision challenged on the basis of the *Charter* can be presumed to be consistent with the *Charter* and of full force and effect.

A stay of proceedings and an interlocutory injunction are remedies of the same nature and should be governed by the same rules. In order to better delineate the situations in which it is just and equitable to grant an interlocutory injunction, the courts currently apply three main tests.

The first test is a preliminary and tentative assessment of the merits of the case. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case. A more recent formulation holds that all that is necessary is to satisfy the court that there is a serious question to be tried as opposed to a frivolous or vexatious claim. The "serious question" test is sufficient in a case involving the constitutional challenge of a law where the public interest must be taken into consideration in the balance of convenience. The second test addresses the question of irreparable harm. The third test, called the balance of convenience, is a determination of which of the two parties will suffer the greater harm from the grant or refusal of an interlocutory injunction, pending a decision on the merits.

When one contrasts the uncertainty in which a court finds itself with respect to the merits of the constitution-

validité de la loi soit entendue. La requête fut rejetée. N'étant donc pas assujettie à une ordonnance de suspension, la Commission a fait savoir qu'une convention collective serait imposée si les parties n'en venaient pas à une entente. La Cour d'appel du Manitoba a accueilli l'appel formé par l'employeur contre la décision de refuser l'ordonnance de suspension et a accordé une suspension d'instance. Les questions en litige en l'espèce sont de savoir: (1) si la Cour d'appel a commis une erreur en ne reconnaissant pas l'existence d'une présomption de constitutionnalité lorsqu'une loi est contestée en vertu de la *Charte*; (2) quels principes régissent l'exercice du pouvoir discrétionnaire d'un juge de cour supérieure d'ordonner une suspension d'instance en attendant que soit déterminée la constitutionnalité d'une loi dont on conteste la validité; et (3) si c'est à bon droit que la Cour d'appel est intervenue dans le pouvoir discrétionnaire du juge de première instance.

Arrêt: Le pourvoi est accueilli.

Le caractère innovateur et évolutif de la *Charte canadienne des droits et libertés* s'oppose à la présomption de constitutionnalité selon le sens littéral, savoir qu'une disposition législative attaquée en vertu de la *Charte* doit être présumée conforme à celle-ci et, en conséquence, pleinement opérante.

La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature qui doivent être régies par les mêmes règles. Pour aider à mieux délimiter les situations dans lesquelles il est juste et équitable d'accorder une injonction interlocutoire, les tribunaux appliquent actuellement trois critères principaux.

Le premier critère revêt la forme d'une évaluation préliminaire et provisoire du fond du litige. La manière traditionnelle consiste à se demander si la partie qui demande l'injonction interlocutoire est en mesure d'établir une apparence de droit suffisante. Selon une formulation plus récente, il suffit de convaincre la cour de l'existence d'une question sérieuse à juger, par opposition à une réclamation futile ou vexatoire. Le critère de la «question sérieuse» suffit dans une affaire soulevant la constitutionnalité d'une loi quand l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients. Le deuxième critère se penche sur la question du préjudice irréparable. Le troisième critère, celui de la prépondérance des inconvénients, consiste à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond.

Quand on oppose l'incertitude dans laquelle un tribunal se trouve au stade interlocutoire relativement au

al challenge of a law at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of an interlocutory injunction, not only for the parties to the litigation but also for the public at large, it becomes evident that the courts ought not to be restricted to the traditional application of the balance of convenience.

It is thus necessary to weigh in the balance of convenience the public interest as well as the interest of the parties, and in cases involving interlocutory injunctions directed at statutory authorities, it is erroneous to deal with these authorities as if they had any interest distinct from that of the public to which they owe the duties imposed upon them by statute. Such is the rule even where there is a *prima facie* case against the enforcement agency, such as one which would require the coming into play of s. 1 of the *Charter*.

The granting of an interlocutory injunction generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined from enforcing the impugned provisions with respect to the specific litigant who requests the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type are called exemption cases. The rule of the public interest should not be interpreted as meaning that interlocutory injunctive relief will only be granted in exceptional or rare circumstances, at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public. On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons.

Finally, in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar.

Here, the motion judge applied the correct principles in taking into consideration the public interest and the

fond de la contestation constitutionnelle d'une loi et les conséquences pratiques parfois graves, quoique temporaires, qu'entraîne une injonction interlocutoire non seulement pour les parties au litige mais aussi pour le grand public, il devient évident que les tribunaux ne doivent pas se limiter à l'application traditionnelle de la prépondérance des inconvénients.

Il est donc nécessaire que l'intérêt public soit pris en considération dans l'appréciation de la prépondérance des inconvénients en même temps que l'intérêt des plaideurs privés, et dans les cas où il s'agit d'injonctions interlocutoires adressées à des organismes constitués en vertu d'une loi, c'est une erreur que d'agir à leur égard comme s'ils avaient un intérêt distinct de celui du public au bénéfice duquel ils sont tenus de remplir les fonctions que leur impose la loi. Telle est la règle, même s'il existe une apparence de droit suffisante contre l'organisme chargé de l'application de la loi, laquelle apparence nécessiterait le recours à l'article premier de la *Charte*.

Une injonction interlocutoire peut en général avoir deux effets. Elle peut interdire totalement à l'organisme chargé de l'application de la loi d'appliquer les dispositions attaquées en attendant une décision définitive sur la question de leur validité ou elle peut lui interdire d'appliquer les dispositions attaquées à l'égard de la partie qui a précisément demandé la suspension d'instance. Dans le premier volet de l'alternative, l'application des dispositions attaquées est en pratique temporairement suspendue. On peut appeler les cas de ce genre les cas de suspension. Dans le second volet de l'alternative, le plaideur qui se voit accorder une suspension d'instance bénéficie en réalité d'une exemption de l'application de la loi attaquée, laquelle demeure toutefois opérante à l'égard des tiers. On appelle les cas de cet autre genre des cas d'exemption. On ne doit pas interpréter la règle de l'intérêt public comme signifiant qu'une injonction interlocutoire ne sera accordée que dans des cas rares ou exceptionnels, du moins dans les cas d'exemption où les dispositions attaquées revêtent la forme de règlement applicable à un nombre relativement limité de personne et lorsqu'aucun préjudice appréciable n'est subi par le public. D'un autre côté, l'intérêt public commande normalement davantage le respect de la législation existante dans les cas de suspension lorsque les dispositions contestées sont de portée large et générale et touchent un grand nombre de personnes.

Finalement, dans les cas où une injonction interlocutoire est accordée en conformité avec les principes énoncés ci-dessus, les parties devraient généralement être tenues de respecter un calendrier spécial.

En l'espèce, le juge des requêtes a appliqué les principes appropriés en tenant compte de l'intérêt public et de

inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the parties. The Court of Appeal was not justified in substituting its discretion for that of the motion judge: the emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a Court of Appeal to exercise a fresh discretion.

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l'effet inhibitif d'une suspension d'instance sur la Commission, en plus de son effet sur les parties. Rien ne justifiait la Cour d'appel de substituer son jugement à celui du juge de première instance: pour qu'ils justifient qu'une cour d'appel exerce un nouveau pouvoir discrétionnaire, les faits nouveaux qui émergent après le prononcé du jugement de première instance doivent être de telle nature qu'ils aient un effet appréciable sur la décision du juge de première instance.

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Arrêt critiqué: *Home Oil Distributors Ltd. v. Attorney-General for British Columbia*, [1939] 1 D.L.R. 573; **arrêts examinés**: *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504; *Morgentaler v. Ackroyd* (1983), 42 O.R. 659; *Société de développement de la Baie James c. Chef Robert Kanatewat*, [1975] C.A. 166; *Procureur général du Québec c. Lavigne*, [1980] C.A. 25, infirmant [1980] C.S. 318; *Campbell Motors Ltd. v. Gordon*, [1946] 4 D.L.R. 36; *Law Society of Alberta v. Black* (1984), 8 D.L.R. (4th) 346, rejetant (1983), 144 D.L.R. (3d) 439; **arrêts mentionnés**: *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Oakes*, [1986] 1 R.C.S. 103; *R. c. Therens*, [1985] 1 R.C.S. 613; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *McKay v. The Queen*, [1965] R.C.S. 798; *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638; *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590, autorisation de pourvoi accordée [1986] 1 R.C.S. x; *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307; *Boeckh v. Gowganda-Queen Mines, Ltd.* (1912), 6 D.L.R. 292; *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127; *Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association*, Cour div. Ont., 17 janvier 1979, les juges Galligan, Van Camp et Henry (inédit); *Daciuk v. Manitoba Labour Board*, B.R. Man., 25 juin 1985, le juge Dureault (inédit); *Metropolitan Toronto School Board v. Minister of Education* (1985), 6 C.P.C. (2d) 281; *Chesapeake and Ohio Railway Co. v. Ball*, [1953] O.R. 843; *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2; *Weisfeld c. R.* (1985), 16 C.R.R. 24; *Turmel c. Conseil de la radiodiffusion et des télécommunications canadiennes* (1985), 16 C.R.R. 9; *Marchand v. Simcoe County Board of Education* (1984), 10 C.R.R. 169; *Gould c. Procureur général du Canada*, [1984] 2 R.C.S. 124, conf. [1984] 1 C.F. 1133, infirmant [1984] 1 C.F. 1119; *Cayne v. Global Natural Resources plc.*, [1984] 1 All E.R. 225; *R. c. Jones*, [1986] 2 R.C.S. 284; *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66; *Procureur général du Québec c. Greater Hull School Board*, [1984] 2 R.C.S. 575; *Paci-*

Pacific Trollers Association v. Attorney General of Canada, [1984] 1 F.C. 846; *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791; *Smith v. Inner London Education Authority*, [1978] 1 All E.R. 411; *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373; *Bregzis v. University of Toronto* (1986), 9 C.C.E.L. 282; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146; *Rio Hotel Ltd. v. Liquor Licensing Board*, [1986] 2 S.C.R. ix; *Home Oil Distributors Ltd. v. Attorney-General of British Columbia*, [1940] S.C.R. 444; *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342; *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *Garden Cottage Foods Ltd. v. Milk Marketing Board*, [1983] 2 All E.R. 770.

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APPEAL from a judgment of the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, ordering a stay of proceedings pending disposition of a constitutional challenge and allowing an appeal from a decision of Krindle J. (1985), 36 Man. R. (2d) 152, denying an application for a stay of proceedings before The Manitoba Labour Board. Appeal allowed.

Stuart Whitley and *Valerie J. Matthews-Lemieux*, for the appellant.

Walter L. Ritchie, Q.C., and *Robin Kersey*, for the respondent Metropolitan Stores (MTS) Limited.

A. R. McGregor, Q.C., and *D. M. Shrom*, for the respondent the Manitoba Food and Commercial Workers, Local 832.

David Gisser, for the respondent The Manitoba Labour Board.

The judgment of the Court was delivered by

BEETZ J.—

I The Facts, the Proceedings and the Judgments of the Courts Below

The facts are not in dispute. Here is how the Manitoba Court of Appeal (1985), 37 Man. R. (2d) 181, described them at p. 181:

Under the terms of the *Labour Relations Act*, C.C.S.M., c. L-10, there is provision allowing the

Hanbury, Harold Grenville and Ronald Harling Maudsley. *Modern Equity*, 12th ed. By Jill E. Martin. London: Stevens & Sons, 1985.

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Rogers, Brian MacLeod and George W. Hately. «Getting the Pre-Trial Injunction» (1982), 60 *R. du B. can.* 1.

Sharpe, Robert J. *Injunctions and Specific Performance*. Toronto: Canada Law Book, 1983.

POURVOI contre un arrêt de la Cour d'appel du Manitoba (1985), 37 Man. R. (2d) 181, qui a ordonné la suspension d'instance en attendant une décision sur une contestation constitutionnelle et qui a accueilli un appel interjeté d'une décision du juge Krindle (1985), 36 Man. R. (2d) 152, rejetant une demande de suspension des procédures devant The Manitoba Labour Board. Pourvoi accueilli.

Stuart Whitley et *Valerie J. Matthews-Lemieux*, pour l'appelant.

Walter L. Ritchie, c.r., et *Robin Kersey*, pour l'intimée Metropolitan Stores (MTS) Limited.

A. R. McGregor, c.r., et *D. M. Shrom*, pour l'intimé le Manitoba Food and Commercial Workers, section locale 832.

David Gisser, pour l'intimée The Manitoba Labour Board.

Version française du jugement de la Cour rendu par

LE JUGE BEETZ—

I Les faits, la procédure et les jugements des tribunaux d'instance inférieure

Les faits ne font l'objet d'aucune contestation. La Cour d'appel du Manitoba (1985), 37 Man. R. (2d) 181, les relate ainsi à la p. 181:

[TRADUCTION] *The Labour Relations Act*, C.C.S.M., chap. L10, contient une disposition qui autorise The

Manitoba Labour Board to impose a first collective agreement upon the employer and the union, in circumstances where bargaining for a first contract has not been fruitful. In this particular case the respondent union is the certified bargaining agent, but has not been successful in negotiating a first collective agreement with the appellant employer. The union applied to have the Manitoba Labour Board impose a first contract.

The employer then commenced proceedings, by way of originating notice of motion in the Manitoba Court of Queen's Bench, to have those provisions of the *Labour Relations Act* under which a first collective agreement might be imposed, declared invalid, as contravening the *Charter of Rights and Freedoms*. Within the framework of that action, the employer then applied by way of motion for an order to stay the Manitoba Labour Board until such time as the issue as to the validity of the legislation might be heard by a judge of the Court of Queen's Bench. The motion for a stay was denied by Krindle, J. (see 36 Man. R. (2d) 152). The board, unfettered by a stay order, then indicated that if the parties failed to conclude a first collective agreement through further negotiations by September 25, 1985, the board would proceed to impose a first contract upon the parties within 30 days thereafter.

The employer launched an appeal from the decision of Krindle J. refusing a stay order. The Manitoba Court of Appeal allowed the appeal and granted a stay.

The reasons of Krindle J. (1985), 36 Man. R. (2d) 152, for refusing a stay read in part as follows at pp. 153-54:

The employer argues that the granting of a stay will maintain the status quo between the parties until the constitutional challenge has been dealt with. I cannot accept that argument. The entire notion of maintaining a status quo in these circumstances is fanciful. As of the date of the application for certification there were 22 employees in the unit. At the date this matter came to Court, only five of the original 22 continued to be employed. The industry in question is a high turn-over one with no history at all of trade union involvement. At some point the union was able to gain the support of a majority of the 22. Nine employees wrote in letters opposing the certification of the union.

Manitoba Labour Board [ci-après «la Commission»] à imposer une première convention collective à un employeur et à un Syndicat lorsque les négociations en vue d'une première convention se sont révélées infructueuses. Dans le cas présent, le syndicat intimé est l'agent négociateur accrédité, mais il n'a pas réussi à conclure une première convention collective avec l'employeur appelant. Le syndicat a donc demandé à la Commission d'imposer une première convention.

L'employeur a alors engagé, par voie d'avis de requête introductif d'instance, une procédure devant la Cour du Banc de la Reine du Manitoba visant à faire déclarer les dispositions de *The Labour Relations Act* qui permettent d'imposer une première convention collective invalides pour le motif qu'elles contrevenaient à la *Charte des droits et libertés*. Dans le cadre de cette action, l'employeur a ensuite présenté une requête pour obtenir une suspension d'instance devant la Commission en attendant que la question de la validité de la loi puisse être entendue par un juge de la Cour du Banc de la Reine. Cette requête a été rejetée par le juge Krindle (voir 36 Man. R. (2d) 152). La Commission, n'étant pas assujettie à une ordonnance de suspension, a fait savoir aux parties que, si de nouvelles négociations n'aboutissaient pas à un accord d'ici le 25 septembre 1985, elle leur imposerait une première convention collective dans les trente jours de cette date.

L'employeur a porté en appel la décision du juge Krindle refusant d'accorder une ordonnance de suspension. La Cour d'appel du Manitoba a accueilli l'appel et a accordé la suspension.

Voici en partie les raisons qui ont amené le juge Krindle (1985), 36 Man. R. (2d) 152, à refuser la suspension, aux pp. 153 et 154:

[TRADUCTION] L'employeur soutient que la suspension, si elle est accordée, permettra de maintenir le statu quo entre les parties en attendant que la question constitutionnelle soit tranchée. Je ne puis retenir cet argument. Dans les présentes circonstances, la notion même du maintien du statu quo est irréaliste. À la date de la demande d'accréditation, l'unité comptait vingt-deux employés. Lorsque l'affaire est parvenue devant cette Cour, seulement cinq de ces vingt-deux employés y étaient encore. L'industrie en question a un taux de roulement élevé et elle est toujours restée en dehors du mouvement syndical. À un moment donné, le Syndicat a pu néanmoins obtenir le soutien de la majorité des vingt-deux employés. Neuf ont écrit des lettres exprimant leur opposition à l'accréditation du Syndicat.

We are not here looking to a strong base of support that can withstand lengthy periods of having the union appear to do nothing whatsoever for these people. It is acknowledged by both counsel that this case may well have to wend its way up to the Supreme Court of Canada for final resolution, a matter which will take years. Considering the high turn-over rate in the unit and the lack of union tradition in the unit, it seems to me to be self evident that the protracted failure of the union to accomplish anything for the employees in the unit virtually guarantees an erosion of support for the bargaining agent. The right of 55% of the employees within the unit to compell [*sic*] decertification of the bargaining agent, the right of another union to apply for certification on behalf of those employees, are rights not affected by the stay of proceedings. The status quo cannot be frozen. Attempts to freeze it will prejudice the position of the union.

The employer argues that the imposition of a first contract may prejudice the position of the employer. It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation . . . .

Counsel for the employer also raises concern about the contents of the agreement to be imposed. The unit in question is situate in a mall on an Indian Reservation outside The Pas. The terms of the lease between the employer and the owner of the shopping mall contain a provision regarding the employment of a certain minimum percentage of Indian people. That requirement may cause problems if the usual seniority clauses present in most agreements are simply rubber stamped into this first agreement. It may well be that the traditional seniority provisions will have to be modified somewhat in this case to accommodate the requirements of the lease. Surely, though, that is a matter to be brought to the attention of the Board during the course of the Board's hearings into settling the terms of the agreement. I cannot imagine that the Board would fail to give consideration to such a problem in arriving at those terms.

. . .

It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year

Il n'existe pas en l'espèce un appui solide pouvant tenir pendant de longues périodes au cours desquelles le Syndicat paraît ne rien faire du tout pour ces gens. Les deux avocats conviennent que le litige pourra bien devoir être porté jusque devant la Cour suprême du Canada pour son règlement définitif, ce qui prendra des années. Compte tenu du taux de roulement élevé et du manque d'une tradition syndicale dans l'unité de négociation, il me semble évident que, si le Syndicat reste longtemps sans accomplir quoi que ce soit pour les employés composant cette unité, l'érosion de l'appui dont jouit l'agent négociateur est une quasi-certitude. Le droit de 55 p. 100 des employés au sein de l'unité de forcer la révocation de l'accréditation syndicale et le droit de tout autre syndicat de demander l'accréditation au nom de ces employés sont des droits auxquels la suspension d'instance ne portera pas atteinte. Il est impossible de maintenir le statu quo en l'espèce. Toute tentative de le faire nuira à la position du Syndicat.

L'employeur pour sa part prétend que sa situation pourrait être affaiblie si une première convention collective était imposée. Cela pourrait conférer au syndicat une apparence de force de négociation qu'il ne possède pas en réalité. Cela pourrait permettre au Syndicat de bénéficier d'un contrat qu'il n'aurait pas pu réussir à négocier par lui-même. C'était toutefois là l'objet de la loi . . .

L'avocat de l'employeur soulève en outre des questions concernant la teneur de la convention devant être imposée. L'unité de négociation en cause se trouve dans un centre commercial sur une réserve indienne en dehors de Le Pas. Le bail intervenu entre l'employeur et le propriétaire du centre commercial contient une disposition relative à l'embauche d'un pourcentage minimum d'Indiens. Cette exigence peut créer des problèmes si les clauses habituelles en matière d'ancienneté qui figurent dans la plupart des conventions collectives sont simplement incorporées telles quelles dans la première convention. Il se peut bien que les dispositions traditionnelles relatives à l'ancienneté doivent être légèrement modifiées dans le cas présent pour assurer le respect des exigences du bail. Mais cela est certainement un point à soulever devant la Commission au cours des audiences en vue d'arrêter les termes de la convention. Je ne puis concevoir que la Commission omette de prendre ce problème en considération en fixant ces termes.

. . .

Il me semble qu'accorder une suspension en l'espèce constituerait une invitation à en faire autant dans la plupart des autres cas de demandes de première convention ou de demandes visant à obtenir l'inclusion obligatoire de certains articles dans des conventions négociées.

period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.

In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

In reviewing the decision of the learned motion judge, the Manitoba Court of Appeal did not make any finding that Krindle J. was in error in concluding that stay ought to be refused, or that she had declined to exercise her discretion or had acted on a wrong principle in exercising her discretion. The Court of Appeal, at pp. 181-83, exercised fresh discretion based on additional considerations which, in its view, were not before the motion judge:

The appeal first came before this court on September 10, 1985 before a panel consisting of Matas, Huband and Philp, JJ.A. Before any hearing took place on the merits of the appeal, the court adjourned for a few moments, consulted with Court of Queen's Bench authorities as to the prospect of an earlier date for a hearing in the Queen's Bench of the employer's attack on the legislation, resumed the hearing and informed counsel that one day could be set aside for such a hearing on September 25, 1985. This would enable a hearing on the validity of the legislation to take place before any collective agreement could possibly be imposed. Counsel for employer, union and the Manitoba Labour Board, agreed to the September 25th hearing date . . . .

It was understood by all concerned that the one-day hearing would proceed on September 25th. On that date counsel appeared before Glowacki, J., of the Court of Queen's Bench, but in addition, counsel representing the Canadian Labour Congress also appeared, requesting permission to intervene. Glowacki, J., was advised by counsel for the C.L.C. that it wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "prescribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

En réalité, pendant une durée de deux ou trois ans avant que ces articles ne puissent être jugés invalides, leur application serait suspendue, et ce, dans des circonstances où il est pratiquement impossible de maintenir le statu quo.

À mon avis, dans la situation qui se présente en l'espèce et d'une manière plus générale, selon la prépondérance des inconvénients, il convient de faire comme si les articles étaient valides tant qu'on n'aura pas déterminé que ce n'est pas le cas.

En révisant la décision de première instance, la Cour d'appel du Manitoba n'a pas dit que le juge Krindle avait eu tort de conclure qu'il y avait lieu de ne pas accorder de suspension, ni qu'elle avait refusé d'exercer son pouvoir discrétionnaire, ni qu'elle avait appliqué un principe erroné dans l'exercice de ce pouvoir. De fait, la Cour d'appel aux pp. 181 à 183 a exercé un nouveau pouvoir discrétionnaire en se fondant sur des données supplémentaires qui, selon elle, n'avaient pas été présentées au juge de première instance:

[TRADUCTION] L'appel est parvenu devant cette cour pour la première fois le 10 septembre 1985, devant les juges Matas, Huband et Philp. Avant que l'appel ne soit entendu au fond, la cour a levé la séance pendant quelques minutes et a consulté les autorités de la Cour du Banc de la Reine sur la possibilité d'avancer la date d'audition devant cette dernière, relativement à l'attaque de l'employeur contre la loi. À la reprise de la séance, la cour a informé les avocats que la journée du 25 septembre 1985 pourrait être réservée à une telle audition. Cela permettrait que la question de la validité de la loi soit débattue avant qu'une convention collective ne puisse être imposée. Les avocats de l'employeur, du Syndicat et de la Commission se sont entendus sur le 25 septembre comme date d'audition . . .

Tous les intéressés ont bien compris que l'audition d'une durée d'une journée se tiendrait le 25 septembre. Ce jour-là, les avocats se sont présentés devant le juge Glowacki de la Cour du Banc de la Reine; mais l'avocat du Congrès du travail du Canada en a aussi fait de même en demandant l'autorisation d'intervenir. L'avocat du C.T.C. a fait savoir au juge Glowacki que le Congrès désirait produire une quantité considérable de preuves portant sur la question potentielle de savoir si la loi attaquée constituait une restriction raisonnable qui est prescrite par une «règle de droit» et «dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique» au sens de l'article premier de la *Charte des droits et libertés*.

Instead of the planned one-day hearing, a hearing of several days' duration was envisaged. Instead of the matter proceeding on September 25th, Glowacki, J., fixed a hearing date for some time in December 1985.

Once again the prospect of a collective agreement being imposed before a hearing to determine the validity of the legislation became real. Counsel for the employer immediately requested a hearing in this court on the appeal from the order of Krindle, J., denying the stay order which had been adjourned sine die on September 10th. The present panel heard the appeal on the afternoon of September 25th.

At the conclusion of that hearing, it was suggested to counsel for the Manitoba Labour Board, that in order to expedite matters and obtain a decision on the validity of the legislation, it was open to the Manitoba Labour Board to direct a reference to this court. We are informed that there are other cases besides this one where provisions of the *Labour Relations Act* are under attack as violating the *Charter*, and it was suggested that these matters might also be resolved by way of a direct reference to this court. We have now been informed however that the board " ... will not, at this time, be requesting a reference to the Court of Appeal pursuant to the *Labour Relations Act*".

. . .

By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.

There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.

In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned motions judge. Additional considerations affecting the

Au lieu de l'audition d'une journée qui avait été prévue, on envisageait maintenant une audition qui durerait plusieurs jours. Au lieu d'entendre l'affaire le 25 septembre, le juge Glowacki a fixé une date d'audition au cours du mois de décembre 1985.

Une fois de plus, il existait une possibilité réelle qu'une convention collective soit imposée avant la tenue d'une audition pour déterminer la validité de la loi en cause. L'avocat de l'employeur a immédiatement demandé à cette cour d'entendre l'appel interjeté contre l'ordonnance du juge Krindle refusant la suspension, appel qui avait été ajourné *sine die* le 10 septembre. La formation actuelle a entendu l'appel le 25 septembre en après-midi.

À la fin de cette audition, on a dit à l'avocat de la Commission que, pour accélérer les choses et pour obtenir une décision sur la validité de la loi, la Commission pouvait renvoyer l'affaire à cette cour. On nous informe qu'en plus de la présente instance il y en a d'autres où des dispositions *The Labour Relations Act* sont attaquées parce qu'elles contreviendraient à la *Charte*, et, a-t-on prétendu, ces questions pourraient également être résolues par voie d'un renvoi direct devant cette cour. Nous avons cependant appris que la Commission « ... n'entend pas, pour le moment, demander un renvoi devant la Cour d'appel en vertu de *The Labour Relations Act*».

. . .

Par son avis de requête introductif d'instance, l'employeur soulève une question sérieuse relativement à la constitutionnalité de plusieurs articles de *The Labour Relations Act*. Comme je l'ai déjà fait remarquer, d'autres dispositions de la Loi sont attaquées dans d'autres litiges. Quand le juge Krindle a rejeté la demande initiale d'ordonnance de suspension, elle ignorait l'intervention envisagée en l'espèce par le Congrès du travail du Canada de même que l'existence d'autres litiges dans lesquels la Loi faisait l'objet de contestations fondées sur la *Charte*.

Il y a en outre un nouvel élément en ce sens que la Cour du Banc de la Reine aurait pu rendre plus rapidement une décision au fond relativement à la contestation portant sur la loi, et une audience visant à déterminer la validité des articles attaqués aurait pu avoir lieu à la fin de septembre, n'eût été l'intervention du Congrès du travail du Canada.

En bref, il ne s'agit plus d'une affaire où cette cour se trouve à réviser une ordonnance rendue par le savant juge des requêtes dans l'exercice de son pouvoir discrétionnaire. D'autres considérations touchant l'exercice du pouvoir discrétionnaire ont maintenant été soulevées, si

exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.

In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.

A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

In allowing the appeal, the Manitoba Court of Appeal ordered that:

all proceedings before the Manitoba Labour Board relating to the application for settlement of a first collective agreement between the Applicant and the Respondent Manitoba Food and Commercial Workers, Local 832, pursuant to Section 75.1 of *The Labour Relations Act* (Case No. 586/85/LRA), be stayed until after this action has been heard and determined by the Court of Queen's Bench, or further Order of this Court.

It is from this interlocutory order that the Attorney General is appealing by leave of this Court. He is supported by the Manitoba Food and Commercial Workers, Local 832, (the "Union") and by The Manitoba Labour Board, (the "Board").

II The Issues

The points in issue, according to appellant's factum, are as follows:

1. Did the Manitoba Court of Appeal err in failing to recognize that a presumption of constitutional validity continues to exist where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*?
2. Did the Manitoba Court of Appeal err in exercising its discretionary power to grant a stay of proceedings until the constitutional validity of section 75.1 of *The Labour Relations Act*, C.C.S.M., c. L10 has been determined, since the effect of the stay is to render the legislation inoperative?
3. Did the Manitoba Court of Appeal err when it interfered with the exercise of the trial Judge's discretion in refusing to grant a stay of proceedings?

bien que la cour est autorisée à exercer un nouveau pouvoir discrétionnaire.

Selon nous, il ne serait pas sage de permettre que la Commission impose une première convention collective alors que la loi en cause pourrait quelques mois plus tard être déclarée contraire à la *Charte* et, partant, inconstitutionnelle.

La suspension est donc accordée et les dépens suivront l'issue de la cause. Nous engageons les parties à procéder promptement à une audience sur le fond de la requête de l'employeur.

La Cour d'appel du Manitoba a accueilli l'appel et a ordonné:

[TRADUCTION] que toutes les procédures engagées devant la Commission relativement à la demande de règlement d'une première convention collective entre la requérante et l'intimé, Manitoba Food and Commercial Workers, section locale 832, fondée sur l'art. 75.1 de *The Labour Relations Act* (affaire nº 586/85/LRA), soient suspendues jusqu'à ce que la présente action ait été entendue et tranchée par la Cour du Banc de la Reine ou sous réserve d'une autre ordonnance de cette cour.

C'est contre cette ordonnance interlocutoire que le procureur général a formé un pourvoi avec l'autorisation de cette Cour. Il est appuyé par le Manitoba Food and Commercial Workers, section locale 832 (le «Syndicat») et par The Manitoba Labour Board (la «Commission»).

II Les questions en litige

D'après le mémoire de l'appelant, les points en litige sont les suivants:

[TRADUCTION]

1. La Cour d'appel du Manitoba a-t-elle commis une erreur en ne reconnaissant pas qu'une présomption de constitutionnalité subsiste lorsqu'une loi fait l'objet d'une contestation fondée sur la *Charte canadienne des droits et libertés*?
2. Étant donné qu'une suspension a pour effet de rendre la loi inopérante, la Cour d'appel du Manitoba a-t-elle commis une erreur en exerçant son pouvoir discrétionnaire de manière à accorder la suspension d'instance en attendant une décision sur la constitutionnalité de l'art. 75.1 de *The Labour Relations Act*, C.C.S.M., chap. L10?
3. La Cour d'appel du Manitoba a-t-elle commis une erreur en modifiant la décision du juge de première instance qui avait, dans l'exercice de son pouvoir discrétionnaire, refusé d'accorder la suspension d'instance?

4. Did the Manitoba Court of Appeal apply proper legal principles when it decided that proceedings before a quasi-judicial tribunal; namely, a labour board constituted under provincial legislation, should be stayed?

The first issue stated by the appellant is related to the existence of a so-called presumption of constitutional validity of a law when challenged under the *Canadian Charter of Rights and Freedoms* and will be dealt with first.

The second and fourth issues essentially address the same question: in a case where the constitutionality of a legislative provision is challenged, what principles govern the exercise by a Superior Court judge of his discretionary power to order a stay of proceedings until it has been determined whether the impugned provision is constitutional? This issue arises not only in *Charter* cases but also in other constitutional cases and I propose to review some cases dealing with the distribution of powers between Parliament and the legislatures and some administrative law decisions having to do with the *vires* of delegated legislation: as I read those cases, there is no essential difference between this type of cases and the *Charter* cases in so far as the principles governing the grant of interlocutory injunctive relief are concerned.

Finally, the third issue raises the question of the appropriateness of the Court of Appeal's intervention in the motion judge's discretion; it will be examined in the last part of this judgment.

III The *Canadian Charter of Rights and Freedoms* and the So-called Presumption of Constitutional Validity

According to the appellant, the Manitoba Court of Appeal erred in granting a stay of the proceedings since it failed "to recognize that a presumption of constitutional validity continues to exist

4. La Cour d'appel du Manitoba a-t-elle appliqué les principes de droit appropriés quand elle a décidé que des procédures devant un tribunal quasi judiciaire, en l'occurrence une commission des relations de travail constituée en vertu d'une loi provinciale, devaient être suspendues?

La première question formulée par l'appelant se rapporte à l'existence d'une prétendue présomption de constitutionnalité dans le cas d'une loi dont la validité est contestée en vertu de la *Charte canadienne des droits et libertés*; j'aborderai cette question en premier.

Les deuxième et quatrième questions se ramènent essentiellement au même point: lorsque la constitutionnalité d'une disposition législative est contestée, quels sont les principes que doit suivre un juge de la cour supérieure dans l'exercice de son pouvoir discrétionnaire d'ordonner la suspension d'instance en attendant une décision sur la constitutionnalité de la disposition attaquée? Cette question se pose non seulement dans les affaires relevant de la *Charte* mais aussi dans d'autres affaires constitutionnelles et je me propose d'examiner certaines décisions portant sur le partage des pouvoirs entre le Parlement et les législatures ainsi que quelques décisions de droit administratif concernant la validité de la législation déléguée. Selon mon interprétation de cette jurisprudence, il n'existe, du point de vue des principes applicables au redressement sous forme d'injonction interlocutoire, aucune différence fondamentale entre ce type d'affaires et celles relevant de la *Charte*.

Finalement, le point soulevé par la troisième question est de savoir si la Cour d'appel était justifiée de modifier la décision prise par le juge de première instance dans l'exercice de son pouvoir discrétionnaire. Cette question sera étudiée dans la dernière partie des présents motifs.

III La *Charte canadienne des droits et libertés* et la prétendue présomption de constitutionnalité

Selon l'appelant, la Cour d'appel du Manitoba a eu tort d'accorder la suspension d'instance parce qu'elle n'a pas reconnu [TRADUCTION] «qu'une présomption de constitutionnalité subsiste lors-

where legislation is being challenged on the basis of the *Canadian Charter of Rights and Freedoms*".

I should state at the outset that, while I have reached the conclusion that the appeal ought to be allowed, it is not on account of what the appellant calls a presumption of constitutional validity.

We have not been told much about the nature, weight, scope and meaning of that presumption. For lack of a better definition, I must assume that the so-called presumption means exactly what it says, namely, that a legislative provision challenged on the basis of the *Charter* must be presumed to be consistent with the *Charter* and of full force and effect.

Not only do I find such a presumption not helpful, but, with respect, I find it positively misleading. If it is a presumption strictly so-called, surely it is a rebuttable one. Otherwise a stay of proceedings could never be granted. But to say that the presumption is rebuttable is to open the way for a rebuttal. This in its turn involves a consideration of the merits of the case which is generally not possible at the interlocutory stage.

A reason of principle related to the character of the *Charter* also persuades me to dismiss the appellant's submission based on the presumption of constitutional validity. Even when one has reached the merits, there is no room for the presumption of constitutional validity within the literal meaning suggested above: the innovative and evolutive character of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the *Charter*.

As was said by Lamer J., speaking for himself and five other members of the Court in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 496:

> The truly novel features of the *Constitution Act, 1982* are that it has sanctioned the process of constitutional adjudication and has extended its scope so as to encompass a broader range of values.

qu'une loi fait l'objet d'une contestation fondée sur la *Charte canadienne des droits et libertés*».

Je souligne dès l'abord que si j'ai conclu que le pourvoi doit être accueilli, ce n'est pas en raison de ce que l'appelant qualifie de présomption de constitutionnalité.

On nous a dit fort peu de choses sur la nature, le poids, la portée et le sens de cette présomption. Faute d'une meilleure définition, je dois supposer que la prétendue présomption a son sens littéral, savoir qu'une disposition législative attaquée en vertu de la *Charte* doit être présumée conforme à celleci et, en conséquence, pleinement opérante.

Non seulement je trouve qu'une telle présomption ne nous est d'aucun secours mais, avec égards, j'estime qu'elle est carrément trompeuse. S'il s'agit d'une présomption au sens strict, elle est assurément réfutable, sinon une suspension d'instance ne pourrait jamais être accordée. Mais dire que la présomption est réfutable c'est ouvrir la voie à une réfutation. Or, cela nécessite que l'affaire soit examinée au fond, chose généralement impossible au stade interlocutoire.

Il y a en outre une raison de principe reliée à la nature de la *Charte* qui me persuade d'écarter l'argument de l'appelant fondé sur la présomption de constitutionnalité. Même au stade du débat sur le fond, il n'y a pas de place pour la présomption de constitutionnalité selon le sens littéral déjà mentionné: le caractère innovateur et évolutif de la *Charte canadienne des droits et libertés* s'oppose à la notion voulant qu'une disposition législative puisse être présumée conforme à celle-ci.

Comme l'a dit le juge Lamer, en son propre nom et au nom de cinq autres membres de la Cour, dans *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, à la p. 496:

> Les éléments vraiment nouveaux de la *Loi constitutionnelle de 1982* tiennent à ce qu'elle a sanctionné le processus de décision constitutionnelle et en a étendu la portée de manière à englober un plus grand nombre de valeurs.

The *Charter* extends its protection to rights of a new type such as mobility rights and minority language educational rights. It is significant also that the effect of s. 15, relating to equality rights, was delayed by three years pursuant to s. 32(2) of the *Charter*, presumably to give time to Parliament and the legislatures to prepare for the necessary adjustments.

Furthermore, the innovative character of the *Charter* affects even traditional rights already recognized before the coming into force of the *Charter* and which must now be viewed in a new light. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court declined to restrict the meaning of the freedom of conscience and religion guaranteed by the *Charter* to such interpretation of this freedom as had prevailed before the *Charter*. At pages 343-44 of the *Big M* case, Dickson J., as he then was, speaking for himself and four other members of the Court, wrote as follows:

> ... it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter*'s entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> **2.** Everyone has the following fundamental freedoms:
>
> (*a*) Freedom of conscience and religion;
>
> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which present as well as future legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*.

Similarly, as traditional a right as the presumption of innocence is given a greater degree of protection under the *Charter* than it has received prior to the *Charter*: *R. v. Oakes*, [1986] 1 S.C.R. 103.

Thus, the setting out of certain rights and freedoms in the *Charter* has not frozen their content.

La *Charte* fait bénéficier de sa protection des droits d'un nouveau type tels que la liberté de circulation et d'établissement et les droits à l'instruction dans la langue de la minorité. Il est révélateur aussi que le par. 32(2) de la *Charte* a retardé de trois ans l'entrée en vigueur de l'art. 15 relatif aux droits à l'égalité, vraisemblablement pour donner au Parlement et aux législatures le temps de se préparer aux adaptations qui s'imposeraient.

De plus, le caractère innovateur de la *Charte* touche même les droits traditionnels déjà reconnus avant son entrée en vigueur et qui doivent maintenant être regardés sous un jour nouveau. Dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, cette Cour a refusé de limiter le sens de la liberté de conscience et de religion garantie par la *Charte* à celui qu'on lui prêtait antérieurement à l'adoption de la *Charte*. Aux pages 343 et 344 de l'arrêt *Big M*, le juge Dickson, alors juge puîné, parlant en son propre nom et au nom de quatre autres membres de la Cour, a écrit:

> ... il est certain que la *Charte canadienne des droits et libertés* ne fait pas que «reconnaître et déclarer» l'existence de droits déjà existants dont l'étendue était délimitée par la législation en vigueur au moment de son enchâssement dans la Constitution. Le texte de la *Charte* est impératif. Elle évite de parler de droits existants ou de droits qui continuent d'exister et fait plutôt, à l'art. 2, cette proclamation retentissante:
>
> **2.** Chacun a les libertés fondamentales suivantes:
>
> *a*) liberté de conscience et de religion;
>
> Je suis d'accord avec l'intimée que la *Charte* vise à établir une norme en fonction de laquelle les lois actuelles et futures seront appréciées. Donc, le sens du concept de la liberté de conscience et de religion ne doit pas être déterminé uniquement en fonction de la mesure dans laquelle les Canadiens jouissaient de ce droit avant la proclamation de la *Charte*.

De même, un droit aussi traditionnel que la présomption d'innocence reçoit sous la *Charte* une plus grande protection qu'auparavant: *R. c. Oakes*, [1986] 1 R.C.S. 103.

Donc, si certains droits et libertés sont consacrés dans la *Charte*, ils ne restent pas pour autant figés.

The meaning of those rights and freedoms has in many cases evolved, and, given the nature of the *Charter*, must remain susceptible to evolve in the future:

> In my opinion the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.

(*Per* Le Dain J., dissenting, although not on this point, in *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 638.)

The views of Le Dain J. reflect those of Dickson J., as he then was, in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, at p. 155:

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers.

In my view, the presumption of constitutional validity understood in the literal sense mentioned above, and whether it is applied to laws enacted prior to the *Charter* or after the *Charter*, is not compatible with the innovative and evolutive character of this constitutional instrument.

This proposition should not be taken as necessarily affecting what has sometimes been designated, perhaps improperly, as other meanings of the "presumption of constitutionality".

One such meaning refers to the elementary rule of legal procedure according to which "the one

Le sens de ces droits et libertés a évolué dans plusieurs cas et, étant donné la nature de la *Charte*, il doit pouvoir continuer à le faire:

> Selon moi, la prémisse portant qu'il faut présumer que les rédacteurs de la *Charte* ont voulu que ses termes reçoivent le sens que leur donnait la jurisprudence à l'époque de son adoption n'est pas un guide fiable quant à la façon de l'interpréter et de l'appliquer. De par sa nature même une charte constitutionnelle des droits et libertés doit être rédigée en termes généraux susceptibles d'évolution et d'adaptation par les tribunaux.

(Le juge Le Dain, dissident, mais non sur ce point, dans l'affaire *R. c. Therens*, [1985] 1 R.C.S. 613, à la p. 638.)

Les vues du juge Le Dain reflètent celles qu'a exprimées le juge Dickson, alors juge puîné, dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, à la p. 155:

> L'interprétation d'une constitution est tout à fait différente de l'interprétation d'une loi. Une loi définit des droits et des obligations actuels. Elle peut être facilement adoptée et aussi facilement abrogée. Par contre, une constitution est rédigée en prévision de l'avenir. Elle vise à fournir un cadre permanent à l'exercice légitime de l'autorité gouvernementale et, lorsqu'on y joint une *Déclaration* ou une *Charte des droits*, à la protection constante des droits et libertés individuels. Une fois adoptées, ses dispositions ne peuvent pas être facilement abrogées ou modifiées. Elle doit par conséquent être susceptible d'évoluer avec le temps de manière à répondre à de nouvelles réalités sociales, politiques et historiques que souvent ses auteurs n'ont pas envisagées.

À mon avis, la présomption de constitutionnalité dans son sens littéral évoqué précédemment, qu'on l'applique à des lois adoptées avant ou après la *Charte*, est incompatible avec le caractère innovateur et évolutif de ce texte constitutionnel.

Il ne faut cependant pas conclure que cette proposition a nécessairement un effet sur ce qu'on a parfois appelé, peut-être improprement, les autres significations de la «présomption de constitutionnalité».

L'une de ces significations se rapporte à la règle fondamentale en matière de procédure suivant

who asserts must prove" and "the onus of establishing that legislation violates the Constitution undeniably lies with those who oppose the legislation": D. Gibson, *The Law of the Charter: General Principles* (1986), pp. 56 and 58. By definition, such a rule is essentially directed to the merits of the case.

Still another meaning of the "presumption of constitutionality" is the rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution. This rule of construction is well known and generally accepted and applied under the provisions of the Constitution relating to the distribution of powers between Parliament and the provincial legislatures. It is this rule which has led to the "reading down" of certain statutes drafted in terms sufficiently broad to reach objects not within the competence of the enacting legislature: *McKay v. The Queen*, [1965] S.C.R. 798. In the *Southam* case, *supra*, a *Charter* case, it was held at p. 169 that it "should not fall to the courts to fill in the details that will render legislative lacunae constitutional". But that was a question of "reading in", not "reading down". The extent to which this rule of construction otherwise applies, if at all, in the field of the *Charter* is a matter of controversy: *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638, at p. 658 (Ont. C.A.); *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590, at p. 628 (Alta. C.A.), leave to appeal has been granted, [1986] 1 S.C.R. x; P.-A. Côté, "La préséance de la Charte canadienne des droits et libertés," in *La Charte canadienne des droits et libertés: Concepts et impacts* (1984), pp. 124-26; R. M. McLeod, et al., eds., *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (1983), vol. 1, pp. 2-198 to 2-209; P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), p. 327; D. Gibson, *The Law of the Charter: General Principles* (1986), pp. 57, 58 and 186-88. I refrain from expressing any view on this question which also arises only when the merits are being considered.

laquelle [TRADUCTION] «celui qui fait une allégation doit la prouver» et [TRADUCTION] «le fardeau d'établir qu'une loi va à l'encontre de la Constitution incombe indubitablement à ceux qui la contestent»: D. Gibson, *The Law of the Charter: General Principles* (1986), aux pp. 56 et 58. Par définition, une telle règle vise essentiellement le fond du litige.

Dans un autre sens, la «présomption de constitutionnalité» est la règle d'interprétation selon laquelle une loi contestée doit, autant que possible, être interprétée de manière qu'elle soit conforme à la Constitution. Cette règle d'interprétation est bien connue et est généralement acceptée et appliquée sous l'empire des dispositions de la Constitution relatives au partage des pouvoirs entre le Parlement et les législatures provinciales. C'est cette règle qui a amené une «interprétation atténuée» de certaines lois rédigées en des termes suffisamment larges pour viser des objets hors de la compétence de la législature qui les a adoptées: *McKay v. The Queen*, [1965] R.C.S. 798. Dans l'arrêt *Southam*, précité, qui porte sur la *Charte*, on a conclu, à la p. 169, «[qu']il n'appartient pas aux tribunaux d'ajouter les détails qui rendent constitutionnelles les lacunes législatives». Mais il y était question d'une «interprétation large» et non pas d'une «interprétation atténuée». Quant à savoir si cette règle d'interprétation s'applique par ailleurs dans le domaine de la *Charte* est un point controversé: *Re Federal Republic of Germany and Rauca* (1983), 145 D.L.R. (3d) 638, à la p. 658 (C.A. Ont.); *Black v. Law Society of Alberta*, [1986] 3 W.W.R. 590, à la p. 628 (C.A. Alb.), autorisation de pourvoi accordée, [1986] 1 R.C.S. x; P.-A. Côté, «La préséance de la Charte canadienne des droits et libertés,» dans *La Charte canadienne des droits et libertés: Concepts et impacts* (1984), aux pp. 124 à 126; R. M. McLeod, et al., eds., *The Canadian Charter of Rights: The Prosecution and Defence of Criminal and Other Statutory Offences* (1983), vol. 1, aux pp. 2-198 à 2-209; P. W. Hogg, *Constitutional Law of Canada* (2nd ed. 1985), à la p. 327; D. Gibson, *The Law of the Charter: General Principles* (1986), aux pp. 57, 58 et 186 à 188. Je m'abstiens d'exprimer une opinion sur cette question qui, elle aussi, ne se pose qu'au moment de l'examen du fond du litige.

IV The Principles Which Govern the Exercise of the Discretionary Power to Order a Stay of Proceedings Pending the Constitutional Challenge of a Legislative Provision

The second question in issue involves a study of the principles which govern the granting of a stay of proceedings while the constitutionality of a legislative provision is challenged in court by the plaintiff.

It should be observed that none of the parties has disputed the existence of the discretionary power to order a stay in such a case and, in my view, the parties were right in conceding that the trial judge had jurisdiction to order a stay: see *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 330.

(1) The Usual Conditions for the Granting of a Stay

Prior to the *Supreme Court of Judicature Act*, 1873, 36 & 37 Vict., c. 66, no distinction between injunctions restraining proceedings and other sorts of injunctions was drawn in English law (*Halsbury's Laws of England*, vol. 24, 4th ed., p. 577). The Parliament of Westminster then enacted the Act referred to above, which in the main has been adopted by all of the provinces of Canada except Quebec where the distinction between equity and law is unknown. The distinction the English *Judicature Act* created between a stay of proceedings and an injunction was, however, essentially procedural. Section 24(5) stated that no cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction provided that "any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any Court to restrain the prosecution thereof . . . shall be at liberty to apply to the said Courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the Court shall thereupon make such Order as shall be just." Section 25(8) of the same Act provided further that an injunction may be granted in all cases in which it shall appear to

IV Les principes régissant l'exercice du pouvoir discrétionnaire d'ordonner une suspension d'instance pendant la contestation de la constitutionnalité d'une disposition législative

La deuxième question en litige commande une étude des principes régissant la suspension d'instance pendant que le demandeur conteste devant les tribunaux la constitutionnalité d'une disposition législative.

Il convient de faire remarquer qu'aucune partie n'a mis en doute l'existence du pouvoir discrétionnaire d'ordonner une suspension d'instance dans un tel cas et, selon moi, elles ont eu raison de reconnaître que le juge de première instance avait compétence pour ordonner la suspension: voir *Procureur général du Canada c. Law Society of British Columbia*, [1982] 2 R.C.S. 307, à la p. 330.

1) Les conditions normales de la suspension d'instance

Antérieurement à la *Supreme Court of Judicature Act*, 1873, 36 & 37 Vict., chap. 66, le droit anglais ne distinguait pas entre les injonctions destinées à suspendre une instance et les autres sortes d'injonctions (*Halsbury's Laws of England*, vol. 24, 4th ed., à la p. 577). Puis le Parlement de Westminster a adopté la loi susmentionnée qui, d'une manière générale, a été reprise par toutes les provinces du Canada, sauf le Québec, où la distinction entre l'*equity* et la *common law* est inconnue. Toutefois, la distinction que la *Judicature Act* anglaise créait entre une suspension d'instance et une injonction tenait essentiellement à la procédure. Le paragraphe 24(5) prévoyait qu'on ne peut empêcher aucune cause ni aucune procédure en instance devant la Haute Cour de Justice ou devant la Cour d'appel par voie de prohibition ou d'injonction pourvu que [TRADUCTION] «une personne, partie ou non à une affaire, qui aurait eu le droit, si cette loi n'avait pas été adoptée, de demander à un tribunal d'empêcher la poursuite [. . .] ait le droit de demander auxdits tribunaux respectivement, par requête sommaire, une suspension d'instance dans l'affaire en question qui soit générale ou autre suivant ce qu'exigent les fins de la justice; le tribunal pourra alors rendre l'ordonnance qu'il estime juste». De plus, le par. 25(8) de la même loi disposait qu'une injonction pouvait

the Court to be "just and convenient" that such order should be made. See also *Boeckh v. Gowganda-Queen Mines, Ltd.* (1912), 6 D.L.R. 292.

A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions: *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127, at p. 132; *Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association*, Ont. Div. Ct., January 17, 1979, Galligan, Van Camp and Henry JJ. (unreported); *Daciuk v. Manitoba Labour Board*, Man. Q.B., June 25, 1985, Dureault J. (unreported); *Metropolitan Toronto School Board v. Minister of Education* (1985), 6 C.P.C. (2d) 281 (Ont. Div. Ct.), at p. 292, leave to appeal to the Court of Appeal refused.

The case law is abundant as well as relatively fluid with regard to the tests developed by the courts in order to help better delineate the situations in which it is just and equitable to grant an interlocutory injunction. Reviewing it is the function of doctrinal analysis rather than that of judicial decision-making and I simply propose to give a bare outline of the three main tests currently applied.

The first test is a preliminary and tentative assessment of the merits of the case, but there is more than one way to describe this first test. The traditional way consists in asking whether the litigant who seeks the interlocutory injunction can make out a *prima facie* case. The injunction will be refused unless he can: *Chesapeake and Ohio Railway Co. v. Ball*, [1953] O.R. 843, *per* McRuer C.J.H.C., at pp. 854-55. The House of Lords has somewhat relaxed this first test in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, where it held that all that was necessary to meet this test was to satisfy the Court

être accordée chaque fois que la cour jugeait [TRADUCTION] «juste et à propos» de rendre une telle ordonnance. Voir aussi *Boeckh v. Gowganda-Queen Mines, Ltd.* (1912), 6 D.L.R. 292.

La suspension d'instance et l'injonction interlocutoire sont des redressements de même nature. À moins qu'un texte législatif ne prescrive un critère différent, elles ont suffisamment de traits en commun pour qu'elles soient assujetties aux mêmes règles et c'est avec raison que les tribunaux ont eu tendance à appliquer à la suspension interlocutoire d'instance les principes qu'ils suivent dans le cas d'injonctions interlocutoires: *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127, à la p. 132; *Haldimand-Norfolk Regional Health Unit and Ontario Nurses' Association*, C. div. Ont., 17 janvier 1979, les juges Galligan, Van Camp et Henry (inédit); *Daciuk v. Manitoba Labour Board*, B.R. Manitoba, 25 juin 1985, le juge Dureault (inédit); *Metropolitan Toronto School Board v. Minister of Education* (1985), 6 C.P.C. (2d) 281 (C. div. Ont.), à la p. 292, autorisation d'en appeler devant la Cour d'appel refusée.

Il y a une jurisprudence à la fois abondante et relativement fluide sur les critères élaborés par les tribunaux pour aider à mieux délimiter les situations dans lesquelles il est juste et équitable d'accorder une injonction interlocutoire. Comme l'examen de cette jurisprudence relève plutôt de l'analyse doctrinale que de la prise de décisions judiciaires, je me propose simplement de présenter un exposé sommaire des trois critères principaux actuellement appliqués.

Le premier critère revêt la forme d'une évaluation préliminaire et provisoire du fond du litige, mais il y a plus d'une façon de décrire ce critère. La manière traditionnelle consiste à se demander si la partie qui demande l'injonction interlocutoire est en mesure d'établir une apparence de droit suffisante. Si elle ne le peut pas, l'injonction sera refusée: *Chesapeake and Ohio Railway Co. v. Ball*, [1953] O.R. 843, le juge en chef McRuer de la Haute Cour, aux pp. 854 et 855. Ce premier critère a été quelque peu assoupli par la Chambre des lords dans l'arrêt *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504, où elle a

that there was a serious question to be tried as opposed to a frivolous or vexatious claim. Estey J. speaking for himself and five other members of the Court in a unanimous judgment referred to but did not comment upon this difference in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, at pp. 9-10.

American Cyanamid has been followed on this point in many Canadian and English cases, but it has also been rejected in several other instances and it does not appear to be followed in Australia: see the commentaries and cases referred to in P. Carlson, "Granting an Interlocutory Injunction: What is the Test?" (1982), 12 *Man. L.J.* 109; B. M. Rogers and G. W. Hately, "Getting the Pre-Trial Injunction" (1982), 60 *Can. Bar Rev.* 1, at pp. 9-19; R. J. Sharpe, *Injunctions and Specific Performance* (Toronto 1983), at pp. 66-77.

In the case at bar, it is neither necessary nor advisable to choose, for all purposes, between the traditional formulation and the *American Cyanamid* description of the first test: the British case law illustrates that the formulation of a rigid test for all types of cases, without considering their nature, is not to be favoured (see Hanbury and Maudsley, *Modern Equity* (12th ed. 1960), pp. 736-43). In my view, however, the *American Cyanamid* "serious question" formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience. But I refrain from expressing any view with respect to the sufficiency or adequacy of this formulation in any other type of case.

The second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm, that is harm not susceptible or difficult to be compensated in damages. Some judges consider at the same time the situation of the other party to the litigation and ask themselves

conclu que, pour y satisfaire, il suffisait de convaincre la cour de l'existence d'une question sérieuse à juger, par opposition à une réclamation futile ou vexatoire. Dans l'arrêt *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2, aux pp. 9 et 10, rendu à l'unanimité, le juge Estey, parlant pour lui-même et pour cinq autres membres de la Cour, a mentionné cette différence, sans pourtant la commenter.

L'arrêt *American Cyanamid* a été suivi sur ce point dans bien des décisions canadiennes et anglaises, mais il a été rejeté dans plusieurs autres cas et ne paraît pas être suivi en Australie: voir les commentaires exprimés et les décisions mentionnées dans P. Carlson, «Granting an Interlocutory Injunction: What is the Test?» (1982), 12 *Man. L.J.* 109; B. M. Rogers and G. W. Hately, «Getting the Pre-Trial Injunction» (1982), 60 *R. du B. can.* 1, aux pp. 9 à 19; R. J. Sharpe, *Injunctions and Specific Performance* (Toronto 1983), aux pp. 66 à 77.

En l'espèce, il n'est ni nécessaire ni recommandable de choisir à tous égards entre la formulation traditionnelle du premier critère et celle donnée dans l'arrêt *American Cyanamid*: la jurisprudence britannique démontre que la formulation d'un critère rigide applicable à tous les types d'affaires, sans avoir égard à leur nature, n'est pas une solution à retenir (voir Hanbury et Maudsley, *Modern Equity* (12th ed. 1960), aux pp. 736 à 743). À mon avis, cependant, la formulation dans l'arrêt *American Cyanamid*, savoir celle de l'existence d'une «question sérieuse», suffit dans une affaire constitutionnelle où, comme je l'indique plus loin dans les présents motifs, l'intérêt public est pris en considération dans la détermination de la prépondérance des inconvénients. Mais je m'abstiens d'exprimer une opinion quelconque sur le caractère suffisant ou adéquat de cette formulation dans tout autre type d'affaires.

Le deuxième critère consiste à décider si la partie qui cherche à obtenir l'injonction interlocutoire subirait, si elle n'était pas accordée, un préjudice irréparable, c'est-à-dire un préjudice qui n'est pas susceptible d'être compensé par des dommages-intérêts ou qui peut difficilement l'être. Certains juges tiennent compte en même temps de la

whether the granting of the interlocutory injunction would cause irreparable harm to this other party if the main action fails. Other judges take the view that this last aspect rather forms part of the balance of convenience.

The third test, called the balance of convenience and which ought perhaps to be called more appropriately the balance of inconvenience, is a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits.

I now propose to consider the particular application of the test of the balance of convenience in a case where the constitutional validity of a legislative provision is challenged. As Lord Diplock said in *American Cyanamid, supra,* at p. 511:

> ... there may be many other special factors to be taken into consideration in the particular circumstances of individual cases.

It will be seen in what follows that the consequences for the public as well as for the parties, of granting a stay in a constitutional case, do constitute "special factors" to be taken into consideration.

(2) The Balance of Convenience and the Public Interest

A review of the case law indicates that, when the constitutional validity of a legislative provision is challenged, the courts consider that they ought not to be restricted to the application of traditional criteria which govern the granting or refusal of interlocutory injunctive relief in ordinary private or civil law cases. Unless the public interest is also taken into consideration in evaluating the balance of convenience, they very often express their disinclination to grant injunctive relief before constitutional invalidity has been finally decided on the merits.

The reasons for this disinclination become readily understandable when one contrasts the uncertainty in which a court finds itself with respect to

situation de l'autre partie au litige et se demandent si l'injonction interlocutoire occasionnerait un préjudice irréparable à cette autre partie dans l'hypothèse où la demande principale serait rejetée. D'autres juges estiment que ce dernier élément fait plutôt partie de la prépondérance des inconvénients.

Le troisième critère, celui de la prépondérance des inconvénients, consiste à déterminer laquelle des deux parties subira le plus grand préjudice selon que l'on accorde ou refuse une injonction interlocutoire en attendant une décision sur le fond.

Voila qui m'amène à l'application particulière du critère de la prépondérance des inconvénients dans un cas où l'on conteste la constitutionnalité d'une disposition législative. Comme l'a dit lord Diplock dans l'arrêt *American Cyanamid*, précité, à la p. 511:

> [TRADUCTION] ... il peut y avoir beaucoup d'autres éléments particuliers dont il faut tenir compte dans les circonstances particulières d'un cas déterminé.

Comme on le verra, les conséquences d'une suspension d'instance pour le public aussi bien que pour les parties constituent assurément, dans une affaire constitutionnelle, des «éléments particuliers» dont il faut tenir compte.

2) La prépondérance des inconvénients et l'intérêt public

D'après la jurisprudence, quand la constitutionnalité d'une disposition législative est contestée, les tribunaux estiment qu'ils ne doivent pas se limiter à l'application des critères traditionnels régissant l'octroi ou le refus d'une injonction interlocutoire dans les affaires civiles ordinaires. À moins que l'intérêt public ne soit également pris en considération dans l'appréciation de la prépondérance des inconvénients, les tribunaux se montrent très souvent réticents à accorder une injonction avant que la question de la constitutionnalité ait été définitivement tranchée au fond.

Les raisons de cette réticence se comprennent facilement quand on oppose l'incertitude dans laquelle un tribunal se trouve au stade interlocu-

the merits at the interlocutory stage, with the sometimes far-reaching albeit temporary practical consequences of a stay of proceedings, not only for the parties to the litigation but also for the public at large.

(i) *Difficulty or Impossibility to Decide the Merits at the Interlocutory Stage*

The limited role of a court at the interlocutory stage was well described by Lord Diplock in the *American Cyanamid* case, *supra*, at p. 510:

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

The *American Cyanamid* case was a complicated civil case but Lord Diplock's *dictum*, just quoted, should *a fortiori* be followed for several reasons in a *Charter* case and in other constitutional cases when the validity of a law is challenged.

First, the extent and exact meaning of the rights guaranteed by the *Charter* are often far from clear and the interlocutory procedure rarely enables a motion judge to ascertain these crucial questions. Constitutional adjudication is particularly unsuited to the expeditious and informal proceedings of a weekly court where there are little or no pleadings and submissions in writing, and where the Attorney General of Canada or of the Province may not yet have been notified as is usually required by law; see *Home Oil Distributors Ltd. v. Attorney-General for British Columbia*, [1939] 1 D.L.R. 573, at p. 577; *Weisfeld v. R.* (1985), 16 C.R.R. 24, and, for an extreme example, *Turmel v. Canadian Radio-Television and Telecommunications Commission* (1985), 16 C.R.R. 9.

Still, in *Charter* cases such as those which may arise under s. 23 relating to Minority Language Educational Rights, the factual situation as well as

toire relativement au fond et les conséquences pratiques parfois graves, quoique temporaires, qu'entraîne une suspension d'instance non seulement pour les parties au litige mais aussi pour le grand public.

i) *La difficulté ou l'impossibilité de rendre une décision au fond au stade interlocutoire*

Le rôle limité d'un tribunal au stade interlocutoire est bien décrit par lord Diplock dans l'arrêt *American Cyanamid*, précité, à la p. 510:

> [TRADUCTION] La cour n'a pas, en cet état de la cause, à essayer de résoudre les contradictions de la preuve soumise par affidavit, quant aux faits sur lesquels les réclamations de chaque partie peuvent ultimement reposer, ni à trancher les épineuses questions de droit qui nécessitent des plaidoiries plus poussées et un examen plus approfondi. Ce sont des questions à régler au procès.

American Cyanamid était une affaire civile complexe, mais l'opinion de lord Diplock que je viens de citer doit, pour plusieurs raisons, être suivie à fortiori dans une affaire relevant de la *Charte* comme dans les autres affaires constitutionnelles où il y a contestation de la validité d'une loi.

Premièrement, l'étendue et le sens exact des droits garantis par la *Charte* sont souvent loins d'être clairs et la procédure interlocutoire permet rarement à un juge saisi d'une requête de trancher ces questions capitales. Les litiges constitutionnels se prêtent particulièrement mal à la procédure expéditive et informelle d'une cour des sessions hebdomadaires où les actes de procédure et les arguments écrits sont peu nombreux ou même inexistants et où le procureur général du Canada ou de la province peut ne pas avoir encore reçu l'avis qu'exige généralement la loi: voir *Home Oil Distributors Ltd. v. Attorney-General for British Columbia*, [1939] 1 D.L.R. 573, à la p. 577; *Weisfeld c. R.* (1985), 16 C.R.R. 24, et, pour un exemple extrême, *Turmel c. Conseil de la radiodiffusion et des télécommunications canadiennes* (1985), 16 C.R.R. 9.

En outre, dans les affaires relevant de la *Charte*, par exemple celles qui peuvent découler de l'art. 23 qui porte sur les droits à l'instruction dans la

the law may be so uncertain at the interlocutory stage as to prevent the court from forming even a tentative opinion on the case of the plaintiff; *Marchand v. Simcoe County Board of Education* (1984), 10 C.R.R. 169, at p. 174.

Furthermore, in many *Charter* cases such as the case at bar, some party may find it necessary or prudent to adduce evidence tending to establish that the impugned provision, although *prima facie* in violation of a guaranteed right or freedom, can be saved under s. 1 of the *Charter*. But evidence adduced pursuant to s. 1 of the *Charter* essentially addresses the merits of the case.

This latter rule was clearly stated in *Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124, aff. [1984] 1 F.C. 1133, which set aside [1984] 1 F.C. 1119. It was held that a court is not at the interlocutory stage in an adequate position to decide the merits of a case even though the evidence that is likely to be adduced under s. 1 seems of little weight. In the Federal Court of Appeal, Thurlow C.J., dissenting, held at pp. 1137-38 that a court is sometimes entitled to examine the merits of the case and anticipate the result of the action:

> I agree with the criticisms and views expressed by the learned Trial Judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of paragraph 14(4)(*e*) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the Court to show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.

In such circumstances then should the Court treat it seriously? Should the Court irrevocably deprive the respondent of a constitutional right to which he appears

langue de la minorité, la situation factuelle ainsi que le droit peuvent être à ce point incertains au stade interlocutoire que le tribunal ne peut même pas se former une opinion préliminaire sur la position du demandeur: *Marchand v. Simcoe County Board of Education* (1984), 10 C.R.R. 169, à la p. 174.

De plus, dans bien des affaires relevant de la *Charte*, il peut arriver, à l'instar de la présente instance, qu'une partie juge nécessaire ou prudent de présenter des éléments de preuve tendant à établir que la disposition attaquée, bien qu'elle constitue à première vue une atteinte à un droit ou à une liberté garantis, est légitimée par l'article premier de la *Charte*. Toutefois, les éléments de preuve produits en vertu de l'article premier de la *Charte* portent essentiellement sur le fond du litige.

Cette dernière règle a été clairement énoncée dans l'arrêt *Gould c. Procureur général du Canada*, [1984] 2 R.C.S. 124, conf. [1984] 1 C.F. 1133, qui infirmait [1984] 1 C.F. 1119. On a conclu qu'au stade interlocutoire un tribunal est mal placé pour décider un litige au fond, bien que la preuve qui sera vraisemblablement produite aux fins de l'article premier puisse paraître peu convaincante. En Cour d'appel fédérale, le juge en chef Thurlow, dissident, a dit qu'un tribunal est parfois autorisé à étudier l'affaire au fond et de préjuger l'action (aux pp. 1137 et 1138):

> Je partage les critiques et les opinions formulées par le juge de première instance quant à la faiblesse de la preuve apportée pour prouver qu'on pouvait démontrer que l'alinéa 14(4)*e*) constitue une limite dont la justification peut se démontrer dans le cadre d'une société libre et démocratique. Cette preuve n'a manifestement pas impressionné le juge de première instance et je partage l'avis de celle-ci. L'impression que j'ai face à cette preuve est que lorsque c'est tout ce que l'on peut soumettre à la Cour pour établir un argument sérieux après quatre années de travail sur la question, il devient évident que l'argument en faveur du maintien de la validité des dispositions adoptées relativement à l'inhabilité de personnes à voter peut difficilement être considéré comme sérieux.

Dans de telles circonstances, la Cour devrait-elle considérer cet argument comme sérieux? La Cour devrait-elle priver l'intimé de manière irrévocable d'un droit

to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this Court should interfere with the exercise of the discretion of the Trial Judge in the circumstances.

Mahoney J., whose opinion was generally approved by this Court, took the opposite view (at p. 1140):

> The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14(4)(*e*) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional.

Such cautious restraint respects the right of both parties to a full trial, the importance of which was emphasized by the judicious comments of May L.J. in *Cayne v. Global Natural Resources plc.*, [1984] 1 All E.R. 225, at p. 238. Also, it is consistent with the fact that, in some cases, the impugned provision will not be found to violate a right or freedom protected by the *Charter* after all and thus will not need to be saved under s. 1; see *R. v. Jones*, [1986] 2 S.C.R. 284.

In addition, to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise. A plaintiff may fail for lack of standing, lack of adequate proof, procedural or other defect. As was correctly put by Professor J. E. Magnet:

> Unconstitutionality cannot be understood as an unqualified condition. It has to be understood in light of the plaintiff's ability to bring to fruition judgment in his favour.

constitutionnel auquel il paraît avoir droit en refusant d'accorder l'injonction afin de donner aux appelants l'occasion, qui ne se présentera probablement pas, de prouver qu'il n'y a pas droit, lorsque les seuls arguments que les appelants peuvent apporter sont faibles? Je ne le crois pas, et je crois encore moins que la Cour devrait intervenir, dans les circonstances, dans l'exercice du pouvoir discrétionnaire du juge de première instance.

Le juge Mahoney, dont le point de vue a reçu d'une manière générale l'approbation de cette Cour, a été d'avis contraire (à la p. 1140):

> L'ordonnance laisse entendre que l'intimé possède, en réalité, le droit qu'il revendique et que l'alinéa 14(4)*e*) est nul dans la mesure invoquée. Cela constitue un jugement déclaratoire provisoire sur un droit qui, en toute déférence, ne peut être rendu à bon droit avant l'instruction. Le défendeur dans une action a droit tout autant que le demandeur à une instruction équitable et complète, et il en est de même lorsque le litige est de nature constitutionnelle.

Cette attitude de prudente réserve respecte le droit des deux parties à une instruction complète, ce dont l'importance a été soulignée dans les observations judicieuses faites par le lord juge May dans l'affaire *Cayne v. Global Natural Resources plc.*, [1984] 1 All E.R. 225, à la p. 238. Au surplus, cette attitude est compatible avec le fait que, dans certains cas, il sera jugé que, en définitive, la disposition attaquée ne porte atteinte à aucun droit ni à aucune liberté protégés par la *Charte* et qu'en conséquence il ne sera pas besoin d'avoir recours à l'article premier pour la justifier: voir *R. c. Jones*, [1986] 2 R.C.S. 284.

De plus, croire que la question de la constitutionnalité peut se régler au stade interlocutoire, c'est faire abstraction des nombreux aléas d'une action en justice, qu'elle relève ou non du domaine constitutionnel. En effet, un demandeur peut se voir débouter parce qu'il n'a pas qualité pour agir, parce que la preuve est insuffisante ou en raison d'un vice de procédure ou autre. Comme l'a dit si justement le professeur J. E. Magnet:

> [TRADUCTION] On ne saurait prêter à l'inconstitutionnalité un caractère absolu. Elle doit être vue en fonction de la capacité du demandeur d'obtenir un jugement favorable.

(J. E. Magnet, "Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality" (1980), 11 *Man. L.J.* 21, at p. 29.)

However, the principle I am discussing is not absolute. There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional.

Most of the difficulties encountered by a trial judge at the interlocutory stage, which are raised above, apply not only in *Charter* cases but also in other constitutional challenges of a law. I therefore fully agree with what Professor R. J. Sharpe wrote in *Injunctions and Specific Performance*, at p. 177, in particular with respect to constitutional cases that "the courts have sensibly paid heed to the fact that at the interlocutory stage they cannot fully explore the merits of the plaintiff's case". At this stage, even in cases where the plaintiff has a serious question to be tried or even a *prima facie* case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

(ii) *The Consequences of Granting a Stay in Constitutional Cases*

Keeping in mind the state of uncertainty above referred to, I turn to the consequences that will certainly or probably follow the granting of a stay of proceedings. As previously said, I will not restrict myself to *Charter* instances. I also propose

(J. E. Magnet, «Jurisdictional Fact, Constitutional Fact and the Presumption of Constitutionality» (1980), 11 *Man. L.J.* 21, à la p. 29.)

Le principe dont je traite n'est toutefois pas absolu. Il peut exister des cas rares où la question de la constitutionnalité se présente sous la forme d'une question de droit purement et simplement, laquelle peut être définitivement tranchée par un juge saisi d'une requête. Un exemple théorique qui vient à l'esprit est la situation où le Parlement ou une législature prétendrait adopter une loi imposant les croyances d'une religion d'État. Pareille loi enfreindrait l'al. 2*a*) de la *Charte canadienne des droits et libertés*, ne pourrait possiblement pas être justifiée par l'article premier de celle-ci et courrait peut-être le risque d'être frappée d'illégalité sur-le-champ: voir *Procureur général du Québec c. Quebec Association of Protestant School Boards*, [1984] 2 R.C.S. 66, à la p. 88. Or, il va sans dire qu'il s'agit là de cas exceptionnels.

La plupart des difficultés susmentionnées auxquelles se heurte un juge de première instance au stade interlocutoire surgissent non seulement dans les affaires relevant de la *Charte*, mais aussi dans les autres cas où l'on conteste la constitutionnalité d'une loi. Donc, je souscris entièrement à ce que le professeur R. J. Sharpe a écrit, en particulier relativement aux affaires constitutionnelles, dans *Injunctions and Specific Performance*, à la p. 177, où il fait remarquer que [TRADUCTION] «les tribunaux ont sagement tenu compte du fait qu'ils ne peuvent pas examiner à fond les allégations du demandeur au stade interlocutoire». À ce stade, même dans les affaires où le demandeur a soulevé une question importante à juger ou qu'il a même établi une apparence de droit suffisante, l'incertitude quant aux faits et au droit est généralement trop grande pour que le tribunal soit en mesure de rendre une décision sur le fond.

ii) *Les conséquences de la suspension d'instance dans les affaires constitutionnelles*

Gardant à l'esprit l'incertitude évoquée ci-dessus, j'aborde maintenant les conséquences certaines ou probables d'une suspension d'instance. Comme je l'ai déjà fait remarquer, mon analyse ne se bornera pas aux affaires relevant de la *Charte*.

to refer to a few Quebec examples. In that province, the issuance of interlocutory injunctions is governed by arts. 751 and 752 of the *Code of Civil Procedure*:

751. An injunction is an order of the Superior Court or of a judge thereof, enjoining a person, his officers, agents or employees, not to do or to cease doing, or, in cases which admit of it, to perform a particular act or operation, under pain of all legal penalties.

752. In addition to an injunction, which he may demand by action, with or without other conclusions, a party may, at the commencement of or during a suit, obtain an interlocutory injunction.

An interlocutory injunction may be granted when the applicant appears to be entitled to it and it is considered to be necessary in order to avoid serious or irreparable injury to him, or a factual or legal situation of such a nature as to render the final judgment ineffectual.

While these provisions differ somewhat from the English law of injunctions, they are clearly inspired by and derived from this law and I do not think that the Quebec cases I propose to refer to turn on any differences between the English law and the Code.

Although constitutional cases are often the result of a *lis* between private litigants, they sometimes involve some public authority interposed between the litigants, such as the Board in the case at bar. In other constitutional cases, the controversy or the *lis*, if it can be called a *lis*, will arise directly between a private litigant and the State represented by some public authority; *Morgentaler v. Ackroyd* (1983), 42 O.R. 659.

In both sorts of cases, the granting of a stay requested by the private litigants or by one of them is usually aimed at the public authority, law enforcement agency, administrative board, public official or minister responsible for the implementation or administration of the impugned legislation and generally works in one of two ways. Either the law enforcement agency is enjoined from enforcing the impugned provisions in all respects until the question of their validity has been finally determined, or the law enforcement agency is enjoined

Je me référerai aussi à quelques exemples québécois. Au Québec, ce sont les art. 751 et 752 du *Code de procédure civile* qui régissent les injonctions interlocutoires:

751. L'injonction est une ordonnance de la Cour supérieure ou de l'un de ses juges, enjoignant à une personne, à ses officiers, représentants ou employés, de ne pas faire ou de cesser de faire, ou, dans les cas qui le permettent, d'accomplir un acte ou une opération déterminés, sous les peines que de droit.

752. Outre l'injonction qu'elle peut demander par action, avec ou sans autres conclusions, une partie peut, au début ou au cours d'une instance, obtenir une injonction interlocutoire.

L'injonction interlocutoire peut être accordée lorsque celui qui la demande paraît y avoir droit et qu'elle est jugée nécessaire pour empêcher que ne lui soit causé un préjudice sérieux ou irréparable, ou que ne soit créé un état de fait ou de droit de nature à rendre le jugement final inefficace.

Quoique ces dispositions ne concordent pas parfaitement avec le droit anglais en matière d'injonctions, il est évident qu'elles s'en inspirent et qu'elles en sont dérivées et je ne crois pas que les décisions québécoises que j'ai l'intention d'examiner soient fondées sur des différences entre le droit anglais et le Code.

Bien que les affaires constitutionnelles tirent souvent leur origine d'un *lis* entre particuliers, il arrive parfois qu'un organisme public se trouve interposé entre les parties, telle la Commission en l'espèce. Dans d'autres affaires constitutionnelles, la controverse ou le *lis*, s'il s'agit en fait d'un *lis*, prendra naissance directement entre un particulier et l'État représenté par un organisme public: *Morgentaler v. Ackroyd* (1983), 42 O.R. 659.

Dans un cas comme dans l'autre, la suspension d'instance accordée à la demande des plaideurs privés ou de l'un d'eux vise normalement un organisme public, un organisme d'application de la loi, une commission administrative, un fonctionnaire public ou un ministre chargé de l'application ou de l'administration de la loi attaquée. La suspension d'instance peut en général avoir deux effets. Elle peut prendre la forme d'une interdiction totale d'appliquer les dispositions attaquées en attendant une décision définitive sur la question de leur

from enforcing the impugned provisions with respect to the specific litigant or litigants who request the granting of a stay. In the first branch of the alternative, the operation of the impugned provisions is temporarily suspended for all practical purposes. Instances of this type can perhaps be referred to as suspension cases. In the second branch of the alternative, the litigant who is granted a stay is in fact exempted from the impugned legislation which, in the meanwhile, continues to operate with respect to others. Instances of this other type, I will call exemption cases.

Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically-elected legislatures and are generally passed for the common good, for instance: the providing and financing of public services such as educational services, or of public utilities such as electricity, the protection of public health, natural resources and the environment, the repression of what is considered to be criminal activity, the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good.

While respect for the Constitution must remain paramount, the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest, and,

validité ou elle peut empêcher l'application des dispositions attaquées dans la mesure où elle ne vise que la partie ou les parties qui ont précisément demandé la suspension d'instance. Dans le premier volet de l'alternative, l'application des dispositions attaquées est en pratique temporairement suspendue. On peut peut-être appeler les cas qui tombent dans cette catégorie les «cas de suspension». Dans le second volet de l'alternative, le plaideur qui se voit accorder une suspension d'instance bénéficie en réalité d'une exemption de l'application de la loi attaquée, laquelle demeure toutefois opérante à l'égard des tiers. J'appellerai ces cas des «cas d'exemption».

Qu'elles soient ou non finalement jugées constitutionnelles, les lois dont les plaideurs cherchent à obtenir la suspension, ou de l'application desquelles ils demandent d'être exemptés par voie d'injonction interlocutoire, ont été adoptées par des législatures démocratiquement élues et visent généralement le bien commun, par exemple: assurer et financer des services publics tels que des services éducatifs ou l'électricité; protéger la santé publique, les ressources naturelles et l'environnement; réprimer toute activité considérée comme criminelle; diriger les activités économiques notamment par l'endiguement de l'inflation et la réglementation des relations du travail, etc. Il semble bien évident qu'une injonction interlocutoire dans la plupart des cas de suspension et, jusqu'à un certain point, comme nous allons le voir plus loin, dans un bon nombre de cas d'exemption, risque de contrecarrer temporairement la poursuite du bien commun.

Quoique le respect de la Constitution doive conserver son caractère primordial, il y a lieu à ce moment-là de se demander s'il est juste et équitable de priver le public, ou d'importants secteurs du public, de la protection et des avantages conférés par la loi attaquée, dont l'invalidité n'est qu'incertaine, sans tenir compte de l'intérêt public dans l'évaluation de la prépondérance des inconvénients et sans lui accorder l'importance qu'il mérite. Comme il fallait s'y attendre, les tribunaux ont généralement répondu à cette question par la négative. Sur la question de la prépondérance des inconvénients, ils ont jugé nécessaire de subordon-

in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute.

The following provide examples of the concern expressed by the courts for the protection of the common good in suspension and exemption cases. I will first address the suspension cases.

Société de développement de la Baie James c. Chef Robert Kanatewat, [1975] C.A. 166, is a striking illustration of interlocutory relief which could have compromised the common good of the public as a whole. In that case, the Quebec Court of Appeal, reversing the Superior Court, [1974] R.P. 38, dismissed an application for interlocutory injunction which would have required the appellants to halt the James Bay project authorized by the *James Bay Region Development Act*, S.Q. 1971, c. 34, the constitutional validity of which had been challenged by the respondents. Crête J.A., as he then was, wrote what follows in looking at the balance of convenience at p. 182:

[TRANSLATION] . . . I am not persuaded that the inconvenience suffered or apprehended by the respondents was of the same order of magnitude as the growing energy needs of Quebec as a whole.

Turgeon J.A. reached the same conclusions at p. 177:

[TRANSLATION] It is important to note at the outset that hydroelectricity is the only primary energy resource the province of Quebec has. With the present acute world oil crisis, this resource has assumed a critical importance in guaranteeing the economic future and well-being of Quebec citizens. The interests of the people of Quebec are represented in the case at bar by the principal appellant companies.

The evidence established that is imperative for Hydro-Quebec to complete its program if it is to meet the growing demand for electricity up to 1985. . . . A suspension of work would have disastrous consequences, as it would mean an alternative program would have to be

ner les intérêts des plaideurs privés à l'intérêt public et, dans les cas où il s'agit d'injonctions interlocutoires adressées à des organismes constitués en vertu d'une loi, ils ont conclu à bon droit que c'est une erreur que d'agir à leur égard comme s'ils avaient un intérêt distinct de celui du public au bénéfice duquel ils sont tenus de remplir les fonctions que leur impose la loi.

Je présente ci-après des exemples de causes dans lesquelles les tribunaux se sont montrés soucieux de protéger le bien commun dans des cas de suspension et d'exemption. Commençons par les cas de suspension.

L'affaire *Société de développement de la Baie James c. Chef Robert Kanatewat*, [1975] C.A. 166, est un exemple frappant d'un redressement interlocutoire qui aurait pu compromettre le bien commun du public dans son ensemble. Dans cet arrêt, la Cour d'appel du Québec, infirmant une décision de la Cour supérieure, [1974] R.P. 38, a rejeté une demande d'injonction interlocutoire qui aurait obligé les appelants d'arrêter le projet de la Baie James autorisé par la *Loi du développement de la région de la Baie James*, L.Q. 1971, chap. 34, dont les intimés contestaient la constitutionnalité. Le juge Crête, alors juge puîné, a écrit ce qui suit relativement à la prépondérance des inconvénients, à la p. 182:

. . . je n'ai pu me convaincre que les inconvénients subis ou appréhendés par les intimés étaient de la même échelle de grandeur que les besoins croissants d'énergie pour tout le Québec.

Le juge Turgeon est arrivé aux mêmes conclusions, à la p. 177:

Il est important de noter au départ que l'hydroélectricité est la seule ressource d'énergie primaire possédée par la province de Québec. Avec la crise du pétrole qui sévit actuellement dans le monde, cette ressource est devenue d'une importance capitale pour assurer l'avenir économique et le bien-être des citoyens. L'intérêt de la population québécoise est représenté dans cette cause par les principales sociétés appelantes.

La preuve démontre qu'il est impérieux pour l'Hydro-Québec de réaliser son programme pour faire face à la demande croissante d'électricité jusqu'en 1985 . . . Un arrêt des travaux aurait des conséquences désastreuses car il faudrait mettre sur pied un programme de substi-

created to produce electricity by thermal or nuclear plants. [Emphasis added.]

(Leave to appeal was granted by this Court on February 13, 1975, but a declaration of settlement out of court was filed on January 1980, further to which, on the same date, Chief Robert Kanatewat and others discontinued their appeal.)

In *Procureur général du Québec c. Lavigne*, [1980] C.A. 25, the Quebec Court of Appeal, again reversing the Superior Court, [1980] C.S. 318, dismissed an application for interlocutory injunction enjoining the Attorney General, the Minister of Education, the Minister of Municipal Affairs and others from temporarily enforcing certain provisions of the *Act respecting municipal taxation and providing amendments to certain legislation*, S.Q. 1979, c. 72. The statute in question provided for school financing through a system of grants; taxation became a complementary method subject to new conditions. The scheme allegedly violated the constitutional guarantees of s. 93 of the *Constitution Act, 1867*, an allegation which was later sustained by this Court in *Attorney General of Quebec v. Greater Hull School Board*, [1984] 2 S.C.R. 575.

The Superior Court had granted an interlocutory injunction for the following reasons, *inter alia*, at p. 323:

[TRANSLATION] At the outset is must be said that the case at bar is not an *ordinary* constitutional question: we are not concerned here with the usual conflict between the jurisdiction of the federal government and one of the provinces, the jurisdictional conflict between two provinces or a province which is alleged to be legislating beyond the limits of the powers conferred by s. 92 of the *B.N.A. Act*.

Rather, this is a *very special case* (like that of s. 133 of the *B.N.A. Act*), in which the legislation being challenged is said to be contrary to a *constitutional guarantee*.

Accordingly, the question is not simply a constitutional one, it involves a guaranteed right, like the language right (133).

tution pour produire l'électricité par des centrales thermiques ou nucléaires. [C'est moi qui souligne.]

(Cette Cour a accordé l'autorisation de pourvoi le 13 février 1975, mais une déclaration de transaction a été déposée en janvier 1980, par suite de quoi, le chef Robert Kanatewat et autres se sont désistés de leur pourvoi le même jour.)

Dans l'arrêt *Procureur général du Québec c. Lavigne*, [1980] C.A. 25, la Cour d'appel du Québec, infirmant encore une fois une décision de la Cour supérieure, [1980] C.S. 318, a rejeté une demande d'injonction interlocutoire qui aurait empêché le procureur général, le ministre de l'Éducation, le ministre des Affaires municipales et d'autres personnes, d'appliquer temporairement certaines dispositions de la *Loi sur la fiscalité municipale et modifiant certaines dispositions législatives*, L.Q. 1979, chap. 72. La loi en question prévoyait le financement des écoles par un système de subventions; l'imposition, qui devenait une méthode complémentaire de financement, était assujettie à des conditions nouvelles. On reprochait à ce régime de violer les garanties constitutionnelles de l'art. 93 de la *Loi constitutionnelle de 1867*, allégation qui a par la suite été retenue par cette Cour dans l'arrêt *Procureur général du Québec c. Greater Hull School Board*, [1984] 2 R.C.S. 575.

La Cour supérieure avait accordé une injonction interlocutoire notamment pour les raisons suivantes, qui sont exposées à la p. 323:

Au départ, précisons que le cas d'espèce soumis n'est pas une question constitutionnelle *ordinaire*: il ne s'agit pas ici du conflit habituel entre la juridiction de l'État fédéral et l'une des provinces, du conflit juridictionnel entre deux provinces, d'une province qui légiférerait hors des cadres des pouvoirs accordés par l'article 92 *A.A.N.B.*

Il s'agit ici plutôt du *cas très spécial* (comme celui de l'article 133 *A.A.N.B.*) où l'on attaque une législation que l'on prétend à l'encontre *d'une garantie constitutionnelle*.

En conséquence, il ne s'agit pas d'une simple question constitutionnelle, mais d'un droit garanti, comme le droit à la langue (133).

In the case of a constitutional guarantee, such as language or religion, it will suffice that a person appears *prima facie* to have been deprived of a right for him to be absolutely entitled to the remedy of an injunction. This follows from the very nature of the constitutional guarantee. When a right is constitutionally guaranteed, it is indefeasible, however extreme the consequences . . . [Emphasis added.]

The Quebec Court of Appeal reversed the Superior Court, holding as follows at p. 26:

[TRANSLATION] The Superior Court judge, indicating the reasons for issuing the injunctions, held that the disputed provisions *prima facie* infringed the constitutional guarantees contained in s. 93 of the *British North America Act*, and that in that case it will suffice that a person is deprived of a right for him to be absolutely entitled to the remedy of an injunction, without the need of presenting evidence on damage or the balance of convenience.

On reviewing the record and considering the arguments submitted to us by counsel for the parties in connection with the Superior Court judgments, the Court is of the view that the right relied on by the plaintiffs, the applicants for an interlocutory injunction, is not clear, that the questions involved are highly complex ones. There is some doubt as to the scope of the constitutional guarantees relied on and the effect of the injunctions is to suspend the operation of a considerable portion of the law throughout the Province of Quebec. In the circumstances, the presumption that legislation is valid must prevail over the *prima facie* uncertain right at this stage of the proceedings. [Emphasis added.]

It can be seen that, apart from the presumption of constitutionality, the Court of Appeal took into consideration the paralysing impact of the injunction which would have suspended the operation of an important part of the impugned legislation throughout the Province.

A somewhat similar situation arose in *Metropolitan Toronto School Board v. Minister of Education, supra.* Interim measure regulations which provided for the funding of separate schools were challenged as being *ultra vires* by the school board and the teachers' federation in an application for judicial review. The Divisional Court vacated an order of a single judge prohibiting the expenditure of funds pursuant to the regulations, pending a decision of the Divisional Court on the

Il suffit, dans le cas d'une garantie constitutionnelle, comme la langue ou la religion, qu'il appert à sa face même qu'on enlève un droit pour que, d'une façon absolue, le justiciable ait droit à son recours en injonction. Cela découle de la nature même de la garantie constitutionnelle. Quand un droit est garanti constitutionnellement, peu importe l'énormité des conséquences, son aspect immuable demeure . . . [C'est moi qui souligne.]

La Cour d'appel du Québec, qui a infirmé la décision de la Cour supérieure, a conclu, à la p. 26:

Le juge de la Cour supérieure, pour motiver l'émission des injonctions, décide que les dispositions attaquées, à leur face même, viol (sic) des garanties constitutionnelles contenues à l'article 93 de l'*Acte de l'Amérique du Nord britannique*, qu'il suffit dans ce cas qu'on enlève un droit pour que d'une façon absolue, le recours en injonction soit fondé sans que soit requise une preuve de préjudice ou de la balance des inconvénients.

Après étude du dossier et considération des arguments que nous soumettent les procureurs des parties en regard des jugements de la Cour supérieure, nous sommes d'avis que le droit sur lequel se fondent les demandeurs, requérants en injonction interlocutoire, n'est pas clair, que les questions en litige sont fort complexes. L'étendue des garanties constitutionnelles invoquées n'est pas sans susciter des doutes et l'effet des injonctions est de suspendre la mise en opération d'une partie importante de la loi, dans toute la province de Québec. Dans les circonstances, à ce stade des procédures, la présomption de validité de la loi doit prévaloir sur l'apparence d'un droit incertain. [C'est moi qui souligne.]

On peut constater que, outre la présomption de constitutionnalité, la Cour d'appel a pris en considération l'effet paralysant de l'injonction qui aurait suspendu partout dans la province l'application d'une partie importante de la loi attaquée.

Une situation à peu près analogue s'est présentée dans l'affaire *Metropolitan Toronto School Board v. Minister of Education*, précitée. Dans cette affaire, le conseil scolaire et l'association des enseignants, dans le cadre d'une demande de contrôle judiciaire, contestaient la validité de règlements provisoires prévoyant le financement d'écoles séparées; ils prétendaient en fait que ces règlements étaient *ultra vires*. La Cour divisionnaire a annulé une ordonnance d'un juge siégeant

main application. The following words reflect the interest shown by the Court in the preservation of the educational system (at pp. 293-94):

> On the evidence before this Court as between the applicants, on the one hand, and the Roman Catholic Separate School Boards, teachers, students and parents on the other, the balance of convenience overwhelmingly is in the latter's favour. The disruption of the educational system and its interim funding is, in the opinion of this Court, a matter to be avoided at all costs. [Emphasis added.]

Reference can also be made to *Pacific Trollers Association v. Attorney General of Canada*, [1984] 1 F.C. 846, where the Trial Division of the Federal Court declined to grant an interlocutory injunction restraining certain Fisheries Officers from enforcing amendments made to the *Pacific Commercial Salmon Fishery Regulations*, the validity of which had been attacked. And see *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791, where the Federal Court of Appeal, reversing the Trial Division, dismissed an application for interlocutory injunction restraining Fisheries Officers from implementing the fishing plan adopted under the *Fisheries Act*, R.S.C. 1970, c. F-14, and the *Pacific Commercial Salmon Fishery Regulations*, C.R.C. 1978, c. 823. The plan in question was alleged to be beyond the legislative power of Parliament and beyond the powers conferred by the *Fisheries Act*. The Court noted at p. 795:

> ... the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm; ...

These words of the Federal Court of Appeal amplify, somewhat broadly perhaps, the idea expressed in more guarded language by

seul portant interdiction de dépenser les fonds alloués conformément aux règlements, en attendant que la Cour divisionnaire statue sur la demande principale. Il se dégage du passage suivant que la cour s'est souciée de la préservation du système éducatif (aux pp. 293 et 294):

> [TRADUCTION] D'après la preuve produite en cette cour par les requérants d'une part et les conseils des écoles séparées catholiques, les enseignants, les élèves et les parents d'autre part, la prépondérance des inconvénients est nettement du côté de ces derniers. Toute perturbation dans le système éducatif et dans son financement provisoire doit, de l'avis de cette Cour, être évitée à tout prix. [C'est moi qui souligne.]

Mentionnons aussi l'affaire *Pacific Trollers Association c. Procureur général du Canada*, [1984] 1 C.F. 846, où la Division de première instance de la Cour fédérale a refusé d'accorder une injonction interlocutoire qui aurait empêché certains fonctionnaires des pêcheries d'appliquer des modifications apportées au *Règlement de pêche commerciale du saumon dans le Pacifique*, modifications dont on contestait la validité. Voir également l'arrêt *Procureur général du Canada c. Fishing Vessel Owners' Association of B.C.*, [1985] 1 C.F. 791, dans lequel la Cour d'appel fédérale, infirmant la décision de la Division de première instance, a rejeté une demande d'injonction interlocutoire empêchant des fonctionnaires des pêcheries d'exécuter le plan de pêche adopté en vertu de la *Loi sur les pêcheries*, S.R.C. 1970, chap. F-14 et du *Règlement de pêche commerciale du saumon dans le Pacifique*, C.R.C. 1978, chap. 823. Le plan en question, a-t-on prétendu, constituait un excès du pouvoir législatif du Parlement et aussi des pouvoirs conférés par la *Loi sur les pêcheries*. La cour a souligné à la p. 795:

> ... le juge a eu tort de tenir pour acquis que le fait d'accorder l'injonction ne causerait aucun tort aux appelants. Lorsqu'on empêche un organisme public d'exercer les pouvoirs que la loi lui confère, on peut alors affirmer, en présence d'un cas comme celui qui nous occupe, que l'intérêt public, dont cet organisme est le gardien, subit un tort irréparable; ...

Ces propos de la Cour d'appel fédérale développent, en des termes peut-être un peu généraux, l'idée exprimée d'une façon plus réservée par lord

Browne L.J. in *Smith v. Inner London Education Authority*, [1978] 1 All E.R. 411, at p. 422:

He [the motion judge] only considered the balance of convenience as between the plaintiffs and the authority, but I think counsel for the authority is right in saying that where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed. I think this is an example of the 'special factors' affecting the balance of convenience which are referred to by Lord Diplock in *American Cyanamid Co v Ethicon Ltd.*

Similar considerations govern the granting of interlocutory injunctive relief in the context of exemption cases.

Ontario Jockey Club v. Smith (1922), 22 O.W.N. 373, is the earliest example I know of an exemption case. The plaintiff club sought an interim injunction restraining the Provincial Treasurer and the Provincial Police Commissioner from collecting from it a provincial tax which was allegedly indirect and *ultra vires* of the Province or, in the alternative, from closing the club's race track, until a decision was rendered on the merits. Middleton J., concerned with the protection of the public interest, issued the injunction subject to an undertaking by the club to pay into Court from time to time, the amount payable in respect of the taxes claimed.

In *Campbell Motors Ltd. v. Gordon*, [1946] 4 D.L.R. 36, the appellant company sought a declaration that *The National Emergency Transitional Powers Act, 1945*, S.C. 1945, c. 25, and certain regulations made thereunder for the purpose of [s. 2(1)(*c*)] "maintaining, controlling and regulating supplies and services, prices, transportation ... to ensure economic stability and an orderly transition to conditions of peace" were *ultra vires* on the ground that the war had come to an end. That appellant company was a used car dealer. It had been convicted four times for contravention to the regulations further to which its licence had been cancelled by the Wartime Prices and Trade Board, three of its motor vehicles had been seized together

juge Browne dans la décision *Smith v. Inner London Education Authority*, [1978] 1 All E.R. 411, à la p. 422:

[TRADUCTION] Il [le juge des requêtes] n'a considéré la prépondérance des inconvénients que par rapport aux demandeurs et à l'Office, mais je crois que l'avocat de celui-ci a raison d'affirmer que, lorsque le défendeur est un organisme public ayant pour tâche de servir le public, on doit examiner la prépondérance des inconvénients sous un angle plus large et tenir compte des intérêts du grand public auquel ces services sont destinés. J'estime qu'il s'agit là d'un exemple des «éléments particuliers» jouant dans la prépondérance des inconvénients, dont fait mention lord Diplock dans l'arrêt *American Cyanamid Co. v. Ethicon Ltd.*

Des considérations semblables s'appliquent à l'injonction interlocutoire dans le contexte des cas d'exemption.

La décision *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373, est le plus vieil exemple que je connaisse d'un cas d'exemption. Le club demandeur demandait une injonction provisoire qui aurait interdit au trésorier provincial et au commissaire de police provincial de percevoir auprès du club une taxe provinciale que celui-ci prétendait indirecte et, partant, *ultra vires* de la province, ou, subsidiairement, qui les aurait empêchés de fermer la piste du club en attendant qu'une décision soit rendue sur le fond. Le juge Middleton, soucieux de protéger l'intérêt public, a accordé l'injonction sous réserve que le club s'engage à consigner régulièrement à la cour la somme correspondant aux taxes exigées.

Dans l'affaire *Campbell Motors Ltd. v. Gordon*, [1946] 4 D.L.R. 36, la société appelante demandait un jugement déclaratoire portant que la *Loi de 1945 sur les pouvoirs transitoires résultant de circonstances critiques nationales*, S.C. 1945, chap. 25, et certains règlements adoptés sous son régime pour [al. 2(1)*c*)] «maintenir, contrôler et réglementer les approvisionnements et services, les prix, les transports ... afin d'assurer la stabilité économique et une transition ordonnée aux conditions du temps de paix» étaient *ultra vires* parce que la guerre était finie. La société appelante vendait des voitures d'occasion. Par suite de quatre déclarations de culpabilité d'avoir enfreint les règlements, sa licence avait été révoquée par la

with certain books and records and it had been prohibited from selling any motor vehicles except with the concurrence of the representative of the Board in Vancouver. By a majority decision, the British Columbia Court of Appeal, confirming the motion judge, refused to continue an *ex parte* interim injunction restraining members of the Board from prosecuting the company for doing business without a licence and also refused to order the return of the company's seized property. Sidney Smith J.A., who gave the reasons of the majority, wrote at p. 48:

> If this injunction were to stand there would be a risk of confusion in the public mind which, in the general interest, should not without good reason be authorized.

Robertson J.A., who agreed with the reasons of Sidney Smith J.A., added at p. 47:

> Subsection (*c*) of s. 2 quoted above, showed the extent of the economic affairs of Canada, to which the legislation applies. If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish, thus resulting in economic confusion and ultimately in inflation.

A more recent example can be found in *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 (Alta. Q.B.), and *Law Society of Alberta v. Black* (1984), 8 D.L.R. (4th) 346 (Alta. C.A.) The Law Society had adopted two rules, one of which prohibited members from being partners in more than one law firm; the other rule prohibited members residing in Alberta from entering into partnerships with members residing outside Alberta. This latter rule was challenged as being inconsistent with s. 6(2) of the *Charter*. The Alberta Court of Queen's Bench granted an interlocutory injunction restraining the Law Society from enforcing the two rules against the plaintiff solicitors pending the trial of the action. The Law Society only appealed the order granting the interlocutory injunction with respect to the first rule. In

Commission des prix et du commerce en temps de guerre, trois de ses véhicules automobiles avaient été saisis ainsi que certains livres et dossiers et on lui avait interdit de vendre tout véhicule automobile, si ce n'était avec le consentement du représentant de la Commission à Vancouver. La Cour d'appel de la Colombie-Britannique à la majorité a confirmé la décision du juge de première instance et a refusé de maintenir une injonction provisoire *ex parte* qui empêchait les membres de la Commission de poursuivre la société pour avoir fait affaires sans licence; la Cour d'appel a de plus refusé d'ordonner la restitution des biens saisis à la société. Le juge Sidney Smith, qui a prononcé les motifs de la majorité, a écrit, à la p. 48:

> [TRADUCTION] Si cette injonction devait être maintenue, il y aurait risque de confusion dans l'esprit public, ce qui, dans l'intérêt général, ne doit pas être autorisé sans raison valable.

Le juge Robertson, qui a souscrit aux motifs du juge Sidney Smith, a ajouté, à la p. 47:

> [TRADUCTION] L'alinéa *c*) de l'art. 2 cité ci-dessus révèle l'ampleur des affaires économiques canadiennes auxquelles s'applique la législation. Nul ne peut dire quel effet une injonction pourrait avoir sur la situation économique du Canada, car bien des gens pourraient, en conséquence, refuser d'obéir à la loi et, quand on leur intenterait des poursuites, ils pourraient demander et obtenir des injonctions et ensuite faire à leur guise, ce qui aboutirait à la confusion économique et, à la longue, à l'inflation.

Un exemple plus récent se trouve dans les affaires *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 (B.R. Alb.), et *Law Society of Alberta v. Black* (1984), 8 D.L.R. (4th) 346 (C.A. Alb.) La Law Society (le Barreau) avait adopté deux règles. L'une interdisait aux membres d'être des associés dans plus d'un cabinet d'avocats; l'autre défendait les membres résidant en Alberta de s'associer avec des membres demeurant en dehors de l'Alberta. Cette dernière règle a été contestée parce qu'on la prétendait incompatible avec le par. 6(2) de la *Charte*. La Cour du Banc de la Reine de l'Alberta a accordé une injonction interlocutoire qui empêchait le Barreau d'appliquer les deux règles aux avocats demandeurs en attendant l'instruction de l'action. Le Barreau n'a interjeté appel de l'ordonnance accordant l'injonction interlocu-

allowing the appeal, Kerans J.A., who delivered the reasons of the Court, wrote at p. 349:

> It is correct ... that the fact that the injunction is sought against a public authority exercising a statutory power is a matter to be considered when one comes to the balance of convenience. However, we do not agree that the *Cyanamid* test simply disappears in such a case.

The *Morgentaler* case, *supra*, is an exemption case involving the *Charter* which has been quoted and relied upon several times. The plaintiff applicants had opened a clinic offering abortion services, which was not an "accredited hospital" within the meaning of s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34. They commenced an action claiming that s. 251 was inconsistent with the *Canadian Charter of Rights and Freedoms* and an interim injunction and a permanent injunction. Pending the hearing and disposition of the interim injunction, they sought an "interim interim" injunction restraining the Chief of the Metropolitan Toronto Police Force, the Commissioner of the Ontario Provincial Police, and their servants, agents or any persons acting under their instruction, from investigating, enquiring into, reporting and otherwise acting upon the activities of the plaintiffs referable only to s. 251 of the *Criminal Code*. Linden J., of the Ontario High Court, dismissed their application and expressed the following opinion on the balance of convenience at pp. 666-68:

> The third matter that must be demonstrated is that the balance of convenience in the granting of an interim injunction favours the applicants over the respondents. If only these two sets of parties were involved in this application it might well be that the convenience of the applicants would predominate over that of the respondents, since the applicants have much to lose while the respondents do not. However, this is not an ordinary civil injunction matter; it involves a significant question of constitutional law and raises a major public issue to be addressed—that is, what may law enforcement agen-

toire que dans la mesure où elle visait la première règle. L'appel a été accueilli et le juge Kerans, qui a prononcé les motifs de la cour, a écrit, à la p. 349:

> [TRADUCTION] Il est exact ... que le fait que l'injonction demandée vise un organisme public qui exerce un pouvoir conféré par une loi doit entrer en ligne de compte quand on considère la prépondérance des inconvénients. Toutefois, nous ne sommes pas d'accord pour dire que le critère formulé dans l'arrêt *Cyanamid* cesse simplement de s'appliquer dans un cas semblable.

L'affaire *Morgentaler*, précitée, est un cas d'exemption portant sur la *Charte*. Cette décision a été citée et invoquée à plusieurs reprises. Les requérants demandeurs avaient ouvert une clinique offrant des services d'avortement, laquelle clinique n'était pas un «hôpital accrédité» au sens de l'art. 251 du *Code criminel*, S.R.C. 1970, chap. C-34. Ils ont intenté une action dans laquelle ils alléguaient que l'art. 251 était incompatible avec la *Charte canadienne des droits et libertés* et qui visait à obtenir une injonction provisoire ainsi qu'une injonction permanente. En attendant l'issue de l'audition relative à l'injonction provisoire, ils ont demandé une injonction «doublement provisoire» qui aurait empêché le chef de la police de Toronto, le commissaire de la Sûreté de l'Ontario, leurs préposés, leurs mandataires ou toute personne agissant conformément à leurs directives, de mener une investigation ou une enquête ou de faire rapport sur les activités des demandeurs et de prendre tout autre mesure à cet égard, relativement à l'art. 251 du *Code criminel* seulement. Le juge Linden de la Haute Cour de l'Ontario a rejeté leur demande et a exprimé sur la question de la prépondérance des inconvénients l'opinion suivante (aux pp. 666 à 668):

> [TRADUCTION] Troisièmement, il faut démontrer que, selon la règle de la prépondérance des inconvénients, l'injonction provisoire favoriserait les requérants aux dépens des intimés. Si ces parties étaient les seules impliquées dans la présente requête, il pourrait y avoir lieu de faire pencher la balance en faveur des requérants par rapport aux intimés, puisque les requérants ont beaucoup à perdre mais non les intimés. Mais il ne s'agit pas ici d'une injonction ordinaire, au civil; l'affaire soulève une importante question de droit constitutionnel et une question d'intérêt public majeure: que peuvent

cies do pending the outcome of constitutional litigation challenging the laws they are meant to enforce?

It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences under s. 251 pending the final resolution of the constitutional issue. Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever. In the event that the impugned law is ultimately held to be invalid, no harm would be done by such a course of conduct. But, if the law is ultimately held to be constitutional, the result would be that the courts would have prohibited the police from investigating and prosecuting what has turned out to be criminal activity. This cannot be.

For example, let us assume that someone challenged the constitutional validity of the *Narcotic Control Act*, R.S.C. 1970, c. N1, and sought an injunction to prevent the police from investigating and prosecuting that person for importing and selling narcotics pending the resolution of the litigation. If the court granted the injunction, the sale of narcotic drugs would be authorized by court order, which would be most inappropriate if the law is later held to be valid.

. . .

In my view, therefore, the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision. If the law is eventually proclaimed unconstitutional, then it need no longer be complied with, but until that time, it must be respected and this court will not enjoin its enforcement. Such a course of action seems to be the best method of ensuring that our society will continue to respect the law at the same time as it is being challenged in an orderly way in the courts. This does not mean, however, that in exceptional circumstances this court is precluded from granting an interim injunction to prevent grave injustice, but that will be rare indeed.

The principles followed in the above-quoted cases have been summarized and confirmed for the greater part by this Court in *Gould, supra*. Gould, a penitentiary inmate prohibited from voting by s. 14(4)(*e*) of the *Canada Elections Act*, R.S.C. 1970 (1st Supp.), c. 14, had commenced an action in the Trial Division of the Federal Court seeking a declaration that the provision in question was invalid as contrary to s. 3 of the *Canadian Charter*

faire les organes d'application de la loi en attendant l'issue d'un litige constitutionnel mettant en cause les lois qu'ils doivent appliquer?

On soutient dans cette requête que les tribunaux devraient faire cesser toute poursuite (et même toute enquête) portant sur les prétendues infractions à l'art. 251 jusqu'à jugement définitif sur le litige constitutionnel. Une telle démarche aurait pour effet d'accorder aux contrevenants éventuels une impunité provisoire, voire définitive. Si la loi contestée devait finalement être jugée invalide, aucun dommage n'aurait alors été causé, mais si au contraire elle était jugée constitutionnelle, les tribunaux auraient en réalité interdit à la force policière de faire des enquêtes et d'entamer des poursuites relativement à ce qui était en fin de compte une activité criminelle. Cela ne saurait être.

Par exemple, supposons que soit mise en cause la validité constitutionnelle de la *Loi sur les stupéfiants*, S.R.C. 1970, chap. N-1, et qu'on demande une injonction afin d'interdire à la force policière de faire enquête et de poursuivre ceux qui se livrent au trafic de stupéfiants, en attendant qu'il soit statué sur ce litige. Si la cour accordait l'injonction, la vente de ces stupéfiants s'en trouverait autorisée par ordonnance judiciaire, ce qui serait tout à fait déplorable si la loi était ultérieurement jugée valide.

. . .

À mon avis, la règle du plus grand préjudice dicte donc normalement que ceux qui contestent la validité constitutionnelle des lois doivent leur obéir tant que la cour n'a pas statué. Si la loi est en fin de compte jugée inconstitutionnelle, il n'y a plus lieu alors de la respecter, mais jusqu'à ce moment, elle doit être appliquée et la cour n'ordonnera pas qu'elle ne le soit pas. Cette solution paraît être le meilleur moyen d'assurer dans notre société le respect de la loi au moment même où elle est contestée dans le respect de l'ordre devant les tribunaux. Cela ne signifie toutefois pas que, dans des cas exceptionnels, il ne sera pas permis à la cour d'accorder une injonction provisoire pour prévenir une grave injustice, mais ces cas seront vraiment rares.

La plupart des principes appliqués dans les décisions susmentionnées ont été résumés et confirmés par cette Cour dans l'arrêt *Gould*, précité. Gould, un détenu dans un pénitencier, à qui l'al. 14(4)*e*) de la *Loi électorale du Canada*, S.R.C. 1970 (1er Supp.), chap 14, interdisait de voter, avait engagé devant la Division de première instance de la Cour fédérale une action visant à obtenir un jugement déclarant la disposition en question invalide parce

of Rights and Freedoms which provides that every citizen of Canada has the right to vote. With a general election about to be held, the inmate applied for an interlocutory injunction, mandatory in nature, requiring the Chief Electoral Officer and the Solicitor General to allow him to vote by proxy. By a majority decision reversing the Trial Division, the Federal Court of Appeal dismissed his application. Mahoney J., with whom this Court expressed its general agreement, wrote at p. 1139 as follows:

> Paragraph 14(4)(*e*) plainly cannot stand unless, by virtue of section 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society.

That the respondent inmate had thus a *prima facie* case was, however, not considered as conclusive. Mahoney J. went on to consider the general repercussions of the remedy sought by the respondent and dismissed his application for interlocutory injunction on the following grounds, *inter alia*, to be found at pp. 1139-40:

> To treat the action as affecting only the rights of the respondent is to ignore reality. If paragraph 14(4)(*e*) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned Trial Judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

And, as we have already seen above, Mahoney J. went on to hold that the interlocutory injunction should be refused for the additional reason that it decided the merits, a matter that should not be resolved at the interlocutory stage.

The same principles have been followed recently in *Bregzis v. University of Toronto* (1986), 9 C.C.E.L. 282, where the applicant, an associate librarian, was retired involuntarily from his employment with the university, when he reached the age of sixty-five, in accordance with the university's mandatory retirement policy. He chal-

qu'elle contrevenait à l'art. 3 de la *Charte canadienne des droits et libertés* qui reconnaît à tout citoyen du Canada le droit de vote. À la veille d'une élection générale, le détenu a demandé une injonction interlocutoire de caractère obligatoire qui aurait obligé le directeur général des élections et le solliciteur général à lui permettre de voter par procuration. La Cour d'appel fédérale à la majorité a infirmé la décision de la Division de première instance et a rejeté sa demande. Le juge Mahoney, avec lequel cette Cour s'est dite généralement d'accord, a écrit ce qui suit (à la p. 1139):

> L'alinéa 14(4)*e*) ne peut manifestement rester valide à moins que l'on puisse conclure, en vertu de l'article 1 de la Charte, qu'il constitue une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

Le fait que le détenu intimé avait donc établi une apparence de droit suffisante n'a toutefois pas été considéré comme concluant. Le juge Mahoney a examiné ensuite les répercussions générales du redressement sollicité par l'intimé, puis a rejeté sa demande d'injonction interlocutoire notamment pour les motifs suivants qui sont exposés aux pp. 1139 et 1140:

> Considérer que cette action ne touche que les droits de l'intimé équivaut à ne pas tenir compte de la réalité. Si l'alinéa 14(4)*e*) est jugé nul en tout ou en partie, il sera nul en ce qui concerne tout prisonnier incarcéré au Canada. C'est pourquoi, en toute déférence, j'estime que le juge de première instance a commis une erreur en traitant la demande dont elle avait été saisie comme s'il s'agissait d'une demande ordinaire d'injonction interlocutoire dont il fallait connaître en considérant que les inconvénients devraient être répartis entre l'intimé et les appelants seulement.

De plus, comme nous l'avons déjà vu, le juge Mahoney a conclu que l'injonction interlocutoire devait être refusée en outre parce que l'injonction constituait une décision sur le fond, ce qui était hors de propos au stade interlocutoire.

Les mêmes principes ont été suivis récemment dans l'affaire *Bregzis v. University of Toronto* (1986), 9 C.C.E.L. 282, dans laquelle le requérant, un bibliothécaire adjoint a dû, en conformité avec la politique de retraite obligatoire de l'université, quitter son poste à l'université contre son gré quand il a atteint l'âge de 65 ans. Il a contesté la

lenged the legality of the retirement policy as well as s. 9(*a*) of the *Human Rights Code, 1981*, S.O. 1981, c. 53, on the ground that they offended s. 15 of the *Canadian Charter of Rights and Freedoms*. In his reasons, Osborne J. of the Ontario Supreme Court referred to judgments in both *Morgentaler, supra*, and *Gould, supra*, and agreed that "the spectrum of concern on the balance of convenience issue must be wider than the issue joined by the parties themselves" (p. 286).

Another case involving facts somewhat similar to *Bregzis* is *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146, where the plaintiffs, fifteen doctors with active medical practices, contested the validity of a hospital regulation approved by the Minister of Health pursuant to the *Hospital Act*, R.S.B.C. 1979, c. 176, and under the authority of which their admitting privileges had been terminated because they were over the age of sixty-five. The regulation allegedly constituted discrimination based on age in violation of s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In a unanimous judgment, the British Columbia Court of Appeal confirmed the judgment of the Supreme Court of British Columbia which had granted the doctors an interlocutory injunction restraining the hospital from interfering with their privileges pending termination of the issue. While the Court of Appeal did not explicitly refer to the public interest, it nevertheless showed its concern for the safety of the fifteen respondents' patients in holding that "All of the doctors were in good health at the material time" (at p. 154).

Finally, in *Rio Hotel Ltd. v. Liquor Licensing Board*, [1986] 2 S.C.R. ix, Rio Hotel Ltd. which had admittedly violated the conditions of its liquor permit relating to the presence of nude dancers on the premises, challenged the validity of those conditions on the basis of the *Charter* as well as of ss. 91 and 92 of the *Constitution Act, 1867*. It had

légalité de cette politique en matière de retraite et aussi la définition d'«âge» à l'art. 9 du *Code des droits de la personne 1981*, S.O. 1981, chap. 53, parce que, selon lui, ils allaient à l'encontre de l'art. 15 de la *Charte canadienne des droits et libertés*. Dans ses motifs de jugement, le juge Osborne de la Cour suprême de l'Ontario s'est référé aux jugements rendus dans l'affaire *Morgentaler*, précitée, et aussi dans l'affaire *Gould*, précitée, et s'est dit d'accord que [TRADUCTION] «sur la question de la prépondérance des inconvénients, la portée de l'examen ne doit pas se limiter au point mis en litige par les parties elles-mêmes» (à la p. 286).

Une affaire dont les faits se rapprochent de ceux de l'affaire *Bregzis* est *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146, dans laquelle les demandeurs, quinze médecins qui exerçaient activement la médecine, contestaient la validité d'un règlement hospitalier approuvé par le ministre de la Santé sous le régime de la *Hospital Act*, R.S.B.C. 1979, chap. 176, et en vertu duquel on leur avait retiré leurs privilèges d'admission parce qu'ils avaient plus de 65 ans. Le règlement, prétendait-on, constituait une discrimination fondée sur l'âge, ce qu'interdit le par. 15(1) de la *Charte canadienne des droits et libertés*. Dans un arrêt unanime, la Cour d'appel de la Colombie-Britannique a confirmé le jugement de la Cour suprême de la Colombie-Britannique qui avait accordé aux médecins une injonction interlocutoire qui défendait à l'hôpital de toucher à leurs privilèges en attendant que la question en litige soit tranchée. Bien que la Cour d'appel n'ait pas mentionné explicitement l'intérêt public, elle a néanmoins manifesté sa préoccupation à l'égard de la sécurité des patients des quinze intimés lorsqu'elle a conclu que [TRADUCTION] «tous les médecins étaient en bonne santé à l'époque pertinente» (à la p. 154).

Finalement, dans l'affaire *Rio Hotel Ltd. c. Commission des licences et permis d'alcool*, [1986] 2 R.C.S. ix, Rio Hotel Ltd., qui reconnaissait avoir violé les conditions de son permis d'alcool relatives à la présence de danseuses nues dans ses locaux, s'est fondée sur la *Charte* ainsi que sur les art. 91 et 92 de la *Loi constitutionnelle de 1867*

lost in the New Brunswick Court of Appeal and was threatened with the cancellation of its permit when, in an unreported judgment dated July 31, 1986, this Court granted it leave to appeal as well as a stay of proceedings before the Liquor Licensing Board, pending the determination of its appeal. The stay was granted subject to compliance with an expedited schedule for filing the materials and for hearing the appeal. No reasons were given by this Court but those who were present at the oral argument of the application for leave to appeal and for a stay could easily infer from exchanges between members of the Court and counsel that the Court was alive to the enforcement problems created for the New Brunswick Liquor Licensing Board with respect to licence holders other than the Rio Hotel.

(iii) *Conclusion*

It has been seen from what preceeds that suspension cases and exemption cases are governed by the same basic rule according to which, in constitutional litigation, an interlocutory stay of proceedings ought not to be granted unless the public interest is taken into consideration in the balance of convenience and weighted together with the interest of private litigants.

The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

The problem had already been raised in the *Campbell Motors* case, *supra*, where Robertson J.A. wrote at p. 47 in the above-quoted passage:

pour contester la validité de ces conditions. Débouté en Cour d'appel du Nouveau-Brunswick, le Rio Hotel était menacé de l'annulation de sa licence quand, dans une décision inédite en date du 31 juillet 1986, cette Cour lui a accordé l'autorisation de pourvoi ainsi que la suspension des procédures devant la Commission des licences et permis d'alcool en attendant l'issue de son pourvoi. La suspension d'instance fut accordée à la condition que la production de documents en vue du pourvoi et l'audition aient lieu dans des délais abrégés. Cette Cour n'a pas motivé sa décision, mais ceux qui étaient présents à l'audition relative à la demande d'autorisation de pourvoi et à la demande de suspension d'instance pouvaient facilement déduire des échanges entre les membres de la Cour et les avocats que la Cour était préoccupée par les problèmes d'application qui en résulteraient pour la Commission des licences et permis d'alcool du Nouveau-Brunswick dans le cas de titulaires de licences autres que le Rio Hotel.

iii) *Conclusion*

Il se dégage de ce qui précède que les cas de suspension et les cas d'exemption sont régis par la même règle fondamentale selon laquelle, dans les affaires constitutionnelles, une suspension interlocutoire d'instance ne devrait pas être accordée à moins que l'intérêt public ne soit pris en considération dans l'appréciation de la prépondérance des inconvénients en même temps que l'intérêt des plaideurs privés.

Si les cas d'exemption sont assimilés aux cas de suspension, cela tient à la valeur jurisprudentielle et à l'effet exemplaire des cas d'exemption. Suivant la nature des affaires, du moment qu'on accorde à un plaideur une exemption sous la forme d'une suspension d'instance, il est souvent difficile de refuser le même redressement à d'autres justiciables qui se trouvent essentiellement dans la même situation et on court alors le risque de provoquer une avalanche de suspensions d'instance et d'exemptions dont l'ensemble équivaut à un cas de suspension de la loi.

Ce problème avait déjà été évoqué dans l'arrêt *Campbell Motors*, précité, où le juge Robertson a écrit, dans le passage déjà reproduit à la p. 47:

If an injunction were to be granted, no one can tell the result it might have on the economic position of Canada, as many persons might, in consequence, refuse to obey the law and, when proceeded against, apply for and obtain injunctions and proceed to do as they wish . . . .

In a case like the *Morgentaler* case, *supra*, for instance, to grant a temporary exemption from the provisions of the *Criminal Code* to one medical doctor is to make it practically impossible to refuse it to others. This consideration seems to have been very much in the mind of Linden J. in that case where, passing from the particular to the general, he wrote at p. 667:

It is contended in this application that the courts should halt all prosecution (and even investigation) of alleged offences . . . Such a step would grant to potential offenders an immunity from prosecution in the interim and perhaps forever.

This being said, I respectfully take the view that Linden J. has set the test too high in writing in *Morgentaler, supra*, that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief. It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public: it does not seem to me, for instance, that the cases of *Law Society of Alberta v. Black, supra*, and *Vancouver General Hospital v. Stoffman, supra*, can be considered as exceptional or rare. Even the *Rio Hotel* case, *supra*, where the impugned provisions were broader, cannot, in my view, be labeled as an exceptional or rare case.

On the other hand, the public interest normally carries greater weight in favour of compliance with existing legislation in suspension cases when the impugned provisions are broad and general and such as to affect a great many persons. And it may well be that the above mentioned test set by Linden J. in *Morgentaler, supra*, is closer to the

[TRADUCTION] Nul ne peut dire quel effet une injonction pourrait avoir sur la situation économique du Canada, car bien des gens pourraient, en conséquence, refuser d'obéir à la loi et, quand on leur intenterait des poursuites, ils pourraient demander et obtenir des injonctions et ensuite faire à leur guise . . .

Dans un cas comme l'affaire *Morgentaler*, précité, par exemple, accorder à un médecin une exemption temporaire de l'application des dispositions du *Code criminel* rend pratiquement impossible de la refuser à d'autres médecins. Cette considération semble avoir été bien présente à l'esprit du juge Linden dans cette affaire-là quand, passant du particulier au général, il a écrit, à la p. 667:

[TRADUCTION] On soutient dans cette requête que les tribunaux devraient faire cesser toute poursuite (et même toute enquête) portant sur les prétendues infractions . . . Une telle démarche aurait pour effet d'accorder aux contrevenants éventuels une impunité provisoire, voire définitive.

Cela dit, j'estime avec égards que le juge Linden pose un critère trop sévère quand il dit dans la décision *Morgentaler*, précitée, que ce n'est que dans des cas «exceptionnels» ou «rares» que les tribunaux accorderont une injonction interlocutoire. À mon sens, le critère est trop sévère, du moins dans les cas d'exemption lorsque les dispositions attaquées revêtent la forme de règlements applicables à un nombre relativement restreint de personnes et lorsqu'aucun préjudice appréciable n'est subi par le public: je ne crois pas, par exemple, que les situations qui se présentent dans les affaires *Law Society of Alberta v. Black* et *Vancouver General Hospital v. Stoffman*, précitées, peuvent être considérées comme exceptionnelles ou rares. Même l'affaire *Rio Hotel*, précitée, où les dispositions contestées étaient de portée plus large, ne peut, selon moi, être qualifiée de cas exceptionnel ou rare.

D'un autre côté, dans les cas de suspension, lorsque les dispositions contestées sont de portée large et générale et touchent un grand nombre de personnes, l'intérêt public commande normalement davantage le respect de la législation existante. Il se peut bien que le critère susmentionné qu'a formulé le juge Linden dans l'affaire *Morgentaler*,

mark with respect to this type of case. In fact, I am aware of only two instances where interlocutory relief was granted to suspend the operation of legislation and, in my view, these two instances present little precedent value.

One of these instances is *Home Oil Distributors Ltd. v. Attorney-General for British Columbia, supra*, where the majority of the British Columbia Court of Appeal confirmed the granting of an interlocutory injunction restraining the enforcement of the *Coal and Petroleum Products Control Board Act*, S.B.C. 1937, c. 8, pending final determination of the validity of this statute which regulated the price at which gasoline could be sold in the province. The impugned legislation was *intra vires* on its face. The sole ground invoked against it was that it constituted a colourable attempt to regulate the international oil industry and to foster the local coal industry at the expense of that of foreign petroleum. And the sole evidence of this colourable intent was the interim report of a Royal Commission made prior to the passing of the statute. In *Home Oil Distributors Ltd. v. Attorney-General of British Columbia*, [1940] S.C.R. 444, this Court looked at the report of the Royal Commission but it upheld the validity of the legislation. The granting of an interlocutory injunction by the motion judge, confirmed by the Court of Appeal, in a case of this nature, is an early and perhaps the first example where this was done in Canada. In a strong dissent, McQuarrie J.A. was the only judge who dealt at any length with the public interest aspect of the case and underlined the one million dollars a year cost of the injunction to the public. The decision seems to have been regarded as an isolated one in the *Campbell Motors* case, *supra*, at p. 48, in a passage that may amount to a veiled criticism. In my view, the *Home Oil Distributors* decision of the British Columbia Court of Appeal constitutes a weak precedent.

The other instance is *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342, where the Quebec Court of Appeal, reversing the Superior Court, issued an interlocutory injunction restraining the Attorney General and any other

précitée, convienne mieux à ce type de cas. En fait, je ne connais que deux affaires où on a accordé un redressement interlocutoire pour suspendre l'application d'une loi et, à mon avis, ces deux affaires ont peu de valeur comme précédents.

L'une d'elles est l'affaire *Home Oil Distributors Ltd. v. Attorney-General for British Columbia*, précitée, dans laquelle la Cour d'appel de la Colombie-Britannique à la majorité a confirmé une injonction interlocutoire accordée pour empêcher l'application de la *Coal and Petroleum Products Control Board Act*, S.B.C. 1937, chap. 8, en attendant une décision définitive sur la validité de cette loi qui fixait le prix de vente de l'essence dans la province. La loi attaquée était à première vue *intra vires*. On lui reprochait seulement de constituer une tentative déguisée de réglementer l'industrie pétrolière internationale et de favoriser l'industrie charbonnière locale au détriment du pétrole étranger. L'unique élément de preuve établissant cette intention déguisée était le rapport provisoire qu'une commission royale avait dressé antérieurement à l'adoption de la loi. Dans l'arrêt *Home Oil Distributors Ltd. v. Attorney-General of British Columbia*, [1940] R.C.S. 444, cette Cour a examiné le rapport de la commission royale mais a conclu à la validité de la loi. L'injonction interlocutoire accordée par le juge de première instance et confirmée par la Cour d'appel représente peut-être la première injonction interlocutoire rendue au Canada dans un cas de ce genre. Dans une dissidence énergique en Cour d'appel, le juge MacQuarrie a été le seul juge à examiner plus en détail l'aspect intérêt public de l'affaire et à souligner que l'injonction coûtait au public un million de dollars par année. D'après un passage de l'arrêt *Campbell Motors*, précité, à la p. 48, qui revient peut-être à une critique voilée, l'affaire *Home Oil Distributors* semble avoir été vue comme un cas isolé. À mon avis, l'arrêt *Home Oil Distributors* de la Cour d'appel de la Colombie-Britannique constitue un précédent faible.

Dans l'autre affaire, *Société Asbestos Ltée c. Société nationale de l'amiante*, [1979] C.A. 342, la Cour d'appel du Québec, infirmant une décision de la Cour supérieure, a rendu une injonction interlocutoire qui interdisait au procureur général

person, physical or corporate, from enforcing any right conferred upon them by Bill No. 70, *Loi constituant la Société nationale de l'amiante* and by Bill No. 121, *Loi modifiant la Loi constituant la Société nationale de l'amiante*, pursuant to which the appellant's property could be expropriated and the constitutional validity of which had been challenged in a declaratory action. The two statutes in question had been enacted in the French language only, in violation of s. 133 of the *Constitution Act, 1867*, and the Court of Appeal immediately came to the firm conclusion that, on that account, they were invalid. This is one of those exceptional cases where the merits were in fact decided at the interlocutory stage.

In short, I conclude that in a case where the authority of a law enforcement agency is constitutionally challenged, no interlocutory injunction or stay should issue to restrain that authority from performing its duties to the public unless, in the balance of convenience, the public interest is taken into consideration and given the weight it should carry. Such is the rule where the case against the authority of the law enforcement agency is serious, for if it were not, the question of granting interlocutory relief should not even arise. But that is the rule also even where there is a *prima facie* case against the enforcement agency, such as one which would require the coming into play of s. 1 of the *Canadian Charter of Rights and Freedoms*.

I should point out that I would have reached the same conclusion had s. 24 of the *Charter* been relied upon by counsel. Assuming for the purpose of the discussion that this provision applies to interlocutory relief in the nature of the one sought in this case, I would still hold that the public interest must be weighed as part of the balance of convenience: s. 24 of the *Charter* clearly indicates that the remedy sought can be refused if it is not considered by the court to be "appropriate and just in the circumstances".

et à toute autre personne, physique ou civile, d'exercer tout droit que leur conférait la loi nº 70, *Loi constituant la Société nationale de l'amiante*, et la loi nº 121, *Loi modifiant la Loi constituant la Société nationale de l'amiante*, qui autorisaient l'expropriation des biens de l'appelante et dont la constitutionnalité avait été contestée dans une action en jugement déclaratoire. Les deux lois en question avaient été adoptées en français seulement, ce qui allait à l'encontre de l'art. 133 de la *Loi constitutionnelle de 1867*, et la Cour d'appel est arrivée immédiatement à la ferme conclusion qu'elles étaient pour cette raison invalides. Il s'agit là d'un de ces cas exceptionnels où une décision au fond pouvait intervenir au stade interlocutoire.

En bref, je conclus que, lorsque l'autorité d'un organisme chargé de l'application de la loi fait l'objet d'une attaque fondée sur la Constitution, aucune injonction interlocutoire ni aucune suspension d'instance ne devrait être prononcée pour empêcher cet organisme de remplir ses obligations envers le public, à moins que l'intérêt public ne soit pris en considération et ne reçoive l'importance qu'il mérite dans l'appréciation de la prépondérance des inconvénients. Telle est la règle lorsqu'il y a un doute sérieux relativement à l'autorité de l'organisme chargé de l'application de la loi car, s'il en était autrement, la question d'un redressement interlocutoire ne devrait même pas se poser. Toutefois, cette règle s'applique aussi même lorsqu'on considère qu'il y a une apparence de droit suffisante contre l'organisme chargé de l'application de la loi, laquelle apparence de droit nécessiterait par exemple le recours à l'article premier de la *Charte canadienne des droits et libertés*.

Je dois souligner que ma conclusion aurait été la même si les procureurs s'étaient appuyés sur l'art. 24 de la *Charte*. À supposer aux fins de la présente analyse que cette disposition s'applique à un redressement interlocutoire comme celui demandé en l'espèce, je serais tout de même d'avis que l'intérêt public doit entrer en ligne de compte dans l'appréciation de la prépondérance des inconvénients: il ressort nettement de l'art. 24 de la *Charte* que le redressement demandé peut être refusé si la cour estime qu'il n'est pas «convenable et juste eu égard aux circonstances».

On the whole, I thus find myself in agreement with the following excerpt from Sharpe, *op. cit.*, at pp. 176-77:

> Indeed, in many situations, problems will arise if no account is taken of the general public interest where interlocutory relief is sought. In assessing the risk of harm to the defendant from an interlocutory injunction which might later be dissolved at trial, the courts may be expected to be conscious of the public interest. Too ready availability of interlocutory relief against government and its agencies could disrupt the orderly functioning of government.

I would finally add that in cases where an interlocutory injunction issues in accordance with the above-stated principles, the parties should generally be required to abide by the dates of a preferential calendar so as to avoid undue delay and reduce to the minimum the period during which a possibly valid law is deprived of its effect in whole or in part. See in this respect *Black v. Law Society of Alberta, supra*, p. 453, and the *Rio Hotel* case, *supra*.

V Review of the Judgments of the Courts Below

Finally, it is now appropriate to review the judgments of the courts below in light of the principles set out above.

The main legislative provision under attack is s. 75.1 of *The Labour Relations Act* of Manitoba, enacted in S.M. 1984-85, c. 21, s. 37, which enables the Board to settle the provisions of a first collective agreement. It is alleged by the employer that these provisions in question violate ss. 2(*b*), (*d*) and 7 of the *Canadian Charter of Rights and Freedoms* relating respectively to freedom of expression, freedom of association, liberty and security of the person. The Manitoba Court of Appeal has taken the view that the employer raises "a serious challenge" to the constitutional validity of the impugned provision and all the parties have conceded that the constitutional challenge is indeed a serious one. The test of a "serious question" applicable in a constitutional challenge of a law has therefore been met.

Dans l'ensemble, j'approuve donc le passage suivant tiré de Sharpe, *op. cit.*, aux pp. 176 et 177:

> [TRADUCTION] En fait, dans bien des situations, des problèmes surgiront si l'intérêt public général n'est pas pris en considération lorsqu'on demande un redressement interlocutoire. On peut s'attendre que, dans l'appréciation du risque de préjudice que peut présenter pour un défendeur une injonction interlocutoire susceptible d'être annulée au procès, les tribunaux aient à l'esprit l'intérêt public. S'il était trop facile d'obtenir un redressement interlocutoire contre le gouvernement et ses organismes, cela pourrait venir perturber le bon fonctionnement du gouvernement.

J'ajouterais en dernier lieu que, dans les cas où une injonction interlocutoire est accordée en conformité avec les principes énoncés ci-dessus, les parties devraient généralement être tenues de respecter un calendrier spécial afin d'éviter les retards indus et de réduire au minimum la période durant laquelle une loi qui est peut-être valide est privée totalement ou partiellement de son effet. Voir à cet égard les affaires *Black v. Law Society of Alberta*, précitée, à la p. 453, et *Rio Hotel*, précitée.

V Examen des jugements des tribunaux d'instance inférieure

Il convient enfin d'étudier à la lumière des principes énoncés précédemment les jugements des tribunaux d'instance inférieure.

La contestation porte essentiellement sur l'art. 75.1 de *The Labour Relations Act* du Manitoba, adopté par S.M. 1984-85, chap. 21, art. 37, qui autorise la Commission à établir la teneur d'une première convention collective. L'employeur allègue que les dispositions en cause enfreignent les al. 2*b*) et *d*) ainsi que l'art. 7 de la *Charte canadienne des droits et libertés* qui traitent respectivement de la liberté d'expression, de la liberté d'association et de la liberté et de la sécurité de la personne. Selon la Cour d'appel du Manitoba, l'employeur «soulève une question sérieuse» relativement à la constitutionnalité de la disposition attaquée et toutes les parties reconnaissent le sérieux de la contestation fondée sur la Constitution. On a donc satisfait au critère de la «question sérieuse» qui doit être rempli quand la constitutionnalité d'une loi est contestée.

The "irreparable harm" test also clearly appears to have been satisfied.

As I read her reasons, Krindle J., at p. 153, implicitly accepted the employer's argument that the imposition of a first contract was susceptible to prejudice its position:

> It may give to the union a semblance of bargaining strength which the union does not in fact possess. It may permit the union to benefit from a contract which, left to its own devices, it could not have successfully negotiated. That, however, was the object of the legislation.

It is difficult to imagine how the employer can be compensated satisfactorily in damages, for instance for the imposition of possibly higher wages or of better conditions of work, if it is later to be held that the imposed collective agreement is a constitutional nullity.

The same observation should be made with respect to the position of the union; as I understand the findings of Krindle J., the very existence of the unit was compromised without the imposition of a first collective agreement.

Krindle J.'s findings of facts have not been questioned by the Court of Appeal and it is not for this Court to review these findings.

Krindle J. then considered the balance of convenience and I refer in this respect to the above-quoted parts of her reasons for judgment. I am of the view that she applied the correct principles. More particularly, at p. 154, she looked at the public interest and at the inhibitory impact of a stay of proceedings upon the Board, in addition to its effect upon the employer and the union:

> It would seem to me that the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements or applications involving the mandatory inclusion of sections within negotiated agreements. In effect, for a two or three year period, prior to any finding of invalidity of those sections, their operation would be suspended, suspended in circumstances where the status quo cannot, practically speaking, be maintained.

On paraît manifestement avoir satisfait aussi au critère du «préjudice irréparable».

Selon mon interprétation de ses motifs, le juge Krindle, à la p. 153, a implicitement retenu l'argument de l'employeur qui affirmait que sa position risquerait d'être affaiblie si une première convention collective était imposée:

> [TRADUCTION] Cela pourrait conférer au Syndicat une apparente force de négociation qu'il ne possède pas en réalité. Cela pourrait permettre au Syndicat de bénéficier d'un contrat qu'il n'aurait pas pu réussir à négocier par lui-même. C'était toutefois là l'objet de la loi.

On conçoit mal comment des dommages-intérêts pourront constituer une compensation adéquate pour l'employeur qui se voit par exemple obligé d'offrir des salaires peut-être plus élevés ou des meilleures conditions de travail, si la convention collective ainsi imposée doit être par la suite jugée inconstitutionnelle.

La même observation s'applique à la situation du Syndicat. Si je comprends bien les conclusions du juge Krindle, l'existence même de l'unité de négociation serait compromise si une première convention collective n'était pas imposée.

Les conclusions de fait du juge Krindle n'ont pas été mises en doute par la Cour d'appel et il ne nous appartient pas de réviser ces conclusions.

Le juge Krindle s'est penchée ensuite sur la prépondérance des inconvénients et, sur cette question, je renvoie aux extraits précités tirés de ses motifs de jugement. J'estime qu'elle a appliqué les principes appropriés. Plus particulièrement, à la p. 154, elle a tenu compte de l'intérêt public et de l'effet inhibitif qu'une suspension d'instance aurait non seulement sur l'employeur et le Syndicat, mais aussi sur la Commission:

> [TRADUCTION] Il me semble qu'accorder une suspension en l'espèce constituerait une invitation à en faire autant dans la plupart des autres cas de demandes de première convention ou de demandes visant à obtenir l'inclusion obligatoire de certains articles dans des conventions négociées. En réalité, pendant une durée de deux ou trois ans avant que ces articles ne puissent être jugés invalides, leur application serait suspendue, et ce, dans des circonstances où il est pratiquement impossible de maintenir le statu quo.

In my opinion, in both the circumstances of this particular case and more generally, the balance of convenience favours proceeding as though the sections were valid unless and until the contrary is found.

While this is an exemption case, not a suspension case, and each case, including *a fortiori* an exemption case, turns on its own particular facts, yet, the inconvenience suffered by the parties is likely to be quite similar in most cases involving the imposition of a first collective agreement. Accordingly, the motion judge was not only entitled to but required to weigh the precedential value and exemplary effect of granting a stay of proceedings before the Board. I have not been persuaded that she committed reversible error in concluding that "the granting of a stay in this case would invite the granting of stays in most other cases of applications for first agreements".

I now turn to the reasons of the Court of Appeal. I repeat that the Court of Appeal did not find any error of facts or law in the judgment of Krindle J. nor any abuse of her discretion. The main consideration which appears to have been present in the mind of the Court of Appeal is the issue of delay in disposing of the merits.

Thus, the Court of Appeal observed that it was open to the Board to direct a reference to the Court of Appeal "in order to expedite matters and obtain a decision on the validity of the legislation" and it noted that the Board declined to do so. I would not go so far as to say that this was not a relevant consideration but it was anything but determinative.

According to the reasons of the Court of Appeal, at p. 182, the Canadian Labour Congress, which had obtained leave to intervene on the merits,

> . . . wished to present a considerable amount of evidence relative to the question which might arise as to whether the impugned legislation is a reasonable limit "pre-

À mon avis, dans la situation qui se présente en l'espèce et d'une manière plus générale, selon la prépondérance des inconvénients, il convient de faire comme si les articles étaient valides tant qu'on n'aura pas déterminé que ce n'est pas le cas.

Certes, nous sommes ici en présence d'un cas d'exemption, non d'un cas de suspension, et chaque cas, y compris a fortiori un cas d'exemption, doit être tranché en fonction de ses faits particuliers; toutefois, les inconvénients subis par les parties seront probablement très semblables dans la plupart des situations où une première convention collective leur est imposée. Cela étant, le juge de première instance avait non seulement le droit mais aussi l'obligation de prendre en considération la valeur de précédents et l'effet exemplaire qu'aurait une décision de suspendre les procédures devant la Commission. Je ne suis pas convaincu qu'elle a commis une erreur donnant lieu à cassation lorsqu'elle a conclu que [TRADUCTION] «accorder une suspension en l'espèce constituerait une invitation à en faire autant dans la plupart des autres cas de demandes de première convention».

J'en viens maintenant aux motifs de la Cour d'appel. Je répète que celle-ci n'a dégagé du jugement du juge Krindle aucune erreur de fait ou de droit ni aucun abus de son pouvoir discrétionnaire. La considération principale qui paraît avoir été présente à l'esprit de la Cour d'appel était la question du délai jusqu'à ce qu'une décision sur le fond soit rendue.

Dans cette optique, la Cour d'appel a fait remarquer qu'il était loisible à la Commission de lui renvoyer l'affaire [TRADUCTION] «pour accélérer les choses et pour obtenir une décision sur la validité de la loi», ce que, a-t-elle fait remarquer, la Commission s'est abstenue de faire. Je n'irai pas jusqu'à prétendre que cela ne constituait pas une considération pertinente, mais c'était loin d'être déterminant.

D'après les motifs de la Cour d'appel, à la p. 182, le Congrès du travail du Canada, qui avait obtenu l'autorisation d'intervenir sur le fond,

> [TRADUCTION] . . . désirait produire une quantité considérable de preuves portant sur la question potentielle de savoir si la loi attaquée constituait une restriction rai-

scribed by law as can be demonstrably justified in a free and democratic society" in accordance with s. 1 of the *Charter of Rights and Freedoms*.

The appellate level is not the conventional forum for the adducing of evidence and the case may not have appeared to the Board to be a clearly appropriate one for a direct reference to the Court of Appeal. In any event, what matters is not so much the attitude or conduct of the Board in declining to request a reference to the Court of Appeal as the impact of a stay upon the litigants who came within the purview of the Board's authority and upon the public in general. To repeat what was said by Browne L.J. in *Smith v. Inner London Education Authority, supra*, at p. 422:

> ... where the defendant is a public authority performing duties to the public one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.

The other new factors which were not before the motion judge and on the basis of which the Court of Appeal purported to exercise fresh discretion are also all related to the issue of delay. I find it convenient here to repeat part of the above-quoted reasons of the Court of Appeal (pp. 182-83):

> By its originating notice of motion, the employer raises a serious challenge to the constitutional validity of various sections of the *Labour Relations Act*. As previously noted, other provisions in the *Act* are under attack in other litigation. When Krindle, J., denied the initial request for a stay order, she was not made aware of either the proposed new intervention in this case by the Canadian Labour Congress, nor the other challenges to the *Act*, based upon the *Charter* in other litigation.
>
> There is also a new factor, in that the merits of the attack on the legislation could have been expedited in the Court of Queen's Bench, and a hearing to determine the validity of the impugned sections could have taken place in late September, but for the intervention of the Canadian Labour Congress.
>
> In short, this is no longer a matter where this court is reviewing a discretionary order made by the learned

sonnable qui est prescrite par une «règle de droit» et «dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique» au sens de l'article premier de la *Charte des droits et libertés*.

Une cour d'appel n'est pas le forum habituel pour produire des éléments de preuve et il a pu sembler à la Commission que ce n'était pas un cas où il convenait clairement de renvoyer directement devant la Cour d'appel. Quoi qu'il en soit, ce qui importe n'est pas tant l'attitude ou la conduite de la Commission manifestée par son refus de demander un renvoi devant la Cour d'appel que l'effet d'une suspension d'instance sur les parties, lesquelles relevaient du pouvoir de la Commission, et sur le public en général. Répétons ici les observations de lord juge Brown à la p. 422 de l'affaire *Smith v. Inner London Education Authority*, précitée:

> [TRADUCTION] ... lorsque le défendeur est un organisme public ayant pour tâche de servir le public, on doit examiner la prépondérance des inconvénients sous un angle plus large et tenir compte des intérêts du grand public auquel ces services sont destinés.

Les autres éléments nouveaux dont le juge de première instance ne disposait pas et sur lesquels la Cour d'appel s'est fondée pour exercer un nouveau pouvoir discrétionnaire sont également tous reliés à la question des délais. Par souci de commodité, je reprends ici une partie des motifs précités de la Cour d'appel (aux pp. 182 et 183):

> [TRADUCTION] Par son avis de requête introductif d'instance, l'employeur soulève une question sérieuse relativement à la constitutionnalité de plusieurs articles de *The Labour Relations Act*. Comme je l'ai déjà fait remarquer, d'autres dispositions de la Loi sont attaquées dans d'autres litiges. Quand le juge Krindle a rejeté la demande initiale d'ordonnance de suspension, elle ignorait l'intervention envisagée en l'espèce par le Congrès du travail du Canada de même que l'existence d'autres litiges dans lesquels la Loi faisait l'objet de contestations fondées sur la *Charte*.
>
> Il y a en outre un nouvel élément en ce sens que la Cour du Banc de la Reine aurait pu rendre plus rapidement une décision au fond relativement à la contestation portant sur la loi, et une audience visant à déterminer la validité des articles attaqués aurait pu avoir lieu à la fin de septembre, n'eût été l'intervention du Congrès du travail du Canada.
>
> En bref, il ne s'agit plus d'une affaire où cette cour se trouve à réviser une ordonnance rendue par le savant

motions judge. Additional considerations affecting the exercise of discretion have now been raised, allowing this court to exercise a fresh discretion.

In our view it would be unwise to permit the Manitoba Labour Board to impose a new first contract and then some few months later to find the legislation set aside as unconstitutional as being contrary to the *Charter*.

A stay is therefore granted, with costs in the cause. We urge that the parties proceed with a hearing on the merits of the employer's motion with dispatch.

With the greatest of respect, these reasons contain in my view at least two fatal errors of law.

In the first place, the Court of Appeal was not justified in substituting its discretion for that of the motion judge on the basis of new facts which were not before the latter.

The emergence of new facts after the judgment of first instance must be of such a nature as to substantially affect the decision of the motion judge in order to justify a court of appeal to exercise a fresh discretion. In the case at bar, the Court of Appeal failed to indicate in what respect the new facts affected the judgment of Krindle J. It did not even refer to her reasons. Each of those new facts related to the issue of delay in hearing and deciding the merits, a factor which, as can be seen in her above-quoted reasons, had been considered and taken into account by Krindle J.

The House of Lords has recently emphasized the limits imposed upon a Court of Appeal in substituting its discretion to that of a motion judge with respect to the granting of an interlocutory injunction, even in a case where the Court of Appeal has the benefit of additional evidence: *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042. In this latter case, which presents striking similarities with the case at bar, the Court of Appeal had held it was justified in exercising fresh discretion in view of additional evidence

juge des requêtes dans l'exercice de son pouvoir discrétionnaire. D'autres considérations touchant l'exercice du pouvoir discrétionnaire ont maintenant été soulevées, si bien que la Cour est autorisée à exercer un nouveau pouvoir discrétionnaire.

Selon nous, il ne serait pas sage de permettre que la Commission impose une première convention collective alors que la loi en cause pourrait quelques mois plus tard être déclarée contraire à la *Charte* et, partant, inconstitutionnelle.

La suspension est donc accordée et les dépens suivront l'issue de la cause. Nous engageons les parties à procéder promptement à une audience sur le fond de la requête de l'employeur.

Avec les plus grands égards, ces motifs renferment à mon avis au moins deux erreurs de droit fatales.

En premier lieu, rien ne justifiait la Cour d'appel, sur la foi de faits nouveaux dont ne disposait pas le juge de première instance, de substituer son jugement à celui du juge de première instance.

Pour qu'ils justifient qu'une cour d'appel exerce un nouveau pouvoir discrétionnaire, les faits nouveaux qui émergent après le prononcé du jugement de première instance doivent être de telle nature qu'ils aient un effet appréciable sur la décision du juge de première instance. En l'espèce, la Cour d'appel a omis d'indiquer en quoi les faits nouveaux changeaient la décision du juge Krindle. Elle ne s'est même pas référée aux motifs de celle-ci. Chacun de ces faits nouveaux se rapportait à la question des délais jusqu'à la tenue de l'audition et à la décision au fond, élément que, comme on peut le constater dans les passages précités tirés de ses motifs, le juge Krindle avait examiné et pris en considération.

La Chambre des lords a souligné dernièrement les limites auxquelles se trouve assujetti un tribunal d'appel qui substitue sa discrétion à celle du juge de première instance en matière d'injonction interlocutoire, et ce, même dans un cas où le tribunal d'appel bénéficie d'éléments de preuve supplémentaires: *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042. Dans cette affaire, qui présente des ressemblances frappantes avec la présente instance, la Cour d'appel avait conclu que, compte tenu d'éléments de preuve

adduced before it, and had set aside the decision of the motion judge without commenting upon it. The House of Lords restored the judgment of first instance in a unanimous judgment delivered by Lord Diplock:

Before adverting to the evidence that was before the judge and the additional evidence that was before the Court of Appeal, it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. On an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based on a misunderstanding of the law or of the evidence before him or on an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn on the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or on the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside on the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons that it becomes entitled to exercise an original discretion of its own.

supplémentaires produits devant elle, elle avait le droit d'exercer un nouveau pouvoir discrétionnaire, ce qu'elle a fait en infirmant la décision du juge de première instance sans même la commenter. La Chambre des lords, dans un arrêt unanime rendu par lord Diplock, a rétabli le jugement de première instance:

[TRADUCTION] Avant d'en venir à la preuve produite devant le juge et aux éléments de preuve supplémentaires dont disposait la Cour d'appel, je crois qu'il convient de rappeler à vos Seigneuries le rôle limité d'un tribunal d'appel dans un appel de ce genre. Une injonction interlocutoire est un redressement discrétionnaire et c'est le juge de la Haute Cour saisi de la demande visant à obtenir ce redressement qui détient le pouvoir discrétionnaire de l'accorder ou de ne pas l'accorder. Lorsque la décision du juge d'accorder ou de refuser une injonction interlocutoire est portée en appel, la tâche du tribunal d'appel, que ce soit la Cour d'appel ou cette Chambre, ne consiste pas à exercer un pouvoir discrétionnaire indépendant qui lui est propre. Ce tribunal doit déférer à la décision prise par le juge dans l'exercice de son pouvoir discrétionnaire et ne doit pas modifier cette décision simplement parce que ses membres auraient exercé le pouvoir discrétionnaire différemment. Au départ, le tribunal d'appel n'a qu'une fonction de révision. Il peut annuler la décision rendue par le juge dans l'exercice de son pouvoir discrétionnaire, soit pour le motif que cette décision repose sur une erreur de droit ou sur une interprétation erronée de la preuve produite devant lui ou sur une conclusion à l'existence ou à l'inexistence de certains faits, conclusion dont, bien qu'elle puisse avoir été justifiée par la preuve produite devant le juge, le caractère erroné peut être démontré par des éléments de preuve supplémentaires dont on dispose au moment de l'appel, soit pour le motif qu'après que le juge a rendu son ordonnance les circonstances ont changé d'une manière qui aurait justifié qu'il accède à une demande en modification de cette ordonnance. Puisque les raisons données par les juges pour accorder ou refuser des injonctions interlocutoires se révèlent parfois sommaires, il peut à l'occasion y avoir des cas où, bien qu'on ne puisse découvrir aucune conclusion erronée de droit ou de fait, la décision du juge d'accorder ou de refuser l'injonction est à ce point aberrante qu'elle doit être infirmée pour le motif qu'aucun juge raisonnable conscient de son obligation d'agir judiciairement aurait pu la rendre. Ce n'est que si le tribunal d'appel a conclu que la décision rendue par le juge dans l'exercice de son pouvoir discrétionnaire doit être écartée pour l'une ou l'autre raison susmentionnée qu'il est autorisé à exercer son propre pouvoir discrétionnaire.

In the instant case no deference was paid, no reference was even made, to the reasons given by Dillon J. for exercising his discretion in the way that he had done. The explanation given by Lord Denning MR why the Court of Appeal was entitled to ignore that judge's reasons for his decision was that in the interval between the hearing of the motion and the hearing of the appeal both sides had adduced further evidence 'so virtually we have to consider it all afresh'.

My Lords, with great respect, I cannot agree that the production of additional evidence before the Court of Appeal, all of which related to events that had taken place earlier than the hearing before Dillon J, is of itself sufficient to entitle the Court of Appeal to ignore the judge's exercise of his discretion and to exercise an original discretion of its own. The right approach by an appellate court is to examine the fresh evidence in order to see to what extent, if any, the facts disclosed by it invalidate the reasons given by the judge for his decision. Only if they do is the appellate court entitled to treat the fresh evidence as constituting in itself a ground for exercising an original discretion of its own to grant or withhold the interlocutory relief. In my view, if this approach had been adopted by the Court of Appeal in the instant case the additional evidence, so far from invalidating, would have been seen to provide additional support for Dillon J's reasons for refusing the interlocutory injunctions. [p. 1046.]

(See, also to the same effect, *Garden Cottage Foods Ltd. v. Milk Marketing Board*, [1983] 2 All E.R. 770 (H.L.))

I have no hesitation in holding that the Manitoba Court of Appeal erred in thus substituting its discretion to that of the motion judge and, on this sole ground, I would allow the appeal.

But there is more.

The Court of Appeal did not exercise its fresh discretion in accordance with the above-stated principles. It did not itself proceed to consider the balance of convenience nor did it consider the public interest as well as the interest of the parties. It only urged the parties to be expeditious. But urging or even ordering the parties to be expeditious does not dispense from weighing the public interest in the balance of convenience. It simply

En l'espèce, on n'a pas déféré aux motifs donnés par le juge Dillon pour justifier la manière dont il a exercé son pouvoir discrétionnaire; on n'en a même pas fait mention. Le maître des rôles lord Denning a affirmé que la Cour d'appel était autorisée à ne pas tenir compte des motifs de la décision de ce juge parce que, dans l'intervalle entre l'audition de la requête et l'appel, les deux parties avaient présenté d'autres éléments de preuve, «alors nous sommes pratiquement obligés d'examiner toute la preuve à nouveau».

Vos Seigneuries, j'estime avec grande déférence que la production devant la Cour d'appel d'éléments de preuve supplémentaires, chacun desquels se rapportait à des événements qui avaient eu lieu antérieurement à l'audition devant le juge Dillon, ne suffit pas en soi pour autoriser la Cour d'appel à faire abstraction de l'exercice du pouvoir discrétionnaire du juge et à exercer son propre pouvoir discrétionnaire. La façon dont un tribunal d'appel doit procéder consiste à examiner les éléments de preuve nouveaux afin de déterminer dans quelle mesure, le cas échéant, les faits qui s'en dégagent réfutent les raisons données par le juge pour sa décision. Seulement dans ce cas est-il loisible au tribunal d'appel de considérer les éléments de preuve nouveaux comme constituant en eux-mêmes un motif d'exercer son propre pouvoir discrétionnaire et d'accorder ou de refuser le redressement interlocutoire. À mon avis, si la Cour d'appel avait suivi cette démarche en l'espèce, les éléments de preuve supplémentaires, bien loin de réfuter les raisons données par le juge Dillon pour refuser les injonctions interlocutoires, les auraient renforcées. [p. 1046.]

(Voir également l'arrêt *Garden Cottage Foods Ltd. v. Milk Marketing Board*, [1983] 2 All E.R. 770 (H.L.) qui va dans le même sens.)

Je conclus sans hésitation que la Cour d'appel du Manitoba a commis une erreur en substituant ainsi sa discrétion à celle du juge de première instance, et, pour ce seul motif, je suis d'avis d'accueillir le pourvoi.

Mais ce n'est pas tout.

Lorsque la Cour d'appel a exercé un nouveau pouvoir discrétionnaire, elle ne l'a pas fait d'une manière conforme aux principes énoncés précédemment. Elle n'a pas considéré la prépondérance des inconvénients, non plus que l'intérêt public et l'intérêt des parties. Elle a simplement engagé ces dernières à agir avec célérité. Mais exhorter les parties à être diligentes ou même leur ordonner de l'être ne dispense pas de l'obligation de tenir

attenuates the unfavourable consequences of a stay for the public where those consequences are limited.

The judgment of the Court of Appeal could be construed as meaning that an interlocutory stay of proceedings may be granted as a matter of course whenever a serious argument is invoked against the validity of legislation or, at least, whenever a *prima facie* case of violation of the *Canadian Charter of Rights and Freedoms* will normally trigger a recourse to the saving effect of s. 1 of the *Charter*. If this is what the Court of Appeal meant, it was clearly in error: its judgment is in conflict with *Gould, supra*, and is inconsistent with the principles set out herein.

VI Conclusions

I would allow the appeal and set aside the stay of proceedings ordered by the Manitoba Court of Appeal.

There should be no order as to costs.

Appeal allowed.

Solicitor for the appellant: Tanner Elton, Winnipeg.

Solicitors for the respondent Metropolitan Stores (MTS) Limited: Thompson, Dorfman, Sweatman, Winnipeg.

Solicitors for the respondent Manitoba Food and Commercial Workers, Local 832: Simkin, Gallagher, Winnipeg.

Solicitor for the respondent The Manitoba Labour Board: David Gisser, Winnipeg.

compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients. Cela ne fait qu'atténuer les conséquences néfastes d'une suspension d'instance pour le public lorsque l'effet de ces conséquences est limité.

On pourrait interpréter l'arrêt de la Cour d'appel comme signifiant qu'une suspension interlocutoire d'instance peut être accordée automatiquement chaque fois qu'un argument sérieux est opposé à la validité d'une loi ou, à tout le moins, chaque fois qu'une apparence suffisante de violation de la *Charte canadienne des droits et libertés* entraînera normalement un recours à l'effet légitimant de l'article premier de la *Charte*. Si c'est là ce qu'a voulu dire la Cour d'appel, elle a eu manifestement tort: son arrêt s'oppose à l'arrêt *Gould*, précité, et est incompatible avec les principes énoncés dans les présents motifs.

VI Conclusions

Je suis d'avis d'accueillir le pourvoi et d'annuler la suspension d'instance ordonnée par la Cour d'appel du Manitoba.

Il n'y aura pas d'adjudication de dépens.

Pourvoi accueilli.

Procureur de l'appelant: Tanner Elton, Winnipeg.

Procureurs de l'intimée Metropolitan Stores (MTS) Limited: Thompson, Dorfman, Sweatman, Winnipeg.

Procureurs de l'intimé Manitoba Food and Commercial Workers, section locale 832: Simkin, Gallagher, Winnipeg.

Procureur de l'intimée The Manitoba Labour Board: David Gisser, Winnipeg.

Tab 4

COURT OF APPEAL FOR ONTARIO

CITATION: Frank v. Canada (Attorney General), 2014 ONCA 485
DATE: 20140623
DOCKET: M43860 (C58876)

Sharpe J.A. (In Chambers)

BETWEEN

Gillian Frank and Jamie Duong

Responding Party/Applicants
(Respondents in Appeal)

and

The Attorney General of Canada

Moving Party/Respondent
(Appellant in Appeal)

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

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

Heard: June 20, 2014

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

[1] The Attorney General of Canada moves for a stay pending appeal of a judgment holding that provisions of the *Canada Elections Act,* S.C. 2000, c. 9 (the "*Act*"), relating to the voting rights of non-resident Canadians are too

restrictive and extending the vote to all Canadian citizens resident outside Canada.

The *Charter* challenge to limits on voting by non-residents

[2] Voting by non-resident citizens has been a feature of Canadian elections, in one form or another, since the vote was extended to soldiers in World War I. The current regime dates from 1993. The *Act*, s. 11 provides that the following classes of citizens are eligible to vote by mail pursuant to a special procedure found in Part 11 of the Act:

> (*a*) a Canadian Forces elector;
>
> (*b*) an elector who is an employee in the federal public administration or the public service of a province and who is posted outside Canada;
>
> (*c*) a Canadian citizen who is employed by an international organization of which Canada is a member and to which Canada contributes and who is posted outside Canada;
>
> (*d*) a person who has been absent from Canada for less than five consecutive years and who intends to return to Canada as a resident;
>
> (*e*) an incarcerated elector within the meaning of that Part; and
>
> (*f*) any other elector in Canada who wishes to vote in accordance with that Part.

[3] The Part 11 procedure allows the non-resident citizen to register and vote by mail in a riding chosen by the voter based on contacts specified in the Act.

[4] The applicants, both resident in the United States for more than five years, challenged the denial of the vote to non-resident citizens absent from Canada for more than five consecutive years.

The judgment under appeal

[5] In a lengthy and carefully considered judgment, the application judge held that to the extent the *Act* disenfranchised citizens absent from Canada for more than five years, it violated their democratic right to vote right guaranteed by section 3 of the *Charter:*

> Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein

[6] The application judge struck down s. 11(d) of the *Act* and related provisions and replaced the words of s. 11(d) with “an elector who resides outside of Canada”.

[7] The Attorney General argued that Parliament had a pressing and substantial objective to limit non-resident voting pursuant to s. 1 of the Charter, namely:

1. to extend the right to vote to non-resident citizens but not to the point of giving rise to unfairness for Canada’s resident voters, and

2. to maintain the proper functioning and integrity of Canada's electoral system and system of parliamentary representation.

[8] The application judge characterized those objectives as being so abstract, broad and symbolic that they barely qualified, if at all, as pressing and substantial for purposes of s. 1 analysis. However, the application judge proceeded to consider whether the limitation on non-resident citizen voting satisfied the proportionality test. He concluded that it did not. First, he found there was no rational connection between the objectives of fairness and avoiding possible election abuses and denying the vote to certain non-residents. Second, he found the five-year limitation overly drastic and that less restrictive means were available to achieve the same objectives. Finally, the application judge found that the substantial deleterious effect of losing the right to vote outweighed what he found to be the tenuous salutary impact of the law.

[9] The application judge refused to stay or temporarily suspend the declaration of invalidity. He stated, at para. 159: "An immediate declaration of invalidity would create no danger to the public or to the rule of law. Nor is this a situation where Parliament will be unable to hold an election due to the court's decision." He added that there was no evidence that an election was anticipated in the next 12 months.

Events following the judgment

[10] The judgment was handed down on May 2, 2014. On May 11, 2014, four federal by-elections were called for June 30, 2014 – two in Ontario and two in Alberta. Elections Canada immediately announced that the judgment would be complied with for all four by-elections and implemented the steps necessary to enable all Canadian citizens resident abroad to register and vote. As of June 16, 2014, thirteen non-resident citizens registered to vote (although it is not known how many of those would have been eligible under the prior regime). One of those individuals is the wife of one of the applicants who has already cast her ballot.

The Attorney General's stay motion

[11] I note that Elections Canada was not served with this motion. In my view, it should have been served as it would be immediately and directly impacted by the effect of a stay. I allowed the motion to proceed as it is apparent from correspondence in the record that Elections Canada is fully aware of this motion and its legal counsel has outlined the steps Elections Canada could take in the event a stay is granted.

[12] It is common ground that to obtain a stay the Attorney General must satisfy the familiar three-part test and show:

1. that there is a serious question to be determined;

2. that irreparable harm to the public interest will be suffered should the stay not be granted; and

3. that the balance of convenience and public-interest considerations favor a stay.

Serious question to be tried

[13] This appeal will almost certainly be decided on the basis of the s. 1 analysis. I share the application judge's concern that the objectives identified by the Attorney General as being sufficient to justify limiting the right to vote are broad, symbolic and rhetorical. In oral argument, counsel insisted that Parliament's central concern was election fairness. It is not clear to me how denying a citizen the right to vote can be justified on the basis of electoral fairness. The objectives identified by the Attorney General obscure what appears to me to be the real issue, namely, whether the five year limit on non-resident voting can be justified on the basis that it is necessary to sustain our geographically determined, constituency-based system of representation. As the Supreme Court of Canada observed in *Sauvé v. Canada (Chief Electoral Officer),* [2002] 3 S.C.R. 519, the prisoner voting case, "[v]ague and symbolic objectives" render proportionality analysis hollow. However, I do not say that the Attorney General has failed to show that the appeal is arguable. While the application judge gave full and fair consideration of the s. 1 issue, there does appear to be an argument to be made on the other side.

Does the Attorney General have a presumptive or automatic right to a stay?

[14] The Attorney General submits that as guardian of the public interest it has something approaching an automatic right to a stay due to a presumption of irreparable harm and that the balance of convenience favours maintaining the "status quo". I am unable to accept that proposition. It is inconsistent with what occurred in the prisoner voting litigation where a stay was refused pending appeal: *Sauvé v. Canada (Chief Electoral Officer),* [1997] 3 F.C. 628, aff'd. [1997] 3 F.C. 643 (C.A.), leave to appeal dismissed [1997] S.C.C.A. No. 264. It is also inconsistent with the general principle that the decision to grant or withhold a stay lies in the discretion of the court.

[15] The Attorney General relies on the following passage from *Bedford v. Canada (Attorney General),* 2010 ONCA 814, 330 D.L.R. (4th) 162, at para 13:

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

[16] In my view, that passage must be read in its proper context and when so read, it is apparent that a court will only grant a stay at the suit of the Attorney General where it is satisfied, after careful review of the facts and circumstances

of the case, that the public interest and the interests of justice warrant a stay. In that case, the government filed a substantial volume of evidence to demonstrate the very real and tangible harm that would result if the matter of prostitution were left completely unregulated. It is clear from reading the reasons as a whole that Rosenberg J.A. only granted a stay in because, after reviewing and weighing that body of evidence, he was (at para. 72) “satisfied that the moving party ha[d] satisfied irreparable harm test”.

[17] It is the case that very often, the public interest in the orderly administration of the law will tilt the balance of convenience in favour of maintaining impugned legislation pending the final determination of its validity on appeal: See, for example *RJR-MacDonald Inc. v. Canada (A.G.),* [1994] 1 S.C.R. 311 at p. 346

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[18] However, I cannot agree with the Attorney General that there is a *presumption* approaching an automatic right to a stay in every case where a

court of first instance has ruled legislation to be unconstitutional. As Lamer J. also held in *RJR-MacDonald*, at p. 343, that "the government does not have a monopoly on the public interest." See also *Bedford*, at para. 73: "The Attorney General does not have a monopoly on the public interest, and it is open to both parties to rely upon the considerations of public interest, including the concerns of identifiable groups."

[19] In my view, it is necessary to carefully review the particular facts and circumstances of this case in order to determine whether or not a stay is warranted.

Irreparable harm

[20] Turning to the specifics of this case, the Attorney General argues that irreparable harm would ensue if a close election were decided by the single vote of a non-resident voter ultimately found on appeal not to have the right to vote. I agree that such a scenario would amount to irreparable harm.

[21] However, elections decided by a very few votes are rare and in my view, the prospect of irreparable harm on that account is fairly remote.

[22] More important, the class of non-resident voters affected by the judgment face precisely the same risk of irreparable harm. Once the election has passed, the constitutional right to vote in that election will be lost forever. If the election is decided by one or a very few votes and if the judgment is affirmed on appeal, the

stay requested by the Attorney General will have improperly disenfranchised voters whose vote could have changed the result of the election. That would constitute irreparable harm to the non-resident voters and to the public.

[23] I conclude that any risk if irreparable harm claimed by the Attorney General is matched by the same risk of irreparable harm to non-resident voters.

[24] Nor do I see merit in the argument that Members of Parliament elected in an election governed by the judgment would somehow be different in any material way from those previously elected. All Members of Parliament are elected according to the law as it stands at the time of the election. There is no air of reality to the claim that Members of Parliament elected at by-election under a changed or amended law would be seen as different from their parliamentary colleagues elected under the earlier law.

[25] In my view, the consideration of irreparable harm is neutral and does not favour granting a stay.

Balance of convenience

[26] In my view, the balance of convenience in this case favours refusal of a stay. I reach that conclusion for the following reasons.

[27] First, this is not the typical case where a complex statutory scheme or administrative apparatus has to be dismantled or constructed in order to give effect to the trial judgment. In such cases, the balance of convenience will

typically favour a stay to avoid the cost and disruption that would flow from implementing a new regime based upon a trial judgment that may need to be undone in the event of a successful appeal.

[28] In the present case, Elections Canada immediately took the minimal administrative steps required to permit non-resident citizens to vote in accordance with the decision of the application judge. If a stay is granted, Elections Canada will have to undo what it has already done. It is clear from the record that it may not be possible for Elections Canada to determine in time for the by-elections which non-resident voters who registered after the judgment would have been eligible before the judgment. The terms of the stay requested by the Attorney General recognize that difficulty and ask for a qualified stay that applies “unless Elections Canada is unable to determine” if those who registered meet the pre-judgment requirements. In addition, at least one non-resident has cast her ballot. To grant a stay in this case would require Elections Canada to rescind the registrations of up to 13 non-resident electors and claw back the vote of a citizen who may well in the end have the right to cast her ballot. Granting a stay in this case would not avoid the cost and inconvenience of prematurely erecting or dismantling a scheme – it would do the opposite.

[29] Second, this is not a case like *Bedford* where the trial judgment creates a legislative void in an area of activity that needs to be regulated in the public interest. Allowing the judgment to operate does not create a void or gap in

Canada's election law. Nor does the judgment radically alter the class of those eligible to vote. The *Act* already grants many non-resident citizens the right to vote. The judgment under appeal merely extends the right to a broader class of non-resident citizens.

[30] As counsel for the applicants pointed out, it is highly unlikely that the judgment will produce a floodgate of votes from disinterested and disengaged non-resident Canadians. We know that the number of newly qualified non-resident voters who had registered as of June 16 is 13 or fewer. The non-resident must be both determined and informed. He or she must first register and then obtain a ballot. The non-resident voter cannot vote by simply marking an X beside one of the listed candidates but must complete a special ballot that requires the voter to know and write in the name of an actual candidate.

[31] I conclude that the balance of convenience does not favour granting a stay in this case.

Conclusion

[32] For these reasons, I conclude that while there is an arguable appeal, both sides demonstrate a similar risk of irreparable harm and the balance of convenience weighs in favour of refusing a stay. Accordingly, I dismiss the Attorney General's motion.

[33] If the parties are not able agree as to the costs of this motion, I will receive brief written submissions from the respondents within ten days of the release of these reasons and from the Attorney General within five days thereafter.

Released:

Tab 5

DATE: 19980428
DOCKET: M22334 (C29462)

COURT OF APPEAL FOR ONTARIO

ROBINS, McKINLAY and WEILER JJ.A.

B E T W E E N:	
OGDEN ENTERTAINMENT SERVICES	
Plaintiff/Respondent Moving Party	**F. Paul Morrison and Steven G. Mason for the moving party**
and	
AL KAY, in his representative capacity as Area Representative of Retail, Wholesale/Canada CANADIAN SERVICE SECTOR DIVISION OF THE UNITED STEELWORKERS OF AMERICA, LOCAL 440, JACK DAVIS, in his capacity as Picket Captain and on behalf of all members of the aforementioned Union	**Dougald Brown for the responding parties**
	Anita Lyon for Her Majesty The Queen In Right of Ontario as represented by the Ontario Provincial Police
Defendants/Appellants Responding Parties	
	Heard: April 24, 1998

ROBINS J.A.: (ORALLY)

[1] This is a motion by the plaintiff Ogden Entertainment Services (the respondent in the appeal) under s. 7(5) of the *Courts of Justice Act* to set aside the order of Abella J.A. staying the order of McKinnon J. dated April 2, 1998 granting an injunction restraining the defendants and others from:

> ... intimidating, molesting or interfering with or blocking or physically obstructing or delaying whatsoever any person or vehicle from entering or exiting the property administered by Ogden Entertainment Services located at 1,000 Palladium Drive in the City of Kanata, including but not limited to all parking areas and parking lots where Ogden Entertainment Services carry on its operations.

[2] The defendants (the appellants in the appeal), who shall be referred to as "Local 440", hold bargaining rights for approximately 90 cleaners employed by the plaintiff at the Corel Centre in Ottawa. On February 5, 1998 the union commenced a lawful strike. On March 20, 1998 the plaintiff brought this application contending that picketers were improperly impeding and obstructing traffic to and from the Corel Centre, which is a multiple-purpose arena located to the west of Ottawa. It appears that on the days when the events were scheduled anywhere from 40 to 120 picketers were present at 11 different locations in the area.

[3] It is uncontroverted that union members and their supporters impeded the access of passenger vehicles, transport buses carrying event spectators, passenger vehicles carrying employees, commercial vehicles, team buses and vehicles carrying performers to the centre. During these events, and particularly events involving the Ottawa Senators Hockey Club, between 17,500 and 18,500 members of the public have attended the Corel Centre. Approximately 7,500 passenger vehicles entered the Centre over a 90 minute period prior

to each game.

[4] In determining whether a stay should be granted pending appeal, the appropriate test to be applied is that set out in *R.J.R. MacDonald Inc. v. Canada* (1994), 111 D.L.R. (4th) 385. This test is the same as the test for an interlocutory injunction. Generally, the court must decide whether the interests of justice call for a stay.

[5] In determining whether a stay should be granted, regard must be had to the judgment under appeal and a strong case in favour of a stay must be made out. The court must proceed on the assumption that the judgment is correct and that the relief ordered was properly granted. The court is not engaged in a determination of the merits of the appeal on a stay application.

[6] In this case, there are factual disputes that will have to be dealt with on the appeal. However, there is no basis at this stage for rejecting the findings of the motions judge. He stated in granting the injunction in question, that:

> During the normal course of events, the OPP have nine officers monitoring the Corel Centre. Since the protocol was developed the OPP have had to send as many as 43 officers in an attempt to maintain order. Numerous troubling incidents have occurred,

particularly during hockey events. Because the picketers have stood on public roadways leading to the Corel Centre and stopped vehicles for two minutes per vehicle, traffic on Highway 417 has been backed up for many miles. Some patrons have parked their cars on the side of the Highway 417 and walked to the Corel Centre. OC Transpo buses have not been permitted entry, requiring passengers to be let off at some distance from the Corel Centre and having people walk to the arena. Predictably and inevitably, this situation has led to numerous incidents of "road rage" on the part of patrons, who have on numerous occasions nudged picketers with their cars, become involved in emotionally charged verbal exchanges with picketers and on a number of occasions have caused minor injury to picketers. To date, five members of the public have been charged with dangerous driving, and one other person has been charged with assault. Luckily, no serious injuries have occurred.

...

All the picketers have placards. Vehicle traffic is backed up; various vehicles have tried to circumvent the picketers; squealing tires can be heard; shouts can be heard; and, during the video, Inspector Beechey can be heard to say, "We have a real unsafe situation here."

...

Inspector Beechey of the OPP is the officer in charge of maintaining order relating to the strike. If his examination for discovery, he stated that in his opinion there was an unsafe situation. he was concerned about the picketers; about his own officers, one of whom had had a flashlight ripped out of his hand; about the pedestrians entering the Corel Centre, trying to

> run through the line of cars, some of which were gunning their engines....
>
> ...
>
> He was asked whether or not he could prevent similar incidents at future events. His answer was this,
>
> > Gauging from the history of what has gone on, I would say that no way can we prevent incidents from happening. They are going to happen. You have, as you heard before, in the neighbourhood of 7,500 vehicles for any events. And any place where there are picketers, we have always had nudging. We have had people hit. We have had cars running through and those type of things. They are really unforeseeable and uncontrollable. Our presence out there should deter most of this, but it seems that the people getting held up for long periods of time don't even consider that.

[7] The defendants' argument in favour of a stay appears to be based primarily on two grounds. First, it is contended that the plaintiff has not satisfied the requirements of s. 102(3) of the *Courts of Justice Act* in that it has not established that reasonable efforts to obtain police assistance, protection and action to prevent or remove any obstruction of or interference with lawful entry or exit from the plaintiff's premises have been unsuccessful. While this will properly be a matter of argument on the hearing of the appeal, at this stage, the judge's finding must *prima facie* be accepted. The evidence of the police, as the motions

judge interpreted that evidence, appears sufficient to satisfy the requirements of s. 102(3). It is not for this panel on a stay application to place a contrary interpretation on this evidence of the police action and the safety factors that came under consideration.

[8] The second ground advance in support of the stay is to the effect that the defendants are entitled to impede or delay traffic by stopping cars for short periods in furtherance of their acknowledged right to picket in the course of their lawful strike. We have set out the terms of the order. It is clear that this order does not, as suggested, constitute a ban on picketing. Nor can the order be said to be analogous to a ban. The striking employees remain fully entitled to peacefully picket the plaintiff's premises in the locations where they have been doing so. They are restrained only from engaging in the type of conduct specified in the order, in particular, from interfering with or blocking or physically obstructing or delaying any person or vehicle from entering or exiting the property. The prohibition is against engaging in conduct of that nature.

[9] A question arose during argument today as to the interpretation of the order as a result of comments which were apparently made during the hearing before the motions judge. The question is whether picketers are entitled to offer leaflets or pamphlets to motorists who may be stopped while waiting to enter the parking lots or who may of their

own free will stop in order to accept information of this nature. The injunction does not appear to restrain this type of activity and Mr. Morrison, counsel for the plaintiff, agrees that such conduct would not, in and of itself, constitute a violation of the order. We make this comment in the hope of avoiding any misunderstanding as to what is covered by the order.

[10] Applying the test in *R.J.R. v. MacDonald* to the facts as found by the motions judge, we have concluded that there is no valid reason to stay his order, save in one respect. Counsel has appeared here today, with our leave, representing the Ontario Provincial Police. She takes the position that there was no jurisdiction on the part of the motions judge to direct, quoting the order, that "the Ontario Provincial Police enforce the Order of this Honourable Court." Counsel for the parties do not argue against the position advanced on behalf of the OPP. We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the *Courts of Justice Act*.

[11] Accordingly, in so far as paragraph 4 of the order of McKinnon J. is concerned, the stay previously granted will be continued. Otherwise, the stay is vacated. Costs of this application will be reserved to the panel hearing the appeal.

8p

Tab 6

1997 CarswellNat 825
Federal Court of Canada — Trial Division

Sauvé v. Canada (Chief Electoral Officer)

1997 CarswellNat 2716, 1997 CarswellNat 825, [1997] 3 F.C. 628, [1997] F.C.J. No. 594, 132 F.T.R. 250, 71 A.C.W.S. (3d) 217

Richard Sauvé, Respondent, (Plaintiff) and The Chief Electoral Officer of Canada The Solicitor General of Canada The Attorney General of Canada, Applicants, (Defendants)

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

Wetston J.

Heard: May 15, 1997
Judgment: May 16, 1997
Docket: T-2257-93, T-1084-94

Proceedings: affirmed *Sauvé v. Canada (Chief Electoral Officer)* (May 21, 1997), A-372-97 (Fed. C.A.)

Counsel: *Mr. Fergus J. O'Connor*, for the Respondent Sauvé (Plaintiff).
Mr. Arne Peltz, for the Respondents McCorrister et al. (Plaintiffs).
Gérald L. Chartier and *Mr. Glenn D. Joyal*, for the Applicants (Defendants).

Subject: Public; Constitutional; Civil Practice and Procedure

MOTION for stay of decision pending appeal.

***Wetston J.*:**

1 This is a motion to stay a decision of this court which declared section 51(e) of the *Canada Elections Act*, R.S.C. 1985, c. E-2, (as am. by S.C. 1993, c. 19, s.23), to be in violation of section 3 of the *Charter*. At the request of the parties, this motion was heard by myself on an urgent basis.

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

3 On April 23, 1997, the Crown filed this motion, in anticipation of a Federal election call, to stay the effect of the decision of this Court pending the outcome of the appeal. On April 27, 1997, the Federal government announced a Federal election to be held on June 2, 1997. Steps were then taken to prepare for Prisoners' voting day, pursuant to *Special Voting Rules*, set for May 23, 1997.

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

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

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

5 In *RJR-Macdonald* supra, at page 347, the Supreme Court reviewed the factors to be considered on an application for a stay in a *Charter* case. The Court adopted the three-

part *American Cyanamid* test to be applied for stays in both private law and *Charter* cases. This tripartite test is well-known. At the first stage, an applicant must demonstrate a serious question to be tried. At the second stage, the applicant must convince the Court that it will suffer irreparable harm if the relief is not granted. At the third stage, the applicant is required to demonstrate that the balance of inconvenience is in its favour. In this regard, the Supreme Court was careful to note that the requirement to assess the balance of inconvenience will often determine the result in applications involving *Charter* rights.

Serious Question to be Tried

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

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

Irreparable Harm

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

> At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

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

> In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

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

> We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

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

12 This interpretation is supported by the comments of the majority of Supreme Court of Canada in *Tabah c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.) at page 385:

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

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

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

14 Finally, with respect to the matter of irreparable harm, it may be worthwhile to consider one further passage from the Supreme Court of Canada in *Tabah c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.), wherein La Forest J. (in dissent) stated, at page 359:

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

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

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

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

16 The Crown argued that if they do not have the benefit of the assumption as described in *RJR-Macdonald* supra, then it would be virtually impossible for the Crown to ever obtain a stay. I do not believe that this is the case. Even if the Crown does not have the benefit of the assumption of irreparable harm in satisfying the second stage in all cases, it is still open to the Crown to lead evidence of harm. That was the case in both *Schreiber v. Canada (Attorney General)* (1996), 118 F.T.R. 231 (Fed. T.D.) and *Tabah c. Québec (Procureur général)* supra, in which the Crown led evidence regarding the public harm that would be suffered in the period pending the appeal if the stay was not granted. Furthermore, the Crown may also establish that, on balance, the public interest outweighs any harm to the respondents at the third stage.

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

Balance of Inconvenience

18 In weighing the balance of inconvenience between the parties, the factors to be considered are as follows, *RJR-Macdonald* supra, at p. 350:

> Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

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

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

previous provisions even though that disqualification was subsequently struck down by the Supreme Court of Canada.

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

> It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

21 In the case at bar, I have no doubt that the Federal Government is charged with the duty of promoting and protecting the public interest. The question is what is the public interest in this case? The applicants argue that the public interest should be found in the two pressing and substantial objectives that this legislation was found to have at trial; namely, the enhancement of civic responsibility and respect for the rule of law and the enhancement of the general purposes of criminal sanctions.

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

23 In this case, can it be said that the denial of the franchise which has been declared unconstitutional by this Court is consistent with the government's role in protecting *Charter* rights? There may be circumstances in which a court would delay or stay the effects of an unconstitutional ruling and on several occasions the Supreme Court of Canada has done just that. For example, the Crown referred to the case of *Thibaudeau v. R.*, [1994] 2 F.C. 189 (Fed. C.A.); aff'd (1995), 95 D.T.C. 5273 (S.C.C.), as authority for the proposition that a declaration of unconstitutionality could be stayed pending an appeal. I would note that *Thibaudeau* is different from this case in several ways. In the first place, while the law had been found to violate section 15 of the *Charter*, the harm which would be suffered if the legislation was enforced was monetary and could be compensated in damages if the finding was upheld on appeal. In this case, the respondents cannot be compensated for the denial of

their right to vote in the upcoming Federal election. Furthermore, no reasons were given by the Supreme Court of Canada in allowing the stay in *Thibaudeau*.

24 As part of the argument in this case, the respondents referred the Court to the decision of *Schreiber v. Canada (Attorney General)* supra, at page 235, wherein Gibson J., on a motion for a stay of a constitutional decision of this Court, noted that the "short-term context of a period, pending disposition of an appeal" was the relevant period to address in a motion for a stay. In *Schreiber*there was affidavit evidence before Gibson J. upon which he determined that the short-term interference with international criminal investigations was sufficient harm to justify a stay.

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

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

27 In weighing the balance of inconvenience, I note that the Crown only argued that irreparable harm, in this case, would be harm to the public interest. While this is of significance, the Crown did not argue that there was any administrative burden that could not be met to allow prisoners to vote, nor did they seriously argue that the vote of 14,000 prisoners disseminated throughout various ridings in Canada could affect the overall outcome of the election. In fact, everything is in place at this time for prisoners to vote. Posters have been placed in prisons advising them of the upcoming voting and steps have been taken to put the machinery for voting in place.

28 During 1996, after the filing of the Crown's Notice of Appeal in this matter, there were seven by-elections held under the *Canada Elections Act*. No motion for a stay of the Order declaring the law to be unconstitutional was made by the Crown prior to the holding of either the March 25th or the June 17th, 1996, federal by-elections. As such, prisoners voted in those by-elections. The Crown distinguished voting in a by-election from voting in a federal

election because, in the latter, citizens are voting for their government. In a by-election they are voting for individual members of parliament. For the purposes of determining harm to the public interest, I am not persuaded by this distinction submitted by the Crown.

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

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

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

Motion dismissed.

1997 CarswellNat 1289
Federal Court of Canada — Appeal Division

Sauvé v. Canada (Chief Electoral Officer)

1997 CarswellNat 1289, 1997 CarswellNat 2722, [1997] 3 F.C. 643, 71 A.C.W.S. (3d) 1024

Richard Sauvé, Respondent (Plaintiff) and The Chief Electoral Officer of Canada, The Solicitor General of Canada, The Attorney General of Canada, Appellants (Defendants)

Sheldon McCorrister, Chairman, Lloyd Knezack, Vice Chairman on their own behalf and on behalf of the Stoney Mountain Institution Inmate Welfare Committee, and Clair Woodhouse, Chairman, Aaron Spence, Vice Chairman, on their own behalf and on behalf of the Native Brotherhood Organization of Stony Mountain Institution, and Serge Belanger, Emile A. Bear and Randy Opponechaw, Respondents (Plaintiffs) and The Attorney General of Canada, Appellant (Defendant)

Hugessen, Stone, McDonald JJ.A.

Oral reasons: May 21, 1997
Docket: A-372-97

Proceedings: affirming (May 16, 1997), Doc. T-2257-93, T-1084-94 (Federal Court of Canada — Appeal Division)

Counsel: *Mr. Glenn D. Joyal* and *Mr. Gerald L. Chartier*, for the Appellants.
Mr. Fergus J. O'Connor, for the Respondent - Sauvé.
Mr. Arne Peltz, for the Respondents - McCorrister et al.

Subject: Civil Practice and Procedure

APPEAL by Crown from dismissal of application for stay pending appeal.

***McDonald J.A.*:**

1 Having heard the able arguments of counsel, we remain unconvinced that the motions judge made any reviewable error. The granting of a stay of judgment is a discretionary matter for the motions judge. As was held by this Court in *Canderel Ltd. v. R.* (1993), [1994] 1 F.C. 3 (Fed. C.A.) at 9, in the absence of an error of law, this Court cannot interfere with a discretionary order of a judge.

2 The motions judge correctly turned his mind to the tripartite test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). He found that the Crown failed on both the second and third branches of that test. We have not been persuaded that the motions judge erred in applying the test. Even if this Court's overall decision may have been different, it is not open to an appellate court to interfere where the motions judge, in exercising his discretion, made no error in law.

3 The appeal is dismissed with costs.

Appeal dismissed.

Tab 7

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

INDEXED AS: REFERENCE RE SECESSION OF QUEBEC

File No.: 25506.

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:

DANS L'AFFAIRE DE l'article 53 de la *Loi sur la Cour suprême,* L.R.C. (1985), ch. S-26;

ET DANS L'AFFAIRE D'UN renvoi par le Gouverneur en conseil au sujet de certaines questions ayant trait à la sécession du Québec du reste du Canada formulées dans le décret C.P. 1996-1497 en date du 30 septembre 1996

RÉPERTORIÉ: RENVOI RELATIF À LA SÉCESSION DU QUÉBEC

N° du greffe: 25506.

1998: 16, 17, 18, 19 février; 1998: 20 août.

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

RENVOI PAR LE GOUVERNEUR EN CONSEIL

Droit constitutionnel — Cour suprême du Canada — Compétence en matière de renvoi — La compétence de la Cour suprême en matière de renvoi est-elle constitutionnelle? — Loi constitutionnelle de 1867, art. 101 — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 53.

Tribunaux — Cour suprême du Canada — Compétence en matière de renvoi — Trois questions relatives à la sécession du Québec du Canada soumises par le gouverneur en conseil à la Cour suprême — Les questions soumises relèvent-elles de la compétence de la Cour suprême en matière de renvoi? — Les questions sont-elles justiciables? — Loi sur la Cour suprême, L.R.C. (1985), ch. S-26, art. 53.

Droit constitutionnel — Sécession d'une province — Sécession unilatérale — Le Québec peut-il, en vertu de la Constitution, procéder unilatéralement à la sécession?

Droit international — Sécession d'une province de la fédération canadienne — Droit à l'autodétermination — Principe de l'effectivité — Le Québec a-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession?

Le gouverneur en conseil a soumis à la Cour, en vertu de l'art. 53 de la *Loi sur la Cour suprême*, les questions suivantes:

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 con-

1. L'Assemblée nationale, la législature, ou le gouvernement du Québec peut-il, en vertu de la Constitution du Canada, procéder unilatéralement à la sécession du Québec du Canada?

2. L'Assemblée nationale, la législature, ou le gouvernement du Québec possède-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada? À cet égard, en vertu du droit international, existe-t-il un droit à l'autodétermination qui procurerait à l'Assemblée nationale, la législature, ou le gouvernement du Québec le droit de procéder unilatéralement à la sécession du Québec du Canada?

3. Lequel du droit interne ou du droit international aurait préséance au Canada dans l'éventualité d'un conflit entre eux quant au droit de l'Assemblée nationale, de la législature ou du gouvernement du Québec de procéder unilatéralement à la sécession du Québec du Canada?

L'*amicus curiae* a soulevé des questions concernant la compétence de la Cour en matière de renvoi, plaidant que l'art. 53 de la *Loi sur la Cour suprême* est inconstitutionnel; que, même si la compétence de la Cour en matière de renvoi est constitutionnellement valide, les questions soumises ne relèvent pas du champ d'application de l'art. 53; et enfin que les questions ne sont pas justiciables.

Arrêt: L'article 53 de la *Loi sur la Cour suprême* est constitutionnel et la Cour doit répondre aux questions du renvoi.

(1) *La compétence de la Cour suprême en matière de renvoi*

L'article 101 de la *Loi constitutionnelle de 1867* donne au Parlement le pouvoir de conférer à la Cour la compétence en matière de renvoi prévue à l'art. 53 de la *Loi sur la Cour suprême*. Les mots «cour générale d'appel» à l'art. 101 indiquent le rang de la Cour au sein de l'organisation judiciaire nationale et ne doivent pas être considérés comme une définition restrictive de ses fonctions. Même si, dans la plupart des cas, la Cour exerce le rôle de juridiction d'appel suprême et exclusive au pays, une cour d'appel peut, à titre exceptionnel, se voir attribuer une compétence de première instance qui n'est pas incompatible avec sa compétence en appel. Même si la compétence de la Cour en matière de renvoi entrait en conflit avec la compétence des cours supérieures provinciales en première instance, un tel conflit devrait être résolu en faveur de l'exercice par le Parlement de son pouvoir plein et entier de créer une «cour générale d'appel». Une «cour générale d'appel» peut également exer-

stitutional 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.

cer à bon droit d'autres fonctions juridiques, comme donner des avis consultatifs. Rien dans la Constitution n'empêche la Cour de se voir attribuer le pouvoir d'exercer un rôle consultatif.

Les questions du renvoi entrent dans le champ d'application de l'art. 53 de la *Loi sur la Cour suprême*. La question 1 touche, du moins en partie, l'interprétation des *Lois constitutionnelles* dont il est fait mention à l'al. 53(1)*a*). Les questions 1 et 2 relèvent l'une et l'autre de l'al. 53(1)*d*), puisqu'elles se rapportent aux pouvoirs de la législature ou du gouvernement d'une province canadienne. Enfin, chacune des trois questions est une «question importante de droit ou de fait touchant toute autre matière» et est, de ce fait, visée au par. 53(2). En répondant à la question 2, la Cour n'outrepasse pas sa compétence en prétendant agir en tant que tribunal international. La Cour donne au gouverneur en conseil, en sa qualité de tribunal national, un avis consultatif sur des questions juridiques qui touchent l'avenir de la fédération canadienne. En outre, on ne peut pas dire que la question 2 échappe à la compétence de la Cour, en tant que tribunal interne, parce qu'elle l'oblige à examiner le droit international plutôt que le droit interne. Plus important, la question 2 n'est pas une question abstraite de droit international «pur» mais vise à déterminer les droits et obligations juridiques de la législature ou du gouvernement du Québec, institutions qui font partie de l'ordre juridique canadien. Enfin il faut traiter du droit international puisqu'on a plaidé qu'il fallait le prendre en considération dans le contexte du renvoi.

Les questions du renvoi sont justiciables et doivent recevoir une réponse. Elles ne demandent pas à la Cour d'usurper un pouvoir de décision démocratique que la population du Québec peut être appelée à exercer. Suivant l'interprétation de la Cour, les questions se limitent strictement au cadre juridique dans lequel cette décision démocratique doit être prise. Les questions peuvent clairement être considérées comme visant des questions juridiques et, de ce fait, la Cour est en mesure d'y répondre. La Cour ne peut pas exercer son pouvoir discrétionnaire et refuser d'y répondre pour des raisons d'ordre pragmatique. Les questions revêtent une importance fondamentale pour le public et ne sont pas trop imprécises ou ambiguës pour qu'il soit possible d'y répondre correctement en droit. On ne peut pas dire non plus que la Cour n'a pas reçu suffisamment d'information sur le contexte actuel dans lequel les questions sont soulevées. En dernier lieu, la Cour peut, dans un renvoi, examiner des questions qui pourraient autrement ne pas être considérées «mûres» pour une décision judiciaire.

(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.

(2) *Question 1*

La Constitution n'est pas uniquement un texte écrit. Elle englobe tout le système des règles et principes qui régissent l'exercice du pouvoir constitutionnel. Une lecture superficielle de certaines dispositions spécifiques du texte de la Constitution, sans plus, pourrait induire en erreur. Il faut faire un examen plus approfondi des principes sous-jacents qui animent l'ensemble de notre Constitution, dont le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, ainsi que le respect des minorités. Ces principes doivent guider notre appréciation globale des droits et obligations constitutionnels qui entreraient en jeu si une majorité claire de Québécois, en réponse à une question claire, votaient pour la sécession.

Le renvoi demande à la Cour de déterminer si le Québec a le droit de faire sécession unilatéralement. Les arguments à l'appui de l'existence d'un tel droit étaient fondés avant tout sur le principe de la démocratie. La démocratie, toutefois, signifie davantage que la simple règle de la majorité. La jurisprudence constitutionnelle montre que la démocratie existe dans le contexte plus large d'autres valeurs constitutionnelles. Depuis la Confédération, les habitants des provinces et territoires ont noué d'étroits liens d'interdépendance (économique, sociale, politique et culturelle) basés sur des valeurs communes qui comprennent le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, ainsi que le respect des minorités. Une décision démocratique des Québécois en faveur de la sécession compromettrait ces liens. La Constitution assure l'ordre et la stabilité et, en conséquence, la sécession d'une province ne peut être réalisée unilatéralement «en vertu de la Constitution», c'est-à-dire sans négociations, fondées sur des principes, avec les autres participants à la Confédération, dans le cadre constitutionnel existant.

Nos institutions démocratiques permettent nécessairement un processus continu de discussion et d'évolution, comme en témoigne le droit reconnu par la Constitution à chacun des participants à la fédération de prendre l'initiative de modifications constitutionnelles. Ce droit emporte l'obligation réciproque des autres participants d'engager des discussions sur tout projet légitime de modification de l'ordre constitutionnel. Un vote qui aboutirait à une majorité claire au Québec en faveur de la sécession, en réponse à une question claire, conférerait au projet de sécession une légitimité démocratique que tous les autres participants à la Confédération auraient l'obligation de reconnaître.

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.

Le Québec ne pourrait, malgré un résultat référendaire clair, invoquer un droit à l'autodétermination pour dicter aux autres parties à la fédération les conditions d'un projet de sécession. Le vote démocratique, quelle que soit l'ampleur de la majorité, n'aurait en soi aucun effet juridique et ne pourrait écarter les principes du fédéralisme et de la primauté du droit, les droits de la personne et des minorités, non plus que le fonctionnement de la démocratie dans les autres provinces ou dans l'ensemble du Canada. Les droits démocratiques fondés sur la Constitution ne peuvent être dissociés des obligations constitutionnelles. La proposition inverse n'est pas acceptable non plus: l'ordre constitutionnel canadien existant ne pourrait pas demeurer indifférent devant l'expression claire, par une majorité claire de Québécois, de leur volonté de ne plus faire partie du Canada. Les autres provinces et le gouvernement fédéral n'auraient aucune raison valable de nier au gouvernement du Québec le droit de chercher à réaliser la sécession, si une majorité claire de la population du Québec choisissait cette voie, tant et aussi longtemps que, dans cette poursuite, le Québec respecterait les droits des autres. Les négociations qui suivraient un tel vote porteraient sur l'acte potentiel de sécession et sur ses conditions éventuelles si elle devait effectivement être réalisée. Il n'y aurait aucune conclusion prédéterminée en droit sur quelque aspect que ce soit. Les négociations devraient traiter des intérêts des autres provinces, du gouvernement fédéral, du Québec et, en fait, des droits de tous les Canadiens à l'intérieur et à l'extérieur du Québec, et plus particulièrement des droits des minorités.

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.

Le processus de négociation exigerait la conciliation de divers droits et obligations par voie de négociation entre deux majorités légitimes, soit la majorité de la population du Québec et celle de l'ensemble du Canada. Une majorité politique, à l'un ou l'autre niveau, qui n'agirait pas en accord avec les principes sous-jacents de la Constitution mettrait en péril la légitimité de l'exercice de ses droits et ultimement l'acceptation du résultat par la communauté internationale.

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.

La tâche de la Cour était de clarifier le cadre juridique dans lequel des décisions politiques doivent être prises «en vertu de la Constitution», et non d'usurper les prérogatives des forces politiques qui agissent à l'intérieur de ce cadre. Les obligations dégagées par la Cour sont des obligations impératives en vertu de la Constitution. Toutefois, il reviendra aux acteurs politiques de déterminer en quoi consiste «une majorité claire en réponse à une question claire», suivant les circonstances dans lesquelles un futur référendum pourrait être tenu. De même, si un appui majoritaire était exprimé en faveur de la sécession du Québec, il incomberait aux acteurs poli-

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 lead-

tiques de déterminer le contenu des négociations et le processus à suivre. La conciliation des divers intérêts constitutionnels légitimes relève nécessairement du domaine politique plutôt que du domaine judiciaire, précisément parce que cette conciliation ne peut être réalisée que par le jeu des concessions réciproques qui caractérise les négociations politiques. Dans la mesure où les questions abordées au cours des négociations seraient politiques, les tribunaux, conscients du rôle qui leur revient dans le régime constitutionnel, n'auraient aucun rôle de surveillance à jouer.

(3) *Question 2*

Il est également demandé à la Cour s'il existe, en vertu du droit international, un droit de sécession unilatérale. Certains de ceux qui apportent une réponse affirmative se fondent sur le droit reconnu à l'autodétermination qui appartient à tous les «peuples». Même s'il est certain que la majeure partie de la population du Québec partage bon nombre des traits qui caractérisent un peuple, il n'est pas nécessaire de trancher la question de l'existence d'un «peuple», quelle que soit la réponse exacte à cette question dans le contexte du Québec, puisqu'un droit de sécession ne prend naissance en vertu du principe de l'autodétermination des peuples en droit international que dans le cas d'«un peuple» gouverné en tant que partie d'un empire colonial, dans le cas d'«un peuple» soumis à la subjugation, à la domination ou à l'exploitation étrangères, et aussi, peut-être, dans le cas d'«un peuple» empêché d'exercer utilement son droit à l'autodétermination à l'intérieur de l'État dont il fait partie. Dans d'autres circonstances, les peuples sont censés réaliser leur autodétermination dans le cadre de l'État existant auquel ils appartiennent. L'État dont le gouvernement représente l'ensemble du peuple ou des peuples résidant sur son territoire, dans l'égalité et sans discrimination, et qui respecte les principes de l'autodétermination dans ses arrangements internes, a droit au maintien de son intégrité territoriale en vertu du droit international et à la reconnaissance de cette intégrité territoriale par les autres États. Le Québec ne constitue pas un peuple colonisé ou opprimé, et on ne peut pas prétendre non plus que les Québécois se voient refuser un accès réel au gouvernement pour assurer leur développement politique, économique, culturel et social. Dans ces circonstances, «l'Assemblée nationale, la législature ou le gouvernement du Québec» ne possèdent pas, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada.

Même s'il n'existe pas de droit de sécession unilatérale en vertu de la Constitution ou du droit international, cela n'écarte pas la possibilité d'une déclaration incons-

ing 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.

Cases Cited

Referred to: *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721; *Re References by Governor-General in Council* (1910), 43 S.C.R. 536, aff'd [1912] A.C. 571; *Quebec North Shore Paper Co. v. Canadian Pacific Ltd.*, [1977] 2 S.C.R. 1054; *De Demko v. Home Secretary*, [1959] A.C. 654; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *Attorney-General for Ontario v. Attorney-General for Canada*, [1947] A.C. 127; *Muskrat v. United States*, 219 U.S. 346 (1911); *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] S.C.R. 208; *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; *Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525; *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; *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; *Reference re Resolution to amend the Constitution*, [1981] 1 S.C.R. 753; *Reference re Objection by Quebec to a Resolution to Amend the Constitution*, [1982] 2 S.C.R. 793; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Edwards v. Attorney-General for Canada*, [1930] A.C. 124; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319; *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R.

titutionnelle de sécession conduisant à une sécession *de facto*. Le succès ultime d'une telle sécession dépendrait de sa reconnaissance par la communauté internationale qui, pour décider d'accorder ou non cette reconnaissance, prendrait vraisemblablement en considération la légalité et la légitimité de la sécession eu égard, notamment, à la conduite du Québec et du Canada. Même si elle était accordée, une telle reconnaissance ne fournirait toutefois aucune justification rétroactive à l'acte de sécession, en vertu de la Constitution ou du droit international.

(4) *Question 3*

Compte tenu des réponses aux questions 1 et 2, il n'existe, entre le droit interne et le droit international, aucun conflit à examiner dans le contexte du renvoi.

Jurisprudence

Arrêts mentionnés: *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721; *Re References by Governor-General in Council* (1910), 43 R.C.S. 536, conf. par [1912] A.C. 571; *Quebec North Shore Paper Co. c. Canadien Pacifique Ltée*, [1977] 2 R.C.S. 1054; *De Demko c. Home Secretary*, [1959] A.C. 654; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445; *Attorney-General for Ontario c. Attorney-General for Canada*, [1947] A.C. 127; *Muskrat c. United States*, 219 U.S. 346 (1911); *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208; *Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] R.C.S. 792; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86; *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525; *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3; *Reference re Education System in Island of Montreal*, [1926] R.C.S. 246; *Renvoi: Compétence du Parlement relativement à la Chambre haute*, [1980] 1 R.C.S. 54; *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753; *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793; *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2; *Edwards c. Attorney-General for Canada*, [1930] A.C. 124; *New Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1

455; *Liquidators of the Maritime Bank of Canada v. Receiver-General of New Brunswick*, [1892] A.C. 437; *Northern Telecom Canada Ltd. v. Communication Workers of Canada*, [1983] 1 S.C.R. 733; *Re the Initiative and Referendum Act*, [1919] A.C. 935; *Haig v. Canada*, [1993] 2 S.C.R. 995; *R. v. S. (S.)*, [1990] 2 S.C.R. 254; *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; *Reference re Alberta Statutes*, [1938] S.C.R. 100; *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Reference re Bill 30, An Act to amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148; *Reference re Education Act (Que.)*, [1993] 2 S.C.R. 511; *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, [1989] 1 S.C.R. 377; *Adler v. Ontario*, [1996] 3 S.C.R. 609; *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents for Fairness in Education*, [1986] 1 S.C.R. 549; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, [1993] 1 S.C.R. 839; *Mahe v. Alberta*, [1990] 1 S.C.R. 342; *R. v. Sparrow*, [1990] 1 S.C.R. 1075; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49.

R.C.S. 319; *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455; *Liquidators of the Maritime Bank of Canada c. Receiver-General of New Brunswick*, [1892] A.C. 437; *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733; *Re the Initiative and Referendum Act*, [1919] A.C. 935; *Haig c. Canada*, [1993] 2 R.C.S. 995; *R. c. S. (S.)*, [1990] 2 R.C.S. 254; *Switzman c. Elbling*, [1957] R.C.S. 285; *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299; *Boucher c. The King*, [1951] R.C.S. 265; *Reference re Alberta Statutes*, [1938] R.C.S. 100; *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; *R. c. Oakes*, [1986] 1 R.C.S. 103; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *Roncarelli c. Duplessis*, [1959] R.C.S. 121; *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441; *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148; *Renvoi relatif à la Loi sur l'instruction publique (Qué.)*, [1993] 2 R.C.S. 511; *Grand Montréal, Commission des écoles protestantes c. Québec (Procureur général)*, [1989] 1 R.C.S. 377; *Adler c. Ontario*, [1996] 3 R.C.S. 609; *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education*, [1986] 1 R.C.S. 549; *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839; *Mahe c. Alberta*, [1990] 1 R.C.S. 342; *R. c. Sparrow*, [1990] 1 R.C.S. 1075; *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49.

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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.

RENVOI par le Gouverneur en conseil, conformément à l'art. 53 de la *Loi sur la Cour suprême*, concernant la sécession du Québec du reste du Canada.

L. Yves Fortier, Q.C., Pierre Bienvenu, Warren J. Newman, Jean-Marc Aubry, Q.C., and *Mary Dawson, Q.C.*, for the Attorney General of Canada.

L. Yves Fortier, c.r., Pierre Bienvenu, Warren J. Newman, Jean-Marc Aubry, c.r., et *Mary Dawson, c.r.*, pour le procureur général du Canada.

André Joli-Cœur, Michel Paradis, Louis Masson, André Binette, Clément Samson, Martin Bédard and *Martin St-Amant*, for the *amicus curiae*.

André Joli-Cœur, Michel Paradis, Louis Masson, André Binette, Clément Samson, Martin Bédard et *Martin St-Amant*, pour l'*amicus curiae*.

Donna J. Miller, Q.C., and *Deborah L. Carlson*, for the intervener the Attorney General of Manitoba.

Donna J. Miller, c.r., et *Deborah L. Carlson*, pour l'intervenant le procureur général du Manitoba.

Graeme G. Mitchell and *John D. Whyte, Q.C.*, for the intervener the Attorney General for Saskatchewan.

Graeme G. Mitchell et *John D. Whyte, c.r.*, pour l'intervenant le procureur général de la Saskatchewan.

Bernard W. Funston, for the intervener the Minister of Justice of the Northwest Territories.

Bernard W. Funston, pour l'intervenant le ministre de la Justice des Territoires du Nord-Ouest.

Stuart J. Whitley, Q.C., and *Howard L. Kushner*, for the intervener the Minister of Justice for the Government of the Yukon Territory.

Agnès Laporte and *Richard Gaudreau*, for the intervener Kitigan Zibi Anishinabeg.

Claude-Armand Sheppard, *Paul Joffe* and *Andrew Orkin*, for the intervener the Grand Council of the Crees (Eeyou Estchee).

Peter W. Hutchins and *Carol Hilling*, for the intervener the Makivik Corporation.

Michael Sherry, for the intervener the Chiefs of Ontario.

Raj Anand and *M. Kate Stephenson*, for the intervener the Minority Advocacy and Rights Council.

Mary Eberts and *Anne Bayefsky*, for the intervener the *Ad Hoc* Committee of Canadian Women on the Constitution.

Guy Bertrand and *Patrick Monahan*, for the intervener Guy Bertrand.

Stephen A. Scott, for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway.

Vincent Pouliot, on his own behalf.

The following is the judgment delivered by

THE COURT —

I. Introduction

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

Stuart J. Whitley, *c.r.*, et *Howard L. Kushner*, pour l'intervenant le ministre de la Justice pour le gouvernement du territoire du Yukon.

Agnès Laporte et *Richard Gaudreau*, pour l'intervenante Kitigan Zibi Anishinabeg.

Claude-Armand Sheppard, *Paul Joffe* et *Andrew Orkin*, pour l'intervenant le Grand Conseil des Cris (Eeyou Estchee).

Peter W. Hutchins et *Carol Hilling*, pour l'intervenante la Corporation Makivik.

Michael Sherry, pour l'intervenant Chiefs of Ontario.

Raj Anand et *M. Kate Stephenson*, pour l'intervenant le Conseil des revendications et des droits des minorités.

Mary Eberts et *Anne Bayefsky*, pour l'intervenant *Ad Hoc* Committee of Canadian Women on the Constitution.

Guy Bertrand et *Patrick Monahan*, pour l'intervenant Guy Bertrand.

Stephen A. Scott, pour les intervenants Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell et Van Hoven Petteway.

Vincent Pouliot, en personne.

Le jugement suivant a été rendu par

LA COUR —

I. Introduction

1 Nous sommes appelés, dans le présent renvoi, à examiner des questions d'extrême importance, qui touchent au cœur même de notre système de gouvernement constitutionnel. L'observation que nous avons faite, il y a plus de dix ans, dans le *Renvoi relatif aux droits linguistiques au Manitoba*, [1985] 1 R.C.S. 721, à la p. 728, s'applique tout autant au présent renvoi qui, lui aussi, «allie des questions juridiques et constitutionnelles des plus subtiles et

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

complexes à des questions politiques très délicates». À notre avis, il n'est pas possible de répondre aux questions soumises sans d'abord examiner un certain nombre de principes sous-jacents. L'étude de la nature et du sens de ces principes ne revêt pas seulement un intérêt théorique, mais est, au contraire, d'une très grande utilité pratique. Ce n'est que lorsque ces principes sous-jacents auront été examinés et circonscrits que nous pourrons donner une réponse valable aux questions auxquelles nous devons répondre.

Les questions posées par le gouverneur en conseil dans le décret C.P. 1996-1497, daté du 30 septembre 1996, sont rédigées ainsi:

1. L'Assemblée nationale, la législature, ou le gouvernement du Québec peut-il, en vertu de la Constitution du Canada, procéder unilatéralement à la sécession du Québec du Canada?

2. L'Assemblée nationale, la législature, ou le gouvernement du Québec possède-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada? À cet égard, en vertu du droit international, existe-t-il un droit à l'autodétermination qui procurerait à l'Assemblée nationale, la législature, ou le gouvernement du Québec le droit de procéder unilatéralement à la sécession du Québec du Canada?

3. Lequel du droit interne ou du droit international aurait préséance au Canada dans l'éventualité d'un conflit entre eux quant au droit de l'Assemblée nationale, de la législature ou du gouvernement du Québec de procéder unilatéralement à la sécession du Québec du Canada?

Avant d'aborder la question 1, il faut examiner les points soulevés relativement à la compétence de notre Cour en matière de renvoi.

II. Objections préliminaires à la compétence de la Cour en matière de renvoi

L'*amicus curiae* soutient que l'art. 101 de la *Loi constitutionnelle de 1867* ne donne pas au Parlement le pouvoir de conférer à notre Cour la compétence prévue à l'art. 53 de la *Loi sur la Cour suprême*, L.R.C. (1985), ch. S-26. Subsidiairement, il affirme que, même si le Parlement était habilité à édicter l'art. 53 de la *Loi sur la Cour*

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.

suprême, le champ d'application de cet article devrait être interprété de manière à en exclure le genre de questions que le gouverneur en conseil a soumises dans le présent renvoi. De façon plus particulière, on prétend que notre Cour ne peut répondre à la question 2 puisqu'il s'agit d'une question de droit international «pur» sur laquelle la Cour n'a pas compétence. Enfin, même si la compétence de notre Cour en matière de renvoi est constitutionnellement valide et même si les questions soumises à la Cour relèvent du champ d'application de l'art. 53 de la *Loi sur la Cour suprême*, on avance que ces questions sont conjecturales, qu'elles sont de nature politique et que, de toute façon, elles ne sont pas mûres pour décision judiciaire et ne sont donc pas justiciables.

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.

Malgré quelques objections formelles soulevées par le procureur général du Canada, nous sommes d'avis que l'*amicus curiae* était en droit de présenter ces objections préliminaires et que nous devons y répondre. 5

A. *The Constitutional Validity of Section 53 of the Supreme Court Act*

A. *La validité constitutionnelle de l'art. 53 de la Loi sur la Cour suprême*

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.

Dans l'arrêt *Re References by Governor-General in Council* (1910), 43 R.C.S. 536, confirmé en appel par le Conseil privé, [1912] A.C. 571 (*sub nom. Attorney-General for Ontario c. Attorney-General for Canada*), la constitutionnalité de la juridiction spéciale de notre Cour a été confirmée à deux reprises. On nous demande de revoir ces décisions. Compte tenu des changements considérables apportés au rôle de la Cour depuis 1912 et des questions très importantes soulevées dans le présent renvoi, il convient de réexaminer brièvement la validité constitutionnelle de la compétence de la Cour en matière de renvoi. 6

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

L'article 3 de la *Loi sur la Cour suprême* établit notre Cour à la fois comme «cour générale d'appel pour l'ensemble du pays» et «tribunal additionnel propre à améliorer l'application du droit canadien». Ces deux rôles reflètent les deux pouvoirs énoncés à l'art. 101 de la *Loi constitutionnelle de 1867*. Cependant, l'expression «lois du Canada» à l'art. 101 ne vise que les lois et autres règles de droit fédérales: voir *Quebec North Shore Paper* 7

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.

Co. c. Canadien Pacifique Ltée, [1977] 2 R.C.S. 1054, aux pp. 1065 et 1066. En conséquence, l'expression «tribunaux additionnels» figurant à l'art. 101 est une assise insuffisante pour fonder la juridiction spéciale établie à l'art. 53 de la *Loi sur la Cour suprême*, qui déborde clairement l'examen du seul droit fédéral (voir, par exemple, le par. 53(2)). L'article 53 doit donc être considéré comme ayant été édicté en application du pouvoir du Parlement de créer une «cour générale d'appel» pour le 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.

L'article 53 de la *Loi sur la Cour suprême* est *intra vires* des pouvoirs dont dispose le Parlement en vertu de l'art. 101 si, de par son «caractère véritable», cette disposition législative concerne la création ou l'organisation d'une «cour générale d'appel». L'article 53 comporte deux volets principaux — il investit notre Cour d'une compétence de première instance et lui impose l'obligation de donner des avis consultatifs. L'article 53 ne peut donc être constitutionnellement valide que si (1) une «cour générale d'appel» peut à bon droit exercer une compétence de première instance, et si (2) une «cour générale d'appel» peut à bon droit exercer d'autres fonctions juridiques, comme donner des avis consultatifs.

(1) May a Court of Appeal Exercise an Original Jurisdiction?

(1) Une cour d'appel peut-elle exercer une compétence de première instance?

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.

Les mots «cour générale d'appel» à l'art. 101 indiquent le rang de la Cour au sein de l'organisation judiciaire nationale et ne doivent pas être considérés comme une définition restrictive de ses fonctions. Dans la plupart des cas, notre Cour exerce le rôle de juridiction d'appel suprême et exclusive au pays et, en tant que telle, elle est à bon droit constituée «cour générale d'appel» pour le Canada. Par ailleurs, il est clair qu'une cour d'appel peut, à titre exceptionnel, se voir attribuer une compétence de première instance qui n'est pas incompatible avec sa compétence en appel.

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*

La Cour d'appel d'Angleterre, la Cour suprême des États-Unis et certaines cours d'appel canadiennes exercent une compétence de première instance en plus de leurs fonctions en matière d'appel. Voir *De Demko c. Home Secretary*, [1959] A.C.

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, § 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.

654 (H.L.), à la p. 660; *Re Forest and Registrar of Court of Appeal of Manitoba* (1977), 77 D.L.R. (3d) 445 (C.A. Man.), à la p. 453; Constitution des États-Unis, art. III, § 2. Même si ces tribunaux ne sont pas constitués en vertu d'une disposition habilitante analogue à l'art. 101, ces exemples indiquent certainement qu'il n'y a rien d'intrinsèquement contradictoire au fait qu'une cour d'appel exerce, à titre exceptionnel, une compétence de première instance.

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.

11 On plaide également que la compétence de première instance de notre Cour est inconstitutionnelle parce qu'elle entre en conflit avec la compétence correspondante des cours supérieures provinciales, et qu'elle court-circuite le processus d'appel normal. Toutefois, le Parlement a pleine compétence pour créer une cour générale d'appel en application de l'art. 101 et cette compétence a préséance sur le pouvoir conféré aux provinces en matière d'administration de la justice par le par. 92(14). Voir *Attorney-General for Ontario c. Attorney-General for Canada*, [1947] A.C. 127 (C.P.). Par conséquent, même s'il était possible d'affirmer que la compétence de notre Cour en matière de renvoi entre en conflit avec la compétence des cours supérieures provinciales en première instance, un tel conflit doit être résolu en faveur de l'exercice par le Parlement de son pouvoir plein et entier de créer une «cour générale d'appel», pourvu, comme nous l'examinerons ci-après, que des fonctions consultatives ne soient pas considérées incompatibles avec les fonctions d'une cour générale d'appel.

(2) May a Court of Appeal Undertake Advisory Functions?

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.]

(2) Une cour d'appel peut-elle exercer des fonctions consultatives?

12 L'*amicus curiae* soutient

[o]u bien ce pouvoir constitutionnel [de doter le plus haut tribunal de la fédération de la compétence d'émettre des avis consultatifs] est expressément prévu par la Constitution, comme c'est le cas en Inde, (*Constitution de l'Inde*, art. 143), ou bien il n'y est pas prévu et alors il n'existe tout simplement pas. C'est ce qu'a reconnu pour elle la Cour suprême des États-Unis. [Nous soulignons.]

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, § 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 § 12-2-10; Del. Code Ann. tit. 10, § 141 (1996 Supp.)).

Cependant, la Cour suprême des États-Unis n'a pas conclu qu'elle n'était pas habilitée à donner des avis consultatifs pour le motif qu'aucun pouvoir exprès à cet effet n'était inscrit dans la Constitution américaine. Bien au contraire, elle a fondé cette conclusion sur la limite expresse prévue à l'art. III, § 2 de la Constitution américaine qui restreint la compétence des tribunaux fédéraux aux «causes» («*cases*») ou «différends» («*controversies*») concrets. Voir, par exemple, *Muskrat c. United States*, 219 U.S. 346 (1911), à la p. 362. Cette section témoigne de la stricte séparation des pouvoirs dans le dispositif constitutionnel fédéral aux États-Unis. Dans les cas où la limite fondée sur les «causes ou différends» n'est pas présente dans la Constitution de leur État, certains tribunaux des États américains exercent effectivement des fonctions consultatives (par exemple, dans deux États au moins — l'Alabama et le Delaware — la loi autorise les tribunaux à donner, dans certaines circonstances, des avis consultatifs: voir Ala. Code 1975 § 12-2-10; Del. Code Ann. tit. 10, § 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

En outre, le système judiciaire de plusieurs pays européens (tels l'Allemagne, la France, l'Italie, l'Espagne, le Portugal et la Belgique) compte des tribunaux chargés de l'examen des affaires constitutionnelles. L'existence d'un différend concret mettant en jeu des droits individuels n'est pas nécessaire pour que ces tribunaux examinent la constitutionnalité d'une nouvelle règle de droit, une [TRADUCTION] «question abstraite ou objective» suffit. Voir L. Favoreu, «American and European Models of Constitutional Justice», dans D. S. Clark, éd., *Comparative and Private International Law* (1990), 105, à la p. 113. La Cour européenne de justice, la Cour européenne des droits de l'homme et la Cour interaméricaine des droits de l'homme ont toutes une compétence qui leur est expressément conférée pour donner des avis consultatifs. Voir *Traité instituant la Communauté européenne*, art. 228(6); Protocole nº 2 de la *Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales*, S.T. Europ. nº 5, p. 37; *Statut de la Cour interaméricaine des droits de l'Homme*, art. 2. Il n'existe aucun fondement plausible qui permette de conclure qu'une cour de

another legal function in tandem with its judicial duties.

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*

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

justice est, de par sa nature, intrinsèquement empêchée d'exercer une fonction juridique autre, en plus de ses fonctions judiciaires.

Qui plus est, la Constitution canadienne n'impose pas une séparation stricte des pouvoirs. Le Parlement et les législatures provinciales peuvent à bon droit confier aux tribunaux d'autres fonctions juridiques, et conférer certaines fonctions judiciaires à des organismes qui ne sont pas des tribunaux. L'exception à cette règle touche uniquement les cours visées à l'art. 96. Par conséquent, même si le fait de donner des avis consultatifs est très clairement une fonction accomplie en dehors du cadre des procédures contentieuses, et que l'exécutif obtient habituellement de tels avis des juristes de l'État, rien dans la Constitution n'empêche notre Cour de se voir attribuer le pouvoir d'exercer un tel rôle consultatif. L'attribution législative de compétence en matière de renvoi prévue à l'art. 53 de la *Loi sur la Cour suprême* est donc constitutionnellement valide. 15

B. *La compétence de la Cour aux termes de l'art. 53*

Les passages pertinents de l'art. 53 disposent: 16

53. (1) Le gouverneur en conseil peut soumettre au jugement de la Cour toute question importante de droit ou de fait touchant:

a) l'interprétation des *Lois constitutionnelles*;

. . .

d) les pouvoirs du Parlement canadien ou des législatures des provinces, ou de leurs gouvernements respectifs, indépendamment de leur exercice passé, présent ou futur.

(2) Le gouverneur en conseil peut en outre, s'il l'estime indiqué, déférer à la Cour toute question importante de droit ou de fait touchant toute autre matière, que celle-ci soit ou non, selon la Cour, du même ordre que les matières énumérées au paragraphe (1).

(3) Les questions touchant les matières visées aux paragraphes (1) et (2) sont d'office réputées être impor-

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.

tantes quand elles sont ainsi déférées à la Cour par le gouverneur en conseil.

On plaide que même si le Parlement était habilité à édicter l'art. 53 de la *Loi sur la Cour suprême*, les questions soumises par le gouverneur en conseil n'entrent pas dans le champ d'application de cet article.

Cet argument ne peut être retenu. La question 1 touche, du moins en partie, l'interprétation des *Lois constitutionnelles*, dont il est fait mention à l'al. 53(1)*a*). La question 1 et la question 2 relèvent l'une et l'autre de l'al. 53(1)*d*), puisqu'elles se rapportent aux pouvoirs de la législature ou du gouvernement d'une province canadienne. Enfin, chacune des trois questions est clairement une «question importante de droit ou de fait touchant toute autre matière» et est, de ce fait, visée au par. 53(2).

Toutefois, l'*amicus curiae* a exprimé aussi certaines réserves spécifiques à l'égard du pouvoir de la Cour de répondre à la question 2. À première vue, la question 2 relève du champ d'application de l'art. 53, mais ses réserves sont plus générales et concernent le pouvoir de la Cour, en tant que tribunal interne, de répondre à ce qu'il décrit comme étant une question de droit international «pur».

Le premier argument est que, en répondant à la question 2, la Cour outrepasserait sa compétence en prétendant agir en tant que tribunal international. La réponse évidente à cet argument est que, en donnant un avis consultatif dans un renvoi, la Cour ne prétend pas «agir en tant que» tribunal international ni se substituer à un tel tribunal. Conformément aux principes bien établis du droit international, la réponse de la Cour à la question 2 n'est pas censée lier un autre État ou un tribunal international susceptible d'examiner ultérieurement une question analogue. La Cour a néanmoins compétence pour donner au gouverneur en conseil, en sa qualité de tribunal national, des avis consultatifs sur des questions juridiques qui touchent ou concernent l'avenir de la fédération canadienne.

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.

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).

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*

It is submitted that even if the Court has jurisdiction over the questions referred, the questions

Deuxièmement, on se demande si la question 2 échappe à la compétence de la Cour, en tant que tribunal interne, parce qu'elle l'oblige à examiner le droit international plutôt que le droit interne. 21

Ce doute est sans fondement. Dans le passé, la Cour a dû faire appel plusieurs fois au droit international pour déterminer les droits et les obligations d'un acteur donné au sein du système juridique canadien. Par exemple, dans *Reference re Powers to Levy Rates on Foreign Legations and High Commissioners' Residences*, [1943] R.C.S. 208, la Cour devait décider si, compte tenu des principes du droit international en matière d'immunité diplomatique, un conseil municipal avait le pouvoir de percevoir des taxes sur certaines propriétés appartenant à des gouvernements étrangers. Dans deux renvois ultérieurs, la Cour a encore fait appel au droit international pour déterminer si le gouvernement fédéral ou une province possédait des droits de propriété à l'égard de certaines parties de la mer territoriale et du plateau continental (*Reference re Ownership of Offshore Mineral Rights of British Columbia*, [1967] R.C.S. 792; *Renvoi relatif au plateau continental de Terre-Neuve*, [1984] 1 R.C.S. 86). 22

En outre, ce qui est plus important, la question 2 du renvoi n'est pas une question abstraite de droit international «pur». Elle vise à faire déterminer les droits et obligations juridiques de l'Assemblée nationale, de la législature ou du gouvernement du Québec, institutions qui font clairement partie de l'ordre juridique canadien. Comme nous le verrons, l'*amicus curiae* a lui-même plaidé que le succès de toute démarche du Québec en vue de faire sécession de la fédération canadienne serait déterminé par le droit international. Dans ces circonstances, la prise en considération du droit international dans le contexte du présent renvoi concernant les aspects juridiques de la sécession unilatérale du Québec est non seulement permise mais inévitable. 23

C. *La justiciabilité*

On fait valoir que, même si la Cour a compétence sur les questions soumises, les questions 24

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

elles-mêmes ne sont pas justiciables. Trois arguments principaux sont avancés à cet égard:

(1) les questions ne sont pas justiciables parce que trop «théoriques» ou conjecturales;

(2) les questions ne sont pas justiciables parce qu'elles sont de nature politique;

(3) les questions ne sont pas encore mûres pour faire l'objet d'un recours judiciaire.

Dans le contexte d'un renvoi, la Cour n'exerce pas sa fonction judiciaire traditionnelle, mais joue un rôle consultatif. Le fait même d'être consultée sur des questions hypothétiques dans un renvoi, par exemple la constitutionnalité d'un projet de texte législatif, entraîne la Cour dans un exercice auquel elle ne se livrerait jamais dans le contexte d'un litige. Peu importe que la procédure suivie dans un renvoi ressemble à la procédure en matières contentieuses, la Cour ne statue pas sur des droits. Pour la même raison, la Cour peut, dans un renvoi, examiner des questions qui pourraient autrement ne pas être considérées comme assez «mûres» pour faire l'objet d'un recours judiciaire.

Même si un renvoi diffère de sa fonction juridictionnelle habituelle, la Cour ne doit pas, même dans le contexte d'un renvoi, examiner des questions auxquelles il serait inapproprié de répondre. Cependant, vu la nature très différente d'un renvoi, pour décider de l'opportunité de répondre à une question, il ne faut pas s'attacher à la question de savoir si le différend a un caractère formellement contradictoire ou s'il vise à trancher des droits pouvant faire l'objet d'un recours judiciaire. Il faut plutôt se demander s'il s'agit d'un différend dont on peut à bon droit saisir une cour de justice. Comme nous l'avons affirmé dans le *Renvoi relatif au Régime d'assistance publique du Canada (C.-B.)*, [1991] 2 R.C.S. 525, à la p. 545:

> Quoiqu'une question puisse ne pas relever de la compétence des tribunaux pour bien des raisons, le procureur général du Canada a fait valoir, dans le présent pourvoi qu'en répondant aux questions, la Cour se laisserait entraîner dans une controverse politique et deviendrait engagée dans le processus législatif. Dans l'exercice de son pouvoir discrétionnaire de décider s'il convient de répondre à une question qui, allègue-t-on, ne relève pas de la compétence des tribunaux, la Cour

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.]

doit veiller surtout à conserver le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement. [. . .] En s'enquérant du rôle qu'elle doit jouer, la Cour doit décider si la question qu'on lui a soumise revêt un caractère purement politique et devrait, en conséquence, être tranchée dans une autre tribune ou si elle présente un aspect suffisamment juridique pour justifier l'intervention du pouvoir judiciaire. [Nous soulignons.]

Thus the circumstances in which the Court may decline to answer a reference question on the basis of "non-justiciability" include:

Ainsi, la Cour peut refuser, pour cause de «non-justiciabilité», de répondre à une question soumise par renvoi dans les circonstances suivantes:

(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.

(i) en répondant à la question, la Cour outrepasserait ce qu'elle estime être le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement, ou

(ii) la Cour ne pourrait pas donner une réponse relevant de son champ d'expertise: l'interprétation du droit.

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.

27 Pour ce qui est du «rôle légitime» de la Cour, il est important de souligner que, contrairement à la prétention de l'*amicus curiae*, les questions posées dans le renvoi ne demandent pas à la Cour d'usurper un pouvoir de décision démocratique que la population du Québec peut être appelée à exercer. Suivant notre interprétation des questions posées par le gouverneur en conseil, celles-ci se limitent strictement à certains aspects du cadre juridique dans lequel cette décision démocratique doit être prise. L'analogie qu'on a tenté de faire avec la doctrine américaine des «questions politiques» ne s'applique donc pas. Le cadre juridique ayant été clarifié, il appartiendra à la population du Québec de décider, par le processus politique, de chercher ou non à réaliser la sécession. Comme nous le verrons, le cadre juridique concerne les droits et obligations tant des Canadiens qui vivent à l'extérieur de la province de Québec que de ceux qui vivent au Québec.

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

28 Pour ce qui est de la nature «juridique» des questions posées, si la Cour est d'avis qu'une question comporte un élément important à caractère non juridique, elle peut interpréter cette question de manière à ne répondre qu'à ses aspects juridiques. Si cela n'est pas possible, la Cour peut

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

refuser de répondre à la question. Dans le présent renvoi, les questions peuvent clairement être considérées comme visant des questions juridiques et, de ce fait, la Cour est en mesure d'y répondre.

Enfin, il reste l'argument suivant lequel, même si les questions soumises sont justiciables en ce sens qu'elles peuvent faire l'objet d'un «renvoi», la Cour doit encore se demander si elle devrait exercer son pouvoir discrétionnaire et refuser d'y répondre pour des raisons d'ordre pragmatique.

De façon générale, on peut diviser en deux grandes catégories les cas où la Cour a exercé son pouvoir discrétionnaire et refusé de répondre à une question soumise par renvoi qui était par ailleurs justiciable. Premièrement, lorsque la question est trop imprécise ou ambiguë pour qu'il soit possible d'y apporter une réponse complète ou exacte: voir, par exemple, *McEvoy c. Procureur général du Nouveau-Brunswick*, [1983] 1 R.C.S. 704; *Reference re Waters and Water-Powers*, [1929] R.C.S. 200; *Renvoi relatif à la taxe sur les produits et services*, [1992] 2 R.C.S. 445; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3 (*Renvoi relatif aux juges de la Cour provinciale*), au par. 256. Deuxièmement, lorsque les parties n'ont pas fourni suffisamment d'information pour permettre à la Cour de donner des réponses complètes ou exactes: voir, par exemple, *Reference re Education System in Island of Montreal*, [1926] R.C.S. 246; *Renvoi: Compétence du Parlement relativement à la Chambre haute*, [1980] 1 R.C.S. 54 (*Renvoi relatif au Sénat*); *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 257.

Il ne fait aucun doute que les questions du renvoi soulèvent des points difficiles et sont susceptibles d'interprétations diverses. Toutefois, plutôt que de refuser complètement d'y répondre, la Cour est guidée par l'approche préconisée par la majorité à l'égard de la question touchant les «conventions» dans le *Renvoi: Résolution pour modifier la Constitution*, [1981] 1 R.C.S. 753 (*Renvoi relatif au rapatriement*), aux pp. 875 et 876:

> Si les questions paraissent ambiguës, la Cour ne devrait pas, dans un renvoi constitutionnel, être dans une

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

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.

situation pire que celle d'un témoin à un procès, et se sentir obligée de répondre par oui ou par non. Si elle estime qu'une question peut être trompeuse ou si elle veut seulement éviter de risquer un malentendu, il lui est loisible d'interpréter la question [. . .] ou de nuancer à la fois la question et la réponse . . .

Les questions du renvoi revêtent une importance fondamentale pour le public. On ne peut affirmer que les questions sont trop imprécises ou ambiguës pour qu'il soit possible d'y répondre correctement en droit. On ne peut pas dire non plus que la Cour n'a pas reçu suffisamment d'information sur le contexte actuel dans lequel les questions sont soulevées. Dans les circonstances, la Cour est donc tenue d'y répondre.

III. Les questions du renvoi

A. *Question 1*

> L'Assemblée nationale, la législature ou le gouvernement du Québec peut-il, en vertu de la Constitution du Canada, procéder unilatéralement à la sécession du Québec du Canada?

(1) Introduction

Comme nous l'avons confirmé dans le *Renvoi: Opposition du Québec à une résolution pour modifier la Constitution*, [1982] 2 R.C.S. 793, à la p. 806: «La *Loi constitutionnelle de 1982* est maintenant en vigueur. Sa légalité n'est ni contestée ni contestable.» La «Constitution du Canada» comprend certainement les textes énumérés au par. 52(2) de la *Loi constitutionnelle de 1982*. Même si ces textes jouent un rôle de premier ordre dans la détermination des règles constitutionnelles, ils ne sont pas exhaustifs. La Constitution «comprend des règles non écrites — et écrites —», comme nous l'avons souligné récemment dans le *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 92. Enfin, selon le *Renvoi relatif au rapatriement*, précité, à la p. 874, la Constitution du Canada comprend 32

> le système global des règles et principes qui régissent la répartition ou l'exercice des pouvoirs constitutionnels dans l'ensemble et dans chaque partie de l'État canadien.

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.

Ces règles et principes de base, qui comprennent les conventions constitutionnelles et les rouages du Parlement, font nécessairement partie de notre Constitution, parce qu'il peut survenir des problèmes ou des situations qui ne sont pas expressément prévus dans le texte de la Constitution. Pour résister au passage du temps, une constitution doit comporter un ensemble complet de règles et de principes offrant un cadre juridique exhaustif pour notre système de gouvernement. Ces règles et principes ressortent de la compréhension du texte constitutionnel lui-même, de son contexte historique et des diverses interprétations données par les tribunaux en matière constitutionnelle. À notre avis, quatre principes constitutionnels directeurs fondamentaux sont pertinents pour répondre à la question posée (cette énumération n'étant pas exhaustive): le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, et le respect des minorités. Nous traitons du fondement et de la substance de ces principes dans les prochains paragraphes. Nous examinons ensuite leur application particulière à la première question du renvoi.

(2) Historical Context: The Significance of Confederation

(2) Le contexte historique: l'importance de la Confédération

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.

Dans notre tradition constitutionnelle, légalité et légitimité sont liées. La nature précise de ce lien sera examinée plus loin. Toutefois, à ce stade-ci, nous tenons simplement à souligner que notre histoire constitutionnelle démontre que nos institutions gouvernementales ont su changer et s'adapter à l'évolution des valeurs sociales et politiques. Ces changements ont généralement été apportés par des moyens qui ont permis d'assurer la continuité, la stabilité et l'ordre juridique.

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.

Puisque le renvoi porte sur des questions fondamentales pour la nature du Canada, il n'est pas étonnant qu'il faille s'arrêter au contexte dans lequel l'union canadienne a évolué. À cette fin, nous décrirons brièvement l'évolution juridique de la Constitution et les principes fondamentaux qui régissent les modifications constitutionnelles. Notre but n'est pas d'en faire un examen exhaustif, mais simplement de souligner les caractéristiques les plus pertinentes dans le contexte du présent renvoi.

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.

35 La Confédération résulte d'une initiative de représentants élus des habitants des diverses colonies établies sur une partie du territoire du Canada actuel. Elle ne résulte pas d'un *fiat* impérial. En mars 1864, un comité spécial de l'Assemblée législative de la province du Canada, présidé par George Brown, commence à examiner les possibilités de réforme constitutionnelle. Dans son rapport, déposé en juin 1864, le comité recommande l'établissement d'une union fédérale formée du Canada-Est, du Canada-Ouest et peut-être d'autres colonies britanniques en Amérique du Nord. Un groupe de réformistes du Canada-Ouest, dirigés par Brown, se joint à Étienne P. Taché et John A. Macdonald dans un gouvernement de coalition afin d'entreprendre une réforme constitutionnelle selon le modèle fédéral proposé dans le rapport du comité.

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.

36 Une occasion se présente rapidement de donner suite au projet d'union fédérale. Les leaders des colonies des Maritimes projettent en effet de se rencontrer à Charlottetown à l'automne pour discuter à nouveau de l'union des Maritimes. La province du Canada obtient l'invitation d'une délégation canadienne. Le 1er septembre 1864, 23 délégués (cinq du Nouveau-Brunswick, cinq de la Nouvelle-Écosse, cinq de l'Île-du-Prince-Édouard et huit de la province du Canada) se réunissent à Charlottetown. Après cinq jours de discussion, les délégués s'entendent sur un projet d'union fédérale.

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.

37 Les principaux aspects de l'accord comportent une union fédérale, dotée d'une législature centrale bicamérale; une représentation fondée, à la Chambre Basse, sur la population et, à la Chambre Haute, sur le principe de l'égalité des régions, soit le Canada-Est, le Canada-Ouest et les Maritimes. On ne saurait trop insister sur l'importance de l'adoption d'une forme fédérale de gouvernement. Sans elle, ni l'accord des délégués du Canada-Est ni celui des colonies maritimes n'auraient pu être obtenus.

Several matters remained to be resolved, and so the Charlottetown delegates agreed to meet again at Quebec in October, and to invite Newfoundland

38 Comme il reste plusieurs questions à régler, les délégués de Charlottetown conviennent de se réunir de nouveau à Québec en octobre et d'inviter

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.

Terre-Neuve à y envoyer une délégation. La conférence de Québec commence le 10 octobre 1864. Trente-trois délégués (deux de Terre-Neuve, sept du Nouveau-Brunswick, cinq de la Nouvelle-Écosse, sept de l'Île-du-Prince-Édouard et douze de la province du Canada) se réunissent pendant deux semaines et demie. L'examen minutieux de chaque aspect de la structure fédérale domine l'ordre du jour politique. Les délégués approuvent 72 résolutions, touchant presque tout ce qui formera plus tard le texte final de la *Loi constitutionnelle de 1867*. Y figurent des garanties visant à protéger la langue et la culture françaises, à la fois directement (en faisant du français une langue officielle au Québec et dans l'ensemble du Canada) et indirectement (en attribuant aux provinces la compétence sur l'éducation et sur «[l]a propriété et les droits civils dans la province»). La protection des minorités est ainsi réaffirmée.

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).)

Légalement, il ne reste qu'à mettre les Résolutions de Québec sous une forme appropriée et à les faire adopter par le Parlement impérial à Londres. Politiquement, toutefois, on estime qu'il reste davantage à faire. De fait, la résolution 70 dit ceci: «L'on devra réclamer la sanction du parlement impérial et des parlements locaux, pour l'union des provinces, sur les principes adoptés par la convention.» (*Débats parlementaires sur la question de la Confédération* (1865), à la p. 5 (nous soulignons).)

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,

La confirmation des Résolutions de Québec est obtenue plus facilement dans le Canada central que dans les Maritimes. En février et en mars 1865, les Résolutions de Québec sont débattues de façon soutenue pendant près de six semaines par les deux chambres de la législature canadienne. L'Assemblée législative canadienne approuve les Résolutions de Québec en mars 1865, avec l'appui d'une majorité de députés tant du Canada-Est que du Canada-Ouest. Le gouvernement de l'Île-du-Prince-Édouard et celui de Terre-Neuve choisissent, conformément au sentiment populaire dans ces colonies, de ne pas donner leur assentiment aux Résolutions de Québec. Au Nouveau-Brunswick, une élection générale doit être tenue avant

Premier Tupper ultimately obtained a resolution from the House of Assembly favouring Confederation.

que le parti pro-confédération du premier ministre Tilley l'emporte. En Nouvelle-Écosse, le premier ministre Tupper obtient finalement une résolution de la Chambre d'assemblée en faveur de la Confédération.

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.

41 Seize délégués (cinq du Nouveau-Brunswick, cinq de la Nouvelle-Écosse et six de la province du Canada) se rencontrent à Londres, en décembre 1866, pour finaliser le projet de Confédération. À cette fin, ils conviennent d'apporter de légers changements et ajouts aux Résolutions de Québec. Des modifications mineures sont faites au partage des pouvoirs, on pourvoit à la nomination de sénateurs supplémentaires en cas d'impasse entre la Chambre des communes et le Sénat, et on accorde à certaines minorités religieuses le droit de faire appel au gouvernement fédéral dans le cas où une loi provinciale porterait atteinte à leurs droits en matière d'écoles confessionnelles. Le projet d'Acte de l'Amérique du Nord britannique est rédigé après la Conférence de Londres, avec l'aide du ministère britannique des Affaires coloniales, et déposé à la Chambre des lords en février 1867. L'Acte, adopté en troisième lecture à la Chambre des communes le 8 mars 1867, reçoit la sanction royale le 29 mars et est proclamé le 1er juillet de la même année. Le Dominion du Canada est devenu une réalité.

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:

42 Il y a très tôt une tentative de sécession. Le parti du premier ministre Tupper est décimé dans la première élection fédérale en septembre 1867. Les députés opposés à la Confédération remportent 18 des 19 sièges fédéraux de la Nouvelle-Écosse, et 36 des 38 sièges à la législature provinciale au cours des élections provinciales tenues au même moment. Le premier ministre nouvellement élu, Joseph Howe, se rend au parlement impérial à Londres, à la tête d'une délégation, dans le but de faire annuler les arrangements constitutionnels, mais il est trop tard. Le ministère des Affaires coloniales rejette la requête du premier ministre Howe demandant que la Nouvelle-Écosse soit autorisée à se retirer de la Confédération. Voici ce qu'écrit le secrétaire aux Affaires coloniales en 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

[TRADUCTION] La province voisine, le Nouveau-Brunswick, est entrée dans l'union en comptant sur la participation de la province-sœur, la Nouvelle-Écosse; de plus, de vastes obligations, politiques et commerciales, ont déjà été contractées sur la foi d'une mesure longuement négociée et adoptée solennellement. [. . .] Je suis confiant que l'Assemblée et les habitants de la Nouvelle-Écosse ne seront pas surpris du fait que le gouvernement de Sa Majesté estime qu'il ne serait pas justifié de conseiller l'annulation d'une grande mesure étatique, qui a tant de conséquences considérables produisant déjà leurs effets. . .

(Propos cités dans H. Wade MacLauchlan, «Accounting for Democracy and the Rule of Law in the Quebec Secession Reference» (1997), 76 *R. du B. can.* 155, à la p. 168.)

L'interdépendance caractérisée par de «vastes obligations politiques et commerciales», dont fait mention le secrétaire aux Affaires Coloniales en 1868, s'est évidemment accrue de façon incommensurable au cours des 130 dernières années.

Le fédéralisme était la réponse juridique aux réalités politiques et culturelles qui existaient à l'époque de la Confédération et qui existent toujours aujourd'hui. À l'époque de la Confédération, les dirigeants politiques avaient dit à leur collectivité respective que l'union canadienne permettrait de concilier unité et diversité. Il est pertinent, dans le contexte du présent renvoi, de faire état des propos de George-Étienne Cartier (cités dans les *Débats parlementaires sur la question de la Confédération*, *op. cit.*, à la p. 59):

Lorsque nous serons unis, si toutefois nous le devenons, nous formerons une nationalité politique indépendante de l'origine nationale, ou de la religion d'aucun individu. Il en est qui ont regretté qu'il y eut diversité de races et qui ont exprimé l'espoir que ce caractère distinctif disparaîtrait. L'idée de l'unité des races est une utopie; c'est une impossibilité. Une distinction de cette nature existera toujours, de même que la dissemblance paraît être dans l'ordre du monde physique, moral et politique. Quant à l'objection basée sur ce fait, qu'une grande nation ne peut pas être formée parce que le Bas-Canada est en grande partie français et catholique et que le Haut-Canada est anglais et protestant, et que les provinces inférieures sont mixtes, elle constitue, à mon avis, un raisonnement futile à l'extrême. [. . .] Dans notre propre fédération, nous aurons des catholiques et

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.

des protestants, des anglais, des français, des irlandais et des écossais, et chacun, par ses efforts et ses succès, ajoutera à la prospérité et à la gloire de la nouvelle confédération. Nous sommes de races différentes, non pas pour nous faire la guerre, mais afin de travailler conjointement à notre propre bien-être.

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.

Le partage des pouvoirs entre le fédéral et les provinces était une reconnaissance juridique de la diversité des premiers membres de la Confédération, et il témoignait du souci de respecter cette diversité au sein d'une seule et même nation en accordant d'importants pouvoirs aux gouvernements provinciaux. La *Loi constitutionnelle de 1867* était un acte d'édification d'une nation. Elle était la première étape de la transformation de colonies dépendant chacune du Parlement impérial pour leur administration en un État politique unifié et indépendant où des peuples différents pouvaient résoudre leurs divergences et, animés par un intérêt mutuel, travailler ensemble à la réalisation d'objectifs communs. Le fédéralisme était la structure politique qui permettait de concilier unité et diversité.

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.

44 Le partage des pouvoirs au sein de la fédération nécessitait une constitution écrite délimitant les pouvoirs du nouveau Dominion et des provinces du Canada. Malgré sa structure fédérale, le nouveau Dominion allait être doté d'«une constitution reposant sur les mêmes principes que celle du Royaume-Uni» (*Loi constitutionnelle de 1867*, préambule). Malgré les différences évidentes dans les structures gouvernementales du Canada et du Royaume Uni, on estimait important néanmoins de souligner la continuité des principes constitutionnels, notamment les institutions démocratiques et la primauté du droit, ainsi que la continuité de l'exercice du pouvoir souverain transféré de Westminster aux capitales fédérale et provinciales du Canada.

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,

45 Après 1867, la fédération canadienne continue à évoluer tant sur le plan territorial que sur le plan politique. De nouveaux territoires sont admis dans l'union et de nouvelles provinces sont formées. En 1870, la Terre de Rupert et les Territoires du Nord-Ouest sont admis et le Manitoba est constitué en province. La Colombie-Britannique est admise en

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.

1871 et l'Île-du-Prince-Édouard en 1873, et les îles de l'Arctique sont ajoutées en 1880. Le territoire du Yukon, en 1898, et les provinces d'Alberta et de la Saskatchewan, en 1905, sont taillés à même les Territoires du Nord-Ouest. Terre-Neuve est admise en 1949 par modification de la *Loi constitutionnelle de 1867*. Le nouveau territoire du Nunavut est découpé dans les Territoires du Nord-Ouest en 1993, cette partition prenant effet à compter d'avril 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.*

L'évolution du Canada du statut de colonie à celui d'État indépendant a été graduelle. L'adoption par le parlement impérial du *Statut de Westminster de 1931* (R.-U.), 22 & 23 Geo. 5, ch. 4, a confirmé en droit ce qui avait été confirmé plus tôt dans les faits par la Déclaration Balfour de 1926, savoir que le Canada était un pays indépendant. Par la suite, seul le droit canadien devait s'appliquer au Canada, à moins que le Canada ne consente expressément au maintien de l'application d'une loi impériale. Le Canada a réalisé son indépendance de la Grande-Bretagne au moyen d'une évolution politique et juridique marquée par l'adhésion aux principes de la primauté du droit et de la stabilité. La proclamation de la *Loi constitutionnelle de 1982* a éliminé les derniers vestiges de l'autorité britannique sur la Constitution canadienne et réaffirmé l'engagement du Canada envers la protection des droits des minorités et des autochtones, du droit à l'égalité, des droits linguistiques, des garanties juridiques et des libertés fondamentales énoncés dans la *Charte canadienne des droits et libertés*.

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,

Pour assurer la continuité juridique, qui requiert un transfert ordonné des pouvoirs, les modifications de 1982 devaient être apportées par le Parlement de Westminster. Toutefois, la légitimité de ces modifications, par opposition à leur légalité formelle, découlait de décisions politiques prises au Canada, dans un cadre juridique que notre Cour avait déclaré conforme à la Constitution canadienne dans le *Renvoi relatif au rapatriement*. Entre parenthèses, il faut signaler que les modifications de 1982 n'ont pas touché au partage des pouvoirs établi aux art. 91 et 92 de la *Loi constitutionnelle de 1867*, qui constitue la principale

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*.

expression textuelle dans notre Constitution du principe du fédéralisme dont il a été convenu au moment de la Confédération. Toutefois, elles ont eu un effet important en ce que, malgré le refus du gouvernement du Québec de souscrire à leur adoption, le Québec est devenu lié par les termes d'une Constitution qui est différente de celle qui était en vigueur jusque-là, notamment quant aux dispositions régissant sa modification et la *Charte canadienne des droits et libertés*. Quant à cette dernière, dans la mesure où la portée des pouvoirs législatifs est limitée depuis par la *Charte*, cette limitation s'applique autant aux pouvoirs législatifs fédéraux qu'aux pouvoirs législatifs provinciaux. Qui plus est, il faut rappeler que l'art. 33, la «clause de dérogation», donne au Parlement et aux législatures provinciales le pouvoir d'adopter, dans les domaines relevant de leurs compétences respectives, des lois dérogeant aux dispositions de la *Charte* qui concernent les libertés fondamentales (art. 2), les garanties juridiques (art. 7 à 14) et les droits à l'égalité (art. 15).

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.

48 Nous estimons qu'il ressort de façon évidente, même d'un aussi bref rappel historique, que l'évolution de nos arrangements constitutionnels a été marquée par l'adhésion aux principes de la primauté du droit, le respect des institutions démocratiques, la prise en compte des minorités, l'insistance sur le maintien par les gouvernements d'une conduite respectueuse de la Constitution et par un désir de continuité et de stabilité. Nous passons maintenant à l'analyse des grands principes constitutionnels qui ont une incidence dans le présent renvoi.

(3) Analysis of the Constitutional Principles

(3) L'analyse des principes constitutionnels

(a) *Nature of the Principles*

a) *La nature des principes*

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

Quels sont ces principes fondamentaux? Notre Constitution est principalement une Constitution écrite et le fruit de 131 années d'évolution. Derrière l'écrit transparaissent des origines historiques très anciennes qui aident à comprendre les principes constitutionnels sous-jacents. Ces principes inspirent et nourrissent le texte de la Constitution: ils en sont les prémisses inexprimées. L'analyse qui suit traite des quatre principes constitutionnels

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

fondamentaux qui intéressent le plus directement le présent renvoi: le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, et le respect des droits des minorités. Ces principes déterminants fonctionnent en symbiose. Aucun de ces principes ne peut être défini en faisant abstraction des autres, et aucun de ces principes ne peut empêcher ou exclure l'application d'aucun autre.

Notre Constitution a une architecture interne, ce que notre Cour à la majorité, dans *SEFPO c. Ontario (Procureur général)*, [1987] 2 R.C.S. 2, à la p. 57, a appelé une «structure constitutionnelle fondamentale». Chaque élément individuel de la Constitution est lié aux autres et doit être interprété en fonction de l'ensemble de sa structure. Dans le récent *Renvoi relatif aux juges de la Cour provinciale*, nous avons souligné que certains grands principes imprègnent la Constitution et lui donnent vie. Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, à la p. 750, nous avons dit de la primauté du droit que ce «principe est nettement implicite de par la nature même d'une constitution». On peut dire la même chose des trois autres principes constitutionnels analysés ici.

Bien que ces principes sous-jacents ne soient pas expressément inclus dans la Constitution, en vertu d'une disposition écrite, sauf pour certains par une allusion indirecte dans le préambule de la *Loi constitutionnelle de 1867*, il serait impossible de concevoir notre structure constitutionnelle sans eux. Ces principes ont dicté des aspects majeurs de l'architecture même de la Constitution et en sont la force vitale.

Ces principes guident l'interprétation du texte et la définition des sphères de compétence, la portée des droits et obligations ainsi que le rôle de nos institutions politiques. Fait tout aussi important, le respect de ces principes est indispensable au processus permanent d'évolution et de développement de notre Constitution, cet [TRADUCTION] «arbre vivant» selon la célèbre description de l'arrêt *Edwards c. Attorney-General for Canada*, [1930] A.C. 124 (C.P.), à la p. 136. Notre Cour a indiqué dans *New-Brunswick Broadcasting Co. c. Nouvelle-Écosse (Président de l'Assemblée législative)*, [1993] 1 R.C.S. 319, que les Canadiens

existence and importance of unwritten constitutional principles in our system of government.

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".

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,

reconnaissent depuis longtemps l'existence et l'importance des principes constitutionnels non écrits de notre système de gouvernement.

53 Étant donné l'existence de ces principes constitutionnels sous-jacents, de quelle façon notre Cour peut-elle les utiliser? Dans le *Renvoi relatif aux juges de la Cour provinciale*, précité, aux par. 93 et 104, nous avons apporté la réserve que la reconnaissance de ces principes constitutionnels (l'opinion majoritaire parle de «principes structurels» et décrit l'un d'eux, l'indépendance de la magistrature, comme une norme non écrite) n'est pas une invitation à négliger le texte écrit de la Constitution. Bien au contraire, nous avons réaffirmé qu'il existe des raisons impératives d'insister sur la primauté de notre Constitution écrite. Une constitution écrite favorise la certitude et la prévisibilité juridiques, et fournit les fondements et la pierre de touche du contrôle judiciaire en matière constitutionnelle. Nous avons toutefois signalé dans le *Renvoi relatif aux juges de la Cour provinciale* que le préambule de la *Loi constitutionnelle de 1867* avait pour effet d'incorporer par renvoi certains principes constitutionnels, proposition affirmée auparavant par l'arrêt *Fraser c. Commission des relations de travail dans la Fonction publique*, [1985] 2 R.C.S. 455, aux pp. 462 et 463. Dans le *Renvoi relatif aux juges de la Cour provinciale*, au par. 104, nous avons statué que le préambule «invite les tribunaux à transformer ces principes en prémisses d'une thèse constitutionnelle qui amène à combler les vides des dispositions expresses du texte constitutionnel».

54 Des principes constitutionnels sous-jacents peuvent, dans certaines circonstances, donner lieu à des obligations juridiques substantielles (ils ont «plein effet juridique» selon les termes du *Renvoi relatif au rapatriement*, précité, à la p. 845) qui posent des limites substantielles à l'action gouvernementale. Ces principes peuvent donner naissance à des obligations très abstraites et générales, ou à des obligations plus spécifiques et précises. Les principes ne sont pas simplement descriptifs; ils sont aussi investis d'une force normative puissante et lient à la fois les tribunaux et les gouvernements. «En d'autres termes», comme l'affirme notre Cour

"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

dans le *Renvoi relatif aux droits linguistiques au Manitoba*, «dans les décisions constitutionnelles, la Cour peut tenir compte des postulats non écrits qui constituent le fondement même de la Constitution du Canada» (p. 752). Ce sont ces principes constitutionnels sous-jacents que nous allons analyser maintenant.

b) *Le fédéralisme*

On ne conteste pas que le Canada est un État fédéral. Pourtant plusieurs auteurs ont noté que les termes précis de la *Loi constitutionnelle de 1867* n'en font qu'un État partiellement fédéral. Voir, par exemple, K. C. Wheare, *Federal Government* (4e éd. 1963), aux pp. 18 à 20. Cela tenait à ce que, selon les textes, le gouvernement fédéral conservait de vastes pouvoirs qui menaçaient de saper l'autonomie des provinces. Ici encore, cependant, un examen du texte des dispositions de la Constitution ne fournit pas une image complète. Nos usages politiques et constitutionnels ont respecté le principe sous-jacent du fédéralisme et ont appuyé une interprétation du texte de la Constitution conforme à ce principe. Par exemple, bien que le pouvoir fédéral de désaveu ait été inclus dans la *Loi constitutionnelle de 1867*, le principe sous-jacent du fédéralisme a triomphé très rapidement. De nombreux auteurs estiment que le pouvoir fédéral de désaveu a été abandonné (par exemple, P. W. Hogg, *Constitutional Law of Canada* (4e éd. 1997), à la p. 120).

Dans un système fédéral de gouvernement comme le nôtre, le pouvoir politique est partagé entre deux ordres de gouvernement: le gouvernement fédéral, d'une part, et les provinces, de l'autre. La *Loi constitutionnelle de 1867* a attribué à chacun d'eux sa propre sphère de compétence. Voir, par exemple, *Liquidators of the Maritime Bank of Canada c. Receiver-General of New-Brunswick*, [1892] A.C. 437 (C.P.), aux pp. 441 et 442. Il appartient aux tribunaux de «contrôle[r] les bornes de la souveraineté propre des deux gouvernements», *Northern Telecom Canada Ltée c. Syndicat des travailleurs en communication du Canada*, [1983] 1 R.C.S. 733, à la p. 741. Dans leur interprétation de notre Constitution, les tribu-

arrangements, which has from the beginning been the lodestar by which the courts have been guided.

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.

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.

naux ont toujours tenu compte du principe du fédéralisme inhérent à la structure de nos arrangements constitutionnels, l'étoile qui les a guidés depuis le tout début.

57 Le principe sous-jacent du fédéralisme a donc joué un rôle d'une importance considérable dans l'interprétation du texte de la Constitution. Dans le *Renvoi relatif au rapatriement*, aux pp. 905 à 909, nous avons confirmé que le principe du fédéralisme imprègne les systèmes politique et juridique du Canada. Ainsi, les juges Martland et Ritchie, dissidents dans le *Renvoi relatif au rapatriement*, à la p. 821, ont considéré que le fédéralisme était «le principe dominant du droit constitutionnel canadien». Il se peut que, depuis l'adoption de la *Charte*, cette affirmation ait moins de force qu'elle n'en avait auparavant, mais il n'y a guère de doute que le principe du fédéralisme demeure un thème central dans la structure de notre Constitution. De façon tout aussi importante, quoique moins évidente peut-être, le fédéralisme est une réponse politique et juridique aux réalités du contexte social et politique.

58 Le principe du fédéralisme est une reconnaissance de la diversité des composantes de la Confédération et de l'autonomie dont les gouvernements provinciaux disposent pour assurer le développement de leur société dans leurs propres sphères de compétence. La structure fédérale de notre pays facilite aussi la participation à la démocratie en conférant des pouvoirs au gouvernement que l'on croit le mieux placé pour atteindre un objectif sociétal donné dans le contexte de cette diversité. Selon l'arrêt *Re the Initiative and Referendum Act*, [1919] A.C. 935 (C.P.), à la p. 942, le but de la *Loi constitutionnelle de 1867*

> [TRADUCTION] n'était pas de fusionner les provinces en une seule, ni de mettre les gouvernements provinciaux en état de subordination par rapport à une autorité centrale, mais d'établir un gouvernement central dans lequel ces provinces seraient représentées, revêtu d'une autorité exclusive dans l'administration des seules affaires dans lesquelles elles avaient un intérêt commun. Sous cette réserve, chaque province devait garder son indépendance et son autonomie, assujettie directement à la Couronne.

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

Plus récemment dans notre arrêt *Haig c. Canada*, [1993] 2 R.C.S. 995, à la p. 1047, les juges de la majorité ont déclaré que les différences existant entre les provinces «font rationnellement partie de la réalité politique d'un régime fédéral». Cette remarque, qui visait l'application différente du droit fédéral aux diverses provinces, a néanmoins une portée plus générale. La Cour a unanimement exprimé un point de vue semblable dans *R. c. S. (S.)*, [1990] 2 R.C.S. 254, aux pp. 287 et 288.

Le principe du fédéralisme facilite la poursuite d'objectifs collectifs par des minorités culturelles ou linguistiques qui constituent la majorité dans une province donnée. C'est le cas au Québec, où la majorité de la population est francophone et qui possède une culture distincte. Ce n'est pas le simple fruit du hasard. La réalité sociale et démographique du Québec explique son existence comme entité politique et a constitué, en fait, une des raisons essentielles de la création d'une structure fédérale pour l'union canadienne en 1867. Tant pour le Canada-Est que pour le Canada-Ouest, l'expérience de l'*Acte d'Union, 1840* (R.-U.), 3-4 Vict., ch. 35, avait été insatisfaisante. La structure fédérale adoptée à l'époque de la Confédération a permis aux Canadiens de langue française de former la majorité numérique de la population de la province du Québec, et d'exercer ainsi les pouvoirs provinciaux considérables que conférait la *Loi constitutionnelle de 1867* de façon à promouvoir leur langue et leur culture. Elle garantissait également une certaine représentation au Parlement fédéral lui-même.

La Nouvelle-Écosse et le Nouveau-Brunswick, qui avaient aussi affirmé leur volonté de préserver leur culture propre et leur autonomie en matière locale, ont bien accueilli également le fédéralisme. Toutes les provinces qui se sont jointes depuis à la fédération cherchaient à atteindre des objectifs similaires qui sont poursuivis non moins vigoureusement par les provinces et les territoires à l'approche du nouveau millénaire.

c) *La démocratie*

La démocratie est une valeur fondamentale de notre culture juridique et politique. Quoiqu'il ait à

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.

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.

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

la fois un aspect institutionnel et un aspect individuel, le principe démocratique a été invoqué dans le présent renvoi au sens de suprématie de la volonté souveraine d'un peuple, potentiellement exprimée dans ce cas par les Québécois en faveur d'une sécession unilatérale. Il est utile d'étudier brièvement ces divers aspects du principe démocratique.

62 Le principe de la démocratie a toujours inspiré l'aménagement de notre structure constitutionnelle, et demeure aujourd'hui une considération interprétative essentielle. Dans notre arrêt *SEFPO c. Ontario*, précité, à la p. 57, les juges de la majorité ont confirmé que «la structure fondamentale de notre Constitution établie par la *Loi constitutionnelle de 1867* envisage l'existence de certaines institutions politiques dont des corps législatifs librement élus aux niveaux fédéral et provincial». Il ressort d'une série plus ancienne de décisions émanant de notre Cour, notamment *Switzman c. Elbling*, [1957] R.C.S. 285, *Saumur c. City of Quebec*, [1953] 2 R.C.S. 299, *Boucher c. The King*, [1951] R.C.S. 265, et *Reference re Alberta Statutes*, [1938] R.C.S. 100, que, pour bien comprendre le principe de la démocratie, il faut l'envisager comme l'assise que les rédacteurs de notre Constitution et, après eux, nos représentants élus en vertu de celle-ci ont toujours prise comme allant de soi. C'est peut-être pour cette raison que ce principe n'est pas mentionné expressément dans le texte même de la *Loi constitutionnelle de 1867*. Cela aurait sans doute paru inutile, voire même saugrenu, aux rédacteurs. Comme l'explique le *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 100, il est évident que notre Constitution établit au Canada un régime de démocratie constitutionnelle. Cela démontre l'importance des principes constitutionnels sous-jacents qui ne sont décrits expressément nulle part dans nos textes constitutionnels. Le caractère représentatif et démocratique de nos institutions politiques était tout simplement tenu pour acquis.

63 Par démocratie, on entend communément un système politique soumis à la règle de la majorité. Il est essentiel de bien comprendre ce que cela signifie. L'évolution de notre tradition démocra-

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.

tique remonte à la *Magna Carta* (1215) et même avant, à travers le long combat pour la suprématie parlementaire dont le point culminant a été le *Bill of Rights* anglais de 1689, puis l'émergence d'institutions politiques représentatives pendant la période coloniale, le développement de la responsabilité gouvernementale au XIX^e^ siècle et, finalement, l'avènement de la Confédération elle-même en 1867. «[L]e modèle canadien», selon les juges majoritaires dans le *Renvoi relatif aux circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158, à la p. 186, est «une démocratie en évolution qui se dirige par étapes inégales vers l'objectif du suffrage universel et d'une représentation plus effective». Depuis la Confédération, les efforts pour étendre la participation dans notre système politique à ceux qui en étaient injustement privés — notamment les femmes, les minorités et les peuples autochtones — se poursuivent avec un certain succès jusqu'à ce jour.

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.

La démocratie ne vise pas simplement les mécanismes gouvernementaux. Bien au contraire, comme l'indique *Switzman c. Elbling*, précité, à la p. 306, la démocratie est fondamentalement liée à des objectifs essentiels dont, tout particulièrement, la promotion de l'autonomie gouvernementale. La démocratie respecte les identités culturelles et collectives: *Renvoi relatif aux circonscriptions électorales provinciales*, à la p. 188. Autrement dit, un peuple souverain exerce son droit à l'autonomie gouvernementale à travers le processus démocratique. Dans l'arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, notre Cour, qui examinait la portée et l'objet de la *Charte*, a énoncé certaines valeurs inhérentes à la notion de démocratie (à la p. 136):

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société.

65 In institutional terms, democracy means that each of the provincial legislatures and the federal Parliament is elected by popular franchise. These

En termes institutionnels, la démocratie signifie que chacune des assemblées législatives provinciales et le Parlement fédéral sont élus au suffrage

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.

populaire. Selon *New Brunswick Broadcasting*, précité, à la p. 387, ces assemblées législatives sont des «élément[s] essentiel[s] du système de gouvernement représentatif». Au niveau individuel, le droit de vote aux élections à la Chambre des communes et aux assemblées législatives provinciales, ainsi que le droit d'être candidat à ces élections, sont garantis à «[t]out citoyen canadien» en vertu de l'art. 3 de la *Charte*. La démocratie, dans la jurisprudence de notre Cour, signifie le mode de fonctionnement d'un gouvernement représentatif et responsable et le droit des citoyens de participer au processus politique en tant qu'électeurs (*Renvoi relatif aux circonscriptions électorales provinciales*, précité), et en tant que candidats (*Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876). En outre, l'art. 4 de la *Charte* a pour effet d'obliger la Chambre des communes et les assemblées législatives provinciales à tenir régulièrement des élections et de permettre aux citoyens d'élire des représentants aux diverses institutions politiques. Le principe démocratique est énoncé de façon particulièrement claire puisque l'art. 4 n'est pas sujet à l'exercice du pouvoir dérogatoire de l'art. 33.

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

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Il est vrai, bien sûr, que la démocratie exprime la volonté souveraine du peuple. Pourtant cette expression doit aussi être considérée dans le contexte des autres valeurs institutionnelles que nous estimons pertinentes dans ce renvoi. Les rapports entre démocratie et fédéralisme signifient par exemple que peuvent coexister des majorités différentes et également légitimes dans divers provinces et territoires ainsi qu'au niveau fédéral. Aucune majorité n'est plus, ou moins, «légitime» que les autres en tant qu'expression de l'opinion démocratique, quoique, bien sûr, ses conséquences varieront selon la question en jeu. Un système fédéral de gouvernement permet à différentes provinces de mettre en œuvre des politiques adaptées aux préoccupations et aux intérêts particuliers de leur population. En même temps, le Canada dans son ensemble est aussi une collectivité démocratique au sein de laquelle les citoyens poursuivent et réalisent des objectifs à l'échelle nationale, par l'intermédiaire d'un gouvernement fédéral agissant dans les

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.

limites de sa compétence. La fonction du fédéralisme est de permettre aux citoyens de faire partie simultanément de collectivités différentes et de poursuivre des objectifs aussi bien au niveau provincial qu'au niveau fédéral.

L'assentiment des gouvernés est une valeur fondamentale dans notre conception d'une société libre et démocratique. Cependant, la démocratie au vrai sens du terme ne peut exister sans le principe de la primauté du droit. C'est la loi qui crée le cadre dans lequel la «volonté souveraine» doit être déterminée et mise en œuvre. Pour être légitimes, les institutions démocratiques doivent reposer en définitive sur des fondations juridiques. Cela signifie qu'elles doivent permettre la participation du peuple et la responsabilité devant le peuple par l'intermédiaire d'institutions publiques créées en vertu de la Constitution. Il est également vrai cependant qu'un système de gouvernement ne peut survivre par le seul respect du droit. Un système politique doit aussi avoir une légitimité, ce qui exige, dans notre culture politique, une interaction de la primauté du droit et du principe démocratique. Le système doit pouvoir refléter les aspirations de la population. Il y a plus encore. La légitimité de nos lois repose aussi sur un appel aux valeurs morales dont beaucoup sont enchâssées dans notre structure constitutionnelle. Ce serait une grave erreur d'assimiler la légitimité à la seule «volonté souveraine» ou à la seule règle de la majorité, à l'exclusion d'autres valeurs constitutionnelles.

Enfin, nous devons souligner que le bon fonctionnement d'une démocratie exige un processus permanent de discussion. La Constitution instaure un gouvernement par des assemblées législatives démocratiquement élues et par un exécutif responsable devant elles, [TRADUCTION] «un gouvernement [qui] repose en définitive sur l'expression de l'opinion publique réalisée grâce à la discussion et au jeu des idées» (*Saumur c. City of Quebec*, précité, à la p. 330). Le besoin de constituer des majorités, tant au niveau fédéral qu'au niveau provincial, par sa nature même, entraîne des compromis, des négociations et des délibérations. Nul n'a le monopole de la vérité et notre système repose sur

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.

la croyance que, sur le marché des idées, les meilleures solutions aux problèmes publics l'emporteront. Il y aura inévitablement des voix dissidentes. Un système démocratique de gouvernement est tenu de prendre en considération ces voix dissidentes, et de chercher à en tenir compte et à y répondre dans les lois que tous les membres de la collectivité doivent respecter.

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.

69 La *Loi constitutionnelle de 1982* exprime ce principe en conférant à chaque participant de la Confédération le droit de prendre l'initiative d'une proposition de modification constitutionnelle. À notre avis, l'existence de ce droit impose aux autres participants de la Confédération l'obligation réciproque d'engager des discussions constitutionnelles pour tenir compte de l'expression démocratique d'un désir de changement dans d'autres provinces et d'y répondre. Cette obligation est inhérente au principe démocratique qui est un précepte fondamental de notre système de gouvernement.

(d) *Constitutionalism and the Rule of Law*

d) *Le constitutionnalisme et la primauté du droit*

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.

70 Les principes du constitutionnalisme et de la primauté du droit sont à la base de notre système de gouvernement. Comme l'indique l'arrêt *Roncarelli c. Duplessis*, [1959] R.C.S. 121, à la p. 142, la primauté du droit (le principe de la légalité) est [TRADUCTION] «un des postulats fondamentaux de notre structure constitutionnelle». Nous avons noté, dans le *Renvoi relatif au rapatriement*, précité, aux pp. 805 et 806, que «[l]a règle de droit est une expression haute en couleur qui, sans qu'il soit nécessaire d'en examiner ici les nombreuses implications, communique par exemple un sens de l'ordre, de la sujétion aux règles juridiques connues et de la responsabilité de l'exécutif devant l'autorité légale». À son niveau le plus élémentaire, le principe de la primauté du droit assure aux citoyens et résidents une société stable, prévisible et ordonnée où mener leurs activités. Elle fournit aux personnes un rempart contre l'arbitraire de l'État.

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

71 Dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, aux pp. 747 à 752, notre Cour a défini les éléments de la primauté du droit. Nous

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.

avons souligné en premier lieu la suprématie du droit sur les actes du gouvernement et des particuliers. En bref, il y a une seule loi pour tous. Deuxièmement, nous expliquons, à la p. 749, que «la primauté du droit exige la création et le maintien d'un ordre réel de droit positif qui préserve et incorpore le principe plus général de l'ordre normatif». C'est principalement ce deuxième aspect de la primauté du droit qui était en cause dans le *Renvoi relatif aux droits linguistiques au Manitoba* lui-même. Un troisième aspect de la primauté du droit, comme l'a récemment confirmé le *Renvoi relatif aux juges de la Cour provinciale*, précité, au par. 10, tient à ce que «l'exercice de tout pouvoir public doit en bout de ligne tirer sa source d'une règle de droit». En d'autres termes, les rapports entre l'État et les individus doivent être régis par le droit. Pris ensemble, ces trois volets forment un principe d'une profonde importance constitutionnelle et politique.

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.

Le principe du constitutionnalisme ressemble beaucoup au principe de la primauté du droit, mais ils ne sont pas identiques. L'essence du constitutionnalisme au Canada est exprimée dans le par. 52(1) de la *Loi constitutionnelle de 1982*: «La Constitution du Canada est la loi suprême du Canada; elle rend inopérantes les dispositions incompatibles de toute autre règle de droit.» En d'autres mots, le principe du constitutionnalisme exige que les actes de gouvernement soient conformes à la Constitution. Le principe de la primauté du droit exige que les actes de gouvernement soient conformes au droit, dont la Constitution. Notre Cour a souligné plusieurs fois que, dans une large mesure, l'adoption de la *Charte* avait fait passer le système canadien de gouvernement de la suprématie parlementaire à la suprématie constitutionnelle. La Constitution lie tous les gouvernements, tant fédéral que provinciaux, y compris l'exécutif (*Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, à la p. 455). Ils ne sauraient en transgresser les dispositions: en effet, leur seul droit à l'autorité qu'ils exercent réside dans les pouvoirs que leur confère la Constitution. Cette autorité ne peut avoir d'autre source.

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.

Pour bien comprendre l'étendue et l'importance des principes de la primauté du droit et du constitutionnalisme, il est utile de reconnaître explicitement les raisons pour lesquelles une constitution est placée hors de la portée de la règle de la simple majorité. Trois raisons se chevauchent. 73

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.

Premièrement, une constitution peut fournir une protection supplémentaire à des droits et libertés fondamentaux qui, sans elle, ne seraient pas hors d'atteinte de l'action gouvernementale. Malgré la déférence dont font généralement preuve les gouvernements démocratiques envers ces droits, il survient des occasions où la majorité peut être tentée de passer outre à des droits fondamentaux en vue d'accomplir plus efficacement et plus facilement certains objectifs collectifs. La constitutionnalisation de ces droits sert à garantir le respect et la protection qui leur sont dus. Deuxièmement, une constitution peut chercher à garantir que des groupes minoritaires vulnérables bénéficient des institutions et des droits nécessaires pour préserver et promouvoir leur identité propre face aux tendances assimilatrices de la majorité. Troisièmement, une constitution peut mettre en place un partage des pouvoirs qui répartit le pouvoir politique entre différents niveaux de gouvernement. Cet objectif ne pourrait pas être atteint si un de ces niveaux de gouvernement démocratiquement élus pouvait usurper les pouvoirs de l'autre en exerçant simplement son pouvoir législatif pour s'attribuer à lui-même, unilatéralement, des pouvoirs politiques supplémentaires. 74

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

L'argument selon lequel on peut légitimement contourner la Constitution en s'appuyant sur un vote majoritaire obtenu dans un référendum provincial est superficiellement convaincant, dans une large mesure parce qu'il paraît faire appel à certains des principes qui sous-tendent la légitimité de la Constitution elle-même, c'est-à-dire la démocratie et l'autonomie gouvernementale. En bref, on avance que, puisque la notion de souveraineté populaire sous-tend la légitimité de nos arrangements constitutionnels actuels, alors cette même souveraineté populaire qui a donné naissance à la Constitution actuelle devrait aussi permettre au «peuple», dans l'exercice de la souveraineté popu- 75

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

laire, de faire sécession par un vote majoritaire seulement. Une analyse plus poussée révèle toutefois que cet argument est mal fondé parce qu'il méconnaît le sens de la souveraineté populaire et l'essence même d'une démocratie constitutionnelle.

Les Canadiens n'ont jamais admis que notre système est entièrement régi par la seule règle de la simple majorité. Notre principe de la démocratie, en corrélation avec les autres principes constitutionnels mentionnés plus haut, est plus riche. Un gouvernement constitutionnel est nécessairement fondé sur l'idée que les représentants politiques du peuple d'une province ont la possibilité et le pouvoir de prendre, au nom de la province, l'engagement pour l'avenir de respecter les règles constitutionnelles qui sont adoptées. Ces règles les «lient» non pas en ce qu'elles font échec à la volonté de la majorité dans une province, mais plutôt en ce qu'elles définissent la majorité qui doit être consultée afin de modifier l'équilibre fondamental en matière de partage du pouvoir politique (y compris les sphères d'autonomie garanties par le principe du fédéralisme), de droits de la personne et de droits des minorités dans notre société. Bien entendu, ces règles constitutionnelles sont elles-mêmes susceptibles de modification, mais seulement par un processus de négociation qui permet d'assurer à toutes les parties le respect et la conciliation des droits garantis par la Constitution.

De cette façon, il est possible d'allier notre foi dans la démocratie et notre foi dans le constitutionnalisme. La modification de la Constitution requiert souvent quelque forme de consensus important, précisément parce que la teneur des principes fondamentaux de la Constitution l'exige. L'exigence d'un vaste appui sous forme de «majorité élargie» pour introduire une modification constitutionnelle garantit que les intérêts des minorités seront pris en considération avant l'adoption de changements qui les affecteront.

On pourrait alors objecter que constitutionnalisme est par conséquent incompatible avec gouvernement démocratique. Ce serait faux. Le constitutionnalisme facilite et, en fait, rend possible un système politique démocratique en instaurant un

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*

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.

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

cadre ordonné dans lequel les gens peuvent prendre des décisions politiques. Bien compris, le constitutionnalisme et la primauté du droit n'entrent pas en conflit avec la démocratie; bien au contraire, ils lui sont indispensables. Sans cette relation, la volonté politique qui anime les décisions démocratiques serait elle-même ébranlée.

e) *La protection des minorités*

79 Le quatrième principe constitutionnel à examiner ici concerne la protection des minorités. Plusieurs dispositions constitutionnelles protègent spécifiquement des droits linguistiques, religieux et scolaires de minorités. Comme nous l'avons reconnu en plusieurs occasions, certaines de ces dispositions sont le résultat de compromis historiques. Notre Cour a signalé dans le *Renvoi relatif au projet de loi 30, An Act to amend the Education Act (Ont.)*, [1987] 1 R.C.S. 1148, à la p. 1173, et dans le *Renvoi relatif à la Loi sur l'instruction publique (Qué.)*, [1993] 2 R.C.S. 511, aux pp. 529 et 530, que la protection des droits des minorités religieuses en matière d'éducation avait été une considération majeure dans les négociations qui ont mené à la Confédération. On craignait qu'en l'absence de protection, les minorités de l'Est et de l'Ouest du Canada d'alors soient submergées et assimilées. Voir aussi *Grand Montréal, Commission des écoles protestantes c. Québec (Procureur général)*, [1989] 1 R.C.S. 377, aux pp. 401 et 402, et *Adler c. Ontario*, [1996] 3 R.C.S. 609. Des inquiétudes semblables ont inspiré les dispositions protégeant les droits linguistiques des minorités, comme le mentionne l'arrêt *Société des Acadiens du Nouveau-Brunswick Inc. c. Association of Parents for Fairness in Education*, [1986] 1 R.C.S. 549, à la p. 564.

80 Il faut bien souligner toutefois que, même si ces dispositions sont le résultat de négociations et de compromis politiques, cela ne signifie pas qu'elles ne sont pas fondées sur des principes. Bien au contraire, elles sont le reflet d'un principe plus large lié à la protection des droits des minorités. Les trois autres principes constitutionnels ont sans aucun doute une incidence sur la portée et l'application des garanties protégeant spécifiquement les droits des minorités. Nous soulignons que la

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,

protection de ces droits est elle-même un principe distinct qui sous-tend notre ordre constitutionnel. Ce principe se reflète clairement dans les dispositions de la *Charte* relatives à la protection des droits des minorités. Voir, par exemple, le *Renvoi relatif à la Loi sur les écoles publiques (Man.), art. 79(3), (4) et (7)*, [1993] 1 R.C.S. 839, et *Mahe c. Alberta*, [1990] 1 R.C.S. 342.

Le souci de nos tribunaux et de nos gouvernements de protéger les minorités a été notoire ces dernières années, surtout depuis l'adoption de la *Charte*. Il ne fait aucun doute que la protection des minorités a été un des facteurs clés qui ont motivé l'adoption de la *Charte* et le processus de contrôle judiciaire constitutionnel qui en découle. Il ne faut pas oublier pour autant que la protection des droits des minorités a connu une longue histoire avant l'adoption de la *Charte*. De fait, la protection des droits des minorités a clairement été un facteur essentiel dans l'élaboration de notre structure constitutionnelle même à l'époque de la Confédération: *Renvoi relatif au Sénat*, précité, à la p. 71. Même si le passé du Canada en matière de défense des droits des minorités n'est pas irréprochable, cela a toujours été, depuis la Confédération, un but auquel ont aspiré les Canadiens dans un cheminement qui n'a pas été dénué de succès. Le principe de la protection des droits des minorités continue d'influencer l'application et l'interprétation de notre Constitution.

Conformément à cette longue tradition de respect des minorités, qui est au moins aussi ancienne que le Canada lui-même, les rédacteurs de la *Loi constitutionnelle de 1982* ont ajouté à l'art. 35 des garanties expresses relatives aux droits existants — ancestraux ou issus de traités — des autochtones, et à l'art. 25 une clause de non-atteinte aux droits des peuples autochtones. La «promesse» de l'art. 35, comme l'appelle l'arrêt *R. c. Sparrow*, [1990] 1 R.C.S. 1075, à la p. 1083, reconnaît non seulement l'occupation passée de terres par les autochtones, mais aussi leur contribution à l'édification du Canada et les engagements spéciaux pris envers eux par des gouvernements successifs. La protection de ces droits, réalisée si récemment et si

reflects an important underlying constitutional value.

(4) The Operation of the Constitutional Principles in the Secession Context

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.

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 inter-

laborieusement, envisagée isolément ou dans le cadre du problème plus large des minorités, reflète l'importance de cette valeur constitutionnelle sous-jacente.

(4) L'application des principes constitutionnels dans un contexte de sécession

83 La sécession est la démarche par laquelle un groupe ou une partie d'un État cherche à se détacher de l'autorité politique et constitutionnelle de cet État, en vue de former un nouvel État doté d'une assise territoriale et reconnu au niveau international. Dans le cas d'un État fédéral, la sécession signifie normalement le détachement d'une entité territoriale de la fédération. La sécession est autant un acte juridique qu'un acte politique. La question 1 du renvoi nous demande de statuer sur la légalité d'une sécession unilatérale «en vertu de la Constitution du Canada». La question est appropriée puisqu'elle comporte l'examen de la légalité d'une sécession unilatérale, en premier lieu du moins, du point de vue de l'ordre juridique interne de l'État dont l'entité cherche à se séparer. Comme nous le verrons, on prétend aussi que le droit international pose une norme permettant d'apprécier la légalité de l'acte de sécession envisagé.

84 La sécession d'une province du Canada doit être considérée, en termes juridiques, comme requérant une modification de la Constitution, qui exige forcément une négociation. Les modifications requises pour parvenir à une sécession pourraient être vastes et radicales. Certains auteurs ont exprimé l'avis qu'une sécession entraînerait un changement d'une telle ampleur qu'il ne pourrait pas être considéré simplement comme une modification de la Constitution. Nous n'en sommes pas convaincus. Il est vrai que la Constitution est muette quant à la faculté d'une province de faire sécession de la Confédération, mais bien que la Constitution n'autorise pas ni n'interdise expressément la sécession, un acte de sécession aurait pour but de transformer le mode de gouvernement du territoire canadien d'une façon qui est sans aucun doute incompatible avec nos arrangements constitutionnels actuels. Le fait que ces changements seraient profonds, ou

national 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

qu'ils prétendraient avoir une incidence en droit international, ne leur retire pas leur caractère de modifications de la Constitution du Canada.

La Constitution est l'expression de la souveraineté de la population du Canada. La population du Canada, agissant par l'intermédiaire des divers gouvernements dûment élus et reconnus en vertu de la Constitution, détient le pouvoir de mettre en œuvre tous les arrangements constitutionnels souhaités dans les limites du territoire canadien, y compris, si elle était souhaitée, la sécession du Québec du Canada. Comme l'a affirmé notre Cour dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, à la p. 745, «[l]a Constitution d'un pays est l'expression de la volonté du peuple d'être gouverné conformément à certains principes considérés comme fondamentaux et à certaines prescriptions qui restreignent les pouvoirs du corps législatif et du gouvernement». La méthode par laquelle une telle volonté politique prendrait forme et serait mobilisée demeure quelque peu conjecturale. Toutefois, on nous demande de présumer l'existence d'une telle volonté politique aux fins de répondre à la question soumise. Les termes mêmes du renvoi nous demandent de déterminer si, constitutionnellement, l'Assemblée nationale, la législature ou le gouvernement du Québec pourraient procéder unilatéralement à la sécession du Québec du Canada dans de telles circonstances.

Le caractère «unilatéral» de l'acte est de première importance, et il faut bien comprendre le sens donné à ce mot. Dans un sens, toute démarche faite par un acteur unique sur le plan constitutionnel en vue de parvenir à une modification de la Constitution est «unilatérale». Nous ne pensons pas que tel soit le sens visé dans la question 1, ni le sens donné dans les arguments présentés devant nous. Ce qui est revendiqué comme droit de faire «unilatéralement» sécession est plutôt le droit de procéder à la sécession sans négociations préalables avec les autres provinces et le gouvernement fédéral. Ce n'est pas la légalité de la démarche initiale qui est en cause ici, mais la légalité de l'acte final de sécession unilatérale envisagée. Le fondement juridique d'un tel acte serait une volonté démocratique clairement exprimée par un référen-

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.

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.

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

dum dans la province de Québec. Cet argument nous amène à examiner l'impact juridique que pourrait avoir un tel référendum sur le fonctionnement de notre Constitution et sur la légalité alléguée d'un acte unilatéral de sécession.

87 La Constitution elle-même ne traite pas d'un recours au référendum, et les résultats d'un référendum n'ont aucun rôle direct ni effet juridique dans notre régime constitutionnel, mais un référendum peut certainement fournir un moyen démocratique de connaître l'opinion de l'électorat sur des questions politiques importantes dans un cas précis. Le principe démocratique défini plus haut exigerait d'accorder un poids considérable à l'expression claire par la population du Québec de sa volonté de faire sécession du Canada même si un référendum, de lui-même et sans plus, n'aurait aucun effet juridique direct et ne pourrait à lui seul réaliser une sécession unilatérale. Nos institutions politiques sont basées sur le principe démocratique et, par conséquent, l'expression de la volonté démocratique de la population d'une province aurait du poids, en ce sens qu'elle conférerait légitimité aux efforts que ferait le gouvernement du Québec pour engager un processus de modification de la Constitution en vue de faire sécession par des voies constitutionnelles. Dans ce contexte, nous parlons de majorité «claire» au sens qualitatif. Pour être considérés comme l'expression de la volonté démocratique, les résultats d'un référendum doivent être dénués de toute ambiguïté en ce qui concerne tant la question posée que l'appui reçu.

88 Le principe du fédéralisme, joint au principe démocratique, exige que la répudiation claire de l'ordre constitutionnel existant et l'expression claire par la population d'une province du désir de réaliser la sécession donnent naissance à une obligation réciproque pour toutes les parties formant la Confédération de négocier des modifications constitutionnelles en vue de répondre au désir exprimé. La modification de la Constitution commence par un processus politique entrepris en vertu de la Constitution elle-même. Au Canada, l'initiative en matière de modification constitutionnelle relève de la responsabilité des représentants démocratique-

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.

ment élus des participants à la Confédération. Pour ces représentants, le signal peut être donné par un référendum mais, en termes juridiques, le pouvoir constituant au Canada, comme dans bien d'autres pays, appartient aux représentants du peuple élus démocratiquement. La tentative légitime, par un participant de la Confédération, de modifier la Constitution a pour corollaire l'obligation faite à toutes les parties de venir à la table des négociations. Le rejet clairement exprimé par le peuple du Québec de l'ordre constitutionnel existant conférerait clairement légitimité aux revendications sécessionnistes, et imposerait aux autres provinces et au gouvernement fédéral l'obligation de prendre en considération et de respecter cette expression de la volonté démocratique en engageant des négociations et en les poursuivant en conformité avec les principes constitutionnels sous-jacents mentionnés précédemment.

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.

En quoi consiste l'obligation de négocier? La réponse à cette question nous oblige à envisager les liens délicats qui existent entre les obligations substantielles découlant de la Constitution et les moyens de les faire valoir, notamment la compétence des tribunaux et la réserve dont ils doivent faire preuve en la matière. La distinction faite entre la légalité et la légitimité des actes accomplis en vertu de la Constitution reflètent la nature de ces liens. Nous nous proposons de traiter d'abord des obligations qui résultent de cette obligation de négocier. Après avoir décrit la nature de ces obligations, il sera plus facile d'apprécier les moyens appropriés pour en assurer le respect et de commenter la distinction entre légalité et légitimité.

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

La conduite des parties dans de telles négociations serait régie par les mêmes principes constitutionnels que ceux qui ont donné naissance à l'obligation de négocier: le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, et la protection des minorités. Ces principes nous amènent à rejeter deux propositions extrêmes. La première consiste à dire que les autres provinces et le gouvernement fédéral auraient l'obligation légale de donner leur assentiment à la sécession d'une province, sous réserve seulement de la négociation des détails logistiques de la sécession. Cette propo-

democratic principle of the Constitution, or to the international law principle of self-determination of peoples.

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.

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

sition serait une conséquence soi-disant implicite du principe démocratique de la Constitution, ou reposerait sur le principe de l'autodétermination des peuples en droit international.

91 Nous ne pouvons accepter ce point de vue pour des raisons à la fois théoriques et pratiques. À notre avis, le Québec ne pourrait prétendre invoquer un droit à l'autodétermination pour dicter aux autres parties les conditions d'une sécession: ce ne serait pas là une négociation. De même, il serait naïf de penser que l'objectif principal, la sécession, pourrait être distingué aisément des détails pratiques d'une sécession. Les écueils résident dans les détails. Comme nous l'avons souligné, on ne peut invoquer le principe de la démocratie pour écarter les principes du fédéralisme et de la primauté du droit, les droits de la personne et des minorités, non plus que le fonctionnement de la démocratie dans les autres provinces ou dans l'ensemble du Canada. Il n'y a pas de véritables négociations si le résultat recherché, la sécession, est conçu comme un droit absolu résultant d'une obligation constitutionnelle de lui donner effet. Un tel a priori viendrait en réalité anéantir l'obligation de négocier et la vider de son sens.

92 Toutefois, il nous est tout aussi impossible d'accepter la proposition inverse, selon laquelle une expression claire de la part de la population du Québec d'une volonté d'autodétermination n'imposerait aucune obligation aux autres provinces ou au gouvernement fédéral. L'ordre constitutionnel canadien existant ne pourrait demeurer indifférent devant l'expression claire d'une majorité claire de Québécois de leur désir de ne plus faire partie du Canada. Cela reviendrait à dire que d'autres principes constitutionnels reconnus l'emportent nécessairement sur la volonté démocratiquement et clairement exprimée de la population du Québec. Une telle proposition n'accorde pas suffisamment de poids aux principes constitutionnels sous-jacents qui doivent guider le processus de modification, notamment le principe de la démocratie et le principe du fédéralisme. Les droits des autres provinces et du gouvernement fédéral ne peuvent retirer au gouvernement du Québec le droit de chercher à réaliser la sécession, si une majorité

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

claire de la population du Québec choisissait cette voie, tant et aussi longtemps que, dans cette poursuite, le Québec respecte les droits des autres. Des négociations seraient nécessaires pour traiter des intérêts du gouvernement fédéral, du Québec et des autres provinces, d'autres participants, ainsi que des droits de tous les Canadiens à l'intérieur et à l'extérieur du Québec.

Peut-on concilier le rejet de ces deux propositions? Oui, si l'on comprend bien qu'aucun des droits ou principes en question ici n'est absolu et qu'aucun ne peut exclure les autres. Cette remarque signifie que d'autres parties ne peuvent exercer leurs droits d'une manière qui reviendrait à nier de façon absolue les droits du Québec et que, de la même façon, tant que le Québec exerce ses droits en respectant les droits des autres, il peut proposer la sécession et chercher à la réaliser par la voie de la négociation. Le processus de négociation qui découlerait d'une décision d'une majorité claire de la population du Québec en faveur de la sécession, en réponse à une question claire, exigerait la conciliation de divers droits et obligations par les représentants de deux majorités légitimes, à savoir une claire majorité de la population du Québec et une claire majorité de l'ensemble du Canada quelle qu'elle soit. On ne peut admettre que l'une ou l'autre de ces majorités l'emporte sur l'autre. Une majorité politique qui n'agit pas en accord avec les principes sous-jacents de la Constitution que nous avons décrits met en péril la légitimité de l'exercice de ses droits.

Dans de telles circonstances, la conduite des parties acquiert une grande importance constitutionnelle. On doit mener les négociations sans jamais perdre de vue les principes constitutionnels que nous avons décrits et ces principes doivent guider le comportement de tous les participants à ces négociations.

Le refus d'une partie de participer à des négociations dans le respect des principes et valeurs constitutionnels mettrait gravement en péril la légitimité de ses revendications et peut-être aussi l'ensemble du processus de négociation. Ceux qui, très légitimement, insistent sur l'importance du respect de la primauté du droit ne peuvent, en même

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.

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 trans-

temps, faire abstraction de la nécessité d'agir en conformité avec les principes et valeurs constitutionnels et ainsi de faire leur part pour contribuer à la préservation et à la promotion d'un cadre dans lequel la règle de droit puisse s'épanouir.

96 Personne ne peut prédire le cours que pourraient prendre de telles négociations. Il faut reconnaître la possibilité qu'elles n'aboutissent pas à un accord entre les parties. Des négociations engagées à la suite d'un vote référendaire en faveur d'un projet de sécession toucheraient inévitablement des questions très diverses et souvent d'une grande portée. Il existe inévitablement, après 131 ans de Confédération, un haut niveau d'intégration des institutions économiques, politiques et sociales au Canada. La vision des fondateurs de la Confédération était de créer un pays unifié et non pas une vague alliance de provinces autonomes. Par conséquent, s'il existe des intérêts économiques régionaux qui coïncident parfois avec les frontières provinciales, il existe également des entreprises et intérêts (publics et privés) nationaux qui seraient exposés au démantèlement. Il y a une économie nationale et une dette nationale. La question des frontières territoriales a été invoquée devant nous. Des minorités linguistiques et culturelles, dont les peuples autochtones, réparties de façon inégale dans l'ensemble du pays, comptent sur la Constitution du Canada pour protéger leurs droits. Bien sûr, la sécession donnerait naissance à une multitude de questions très difficiles et très complexes, qu'il faudrait résoudre dans le cadre général de la primauté du droit de façon à assurer aux Canadiens résidant au Québec et ailleurs une certaine stabilité pendant ce qui serait probablement une période d'incertitude et de bouleversement profonds. Nul ne peut sérieusement soutenir que notre existence nationale, si étroitement tissée sous tant d'aspects, pourrait être déchirée sans efforts selon les frontières provinciales actuelles du Québec. Comme le disait le Procureur général de la Saskatchewan dans sa plaidoirie:

> [TRADUCTION] Une nation est construite lorsque les collectivités qui la composent prennent des engagements à son égard, quand elles renoncent à des choix et des possibilités, au nom d'une nation, [. . .] quand les collectivités qui la composent font des compromis, quand

fers 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. . . .

elles se donnent des garanties mutuelles, quand elles échangent et, peut-être plus à propos, quand elles reçoivent des autres les avantages de la solidarité nationale. Les fils de milliers de concessions mutuelles tissent la toile de la 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.

Dans ces circonstances, on ne peut douter que des négociations résultant d'un tel référendum seraient difficiles. Les négociateurs devraient envisager la possibilité d'une sécession, sans qu'il y ait toutefois de droit absolu à la sécession ni certitude qu'il sera réellement possible de parvenir à un accord conciliant tous les droits et toutes les obligations en jeu. Il est concevable que même des négociations menées en conformité avec les principes constitutionnels fondamentaux aboutissent à une impasse. Nous n'avons pas ici à faire des conjectures sur ce qui surviendrait alors. En vertu de la Constitution, la sécession exige la négociation d'une modification.

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.

Les rôles respectifs des tribunaux et des acteurs politiques, dans l'exécution des obligations constitutionnelles que nous avons décrites, découlent inéluctablement des remarques antérieures. Dans le *Renvoi relatif au rapatriement*, une distinction a été faite entre le droit de la Constitution, que généralement les tribunaux font respecter, et d'autres règles constitutionnelles, telles les conventions de la Constitution, qui sont susceptibles de sanctions politiques seulement. Ici encore, toutefois, l'intervention judiciaire, même en ce qui concerne le droit de la Constitution, est subordonnée à l'appréciation que la Cour fait du rôle qui lui revient dans notre système constitutionnel.

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:

Comme nous l'avons souligné dans l'examen des objections préliminaires, la notion de justiciabilité est liée à la notion de réserve judiciaire appropriée. Nous citons plus haut cette allusion à la question de la justiciabilité dans le *Renvoi relatif au Régime d'assistance publique du Canada*, à la 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.

> Dans l'exercice de son pouvoir discrétionnaire de décider s'il convient de répondre à une question qui, allègue-t-on, ne relève pas de la compétence des tribunaux, la Cour doit veiller surtout à conserver le rôle qui lui revient dans le cadre constitutionnel de notre forme démocratique de gouvernement.

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.

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.

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

L'arrêt *Operation Dismantle*, précité, à la p. 459, souligne que la justiciabilité est une «doctrine [. . .] fondée sur une préoccupation à l'égard du rôle approprié des tribunaux en tant que tribune pour résoudre divers genres de différends». Un principe analogue de réserve judiciaire s'applique ici. L'arrêt *Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources)*, [1989] 2 R.C.S. 49 (l'arrêt *Vérificateur général*), dit aussi, à la p. 91:

> Il existe tout un éventail de questions litigieuses exigeant l'exercice d'un jugement judiciaire pour déterminer si elles relèvent à bon droit de la compétence des tribunaux. Finalement, un tel jugement dépend de l'appréciation par le judiciaire de sa propre position dans le système constitutionnel.

100 Le rôle de notre Cour dans ce renvoi se limite à identifier les aspects pertinents de la Constitution, dans leur sens le plus large. Nous avons interprété les questions comme se rapportant au cadre constitutionnel dans lequel des décisions politiques peuvent, en dernière analyse, être prises. À l'intérieur de ce cadre, les rouages du processus politique sont complexes et ne peuvent être déterminés que par le moyen de jugements et d'évaluations d'ordre politique. La Cour n'a aucun rôle de surveillance à jouer sur les aspects politiques des négociations constitutionnelles. De même, l'incitation initiale à la négociation, à savoir une majorité claire en faveur de la sécession en réponse à une question claire, n'est assujettie qu'à une évaluation d'ordre politique, et ce à juste titre. Le droit et l'obligation correspondante de négocier ne peuvent reposer sur une présumée expression de volonté démocratique si cette expression est elle-même chargée d'ambiguïtés. Seuls les acteurs politiques auraient l'information et l'expertise pour juger du moment où ces ambiguïtés seraient résolues dans un sens ou dans l'autre, ainsi que des circonstances dans lesquelles elles le seraient.

101 Si les circonstances donnant lieu à l'obligation de négocier devaient survenir, l'analyse juridique ne permettrait pas non plus de faire la distinction entre la défense énergique d'intérêts légitimes et la prise de positions qui, en réalité, écarteraient totalement les intérêts légitimes de certains. La Cour

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.

n'aurait pas accès à toute l'information dont disposent les acteurs politiques, et les méthodes établies pour la recherche de la vérité devant une cour de justice sont mal adaptées à une analyse en profondeur de négociations constitutionnelles. Dans la mesure où les questions sont de nature politique, ce n'est pas le rôle du judiciaire d'interposer ses propres opinions sur les positions divergentes adoptées par les parties aux négociations, même s'il était invité à le faire. Il incombe plutôt aux représentants élus de s'acquitter de leurs obligations constitutionnelles d'une façon concrète que, en dernière analyse, seuls leurs électeurs et eux-mêmes sont en mesure d'évaluer. La conciliation des divers intérêts constitutionnels légitimes décrits plus haut relève nécessairement du domaine politique plutôt que du domaine judiciaire, précisément parce que cette conciliation ne peut être réalisée que par le «donnant, donnant» du processus de négociation. Une fois établi le cadre juridique, il appartiendrait aux dirigeants démocratiquement élus des divers participants de résoudre leurs différends.

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.

La non-justiciabilité de questions politiques dénuées de composante juridique ne retire pas au cadre constitutionnel existant son caractère impératif et ne signifie pas non plus que les obligations constitutionnelles pourraient être violées sans entraîner de graves conséquences juridiques. Quand il existe des droits, il existe des réparations, mais comme nous l'expliquons dans *Vérificateur général*, précité, à la p. 90, et *New Brunswick Broadcasting*, précité, le recours approprié, dans certaines circonstances, fait appel aux mécanismes du processus politique plutôt qu'aux tribunaux.

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

Dans la mesure où la violation de l'obligation constitutionnelle de négocier conformément aux principes décrits ci-dessus mine la légitimité des actions d'une partie, elle peut avoir des répercussions importantes au plan international. Ainsi, le manquement à l'obligation d'engager et de poursuivre des négociations en conformité avec les principes constitutionnels peut affaiblir la légitimité du gouvernement qui s'en réclame, alors que celle-ci est en règle générale une condition préalable à la reconnaissance par la communauté interna-

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.

tionale. Inversement, la violation de ces principes par le gouvernement fédéral ou le gouvernement d'autres provinces dans leur réponse à une demande de sécession peut entacher leur légitimité. Ainsi, un Québec qui aurait négocié dans le respect des principes et valeurs constitutionnels face à l'intransigeance injustifiée d'autres participants au niveau fédéral ou provincial aurait probablement plus de chances d'être reconnu qu'un Québec qui n'aurait pas lui-même agi conformément aux principes constitutionnels au cours du processus de négociation. La légalité des actes des parties au processus de négociation selon le droit canadien ainsi que la légitimité qu'on leur reconnaît seraient l'une et l'autre des considérations importantes dans le processus de reconnaissance. De cette manière, l'adhésion des parties à l'obligation de négocier serait indirectement évaluée au plan international.

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.

104 Il ressort donc clairement de l'analyse qui précède que la sécession du Québec du Canada ne peut pas être considérée un acte légal si elle est réalisée unilatéralement par l'Assemblée nationale, la législature ou le gouvernement du Québec, c'est-à-dire sans négociations conformes aux principes. Tout projet de sécession d'une province du Canada qui n'est pas entrepris en conformité avec la Constitution du Canada est une violation de l'ordre juridique du Canada. Cependant, l'ordre constitutionnel canadien ne peut manquer d'être affecté dans son existence et son fonctionnement par l'expression non ambiguë d'une majorité claire de Québecois de leur désir de ne plus faire partie du Canada. Le principal moyen de donner effet à cette expression est l'obligation constitutionnelle de négocier conformément aux principes constitutionnels que nous avons définis. Si des négociations de sécession étaient engagées, notre Constitution, tout autant que notre histoire, appellerait les participants à s'efforcer de concilier les droits, les obligations et les aspirations légitimes de tous les Canadiens dans un cadre qui donnerait autant d'importance aux responsabilités qu'aux droits de chacun en vertu de la Constitution.

It will be noted that Question 1 does not ask how secession could be achieved in a constitu-

105 Il faut souligner que la question 1 ne demande pas comment la sécession pourrait être réalisée de

tional 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.

façon constitutionnelle, mais vise uniquement une seule forme de sécession, la sécession unilatérale. Bien que la possibilité d'appliquer des procédures diverses pour réaliser la sécession ait été abordée dans les plaidoiries, chaque option exigerait que nous présumions l'existence de faits qui sont inconnus à ce stade. Selon la règle de prudence requise en matière constitutionnelle, nous nous abstenons de toute conclusion quant à l'application possible d'une procédure précise pour faire sécession tant qu'il n'existe pas suffisamment de faits clairs soulevant une question justiciable.

(5) Suggested Principle of Effectivity

(5) L'argument fondé sur le principe de l'effectivité

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.

Dans ce qui précède, nous n'avons pas écarté le principe de l'effectivité qui a été au premier rang de l'argumentation soumise. Pour les raisons qui suivent, nous ne croyons pas que le principe de l'effectivité s'applique de quelque façon aux points soulevés par la question 1. Il faut bien faire la distinction entre le droit d'un peuple d'agir et son pouvoir d'agir. Ils ne sont pas identiques. Un droit est reconnu par la loi; la simple possibilité matérielle n'a pas nécessairement le statut de droit. Le fait qu'une personne ou un groupe puisse agir d'une certaine manière ne détermine aucunement la qualité ou les conséquences juridiques de l'acte. Un pouvoir peut être exercé même en l'absence d'un droit d'agir, mais ce pouvoir est alors exercé sans fondement juridique. Notre Constitution ne traite pas de pouvoirs dans ce sens-là. Au contraire, notre Constitution s'intéresse uniquement aux droits et obligations d'individus, de groupes et de gouvernements et à la structure de nos institutions. On a soutenu que l'Assemblée nationale, la législature ou le gouvernement du Québec pourraient réaliser unilatéralement la sécession de cette province du Canada, mais on n'a pas indiqué qu'ils pourraient la réaliser en droit: on a plutôt prétendu qu'ils pourraient simplement l'accomplir dans les faits. Quoiqu'il n'existe aucun droit à la sécession unilatérale dans la Constitution, c'est-à-dire sans négociation conforme aux principes, cela n'exclut pas la possibilité d'une déclaration inconstitutionnelle de sécession aboutissant à une sécession de fait. Le succès ultime d'une telle sécession dépendrait du contrôle effectif d'un territoire et de la

tional community. The principles governing secession at international law are discussed in our answer to Question 2.

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.

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

reconnaissance par la communauté internationale. Les principes régissant la sécession en droit international sont analysés dans notre réponse à la question 2.

107 À notre avis, le principe de l'effectivité qui a été plaidé n'a aucun statut constitutionnel ou juridique en ce sens qu'il ne fournit pas d'explication ou de justification préalable à l'acte. L'acceptation d'un principe de l'effectivité reviendrait essentiellement à accepter que l'Assemblée nationale, la législature ou le gouvernement du Québec peuvent agir sans tenir compte du droit, pour la simple raison qu'ils affirment avoir le pouvoir de le faire. Dans une telle perspective, on suggère en réalité que l'Assemblée nationale, la législature ou le gouvernement du Québec pourraient prétendre réaliser unilatéralement la sécession de la province du Canada dans le non-respect du droit canadien et international. On soutient en outre que, si le projet sécessioniste réussissait, un nouvel ordre juridique serait créé dans la province qui serait alors considérée comme un État indépendant.

108 Cette proposition est un énoncé de fait, ce n'est pas un énoncé de droit. Elle peut être ou ne pas être vraie; elle n'a de toute façon aucune pertinence quant aux questions de droit dont nous sommes saisis. Si, par contre, cette proposition est présentée comme un énoncé de droit, elle revient tout simplement à soutenir que l'on peut violer la loi tant que la violation réussit. Une telle affirmation est contraire à la primauté du droit et doit donc être rejetée.

B. *Question 2*

L'Assemblée nationale, la législature, ou le gouvernement du Québec possède-t-il, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada? À cet égard, en vertu du droit international, existe-t-il un droit à l'autodétermination qui procurerait à l'Assemblée nationale, la législature,

effect the secession of Quebec from Canada unilaterally?

ou le gouvernement du Québec le droit de procéder unilatéralement à la sécession du Québec du Canada?

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.

Pour les raisons discutées précédemment, la Cour n'accepte pas la prétention que la question 2 soulève une question de droit international «pur» sur laquelle elle n'a pas compétence. La question 2 est posée dans le contexte d'un renvoi touchant l'existence ou l'inexistence du droit d'une province du Canada de faire sécession unilatéralement. L'*amicus curiae* plaide que cette question doit ultimement être tranchée en vertu du droit international. Dans l'examen de cette question, la Cour ne prétend pas agir à titre d'arbitre entre États souverains ou, plus généralement, au sein de la communauté internationale. La Cour donne un avis consultatif sur certains aspects juridiques du maintien de l'existence de la fédération canadienne. Le droit international est un des facteurs qui ont été plaidés et, par conséquent, il doit être examiné.

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

L'argumentation présentée à la Cour sur la question 2 a porté principalement sur la question de savoir si, en droit international, il existe un droit de sécession unilatérale dans les circonstances qui ont été présentées aux fins de la question 1. On a également avancé d'autres arguments voulant que, indépendamment de l'existence ou de l'inexistence d'un droit de sécession unilatérale, le droit international reconnaîtra en bout de ligne comme un état de fait certaines réalités politiques concrètes — y compris l'émergence d'un nouvel État. Bien que notre réponse à la question 2 tienne compte de considérations soulevées par l'argument subsidiaire fondé sur l'«effectivité», il faut souligner d'abord qu'il y a une grande différence entre conclure à l'existence d'un droit positif et prédire que le droit réagira, après le fait, à une réalité politique existante. Ces deux concepts s'attachent à des moments différents. Les questions posées à la Cour portent sur des droits juridiques dans la perspective d'un éventuel acte unilatéral censé opérer sécession. Même si nous abordons plus loin la pratique régissant la reconnaissance internationale des nouveaux États, notre Cour est tout aussi réticente à se livrer à des spéculations sur les réactions éven-

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

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*

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

tuelles d'États souverains à l'échelle internationale qu'elle l'était, dans le cadre de la question 1, quant au déroulement d'éventuelles négociations politiques entre les participants à la fédération canadienne. Dans les deux cas, les questions du renvoi visent uniquement le cadre juridique à l'intérieur duquel les acteurs politiques s'acquittent de leur mandat respectif.

(1) La sécession en droit international

111 Il est clair que le droit international n'accorde pas expressément aux parties constituantes d'un État souverain le droit de faire sécession unilatéralement de l'État «parent». Cela est reconnu par les experts qui ont donné leur avis tant pour le compte de l'*amicus curiae* que pour le compte du procureur général du Canada. Puisque la sécession unilatérale ne fait pas l'objet d'autorisation expresse, les tenants de l'existence d'un tel droit en droit international n'ont d'autre choix que de fonder leur argument (i) soit sur la thèse selon laquelle la sécession unilatérale n'est pas expressément interdite, et que ce qui n'est pas explicitement interdit est, par inférence, permis; (ii) soit sur l'obligation implicite qui incombe aux États de reconnaître la légitimité d'une sécession accomplie par l'exercice du droit, bien établi en droit international, qu'a «un peuple» à l'autodétermination. L'*amicus curiae* a abordé le droit à l'autodétermination mais a soutenu que celui-ci ne s'appliquait pas au cas du Québec au sein de la fédération canadienne, indépendamment de l'existence ou de l'inexistence d'un résultat référendaire en faveur de la sécession. Nous sommes d'accord avec l'*amicus curiae* sur ce point, pour les raisons que nous allons exposer brièvement.

a) *L'absence d'interdiction expresse*

112 Le droit international ne prévoit pas de droit de sécession unilatérale, mais il n'en nie pas explicitement l'existence, quoique, dans une certaine mesure, une telle négation découle implicitement du caractère exceptionnel des circonstances qui sont requises pour autoriser une sécession fondée sur le droit d'un peuple à l'autodétermination, comme le droit de sécession découlant de la situation exceptionnelle d'un peuple opprimé ou colo-

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.

nisé, qui est examiné plus loin. Comme nous le verrons, le droit international attache une grande importance à l'intégrité territoriale des États Nations et, de manière générale, laisse le droit interne de l'État existant dont l'entité sécessionniste fait toujours partie décider de la création ou non d'un nouvel État (R. Y. Jennings, *The Acquisition of Territory in International Law* (1963), aux pp. 8 et 9). Dans les cas, comme celui qui nous occupe, où la sécession unilatérale serait incompatible avec la constitution interne, le droit international acceptera vraisemblablement cette conclusion, sous réserve du droit des peuples à disposer d'eux-mêmes, ou droit à l'autodétermination, sujet que nous allons maintenant aborder.

(b) *The Right of a People to Self-determination*

b) *Le droit d'un peuple à l'autodétermination*

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.

Bien que le droit international régisse généralement la conduite des États Nations, il reconnaît également, dans certaines circonstances précises, les «droits» d'entités qui ne sont pas des États Nations — tel le droit d'un peuple à l'autodétermination.

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.)

L'existence du droit des peuples à disposer d'eux-mêmes est aujourd'hui si largement reconnue dans les conventions internationales que ce principe a acquis un statut supérieur à celui d'une «convention» et est considéré comme un principe général du droit international. (A. Cassese, *Self-determination of peoples: A legal reappraisal* (1995), aux pp. 171 et 172; K. Doehring, «Self-Determination», dans B. Simma, éd., *The Charter of the United Nations: A Commentary* (1994), à la 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:

L'article premier de la *Charte des Nations Unies*, R.T. Can. 1945 nº 7, édicte notamment que l'un des buts des Nations Unies est de:

Article 1

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;

2. Développer entre les nations des relations amicales fondées sur le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes, et prendre toutes autres mesures propres à consolider la paix du monde;

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".

En outre, en vertu de l'art. 55 de sa Charte, l'Organisation des Nations Unies favorise des buts tels le relèvement des niveaux de vie, le plein emploi et le respect des droits de l'homme «[e]n vue de créer les conditions de stabilité et de bien-être nécessaires pour assurer entre les nations des relations pacifiques et amicales fondées sur le respect du principe de l'égalité des droits des peuples et de leur droit à disposer d'eux-mêmes». 116

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:

Le principe fondamental de l'autodétermination est énoncé et discuté dans un si grand nombre de conventions et de résolutions des Nations Unies que Doehring, *loc. cit.*, souligne ceci, à la p. 60: 117

> The sheer number of resolutions concerning the right of self-determination makes their enumeration impossible.

> [TRADUCTION] Le nombre même de résolutions concernant le droit à l'autodétermination rend leur énumération impossible.

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:

Pour les fins qui nous intéressent, il suffit de mentionner les conventions et résolutions suivantes. Les articles premiers du *Pacte international relatif aux droits civils et politiques*, 999 R.T.N.U. 171, et du *Pacte international relatif aux droits économiques, sociaux et culturels*, 993 R.T.N.U. 3, sont ainsi rédigés: 118

> 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.

> 1. Tous les peuples ont le droit de disposer d'eux-mêmes. En vertu de ce droit, ils déterminent librement leur statut politique et assurent librement leur développement économique, social et culturel.

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:

De même, la *Déclaration relative aux principes du droit international touchant les relations amicales et la coopération entre les États conformément à la Charte des Nations Unies*, Rés. AG 2625 (XXV), 24 octobre 1970 (*Déclaration touchant les relations amicales*), précise: 119

> 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.

> En vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes, principe consacré dans la Charte des Nations Unies, tous les peuples ont le droit de déterminer leur statut politique, en toute liberté et sans ingérence extérieure, et de poursuivre leur développement économique, social et culturel, et tout État a le devoir de respecter ce droit conformément aux dispositions de la Charte.

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,

En 1993, la Conférence mondiale sur les droits de l'homme a adopté le document intitulé *Déclaration et Programme d'action de Vienne*, 120

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

A/CONF.157/24, 25 juin 1993, qui a réaffirmé l'article premier des deux pactes susmentionnés. Dans sa *Déclaration du cinquantième anniversaire de l'Organisation des Nations Unies*, Rés. AG 50/6, 9 novembre 1995, l'Assemblée générale des Nations Unies souligne encore une fois le droit à l'autodétermination en indiquant que ses États membres doivent:

1. . . .

> Continuer à réaffirmer le droit de tous les peuples à disposer d'eux-mêmes, en tenant compte de la situation particulière des peuples soumis à la domination coloniale ou à d'autres formes de domination ou d'occupations étrangères, et reconnaître le droit des peuples à prendre des mesures légitimes conformément à la Charte des Nations Unies pour réaliser leur droit inaliénable à l'autodétermination. Cela ne devra pas être interprété comme autorisant ou encourageant toute mesure de nature à démembrer ou compromettre, en totalité ou en partie, l'intégrité territoriale ou l'unité politique d'États souverains et indépendants respectueux du principe de l'égalité des droits et de l'autodétermination des peuples et, partant, dotés d'un gouvernement représentant la totalité de la population appartenant au territoire, sans distinction aucune. . . [Nous soulignons.]

Le droit à l'autodétermination est également reconnu dans d'autres documents juridiques internationaux. Par exemple, l'*Acte final de la Conférence sur la sécurité et la coopération en Europe* (1975) (*Acte final d'Helsinki*), énonce (à la partie VIII):

> Les États participants respectent l'égalité de droits des peuples et leur droit à disposer d'eux-mêmes, en agissant à tout moment conformément aux buts et aux principes de la Charte des Nations Unies et aux normes pertinentes du droit international, y compris celles qui ont trait à l'intégrité territoriale des États.
>
> En vertu du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes, tous les peuples ont toujours le droit, en toute liberté de déterminer, lorsqu'ils le désirent et comme ils le désirent, leur statut politique interne et externe, sans ingérence extérieure, et de poursuivre à leur gré leur développement politique, économique, social et culturel. [Nous soulignons.]

Comme nous le verrons, en droit international, le droit à l'autodétermination est censé être exercé

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"

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.

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.

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

par des peuples, à l'intérieur d'États souverains existants, et conformément au principe du maintien de l'intégrité territoriale de ces États. Lorsque cela n'est pas possible, un droit de sécession peut naître, dans les circonstances exceptionnelles examinées ci-après.

(i) La définition de «peuples»

123 C'est aux «peuples» que le droit international accorde le droit à l'autodétermination. En conséquence, pour disposer de ce droit, le groupe qui l'invoque doit remplir la condition préliminaire, c'est-à-dire être qualifié de peuple. Toutefois, comme le droit à l'autodétermination s'est développé par l'adoption d'un ensemble d'ententes et de conventions internationales, conjuguée à la pratique des États, et que peu de précisions formelles sont apportées à la définition de «peuples», il s'ensuit que le sens du mot «peuple» reste assez incertain.

124 Il est évident qu'un «peuple» peut s'entendre d'une partie seulement de la population d'un État existant. Le droit à l'autodétermination s'est développé dans une large mesure en tant que droit de la personne et l'expression est généralement utilisée dans des documents où paraissent à la fois les mots «nation» et «État». La juxtaposition de ces termes indique que le mot «peuple» ne vise pas nécessairement l'entière population d'un État. Le fait de restreindre la définition de ce mot à la population d'États existants, d'une part, rendrait largement superflue la reconnaissance du droit à l'autodétermination, compte tenu de l'insistance corrélative, dans la majorité des documents sources, sur la nécessité de protéger l'intégrité territoriale des États existants et, d'autre part, ferait obstacle à l'objectif réparateur de ce droit.

125 Même si la majeure partie de la population du Québec partage bon nombre des traits (par exemple une langue et une culture communes) pris en considération pour déterminer si un groupe donné est un «peuple», à l'instar d'autres groupes à l'intérieur du Québec et du Canada, il n'est pas nécessaire d'étudier cette qualification juridique pour répondre de façon appropriée à la question 2. De même, il n'est pas nécessaire pour la Cour de

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.

déterminer si, à supposer qu'il existe un peuple québécois au sens du droit international, ce peuple englobe la population entière de la province ou seulement une partie de celle-ci. Il n'est pas non plus nécessaire d'examiner la situation de la population autochtone au Québec. Comme le démontrera notre analyse de la portée du droit à l'autodétermination, quelle que soit la juste définition de peuple(s) à appliquer dans le présent contexte, le droit à l'autodétermination ne peut, dans les circonstances présentes, constituer le fondement d'un droit de sécession unilatérale.

(ii) Scope of the Right to Self-determination

(ii) La portée du droit à l'autodétermination

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.]

Les sources reconnues du droit international établissent que le droit d'un peuple à disposer de lui-même est normalement réalisé par voie d'autodétermination interne — à savoir la poursuite par ce peuple de son développement politique, économique, social et culturel dans le cadre d'un État existant. Le droit à l'autodétermination externe (qui, dans le présent cas, pourrait prendre la forme de la revendication d'un droit de sécession unilatérale) ne naît que dans des cas extrêmes dont les circonstances sont par ailleurs soigneusement définies. L'autodétermination externe peut être décrite par l'extrait suivant de la *Déclaration touchant les relations amicales*:

> La création d'un État souverain et indépendant, la libre association ou l'intégration avec un État indépendant ou l'acquisition de tout autre statut politique librement décidé par un peuple constituent pour ce peuple des moyens d'exercer son droit à disposer de lui-même. [Nous soulignons.]

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.

Le principe de l'autodétermination en droit international a évolué dans le respect de l'intégrité territoriale des États existants. Les divers documents internationaux qui étayent l'existence du droit d'un peuple à l'autodétermination renferment également des déclarations au soutien du principe selon lequel l'exercice d'un tel droit doit être suffisamment limité pour prévenir les menaces contre l'intégrité territoriale d'un État existant ou la stabilité des relations entre États souverains.

128 The *Declaration on Friendly Relations*, the *Vienna Declaration* and the *Declaration on the*

La *Déclaration touchant les relations amicales*, la *Déclaration de Vienne* et la *Déclaration du cin-*

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.]

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 described above.

quantième anniversaire de l'Organisation des Nations Unies sont explicites. Immédiatement après avoir affirmé le droit d'un peuple à déterminer son statut politique et à poursuivre son développement économique, social et culturel, elles précisent que ce droit ne doit pas être

interprété comme autorisant ou encourageant toute mesure de nature à démembrer ou compromettre, en totalité ou en partie, l'intégrité territoriale ou l'unité politique d'États souverains et indépendants respectueux du principe de l'égalité des droits et de l'autodétermination des peuples et, partant, dotés d'un gouvernement représentant la totalité de la population appartenant au territoire, sans distinction . . . [Nous soulignons.]

129 De même, le document de clôture de la rencontre de la Conférence sur la sécurité et la coopération en Europe tenue à Vienne en 1989, qui faisait suite à l'*Acte final d'Helsinki*, fait mention du droit des peuples de déterminer «leur statut politique interne et externe» (nous soulignons), mais cette déclaration est immédiatement suivie par la reconnaissance expresse que les États participants agiront à tout moment «conformément aux buts et aux principes de la Charte des Nations Unies et aux normes pertinentes du droit international, y compris celles qui ont trait à l'intégrité territoriale», comme l'énonce l'*Acte final d'Helsinki* (nous soulignons). Il est déclaré, au principe 5 du document de clôture, que les États participants (y compris le Canada):

. . . confirment leur engagement à observer strictement et effectivement le principe de l'intégrité territoriale des États. Ils s'abstiendront de toute violation de ce principe et donc de toute action visant, par des moyens directs ou indirects contrevenant aux buts et principes de la Charte des Nations Unies, aux autres obligations découlant du droit international ou aux dispositions de l'Acte final, à violer l'intégrité territoriale, l'indépendance politique ou l'unité d'un État. Aucune action ou situation contrevenant à ce principe ne sera reconnue comme légale par les États participants. [Nous soulignons.]

Par conséquent, le passage de l'*Acte final d'Helsinki* qui porte sur la détermination par un peuple de son statut politique externe est interprété comme étant l'expression du statut politique externe de ce peuple par l'entremise du gouverne-

tional 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 'territo-

ment de l'État existant, sauf dans les circonstances exceptionnelles examinées plus loin. Comme le souligne Cassese, *op. cit.*, à la p. 287, compte tenu de l'histoire de ce document et de sa structure, la mention de l'autodétermination externe signifie simplement que [TRADUCTION] «les autorités centrales d'un État ne peuvent apporter aucun changement territorial ou autre qui soit contraire à la volonté de l'ensemble de la population de cet État».

Même si le *Pacte international relatif aux droits économiques, sociaux et culturels* et le *Pacte international relatif aux droits civils et politiques*, ne font pas expressément état de la protection de l'intégrité territoriale, ils délimitent la portée du droit à l'autodétermination en fonction de conditions qui sont normalement réalisables dans le cadre d'un État existant. Il n'y a pas nécessairement incompatibilité entre le maintien de l'intégrité territoriale d'États existants, comme le Canada, et le droit d'un «peuple» de disposer complètement de lui-même. Un État dont le gouvernement représente, dans l'égalité et sans discrimination, l'ensemble du peuple ou des peuples résidant sur son territoire et qui respecte les principes de l'autodétermination dans ses arrangements internes a droit, en vertu du droit international, à la protection de son intégrité territoriale.

(iii) Peuples opprimés ou colonisés

Par conséquent, selon l'état général du droit international, le droit à l'autodétermination s'applique dans les limites de la protection prépondérante accordée à l'intégrité territoriale des États «parents». Cependant, comme le souligne Cassese, *op. cit.*, à la p. 334, dans certains contextes définis, le droit des peuples à l'autodétermination peut effectivement être exercé «de manière externe», ce qui, dans le contexte du présent renvoi, pourrait signifier la sécession:

> [TRADUCTION] . . . le droit à l'autodétermination externe, qui emporte la possibilité de choisir (ou de rétablir) l'indépendance, n'a été accordé qu'à deux catégories de peuples (ceux sous domination coloniale ou sous occupation étrangère), sur le fondement de l'hypothèse que, dans les deux cas, ces peuples constituent des entités intrinsèquement distinctes de la puissance coloniale ou

rial integrity', all but destroyed by the colonialist or occupying Power, should be fully restored. . . .

occupante, et que l'«intégrité territoriale» de ces peuples, qui à toutes fins pratiques a été détruite par la puissance coloniale ou occupante, doit être pleinement rétablie. . .

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.

132 Le droit des peuples colonisés d'exercer leur droit à l'autodétermination en se détachant de la puissance «impériale» est maintenant incontesté, mais il n'est pas pertinent dans le présent renvoi.

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*:

133 L'autre cas manifeste d'application du droit à l'autodétermination externe est celui où un peuple est soumis à la subjugation, à la domination ou à l'exploitation étrangères en dehors du contexte colonial. Cette reconnaissance tire son origine de la *Déclaration touchant les relations amicales*:

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.

Tout État a le devoir de favoriser, conjointement avec d'autres États ou séparément, la réalisation du principe de l'égalité de droits des peuples et de leur droit à disposer d'eux-mêmes, conformément aux dispositions de la Charte, et d'aider l'Organisation des Nations Unies à s'acquitter des responsabilités que lui a conférées la Charte en ce qui concerne l'application de ce principe, afin de:

a) Favoriser les relations amicales et la coopération entre les États; et

b) Mettre rapidement fin au colonialisme en tenant dûment compte de la volonté librement exprimée des peuples intéressés;

et en ayant présent à l'esprit que soumettre des peuples à la subjugation, à la domination ou à l'exploitation étrangères constitue une violation de ce principe, ainsi qu'un déni des droits fondamentaux de l'homme, et est contraire à la Charte.

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

134 Plusieurs commentateurs ont en outre affirmé que le droit à l'autodétermination peut, dans un troisième cas, fonder un droit de sécession unilatérale. Bien que ce troisième cas ait été décrit de plusieurs façons, il repose sur l'idée que, lorsqu'un peuple est empêché d'exercer utilement son droit à l'autodétermination à l'interne, il a alors droit, en dernier recours, de l'exercer par la sécession. Le fait que la *Déclaration de Vienne* exige que les gouvernements représentent «l'ensemble de la population appartenant au territoire, sans distinction aucune» ajoute foi à l'affirmation selon

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

laquelle une obstruction aussi complète pourrait donner naissance au droit à la sécession.

De toute évidence, une telle situation s'apparente aux deux autres situations reconnues en ce que la faculté du peuple concerné d'exercer à l'interne son droit à l'autodétermination est totalement contrecarrée. Bien qu'on ne sache pas encore avec certitude si cette troisième thèse reflète réellement une norme juridique internationale établie, il est inutile pour les fins du présent renvoi d'en décider. Même en supposant que cette troisième situation puisse créer un droit de sécession unilatérale en vertu du droit international, on ne peut affirmer que le contexte québécois actuel s'en rapproche. Comme le dit l'*amicus curiae*, dans l'Addendum à son mémoire, aux par. 15 et 16:

15. Le peuple québécois n'est pas la victime d'atteintes à son existence ou à son intégrité physiques, ni de violation massive de ses droits fondamentaux. Le peuple québécois n'est manifestement pas, selon l'*amicus curiae*, un peuple opprimé.

16. En effet, pendant près de 40 des 50 dernières années, le premier ministre du Canada a été un Québécois. Pendant cette période, des Québécois ont occupé de temps à autre tous les postes les plus importants du Cabinet fédéral. Pendant les 8 années qui ont précédé juin 1997, le premier ministre et le chef de l'Opposition officielle à la Chambre des Communes étaient tous deux des Québécois. Actuellement, le premier ministre du Canada, le très honorable juge en chef ainsi que deux autres membres de la Cour, le chef d'état-major des forces armées canadiennes et l'ambassadeur du Canada aux États-Unis, sans compter la vice-secrétaire générale des Nations Unies, sont tous des Québécois. Les réussites internationales des Québécois dans la plupart des champs d'activité humaine sont trop nombreuses pour être énumérées. Depuis que le dynamisme du peuple québécois s'est tourné vers le secteur des affaires, il connaît des succès certains au Québec, dans le reste du Canada et à l'étranger.

On ne peut raisonnablement prétendre que la population du Québec se voit refuser l'accès au gouvernement. Des Québécois occupent des postes très importants au sein du gouvernement du Canada. Les résidents de cette province sont libres de leurs choix politiques et poursuivent librement leur développement économique, social et culturel

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".

à l'intérieur du Québec, dans l'ensemble du Canada et dans le monde entier. La population du Québec est équitablement représentée dans les instances législatives, exécutives et judiciaires. Bref, pour reprendre les termes des instruments internationaux qui traitent du droit des peuples à l'autodétermination, le Canada est un «État souverain et indépendant respectueux du principe de l'égalité des droits et de l'autodétermination des peuples et doté ainsi d'un gouvernement représentant la totalité de la population appartenant au territoire, sans distinction aucune».

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.

137 Les échecs persistants dans la recherche d'un accord sur la modification de la Constitution, dont il y a lieu de se préoccuper, n'équivalent pas à une négation du droit à l'autodétermination. En l'absence de modifications constitutionnelles, nous devons nous fonder sur les arrangements constitutionnels présentement en vigueur et nous ne pouvons conclure, dans les circonstances actuelles, que ces arrangements placent les Québécois dans la situation désavantageuse visée par la règle du droit international.

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.

138 En résumé, le droit à l'autodétermination en droit international donne tout au plus ouverture au droit à l'autodétermination externe dans le cas des anciennes colonies; dans le cas des peuples opprimés, comme les peuples soumis à une occupation militaire étrangère; ou encore dans le cas où un groupe défini se voit refuser un accès réel au gouvernement pour assurer son développement politique, économique, social et culturel. Dans ces trois situations, le peuple en cause jouit du droit à l'autodétermination externe parce qu'on lui refuse la faculté d'exercer, à l'interne, son droit à l'autodétermination. Ces circonstances exceptionnelles ne s'appliquent manifestement pas au cas du Québec dans les conditions actuelles. Par conséquent, ni la population du Québec, même si elle était qualifiée de «peuple» ou de «peuples», ni ses institutions représentatives, l'Assemblée nationale, la législature ou le gouvernement du Québec ne possèdent, en vertu du droit international, le droit de faire sécession unilatéralement du Canada.

We would not wish to leave this aspect of our answer to Question 2 without acknowledging the

139 Nous ne voulons pas clore cet aspect de notre réponse à la question 2 sans reconnaître l'impor-

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.

tance des arguments qui nous ont été présentés relativement aux droits et inquiétudes des peuples autochtones et aux moyens appropriés de délimiter les frontières du Québec, en cas de sécession, particulièrement en ce qui concerne les territoires nordiques occupés principalement par des peuples autochtones. Toutefois, les inquiétudes des peuples autochtones découlent du droit invoqué par le Québec de faire sécession unilatéralement. À la lumière de notre conclusion qu'aucun droit de ce genre ne s'applique à la population du Québec, ni en vertu du droit international ni en vertu de la Constitution du Canada, et que, au contraire, l'expression claire d'une volonté démocratique en faveur de la sécession entraînerait, en vertu de la Constitution, des négociations au cours desquelles les intérêts des autochtones seraient pris en compte, il devient inutile d'examiner davantage les préoccupations des peuples autochtones dans le présent renvoi.

(2) Recognition of a Factual/Political Reality: the "Effectivity" Principle

(2) Reconnaissance de la réalité factuelle ou politique: le principe de l'«effectivité»

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.

L'un des arguments avancés par l'*amicus curiae* sur cet aspect du renvoi est que, même si le droit international ne fonde pas un droit de sécession unilatérale dans le cas du Québec, le droit international n'interdit pas non plus la sécession et, dans les faits, une telle réalité politique serait reconnue internationalement si elle se manifestait, par exemple, par le contrôle effectif du territoire qui constitue maintenant la province de Québec.

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.

Il est vrai que le droit international peut fort bien, selon les circonstances, s'adapter pour reconnaître une réalité factuelle ou politique, indépendamment de la légalité des démarches qui y ont donné naissance. Cependant, comme nous l'avons dit, l'effectivité, en tant que telle, ne relève pas réellement de la question 2, qui nous demande s'il existe un droit de sécession unilatérale.

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

Des conséquences juridiques peuvent certainement découler de faits politiques, et [TRADUCTION] «la souveraineté est un fait politique pour lequel il est impossible d'établir un fondement purement juridique . . .», H. W. R. Wade, «The Basis of Legal Sovereignty», [1995] *Camb. L.J.* 172, à la

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.

p. 196. La sécession d'une province du Canada, si elle réussissait sur le terrain, pourrait bien entraîner la création d'un nouvel État. Même si la reconnaissance par d'autres États n'est pas nécessaire, du moins en théorie, pour accéder au statut d'État, la viabilité d'une entité aspirant à ce statut au sein de la communauté internationale dépend, sur le plan pratique, de sa reconnaissance par d'autres États. Ce processus de reconnaissance est guidé par des normes juridiques. Toutefois, la reconnaissance internationale ne confère pas à elle seule le statut d'État et il faut souligner qu'elle ne remonte pas à la date de la sécession pour servir rétroactivement de source d'un droit «juridique» initial de faire sécession. La reconnaissance ne survient qu'après qu'une entité territoriale a réussi, en tant que fait politique, à réaliser la sécession.

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 prohib-

143 Comme l'indique la réponse à la question 1, l'une des normes juridiques que les États peuvent invoquer pour décider de reconnaître ou non de nouveaux États est la légitimité du processus par lequel ceux-ci ont fait *de facto* sécession ou cherchent à le faire. Le processus de reconnaissance, auparavant considéré comme l'exercice d'un pouvoir souverain absolu, est maintenant assorti de normes juridiques. Voir, par exemple, la déclaration de la Communauté européenne sur les *Lignes directrices sur la reconnaissance de nouveaux États en Europe orientale et en Union soviétique*, Bull. CE 12-1991, à la p. 127. Même si l'intérêt national de l'État qui accorde la reconnaissance et l'avantage politique qu'il y voit jouent manifestement un rôle important, les États étrangers peuvent également prendre en considération leur opinion quant à l'existence du droit à l'autodétermination de la population de l'État putatif, ainsi qu'une évaluation correspondante de la légalité de la sécession suivant le droit de l'État dont l'entité territoriale prétend avoir fait sécession. Comme nous l'avons indiqué dans notre réponse à la question 1, un nouvel État qui passe outre à ses obligations légitimes découlant de sa situation antérieure peut s'attendre à ce que le mépris de ces obligations lui nuise dans l'obtention de la reconnaissance internationale, à tout le moins quant au moment de la reconnaissance. Par contre, le respect par la province sécessioniste de ces obligations légitimes

ited 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

jouerait en faveur de sa reconnaissance internationale. L'idée selon laquelle ce qui n'est pas explicitement interdit est implicitement permis a peu de pertinence dans les cas (comme celui qui nous occupe) où le droit international renvoie au droit interne de l'État sécessioniste pour la détermination de la légalité de la sécession, et où le droit de cet État considère inconstitutionnelle la sécession unilatérale.

En tant que cour de justice, nous ne connaissons ultimement que des demandes fondées sur le droit. Si le principe de l'«effectivité» repose sur la seule affirmation selon laquelle une [TRADUCTION] «révolution réussie engendre sa propre légalité» (S. A. de Smith, «Constitutional Lawyers in Revolutionary Situations» (1968), 7 *West. Ont. L. Rev.* 93, à la p. 96), cela signifie nécessairement que la légalité ne précède pas mais qu'elle suit une révolution réussie. Par hypothèse, la révolution réussie s'est produite en dehors du cadre constitutionnel de l'État précédent, car autrement elle ne pourrait être qualifiée de «révolution». Il se peut qu'un acte de sécession unilatérale par le Québec se voie éventuellement accorder un statut juridique par le Canada et par d'autres États, et qu'il entraîne, de ce fait, des conséquences juridiques. Toutefois, cela n'étaye pas la prétention plus radicale voulant que la reconnaissance d'un état de fait créé par une déclaration unilatérale d'indépendance signifierait que la sécession a été réalisée sous le couvert d'un droit juridique.

On a invoqué une analogie entre le principe de l'effectivité et le second aspect de la primauté du droit dégagé par notre Cour dans le *Renvoi relatif aux droits linguistiques au Manitoba*, précité, à la p. 753, c'est-à-dire la nécessité d'éviter un vide juridique. On se rappellera que notre Cour a refusé dans ce renvoi d'invalider l'ensemble des lois du Manitoba pour non-respect des exigences de la Constitution, de crainte qu'une telle déclaration ne plonge cette province dans le chaos. Nous avons ainsi reconnu que la primauté du droit est un principe constitutionnel qui permet aux tribunaux de tenir compte des conséquences pratiques de leurs jugements, particulièrement dans les affaires constitutionnelles. La similitude entre ce principe et le

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.

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

principe de l'effectivité réside, plaide-t-on, dans leur objectif commun de refaçonner le droit pour tenir compte de la réalité sociale. Cependant, dans le *Renvoi relatif aux droits linguistiques du Manitoba*, nos préoccupations quant aux graves conséquences pratiques de la déclaration d'inconstitutionnalité n'ont pas influencé notre conclusion qu'en droit toutes les lois du Manitoba en litige dans cette affaire étaient inconstitutionnelles. La déclaration d'inconstitutionnalité prononcée par la Cour était claire et non ambiguë. Le souci de la Cour de maintenir la primauté du droit visait à façonner la réparation convenable qui, dans cette affaire, était la suspension de l'effet de la déclaration d'invalidité afin de permettre que soient apportées les rectifications appropriées.

146 Le principe de l'effectivité fonctionne très différemment. Il proclame qu'un acte illégal peut en fin de compte devenir légal si, en tant que fait empirique, il est reconnu à l'échelle internationale. Notre droit reconnaît depuis longtemps que, sous l'effet conjugué de l'acquiescement et de la prescription, un acte illégal peut ultérieurement se voir accorder un certain effet juridique. En droit des biens, par exemple, un squatter peut devenir finalement propriétaire du bien-fonds qu'il occupe si le propriétaire véritable n'exerce pas à temps son droit d'en reprendre possession. Ainsi, un changement dans les faits peut se traduire ultérieurement par un changement de statut juridique. Toutefois, c'est tout autre chose de prétendre que l'approbation subséquente d'un acte illégal à l'origine a pour effet de créer rétroactivement le droit juridique de l'accomplir. Cette prétention plus générale n'est pas étayée par le principe de l'effectivité en droit international ni de quelque autre façon, et elle doit être rejetée.

C. *Question 3*

Lequel du droit interne ou du droit international aurait préséance au Canada dans l'éventualité d'un conflit entre eux quant au droit de l'Assemblée nationale, de la législature ou du gouverne-

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

ment du Québec de procéder unilatéralement à la sécession du Québec du Canada?

À la lumière des réponses que nous avons données aux questions 1 et 2, il n'existe, entre le droit interne et le droit international, aucun conflit à examiner dans le présent renvoi.

IV. Sommaire des conclusions

Comme nous l'avons indiqué au début, nous étions appelés, dans le présent renvoi, à examiner des questions d'une extrême importance, qui touchent au cœur même de notre système de gouvernement constitutionnel. Nous avons souligné que la Constitution n'est pas uniquement un texte écrit. Elle englobe tout le système des règles et principes qui régissent l'exercice du pouvoir constitutionnel. Une lecture superficielle de certaines dispositions spécifiques du texte de la Constitution, sans plus, pourrait induire en erreur. Il faut faire un examen plus approfondi des principes sous-jacents qui animent l'ensemble de notre Constitution, dont le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, et le respect des minorités. Ces principes doivent guider notre appréciation globale des droits et obligations constitutionnels qui entreraient en jeu si une majorité claire de Québécois, en réponse à une question claire, votaient pour la sécession.

Le renvoi nous demande de déterminer si le Québec a le droit de faire sécession unilatéralement. Ceux qui soutiennent l'existence d'un tel droit fondent leur prétention d'abord et avant tout sur le principe de la démocratie. La démocratie, toutefois, signifie davantage que la simple règle de la majorité. Comme en témoigne notre jurisprudence constitutionnelle, la démocratie existe dans le contexte plus large d'autres valeurs constitutionnelles telles celles déjà mentionnées. Pendant les 131 années de la Confédération, les habitants des provinces et territoires ont noué d'étroits liens d'interdépendance (économique, sociale, politique et culturelle) basés sur des valeurs communes qui comprennent le fédéralisme, la démocratie, le constitutionnalisme et la primauté du droit, ainsi que le respect des minorités. Une décision démocratique des Québécois en faveur de la sécession

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.

compromettrait ces liens. La Constitution assure l'ordre et la stabilité et, en conséquence, la sécession d'une province ne peut être réalisée unilatéralement «en vertu de la Constitution», c'est-à-dire sans négociations fondées sur des principes, avec les autres participants à la Confédération, dans le cadre constitutionnel existant.

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.

La Constitution n'est pas un carcan. Un rappel, même bref, de notre histoire constitutionnelle révèle des périodes de changements marquants et extrêmement profonds. Nos institutions démocratiques permettent nécessairement un processus continu de discussion et d'évolution, comme en témoigne le droit reconnu par la Constitution à chacun des participants à la fédération de prendre l'initiative de modifications constitutionnelles. Ce droit emporte l'obligation réciproque des autres participants d'engager des discussions sur tout projet légitime de modification de l'ordre constitutionnel. Même s'il est vrai que certaines tentatives de modification de la Constitution ont échoué au cours des dernières années, un vote qui aboutirait à une majorité claire au Québec en faveur de la sécession, en réponse à une question claire, conférerait au projet de sécession une légitimité démocratique que tous les autres participants à la Confédération auraient l'obligation de reconnaître. 150

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 pur-

Le Québec ne pourrait, malgré un résultat référendaire clair, invoquer un droit à l'autodétermination pour dicter aux autres parties à la fédération les conditions d'un projet de sécession. Le vote démocratique, quelle que soit l'ampleur de la majorité, n'aurait en soi aucun effet juridique et ne pourrait écarter les principes du fédéralisme et de la primauté du droit, les droits de la personne et des minorités, non plus que le fonctionnement de la démocratie dans les autres provinces ou dans l'ensemble du Canada. Les droits démocratiques fondés sur la Constitution ne peuvent être dissociés des obligations constitutionnelles. La proposition inverse n'est pas acceptable non plus. L'ordre constitutionnel canadien existant ne pourrait pas demeurer indifférent devant l'expression claire, par une majorité claire de Québécois, de leur volonté de ne plus faire partie du Canada. Les autres provinces et le gouvernement fédéral n'auraient 151

sue 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.

aucune raison valable de nier au gouvernement du Québec le droit de chercher à réaliser la sécession, si une majorité claire de la population du Québec choisissait cette voie, tant et aussi longtemps que, dans cette poursuite, le Québec respecterait les droits des autres. Les négociations qui suivraient un tel vote porteraient sur l'acte potentiel de sécession et sur ses conditions éventuelles si elle devait effectivement être réalisée. Il n'y aurait aucune conclusion prédéterminée en droit sur quelque aspect que ce soit. Les négociations devraient traiter des intérêts des autres provinces, du gouvernement fédéral, du Québec et, en fait, des droits de tous les Canadiens à l'intérieur et à l'extérieur du Québec, et plus particulièrement des droits des minorités. Il va sans dire que de telles négociations ne seraient pas aisées.

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.

Le processus de négociation exigerait la conciliation de divers droits et obligations par voie de négociation entre deux majorités légitimes, soit la majorité de la population du Québec et celle de l'ensemble du Canada. Une majorité politique, à l'un ou l'autre niveau, qui n'agirait pas en accord avec les principes sous-jacents de la Constitution que nous avons mentionnés mettrait en péril la légitimité de l'exercice de ses droits et ultimement l'acceptation du résultat par la communauté internationale.

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

La tâche de la Cour était de clarifier le cadre juridique dans lequel des décisions politiques doivent être prises «en vertu de la Constitution», et non d'usurper les prérogatives des forces politiques qui agissent à l'intérieur de ce cadre. Les obligations que nous avons dégagées sont des obligations impératives en vertu de la Constitution du Canada. Toutefois, il reviendra aux acteurs politiques de déterminer en quoi consiste «une majorité claire en réponse à une question claire», suivant les circonstances dans lesquelles un futur référendum pourrait être tenu. De même, si un appui majoritaire était exprimé en faveur de la sécession du Québec, il incomberait aux acteurs politiques de déterminer le contenu des négociations et le processus à suivre. La conciliation des divers intérêts constitutionnels légitimes relève nécessairement du domaine politique plutôt que du

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.

domaine judiciaire, précisément parce que cette conciliation ne peut être réalisée que par le jeu des concessions réciproques qui caractérise les négociations politiques. Dans la mesure où les questions abordées au cours des négociations seraient politiques, les tribunaux, conscients du rôle qui leur revient dans le régime constitutionnel, n'auraient aucun rôle de surveillance à jouer.

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

154 Nous nous sommes également demandés s'il existe, en vertu du droit international, un droit de sécession dans les circonstances envisagées par la question 1, c'est-à-dire une expression démocratique claire en faveur de la sécession du Québec, en réponse à une question claire. Certains de ceux qui apportent une réponse affirmative se fondent sur le droit reconnu à l'autodétermination qui appartient à tous les «peuples». Même s'il est certain que la majeure partie de la population du Québec partage bon nombre des traits qui caractérisent un peuple, il n'est pas nécessaire de trancher la question de l'existence d'un «peuple», quelle que soit la réponse exacte à cette question dans le contexte du Québec, puisqu'un droit de sécession ne prend naissance en vertu du principe de l'autodétermination des peuples en droit international que dans le cas d'«un peuple» gouverné en tant que partie d'un empire colonial, dans le cas d'«un peuple» soumis à la subjugation, à la domination ou à l'exploitation étrangères, et aussi, peut-être, dans le cas d'«un peuple» empêché d'exercer utilement son droit à l'autodétermination à l'intérieur de l'État dont il fait partie. Dans les autres circonstances, les peuples sont censés réaliser leur autodétermination dans le cadre de l'État existant auquel ils appartiennent. Un État dont le gouvernement représente l'ensemble du peuple ou des peuples résidant sur son territoire, dans l'égalité et sans discrimination, et qui respecte les principes de l'autodétermination dans ses arrangements internes, a droit au maintien de son intégrité territoriale en vertu du droit international et à la reconnaissance de cette intégrité territoriale par les autres États. Le Québec ne constitue pas un peuple colonisé ou opprimé, et on ne peut pas prétendre non plus que les Québécois se voient refuser un accès réel au gouvernement pour assurer leur déve-

international law to effect the secession of Quebec from Canada unilaterally.

loppement politique, économique, culturel et social. Dans ces circonstances, l'Assemblée nationale, la législature ou le gouvernement du Québec ne possèdent pas, en vertu du droit international, le droit de procéder unilatéralement à la sécession du Québec du Canada.

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.

Même s'il n'existe pas de droit de sécession unilatérale en vertu de la Constitution ou du droit international, c'est-à-dire un droit de faire sécession sans négociation sur les fondements qui viennent d'être examinés, cela n'écarte pas la possibilité d'une déclaration inconstitutionnelle de sécession conduisant à une sécession *de facto*. Le succès ultime d'une telle sécession dépendrait de sa reconnaissance par la communauté internationale qui, pour décider d'accorder ou non cette reconnaissance, prendrait vraisemblablement en considération la légalité et la légitimité de la sécession eu égard, notamment, à la conduite du Québec et du Canada. Même si elle était accordée, une telle reconnaissance ne fournirait toutefois aucune justification rétroactive à l'acte de sécession, en vertu de la Constitution ou du droit international.

156 The reference questions are answered accordingly.

Les questions du renvoi reçoivent des réponses en conséquence.

Judgment accordingly.

Jugement en conséquence.

Solicitor for the Attorney General of Canada: George Thomson, Ottawa.

Procureur du procureur général du Canada: George Thomson, Ottawa.

Solicitors appointed by the Court as amicus curiae: Joli-Cœur Lacasse Lemieux Simard St-Pierre, Sainte-Foy.

Procureurs nommés par la Cour en qualité d'amicus curiae: Joli-Cœur Lacasse Lemieux Simard St-Pierre, Sainte-Foy.

Solicitor for the intervener the Attorney General of Manitoba: The Department of Justice, Winnipeg.

Procureur de l'intervenant le procureur général du Manitoba: Le ministère de la Justice, Winnipeg.

Solicitor for the intervener the Attorney General for Saskatchewan: W. Brent Cotter, Regina.

Procureur de l'intervenant le procureur général de la Saskatchewan: W. Brent Cotter, Regina.

Solicitor for the intervener the Minister of Justice of the Northwest Territories: Bernard W. Funston, Gloucester.

Procureur de l'intervenant le ministre de la Justice des Territoires du Nord-Ouest: 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, Hull.

Solicitors for the intervener the Grand Council of the Crees (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal.

Solicitors for the intervener the Makivik Corporation: Hutchins, Soroka & Dionne, Montréal.

Solicitor for the intervener the Chiefs of Ontario: Michael Sherry, Toronto.

Solicitors for the intervener the Minority Advocacy and Rights Council: Scott & Aylen, Toronto.

Solicitors for the intervener the Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York.

Solicitors for the intervener Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York.

Solicitors for the interveners Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell and Van Hoven Petteway: Stephen A. Scott, Montréal.

Solicitors for the intervener Vincent Pouliot: Paquette & Associés, Montréal.

Procureur de l'intervenant le ministre de la Justice pour le gouvernement du territoire du Yukon: Stuart J. Whitley, Whitehorse.

Procureur de l'intervenante Kitigan Zibi Anishinabeg: Agnès Laporte, Hull.

Procureurs de l'intervenant le Grand Conseil des Cris (Eeyou Estchee): Robinson, Sheppard, Shapiro, Montréal.

Procureurs de l'intervenante la Corporation Makivik: Hutchins, Soroka & Dionne, Montréal.

Procureur de l'intervenant Chiefs of Ontario: Michael Sherry, Toronto.

Procureurs de l'intervenant le Conseil des revendications et des droits des minorités: Scott & Aylen, Toronto.

Procureurs de l'intervenant Ad Hoc Committee of Canadian Women on the Constitution: Eberts Symes Street & Corbett, Toronto; Centre for Refugee Studies, North York.

Procureurs de l'intervenant Guy Bertrand: Guy Bertrand & Associés, Québec; Patrick Monahan, North York.

Procureurs des intervenants Roopnarine Singh, Keith Owen Henderson, Claude Leclerc, Kenneth O'Donnell et Van Hoven Petteway: Stephen A. Scott, Montréal.

Procureurs de l'intervenant Vincent Pouliot: Paquette & Associés, Montréal.

Tab 8

DATE: 20011207
DOCKET: C33807

COURT OF APPEAL FOR ONTARIO

WEILER and SHARPE JJ.A. and RIVARD J. (*ad hoc*)

B E T W E E N:

GISÈLE LALONDE, MICHELLE DE COURVILLE NICOL and HÔPITAL MONTFORT Applicants (Respondents in Appeal)	)	Ronald F. Caza, Pascale Giguère and Marc Cousineau, for the respondents
- and -	)	
COMMISSION DE RESTRUCTURATION DES SERVICES DE SANTÉ Respondent (Appellant)	)	Janet E. Minor and Michel Y. Hélie, for the appellant
- and -	)	
THE COMMISSIONER OF OFFICIAL LANGUAGES OF CANADA, THE ATTORNEY GENERAL OF CANADA, LA FÉDÉRATION DES COMMUNAUTÉS FRANCOPHONES ET ACADIENNE DU CANADA and L'ASSOCIATION CANADIENNE FRANÇAISE DE L'ONTARIO Interveners	)	René Cadieux and Johanne Tremblay, for the intervener The Commissioner of Official Languages of Canada Alain Préfontaine and Warren J. Newman, for the intervener The Attorney General of Canada François Boileau, for the intervener La Fédération des communautés francophones et acadienne du Canada Paul S. Rouleau and Louise Hurteau, for the intervener L'Association canadienne française de l'Ontario Heard: May 14-17, 2001

On appeal from the decision of the Divisional Court (Carnwath R.S.J., Blair and Charbonneau JJ.) dated November 29, 1999.

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Contents (cont'd)

WEILER AND SHARPE JJ.A.:

I INTRODUCTION

[1] This is an appeal from the judgment of the Divisional Court (reported at (1999), 48 O.R. (3d) 50 (in English) and [1999] O.J. No. 4489 (in French)) quashing the directions of the Health Services Restructuring Commission (the "Commission") ordering the respondent Hôpital Montfort ("Montfort") to substantially reduce its health services. The Court remitted the question of restructuring of health services at Montfort to the Commission for reconsideration in accordance with the Court's decision. The Minister of Health ("Ontario") has now replaced the Commission. Ontario appeals on the basis that the Divisional Court erred in fact and in law in ordering it to reconsider its directions to Montfort. Montfort cross-appeals from the decision of the Divisional Court holding that the Commission's directions did not infringe the equality guarantees in s. 15 of the *Charter of Rights and Freedoms*.

[2] This appeal raises important issues in relation to the language rights of Ontario's francophone minority. Montfort, located in Ottawa, is the only hospital in Ontario in which the working language is French and where services in French are available on a full-time basis. Montfort serves as the community hospital for the substantial francophone community of eastern Ontario and also plays a unique role in the education and training of French-speaking health care professionals. The Divisional Court held that as the Commission's directions would cripple Montfort as an important francophone institution, they should be quashed on the ground that the Commission failed to respect the unwritten constitutional principle of respect for and protection of minorities. Ontario appeals, arguing that linguistic rights are exhaustively defined by the written text of the Constitution. As Montfort is not protected by the words of the Constitution, Ontario says that the Commission was free to alter its status. Montfort and the intervenors urge us to uphold the decision of the Divisional Court. They also rely on the quasi-constitutional protections of the *French Language Services Act*, R.S.O. 1990, c. F. 32 ("*F.L.S.A.*"), and say that the Divisional Court erred in rejecting their claim that Montfort is protected by s. 15 of the *Charter*.

II FACTS

(1) Hôpital Montfort

[3] Montfort is located in the eastern part of Ottawa-Carleton. Approximately 80% of Ottawa's francophone population lives east of the Rideau river. Montfort draws the most significant portion of its caseload from neighbourhoods in close proximity to the hospital. Russell County, a high-growth area with a population of 34,761, according to the 1991

census, has no hospital. The population relies entirely on Montfort and the Ottawa General Hospital for hospital services.

[4] Montfort is described in the reasons of the Divisional Court, at pp. 58-60, as follows:

> Hôpital Montfort was founded in 1953 through the efforts of leaders of the Franco-Ontarian community under the direction of a religious order of nuns, the Daughters of Wisdom. Unlike other hospitals in the Ottawa area which were English or designated bilingual, Montfort was a homogeneous francophone hospital. Although today it also provides bilingual services in English, its medical services and training are essentially francophone. Moreover, the hospital plays an important role in the Franco-Ontarian community as a whole. It is the *only* hospital in Ontario to provide a wide range of medical services and training in a truly francophone setting. In 1975 Montfort adopted an official policy regarding its francophone nature, based upon the following premises:
>
> (a) that its francophone character was its *raison d'être*;
>
> (b) that it was necessary to offer all hospital services in French; and
>
> (c) that it was necessary to offer a complete range of medical care, except for certain highly specialized services already available elsewhere in the region.
>
> When the Commission began its work in Ottawa-Carleton in July 1996, there were nine public hospitals providing services on 11 main sites. These included seven acute care hospitals, six of which maintained emergency departments. Hôpital Montfort was one of these six acute care hospitals.
>
> Montfort has a total bed capacity of 252 beds. However, as of 1995-96, 56 of these beds had been taken out of use. Montfort provides services … at the primary and secondary level … . Some of its principal programs include cardiology, surgery, pulmonary medicine, orthopaedics and obstetrics. It offers emergency care. … Although it does not provide services in certain specific highly specialized areas, Hôpital Montfort truly qualifies as a full service "general hospital" and is perceived as such by the community at large.

> Montfort is a unique health care institution in Ontario for a variety of reasons. First, it has a different history than other hospitals established in the eastern part of Ontario by various orders of nuns. Although all were originally francophone institutions, the others have since become either English hospitals (*e.g.*, Hotel Dieu in Kingston) or bilingual hospitals (*e.g.*, Ottawa General). Only Montfort continues as a francophone institution in Ottawa-Carleton.
>
> Although Montfort lost its paediatrics department in 1974, following the creation of the Children's Hospital of Eastern Ontario ("CHEO"), it continued to grow in size and to expand its range of services. It is significant –– both from the perspective of the Hospital's own view of its mandate, and in relation to the community's sense of that mandate –– that following the loss of its paediatrics specialty, Montfort re-emphasized its commitment to continue as a francophone institution, offering all levels of health care services in French and, as noted above, declaring its francophone character to be its very "*raison d'être*".
>
> In 1984, Montfort began offering bilingual services. Today 20 per cent of its patients are anglophone. However, the working language of Montfort was at all times and remains French. Over 95 per cent of its employees are capable of providing services in French. Thus, doctors, nurses, cafeteria employees, caretakers and others touching all aspects and areas of Montfort's services work in French. A person walking in the halls of Montfort hears the French language spoken as the language of choice. All internal communications –– verbal or written –– are in French. With rare exceptions all administrative and medical meetings take place in the French language and the minutes of such meetings are written in that language. Consultations, diagnoses, and communications with patients are in French.
>
> This is unique in Ottawa-Carleton and, indeed, in the province of Ontario.

[5] Some further brief description and elaboration on Montfort's services is in order. As indicated, Montfort is a community hospital with approximately 196 beds in use. It provides primary health care services (*i.e.*, care provided by a health care worker on a patient's first contact with the health care system, including emergency services), secondary care (*i.e.*, care provided by a specialist health care professional, such as a

general surgeon), and, according to the Commission's February 1997 report at p. 34, some tertiary level care (*i.e.*, care that requires highly specialized skills, technology, and support services). In addition, Montfort provides intensive care, treatment and referral services, and outpatient or clinical activities. In addition to cardiology, surgery, orthopaedics and obstetrics, another of its principal inpatient programs was psychiatry.

[6] Montfort also fills an important educational role. In conjunction with the University of Ottawa, Montfort offers a training program for health care providers who have chosen to be trained in French. Montfort currently accommodates 186 students in Health Sciences, including students in physiotherapy and occupational therapy, medical clerks and residents in family medicine. Many of the family physicians that admit patients requiring hospitalization to one of the family medicine beds at the hospital are actively involved in the family medicine training program for residents and undergraduate medical students. Once admitted, patients may require the services of a specialist or a surgeon who would also be involved with students and residents. The training program at Montfort has ramifications that go beyond Ottawa-Carleton and the neighbouring Eastern district. For example, a doctor trained at Montfort may serve the large francophone populations in the Northern Ontario communities of Hearst and Kapuskasing.

[7] The respondents emphasize that the institutional importance of Montfort to Ontario's francophone minority extends beyond the health care and educational needs of the francophone minority. Montfort, they say, is an institution that embodies and evokes the French presence in Ontario. It is asserted that the French speaking minority population is constantly faced with the threat of assimilation. The respondents led evidence, accepted by the Divisional Court, to show that a linguistic minority's institutions are essential to the survival and vitality of this community, not only for its practical functions, but also for the affirmation and expression of cultural identity and sense of belonging. Montfort, they insist, is such an institution.

(2) Mandate of the Health Services Restructuring Commission

[8] The *Ministry of Health Act*, R.S.O. 1990, c. M.26, s. 8, as amended by the *Savings and Restructuring Act, 1996*, S.O. 1996, c. 1, Sched. F, s. 1, provides as follows:

> **8.** (1) The Lieutenant Governor in Council may establish a body to be known in English as the Health Services Restructuring Commission and in French as Commission de restructuration des services de santé.
>
> …
>
> (8) The duties and powers assigned to the Commission under this or any other Act shall be duties and powers with respect to the development, establishment and maintenance of

> an effective and adequate health care system and the restructuring of health care services provided in Ontario communities **having regard to district health council reports for those communities**. [Emphasis added.]

[9] Thus, s. 8(8) of the *Ministry of Health Act* expressly indicates that any Commission set up according to the provision must exercise its duties and powers "having regard to district health council reports" for the community concerned.

[10] By regulation (O. Reg. 88/96) made on March 21, 1996, the government of Ontario set out the Commission's duties and powers referred to in s. 8(8) of the Act:[1]

> 1. (1) The following are the duties of the Commission:
>
> 1. To consider local hospital restructuring plans provided by the Ministry and such other information relevant to the plans as it deems appropriate.
>
> 2. To determine which local hospital restructuring plans provided by the Ministry shall be implemented and to vary or add to those plans if it considers it in the public interest to do so.
>
> 3. To determine the timing of the implementation of local hospital restructuring plans and the manner in which they are to be implemented.
>
> 4. To set guidelines respecting representations that may be made to the Commission by a hospital that has received notice under subsection 6 (5) of the *Public Hospitals Act* that the Commission intends to issue a direction that the hospital cease to operate or that it amalgamate with another hospital.
>
> 5. To give the Minister quarterly reports on the implementation of local hospital restructuring plans.
>
> 6. To advise the Minister where the Commission is of the opinion that a local hospital restructuring plan should be developed for a specified hospital or for two or more hospitals in a geographic area.
>
> 7. Where a hospital fails to carry out a direction issued by the Commission under section 6 of the *Public Hospitals Act*, to advise the Minister as to appropriate actions, including the appointment of investigators under section 8 of the *Public Hospitals Act* and of hospital supervisors under section 9 of that Act.

[1] The Regulation came into force on April 1, 1996. On April 29, 1999, O. Reg. 272/99 revoked O. Reg. 88/96 and provided for more restrictive advisory duties for the Commission.

(2) The guidelines established under paragraph 4 of subsection (1) shall set out the manner in which representations may be made and the procedure for making the representations.

(3) The Commission may exercise such powers as are necessary to carry out the duties of the Commission including the following powers:

1. To consult with providers of health care services and such other persons as the Commission considers necessary in order to determine,

   i. Which local hospital restructuring plans provided by the Ministry shall be implemented,

   ii. whether and in what manner to vary or add to a local hospital restructuring plan,

   iii. the timing of the implementation of a local hospital restructuring plan, and

   iv. the manner in which a local hospital restructuring plan is to be implemented.

2. **To exercise any power under section 6 or subsection 9 (10) of the *Public Hospitals Act* assigned to the Commission by regulation under that Act.**

3. To advise the Minister as to the revocation of a licence under section 15.1 of the *Private Hospitals Act.*

4. To advise the Minister on all matters relating to the development, establishment and maintenance of an effective and adequate health care system and the restructuring of health care services provided in Ontario communities.

[Emphasis added.]

[11] The *Public Hospitals Act*, R.S.O. 1990, c. P.40, s. 6, was re-enacted and amended in 1996 (S.O. 1996, c. 1, Sch. F, s. 6) to provide that "where the Minister considers it *in the public interest* to do so," the Minister (and the Commission in his place) is authorized to issue directions to public hospitals to "cease operating as a public hospital", to amalgamate with other hospitals, to "cease to provide specified services", to "increase or decrease the extent or volume of specified services", or to "provide specified services to a specified extent or volume" [emphasis added]. These amendments provided the Commission with the authority to issue broad "public interest" directions to public hospital boards. Section 6 provides in part:

6. (1) The Minister may direct the board of a hospital to cease operating as a public hospital on or before the date set

> out in the direction where the Minister considers it *in the public interest* to do so.
>
> (2) The Minister may direct the board of a hospital to do any of the following on or before the date set out in the direction where the Minister considers it *in the public interest* to do so:
>
> 1. To provide specified services to a specified extent or of a specified volume.
> 2. To cease to provide specified services.
> 3. To increase or decrease the extent or volume of specified services.
>
> (3) The Minister may direct the boards of two or more hospitals to take all necessary steps required for their amalgamation under section 113 of the *Corporations Act* on or before the date set out in the direction where the Minister considers it *in the public interest* to do so.
>
> …
>
> (7) The Minister may amend or revoke a direction made under this section where the Minister considers it *in the public interest* to do so.
>
> …
>
> [Emphasis added.]

[12] On March 29, 1996, the Ontario government by Order-in-Council established the Commission and appointed Dr. Duncan G. Sinclair as the Commission's Chair.

[13] The *Ministry of Health Act*, as amended by the *Savings and Restructuring Act*, specifically provided that at the end of the period for which the Commission was established (4 years), the appointments of its members were revoked and it would cease to perform any duties or to exercise any powers (s. 8(10)). This has happened and the Ministry of Health now exercises the powers formerly delegated to the Commission.

(3) The Commission's Process

[14] The process established by the Commission was to conduct an initial review, issue a notice of intention regarding its proposed directions, call for public input and consultation, issue a report and then issue its directions to implement the report's recommendations.

(a) The Commission's First Report

[15] The Commission's first report was issued in February 1997. The Commission ("HSRC") described its mandate and terms of reference as follows:

> **HSRC Mandate and Terms of Reference**
>
> Bearing in mind the magnitude of the task and the limited time and funds available, the HSRC will function in accordance with the following terms of reference:
>
> 1. To discharge its mandate, it will:
>
> - Make decisions on restructuring of hospitals, including the provincially operated psychiatric hospitals, by directing hospital closures, amalgamations, program transfers and any other actions considered necessary to implement hospital restructuring.
>
> - Make recommendations to the Minister of Health on how to improve the efficiency and effectiveness, including cost-effectiveness, of other elements of the health services system while maintaining or enhancing the quality of services provided.
>
> - Identify areas for reinvestment in communities that will lead to the development of a comprehensive, integrated community, district and regional health system.
>
> 2. The HSRC's work plan will be undertaken quickly, meeting a schedule to discharge its mandate within four years.
>
> 3. Options for change will be evaluated against three broad criteria:
>
> - maintenance or enhancement of quality of services;
>
> - maintenance or enhancement of accessibility to service, and;
>
> - affordability.

[16] It may be noted that the evaluation criteria did not include the maintenance or enhancement of the delivery of health care services in French.

[17] The report was divided into six sections plus the recommendations. Section I provided a regional and community profile of Ottawa-Carleton. Under this heading the Commission noted that based on 1991 census data the population of the Ottawa-Carleton region was 18.4% francophone. In neighbouring counties served by Ottawa-Carleton hospitals the francophone population was reported at 20.9%. (This figure is significantly lower than the stated figure of the Eastern District Health Council which puts the rate at 44%.) Many people who work in Ottawa live in Quebec. The report noted that the Western Quebec population in the Outaouais region were significant users of Ottawa hospital services. Among the community hospitals, Montfort was the community hospital used by the vast majority of Quebec residents. In terms of actual numbers, two teaching hospitals, Ottawa General and Ottawa Civic, had higher admissions from Quebec particularly for secondary and tertiary care. The report stated at p. 10 that:

> Issues of access to services respecting the cultural and linguistic requirements of this population is an important consideration in the reconfiguration of services in Ottawa-Carleton.

[18] Later in its report, however, the Commission added (at p. 35) that:

> [I]t is important to note that the estimates of Quebec utilization have no impact on the operating costs or savings as identified by the HSRC. Further, depending on the existing excess bed capacity in the system it is likely that there will be no capital costs implications associated with the utilization of health services by Quebec residents.

[19] Section II provided a broad overview of the current health care delivery system as follows:

Ottawa-Carleton Profile of Institutions

Facility	**Current Role**
Ottawa Civic	Acute Care: Adult Tertiary/ Teaching Hospital, includes the Ottawa Heart Institute and the Loeb Research Institute
Ottawa General Hospital	Acute Care: Adult Tertiary/ Teaching Hospital, includes the Eye Institute – designated as a French Language Facility

Children's Hospital of Eastern Ontario (CHEO)	Acute: Paediatric Teaching Hospital, with an emergency department
Queensway-Carleton Hospital	Acute Care: Community Hospital, with an emergency department
Riverside Hospital	Acute Care: Community Hospital, with an emergency department
Hôpital Montfort	Acute Care: Community Hospital, with an emergency department – designated as a French Language Facility
Salvation Army Grace Hospital	Acute Care: Community Hospital, no emergency
Royal Ottawa Health Care Group (ROHCG)	Specialty: Rehabilitation and Psychiatric (with emergency) Hospital (2 sites)
Sisters of Charity of Ottawa (SCO) [Saint Vincent Pavilion and Rehabilitation Centre]	Chronic Care: Multi-site facility for chronic care, chronic rehabilitation, palliative and respite care
Perley Rideau Veteran's Health Centre (PRVHC)	Long-Term Care: Merged facility on new site with role change to Multi-level long-term care facility
National Defence Medical Centre	Acute Care: Federal facility, no longer funded by the Ontario Ministry of Health (*Patient activity not included in acute care statistics for Ottawa-Carleton)*

[20] The report noted that all adult acute care hospitals, except the Royal Ottawa, have medical and surgical beds and offer services in a wide range of primary and secondary medical and surgical specialties. Adult acute care includes crisis and emergency intervention, assessment and short-term admissions, treatment, and referral services. The Civic Hospital and Queensway Carleton provide almost half the emergency services in Ottawa-Carleton. Highly specialized and tertiary services for adults tend to be concentrated at the two teaching hospitals, Ottawa Civic and Ottawa General. Of the community hospitals, Montfort appears to have the highest volume of outpatient or clinical activity.

[21] The report noted that Ottawa-Carleton has an Academic Health Sciences Centre supported by the University of Ottawa. Montfort's role as a teaching and training facility of health care providers in the French language was not mentioned nor was there recognition of its supporting clinical role to the University of Ottawa's School of Medicine programs for francophone health care providers.

[22] In describing the physical site of Montfort, the report noted that Montfort is in good condition although part of the buildings is not air conditioned. There are some deficiencies in the layout of medical records and the psychiatric unit; however, the report acknowledged at p. 19 that "[t]he hospital has a built-in expansion capability vertically, and there is ample area for horizontal expansion." Next to Ottawa General, Montfort ranked highest on the scale developed by the Commission for assessing facilities.

[23] At p. 17, under the heading "French Language Services", the report stated:

> The Montfort, General, Rehabilitation Centre and Saint-Vincent Pavilion are all designated under the French Language Services Act. Partial designation has been given to four other facilities for some of their programs: CHEO, Civic, Royal Ottawa Hospital (psychiatric rehabilitation) and Riverside (sexual assault program).

[24] The report did not recognize that Montfort is the only community hospital providing services in the French language on a full-time basis. The Ottawa General is a teaching hospital and although it is designated under the *F.L.S.A.*, it cannot offer service twenty-four hours a day, seven days a week in French. The Rehabilitation Centre and Saint Vincent-Pavilion are specialized facilities that do not offer general health care. The other centres have only partial designation.

[25] Section III of the report contained a summary of the Ottawa-Carleton Regional District Health Council's report and recommendations to the Commission. Among the key recommendations of the Health Council was one envisaging merger of the Ottawa Civic and Ottawa General hospitals, creating a single hospital on two sites. A further recommendation (reproduced at p. 24 of the Commission's report) emphasized the need to:

> Recognize and encourage the primary and distinctive functions of the Montfort Hospital as a francophone hospital fulfilling regional, extra-regional and provincial functions – including teaching components.

[26] It is worth noting that in a later portion of its report dealing with mental health services, the Commission cited with approval the Health Council's vision for mental health services delivery in Ottawa-Carleton; in describing this vision as being "comparable" to its own, the Commission quoted (at p. 44) a passage from the Health Council's earlier report containing the following statement:

> Service delivery will be considered on the basis that services in French, comparable in quality and accessibility to those offered in English, should be planned and delivered in order

> to conform to the language policy of the District Health Council and the requirements of an area designated under the *French Language Services Act*.

[27] Section IV of the report outlined the decision criteria and assessment of options considered by the Commission during its review process. The Commission determined at p. 35 that there was a significant variation between the number of beds currently in operation and the number of beds required, giving rise to "a significant opportunity to restructure hospital services in Ottawa". The report recommended that there be one community/tertiary hospital (a merged Civic/General hospital including the Heart Institute), one community hospital (Carleton-Queensway), one paediatric hospital (CHEO), one chronic care/rehabilitation centre (Sisters of Charity of Ottawa sites), and one long-term mental health centre (Royal Ottawa). The Montfort, Riverside, and Grace hospitals were to be closed.

[28] Section V described the capital investment requirements of the Commission.

[29] Section VI summarized the decisions and intended directions reached by the Commission. Under the heading "Siting of Clinical Activity" the Commission stated, at p. 80:

> The recommended option for the siting of acute services is a four site scenario, utilizing the existing capacity in the Ottawa General, Ottawa Civic, Children's Hospital of Eastern Ontario, and the Queensway-Carleton Hospital. This option also means the closing of the following sites for acute care: Riverside Hospital, Montfort Hospital and the Salvation Army Grace Hospital.

[30] Thus, with the exception of Queensway-Carleton, a non-designated facility under the *F.L.S.A.*, all community hospitals were to be closed. The Ottawa General, Ottawa Civic, Riverside and Montfort were to be amalgamated. Montfort's clinical activity was to be relocated to the Ottawa General site (acute) and its longer term mental health care to the Royal Ottawa.

[31] Under the heading "Additional Planning and Research", the Commission indicated at p. 82 that it would be "looking at the feasibility of utilizing the Riverside and the Montfort facilities as future sites for long-term care and chronic care."

[32] Despite the fact that the Commission's legislative mandate under the *Ministry of Health Act* (as amended by the *Savings and Restructuring Act*) required it to have regard to district health council reports for the affected community, the Commission gave no

explanation for ignoring the Ottawa-Carleton Health Council's recommendations with respect to Montfort's unique role as a clinical teaching hospital and in the provision of health care services to the francophone population, not only in the region but elsewhere in the province.

(b) Community Reaction to the First Report

[33] The Commission's initial notice of intention and its subsequent directions were met with a storm of protest. Extensive efforts were made to educate the Commission concerning the effect that its recommendations would have on the francophone population not only in Ottawa-Carleton, but also in the five neighbouring counties of eastern Ontario. An extract from the April 1997 response of the District Health Council of Eastern Ontario to the Commission is set out below:

> **French Health Services**
>
> As identified in the HSRC's report (table on page 11), French is the mother tongue of 44% of the population of the five counties of Eastern Ontario. It is the majority language in Prescott-Russell counties at 76% and 67% respectively and a significant minority language in Glengarry (38%) and Stormont (30%). Within the District Health Council of Eastern Ontario area, the Counties of Prescott, Russell, Stormont and Glengarry, the City of Cornwall and the Township of Winchester in Dundas County are designated under the *French Language Services (FLS) Act*. Consequently, planning and development of health services must be consistent with the provisions of the Act.
>
> **a) Respecting Culture and Language**
>
> While the Report mentions community representation and regard for demographic, linguistic and cultural characteristics of the Ottawa-Carleton region as well as identifying the facilities which have complete and partial designations under the *FLS Act*, it does not fully address the objectives of the *Act*. The *FLS Act* is designed to help preserve the French language and culture in Ontario well into the future. It also acknowledges the desire of the Francophone community to have the long-standing contribution of their language and culture recognized. Health services in French are essential to the development of the Francophone community and to the recognition of its full and equal partnership. A community becomes assimilated when its language and culture are invisible to its own members and to society in general.

Recommendation: That the HSRC take into account the need to preserve l'Hôpital Montfort since it is the only hospital whose language of operation is French that serves the Francophone communities of Ottawa-Carleton and of Russell County.

b) Availability of French-Speaking Health Professionals

The permanency and quality of health services in French is determined by the availability of French-speaking health professionals. Recognizing this, the government of Ontario set up the "*Ontario-Quebec Health Study Program*" to increase the number of French-speaking health professionals available to provide health services in French. By applying to participate in this program, French-speaking Ontarians increase their chances of being admitted to limited-enrolment programs in health studies in Quebec, which are not available in French in Ontario. In recent years, the number of Ontario colleges and universities offering health studies in French has also increased, encouraging even more French-speaking students in Ontario to pursue careers in the health field.

Unfortunately, for the clinical component, very few hospitals in Ontario are able to offer an environment in which French-speaking students can actually work in French. If this kind of work environment is not available in Ontario, the above initiatives seem futile. Such a situation serves to perpetuate Ontario's dependence on outside sources to provide training in French.

Recommendation: That the HSRC take into account the need to maintain l'Hôpital Montfort for its unique role in providing a milieu where French-speaking students pursuing health studies in French can obtain training in French in Ontario.

[At pp. 6-8, emphasis in original].

[34] In addition to the Eastern Ontario District Health Council's response, the Ottawa-Carleton Regional District Health Council, the University of Ottawa Faculty of Medicine and Montfort filed responses to the Commission's recommendations. They all stressed that if the Commission's recommendations were implemented, access to health services in French would be more difficult and that the training of health care professionals in French would be imperiled. They recommended that Montfort continue to provide its full range of services.

[35] The Ottawa-Carleton Regional District Health Council's response again described Montfort as unique and recommended that Montfort remain open because it provided an environment in which francophone clients and their families could have access at all times to employees offering services in French. The Council also stressed the important role of Montfort in the training of French-speaking medical personnel.

[36] The Council also noted that the Commission had recommended the closing of the psychiatric hospital at Brockville and the transfer of long-term psychiatric patients from Brockville to the Royal Ottawa Hospital. The Council pointed out that there was no guarantee that services would be offered in French to francophone psychiatric patients at Royal Ottawa because it was not designated under the *F.L.S.A.* and that at least one unit would have to be designated under the *Act*.

(c) The Commission's Final Report

[37] The "final" report of the Commission was issued in August 1997. A summary of "Key Directions, Advice and Notices" (p. 5) was included in the Introduction. Items 2 and 3 concerned Montfort. They stated:

> 2. The Hôpital Montfort will be maintained with its separate governance, representative of the community served:
>
> - it will provide ambulatory care, day surgery, low risk obstetrics, acute and longer-term mental health services and long-term care services.
> - an Ottawa-Carleton French Language Health Services Network will be created under the leadership of Hôpital Montfort to facilitate the delivery of French language services in the other hospitals and agencies.
>
> 3. The Hôpital Montfort, and Sisters of Charity of Ottawa will be required to maintain their designation; and, Children's Hospital of Eastern Ontario (CHEO), and The Ottawa Hospital/L'Hôpital d'Ottawa (Alta Vista Site, Heart Institute and The Rehabilitation Centre) will be required to obtain designation for the provision of French language health services.

[38] The second section of the report was entitled "French Language Health Services" and provided as follows, at pp. 8-9:

> The HSRC's intention in amalgamating two fully designated French language providers, the Hôpital Montfort and Ottawa General Hospital, was to provide a greater critical mass and

clinical coherence of services available in the French language. The governance structures of the amalgamated hospital and other facilities would be established to reflect the linguistic, cultural, socio-economic and demographic mix of the community.

Principal Issues in the Responses to the Notices

- Closure of Hôpital Montfort:
  - limits access to French language services
  - seen as an assault on minority linguistic rights
  - results in dilution and assimilation of francophone health care professionals
  - removes a French milieu for training medical and health professionals
- Merging of two bilingual facilities [Montfort and Ottawa General] with two unilingual facilities [Ottawa Civic and Riverside] weakens French language services
- Needs of French-speaking long-term care and mental health patients not fully considered
- Lack of consideration given to the Prescott and Russell utilization of Hôpital Montfort

The HSRC's Deliberations

Many in the community were concerned that the proposed closure of Hôpital Montfort would significantly reduce the accessibility of services offered in French. In drafting the Notices issued in February, the HSRC considered the issue of access to French language services. The HSRC supports completely the right of individuals to receive services in the French language and is directed in that support by the *French Language Services Act*.

The HSRC believes access to French language services depends on several factors:

- designation of facilities and programs;
- proximity of service providers to patients; and
- French language milieu for health education.

Designation of Facilities and Programs

According to Section 5.1 of the *French Language Services Act*:

> "A person has the right to communicate in French with, and to receive available services in French from, any head or central office of a government agency or institution of the Legislature that is designated by regulations, (for example: hospitals, long-term care facilities, community health centres, mental health programs, addiction services, etc.) and has the same right in respect of any other office of such agency or institution that is located in or serves an area designated in the Schedule."

The process by which a hospital achieves a mandate to offer services in the French language is called "designation" … .

According to the Ministry of Health's French Language Health Services Designation Plan, to obtain designation the agency must demonstrate that all the services which it intends to be designated are available in French on a permanent basis. The plan must prove the availability and permanency of these services.

…

Although hospitals must meet certain criteria to obtain either full or partial designation, the levels of services, whether primary, secondary or tertiary, offered in French may vary greatly among programs and facilities. For example the language for conducting business at the Hôpital Montfort is predominantly French.

[39] Regarding its decision to reverse its proposed direction to close Montfort, the Commission stated at p. 10 that "[o]ne of the most compelling arguments heard by the [Commission] in support of retaining Hôpital Montfort as a separate hospital was the view that in order to promote the development of French language health professionals there should be an environment where the working language is predominantly French." The Commission acknowledged at pp. 10-11 that:

> Closing Montfort would have serious consequences on the quality of French-language training programs at both college and university levels since it is the only hospital where

> trainees are guaranteed to consistently receive all aspects of training in French including instruction, charting and consultations. *In a bilingual setting, some aspects will not be available in French at all times*. [Emphasis added.]

[40] The Commission elaborated on the education and training of French health care providers as follows, at pp. 71-72:

> ***French Language Medical Education and Education of Francophone Health Professionals***
>
> Medical students and postgraduate clinical trainees can no longer undertake their medical studies in Quebec. To meet their education needs, Ottawa based institutions have developed the capacity to provide education in both French and bilingual settings.
>
> The post-secondary educational institutions and the institutions affiliated with them have a particular responsibility and capacity to educate a range of health professionals in the French language. These professionals go on to rewarding health care careers, not only in local hospitals, but in northern and eastern communities in Ontario where the predominant language is French. The University of Ottawa has an essential role to educate francophone health professionals. The University is the only Ontario institution capable of training francophone audiologists, speech pathologists, physiotherapists, occupational therapists, physicians (family physicians and specialists), nurse practitioners, nurses trained at the master's level who provide advanced nursing practice, and clinical psychologists at the Ph.D. level. The University and its affiliated institutions can also offer a bilingual setting for the education of bilingual medical specialists.
>
> To attain the educational objectives assigned by the University, francophone medical students must secure a good portion of their education and training in a francophone clinical setting. To provide medical and other health professional programs in French, the University must not only recruit students who are fluent in both official languages, it must have a critical mass of clinician-educators who will work closely with students in multidisciplinary teams in a French milieu. According to the University, the environment necessary for clinical teaching should include:

- francophone patients with a broad range of diseases;
- exposure to inpatient and outpatient programs;
- *a francophone community hospital setting;*
- a francophone multidisciplinary team consisting of a staff physician, resident, nurse, social worker, physiotherapist, etc.;
- a francophone work setting including French-language charting and communications;
- francophone support services such as laboratory and diagnostics;
- administrative services in French;
- sufficient infrastructure (e.g., meeting rooms, computers, etc.); and
- medical texts in French

In addition, it requires students who, prior to entering their health professional programs, are fluent in the French language. It also requires the University and its partner hospital and other institutions to establish and maintain 'streams' or sections of the curriculum that permit students to reinforce their language skills throughout their undergraduate and postgraduate programs, whether in medicine, or others of the health professions. It requires of the institution as well as its students a major and continuing commitment to the education of graduates who will practice their professions in French and bilingual environments.

The mission statement of the University of Ottawa contains, among other provisions, the following:

> to maintain and develop the widest range of teaching and research programs of national and international standing in both French and English (and) to exercise leadership and development of teaching, research and professional programs designed specifically for the French-speaking population of Ontario.

In response to the February report, the University of Ottawa acknowledged that it has obligations to the communities of eastern and northeastern Ontario. It also acknowledged the obligation to ensure that health services in bilingual

> institutions are delivered in a humane and caring manner which reflects the highest possible standards.
>
> To meet the special needs of francophone medical students and postgraduate clinical trainees, the University recruited a Vice Dean to head up an Office of Francophone Affairs, developed new curricula with an emphasis on small group teaching and problem based learning, made arrangements with Hôpital Montfort to provide a French milieu for training, and finalized a five-year action plan for a francophone medical program.
>
> The University also established a post-graduate residency program in family medicine for francophone graduates, and actively recruits francophone students and staff …
>
> [Emphasis added.]

[41] The Commission's (HSRC's) August report, however, did significantly affect Montfort's program configuration. The following extract from pp. 14-15 of the report dealt with the programs offered by Montfort and the proposal to change them:

> The largest inpatient program of the hospital in 1995/96 was psychiatry. The hospital provides both acute and longer-term mental health care. The HSRC supports the need to continue to provide French language mental health services at the Hôpital Montfort in a French language environment, to serve the needs of the unilingual francophone.
>
> The Hôpital Montfort's second largest inpatient program is cardiology. To ensure greater integration of cardiology and cardiac services, the HSRC directs that the program be moved to the University of Ottawa Heart Institute and that the Institute become fully designated under the French Language Services Act as soon as possible. The Heart Institute, with its critical mass and concentration of expertise, will be able to provide patients with a full range of cardiac care services. Concentrating inpatient services on one site will also reduce transfers and expedite surgical intervention if required.
>
> The Hôpital Montfort will continue to provide outpatient cardiology services. To improve communications between the facilities, the Heart Institute and the Hôpital Montfort should explore effective ways to share information, particularly diagnostic and other patient care information.

> Low risk obstetrics is another program of sufficient size to be maintained and enhanced on the Montfort site. …
>
> The hospital's day care and primary care ambulatory services will also be preserved. … The HSRC will direct Hôpital Montfort to seek an affiliation with The Ottawa Hospital/ L'Hôpital d'Ottawa to provide support for the services which are not available on a 24 hour basis at the Hôpital Montfort and clinical back up for the programs it does provide (*e.g.* day surgery and obstetrics).
>
> All other inpatient activity at the Hôpital Montfort will be transferred to the Alta Vista site of The Ottawa Hospital/ L'Hôpital d'Ottawa, where the programs can be integrated with those currently provided at the site.
>
> The HSRC strongly endorses Hôpital Montfort's role as a teaching facility providing a French milieu for the education of physicians and other health professionals and the training of resident physicians in family medicine and other health care professionals.

[42] With respect to Montfort's role as a teaching facility, the Commission at pp. 73-74 directed the creation of an Academic Coordinating Body composed of the Ottawa teaching hospitals (General and Civic) and the University of Ottawa, with the participation of the French Language Health Services Network, a network that the Commission directed Montfort to establish and lead. The Academic Coordinating Body was to be responsible for "ensuring health professionals have access to opportunities for education and training in French." The report further noted, at p. 74:

> While medical residents and other professionals will have the opportunity to be educated and to train in a primary care environment in the ambulatory setting at Hôpital Montfort, they will also require training in other designated facilities. The University of Ottawa, the French Language Health Services Network and the Academic Coordinating Body will all be responsible for coordinating this training.

[43] The Commission therefore recognized that, as a result of its direction, the education of health care professionals in French would be incomplete at Montfort because it was no longer a community hospital.

[44] To summarize, Montfort would go from receiving funds for a 196-bed general community hospital to a hospital receiving funds for 51 mental health beds and 15 low-risk obstetrical beds. It would no longer provide emergency, intensive care, and general

surgery services associated with short-term hospital admission. It would also no longer offer short-term admission and treatment for a variety of ailments in family medicine or internal medicine. Cardiology, its second largest program, would be transferred to the General campus of the amalgamated Ottawa Hospital and the Heart Centre there was given a direction to obtain designation under the *F.L.S.A.* It would offer "urgent care", a form of walk-in clinic and some day surgery, low risk obstetrical beds, and psychiatric services.

[45] In short, Montfort would still cease to function as a community hospital despite the recommendations of both the Ottawa-Carleton and Eastern Ontario Health Councils that Montfort continue to operate as a community hospital to meet the needs of the francophone community. Although the University of Ottawa stated that the environment necessary for clinical teaching of health care professionals included a francophone community hospital setting, the Commission did not restore the services that it had directed be removed and that made Montfort a general community hospital. Although the Commission professed to strongly endorse Montfort's role as a teaching facility for physicians in family medicine, it did not restore the family medicine beds it had directed be taken away from Montfort. The Commission gave no explanation for the gap between its stated intentions and its directions.

[46] In September 1997, the Ottawa-Carleton Regional District Health Council made a further representation to the Commission. It noted that the opening of long-term care psychiatric beds at Montfort would fill a gap in services in French. The Council asked for clarification of the mandate of the French Language Health Services Network. It expressed concern that the diminished role of Montfort would entirely eliminate the possibility of training certain categories of professionals in French (examples given were general nurses and druggists). It recommended that Montfort be assigned a sufficient number of acute care beds in internal and family medicine to permit it to maintain the critical mass of patients it needed to offer a clinical education. It further recommended that the Commission give the Working Group charged with implementing the Directions a mandate that clearly included responsibility for the provision of health care services in French and that the Commission oversee a plan that clearly defined the linguistic requirements for all positions in hospitals designated bilingual. Additional funds for the costs of providing services in both official languages were requested on an ongoing permanent basis for institutions designated under the *F.L.S.A.* Finally, the Council recommended that, to satisfy the requirements of the *F.L.S.A.*, no service or program be transferred from Montfort until the Council, through its French Language Services Committee, had confirmed that the transferee institution satisfied the requirements of the *F.L.S.A.*

[47] In response to this and further submissions, the Commission in July 1998 directed that 22 sub-acute beds be allocated to Montfort. Sub-acute care refers to care for a

patient who does not require acute care services but is not yet ready for discharge to his or her home and community. Montfort would then have a total of 88 beds.

[48] In April 1998, an interim committee for the establishment of the French Language Services Network submitted a proposal and preliminary budget to the Ministry of Health. The Ministry responded in December and provided funding for only one year but indicated funding could be made available "for specific activities".

[49] In February 1999, the Commission sent a letter to Ms. Michelle de Courville Nicol, the president of Montfort's board of directors, responding to submissions that it had not considered Montfort's larger institutional role as an agent for the preservation of the language and culture of Franco-Ontarians and that a francophone (as opposed to bilingual) milieu was essential in this regard. The letter written by the Commission's president, Dr. Duncan Sinclair, stated in part:

> Debate of this belief is not within the purview of the Health Services Restructuring Commission. Current provincial policy is specified in the *French Languages Services Act*, which provides for hospitals offering services in the French language to be designated bilingual.

[50] Montfort and the individual applicants then brought an application before the Divisional Court to set aside the directions of the Commission.

[51] After the applicants began proceedings, the Restructuring Co-ordination Task Force for Ottawa-Carleton forwarded a proposal to the Commission regarding Montfort's academic service requirements and recommending the siting of 50 acute care beds at the hospital. The proposal caused the Commission to agree to review further information and to assist in the process. Both sides jointly retained two planners to report on the proposal. The Commission ceased to exist by regulation before the matter was heard by the Divisional Court and the court was not provided with the Commission's views on the additional planning reports.

III DECISION OF THE DIVISIONAL COURT

[52] In its reasons quashing the directions of the Commission, the Divisional Court made three important findings of fact. First, the Divisional Court found that the effect of the Commission's directions was to reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region, a region designated as bilingual under the *F.L.S.A.* Secondly, the Divisional Court found that the Commission's directives affected the training program for doctors in the French language and placed insurmountable obstacles on the ability of medical personnel, particularly

doctors, to become trained to adequately serve people in the French language. The Divisional Court found, thirdly, that the Commission saw the importance of continued French language medical services only in terms of the provision of bilingual services, but did not evaluate the importance and need for a truly francophone institution or consider the broader institutional role played by Montfort in helping to protect the francophone population from assimilation.

[53] Montfort made three legal submissions before the Divisional Court. First, Montfort contended that the directions issued respecting Montfort violated s. 15 of the *Charter*. The Divisional Court dismissed this submission, holding that any differential treatment was not based upon the analogous grounds enumerated in s. 15. As we have indicated, Montfort has cross-appealed this portion of the Divisional Court's judgment.

[54] Second, Montfort submitted that the Commission's directions should be invalidated on administrative law principles because they were patently unreasonable. The Divisional Court stressed that its role was a very limited one. It was only to decide whether the Commission acted according to law in arriving at its decision. The Divisional Court rejected the submission that, apart from the constitutional grounds, the Commission's directions were "patently unreasonable" or "clearly irrational", the test the parties agreed was applicable. Montfort has not cross-appealed this portion of the Divisional Court's judgment.

[55] Third, and most significantly, Montfort argued that the Commission's directions should be set aside because they violated one of the fundamental organizing principles of the Constitution, the principle of respect for and protection of minorities – in this case, a minority belonging to one of the country's founding cultures. The Divisional Court accepted this submission and quashed the directions. The Court found at p. 70 that Montfort's designation under the *F.L.S.A.* gave the francophone community a legislatively recognized right to receive health services in "a truly francophone environment", a right that included the facilities necessary for the education and training of health care professionals in French. The essence of the Divisional Court's decision is found in its conclusion at pp. 83- 84 as follows:

> Directions which replace a wide variety of truly francophone medical services and training at Montfort with services and training elsewhere in a bilingual setting – however well those bilingual facilities may appear to work in any given case – fail to conform to the principle underlying our constitution which calls for the protection of francophone minority rights. This is the flaw in the Commission's deliberations and in the directions emanating from them.
>
> …

> Given the constitutional mandate for the protection and respect of minority rights – an 'independent principle underlying our constitution', a 'powerful normative force' – it was not open to the Commission to proceed on a 'restructured health services' mandate only, and to ignore the broader institutional role played by Hôpital Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation. We find this is what the Commission did. Accordingly, its directions cannot stand.

Ontario appeals this portion of the judgment.

IV ISSUES

[56] Ontario submits that the Divisional Court erred in making certain crucial factual findings. Ontario also contends that the Divisional Court erred in law in finding that the status of Montfort was constitutionally protected. Montfort cross-appeals the dismissal of the claim that the Commission's directions violate s. 15 of the *Charter* and urges this court to adopt the reasoning of the Divisional Court with respect to the unwritten principles of the Constitution. Montfort and the interveners also rely on s. 16(3) of the *Charter* and on the *F.L.S.A*.

[57] The issues may be summarized as follows:

(1) Did the Divisional Court err in its factual findings?

(2) Does s. 16(3) of the *Charter* protect the status of Montfort as a francophone institution?

(3) Do the Commission's directions infringe s. 15 of the *Charter*?

(4) What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

(5) Do the Commission's directions violate the *French Language Services Act*?

(6) Are the Commission's directions reviewable pursuant to the unwritten constitutional principle of respect for and protection of minorities?

V ANALYSIS

Part I: Factual Issues

Issue 1: Did the Divisional Court err in its factual findings?

[58] Ontario argues that the Divisional Court erred in making certain crucial factual findings. We note at the outset that Montfort successfully moved to strike from the notice of appeal certain grounds of appeal related to the Divisional Court's factual findings. However, in making that order, Charron J.A. noted in her endorsement that "the extent to which [the remaining grounds of appeal] … require a consideration of the evidentiary basis will be a matter for the panel to determine." Appellate courts are often required to consider legislative or social facts which form the basis for constitutional arguments: see *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at 286-289 per La Forest J. Accordingly, we are prepared to consider Ontario's argument that there is an insufficient basis for the conclusion reached by the Divisional Court.

(a) Reduction in availability of health care services in French

[59] Ontario submits that the Commission's directions ensured that those health care services that would no longer be available at Montfort would continue to be available in French at other health care institutions in the region. These institutions were either designated as bilingual or ordered to become bilingual. This issue can be disposed of summarily.

[60] Montfort is the only hospital in Ontario that can guarantee continuous access to a broad range of primary and secondary health care services in French. Other health care institutions in the Ottawa-Carleton region cannot do so. While the Ottawa General is designated under the *F.L.S.A.*, the Ottawa Civic, with which it is merged, is only partially designated. The Commission ordered the amalgamated hospital to attain designation under the *F.L.S.A.* The Heart Institute, now part of the merged Ottawa Hospital and to which the Commission ordered Montfort's cardiology programs transferred, does not have any designation under the *F.L.S.A.* It too was ordered to attain designation. Even at the Ottawa General, a designated centre under the *F.L.S.A.*, health care services are not available in French on a full-time basis in all areas. The Commission's August 1997 report acknowledged that the quality of services in French offered by designated health care providers other than Montfort varied dramatically despite the fact of designation under the *F.L.S.A.*

[61] Ontario's submission that health care services to the francophone population would not be reduced by the implementation of the Commission's directions ignores reality. Ontario submitted that the situation would gradually improve with the

implementation of the Commission's directions to the transferee health care providers and that patience was required. Good intentions are not a substitution for fact. Four years after the Commission's recommendations, the health care providers directed by the Commission to become designated as offering bilingual services have not yet achieved that designation and may never do so.

[62] The Divisional Court's finding that the Commission's directions for restructuring Montfort would reduce the availability of health care services in French to the francophone population in the Ottawa-Carleton region cannot be disturbed. Further, the evidence also establishes that Montfort offers significant services outside the Ottawa-Carleton region to the outlying francophone rural communities of eastern Ontario for whom it is the closest major hospital. The ability of these communities to receive the present range of health care services in French would also be adversely affected if the Commission's directives were implemented.

(b) The training of health care professionals would be jeopardized

[63] The second factual finding of the Divisional Court challenged by Ontario is that Montfort's role as the only centre in Ontario that trains health care professionals to serve people in French would be jeopardized by the Commission's directions. The Divisional Court stated at pp. 60-61 of its reasons:

> For many years now, Montfort has educated health care professionals in many different fields. An M.D. program was established in association with the University of Ottawa. More recently, a specialist program in family medicine was put in place. Montfort now offers the only French language family medicine residency outside the province of Quebec. The program has received high praise from the Accreditation team Residency Program in Family Medicine…We find that such a totally French program, which is invaluable in assuring that the francophone population is adequately served in the French language, will face insurmountable obstacles in a bilingual institution.

[64] This finding is supported by several sources. Two of them are Dean Walker, the Dean of the Faculty of Medicine at the University of Ottawa, and the Restructuring Coordination Task Force for Ottawa-Carleton. They are concerned that the Commission's directions removing emergency services, inpatient surgical activity and the acute care beds needed to support these services mean that Montfort will no longer be able to offer many of the rotations required for family medicine residency. Dr. Frenette, the expert from the Faculty of Medicine at the University of Laval consulted by the Restructuring Coordination Task Force, estimated (supported by Dean Walker) that 50

acute care beds were required for a sufficient educational exposure to common primary and secondary diagnoses. Without a sufficient number of acute care beds, other health care professionals would no longer be interested in being trained in French at Montfort because there would not be a large enough clientele to attract their services.

[65] Ontario presented evidence from Dr. Ruth Wilson, Head of the Department of Family Medicine at Queen's University, that reconfiguration of Montfort in accordance with the Commision's directions would enable Montfort to continue to provide an appropriate setting for training family medicine residents. Dr. Nick Busing, the Chair of the Department of Family Medicine at the University of Ottawa, filed an affidavit in response disagreeing.

[66] Ontario submits that the Divisional Court misconstrued Dr. Wilson's evidence. Dr. Wilson was of the opinion that, with proper monitoring, Montfort would continue to provide an appropriate setting for family medicine residents to complete the same number of rotations they currently do, namely, six of seven. The Divisional Court indicated it was aware of her opinion that the training program would continue to function as before. The Court however stated at p. 64 that "she [Dr. Wilson] was concerned about the removal of services and conceded that whether there would be a sufficient variety of conditions and of patients was a matter that would have to be monitored." This sentence is in reference to the fact that Dr. Wilson's opinion was qualified by the words "with proper monitoring". The impugned sentence does not indicate that the Divisional Court misconstrued her evidence but only that her evidence was given with a qualification that, in the Court's opinion, was a very important one.

[67] The Divisional Court was entitled to prefer the evidence submitted by the respondents over that put forward by Ontario. We do not agree that, in doing so, the Court placed undue emphasis on speculative as opposed to demonstrable concerns. Indeed, the Commission's August 1997 report provides further support for the Divisional Court's finding. It will be recalled that in that report, the Commission noted that medical residents and other professionals would "also require training in other designated facilities" in addition to the primary care environment at Montfort. The Commission itself recognized that Montfort would no longer be able to fulfill its function of training health care professionals in the French language because it would no longer operate as a community hospital offering secondary services. Outside of Montfort, clinical training is only offered in English. The Commission left it to the University and the Academic Coordinating Body, with input from the French Language Health Services Network, to resolve the problem. In other words, there would be a void unless these bodies could come up with a solution themselves.

[68] The Divisional Court's finding that implementation of the Commission's directions would jeopardize the entire program of training doctors in French, as well as the training of many other health care professionals, is amply supported by the evidence.

(c) Montfort's broader institutional role

[69] The Divisional Court held at p. 76 that the fact that adequate, existing health services and medical training in a truly francophone environment would be taken away would have "a significant a negative impact on the continuing vitality of that community, its language and its culture." In coming to its conclusion, the Court relied on the evidence of Drs. Raymond Breton and Roger Bernard, two sociologists with expertise in social trends affecting the existence and viability of minority communities. Their evidence was that although hospitals are not institutions of the most important order to a culture, they are nevertheless "very important in the network of institutions of a minority culture" and serve as a means of expressing and affirming cultural identity. Ontario called no evidence in this regard.

[70] Ontario submits that hospitals are not institutions that prevent assimilation because people do not frequent them regularly for lengthy intervals. Ontario submits that the experts' analyses of Montfort's broader institutional role is abstract, highly speculative, not firmly rooted in fact, and inextricably linked to the language of politics. As a result, Ontario submits that the court erred in accepting their opinions.

[71] In our opinion, the Divisional Court did not err in its consideration or appreciation of the evidence of Drs. Breton and Bernard. We agree that Montfort has a broader institutional role than the provision of health care services. Apart from fulfilling the additional practical function of medical training, Montfort's larger institutional role includes maintaining the French language, transmitting francophone culture, and fostering solidarity in the Franco-Ontarian minority.

[72] Ontario argues that the Commission did in fact take into consideration Montfort's larger institutional role in issuing its directions and that this was all the Commission was obliged to do. We have already referred to the letter written by Dr. Sinclair, the president of the Commission, dated February 22, 1999, and addressed to Ms. de Courville Nicol, the president of the board of directors of Montfort. The Divisional Court relied on that letter at p. 75 of its reasons stating:

> In that letter, Dr. Sinclair admitted the Commission had not addressed the question of the necessity for homogeneous institutions for a linguistic minority. He took the position that such a question fell outside the mandate of the Commission…

We agree that this is the effect of Dr. Sinclair's letter.

[73] Dr. Sinclair was correct that the Commission's mandate made no mention of Montfort's institutional role (an important part of which comprised training for healthcare providers in the French language). The Commission was, however, specifically mandated to have regard to District Health Council reports. These reports were sensitive to the importance of Montfort as an institution and recommended that Montfort continue to function as a community hospital. The Commission's original directions in February 1997 completely disregarded the Ottawa-Carleton District Health Council's recommendations with respect to Montfort. The Commission's subsequent report and directions reflect an attempt to create a patchwork solution in response to further submissions from the Ottawa-Carleton and Eastern District Health Councils. No reasons were ever given by the Commission for refusing to follow the recommendations of the District Health Councils.

[74] As we have indicated at the outset of these reasons, the Commission also had the authority, incorporated by reference to the relevant sections under the *Public Hospitals Act*, to issue any direction relating to a public hospital it considered to be in the public interest. The preservation and promotion of the French language in regard to community health care by the only francophone institution performing this role was part of the public interest to which the Commission ought to have had regard. The Commission should also have had regard to the public interest raised by the fact that Montfort's institutional role had province-wide implications that went beyond the local health care concerns of Ottawa-Carleton.

[75] The Divisional Court did not err in its finding of fact concerning the importance of the broader institutional role played by Montfort and the adverse impact of the Commission's directions on that role. The Commission appears to have been unaware of Montfort's broader institutional role when it issued its first report, particularly its teaching role; and as we have noted, the Commission took a limited view of its mandate throughout.

[76] Accordingly, we would dismiss Ontario's challenge to the three findings of fact made by the Divisional Court.

Part II: Legal Issues

Language Rights: The Constitution Act, 1867 and the Canadian Charter of Rights and Freedoms

[77] The *Constitution Act, 1867* contains specific language rights, as does the *Canadian Charter of Rights and Freedoms*. The Constitution's specific language rights are not directly at issue in this appeal. They do, however, form the background against

which Montfort's claims must be assessed. Our discussion of the issues we are called to decide will be facilitated by a brief consideration of these provisions.

The Constitution Act, 1867

[78] Section 133 of the *Constitution Act, 1867*, guarantees the right to use both English and French in the Parliament of Canada and in Quebec's Legislature, as well as in the courts of both Quebec and Canada.

[79] The *Constitution Act, 1867* affirms the protection of minorities by including, as the Supreme Court of Canada explained in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 ("*Secession Reference*") at 242, "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).

[80] The *Constitution Act, 1867* also contains in s. 93 important education guarantees for the Catholic minority in Ontario and the Protestant minority in Québec, guarantees that were replicated for religious minorities in several provinces that joined Confederation after 1867.

[81] The protections accorded linguistic and religious minorities are an essential feature of the original 1867 Constitution without which Confederation would not have occurred. In *Re The Regulation and Control of Aeronautics in Canada*, [1932] A.C. 54 (J.C.P.C.) at 70, (a passage quoted by the Supreme Court of Canada in *Reference re Authority of Parliament in Relation to the Upper House*, [1980] 1 S.C.R. 54 at 71) Lord Sankey L.C. observed:

> [I]t is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected.

[82] The Supreme Court of Canada explained in the *Secession Reference*, *supra*, at p. 261 that the protection of religious minorities and the fear of assimilation was a central concern in the Confederation bargain:

> [T]he 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.

[83] Similarly, in *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148 at 1173-4, Wilson J. observed that the protection of religious minorities was a "major preoccupation" at the time of Confederation and the rights accorded to protect these minorities from hostile majorities, in the words of Duff J. in *Reference re Adoption Act*, [1938] S.C.R. 398 at 402, comprised "the basic compact of Confederation."

[84] While the text of the *Constitution Act, 1867* focused on religious minorities, the minority Catholic community in Ontario at that time was, to a significant extent, also the minority francophone community and linguistic and denominational characteristics were typically twinned. As Gonthier J. observed in *Reference re Education Act (Que.),* [1993] 2 S.C.R. 511 at 529-30:

> Section 93 is unanimously recognized as the expression of a desire for political compromise. It served to moderate religious conflicts which threatened the birth of the Union. At the time, disagreements between communities hinged on religion rather than language.

[85] Fifty years after Confederation, in a highly controversial decision, the Privy Council held that s. 93 was limited to denominational protection and included no minority language protection: *Trustees of the Roman Catholic Separate Schools for the Ottawa Separate Schools Trustees v. Mackell*, [1917] A.C. 62. The historic grievance of the linguistic minority in relation to the language of education was finally addressed in 1982 by s. 23 of the *Charter*, discussed below.

[86] It should be mentioned as well that certain features of the *Constitution Act, 1867* for the protection of minorities may have fallen into disuse, but they still may be taken as expressions of the fundamental constitutional importance attached to the protection of the French and Catholic minority outside Quebec. Linguistic and religious minorities were exposed to the risk that their interests might be ignored at the provincial level, but there is little doubt that it was implicit in the Confederation bargain that they could look to the federal government for constitutional protection. In the case of diminution of religious education rights by a provincial government, s. 93(3) gave the adherents of the religious minority a right of appeal to the federal cabinet, and by s. 93(4), Parliament had the right to enact remedial legislation. The federal power of disallowance (ss. 55-57, 90) was available where the legitimate interests of those minorities were imperiled by provincial action.

The Canadian Charter of Rights and Freedoms

[87] Language rights were significantly expanded with the enactment of the *Canadian Charter of Rights and Freedoms* in 1982. Section 16(1) of the *Charter* proclaimed

English and French to be the official languages of Canada with equality of status and equal rights of use "in all institutions of the Parliament and government of Canada." The same status and rights are also accorded to English and French in New Brunswick. Section 16.1, added by amendment in 1993, guarantees the equal status, rights, and privileges of the English and French linguistic communities of New Brunswick. The right to use English or French in Parliament and in the legislature of New Brunswick is conferred by s. 17 and provision is made for the publication of the statutes, records and journals of those bodies in s. 18. The right to use English or French in any court established by Parliament and in the courts of New Brunswick is guaranteed by s. 19. The right to communicate with and receive available services from the governments of Canada and New Brunswick in either official language is detailed in s. 20.

[88] Section 21 states that the specific rights in ss. 16 to 20 do not derogate from any provision that exists elsewhere in the Constitution of Canada pertaining to the use of English or French. Section 22 protects customary rights and privileges enjoyed before or after the coming into force of the *Charter* with respect to any language other than English or French. Section 23 guarantees the general right of primary or secondary school instruction in the language of the English or French linguistic minority population of a province, including Ontario, under certain conditions.

[89] The *Charter* contemplates the advancement of the equality of status of English and French not only by Parliament but also by the provincial legislatures:

> 16(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Section 16(3) applies to Ontario.

Issue 2: Does s. 16(3) of the *Charter* protect the status of Montfort as a francophone institution?

[90] Montfort adopts an argument based on s. 16(3) of the *Charter* advanced by two of the interveners, the Commissioner of Official Languages of Canada and La Fédération des communautés francophones et acadienne du Canada. They submit that once the province established Montfort as a homogeneous francophone institution, s. 16(3) provided a constitutional shield, limiting the right of Ontario to affect or reduce that status. Section 16(3) embodies the constitutional objective of advancing toward the substantive equality of Canada's two official languages. This objective, it is submitted, is to be achieved by means of a "ratchet" principle. It is argued that once Ontario takes a step in the direction of advancing the substantive equality of French, s. 16(3) "ratchets" that step to the level of a constitutional right, limiting any retreat from that advance.

Although not constitutionally required, provincial measures advancing linguistic equality are responsive to a constitutional aspiration. Once taken, steps towards substantive linguistic equality gain constitutional protection, and advances can only be withdrawn if properly justified. It is submitted that this interpretation of s. 16(3) is supported by the principle, elaborated below, that language rights are to be given a large and liberal interpretation. Reliance is also placed upon the unwritten constitutional principle of respect for and protection of minorities as an interpretive aid.

[91] The respondents particularly rely on the following passage from the dissenting judgment of Wilson J. in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch,* [1986] 1 S.C.R. 549 at 618-19:

> In my view, the difficulty in characterizing s. 16 of the *Charter* stems in large part from the problems of construction inherent in s. 16(1). I would read the opening statement "English and French are the official languages of Canada" as declaratory and the balance of the section as identifying the main consequence in the federal context of the official status which has been declared, namely that the two languages have equality of status and have the same rights and privileges as to their use in all institutions of the Parliament and government of Canada. Subsection (3) of s. 16 makes it clear, however, that these consequences represent the goal rather than the present reality; they are something that has to be "advanced" by Parliament and the legislatures. This would seem to be in the spirit of *Jones v. Attorney General of New Brunswick*, [1975] 2 S.C.R. 182, namely that legislatures cannot derogate from already declared rights but they may add to them. Provided their legislation "advances" the cause of equality of status of the two official languages it will survive judicial scrutiny; otherwise not. I do not believe, however, that any falling short of the goal at any given point of time necessarily gives a right to relief. I agree with those who see a principle of growth or development in s. 16, a progression towards an ultimate goal. Accordingly the question, in my view, will always be – where are we currently on the road to bilingualism and is the impugned conduct in keeping with that stage of development? If it is, then even if it does not represent full equality of status and equal rights of usage, it will not be contrary to the spirit of s. 16.

[92] We are not persuaded that s. 16(3) includes a "ratchet" principle that clothes measures taken to advance linguistic equality with constitutional protection. Section 16(3) builds on the principle established in *Jones v. New Brunswick (A.G.)*, [1975] 2 S.C.R. 182 that the Constitution's language guarantees are a "floor" and not a "ceiling" and reflects an aspirational element of advancement toward substantive equality. The aspirational element of s. 16(3) is not without significance when it comes to interpreting legislation. However, it seems to us undeniable that the effect of this provision is to *protect*, not *constitutionalize*, measures to advance linguistic equality. The operative legal effect of s. 16(3) is determined and limited by its opening words: "Nothing in this *Charter* limits the authority of Parliament or a legislature". Section 16(3) is not a rights-conferring provision. It is, rather, a provision designed to shield from attack government action that would otherwise contravene s. 15 or exceed legislative authority. See André Tremblay and Michel Bastarache, "Language Rights" in Gérald-A. Beaudoin & Ed Ratushny eds., *The Canadian Charter of Rights and Freedoms*, 2nd ed. (1989) at 675:

> What was actually desired with this provision [s. 16(3)] was to assure that the power to provide a privileged status for French and English in a statute could not be challenged by virtue of the rights forbidding discrimination contained in section 15 of the Charter. Section 16(3) could thus prevent the measures designed to promote equal access to both official languages from being struck down.

[93] Nor do we find any support for the "ratchet" principle in the case law. The passage relied on from *Société des Acadiens* is found in a dissenting judgment that focuses on s. 19(2) and the specific obligations that ss. 16-20 of the *Charter* impose on New Brunswick.

[94] This argument is made on the assumption that government was under no obligation to create Montfort. This court has held in another context that in the absence of a constitutional right that requires the government to act in the first place, there can be no constitutional right to the continuation of measures voluntarily taken, even where those measures accord with or enhance *Charter* values. In *Ferrel v. Ontario (A.G.)* (1998), 42 O.R. (3d) 97 (C.A.) a case dealing with the repeal of a statute intended to combat systemic discrimination in employment, Morden A.C.J.O. stated as follows at 110-11:

> If there is no constitutional obligation to enact the 1993 Act in the first place I think it is implicit, as far as the requirements of the constitution are concerned, that the legislature is free to return the state of the statute book to what it was before the 1993 Act, without being obligated to justify the repealing statute under s. 1 of the *Charter*.

…

> It would be ironic, in my view, if legislative initiatives such as the 1993 Act with its costs and administrative structure should, once enacted, become frozen into provincial law and susceptible only of augmentation and immune from curtailing amendment or outright appeal without s. 1 justification.

[95] To summarize, Montfort is a public hospital that provides services in French. Section 16(3) of the *Charter* does not constitutionally enshrine Montfort because it is not a rights-conferring provision. Because Montfort is not constitutionally protected by s. 16(3), Ontario can, subject to what follows, alter the status of Montfort as a community hospital without offending s. 16(3).

Issue 3: Do the Commission's Directions infringe s. 15 of the *Charter*?

[96] Montfort cross-appeals the Divisional Court's dismissal of the claim that the Commission's directions violate their equality rights protected by s. 15 of the *Charter*. This issue was not pressed in oral argument, but is fully developed in Montfort's factum. In our view, the Divisional Court was correct in rejecting this submission on the ground, at p. 79, that "s. 15 of the *Charter* may not be used as a back door to enhance language rights beyond what is specifically provided for elsewhere in the *Charter*". Assuming, without deciding, that the respondents otherwise satisfy the test for a violation of s. 15, we agree with the Divisional Court that, in view of the very specific and detailed provisions of ss. 16-23 of the *Charter* dealing with the special status of English and French, any differential treatment to francophones resulting from the Commission's directions is not based upon an enumerated or analogous ground. As the Divisional Court stated at p. 80: "Section 15 itself…cannot be invoked to supplement language rights which the *Charter* has not expressly conferred."

[97] The argument advanced by the respondents has been consistently rejected in other cases: see *Baie d'Urfé (Ville) v. Québec (Procureur général*), [2001] J.Q. no. 4821 (C.A.). In the instant case, the Divisional Court referred to *Mahe v. Alberta*, [1990] 1 S.C.R. 342 at 369, where Dickson C.J.C. stated:

> [I]t would be totally incongruous to invoke in aid of the interpretation of a provision which grants special rights to a select group of individuals, the principle of equality intended to be universally applicable to "every individual".

[98] In *R. v. Turpin*, [1989] 1 S.C.R. 1296 at 1334, the Supreme Court of Canada rejected the reasoning underlying *Reference Re Use of French in Criminal Proceedings*

in Saskatchewan (1987), 44 D.L.R. (4th) 16 (Sask. C.A.), a case on which the respondents rely.

[99] Other provincial courts of appeal have rejected attempts to use s. 15 as a basis for expanding language rights. In *McDonnell v. Fédération des Franco-Colombiens* (1986), 31 D.L.R. (4th) 296, the British Columbia Court of Appeal held that, having regard to the specific rights conferred by ss. 16 to 22 of the *Charter*, s. 15 did not invalidate a provincial rule of court requiring documents to be filed in English. In *R. v. Paquette* (1987), 83 A.R. 41 at 51, the Alberta Court of Appeal rejected the contention that the failure to accord a trial in French infringed s. 15:

> That argument elevates official language rights into a position of equality in all cases. There would be no need for ss. 16 to 23 of the *Charter*. The argument makes the official languages sections redundant, as s. 15 would transform the use of one official language into the use of both. The discrimination is not based on language and the official languages are simply not accorded equality of status by the *Charter*.

[100] To the same effect is the judgment of the Newfoundland Court of Appeal in *Riguette v. Canada (A.G.)* (1987), 63 Nfld. & P.E.I.R. 126.

[101] It has been held in other contexts that where the Constitution accords special rights to special groups, those specific guarantees must be respected and other *Charter* rights cannot be used to expand or diminish the rights so granted. In *Reference Re Bill 30, supra*, Wilson J. stated at pp. 1196-97 that although the special minority religion education rights conferred by s. 93 of the *Constitution Act, 1867* "sit uncomfortably with the concept of equality embodied in the Charter", s. 15 can be used neither to nullify the specific rights of the protected group nor to extend those rights to other religious groups. This position was affirmed in *Adler v. Ontario*, [1996] 3 S.C.R. 609. There, the Court dismissed a claim for funding health services for religious schools falling outside the ambit of s. 93 based on the guarantee of freedom of religion in s. 2(a) and on the right to equality in s. 15.

[102] Accordingly, we would dismiss Montfort's cross-appeal from the dismissal of the s. 15 claim.

Issue 4: What is the relevance to Montfort of the unwritten constitutional principle of respect for and protection of minorities?

[103] The most definitive and complete consideration of the unwritten or structural principles, and the authority most pertinent to the respondents' submissions before this court, is the Supreme Court of Canada's 1998 decision in the *Secession Reference, supra*. There, at p. 240, the Supreme Court affirmed the existence of unwritten constitutional rules "not expressly dealt with by the text of the Constitution" but which nonetheless have normative force as operative instruments of our constitutional order. The Court identified at p. 240 "four fundamental and organizing principles of the Constitution" that bear upon the question of the possibility of provincial secession, namely, federalism, democracy, constitutionalism and the rule of law, and respect for minorities.

[104] These unwritten principles, said the Court at p. 247, "inform and sustain the constitutional text: they are the vital unstated assumptions upon which the text is based." The Court held at p. 248 that the unwritten principles represent the Constitution's "internal architecture" and "infuse our Constitution and breathe life into it". Further, "[t]he principles dictate major elements of the architecture of the Constitution itself and are as such its lifeblood."

Federalism

[105] Federalism, the division of legislative power between the Parliament of Canada and the provincial legislatures, reflects a fundamental fact of Canada's constitutional and political structure. As the Court stated at p. 251, "federalism is a political and legal response to underlying social and political realities". Canada is a country with a rich geographic, cultural, and political diversity. Federalism represents the constitutional definition of those aspects of our political life that unite us while preserving appropriate scope to accommodate and to enhance the heterogeneous social, cultural, and economic realities of the diverse and distinctive provincial communities that make up our nation. Federalism is, as the Supreme Court of Canada explained in the *Secession Reference* at p. 244, "a legal response to the underlying political and cultural realities that existed at Confederation and continue to exist today." At p. 245 the Court added: "Federalism was the political mechanism by which diversity could be reconciled with unity."

[106] The federalism principle has an important bearing on the situation of cultural and linguistic minorities. The reality of the distinctive language and culture of the French speaking majority of Quebec was unquestionably a principal and defining feature of the Canadian union of 1867 as it required the adoption of a federal structure in the first place. As the Court explained in the *Secession Reference* at p. 252: "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."

Democracy

[107] Democracy, as the Supreme Court said in the *Secession Reference* at p. 252, is "a fundamental value in our constitutional law and political culture" and, at p. 253, a "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated." Although not mentioned in the text of the *Constitution Act, 1867*, democracy has always been a fundamental feature of our constitutional structure. In relation to minorities, democracy means more than simple majority rule. As Iacobucci J. explained in *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at 577:

> [T]he concept of democracy means more than majority rule…. In my view, a democracy requires that legislators take into account the interests of majorities and minorities alike, all of whom will be affected by the decisions they make. Where the interests of a minority have been denied consideration, especially where that group has historically been the target of prejudice and discrimination, I believe that judicial intervention is warranted.…

Constitutionalism and the Rule of Law

[108] Constitutionalism and the rule of law are cornerstones of the Constitution and reflect our country's commitment to an orderly and civil society in which all are bound by the enduring rules, principles, and values of our Constitution as the supreme source of law and authority. In the *Secession Reference* at p. 258, the Supreme Court outlined three essential elements of the rule of law. First, the law is supreme over both governments and private persons: "[t]here is…one law for all." Second, the creation and maintenance of a positive legal order is the normative basis for civil society. The third feature is that the exercise of public power must be based on a legal rule that governs the relationship between the state and the individual.

[109] In *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, the Supreme Court identified the rule of law as an operative constitutional principle. The Court held at p. 752 that "in the process of Constitutional adjudication, the Court may have regard to unwritten postulates which form the very foundation of the Constitution of Canada." There, the Court found that the province's failure to comply with s. 23 of the *Manitoba Act* and enact its laws in both English and French rendered legislation enacted since 1890 invalid. Relying on the fundamental principle of the rule of law, the Court adopted a temporary suspension of its declaration of invalidity to avoid a state of legal chaos.

[110] The related principle of constitutionalism rests on the proposition that the Constitution is the supreme source of law and that all government action must comply with its requirements. Constitutionalism qualifies majority rule and, like federalism, has an important bearing on minorities. As the Court explained in the *Secession Reference* at p. 259, the constitutional entrenchment of rights protects these rights against the will of the majority and ensures that they are given due regard and protection. A constitution may, the Court explained at p. 259, "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."

Respect for and protection of minorities

[111] Finally, in the *Secession Reference* the Court spoke of the principle of "respect for minorities" or "protection of minorities". In these reasons, we refer to this principle as "respect for and protection of minorities". The principle of respect for and protection of minorities was described as follows at p. 262:

> 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. 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 [references omitted].

[112] The protection of linguistic minorities is essential to our country. Dickson J. captured the spirit of the place of language rights in the Constitution in *Société des Acadiens*, *supra*, at p. 564: "Linguistic duality has been a longstanding concern in our nation. Canada is a country with both French and English solidly embedded in its history." As stated by La Forest J. in *R. v. Mercure*, [1988] 1 S.C.R. 234 at 269, "rights regarding the English and French languages…are basic to the continued viability of the nation."

[113] As we have already mentioned, the *Charter* enhanced language rights. The entrenched guarantee of equality in s. 15 and the provisions requiring the respect and protection of aboriginal rights enhanced the protection of the rights of other minorities and the right to be free from discrimination. As the Supreme Court of Canada explained in the *Secession Reference* at p. 269, "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."

[114] The principle of respect for and protection of minorities is a fundamental structural feature of the Canadian Constitution that both explains and transcends the minority rights that are specifically guaranteed in the constitutional text. This is an area where, as the Supreme Court of Canada explained in the *Secession Reference* at p. 292, "[a] superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading." This structural feature of the Constitution is reflected not only in the specific guarantees in favour of minorities. It infuses the entire text and, as we have explained, plays a vital role in shaping the content and contours of the Constitution's other structural features: federalism, constitutionalism and the rule of law, and democracy.

The application of the principle to Montfort

[115] This appeal calls for careful consideration of the appropriate weight, value, and effect to be accorded to the respect for and protection of minorities as one of the fundamental principles of our Constitution. Ontario submits that, in the face of the very specific and detailed minority language guarantees in the text of the Constitution, the Divisional Court erred by in effect adding to the list of protected rights. The text of the Constitution's specific language rights gives the Franco-Ontarian minority no right to a French language hospital and, says the appellant, the courts have no role in adding to the list of protected rights. The respondents submit, on the other hand, that the absence of a specific right in the text of the Constitution is not fatal to their case. They say that in view of the importance of Montfort as a cultural, social, and educational institution in the Franco-Ontarian minority's struggle for survival, the Constitution's fundamental principle of respect for and protection of minorities properly may be invoked as a basis for reviewing the legality of the Commission's directions.

[116] The unwritten principles of the Constitution do have normative force. In *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island* ("*Provincial Judges Reference*"), [1997] 3 S.C.R. 3 at 75, Lamer C.J.C. made it clear that, in his view, the preamble to the Constitution "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." This point was reinforced in the *Secession Reference* at p. 249:

> 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 powerful normative force, and are binding upon both courts and governments.

[117] In the *Provincial Judges Reference*, the Court considered the "unwritten constitutional principle" of judicial independence. The Court held, at p. 67, that implicit in s. 11(d) of the *Charter*, which deals with the right to trial by "an independent and impartial tribunal", and ss. 96-100 of the *Constitution Act, 1867*, which deals with the appointment, tenure, and remuneration of superior court judges, is "a deeper set of unwritten understandings which are not found on the face of the document itself" [emphasis in original]. There are, the Court held at p. 69, "organizing principles" that may be used "to fill out gaps in the express terms of the constitutional scheme" to ensure the protection of all of the necessary and essential attributes of this vital structural feature of the Constitution. The Court found, at p. 75, that the preamble to the *Constitution Act, 1867* "identifies the organizing principles of the *Constitution Act, 1867*, and 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."

[118] In his very helpful discussion of the unwritten or organizing principles of the Constitution, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001) 80 Can. Bar Rev. 67 at 83-86, Professor Robin Elliot draws an important distinction between the use of unwritten or structural principles "as independent bases upon which to impugn the validity of legislation" and their use "as aids to interpretation or otherwise to assist in the resolution of constitutional issues." Professor Elliot suggests that when used to impugn the validity of legislation or government action, the unwritten principles "*can fairly be said to be generated by necessary implication from the text of the Constitution*" [emphasis in original]. On this theory, when the organizing principles give rise to rights capable of impugning the validity of legislation, they *are* grounded in the text of the Constitution. Although not expressly stated by the Constitution's text, such rights are immanent in the text when it is understood and interpreted in a proper and complete legal, historical, and political context. When used in this way, the unwritten or organizing principles allow the courts to unlock the full meaning of the Constitution and to flesh out its terms, as explained by

Lamer C.J.C. in the *Provincial Court Judges Reference* at p. 69, even to the extent of allowing the courts "to fill out gaps in the express terms of the constitutional scheme."

[119] Professor Patrick Monahan draws a similar distinction in "The Public Policy Role of the Supreme Court of Canada and the *Secession Reference*" (1999) 11 N.J.C.L. 65 at 75-77. He observes that when following the interpretive theory:

> [T]he court should attempt to fill in that gap by adopting an interpretation that is most consistent with the underlying logic of the existing text, and then to rely upon that logic in order to 'complete' the constitutional text.

[120] This is to be contrasted with what Professor Monahan describes at p. 77 as an unacceptable conception of judges "as akin to constitutional drafters. On this view, the court should fill in the gap by relying upon its own conception as to the best or most appropriate set of constitutional norms that should be added to the existing text."

[121] The unwritten principles of the Constitution do not confer on the judiciary a mandate to rewrite the Constitution's text. In the *Secession Reference* at p. 249, the Supreme Court confirmed that recognition of these unwritten structural principles:

> could not be taken as an invitation to dispense with the written text of the Constitution. On the contrary….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.

[122] Similarly, in the *Provincial Judges Reference* at p. 68, the Court stated: "There are many important reasons for the preference for a written constitution over an unwritten one, not the least of which is the promotion of legal certainty and through it the legitimacy of constitutional judicial review." Again, in *Re Eurig Estate*, [1998] 2 S.C.R. 565 at 594, Binnie J. stated that "implicit principles can and should be used to expound the Constitution, but they cannot alter the thrust of its explicit text."

[123] Against the background of these general principles we turn to the precise issue that confronts us in this appeal. As the Divisional Court observed, we are not concerned here with the validity of legislation that impinges upon the rights of a linguistic minority: compare *Baie d'Urfé* (*Ville) v. Québec, supra*. Nor are we confronted with a situation where a minority group is insisting on the establishment of an institution that is not already in existence. We are asked to review the validity of a discretionary decision with respect to the role and function of an existing institution, made by a statutory authority with a mandate to act in the public interest.

[124] In its submissions, Ontario has chosen to characterize the decision of the Divisional Court as recognizing or creating a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner. We do not accept that as a proper or necessary reading of the judgment. The Divisional Court at pp. 83-84 quashed the Commission's directions on the ground that given the constitutional principle of respect for and protection of minorities, "it was not open to the Commission to proceed on a 'restructured health services' mandate only, and to ignore the broader institutional role played by…Montfort as a truly francophone centre, necessary to promote and enhance the Franco-Ontarian identity as a cultural/linguistic minority in Ontario, and to protect that culture from assimilation." The Divisional Court, at p. 68, explicitly recognized that "the constitutional validity or invalidity of a piece of legislation is not at issue." The Divisional Court added: "What is at issue is whether certain conduct of a government agency falls within the parameters of what is permitted by the Constitution….[T]here is a difference between the validity of legislation and the possibility of unconstitutional behaviour under legislation." We agree with the Divisional Court's characterization of the constitutional issue.

[125] For the reasons that follow, we have concluded that the Constitution's structural principle of respect for and protection of minorities is a bedrock principle that has a direct bearing on the interpretation to be accorded the *F.L.S.A.* and on the legality of the Commission's directions affecting Montfort. This bedrock principle also informs our discussion below of the reviewability of the Commission's directions.

[126] We proceed first to consider the *F.L.S.A.* and its application to the facts of the present case in light of the interpretive principles applicable to language rights and in light of the constitutional principle of respect for and protection of minorities. We then turn to the application of the unwritten principles to the exercise and review of discretionary decisions of statutory bodies with a statutory mandate to act in the public interest. As the conclusion we have reached on these two issues is sufficient to dispose of this appeal, it is not necessary for us to answer the more general question – whether the fundamental constitutional principle of respect for and protection of minorities gives rise to a specific constitutional right capable of impugning the validity of an act of the legislature or sufficient to require the province to act in some specific manner.

Issue 5: Do the Commission's directions violate the *French Language Services Act*?

[127] The Divisional Court held at p. 70 that Montfort's designation as a public service agency under the *F.L.S.A.* meant that:

> [T]he francophone community of Ontario had acquired a legislatively recognized entitlement to receive health services in a truly francophone environment at Hôpital Montfort, and

> an expectation that those services would be provided in at least the quality and extent offered by Montfort, including the existence of a training centre that guaranteed the instruction of medical professionals in French.

[128] The interpretation of the *F.L.S.A.* is central to this appeal.

[129] The *F.L.S.A.* is an example of the provincial legislature of Ontario using s. 16(3) to build on the language rights contained in the *Constitution Act, 1867* and the *Charter* to advance the equality of status or use of the French language. The aspirational element contained in s. 16(3) – advancing the French language toward substantive equality with the English language in Ontario – is of significance in interpreting the *F.L.S.A.*

[130] In addition, the principle of respect for and protection of minority language rights is a useful tool not only in interpreting the *F.L.S.A.* but in assessing the validity of the Commission's directions in light of that legislation. Government action as well as government legislation is to be considered in light of constitutional principles, including the unwritten constitutional principles.

[131] As the title of the *F.L.S.A.* indicates, the Act is about the right to receive services in the French language. The interpretive principles derived from the language-rights jurisprudence have a significant bearing on the approach to be adopted to the *F.L.S.A.* We shall now elaborate on these principles.

[132] At one time, the Supreme Court of Canada adopted a restrictive approach to the interpretation of language rights. In *Société des Acadiens*, *supra*, at p. 578, Beetz J., writing for the majority, held that language rights, which were the result of "political compromise", should be approached with judicial restraint in contrast to human rights, which are "seminal in nature because they are rooted in principle." It is now clear, however, that this narrow and restrictive approach has been abandoned and that language rights are to be treated as fundamental human rights and accorded a generous interpretation by the courts.

[133] In *Ford v. Québec (A.G.)*, *supra*, at 748, the Supreme Court rejected the contention that the specific language rights protected by the Constitution are exhaustive, leaving no room for the protection of the right to use one's language of choice as an aspect of freedom of expression. The Court quoted from its earlier decision in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at 744:

> The importance of language rights is grounded in the essential role that language plays in human existence, development and dignity. It is through language that we are able to form

> concepts; to structure and order the world around us. Language bridges the gap between isolation and community, allowing humans to delineate the rights and duties they hold in respect of one another, and thus to live in society.

In *Ford*, the Court added at pp. 748-49:

> 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.

[134] Similarly, in *Mahe*, *supra*, the Court adopted a generous purposive approach to the interpretation of minority language education rights guaranteed by s. 23 of the *Charter*. Writing for the Court, Dickson C.J.C. at p. 362 again referred to the cultural importance of language:

> [A]ny broad guarantee of language rights, especially in the context of education, cannot be separated from a concern for the culture associated with the language. Language is more than a mere means of communication, it is part and parcel of the identity and culture of the people speaking it. It is the means by which individuals understand themselves and the world around them.

[135] The Chief Justice made reference at p. 363 to the importance of schools as institutions that function as "community centres where the promotion and preservation of minority language culture can occur". With reference to the strictures imposed by the narrow approach taken in *Société des Acadiens*, Dickson C.J.C. observed at p. 365:

> Both its genesis and its form are evidence of the unusual nature of s. 23. Section 23 confers upon a group a right which places positive obligations on government to alter or develop major institutional structures. Careful interpretation of such a section is wise: however, this does not mean that courts should not "breathe life" into the expressed purpose of the section, or avoid implementing the possibly novel remedies needed to achieve that purpose.

[136] More recently, in *R. v. Beaulac*, [1999] 1 S.C.R. 768 at 791-92, the Supreme Court flatly rejected the narrow approach of *Société des Acadiens* and held that a purposive and generous interpretation of language rights was called for:

> Language rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada. To the extent that *Société des Acadiens du Nouveau-Brunswick, supra,* at pp. 579-80, stands for a restrictive interpretation of language rights, it is to be rejected. The fear that a liberal interpretation of language rights will make provinces less willing to become involved in the geographical extension of those rights is inconsistent with the requirement that language rights be interpreted as a fundamental tool for the preservation and protection of official language communities where they do apply.
>
> [Emphasis in original, references omitted.]

[137] We note that in *Beaulac,* the Court was interpreting language rights conferred by the provisions of the *Criminal Code,* and that the interpretive approach enunciated applies both to language rights conferred by ordinary legislation as well as to constitutional guarantees.

[138] In *Arsenault-Cameron v. Prince Edward Island*, [2000] 1 S.C.R. 3 at 24, the Supreme Court reaffirmed the proposition advanced in *Mahe* that "language rights cannot be separated from a concern for the culture associated with the language". The Court also reaffirmed the proposition from *Beaulac* that language rights must be given a purposive interpretation, taking into account the historical and social context, past injustices, and the importance of the rights and institutions to the minority language community affected.

[139] As we have explained, the provisions of the *F.L.S.A.* must be interpreted in light of these principles.

[140] In addition to the aspirational element of s. 16(3), the principle of respect for and protection of the francophone minority in Ontario, and the broad and purposive interpretation to be given to language rights, general principles of statutory interpretation also apply. Statutory interpretation cannot be founded on the wording of legislation alone. As articulated by McLachlin C.J.C. in *R. v. Sharpe*, [2001] 1 S.C.R. 45 at 74-75, the proper approach is found in Driedger's *Construction of Statutes*, 2nd ed. (1983) at 87 as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The context of the Act and its purpose

[141] It was within the overall context of steady progression and advancement of services in French that the *F.L.S.A.* was introduced and passed in 1986.[2] In introducing the legislation on May 1, 1986, the Honourable Bernard Grandmaître, the Minister for Francophone Affairs, stated (*Debates of the Legislative Assembly of Ontario*, pp. 203-204):

> Our province has a special responsibility in this regard [to ensure that francophones receive services in their own language] because Ontario is home to the largest group of French-speaking Canadians outside Quebec. It is for that reason the government of Ontario intends to guarantee through legislation the rights of francophones to receive government services in French.
>
> The various measures contained in this bill are inspired by the basic principles of justice and equality which we value so highly in this province. These are two fundamental principles on which our country has been built by the two founding peoples. The government of Ontario believes that it is now appropriate that this reality and this duality should be reflected in the operations *of all ministries.* (Emphasis added.)

[142] This and other speeches made by members of the Legislature noted that the governments of Ontario had, over the years, changed their policy toward the French

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[2] S.O. 1986, c. 45. Prior to this, the 1960s showed an increased sensitivity to French language rights both as a question of fairness to Ontario's own residents and as a larger backdrop to national unity. The Ontario government passed a motion giving members of the Legislature the right to address the House in English or in French. The *Schools Administration Act*, R.S.O. 1960, c. 361, and the *Secondary Schools and Boards of Education Act*, R.S.O. 1960, c. 362, were passed to facilitate the establishment and support of French elementary and secondary schools. On May 3, 1971, Premier Davis made a formal statement in the legislative assembly in which he pledged to continue the general philosophy of former Premier Robarts concerning bilingualism. He indicated that Ontario's policy would be to provide, wherever practicable, public services in the English and French languages. He recognized the special emphasis given by the federal government to bilingualism in the National Capital region and pledged to support the efforts made to date by the municipalities in the region to increase provision of bilingual services: *Debates of the Legislative Assembly of Ontario*, May 3, 1971 at pp. 1104-9. In the field of justice, a pilot project was begun in June 1976 to permit the use of French in trials before the Criminal Division of the Provincial Court in Sudbury. The project was extended to Ottawa the following year. Bilingual services were then extended to the Family Court Division in Sudbury and Ottawa. At the request of the Attorney General for Ontario, the *Criminal Code* was amended in 1979 to provide for trials before a judge or jury who spoke the official language of the accused or both English and French (S.C. 1977-78, c. 36). In April 1984, the *Courts of Justice Act* was amended to provide in s. 135 (now s. 125, R.S.O. 1990, c. C.43) that the official languages of the courts in Ontario are English and French (S.O. 1984, c. 11). At that time, the then Attorney General for Ontario, the Honourable Roy McMurtry, stated that the government had made it clear that services in the French language in relation to health care had to be a priority: *Debates*, April 10, 1984 at pp. 616-17.

language. The Bill was the result of years of successive steps toward the goal of providing services to francophones in their own language. The Bill received the unanimous support of all three political parties represented in the Legislative Assembly, and amendments were proposed with a view to ensuring its protections would be met. For example, s. 8(1)(d) of the *F.L.S.A.*, which provides that services could be exempted from being offered in French where, in the opinion of the Lieutenant Governor in Council, "it is reasonable and necessary to do so" had added to it the words *"and where the exemption does not derogate from the general purpose and intent of this Act"*: see *Debates of the Legislative Assembly of Ontario*, November 6, 1986, at pp. 3202-3203.

[143] The legislative history and the comments of the members of the legislature when the *F.L.S.A.* was enacted permit this court to draw a number of inferences and conclusions about the underlying purposes and objectives of the *F.L.S.A.* and the intention of the legislature enacting it. One of the underlying purposes and objectives of the Act was the protection of the minority francophone population in Ontario; another was the advancement of the French language and promotion of its equality with English. These purposes coincide with the underlying unwritten principles of the Constitution of Canada. As already stated, underlying constitutional principles may in certain circumstances give rise to substantive legal obligations because of their powerful normative force: *Provincial Judges Reference*, *supra*, at pp. 67-70 per Lamer C.J.C. and *Secession Reference*, *supra*, at pp. 249 and 290-91.

The words and the scheme of the Act

[144] For ease of reference, the Act is attached as Schedule A to these reasons.

[145] The preamble states that the Act is a statutory recognition of the cultural heritage of the French speaking population and a reflection of the Legislative Assembly's commitment to preserve that cultural heritage for future generations. While a preamble is not a source of positive law in contrast to the provisions that follow it, a preamble can contribute to the interpretation of a law: *Provincial Judges Reference*, at p. 69.

[146] Here, the preamble states "it is desirable to guarantee the use of the French language in institutions of the…government of Ontario as provided for in this Act" [emphasis added]. One of those institutions is Montfort, a government agency under the Act.

[147] Section 1 defines a government agency in part as a publicly-subsidized non-profit corporation that provides service to the public and that is designated by regulation. That is Montfort. The word "service" is also defined in s. 1 as any service or procedure provided by a government agency and "includes all communications for the purpose".

[148] Section 2 requires the Government of Ontario to ensure that services are provided in French in accordance with the Act. The *F.L.S.A.* does not impose a requirement of institutional bilingualism across the province. Instead, it provides a measured policy that varies with the circumstances. Thus our decision is a contextual one. This is not a ruling about every hypothetical situation that might arise concerning minority French language rights in the province.

[149] Section 5(1) of the Act gives a person the right "to communicate in French with, and to receive available services in French from, any head or central office of a government agency" and "the same right in respect of any other office of such agency… that is located in or serves an area designated in the Schedule." The right in s. 5 does not apply to all government agencies. It only applies to those institutions that are defined as a government agency in s. 1. Montfort receives public money and is designated under the Act. Montfort satisfies the definition of a government agency. Ottawa-Carleton is also a designated area in the Schedule. Thus, a person has the right to communicate in French with, and to receive available services from, Montfort and any "office" of Montfort. In order to understand the meaning of "available services" as used in s. 5, it will be helpful to provide an overview of the other provisions of the Act.

[150] Section 6 gives some protection to existing practices with respect to the use of English or French outside the application of the Act. It provides that the Act cannot be used to limit the use of either language where the Act does not apply.

[151] Section 7 makes the obligations of government agencies to provide services in French subject to "such limits as circumstances make reasonable and necessary" but requires first that "all reasonable measures and plans for compliance with this Act have been taken or made."

[152] Section 8 gives the Lieutenant Governor in Council the power to make regulations a) designating public service agencies; b) amending the Schedule by adding designated areas to it; and c) exempting services from the application of ss. 2 and 5 where, in its opinion, "it is reasonable and necessary to do so *and where the exemption does not derogate from the general purpose and intent of this Act"* [emphasis added].

[153] Section 9 provides that the right to receive services in French from a designated agency may be limited in that designation may apply only to certain specified services, as opposed to all services, provided by the agency, or the agency may exclude certain of its services from designation. Montfort has not specified certain of its services for inclusion or exclusion. Thus the designation applies to all of the services offered by Montfort.

[154] Section 10 provides that where a regulation exempts a service, revokes the designation of a public service agency, or amends a regulation designating a public

service agency so as to exclude or *remove a service* from the designation, at least 45 days' notice must first have been published in the *Ontario Gazette* and a newspaper of general circulation in Ontario inviting comments to be submitted to the Minister for Francophone Affairs. After the expiry of this period, the regulation may be made without further notice.

[155] The implication of s. 10 is that when there is a change in the services offered by a government agency, a regulation will be passed. Before the regulation passes, 45 days' notice of the change must first be published in both the *Ontario Gazette* and a general circulation newspaper, inviting comment.

[156] Section 11 provides that the Minister for Francophone Affairs is responsible for the administration of the Act, and his function is to develop and co-ordinate the policies and programs of the government.

[157] Section 12(2) provides that the Office of Francophone Affairs may, *inter alia*, "recommend changes in the plans of government agencies for the provision of French language services" and "make recommendations in respect of an exemption or proposed exemption of services under clause 8(1)(c)".

[158] Section 13 requires that a French language services coordinator be appointed for each ministry and that all the coordinators be part of a committee presided over by the Office of Francophone Affairs.

[159] Ontario submits that designation as a government agency under the Act merely confers the right to receive the services provided by the designated agency at any given point in time. In support of its position, Ontario relies on the wording of s. 5: "A person has the right in accordance with this Act to communicate in French with, and to receive *available services* in French from, any…government agency" [emphasis added]. Ontario submits that the Act only gives a person the right to receive whatever services Montfort offers. If Montfort offers ten services in French one year and two services in French the following year, that is all a person has the right to receive. Ontario's position is, further, that the *F.L.S.A.* requires that only services are to be provided in French, and "services" does not include the training of health care professionals in French.

[160] We cannot accept this submission. In our opinion the words "available services" in s. 5 of the Act refer to available healthcare services at the time the agency is designated under the Act. The legislature has quite clearly manifested its intention in the preamble of the *F.L.S.A.* to "guarantee" the provision of services in French. Ontario's submission, if accepted, would result in seriously undermining the guarantee. Our interpretation is reinforced by the French version of the statute which speaks only of "services" and not "available services". Our interpretation is also consistent with the objectives of the

F.L.S.A, the aspirational element of s. 16(3) of the *Charter*, and the unwritten constitutional principle of respect for and protection of minorities.

[161] Ontario's submission also fails to pay adequate attention to the overall scheme of the legislation. Montfort's designation does not apply only in respect of specified services. It applies in respect of all the healthcare services offered by Montfort at the time of designation. If Ontario's submission is correct, there would never be any need to pass an amending regulation under s. 8 or give notice under s. 10 to exempt or remove a service from the designation. In our opinion, before removing an existing service, such as cardiology, from Montfort's designation, it would have been necessary to pass a regulation because cardiology services were no longer going to be available in French not only at Montfort but elsewhere in the Ottawa-Carleton region. Of course, the requirement of s. 7 that circumstances make it "reasonable and necessary" to limit the provision of French language healthcare services would first have to be met.

[162] The Commission appears to have attempted to frame its directions so as to make available equivalent healthcare services in French at other institutions. Language and culture are not, however, separate watertight compartments. The reality of the matter is, as found by the Divisional Court, that the Commission's directions would reduce the availability and accessibility of healthcare services in French, both directly in the Ottawa-Carleton region and eastern Ontario, and indirectly by imperiling the training of health care professionals, which would in turn increase the assimilation of Franco-Ontarians. Montfort's designation under the *F.L.S.A.* includes not only the right to healthcare services in French at the time of designation but also the right to whatever structure is necessary to ensure that those healthcare services are delivered in French. This would include the training of healthcare professionals in French. To give the legislation any other interpretation is to prefer a narrow, literal, compartmentalized interpretation to one that recognizes and reflects the intent of the legislation.

[163] It can hardly be said that the serious adverse effects of the Commission's directions are consistent with the purpose and objectives of the *F.L.S.A.* Nor do the directions accord with the government's criteria for designating an agency under the *F.L.S.A.* The four criteria are: 1) permanency and quality of services in French; 2) access to services in French; 3) francophone representation in the governance and management of the institution; and 4) accountability (H.S.R.C. August 1997 Report at p. 82). Designation entails preparing and submitting a plan specifying the manner in which the institution seeking designation meets these criteria. By designating Montfort under the Act, Ontario has signified it is government policy that the services of Montfort, a general community hospital, are intended to be permanently offered and readily accessible in French. The Commission's directions represent a shift in this policy. Even the Commission itself recognized that the transfer of services from Montfort meant that "some" existing services would not be available in French in Ottawa-Carleton, and that it

would no longer be possible to train healthcare professionals completely in French in a bilingual setting. The Commission, and now Ontario, has given no explanation for this shift in policy. Nor has there been compliance with s. 7 of the *F.L.S.A.*

[164] Section 7 of the *F.L.S.A.* states that the right to receive services in French may only be limited "as circumstances make reasonable and necessary, if all reasonable measures and plans for compliance with this Act have been taken or made." The definition of "necessary" implies "une chose absolument indispensable, ce dont on ne peut rigoureusement pas se passer. En somme, une nécessité inéluctable": Pigeon, *Rédaction et interprétation des lois*, 3e éd. (1986) at 36. The word "necessary" in this context would appear to mean that existing services can only be limited when this is the only course of action that can be taken.

[165] Before limiting Montfort's services as a community hospital, Ontario must also have taken "all reasonable measures" to comply with the Act. It is possible to state with greater precision what falls short of "all reasonable measures". "All reasonable measures" does not simply mean giving a direction to the transferee hospital to attain *F.L.S.A.* designation and then transferring the French services before that designation has been attained. Nor does "all reasonable measures" mean creating a seemingly insurmountable problem for the training of healthcare professionals in French and leaving the affected community to solve the problem itself. The Commission's directions do not comply with s. 7 of the Act.

[166] Although it is impossible to specify precisely what is encompassed by the words "reasonable and necessary" and "all reasonable measures", at a minimum they require some justification or explanation for the directions limiting the rights of francophones to benefit from Montfort as a community hospital.

[167] While the Lieutenant Governor in Council may make regulations exempting services from the application of ss. 2 and 5 where, in the opinion of the Lieutenant Governor in Council, it is reasonable and necessary to do so, there has been no attempt to pass a regulation exempting any of the healthcare services from being provided in French. We also note the requirement that any regulation exempting a service from the application of the Act not derogate from the general purpose and intent of the Act. These words appear to invite some objective scrutiny and indicate that the discretionary opinion of the Lieutenant Governor in Council is not absolute.

[168] While the Commission, and now the Minister, may exercise a discretion to change and to limit the services offered in French by Montfort, it cannot simply invoke administrative convenience and vague funding concerns as the reasons for doing so: see by analogy *R. v. Beaulac*, [1999] 1 S.C.R. 768 at 805-6; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para. 116. The

Commission's mandate has to be reconciled with the statutory requirements of the *F.L.S.A.* The Commission may not issue a directive removing available services in French from Montfort, particularly when the services are not available in French on a full-time basis elsewhere in the Ottawa-Carleton region, without complying with the "reasonable and necessary" requirement of the *F.L.S.A.*

[169] Accordingly, we conclude that the Commission's directions fail to respect the requirements of the *F.L.S.A.*

Issue 6: Are the Commission's directions reviewable pursuant to the unwritten constitutional principle of respect for and protection of minorities?

[170] The Commission had a broad statutory discretion to issue directions for the restructuring of Ontario's health care system. There is no dispute that as a public hospital, Montfort was properly subject to the exercise of the Commission's discretion.

[171] It has long been established in Canadian law that "there is no such thing as absolute and untrammelled 'discretion'": *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 140 per Rand J. In *Mount Sinai, supra,* the Supreme Court reviewed the exercise of discretion by the Quebec Minister of Health in relation to Mount Sinai Hospital. Section 138 of the *Act Respecting Health Services and Social Services,* R.S.Q., c. S-4.2 is similar to s. 6 of the *Public Hospitals Act.* Both statutes give the Minister of Health a wide discretion to act in the manner he or she considers justified in the public interest. In his concurring reasons at para. 16, Binnie J. observed:

> It is true, as the appellant points out, that the Minister's power under s. 138 is framed as a broad policy discretion to be exercised "**in the public interest**". Yet the discretion, however broadly framed, is not unfettered. At the very least the Minister must exercise the power for the purpose for which it was granted: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140; *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030.

[172] The basic principle of the reviewability of ministerial discretion has been applied in relation to the exercise of discretion in relation to s. 23 minority language education rights. In *Arsenault-Cameron, supra,* when striking down a decision of the Minister of Education not to establish a French-language school because of an insufficient number of francophone students, Major and Bastarache JJ. wrote at p. 27:

> The Minister has a duty to exercise his discretion in accordance with the dictates of the *Charter;* see *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *Slaight*

> *Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038. In reaching his decision, the Minister failed to give proper weight to the promotion and preservation of minority language culture and to the role of the French Language Board in balancing the pedagogical and cultural considerations. This was essential to giving full regard to the remedial purpose of the right. The approach adopted by the Minister therefore increased the probability that his decision would fail to satisfy constitutional review by the courts.

[173] The present case does not involve a written constitutional guarantee, but it does involve a situation with profound implications for Ontario's minority francophone community that engages the constitutional principle of respect for and protection of minorities.

[174] Fundamental constitutional values have normative legal force. Even if the text of the Constitution falls short of creating a specific constitutionally enforceable right, the values of the Constitution must be considered in assessing the validity or legality of actions taken by government. This is a long-established principle of our law. Before the advent of the *Charter* and the constitutional entrenchment of rights and freedoms, there can be no doubt that those same rights were fundamental constitutional values. Although they had not been crystallized in the form of entrenched and directly enforceable rights, they were regularly used by the courts to interpret legislation and to assess the legality of administrative action. See *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344. The fundamental rights and freedoms of a liberal democracy are very much a product of our British parliamentary heritage. As explained by Rand J. in *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299 at 329, "[F]reedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." Although these fundamental rights and freedoms had no place in the text of the Constitution until 1982, the courts were entitled to take them into account when deciding cases and interpreting statutes, and when considering the legality of governmental actions.

[175] Similarly, since the enactment of the *Charter*, the application of constitutional values to situations not strictly governed by the text of the Constitution has been recognized and accepted. The *Charter* does not apply as between private individuals, yet *Charter* values are to be applied by the courts in common-law decision making: *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130.

[176] Unwritten constitutional norms may, in certain circumstances, provide a basis for judicial review of discretionary decisions. As Bora Laskin wrote as a professor of constitutional law in "An Inquiry Into the Diefenbaker Bill of Rights" (1959) 37 Can. Bar Rev. 77 at 81, although not entrenched in the Constitution, civil liberties were frequently used "as a means of curial control of administrative adjudication." More recently, Professor David Mullan commented on the same doctrine in *Administrative Law* (2001) at 114, noting that in the pre-*Charter* era, the Courts were "alert in their scrutiny of the exercise of discretionary power" where civil liberties and freedoms were at stake. The statutory conferral of the power to make a discretionary decision does not immunize from judicial scrutiny the decision-maker who ignores the fundamental values of Canada's legal order. In "Unwritten Constitutionalism in Canada: Where Do Things Stand?" (2001) 35 Can. Bus. L. J. 113 at 115, Professor Choudhry questions the propriety of using unwritten principles to challenge the validity of legislation, but regards as benign their use to review administrative action: "To the extent that unwritten principles have been used to control executive action, they function in a manner similar to the common law grounds of judicial review of administrative action."

[177] The possibility of the review of discretionary decisions on the basis of fundamental Canadian constitutional and societal values is reinforced by the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817: see Mullan, *supra*, chapter 6; Dyzenhaus and Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker v. Canada*" (2001), 51 U.T.L.J. 193; MacLachlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001) 40 Can. Bar Rev. 281. In *Baker*, the Court considered a challenge to the exercise of a ministerial decision to refuse to exempt an applicant for permanent resident status, on compassionate and humanitarian grounds, from the requirement that the application be made from outside Canada. Noting that a ministerial discretionary decision made pursuant to a broadly worded statutory mandate is ordinarily entitled to a high level of deference from the courts, L'Heureux-Dubé J. wrote at pp. 853-55 that there were, nonetheless, significant judicially enforceable limits where fundamental constitutional and societal values are at stake:

> [D]iscretion must…be exercised in a manner that is within a reasonable interpretation of the margin of manoeuvre contemplated by the legislature, in accordance with the principles of the rule of law (*Roncarelli v. Duplessis*, [1959] S.C.R. 121), in line with general principles of administrative law governing the exercise of discretion, and consistent with the *Canadian Charter of Rights and Freedoms*….
>
> …
>
> [T]hough discretionary decisions will generally be given considerable respect, that discretion must be exercised in

> accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.

[178] L'Heureux-Dubé J. found that the Minister's decision to refuse an exemption for a woman who had given birth to four children during her 11 years in Canada failed to respect the values expressed in the international *Convention on the Rights of the Child*. The *Convention* had been signed by Canada, but not adopted in statutory form by Parliament. The Minister, held the majority of the Supreme Court of Canada at p. 859, was required "to give serious weight and consideration" to the values of the *Convention* and the interests of the applicant's children who would be left behind if she were not admitted. The Minister's decision was quashed.

[179] If the values of an international convention not adopted in statute form by Parliament have a bearing on the validity of the exercise of ministerial discretion, it must be the case that failure to take into account a fundamental principle of the Constitution when purporting to act in the public interest renders a discretionary decision subject to judicial review.

[180] The Commission was required by statute to exercise its powers with respect to Montfort *in accordance with the public interest*. In determining the public interest, the Commission was required to have regard to the fundamental constitutional principle of respect for and protection of minorities. The Commission was also required to have regard to the recommendations of regional health councils. As noted earlier, the regional health councils recognized the unique role of Montfort and its importance to the continued survival of the language and culture of the francophone community. The Commission, however, viewe d consideration of Montfort's larger institutional role as beyond its mandate. This is demonstrated by the letter written by Dr. Sinclair dated February 22, 1999 to which reference has already been made at paragraphs 49 and 72.

[181] We agree with the Divisional Court, at pp. 65-66, that the language and culture of the francophone minority in Ontario "hold a special place in the Canadian fabric as one of the founding communities of Canada and as one of the two official language groups whose rights are entrenched in the Constitution." If implemented, the Commission's directions would greatly impair Montfort's role as an important linguistic, cultural and educational institution, vital to the minority francophone population of Ontario. This would be contrary to the fundamental constitutional principle of respect for and protection of minorities.

[182] Ontario relies on the following passage in *Mount Sinai*, *supra*, where Bastarache J. held at para. 58, "Decisions of Ministers of the Crown in the exercise of discretionary

powers in the administrative context should generally receive the highest standard of deference, namely patent unreasonableness."

[183] There is little doubt that the Commission's directions themselves are entitled to a high level of curial deference: *Pembroke Civic Hospital v. Ontario (Health Services Restructuring Commission)* (1997), 36 O.R. (3d) 41 (Div. Ct.). However, as we have pointed out, they are by no means immune from judicial review. While the Commission's directions are entitled to deference, as pointed out in *Baker, supra*, at p. 859, quoting Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Taggart, ed. *The Province of Administrative Law* (1997) 279 at 286, deference "requires not submission but a respectful attention to the reasons offered or which could be offered in support of a decision". See also "Transforming Administrative Law", *supra*, where Professor Maclachlan states at 289:

> As explained by Justice McLachlin [in "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1999) 12 CJALP 171], the rule of law should be seen as an essential attribute of decision-making in a democratic society, taking as its overarching principle "a certain *ethos of justification*", under which an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.
>
> [Emphasis in original.]

[184] The Commission offered no justification for diminishing Montfort's important linguistic, cultural, and educational role for the Franco-Ontarian minority. It said that matter was beyond its mandate. The Commission failed to pay any attention to the relevant constitutional values, nor did it make any attempt to justify departure from those values on the ground that it was necessary to do so to achieve some other important objective. While the Commission is entitled to deference, deference does not protect decisions, purportedly taken in the public interest, that impinge on fundamental Canadian constitutional values without offering any justification.

[185] The Divisional Court did not find the Commission's decision to be patently unreasonable or clearly irrational, the test that the parties acknowledged was applicable in the circumstances. Ontario points out that the respondents have not appealed this finding. However, this aspect of the Divisional Court's judgment must not be taken out of context or read in isolation from the Court's central findings. The Divisional Court did find that the Commission ignored Montfort's broader institutional role and failed to pay appropriate heed to a fundamental principle of the Constitution. The application of that constitutional principle to the circumstances of this case is squarely raised by Ontario's appeal, and the point under consideration was fully canvassed in argument.

[186] The Divisional Court, viewing the matter in purely administrative law terms, and without considering the relevance of the constitutional issues to the standard of review, found the standard to be patent unreasonableness. Where constitutional and quasi-constitutional rights or values are concerned, correctness or reasonableness will often be the appropriate standard: see *eg*. *Baker, supra*; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825. In the circumstances, detailed consideration of the appropriate standard of review is neither necessary nor appropriate as it is clear that the directions cannot survive even the most deferential standard because the Commission refused to take into account or give any weight to Montfort's broader institutional role.

[187] We conclude, accordingly, that the Commission's directions must also be quashed on the ground that, contrary to the constitutional principle of respect for and protection of minorities, in the exercise of its discretion, the Commission failed to give serious weight and consideration to the linguistic and cultural significance of Montfort to the survival of the Franco-Ontarian minority.

VI CONCLUSION

[188] Our conclusions may be summarized as follows:

(1) We affirm the Divisional Court's findings of fact that the Commission's directions to Montfort would:

- (a) result in a reduction in availability of health care services in French;
- (b) jeopardize the training of French language health care professionals; and
- (c) impair Montfort's broader role as an important linguistic, cultural, and educational institution, vital to the minority francophone population of Ontario.

(2) The status of Montfort as a francophone institution is not constitutionally protected by s. 16(3) of the *Charter*.

(3) The Commission's directions relating to Montfort did not violate s. 15 of the *Charter* and Montfort's cross-appeal is accordingly dismissed.

(4) The constitutional principle of respect for and protection of minorities is a fundamental constitutional value that has an important bearing upon the status of Montfort and the validity of the Commission's directions.

(5) The fundamental constitutional principle of respect for and protection of minorities, together with the principles that apply to the interpretation of language rights, require that the *F.L.S.A*. be given a liberal and generous interpretation.

(6) By enacting the *F.L.S.A.*, Ontario bound itself to provide the services offered at Montfort at the time of designation under the Act unless it was "reasonable and necessary" to limit them. Ontario has not offered the justification that it is reasonable and necessary to limit the services offered in French by Montfort to the community. The Commission's directions failed to respect the requirements of the *F.L.S.A.*

(7) In exercising its discretion as to what is in the public interest, the Commission was required by the fundamental principles of the Constitution to give serious weight and consideration to the importance of Montfort as an institution to the survival of the Franco-Ontarian minority. The Commission considered this beyond its mandate and its directions are therefore subject to judicial review. This is a second reason for quashing the Commission's directions.

(8) Ontario's appeal is dismissed, the order quashing the Commission's directions relating to Montfort is affirmed, and the matter is remitted to the Minister for reconsideration in accordance with these reasons.

Released: DEC 07 2001

Signed: "K.M. Weiler J.A."
"Robert J. Sharpe J.A.
"I agree Paul Rivard J. (*ad hoc*)

Tab 9

COURT OF APPEAL FOR ONTARIO

CITATION: Fontaine v. Canada (Attorney General), 2018 ONCA 749
DATE: 20180912
DOCKET: M49603 (C65851)

Sharpe J.A. (In Chambers)

BETWEEN

Larry Philip Fontaine in his personal capacity and in his capacity as the executor of the estate of Agnes Mary Fontaine, deceased, Michelline Ammaq, Percy Archie, Charles Baxter Sr., Elijah Baxter, Evelyn Baxter, Donald Belcourt, Nora Bernard, John Bosum, Janet Brewster, Rhonda Buffalo, Ernestine Caibaiosai-Gidmark, Michael Carpan, Brenda Cyr, Deanna Cyr, Malcolm Dawson, Ann Dene, Benny Doctor, Lucy Doctor, James Fontaine in his personal capacity and in his capacity as the executor of the Estate of Agnes Mary Fontaine, deceased, Vincent Bradley Fontaine, Dana Eva Marie Francey, Peggy Good, Fred Kelly, Rosemarie Kuptana, Elizabeth Kusiak, Theresa Larocque, Jane McCullum, Cornelius McComber, Veronica Marten, Stanley Thomas Nepetaypo, Flora Northwest, Norman Pauchey, Camble Quatell, Alvin Barney Saulteaux, Christine Semple, Dennis Smokeyday, Kenneth Sparvier, Edward Tapiatic, Helen Winderman and Adrian Yellowknee

Plaintiffs

and

The Attorney General of Canada, The Presbyterian Church in Canada, The General Synod of the Anglican Church of Canada, The United Church of Canada, The Board of Home Missions of the United Church of Canada, The Women's Missionary Society of the Presbyterian Church, The Baptist Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Bay, The Canada Impact North Ministries of the Company for the Propagation of the Gospel in New England (also known as The New England Company), The Diocese of Saskatchewan, The Diocese of the Synod of Cariboo, The Foreign Mission of the Presbyterian Church in Canada, The Incorporated Synod of the Diocese of Huron, The Methodist Church of Canada, The Missionary Society of the Anglican Church of Canada, The Missionary Society of the Methodist Church of Canada (also known as the Methodist Missionary Society of Canada), The Incorporated Synod of the Diocese of Algoma, The Synod of the Anglican Church of the Diocese of Quebec, The Synod of the Diocese of Athabasca, The Synod of the Diocese of Brandon, The Anglican Synod of the Diocese of British Columbia, The Synod of

the Diocese of Calgary, The Synod of the Diocese of Keewatin, The Synod of the Diocese of Qu'Appelle, The Synod of the Diocese of New Westminster, The Synod of the Diocese of Yukon, The Trustee Board of the Presbyterian Church in Canada, The Board of Home Missions and Social Service of the Presbyterian Church of Canada, The Women's Missionary Society of the United Church of Canada, Sisters of Charity, A Body Corporate also known as Sisters of Charity of St. Vincent De Paul, Halifax, also known as Sisters of Charity Halifax, Roman Catholic Episcopal Corporation of Halifax, Les Sœurs de Notre Dame-Auxiliatrice, Les Sœurs de St. François D'Assise, Institut des Sœurs du Bon Conseil, Les Sœurs de Saint-Joseph de Saint-Hyacinthe, Les Sœurs de Jésus-Marie, Les Sœurs de l'Assomption de la Sainte Vierge, Les Sœurs de L'Assomption de la Saint Vierge de L'Alberta, Les Sœurs de la Charité de St. Hyacinthe, Les Œuvres Oblates de L'Ontario, Les Résidences Oblates du Québec, La Corporation Épiscopale Catholique Romaine de la Baie James (The Roman Catholic Episcopal Corporation of James Bay), The Catholic Diocese of Moosonee, Sœurs Grises de Montréall/Grey Nuns Of Montreal, Sisters of Charity (Grey Nuns) of Alberta, Les Sœurs de la Charité des T.N.O., Hôtel-Dieu de Nicolet, The Grey Nuns of Manitoba Inc.-Les Sœurs Grises du Manitoba Inc., La Corporation Épiscopale Catholique Romaine De La Baie D'Hudson - The Roman Catholic Episcopal Corporation of Hudson's Bay, Missionary Oblates - Grandin Province, Les Oblats de Marie Immaculée du Manitoba, The Archiepiscopal Corporation of Regina, The Sisters of the Presentation, The Sisters of St. Joseph of Sault St. Marie, Sisters of Charity of Ottawa, Oblates of Mary Immaculate -St. Peter's Province, The Sisters of Saint Ann, Sisters of Instruction of the Child Jesus, The Benedictine Sisters of Mt. Angel Oregon, Les Pères Montfortains, The Roman Catholic Bishop of Kamloops Corporation Sole, The Bishop of Victoria, Corporation Sole, The Roman Catholic Bishop of Nelson, Corporation Sole, Order of the Oblates of Mary Immaculate in the Province of British Columbia, The Sisters of Charity of Providence of Western Canada, La Corporation Épiscopale Catholique Romaine de Grouard, Roman Catholic Episcopal Corporation of Keewatin, La Corporation Archiépiscopale Catholique Romaine de St. Boniface, Les Missionnaires Oblates Sisters de St. Boniface-The Missionary Oblates Sisters of St. Boniface, Roman Catholic Archiepiscopal Corporation of Winnipeg, La Corporation Épiscopale Catholique Romaine de Prince Albert, The Roman Catholic Bishop of Thunder Bay, Immaculate Heart Community of Los Angeles CA, Archdiocese of Vancouver - The Roman Catholic Archbishop of Vancouver, Roman Catholic Diocese of Whitehorse, The Catholic Episcopal Corporation of Mackenzie-Fort Smith, The Roman Catholic Episcopal Corporation of Prince Rupert, Episcopal Corporation of Saskatoon, Omi Lacombe Canada Inc. and Mt. Angel Abbey Inc.

Defendants (Responding Parties)

and

Chief Adjudicator Indian Residential Schools Adjudication Secretariat

Respondent (Moving Party)

Proceedings under the *Class Proceedings Act*, 1992, S.O. 1992 c. 6

Joseph Arvay (Q.C.) and Sandy Lockhart, for the Moving Party

Richard Olschewski, for the responding parties, J.W. and REO Law Corporation

Catherine Coughlan and Brent Thompson, for the responding party, The Attorney General of Canada

Heard: September 12, 2018

REASONS FOR DECISION

INTRODUCTION

[1] The Chief Adjudicator of the Independent Assessment Process ("IAP") under the Indian Residential Schools Settlement Agreement ("IRSSA") seeks a stay of a Direction issued by the Eastern Administrative Judge. The Direction at issue prohibits the Chief Adjudicator from continuing his participation in three appeals. One of these appeals, the REO Appeal, is before the Supreme Court of Canada: see *J.W. and REO Law Corporation v. Attorney General of Canada et al.*, SCC Case Number 37725. Two others are before the British Columbia Court of Appeal: see *Ronnie Gail Scout v. Attorney General of Canada et al.*, BCCA File No. CA44379; *Larry Philip Fontaine et al. v. Attorney General of Canada et al.*, BCCA File Nos. CA45085 and CA 45093. The REO Appeal is of particular concern because it is scheduled to be heard by the Supreme Court of Canada on October

10, 2018. It is expected that the two British Columbia appeals will be heard in November and December.

[2] The Eastern Administrative Judge issued the Direction on his own initiative without notice to the Chief Adjudicator or any other party, and apparently without any supporting record.

[3] The Direction was issued on September 5, 2018 and directs the Chief Adjudicator to withdraw from the three appeals by September 13, 2018. Given the urgency of this matter, an immediate answer from this court is required and accordingly these reasons will be relatively brief.

JURISDICTION

[4] The Respondent the Attorney General of Canada submits that as the Direction amounts to an interlocutory case management type order, this Court has no jurisdiction to entertain the appeal and, accordingly, that no stay should be granted: *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 6(2), 19.

[5] I recognize that as a single judge, I have no final authority to determine the issue of jurisdiction. However, as no stay should be granted in a case over which this court lacks jurisdiction, I must deal with the issue.

[6] The difficulty with the Attorney General's submission is that the Chief Adjudicator is named as a respondent in the REO appeal and has participated as a respondent to this point. The Direction requires the Chief Adjudicator to withdraw

from the appeals and terminate his participation. That amounts to a final determination of the Chief Adjudicator's rights of participation as a party and, in my view, is a final order over which this court does have jurisdiction.

STANDING

[7] The respondents J.W. and REO Law Corporation submit that the Chief Adjudicator lacks standing to bring this appeal. While Chief Adjudicator may in certain circumstances participate in appeals brought by others, they argue that he has no right to commence an appeal in his own right.

[8] While the Chief Adjudicator may not be able to initiate an appeal from an IAP decision in his own right, that is not what is involved here. The Chief Adjudicator has been named and recognized as a party in the REO appeal. The Direction directly targets the Chief Adjudicator's participation as a party in the REO appeal and would terminate that participation. In my view, that gives rise to an issue affecting the legal rights of the Chief Adjudicator and he therefore does have standing to appeal the Direction.

THE TEST FOR A STAY

[9] It is common ground that the well-established three-part test for a stay applies. The applicant must demonstrate that there is a serious issue to be tried; that it will suffer irreparable harm if the stay is not granted; and that the balance of convenience favours a stay pending the disposition of the appeal: *RJR -- MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311.

(1) Serious question to be tried

[10] I am satisfied that the Chief Adjudicator's appeal raises arguable grounds of appeal and serious questions to be determined by this court.

[11] First, neither the Chief Adjudicator nor any other party was given notice of the Eastern Administrative Judge's concern regarding the Chief Adjudicator's participation in the appeals. It is certainly arguable that proceeding without notice and without submissions amounted to a denial of procedural justice. It is difficult to see why notice and opportunity to address the Eastern Administrative Judge's concerns could and should not have been given. The Direction takes the form of a judicial order and the reasons given to support it are in the form of a judicial judgment. Accordingly, it is arguable that the usual norms of procedural fairness should have been followed. Of particular concern is the finding in the Direction that the Chief Adjudicator is guilty of "insubordination of the Courts to which he is accountable". This is a finding of serious misconduct made against a lawyer and there is a serious issue as to whether it should have been made without giving the lawyer an opportunity to respond.

[12] Second, the Direction relates to proceedings in other courts. The Chief Adjudicator is a respondent or an intervenor to the appeals in those other courts and is therefore subject to the control of those courts. The Chief Adjudicator accepts that he is subject to the usual limitations imposed upon administrative tribunals who participate in proceedings that challenge their decisions as outlined

in *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147. He disputes that he has transgressed those limits and submits that if he has, that is an issue for courts before whom the Chief Adjudicator appears. I agree with the submission that there is an arguable issue as to whether the Eastern Administrative Judge erred in assuming the authority to determine the nature and scope of the submissions the Chief Adjudicator should make in other courts.

[13] Third, there is an issue as to whether the Chief Adjudicator has exceeded the limits of participation permitted for a tribunal in proceedings that challenge the tribunal's decision. The Chief Adjudicator points out that he has regularly participated in appeals from decisions of supervising and administrative judges and that no issue has been taken with that participation. He strongly contests the Eastern Administrative Judge's characterization of his participation in the three appeals at issue and asserts that no one has challenged the Chief Adjudicator's submissions in the three courts as being inappropriate. The Chief Adjudicator also submits that the Eastern Administrative Judge erred by finding that the Chief Adjudicator cannot challenge decisions of supervising and administrative judges on appeal, even if he respects the limits the law imposes on the arguments administrative tribunals may make. Again, I am satisfied that these amount to serious issues to be tried.

(2) Irreparable harm

[14] The appeal before the Supreme Court of Canada is scheduled to be heard on October 10. If a stay is not granted and the Chief Adjudicator is required to withdraw his factum and participation in that appeal tomorrow, it is difficult to see how the matter could be put back on the rails. The effect of denying the stay would be, in a practical sense, to deprive the Chief Adjudicator of the opportunity to participate in that appeal. It is difficult to see any other remedy that would repair that harm. Accordingly I am satisfied that the Chief Adjudicator has shown if a stay is denied, he will suffer irreparable harm.

(3) Balance of convenience

[15] I am satisfied that the balance of convenience favours granting a stay. If a stay is refused, the Chief Adjudicator's participation in the appeals will be terminated and, in one case at least, terminated without hope of resurrection. On the other hand if, as the Eastern Administrative Judge thinks, the Chief Adjudicator's participation exceeds the limits of what is permitted, the courts before whom the Chief Adjudicator appears can deal with that problem and limit his participation accordingly.

[16] I recognize that granting a stay effectively determines the issue on appeal in favour of the Chief Adjudicator insofar as the REO appeal is concerned. It is accepted that where a stay would effectively determine the matter at issue, a court may go beyond the "serious issue to be tried" standard and grant the stay if the

applicant shows a strong likelihood of success: *RJR -- Macdonald*, at p. 338. In my view, the Chief Adjudicator has met that standard, particularly with respect to the issue of procedural fairness.

[17] Granting the stay will not preclude this court from considering the general issues as to the nature of the relationship between the Eastern Administrative Judge and the Chief Adjudicator on the appeal.

DISPOSITION

[18] For these reasons, the Direction of the Eastern Administrative Judge is stayed pending appeal to this court. As requested by the Chief Adjudicator, the stay is effective as of the date of the Direction in order to facilitate retaining and payment of counsel for this motion.

[19] This is not a case for costs of the motion.

[20] In the circumstances, the hearing of the appeal shall be expedited and I will case manage the appeal to ensure that it is heard as soon as possible.

"Robert J. Sharpe J.A."

Tab 10

COURT FILE NO.: 02-CL-4593
DATE: 20021231

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF A PROCEEDING UNDER SS. 161 AND 248 OF THE BUSINESS CORPORATIONS ACT (ONTARIO), R.S.O. 1990, c. B.16

DARLENE NOBLE v. EDWARD NOBLE, YVONNE SIN, WELLNESS INNOVATIONS CORP., VIBROTONE LTD., ADAM INC., WELLNESS AMERICA INC., WELLNESS AMERICA LP AND RAMEDES INC.

BEFORE: HIMEL, J.

COUNSEL: EDWARD J. BABIN and KRISTINE DIBACCO, for the Applicant (Responding party on the motion)
GEORGE GLEZOS for the Respondents (moving parties)

HEARD: December 19, 2002

ENDORSEMENT

[1] Edward Noble and companies controlled by him are respondents in an application brought by Edward's former spouse Darlene. Edward and the companies appeal a decision I rendered on November 12, 2002, dismissing a motion under Rule 17 of the Rules of Civil Procedure for an order to set aside service of the application record and to stay the application because of the parties' exclusive jurisdiction agreement and that Ontario is the forum non conveniens. I also dismissed a motion to expunge certain exhibits and portions of the applicant's affidavits on the basis that they were subject to solicitor-client privilege. I held that no such privilege attached to the documents which were already known to third parties and had been circulated in other proceedings. The respondents in this application brought under s. 161 and s. 248 of the Ontario Business Corporations Act have filed a notice of appeal of my decision to the Ontario Court of Appeal with respect to the motion on the court's jurisdiction (submitting that it is a final order) and have filed a notice for leave to appeal to the Divisional Court with respect to the motion to expunge (which they say is an interlocutory order). They also appeal the order of Farley J. setting a timetable in this matter. They appear today seeking a stay of my orders and Farley J.'s order pending the hearing of the appeals.

FACTUAL BACKGROUND:

[2] The history and nature of these proceedings are set out in detail in my endorsement of November 12, 2002. Edward Noble takes the position that this court should stay the orders made pending the hearing of the appeal. Darlene Noble opposes the motion for stay and argues that her application under the OBCA was brought on an urgent basis for an investigation and appointing an inspector into the business and affairs of the respondent Wellness Innovations Corp (WIC). Affidavit evidence filed in this case alleges that the respondent Edward Noble has been misappropriating WIC's assets and corporate opportunities. Darlene claims that she has made repeated efforts to gain access to the books and records of WIC in order to determine its value but has been denied access to the underlying source materials. Darlene submits that there is reason to believe that Edward intends to dissolve or wind up WIC imminently and that her interest in WIC is in jeopardy. Accordingly, she takes the position that there is no evidence of the respondents in support of their stay motion, that the consequences of granting a stay would result in significant harm to the applicant and other stakeholders in WIC and that the respondents fail to meet any aspect of the three part test for a stay. She submits that the motion for leave to appeal and the appeal do not raise serious issues, that there is no evidence that they will suffer irreparable harm if a stay is not granted and the balance of convenience does not favour granting a stay.

THE COURT'S JURISDICTION TO HEAR THE MOTION FOR STAY:

[3] Darlene takes the position that this court does not have jurisdiction to grant a stay and that the appellate court is the only court that has such jurisdiction. Counsel argues that since a notice of appeal to the Court of Appeal had been filed, this court lacks jurisdiction to grant a stay of my order. Counsel relies upon the case of Bijowski v. Caicco (1985), 3 C.P.C. (2d) 295 (Ont. C.A.) and the more recent cases of this court of O'Brien v. McNabb, [2000] O.T.C. 21 and Coccimiglio v. 1037687 Ontario Ltd. (1999), 44 C.P.C. (4^{th}) 128.

[4] Edward takes the position that the present wording of Rule 63.02 is different from the wording of the rule that was in place in 1985 when Bijowski was decided by Finlayson J.A. The current phrasing of the rule now confers more extensive jurisdiction upon the court whose decision is appealed to grant a stay. In fact, the present rule confers a concurrent jurisdiction upon the court whose decision is appealed as well as the court to which an appeal of a final order has been taken.

[5] I heard argument on this issue initially and ruled that I did have jurisdiction to hear the motion. My reasons are as follows:

[6] In 1985, Rule 63.02 read as follows:

> (1) An order, whether final or interlocutory, may be stayed on such terms as are just, by,

(a) an order of the court whose decision is to be appealed, but the stay expires,

(i) when the time for delivery of a notice of motion for leave to appeal or notice of appeal expires, or

(ii) when a notice of motion for leave to appeal or notice of appeal is delivered, whichever is earlier; or

(b) an order of a judge of the court to which a motion for leave to appeal has been made or an appeal has been taken.

(2) A stay granted under subrule (1) may be set aside or varied, on such terms as are just, by a judge of the court to which a motion for leave to appeal may or has been made or to which an appeal may be or has been taken.

[7] In Bijowski, supra, at 300, Finlayson J.A. interpreted the meaning of the superseded provision and said:

> In my respectful view, the purpose of r.63.02 is to confer a restricted jurisdiction upon the trial Judge or another Judge of that Court in his absence to stay an order which is not automatically stayed because of the provisions of r.63.01(2). The order that he makes is only effective until notice of appeal is delivered or the time for appeal expires whichever is earlier. The rule really contemplates the maintenance of the status quo during the time available to the unsuccessful party to appeal. Once an appeal is launched the jurisdiction is then in the Court of Appeal to determine whether it would be appropriate for the longer term before the appeal is disposed of to interfere with the judgment or order that is under appeal. (emphasis added)

[8] The current Rule 63.02 reads as follows:

(1) An interlocutory or final order may be stayed on such terms as are just,

(a) by an order of the court whose decision is to be appealed;

(b) by an order of a judge of the court to which a motion for leave to appeal has been made or to which an appeal has been taken.

(2) A stay granted under clause (1)(a) expires if no notice of motion for leave to apeal or no notice of appeal, as the case may be, is delivered and the time for the delivery of the relevant notice has expired.

(3) A stay granted under subrule (1) may be set aside or varied on such terms as are just, by a judge of the court to which a motion for leave to appeal may be or has been made or to which an appeal may be or has been taken.

[9] The wording of the old and new versions of Rule 63.02 is clearly different. The former Rule 63.02(1)(a) comprised two distinct situations where the court which had made an order would no longer have jurisdiction to grant a stay. The first, set out in Rule 63.02(1)(a)(i), involved the applicants having missed the deadline for filing their notice of appeal or notice of motion for leave to appeal. The second, in Rule 63.02(1)(a)(ii), arose once the applicants had filed their notice of appeal or notice of motion for leave to appeal. Any stay which was in effect at either time would expire, and the applicants would have to apply for a new stay before the appellate court.

[10] Under the old Rule 63.02, in other words, there was no concurrent jurisdiction to grant stays of orders pending appeal. The court being appealed from had jurisdiction up until the appeal had been filed or its limitation period expired. The court being appealed to took over from there. This is what I understand Justice Finalyson's decision in Bijowski to mean.

[11] In the cases of O'Brien v. McNabb, supra, and Coccimiglio v. 1037687 Ontario Ltd. supra, the comparison between the old Rule 63.02 and the new Rule 63.02 does not appear to have been fully argued. In the case before me, I have had the benefit of complete argument on this issue and, with all due respect to Justice Kozak, in my view, the new Rule 63.02 has changed and expanded the jurisdiction of the court being appealed from to hear a motion to stay its decision. I find the decision of Bijowski has limited application to the Rule which now governs.

[12] The new Rule 63.02 deletes the former paragraphs (1)(a)(i) and (1)(a)(ii) described above. The new subrule (2), however, only refers to the scenario outlined in former paragraph (1)(a)(i). In other words, any stay obtained by the applicants from the court being appealed from only expires if they have missed their deadline to appeal or to apply for leave to appeal. The court whose decision is being appealed thus has no jurisdiction to grant a stay once the appellants (or applicants) miss their appeal deadline. This does not preclude appellants (or applicants) from obtaining a stay from the court being appealed from once they have given notice of appeal or notice of motion for leave to appeal. The rationale for this new provision is not described in the Rules nor is it considered in caselaw as far as I have been able to determine. However, there is a practical reason for such a provision of concurrent jurisdiction over stays of orders pending their appeal in that it serves the interests of justice and affords efficiency. Not only does it mean that counsel are not obliged to re-argue the motion for a stay once they have filed notice of appeal, but there is also an alternative forum in which to seek a stay should the matter be urgent.

[13] Given the expanded provision in Rule 63.02, I find that the Rule confers jurisdiction upon me to hear this motion.

THE MOTION FOR STAY:

[14] The test for a stay under Rule 63.02(1) of an order pending appeal is the same as the test for an interlocutory injunction: see Circuit World Corp. v. Lesperance (1997), 33 O.R. (3d) 674 (C.A.). It is a three-part test which is set out in the leading decision of RJR-Macdonald Inc. v. Canada (A.G.), [1994] 1 S.C.R. 311. The moving party must establish that the appeal or application for leave to appeal raises a serious issue, that it will suffer irreparable harm if the stay is not granted and that the balance of convenience or inconvenience favours the granting of a stay. The court is to proceed on the assumption that the judgment under appeal is correct and the judge's findings must prima facie be accepted: Ogden Entertainment Services v. United Steelworkers of America, Local 440 (1998), 38 O.R. (3d) 448 at 450 (C.A.); 820099 Ontario Inc. v. Harold E. Ballard Ltd. (1991), 49 C.P.C.(2d) 239 at 243 (Div.Ct).

[15] In deciding whether there is a serious issue to be tried, the court must make a preliminary assessment of the merits of the case and consider the relative strength of each party's case. In the case before me, I note that the respondents have not demonstrated any conflicting authorities to doubt the correctness of the decision. In fact, the only authority cited on point supports the decision. That is the case of TD Asset Management Inc. v. Repap Enterprises Inc. [2000] O.J. No. 2250 (Ont. Sup.Ct.) which was upheld on the leave to appeal application to the Divisional Court reported at [2000] O.J. No. 3395 (Ont. Sup. Ct.). In the leave to appeal application, O'Driscoll J. commented that there was no decision cited that conflicted with the order of Farley J. who refused to grant a stay, and that the applicant had not persuaded him that there is "good reason to doubt the correctness of the order in question". Justice O'Driscoll wrote at para. 28: "Moreover, there is nothing in this case of such general importance nor is there anything relating to the development of the law or the administration of justice that would require leave to be given. There is no issue that warrants resolution by a higher level of judicial authority. The issues under review are those that are of "vital importance" to the parties alone."

[16] In my view, even if the appeal raises serious issues, the respondents have not presented any evidence to demonstrate that proceeding with the application will cause irreparable harm and a stay is necessary. Evidence of irreparable harm must be "clear and not speculative": see Syntex Inc. v. Novopharm Ltd. (1991), 126 N.R. 122; 36 C.P.R. (3d) 129 at 135 (Fed. C.A.) and Kanda Tsushin Kogyo Co. v. Coveley (1997), 96 O.A.C. 324 at 329 (Div.Ct.). That a party is likely to suffer irreparable harm is not enough. It is necessary that the applicant demonstrate evidence to support a finding that the applicant would suffer irreparable harm: see Centre Ice Ltd. v. National Hockey League (1994) 166 N.R. 44 (F.C.A.) at 46. The respondents point out that the denial of a stay will force them to deliver an appearance and file responding materials which will arguably, be attorning to the jurisdiction and would be highly prejudicial. However, so long as the party opposing a stay pending appeal agrees that the appealing party will not be considered to have attorned to the jurisdiction by filing pleadings and proceeding with the litigation, the appealing party will not suffer irreparable harm if a stay is refused

and the action is allowed to proceed pending appeal: see Canaccord Capital Corp. v. Hongkong Bank of Canada, [1998] B.C.J. No. 1654(C.A.); Shaw v. Servier Canada,Inc. [2002] Y.J. No. 76 (C.A.); Marren v. Echo Bay Mines Ltd., [2002] B.C.J. No. 2442(C.A.). Here, Darlene is prepared to agree that the participation of the respondents pending the appeal will be without prejudice to their position on the appeal concerning Rule 17 and the jurisdictional issue.

[17] Furthermore, the respondents argue that having to pursue the litigation while the appeal is pending would result in additional expenses. In Northwest Territories v. Public Service Alliance of Canada (2001) 33 Admin. L.R. (3d) 310 at 314, the Federal Court of Appeal held as follows: "The Government also argues that if the stay is not granted but its appeal eventually succeeds, it will have wasted all of the time and money required to prepare for and attend the hearing (including travel to Ottawa, where most of the hearings are held), and will have no means of recovering the wasted funds. I am unable to agree that resources that may be wasted on litigation is irreparable harm: Bell Canada v. C.E.P. (1997), 127 F.T.R. 44 (Fed. T.D.) at 56." In my view, if the respondents ultimately succeed on appeal, they may be compensated with costs of proceedings should they later be considered unnecessary. I adopt the rationale in 820099 Ontario Inc. v. Harold E. Ballard, supra, where Montgomery J. dismissed a motion for stay of execution pending appeal. In that decision, he considered the submission that the only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the transaction and money would be wasted. At 243, he cited the case of Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co. (1923), 55 O.L.R. 127 9 C.A. where Middleton J.A. wrote at 132:

> There is a wide distinction between cases in which the refusal of a stay will render an appeal nugatory, and cases in which one of the parties must suffer inconvenience and possibly some substantial pecuniary loss. I am inclined to think that it will be found that the refusal of a stay under certain circumstances does not arise from absence of jurisdiction so much as from the view taken that the case is one in which it would be improper to exercise the latent power. In all cases in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irremediable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of the application for an interim injunction – the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as prima facie right.

[18] In my view, the expenses of the litigation may be compensated with costs and that does not constitute irreparable harm. Irreparable harm is irremediable harm and not mere inconvenience.

[19] As to the balance of convenience, I have weighed the harm that Edward says a refusal of a stay would cause and the harm if a stay is granted. On balance, I find that granting a stay would be prejudicial to the applicant who alleges that the respondents have been dissipating assets and the financial positions of the companies are in jeopardy. A stay would result in further delay of the application for relief under the OBCA. The application was commenced in July, 2002 on an urgent basis. The motion under Rule 17 delayed the hearing of the appointment of an inspector which is now scheduled for March 10, 2003. Given the concerns about dissipation of assets, it is important that the action proceed while the appeal is pending. I note that Justice Blair granted an order on August 6, 2002 restraining the respondents from misappropriating or appropriating to their own use funds or assets which belong to WIC and selling or disposing of assets of WIC other than in the ordinary course of business and at fair market value. I acknowledge that the respondents' counsel submits that such an order continues through the determination of the motion under Rule 17 and includes the period during the appeal. Nonetheless, in my view, there will still be prejudice caused by delay if a stay is granted.

[20] In considering the test for staying an order pending an appeal as set out in RJR-Macdonald, supra, I am mindful that in each case the criteria may not be weighted equally. In Circuit World Corp. v. Lesperance, supra, Laskin J.A. wrote at 677:

> These three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay: International Corona Resources Ltd. v. LAC Minerals Ltd. (1986), 21 C.P.C. (2d) 252 (Ont. C.A.) Nonetheless, in many cases whether to grant a stay will depend on the third criterion, called the balance of convenience or the balance of inconvenience.

[21] Applying the test applicable to a motion for stay, I find that the respondents have failed to establish (1) that there is a serious issue to be tried, (2) that there will be irreparable harm caused to the respondents if a stay is not granted, and (3) that the balance of convenience favours the respondents. On the contrary, prejudice will be caused to the applicants if there is further delay of the litigation. In my view, the principles which apply in determining whether a court should impose a stay pending an appeal are clear. The purpose of a stay is to prevent injustice and ensure fairness to both sides until the appeal can be argued. That exercise involves a balance of competing interests. It is for that reason that the courts require that the three criteria be met to justify a stay. In my view, the respondents have not met any of those criteria. Accordingly, the motions for stay of my orders of November 12, 2002 and the order of Farley J. of December 5, 2002 are dismissed. This decision is conditional upon the

applicant, who has already agreed, undertaking not to raise the issue of attornment to the jurisdiction by the respondents pending disposition of the appeals.

[22] If the parties are unable to agree on the issue of costs, they may file written submissions as follows: the applicant Darlene Noble shall file submissions by January 13, 2003 and the respondents Edward Noble and companies shall file submissions by January 17, 2003.

Himel, J.

DATE: December 31, 2002

Para Cited: 16

COURT FILE NO.: 02-CL-4593
DATE: 20021231

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

RE: IN THE MATTER OF A PROCEEDING UNDER SS. 161 AND 248 OF THE BUSINESS CORPORATIONS ACT (ONTARIO), R.S.O. 1990, c. B.16

DARLENE NOTBLE v. EDWARD NOBLE, YVONNE SIN, WELLNESS INNOVATIONS CORP., VIBROTONE LTD., ADAM INC., WELLNESS AMERICA INC., WELLNESS AMERICA LP AND RAMEDES INC.

BEFORE: HIMEL, J.

COUNSEL: EDWARD J. BABIN and KRISTINE DIBACCO, for the Applicant (Responding party on the motion)

GEORGE GLEZOS, for the Respondents (moving parties)

ENDORSEMENT

Himel, J.

DATE: December 31, 2002

9P

Tab 11

1997 CarswellOnt 80
Ontario Court of Justice (General Division) [Divisional Court]

Kanda Tsushin Kogyo Co. v. Coveley

1997 CarswellOnt 80, [1997] O.J. No. 56, 72 A.C.W.S. (3d) 745, 96 O.A.C. 324

Kanda Tsushin Kogyo Co. Ltd. and N.T.T. Fanet Systems Corporation, Plaintiffs/Respondents v. Michael Coveley, A.V.A.R. Communications Inc., Omega Digital Data Inc., Stella Yoon, Ken Chung and Unitech Electronics Co. Limited, Defendants/Appellants

Boland, Farley, Greer JJ.

Judgment: January 10, 1997
Docket: Docs. 96-CU-111783, B353/96

Counsel: *Claude R. Thomson, Q.C., Edward W. Purdy* and *Laura F. Cooper*, for the plaintiff/respondent.
Thomas G. Heintzman, Q.C. and *M.J. Bryant*, for the appellants, except for Unitech Electronics Co. Limited.

Subject: Civil Practice and Procedure

The Court:

1 On December 20, 1996 Saunders J. granted leave to appeal from paragraph 3 of an order of the learned motions court judge dated November 27, 1996:

> 3. THIS COURT FURTHER ORDERS that an interim injunction be ordered until the return date of the Motion, or such further Order of this Court, restraining the Defendants from delivering to the Bank of Nova Scotia or otherwise, units that use, incorporate or derive from, directly or indirectly, industrial design drawings and work allegedly created by Masakatsu Yotsukura for the plaintiffs and referred to in Exhibits 12 to 25 of Mr. Yotsukura's affidavit herein, and to which the Plaintiffs allegedly own copyright, except to the extent such deliveries are reasonably required to satisfy delivery obligations agreed to by the Defendants and under which the Defendants have outstanding legal obligations to make deliveries.

On the appeal before us this injunction was set aside. These reasons are the ones promised on the announcement of the decision on the day of the hearing. Saunders J. stated: "For obvious

reasons it is desirable to say as little as possible about the issues and the factual background, which both the Divisional Court and the Motions Court will have to address in the future"; we continue with that prudence.

2 Allow us to emphasize that the task of a motions court judge in dealing with interlocutory injunction motions (whether they be "interim" or "until trial" in nature) is a most difficult one. It was obvious that the learned motions court judge was attempting to cope with a most a thorny situation in an open and even handed manner.

3 As was stated in Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed., looseleaf, Canada Law Book Inc. Aurora) at paras. 2.10-15:

> The injunction is a flexible and *drastic remedy* (emphasis added). ... There are three sorts of interlocutory restraining orders which are made. The first is the ex parte injunction ... The second, an "interim" injunction usually refers to an order made on notice but after limited argument and only for a specific time, usually to permit the defendant to cross-examine on the affidavits filed by the plaintiffs or to file material in reply. The third, an "interlocutory" injunction, usually refers to an order restraining the defendant until trial or other disposition of the action ... (December 1995).

4 Saunders J. pointed out that:

> Whether an injunction is termed interim or interlocutory, the effect is the same. The court is exercising its civil power to restrain the activities of citizens. The injunction is an *extraordinary remedy* and should only be granted in accordance with settled principles. It follows that those principles should be adhered to, even if the injunction is for a relatively short time, although time may have an impact on the weight of the various factors. (emphasis added).

What we have in a pretrial injunction is a *drastic and extraordinary remedy. Thus it should be granted only in those circumstances which warrant taking such a drastic and extraordinary step*. Implicit in this is that the plaintiff must demonstrate (to a degree appropriate with granting such relief without the benefit of a trial) that such remedy is warranted.

5 In his November 27th endorsement the learned trial judge stated:

> .... I accept that entry into the market is an important economic advantage and that the *risk* that the plaintiffs will be preempted by the defendants creates a *potential* for irreparable harm not adequately compensable in damages. (emphasis added) ...
>
> Returning to the sealed documents, I conclude they raise an issue as to the clean hands of the plaintiffs but even without the response materials of the plaintiffs, the documents do not by themselves lead to the conclusion of probable breach by the plaintiffs of their

> obligations and while the disclosure by the plaintiffs about their dealings with Airos is marginal, I am not able to conclude it is misleading. While the sealed documents also suggest that damages might be adequate and that it is possible the plaintiffs have no plans for exploitation other than via Airos, those considerations can be reflected in the scope of an Order for the interim period. ...

In his follow up endorsement of December 19, 1996 the learned motions court judge stated:

> While I referred to the sealed documents in my reasons, the question whether and on what terms those documents are to be allowed to be filed and referred to should be adjourned to be heard another day.

6 Saunders J. made the following observations in which we concur:

> In this case, the effect of the injunction is to restrain the defendants from carrying on their business for a period of two months. It was granted without any finding of irreparable harm to the plaintiffs. Moreover, the learned judge recognized the possibility that damages might be an adequate remedy. Furthermore there was evidence before the learned judge in which he might have found the plaintiffs did not come before the court with clean hands. The learned judge referred to the issue, but made no express finding. If the plaintiffs' hands were not clean, that should have barred their claim to equitable relief.

Of course the lack of clean hands will not deprive a plaintiff of an injunction that he is otherwise entitled to unless such lack "bears directly upon the appropriateness of the remedy": see Sharpe, looseleaf, supra, at para 1.1060 (December 1995) citing as an example *Argyll v. Argyll*, [1967] Ch. 302 at pp.331-2. Since the sealed material was not before us, it is not possible to determine the situation with precision. However, we think it a fair observation that a motions court judge, having had the issue of clean hands put to him, deal with that issue unequivocally to the extent that the material available to him allows him to do so.

7 It would seem to us that the learned motions court judge concluded that in light of the speed with which it was anticipated that the until trial interlocutory injunction motion could be brought (possibly as early as January 27, 1997 although both sides now apparently have been unable to adhere to that timetable) and the perceived minimally intrusive nature of the interim injunction that a relaxed or modified test might be applied. The learned motions court judge only raised the aspect of "risk" and "potential" as to irreparable harm as opposed to a specific finding of such harm; he went on to allude to a suggestion in the sealed documents that damages might be adequate. He raised the possibility that the plaintiffs' may have no plans for exploitation (apparently in Canada) other than via Airos (against which the defendants as plaintiffs are engaged in separate injunctive proceedings). It would seem to us that an interim injunction motion requires the same standards to be applied to it as for an

until trial interlocutory one and at least the same degree of scrutiny of the evidence available: see *Williamhouse Envelope Ltd. v. Addorisio*, [1986] O.J. No. 207 where O'Driscoll J. stated:

> ... Is there any reason why the plaintiff should continue to enjoy what I consider to be a judicially imposed economical advantage? We live in a free enterprise system that affords equally opportunity in the market place to one and all. The system thrives on competition which is open and sometimes fierce. No competitor should have one hand, or both hands, tied behind his back by a court order unless all the judicial prerequisites for an injunctive or mandatory order have been satisfied.

See also R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity Doctrines and Remedies* (3rd ed. 1992, Butterworths, Sydney) at para. 2183:

> An interim injunction, is really best viewed as a type of interlocutory injunction. ... The principles applicable to interlocutory injunctions also apply to it.

8 The respondents submitted that the reasons of the learned motions court judge should not be examined on the basis of highly selected parsing which would be misleading and defeat his findings which were intended. We do not see this submission as persuasive. Rather to the contrary it appears to us that this judge was, as is his custom, being quite careful not to overreach as to his conclusions. It is for that reason that we determined that the learned motions court judge in exercising his discretion apparently inadvertently applied the wrong test, that is a lesser or relaxed test as opposed to that required of interlocutory injunctions generally.

9 It may be helpful to raise some elements of a general nature regarding interlocutory injunctions. The most recent case of *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 312, a Charter case, dealt with injunctions. The headnote at p.314 states:

> The three-part *American Cyanamid* test (adopted in Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*) should be applied to applications for interlocutory injunctions as well as for stays in both private law and Charter cases.

This synopsis would appear to be too simplistic even though it is stated as such at p.347 as part of the summary. The reason for suggesting caution is found in the analysis of the "strength of the plaintiff's case" at p.335:

> Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that

> "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed., 1992) at pp.2-13 to 2-20.

It may well be that in transporting the *American Cyanamid* reasoning into Canada that the English practice of not cross-examining on affidavits was overlooked. For instance there was no discussion of this aspect in *Yule Inc. v. Atlantic Pizza Delight Franchise (1968) Ltd. et al.* (1977), 17 O.R. (2d) 505 (Div. Ct.). As Lord Diplock said at p. 509 of *American Cyanamid*:

> In those cases where the legal rights of the parties depend on facts that are in dispute between them, the evidence available to the court at the hearing of the application or an interlocutory injunction is incomplete. It is given on affidavits and has not been tested by oral cross-examination.

10 Of course, if the *urgency of the situation* is such that all that can be put before the motions court judge is conflicting affidavits, then it would seem that the lower test of the plaintiff's case being a serious question to be tried would be appropriate subject to the discussion below. However one may well question the urgency of some situations and whether they are to some degree self-created and imposed for tactical reasons. It is appropriate for a motions court judge to take this into consideration. It should be kept in mind that the plaintiff chooses the time of launching the lawsuit and any attendant motion for injunctive relief. Urgency will of course affect the nature and extent of material (of both sides); but the material should be scrutinized to an appropriate degree to establish whether the injunction - even on an interim basis should issue.

11 Under our rules cross-examination on affidavits may clarify such problems to a reasonable degree. As noted in Sharpe, looseleaf, supra, at para: 2.260 (November 1996):

> Moreover, procedural differences in Canada, notably the more frequent resort to the right to cross examine on affidavits, will often place a Canadian judge on firmer ground, even when dealing with conflicting evidence.

Quite clearly, if a plaintiff could be shut out of obtaining an interlocutory injunction by a defendant merely entering a string of conflicting but untestable affidavits, then justice would be defeated unless the threshold test of the strength of the plaintiff's case were put at an extremely low level - as exhibited by the *American Cyanamid* response to this problem of establishing a test of the plaintiff's case being neither frivolous nor vexatious. As stated in Sharpe, looseleaf (November 1996), supra, at para: 2.280:

> It has been suggested in an English case that "frivolous or vexatious" should be read as requiring a higher probability of success than when the same phrase is used in relation

with application to strike out an action. (*Mothercare Ltd. v. Robson Brookes Ltd.*, [1979] F.S.R. 466 (H.L.).

12 Sharpe, looseleaf (November 1996), supra, at paras: 2.370 and 2.380 concludes as to the question of the strength of the plaintiff's case:

> The weight to be placed upon the preliminary assessment of the relative strength of the plaintiff's case is a delicate matter which will vary depending upon the context and circumstances. As the likely result at trial is clearly a relevant factor, the judge's preliminary assessment of the merits should, as a general rule, plan an important part in the process. However, the weight to be attached to the preliminary assessment should depend upon the degree of predictability which the factual and legal issues allow. If the judge is of the view that the plaintiff is unlikely to succeed, but cannot say that the claim is frivolous or vexatious, he or she should still go on to consider the other factors, rather than dismiss the application at the threshold. This is a positive and helpful aspect of the *Cyanamid* case which should not be forgotten. However, the judge's negative impression of the plaintiff's chances of ultimate success should be taken into account, along with all other considerations. By the same token, even if the plaintiff's case looks very strong - a factor which should definitely weigh in his or her favour - the other factors should still be considered. If assessment of the merits is impracticable because of conflicting evidence or questions of credibility, the matter will have to be decided solely on the basis of the balance of convenience and the irreparable harm factors.
>
> In certain situations, the issue is not balancing risks but deciding the case in a final way. In those cases, the balance of risk approach should be abandoned as inappropriate. If it is apparent, as a practical matter, that the interlocutory injunction will be the final determination of the dispute, then the judge must make the best of a difficult situation and base the decision solely on an assessment of the merits.

13 If the pivotal matter in the question of whether to grant an interlocutory injunction hinged on credibility (as may be the case as to the drawings in this case although there may be some question as to their importance overall), then perhaps it would be desirable to have the appropriate witnesses provide vive voce testimony and be subjected to cross-examination before the motions court judge as well as providing the affidavits and cross-examination transcript. The time involved in such live testimony may be minimal and it would seem that this may short cut long and drawn out proceedings. This would appear to be consistent with the philosophy of *Ashmore v. Corp of Lloyds*', [1992] 2 All E.R. 486 (H.L.).

14 As to the question of irreparable harm, we are in concurrence with the the Federal Court of Appeal's view that evidence of irreparable harm must be clear and not speculative: see *Syntex Inc. v. Novapharm Ltd.* (1991), 36 C.P.R. (3d) 129 (F.C.A.) at p.135, leave to appeal to S.C.C. refused 39 C.P.R. (3d) v, 137 N.R. 391n; see also *Centre Ice Ltd. v. National Hockey*

League (1994), 53 C.P.R. (3d) 34 (F.C.A.) at p.54; *Willow Corp. v. McDonald's Restaurants of Canada Ltd.*, [1994] O.J. No. 1169 at para 7; *Risi Stone Ltd. v. Omni Stone Corp.*, [1989] O.J. No. 103.

15 Lord Diplock in *American Cyanamid*, supra, at p.514 examined the question of whether damages would be an adequate remedy so that irreparable harm would not come into play.

> As to that the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them no interlocutory injunction should normally be granted, however strong the plaintiff's case appeared to be at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypotheses that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in a financial position to pay them, there would be no reason [on] this ground to refuse an interlocutory injunction.

16 As to the question of balance of (in)convenience, there is of course the aspect of who can "first" exploit the market as such timing reasonably appears to be a business advantage. It would seem appropriate to review that question in light of any existing operations in the area to be covered by the inunction and compare that with any potentially competing operations of the other side and whether or not those operations have any legal business or functional impediments during the relevant time period.

17 In the end result the injunction set out in paragraph 3 of the November 27, 1996 order is set aside on appeal. Costs to the appellant for the interim interlocutory injunction motion before the learned motions court judge, leave to appeal motion before Saunders J. and of this appeal were fixed at $35,000.

End of Document

Tab 12

1994 CarswellNat 1332
Federal Court of Canada — Appeal Division

Centre Ice Ltd. v. National Hockey League

1994 CarswellNat 1332, [1994] F.C.J. No. 68, 166 N.R. 44, 46 A.C.W.S. (3d) 519, 53 C.P.R. (3d) 34, 5 W.D.C.P. (2d) 164, 75 F.T.R. 240 (note)

In the Matter of Section 27 of the Federal Court Act, R.S.C 1985, c.F-7, as amended

In the Matter of the Trade Marks Act, R.S.C. 1985, c.T-13, as amended

National Hockey League and NHL Services, Inc., also known as NHL Enterprises, Inc., Appellants (Defendants) v. Centre Ice Limited, Respondent (Plaintiff)

Isaac C.J., Heald, Linden JJ.A.

Judgment: January 24, 1994
Docket: Doc. A-696-93

Counsel: *Mr. John B. Laskin*, for the Appellant.
Mr. Patrick Mahoney, for the Respondent.

Subject: Intellectual Property; Property; Civil Practice and Procedure

Heald J.A. **reasons for judgment:**

1 This is an appeal from a Judgment of the Trial Division granting an interlocutory injunction which prohibited the appellants from offering for sale, selling and advertising wares not of the respondent by use of the name "Center Ice" or "Authentic Center Ice Collection" or any other colourable imitation of the trade-mark and the trade-name "Centre Ice" anywhere in that area of Alberta "lying to the south of an imaginary line drawn in an east-west direction through and including the northern most boundary of Innisfail, Alberta."

FACTS

2 The appellant, NHL, is an unincorporated association with offices in Montreal, Quebec. Its members consist of certain owners of teams in the National Hockey League and the American Hockey League. This appellant claims to be the owner of the trade mark "Center Ice" although it did not file any evidence to indicate that it was the registered owner of that mark. The appellant, NHL Services Inc., also known as NHL Enterprises, Inc., is a body corporate incorporated under the laws of the State of New York, in the United States

of America and is the representative and agent of the appellant NHL for marketing and licensing NHL related merchandise. As such representative and agent, the appellant NHL Enterprises Inc. is responsible for licensing the trade mark "Center Ice" in relation to various goods. The respondent has, since 1986, operated a retail store in the City of Calgary, and specializes in the sale of hockey equipment and other sporting goods. It is known in the Calgary retail community as a retailer of "hard" sporting goods such as hockey sticks, skates, helmets and gloves. It has, however, continuously, also sold sports clothing including hockey pants, hockey jerseys, baseball jerseys, athletic shorts, hockey underwear and T-shirts under and by reference to the trade mark "Centre Ice". The respondent has extensively advertised and promoted the "Centre Ice" trade mark and logo in both Alberta and Manitoba. The respondent's revenues from the sale of "Centre Ice" wares and services in Alberta has risen steadily from approximately $250,000. in 1987 to nearly one million dollars in 1991.

3 The dispute leading to the making of the order in the appeal arose in the context of an action commenced by the respondent against the appellants for, *inter alia*, damages for passing off and an injunction, both interim and permanent, to restrain the appellants from passing off wares "not of the plaintiff by use of the name 'Center Ice' or 'Authentic Center Ice Collection' or any other colorable imitation of the trade mark 'Centre Ice' or otherwise howsoever within the Provinces of Alberta and Manitoba."

4 On motion by the respondent, the learned Motions Judge made an order, in the terms already stated, restraining the appellants until the trial or other disposition of the action, he having found that the respondent had established that there was a serious issue to be tried, that the respondent would suffer irreparable harm, if the injunction were not granted, and that the balance of convenience favoured the respondent.

5 The appellants now appeal from that order. In their memorandum of fact and law, the appellants alleged that the learned Motions Judge committed two-fold error when he granted the interlocutory injunction herein: firstly, in failing to find that the respondent was disentitled to a remedy because of its delay in bringing the application for injunctive relief; and, secondly, in finding that the respondent had shown irreparable harm on the record before him. However, at the oral hearing of the appeal before us, counsel for the appellants abandoned the allegation in respect of undue delay on the part of the respondent and focused his oral submissions on the issue of irreparable harm. Reduced to its essentials, the appellants complain that the finding of irreparable harm by the learned Motions Judge was unsupported by the evidence and that, as a result, he erred in law in reaching the conclusion that he did.

DISCUSSION

Irreparable Harm

6 This Court has spoken often on this issue in recent years. In the case of *Cutter Ltd. v. Baxter Travenol Laboratories Ltd.* [1] Chief Justice Thurlow, relying on the view expressed by Lord Diplock in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 397 at 408, adopted the requirement of irreparable harm "...by which I mean harm in respect of which the damages recoverable at law would not be an adequate remedy", as an essential ingredient in establishing a claim for interlocutory injunctive relief.

7 The *Cutter* decision was followed by the *Imperial Chemical Industries Co.* case in 1989 [2] where it was said: "The jurisprudence in this court establishes that the evidence as to irreparable harm must be clear and not speculative." Coming after the decision in *Imperial Chemical* was the *Syntex* decision in 1991. [3] In *Syntex*, this Court held that the finding by the Trial Judge that the applicant *would be likely* to suffer irreparable harm was insufficient to warrant the granting of an interlocutory injunction. The use of the tentative expression "is likely" was not correct in view of the Court's earlier jurisprudence *supra*. It was necessary for the evidence to support a finding that the applicant *would suffer* irreparable harm.

8 The next relevant decision was the *Nature Co.* case in 1992. [4] In that case, Mr. Justice Stone, speaking for the Court refused the request for an interlocutory injunction because "...the evidence did not clearly show that - irreparable harm - would result".

9 On the evidence adduced herein, the learned Motions Judge found that the Appellants' use of the trade name "Center Ice" was confusing to the public. In my view, this conclusion was reasonably open to him on this record. He then went on to state [5]:

> As well, there is evidence, that this confusion has resulted in members of public being discontent to find out that the plaintiff does not carry the products advertised by the defendants. Thus, it can reasonably be concluded that to allow the defendants to continue using the trade name "Center Ice" will result in confusion between the litigants' products and a loss of goodwill which the plaintiff cannot be compensated for in damages.

I am unable to agree that a finding of confusion between competing products necessarily leads to a loss of goodwill for which the plaintiff cannot be compensated in damages. A similar issue was considered by the Alberta Court of Appeal in *Petro-Canada Inc. v. Good Neighbor Fast Food Stores Ltd.* [6]. Kerans J.A. speaking for the Court said:

> The suit here sounds in passing off, and the first category of harm alleged is diminution of goodwill as a result of confusion of names in the minds of reasonable persons. There is evidence in the material presented by the applicant to indicate that it is reasonable for him to allege the existence of confusion. That kind of confusion, as we have said in other

> suits, leads to loss of "name" goodwill the loss of which in the normal course is a kind of damage which, when suffered by a commercial firm in the ordinary course, is fairly readily calculable and therefore can be fairly compensated for in damages.

On the basis of that decision, which I find persuasive, even if loss of goodwill through the use of a confusing mark was shown, a case for irreparable harm would not have been made out because such loss could be fairly compensated for in damages. However, on this record, I cannot conclude that a loss of goodwill has been established. The respondent did not adduce any evidence to show that it had lost even one single sale as a result of the activities of the appellants. The respondent filed many affidavits to the effect that it had acquired a reputation for honesty, integrity and fairness. However, none of the evidence established that this reputation had been impeached or lessened in any way by the actions of the appellants. While the record contains some evidence of confusion, there is no specific evidence that such confusion had led any customer to stop dealing or to even consider not dealing with the respondent on future occasions. The only evidence relating to irreparable harm is contained in the affidavit of Bruce Jones, a Director and Officer of the respondent [7] . In paragraph 49 of that affidavit, Mr. Jones deposed:

> I believe that unless the N.H.L. is stopped from using the name "Center Ice" within the trading area of Centre Ice here in Alberta irreparable harm to Centre Ice will result.

The problem with this statement is that it appears to be unsupported by any evidence leading to a conclusion that, as a consequence of this confusion, there was a loss of goodwill and a loss of distinctiveness. The Jones' affidavit makes reference to confusion in the market place (paragraph 40). However, nowhere does it refer to, let alone establish, a loss of goodwill as a result of the activities of the appellants. It appears that the allegation of irreparable harm in paragraph 49 is nourished only by the confusion which was established by the evidence. It cannot be inferred or implied that irreparable harm will flow wherever confusion has been shown. Accordingly, the learned Motions Judge erred in basing his finding of irreparable harm on this passage from the Jones' affidavit. Likewise, I believe that the learned Motions Judge erred in the passage quoted *supra*, when, in effect, he *inferred* a loss of goodwill not compensable in damages from the fact that confusion had been proven. This view of the matter runs contrary to this Court's jurisprudence to the effect that confusion does not, *per se*, result in a loss of goodwill and a loss of goodwill does not, *per se*, establish irreparable harm not compensable in damages. The loss of goodwill and the resulting irreparable harm cannot be *inferred* it must be established by "clear evidence". On this record, there is a notable absence of such evidence.

10 As in the case at bar, in the *Nature* case, *supra*, there was some evidence of actual confusion. However, that evidence did not go so far as to show that the confusion would

cause irreparable harm to the respondent [8]. In the Court's view, the frailty of that evidence was fatal to the submission of irreparable harm. In my view, the situation here is identical.

11 The learned Motions Judge relied on the Trial Division judgment in *Boutique au Coton Inc. v. Pant-o-rama Inc.* (1987), 17 C.P.R. (3d) 409 at 412. For the reasons given *supra*, I do not agree that the finding of a loss of goodwill on the evidence in this record was reasonably open to him. Additionally the *Au Coton* decision is distinguishable on its facts. In that case, there was evidence that the infringing party had deliberately caused confusion. There was also evidence of a substantial loss of sales as a result and a destruction of goodwill. Loss of goodwill, of reputation, of distinctiveness, if established after a full hearing at trial may well constitute irreparable harm and lead to the issuance of a permanent injunction. However, as this Court's jurisprudence has shown, in the absence of clear evidence that irreparable harm *would* result at this juncture, an interlocutory injunction should not be issued. Since I have concluded that such clear evidence is lacking in this case, it follows that the learned motions judge was in error in granting the interlocutory injunction herein.

12 After the hearing of this appeal and while it was still under reserve, counsel for the appellant drew to the Court's attention the Trial Division decision of Mr. Justice MacKay in *Molson Breweries v. Labatt Brewing Co. Ltd.* (1992), 53 F.T.R. 280. After considering the submissions of counsel for both parties on the relevance of that decision to the issues in this appeal, I have concluded that the *Molson* case is distinguishable on the facts. Accordingly it is of no assistance in deciding the issues herein.

13 For all of these reasons, I would allow the appeal with costs both here and in the Trial Division and set aside the Injunction Order dated December 7, 1992 which was issued against the appellants herein.

***Julius A. Isaac C.J.*:**

14 I agree

***A.M. Linden J.A.*:**

15 I agree

Footnotes

1 (1980), 47 C.P.R. (2d) 53 at 57

2 *Imperial Chemical Industries PLC v. Apotex Inc.* (1989) 27 C.P.R. (3d) 345 at 351 (F.C.A.)

3 *Syntex Inc. v. Novopharm Ltd.* (1991) 36 C.P.R. (3d) 129 at 135

4 *Nature Co. v. Sci-Tech Educational Inc.* (1992) 41 C.P.R. (3d) 359 at 367 (F.C.A.)

5 A.B., Vol. 2, p.741.

6 (1987) 18 C.P.R. (3d) 63 at pp.63-64.

7 A.B., Vol. 1, p.31.

8 See the *Nature Co.* case, p.367, per Stone J.A.

Tab 13

DATE: 20000922
DOCKET: M26208
(M26092)

COURT OF APPEAL FOR ONTARIO

LASKIN, GOUDGE and FELDMAN JJ.A.

B E T W E E N :

SANDRA FALKINER, DEBORAH SEARS, CYNTHIA JOHNSTON-PEPPING and CLAUDE MARIE CADIEUX Respondents on the appeal/moving parties	)	Raj Anand and M. Kate Stephenson, for the respondents on the appeal/ moving parties
–and–	)	
DIRECTOR, INCOME MAINTENANCE BRANCH, MINISTRY OF COMMUNITY AND SOCIAL SERVICES and ATTORNEY GENERAL OF ONTARIO Appellants on the appeal/ responding parties on the motion	)	Janet E. Minor and Sarah T. Kraicer, for the appellants on the appeal/ responding parties on the motion
	)	Heard: September 13, 2000

BY THE COURT:

[1] The moving parties, the respondents on the appeal, Sandra Falkiner et al., move under s.7(5) of the *Courts of Justice Act* to vacate the stay ordered by Osborne A.C.J.O. on July 24, 2000. We will briefly set out the background to this motion. On June 28, 2000, the Divisional Court concluded that the definition of "spouse" in s.1(1)(d) of Regulation 366 under the *Family Benefits Act* was unconstitutional because it violated s.15 of the *Canadian Charter of Rights and Freedoms* and could not be saved under s.1. The appellants, the Director and the Attorney General of Ontario (the "Crown"), sought leave to appeal from the decision of the Divisional Court. While that leave motion was

pending, Osborne A.C.J.O. stayed the Divisional Court's decision on conditions that the Ministry of Community and Social Services would not refer for prosecution any new cases of "welfare fraud" for having an undeclared spouse and would make its best efforts to ensure that pending prosecutions were adjourned or stayed by the Crown. Since the order of Osborne A.C.J.O., this court has granted leave to appeal from the Divisional Court's decision. The hearing of the appeal has been expedited and, on the consent of the parties, has been scheduled for January 31, 2001.

[2] On this motion, the moving parties make one main submission: Osborne A.C.J.O. erred in law in granting the stay because he found that the Crown would not suffer irreparable harm if a stay were refused. We agree with this submission.

[3] Osborne A.C.J.O. applied the three-part test established by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and *R.J.R. MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. The party seeking a stay – here the Crown – must first show that the appeal raises a "serious question to be tried"; second, that it will suffer irreparable harm if the stay is refused; and third, the balance of convenience favours a stay. The constitutionality of the definition of "spouse" in the *Family Benefits Act* raises a serious issue, and Osborne A.C.J.O. held that, with the conditions he imposed, the balance of convenience favoured the Crown.

[4] However, it is the second part of the three-part test that is key on this motion to vary: the issue of irreparable harm. On this issue, Osborne A.C.J.O. held "In my opinion, irreparable harm is a generally neutral factor here. Both sides will suffer harm if I do not accede to their position on the stay issue. Neither side will suffer irreparable harm."

[5] Ms. Minor, with her usual candour, acknowledges that if the Crown cannot show irreparable harm, it is not entitled to a stay. She submits, however, that the Crown will suffer irreparable harm if the stay is not granted. She contends that the government cannot implement the Divisional Court's decision for at least four to six months. Requiring immediate implementation, she argues, would cause confusion and uncertainty in the delivery of benefits both under the *Family Benefits Act* and under related statutory schemes.

[6] We do not accept this submission. Osborne A.C.J.O.'s finding of no irreparable harm is a finding of fact that, in our view, was reasonably supported by the evidence before him. We particularly take into account that at most 500 sole support parents are under the *Family Benefits Act* regime and that, as Osborne A.C.J.O. pointed out, the government promptly put in place temporary measures to implement the Divisional Court's decision after it was released (see the Fact Sheet at p. 124 of the motion record).

In short, we see no grounds to interfere with Osborne A.C.J.O.'s finding of no irreparable harm.

[7] The Crown has therefore failed to meet the test in *R.J.R. MacDonald*, *supra*, and is not entitled to a stay. The motion to vary is granted and the stay ordered by Osborne A.C.J.O. is set aside. The moving parties are entitled to their costs of this motion.

Released: SEP 22 2000
JL

Signed: "John Laskin J.A."
"S.T. Goudge J.A."
"K. Feldman J.A."

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Tab 14

The Minister of Revenue of Quebec, the Deputy Minister of Revenue of Quebec, the Attorney General of Quebec and Robert Paulin *Appellants*

v.

143471 Canada Inc., Leonardo Arcuri, Francesco Milioto, Antonio Facchino, John A. Paoletti, Santo Gracioppo and Casimiro C. Panarello *Respondents*

and between

The Minister of Revenue of Quebec, the Deputy Minister of Revenue of Quebec, the Attorney General of Quebec and François Laramée *Appellants*

v.

Maurice Tabah, 116689 Canada Inc., Les Entreprises immobilières Maurice Tabah Inc., Georges Abouassly, Ibrahim Haddad, Fernand Hétu, Paul-Omer Desrosiers, Me Johanne Piette and Service immobilier Joliette Inc. *Respondents*

INDEXED AS: 143471 CANADA INC. *v.* QUEBEC (ATTORNEY GENERAL); TABAH *v.* QUEBEC (ATTORNEY GENERAL)

File No.: 22989.

1993: October 5; 1994: May 26.

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

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Procedure — Interlocutory relief — Documents seized pursuant to provisions of tax legislation — Motions for orders impounding seized documents granted — Documents sealed until final judgment rendered on legality of search warrants — Whether impounding orders should be set aside.

Le ministre du Revenu du Québec, le sous-ministre du Revenu du Québec, le procureur général du Québec et Robert Paulin *Appelants*

c.

143471 Canada Inc., Leonardo Arcuri, Francesco Milioto, Antonio Facchino, John A. Paoletti, Santo Gracioppo et Casimiro C. Panarello *Intimés*

et entre

Le ministre du Revenu du Québec, le sous-ministre du Revenu du Québec, le procureur général du Québec et François Laramée *Appelants*

c.

Maurice Tabah, 116689 Canada Inc., Les Entreprises immobilières Maurice Tabah Inc., Georges Abouassly, Ibrahim Haddad, Fernand Hétu, Paul-Omer Desrosiers, Me Johanne Piette et Service immobilier Joliette Inc. *Intimés*

RÉPERTORIÉ: 143471 CANADA INC. *c.* QUÉBEC (PROCUREUR GÉNÉRAL); TABAH *c.* QUÉBEC (PROCUREUR GÉNÉRAL)

N° du greffe: 22989.

1993: 5 octobre; 1994: 26 mai.

Présents: Le juge en chef Lamer et les juges La Forest, L'Heureux-Dubé, Sopinka, Cory, McLachlin et Iacobucci.

EN APPEL DE LA COUR D'APPEL DU QUÉBEC

Procédure — Redressement interlocutoire — Documents saisis conformément aux dispositions d'une loi fiscale — Requêtes en vue d'obtenir des ordonnances pour l'entiercement des documents saisis accordées — Documents mis sous scellés jusqu'à ce que jugement final soit rendu sur la légalité des mandats de perquisition — Les ordonnances d'entiercement doivent-elles être annulées?

Commercial documents were seized at the places of business of the corporate respondents and the homes of the respondents Arcuri and Tabah. In both cases the respondents challenged the legality of the search warrants by means of motions in evocation, *certiorari* and mandamus in which they sought to quash the warrants and attacked the constitutionality of ss. 40 and 40.1 of the *Act respecting the Ministère du Revenu* ("*AMR*"), which authorize searches, alleging *inter alia* that these sections infringe ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms*. By way of interlocutory relief the respondents appended to their actions motions to have all the seized documents impounded pending a final judgment on the legality of the search warrants. In *143471 Canada Inc.*, the Superior Court allowed the motion to impound but dismissed the motion in evocation, *certiorari* and mandamus 15 months later, concluding that s. 40 *AMR* was constitutional. The respondents appealed that decision. In the meantime the Court of Appeal allowed their motion to impound the seized documents for the duration of the appeal. While this Court's judgment on the appeal from that decision was still under reserve, the Court of Appeal dismissed the appeal with respect to the motion in evocation, *certiorari* and mandamus. In *Tabah*, the Superior Court allowed the motion to impound and the Court of Appeal dismissed the appellants' appeal from that judgment. This appeal raises the question whether interlocutory relief in the form of an impounding order should be granted until the validity of the provisions in the *AMR* authorizing searches has been determined under the *Charter*.

Held (La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting): The appeal should be dismissed.

Per Sopinka, Cory and Iacobucci JJ.: In considering an interim measure in the context of a *Charter* challenge to the validity of the underlying law, a court must consider three criteria: (1) the seriousness of the question to be tried; (2) the possibility of irreparable harm to the applicant if the interim order is refused; and (3) the balance of inconvenience caused to the parties by the interim order. A consideration of these three criteria in this case leads to the conclusion that the impounding orders should be maintained.

First, there is a serious question of law raised in this case.

Second, if the respondents are successful in the main applications, they would suffer irreparable harm if the

Des documents de nature commerciale ont été saisis aux places d'affaires des sociétés intimées de même qu'aux domiciles des intimés Arcuri et Tabah. Dans les deux affaires, les intimés contestent la légalité des mandats de perquisition au moyen de requêtes en évocation, *certiorari* et *mandamus* dans lesquelles ils demandent l'annulation des mandats et attaquent la constitutionnalité des art. 40 et 40.1 de la *Loi sur le ministère du Revenu* («*LMR*») qui autorisent les perquisitions, alléguant entre autres que ces articles contreviennent aux art. 7 et 8 de la *Charte canadienne des droits et libertés*. À titre de redressement interlocutoire, les intimés joignent à leurs recours des requêtes en entiercement de tous les documents saisis jusqu'à ce qu'un jugement final soit rendu sur la légalité des mandats de perquisition. Dans l'affaire *143471 Canada Inc.*, la Cour supérieure accueille la requête en entiercement mais rejette 15 mois plus tard la requête en évocation, *certiorari* et *mandamus*, concluant à la constitutionnalité de l'art. 40 *LMR*. Les intimés porte cette décision en appel. Entre temps, la Cour d'appel accueille leur requête en entiercement des documents saisis pour valoir durant l'appel. Durant le délibéré de l'appel de cette décision devant notre Cour, la Cour d'appel rejette l'appel relatif à la requête en évocation, *certiorari* et *mandamus*. Dans l'affaire *Tabah*, la Cour supérieure accueille la requête en entiercement et la Cour d'appel rejette l'appel interjeté par les appelants à l'encontre de ce jugement. Le présent pourvoi soulève la question de l'opportunité d'ordonner un redressement interlocutoire de la nature de l'entiercement des documents saisis jusqu'à ce que soit déterminée, à la lumière de la *Charte*, la légalité des dispositions de la *LMR* autorisant les perquisitions.

Arrêt (les juges La Forest, L'Heureux-Dubé et McLachlin sont dissidents): Le pourvoi est rejeté.

Les juges Sopinka, Cory et Iacobucci: Lorsqu'il examine une mesure interlocutoire dans le contexte d'une contestation, fondée sur la *Charte*, de la validité de la loi sous-jacente, le tribunal doit apprécier trois facteurs: (1) le caractère sérieux de la question de droit à trancher, (2) la possibilité que le refus de l'ordonnance interlocutoire cause au requérant un préjudice irréparable, et (3) la prépondérance des inconvénients causés aux parties par l'ordonnance interlocutoire. En l'espèce, l'examen de ces trois critères amène à conclure qu'il y a lieu de maintenir les ordonnances d'entiercement.

Premièrement, une question de droit sérieuse est soulevée en l'espèce.

Deuxièmement, si les intimés voient leurs demandes principales accueillies et si les ordonnances d'entierce-

impounding orders were to be set aside. The searches were made pursuant to the provisions of a regulatory statute dealing with a highly regulated business and the expectation of privacy in the commercial documents seized was thus relatively low. However, there is still some measure of privacy in commercial documents. Since the purpose of the impounding orders is to preserve the rights of the respondents pending a final determination of a legal question which will affect those rights, if the orders are not maintained and the warrants are quashed, the loss of that privacy interest, small as it may be, would in itself constitute irreparable harm. But there is a more significant aspect in this case. The documents were obtained by means of intrusive searches of residential and business premises and so long as the documents are held by or on behalf of the government there is a continuing violation of the respondents' very real and significant privacy interest in those premises. There would thus clearly be irreparable harm to the respondents if the warrants are quashed. The government will have had the continuing possession of these documents in the absence of any authority and in violation of the *Charter*. The intrusive nature of the searches cannot be isolated from the taking of the documents. Section 69 *AMR* does not adequately protect the respondents' privacy interests. It prohibits the public release of information contained in the documents but does not protect the respondents from having their privacy interests in their homes and offices violated by the state — the very interest that s. 8 of the *Charter* is aimed at protecting. Finally, it is highly speculative to expect that a breach of privacy interests, not only in the documents, but also in the homes and offices of the respondents, could be compensated in damages.

Third, and most importantly, the balance of inconvenience favours the respondents. The impounding orders protect both the integrity of the documents and the privacy interest of the respondents, and this sensible interlocutory measure does not harm the public interest. The evidence clearly establishes that the granting of impounding orders will not paralyse the enforcement of taxation laws in the province of Quebec, even if in every case where searches were carried out, impounding orders were in fact issued. The Minister of Revenue is still at liberty to carry out searches and effect seizures and can still investigate and proceed under other sections of the Act. An impounding order does no more

ment sont annulées, ils subiront un préjudice irréparable. Les perquisitions ont été effectuées en application d'une loi de nature réglementaire relative à une activité fort réglementée et l'attente en matière de respect de la vie privée relativement aux documents commerciaux saisis était donc relativement faible. Cependant, il reste qu'une certaine mesure de vie privée est associée aux documents commerciaux. Puisque les ordonnances d'entiercement ont pour objet de maintenir les droits des intimés jusqu'à ce qu'une décision finale qui affectera ces droits soit rendue sur une question de droit, si les ordonnances ne sont pas maintenues et si les mandats sont annulés, la perte du droit à la vie privée, aussi minime soit-il, constituera elle-même un préjudice irréparable. Cependant, il y a en l'espèce un autre aspect plus important. Les documents ont été obtenus grâce à des perquisitions envahissantes de résidences et de locaux commerciaux et tant que les documents sont détenus par le gouvernement ou pour son compte, il y a une violation continue du droit, très réel et très important, à la vie privée dont les intimés jouissent dans ces locaux. Il est clair que les intimés subiront un préjudice irréparable si les mandats sont annulés. Le gouvernement aura eu, sans autorisation et contrairement à la *Charte*, la possession continue de ces documents. La nature envahissante des perquisitions ne peut être dissociée de la saisie des documents. L'article 69 *LMR* ne protège pas suffisamment le droit à la vie privée des intimés. Il interdit la publication de renseignements contenus dans les documents, mais il ne protège pas les intimés contre la violation par l'État de leur droit à la vie privée dans leurs domiciles et leurs bureaux — le droit même que l'art. 8 de la *Charte* vise à protéger. Enfin, il est fort incertain que la violation du droit à la vie privée non seulement à l'égard des documents, mais également dans les domiciles et les bureaux des intimés, pourrait être indemnisée au moyen de dommages-intérêts.

Troisièmement, et qui plus est, la prépondérance des inconvénients favorise les intimés. Les ordonnances d'entiercement protègent à la fois l'intégrité des documents et le droit à la vie privée des intimés et cette mesure interlocutoire raisonnable ne nuit pas à l'intérêt public. La preuve établit clairement que la délivrance des ordonnances d'entiercement ne paralysera pas l'application des lois fiscales au Québec, même si, dans tous les cas où des perquisitions ont été effectuées, des ordonnances d'entiercement étaient effectivement rendues. Le ministre du Revenu demeure libre d'effectuer des perquisitions et des saisies, et il peut encore enquêter et agir en vertu d'autres dispositions de la Loi. Une

than delay the Minister viewing the documents seized. Further, the statistics do not disclose a problem of a flood of impounding orders and there is nothing to indicate that there is a probability, or even a real possibility, that there would be a flood of similar requests as a result of granting these applications. There are so few searches and seizures carried out each year under taxation statutes in the province that this case is still one of exemption and not of suspension. Since there is no serious interference with the enforcement of taxation statutes resulting from the granting of the impounding orders, there is no interference with the public interest and, on this basis, the impounding orders should be granted. Moreover, even if it can be said that the irreparable harm the respondents would suffer from the refusal of the impounding orders is small, the impounding orders should be upheld since there is no significant interference with the public interest.

ordonnance d'entiercement ne fait que retarder le moment où le Ministre pourra consulter les documents saisis. De plus, les statistiques ne révèlent aucun problème de cascade d'ordonnances d'entiercement et rien n'indique qu'il existe une probabilité, ou même une possibilité réelle, qu'il y ait une avalanche de requêtes semblables si les demandes en cause sont accueillies. Le nombre de perquisitions et de saisies effectuées chaque année sous le régime des lois fiscales dans la province est si peu élevé que le présent pourvoi demeure un cas d'exemption et non de suspension. Puisqu'aucune ingérence grave dans l'application des lois fiscales ne résulte de la délivrance des ordonnances d'entiercement, il n'y a pas atteinte à l'intérêt public et, pour ce motif, il y a lieu d'accorder les ordonnances d'entiercement. De plus, même si l'on peut soutenir que le préjudice irréparable que le rejet des ordonnances d'entiercement causerait aux intimés est minime, il y a lieu de maintenir les ordonnances d'entiercement puisqu'il n'y a pas d'atteinte grave à l'intérêt public.

Per Lamer C.J.: Cory J.'s reasons were generally agreed with, subject to one comment. Since the scope of a right guaranteed by the *Charter* must be assessed in context, it is necessary to take into account all the relevant factors which indicate the importance of a right to the person who enjoys it. This means that one should avoid creating rigid categories that will be used to determine the scope of a constitutional guarantee in a mechanical fashion. The "licensing" theory is therefore of no value in determining the extent of the respondents' expectations of privacy. While the distinction between criminal acts and regulatory offences is a useful and very real one, it should not be used to obscure other aspects of the context of a given case. Yet that is precisely what is likely to happen if one presumes that those who engage in "regulated" activities have accepted a lower level of constitutional protection. The licensing theory is based on an erroneous factual premise since it cannot be said, in a general and abstract manner, that any person engaging in a regulated activity, whatever it may be, automatically acquiesces in a limited application of the *Charter* to him- or herself. Here, when all the relevant factors are taken into account, it can be concluded that the respondents had reasonable expectations of privacy with respect to the documents seized and that they are sufficiently important to justify upholding the impounding orders.

Le juge en chef Lamer: Les motifs du juge Cory sont généralement acceptés. Toutefois, une mise au point s'impose. Puisque la portée d'un droit garanti par la *Charte* doit être évaluée en fonction du contexte, il faut tenir compte de tous les facteurs pertinents qui indiquent l'importance que revêt un droit pour son bénéficiaire. Cela implique que l'on doit éviter de créer des catégories rigides qui serviront à déterminer mécaniquement l'étendue d'une garantie constitutionnelle. La théorie de l'«acceptation des conditions» n'est donc d'aucune utilité pour apprécier l'intensité des attentes en matière de vie privée des intimés. Bien que la distinction entre les actes criminels et les infractions réglementaires soit utile et bien réelle, elle ne doit pas servir à obscurcir les autres éléments du contexte d'un litige donné. C'est pourtant ce qui risque de se produire si l'on présume l'acceptation d'une protection constitutionnelle réduite par ceux qui entreprennent des activités «réglementées». La théorie de l'acceptation des conditions est fondée sur une prémisse factuelle erronée puisqu'on ne peut affirmer, d'une manière générale et abstraite, que toute personne s'engageant dans une activité réglementée, quelle qu'elle soit, acquiesce automatiquement à une application limitée de la *Charte* à son cas. En l'espèce, lorsqu'on tient compte de tous les facteurs pertinents, on peut conclure que les intimés avaient des attentes raisonnables en matière de vie privée relativement aux documents saisis et que celles-ci sont suffisamment importantes pour justifier le maintien des ordonnances d'entiercement.

Per La Forest, L'Heureux-Dubé and McLachlin JJ. (dissenting): A *prima facie* case, irreparable harm and the balance of convenience are the three criteria relevant in determining whether interlocutory relief should be granted. This analytical framework permits the reconciliation of the rights and freedoms guaranteed in the *Charter* with the conduct of governmental affairs.

In the present case the first criterion has been met. In view of the serious arguments raised by the respondents against the constitutionality of ss. 40 and 40.1 *AMR*, it cannot be concluded that the motions in evocation, *certiorari* and mandamus are frivolous or vexatious. The dismissal of the motion by the Superior Court in *143471 Canada Inc.* is a relevant factor, but is not sufficient to alter the fact that serious questions have been raised. Moreover, the precedents regarding stay of proceedings should not be applied without qualification when the constitutionality of legislation is challenged under the *Charter*, in view of the importance and complexity of the rights and freedoms it guarantees.

With respect to the second criterion, it cannot be concluded that the respondents will suffer irreparable harm if the impounding orders are set aside. The existence of irreparable harm cannot be inferred simply because a breach of a right protected by the *Charter* is alleged or because the main proceeding itself involves the infringement of a guaranteed right. Both the right and the alleged infringement must be placed in context. In the present case the harm claimed by the respondents relates solely to the fact that the tax authorities will learn the content of the documents seized. Any reasonable expectations of privacy the respondents may have regarding the content of those documents are considerably reduced owing to their relevance in establishing the tax profile of their business and the responsibilities they assume as agents of the government. The search warrants and the seizures were directed only at the respondents' business documents, production of which may be required under the *AMR*. By allowing a person to object to the production or seizure of documents containing information protected by professional privilege, and prohibiting disclosure of the information obtained in the course of the investigation, the *AMR* minimizes the risk that the respondents may suffer harm as a result of the implementation by the tax authorities of the investigative scheme provided by that Act. Finally, the possibility that the seized documents may contain information of a personal nature is not sufficient to alter the reasonable expectations of privacy of taxpayers in respect of

Les juges La Forest, L'Heureux-Dubé et McLachlin (dissidents): L'apparence de droit, le préjudice irréparable et la prépondérance des inconvénients sont les trois critères pertinents pour déterminer l'opportunité d'accorder un redressement interlocutoire. Ce cadre d'analyse permet de réconcilier le respect des droits et libertés garantis dans la *Charte* avec la poursuite des activités de l'administration.

En l'espèce, le premier critère est rempli. Vu les motifs sérieux invoqués par les intimés à l'encontre de la constitutionnalité des art. 40 et 40.1 *LMR*, on ne peut conclure que les recours en évocation, *certiorari* et *mandamus* des intimés sont futiles ou vexatoires. Le rejet de ce recours par la Cour supérieure dans l'affaire *143471 Canada Inc.* est un facteur pertinent mais insuffisant pour éliminer le sérieux des questions soulevées. De plus, la jurisprudence en matière de sursis ne doit pas être appliquée, sans aucune réserve, lorsque la constitutionnalité d'une disposition législative est contestée en vertu de la *Charte*, compte tenu de l'importance et de la complexité des droits et libertés qu'elle garantit.

Quant au deuxième critère, on ne saurait conclure que les intimés subiront un préjudice irréparable si les ordonnances d'entiercement sont annulées. L'existence d'un préjudice irréparable ne peut s'inférer simplement parce qu'une atteinte à un droit protégé par la *Charte* est alléguée ou encore parce que l'instance principale met elle-même en cause la violation d'un droit garanti. Il faut plutôt replacer dans son contexte tant le droit que la violation alléguée. En l'espèce, le préjudice qu'invoquent les intimés réside uniquement dans la prise de connaissance, par les autorités fiscales, du contenu des documents saisis. Or, les attentes raisonnables que les intimés peuvent entretenir en matière de vie privée à l'égard du contenu de ces documents sont considérablement réduites en raison de leur pertinence dans l'établissement du profil fiscal de leur entreprise et des responsabilités qu'ils assument à titre de mandataires du gouvernement. Les mandats de perquisition, de même que les saisies, ne visaient que les documents d'affaires des intimés dont la production peut être exigée en vertu de la *LMR*. En permettant à une personne de s'opposer à la production ou à la saisie de documents qui contiennent des renseignements protégés par le secret professionnel, et en interdisant la divulgation des renseignements obtenus dans le cadre de l'enquête, la *LMR* minimise le risque que les intimés subissent un préjudice consécutif à la mise en œuvre par les autorités fiscales du régime d'enquête prévu dans cette loi. Enfin, la possibilité que les documents saisis puissent contenir

such documents. On the one hand, the *AMR* itself does not permit the seizure of documents containing personal information; on the other hand, the respondents themselves have never claimed that such documents were in fact seized. It can therefore not be concluded that the respondents will suffer irreparable harm if the tax authorities examine the contents of the documents seized.

With respect to the third criterion, an assessment of the balance of convenience does not favour the respondents. As the existence of irreparable harm has been ruled out, it is hard to see how the respondents could suffer significant hardship if they were denied the impoundment. Since the only effect of the impounding order is to delay the examination of the documents, it can be assumed that at some point or other the respondents will suffer the hardships associated with an investigation by the Ministère du Revenu, whether or not the sections are declared unconstitutional. On the other hand, if the impoundment is upheld, the delays imposed on the appellants in examining the contents of the seized documents are likely to jeopardize proof of the offences. Even if it is admitted that impoundment does not have the effect of suspending the Minister's investigative powers, there is nothing to suggest that he could make significant progress with his investigation if the impoundment were upheld.

Be that as it may, the present case has ramifications that go beyond the immediate interests of the parties, if only because of the mandate underlying the action of the Ministère — namely the implementation and execution of tax legislation. It is thus necessary to take the public interest into account in determining the balance of convenience. Because the *AMR* is based on the principle of self-declaration and self-assessment, the implementation of the investigative provisions contained in ss. 40 and 40.1 *AMR* is essential if the integrity of the collection system is to be maintained and these investigative powers form the principal tool available to the Ministère to fight tax evasion. Although it is not possible to speak of a "flood of actions", the systematic nature of recent impounding orders cannot be ignored. Since the Ministère must adduce proof beyond a reasonable doubt and in view of the difficulties of proof inherent in the nature of offences against the tax laws, even temporarily water-

des éléments d'information de nature personnelle est insuffisante pour modifier les attentes raisonnables que les contribuables peuvent entretenir en matière de vie privée à l'égard de tels documents. D'une part, la *LMR* elle-même ne permet pas la saisie de documents contenant des renseignements de nature personnelle; d'autre part, les intimés n'ont eux-mêmes jamais prétendu que de tels documents avaient effectivement été saisis. On ne peut donc conclure que les intimés subiront un préjudice irréparable si les autorités fiscales prennent connaissance du contenu des documents saisis.

Quant au troisième critère, l'appréciation de la prépondérance des inconvénients ne favorise pas les intimés. Ayant écarté l'existence d'un préjudice irréparable, il est difficile de concevoir que les intimés encourraient des inconvénients importants si l'entiercement leur était refusé. Puisque l'entiercement n'a pour effet que de retarder l'analyse des documents, on peut présumer que les intimés subiront, à un moment ou à un autre, les inconvénients reliés à l'enquête du ministère du Revenu, que les dispositions contestées soient ou non déclarées inconstitutionnelles. Par contre, si l'entiercement est maintenu, les délais imposés aux appelants dans l'examen du contenu des documents saisis risquent de compromettre la preuve des infractions. Même en admettant que l'entiercement n'a pas pour effet de suspendre les pouvoirs d'enquête du Ministre, il est illusoire de croire qu'il pourra faire avancer son enquête de manière significative si l'entiercement est maintenu.

Quoi qu'il en soit, le présent litige a une portée qui dépasse l'intérêt immédiat des parties, ne serait-ce qu'en raison du mandat qui sous-tend l'intervention du Ministère — soit l'application et l'exécution des lois fiscales. Il faut donc tenir compte de l'intérêt public dans l'appréciation de la prépondérance des inconvénients. Parce que la *LMR* est fondée sur le principe de l'auto-déclaration et de l'auto-cotisation, la mise en œuvre du régime d'enquête prévu aux art. 40 et 40.1 *LMR* est indispensable au maintien de l'intégrité du système de perception et ces pouvoirs d'enquête constituent le principal outil dont dispose le Ministère pour contrer l'évasion fiscale. Bien qu'on ne puisse parler d'une «cascade de recours», on ne peut ignorer la tendance jurisprudentielle récente à accorder systématiquement des ordonnances d'entiercement. Compte tenu du fait que le Ministère doit présenter une preuve hors de tout doute raisonnable et vu les difficultés de preuve inhérentes à la nature des infrac-

ing down investigative powers has more than a symbolic effect on the public interest.

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By La Forest J. (dissenting)

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tions aux lois fiscales, la dilution des pouvoirs d'enquête, fusse-t-elle temporaire, a une incidence plus que symbolique sur l'intérêt public.

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APPEAL from judgments of the Quebec Court of Appeal (1992), 32 A.C.W.S. (3d) 226 and [1992] R.D.F.Q. 44, granting the motion to impound seized documents brought by the respondents 143471 Canada Inc. et al., and affirming a judgment of the Superior Court, [1991] R.D.F.Q. 90, granting the motion to impound seized documents brought by the respondents Tabah et al. Appeal dismissed, La Forest, L'Heureux-Dubé and McLachlin JJ. dissenting.

Michel Dansereau, Judith Kucharsky and *Pierre Gonthier*, for the appellants.

Guy Du Pont, Basile Angelopoulos and *Ariane Bourque*, for the respondents.

English version of the reasons delivered by

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POURVOI contre des arrêts de la Cour d'appel du Québec (1992), 32 A.C.W.S. (3d) 226 et [1992] R.D.F.Q. 44, qui ont accueilli la requête en entiercement de documents saisis présentée par les intimés 143471 Canada Inc. et autres, et confirmé un jugement de la Cour supérieure, [1991] R.D.F.Q. 90, qui avait accueilli la requête en entiercement de documents saisis présentée par les intimés Tabah et autres. Pourvoi rejeté, les juges La Forest, L'Heureux-Dubé et McLachlin sont dissidents.

Michel Dansereau, Judith Kucharsky et *Pierre Gonthier*, pour les appelants.

Guy Du Pont, Basile Angelopoulos et *Ariane Bourque*, pour les intimés.

Les motifs suivants ont été rendus par

LAMER C.J. — I am generally in agreement with the reasons of Justice Cory. With respect, however, I would like to add a comment concerning the factors he takes into account in assessing the respondents' expectations of privacy.

It is now well settled that the scope of a right guaranteed by the *Canadian Charter of Rights and Freedoms* must be assessed in context. This method was first explained by Wilson J. in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at pp. 1352-55, and again applied by the Court in *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; and *R. v. Généreux*, [1992] 1 S.C.R. 259. It is thus necessary to take into account all the relevant factors which indicate the importance of a right to the person who enjoys it. This also means that we should avoid creating rigid categories that will be used to determine the scope of a constitutional guarantee in a mechanical fashion.

I am concerned about the fact that Cory J. relies on the so-called "licensing" theory in determining the extent of the respondents' expectations of privacy. This theory, which he explained in detail in his reasons in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at pp. 227-33, essentially holds that persons engaging in "regulated" activities are presumed to have accepted the existence of such regulation, greater intervention by the state in their activities, and a lower measure of constitutional protection.

In my humble opinion this theory is open to two kinds of criticism.

First, it tends to give credence to the idea that there is a clear distinction between regulatory offences and truly criminal acts, and that there are two different definitions of the rights guaranteed by the *Charter* corresponding to these two categories of offences. This approach reflects a formalism alien to the contextual method. The distinction between criminal acts and regulatory offences is a useful and very real one, but it should not be used

LE JUGE EN CHEF LAMER — Je suis généralement en accord avec les motifs du juge Cory. Avec égards, j'aimerais toutefois faire une mise au point au sujet des facteurs dont il tient compte pour évaluer les attentes de vie privée des intimés.

Il est maintenant acquis que la portée d'un droit garanti par la *Charte canadienne des droits et libertés* doit être évaluée en fonction du contexte. Cette méthode a été exposée pour la première fois par le juge Wilson dans *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, aux pp. 1352 à 1355, et reprise notamment par la Cour dans *Rocket c. Collège royal des chirurgiens dentistes d'Ontario*, [1990] 2 R.C.S. 232; *Kindler c. Canada (Ministre de la Justice)*, [1991] 2 R.C.S. 779; et *R. c. Généreux*, [1992] 1 R.C.S. 259. Il faut donc tenir compte de tous les facteurs pertinents qui indiquent l'importance que revêt un droit pour son bénéficiaire. Ceci implique aussi que l'on doit éviter de créer des catégories rigides qui serviront à déterminer mécaniquement l'étendue d'une garantie constitutionnelle.

Je m'inquiète du fait que le juge Cory s'appuie sur la théorie dite de l'«acceptation des conditions» pour apprécier l'intensité des attentes de vie privée des intimés. Cette théorie, qu'il a exposée en détail dans ses motifs dans l'arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, aux pp. 227 à 233, veut essentiellement que les personnes qui s'engagent dans des activités «réglementées» sont présumées avoir accepté l'existence de cette réglementation, une intervention accrue de l'État dans leurs activités ainsi qu'une protection constitutionnelle réduite.

À mon humble avis, cette théorie prête flanc à la critique sous deux aspects.

Premièrement, elle tend à accréditer l'idée qu'il existe une distinction claire et nette entre les infractions réglementaires et les actes criminels proprement dits et qu'à ces deux catégories d'infractions correspondent deux définitions différentes des droits garantis par la *Charte*. Procéder ainsi relève d'un formalisme étranger à la méthode contextuelle. La distinction entre les actes criminels et les infractions réglementaires est utile et

to obscure other aspects of the context of a given case. That is precisely what is likely to happen if we presume that those who engage in "regulated" activities have accepted a lower level of constitutional protection. If there were such a waiver there would be no need to examine the other aspects of the context.

Second, with respect, I am of the view that the licensing theory is based on an erroneous factual premise. It cannot be said, in a general and abstract manner, that persons engaging in regulated sectors of life in society expect a lower level of constitutional protection. It is true that intervention by government officials is generally accepted in certain areas and that accordingly the expectations of privacy of persons working in those areas may be lower. However, this observation cannot be transformed into a general rule presuming that any person engaging in a regulated activity, whatever it may be, automatically acquiesces in a limited application of the *Charter* to him- or herself. In the present case I cannot say that the respondents agreed to allow the state to search their homes when they set up their restaurant and hotel businesses. In my opinion, there is no factual foundation for such a proposition. We may also take the example of driving an automobile, a highly regulated activity. Can it be said that people who obtain a driver's licence thereby accept that they will not have the full benefit of the rights set forth in the *Charter*? I do not think so.

In reality the only factual proposition that can be taken as valid is the one set out by Cory J. at p. 377: "Those who enter a regulated field must accept regulations as an integral part of their business operations". The same can be said about the criminal law: anyone who lives in society must accept the rules laid down in the *Criminal Code*, R.S.C., 1985, c. C-46. There is nothing surprising in this: the validity of legislation does not depend on the consent of those to whom it applies. Accordingly, although the statement by Cory J. is

bien réelle, mais elle ne doit pas servir à obscurcir les autres éléments du contexte d'un litige donné. C'est précisément ce qui risque de se produire si l'on présume l'acceptation d'une protection constitutionnelle réduite par ceux qui entreprennent des activités «réglementées». Face à une telle renonciation, il ne serait pas nécessaire d'examiner les autres éléments du contexte.

Deuxièmement, avec respect, j'estime que la théorie de l'acceptation des conditions est fondée sur une prémisse factuelle qui est erronée. On ne peut pas affirmer, d'une manière générale et abstraite, que ceux qui s'engagent dans des secteurs réglementés de la vie en société s'attendent à une protection constitutionnelle réduite. Il est vrai que l'intervention des agents de l'État dans certains domaines est généralement acceptée et qu'en conséquence, les attentes de vie privée des personnes qui œuvrent dans ces domaines peuvent s'en trouver réduites. On ne saurait cependant transformer cette observation en règle générale voulant que toute personne s'engageant dans une activité réglementée, quelle qu'elle soit, acquiesce automatiquement à une application limitée de la *Charte* à son cas. En l'espèce, je ne peux affirmer que les intimés ont accepté que l'État puisse perquisitionner leur domicile lorsqu'ils ont établi leur commerce de restauration et d'hôtellerie. Il n'y a, à mon avis, aucun fondement factuel à une telle proposition. Prenons aussi l'exemple de la conduite d'un véhicule automobile, une activité fortement réglementée. Peut-on dire que les gens qui obtiennent un permis de conduire acceptent de ce seul fait qu'ils ne bénéficieront pas pleinement des droits énoncés dans la *Charte*? Je ne le crois pas.

En réalité, la seule proposition de fait qu'on peut tenir pour valide est celle que mentionne le juge Cory à la p. 377: «Ceux qui se lancent dans un domaine réglementé doivent accepter que la réglementation fait partie intégrante de leurs activités commerciales.» On peut en dire autant du droit criminel: toute personne qui vit en société doit accepter les normes prévues dans le *Code criminel*, L.R.C. (1985), ch. C-46. Cela n'est pas surprenant: la validité d'une loi ne dépend pas du consentement de ceux qu'elle vise. Cette affirmation du

correct, it cannot be used as the basis for a valid distinction between various types of offences, depending on whether or not the individuals concerned "accept" the rules in question. All things considered, I do not feel that the "licensing" theory can be of any value in determining the scope of the rights guaranteed by the *Charter*.

I have nevertheless come to the same conclusion as Cory J. regarding the extent of the respondents' expectations of privacy. Cory J. notes the following factors.

1. The *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31, does not create criminal offences in the strict sense. Its purpose is instead to set up an administrative mechanism for the collection of taxes.

2. The Minister may seize a considerable number of documents whose connection with enforcement of the Act may be tenuous.

3. The Act allows for searches at the premises of third parties who are not the subject of an investigation and who may have been in compliance with the Act.

4. Certain searches took place at the respondents' private homes, not their commercial establishments.

5. Searches involve a greater intrusion into individual privacy than a mere demand for production of documents.

From factors 2, 3, 4 and 5 it can be concluded that the respondents had reasonable expectations of privacy with respect to the documents seized by the appellants. The first factor suggests that the scope of these expectations should be treated as relative, but like Cory J. I am of the view that they are sufficiently important to justify upholding the impounding orders.

I would dismiss the appeal with costs.

English version of the reasons of La Forest, L'Heureux-Dubé and McLachlin JJ. delivered by

juge Cory, malgré son exactitude, ne permet donc pas d'établir une distinction utile entre les divers types d'infractions, selon que les individus concernés «acceptent» ou non les normes en cause. En fin de compte, je ne crois pas que la théorie de l'«acceptation des conditions» puisse être d'une quelconque utilité dans l'évaluation de la portée des droits garantis par la *Charte*.

J'en arrive néanmoins à la même conclusion que le juge Cory relativement à l'importance des attentes de vie privée des intimés. Le juge Cory fait ressortir les facteurs suivants:

1. La *Loi sur le ministère du Revenu*, L.R.Q., ch. M-31, ne crée pas des infractions criminelles au sens strict. Elle vise plutôt à mettre en œuvre un mécanisme administratif de perception de l'impôt.

2. Le ministre peut saisir un nombre important de documents dont le lien avec l'exécution de la Loi peut être ténu.

3. La Loi permet la perquisition chez des tiers qui ne sont pas visés par une enquête et qui se sont possiblement conformés à la Loi.

4. Certaines perquisitions ont eu lieu au domicile privé des intimés, et non à leur établissement commercial.

5. Les perquisitions constituent une intrusion plus grande dans la vie des individus qu'une simple demande de production de documents.

En raison des facteurs 2, 3, 4 et 5, on peut conclure que les intimés avaient des attentes raisonnables de vie privée relativement aux documents saisis par les appelants. Le premier facteur nous amène à relativiser l'ampleur de ces attentes, mais comme le juge Cory, je crois que celles-ci sont suffisamment importantes pour justifier le maintien des ordonnances d'entiercement.

Je rejetterais le pourvoi avec dépens.

Les motifs des juges La Forest, L'Heureux-Dubé et McLachlin ont été rendus par

LA FOREST J. (dissenting) — This case raises the question whether interlocutory relief in the form of an impounding order should be granted until the validity of the provisions authorizing searches in the *Act respecting the Ministère du Revenu*, R.S.Q., c. M-31, has been determined under the *Canadian Charter of Rights and Freedoms*.

Facts

The facts in the two cases giving rise to these appeals are similar and may be summarized as follows. Judges of the Court of Quebec issued written authorizations to conduct searches pursuant to s. 40 of the *Act respecting the Ministère du Revenu* (hereinafter the "Act"), based on sworn informations that the respondents had *inter alia* attempted to avoid the payment of sums of money pursuant to the *Meals and Hotels Tax Act*, R.S.Q., c. T-3. These authorizations were executed at the places of business of the corporate respondents and the homes of the respondents Arcuri and Tabah. Several documents were seized.

In both cases the respondents challenged the legality of the search warrants by means of motions in evocation, *certiorari* and mandamus, seeking to quash the seizure authorizations and their execution and to attack the constitutionality of ss. 40 and 40.1 of the Act in light of ss. 7 and 8 of the *Canadian Charter of Rights and Freedoms* (hereinafter the "*Charter*") and s. 24.1 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12. By way of interlocutory relief the respondents appended to their actions motions to have all the seized documents impounded so they could be sealed and given into the custody of a third party pending a final judgment on the legality of the search warrants.

In the *143471 Canada Inc.* case, on November 7, 1990, Hannan J. of the Quebec Superior Court allowed the motion to impound the seized documents, until such time as judgment was rendered at trial on the legality of the search warrants: [1990]

LE JUGE LA FOREST (dissident) — La présente instance soulève la question de l'opportunité d'ordonner un redressement interlocutoire, de la nature de l'entiercement des documents saisis, jusqu'à ce que soit déterminée, à la lumière de la *Charte canadienne des droits et libertés*, la légalité des dispositions de la *Loi sur le ministère du Revenu*, L.R.Q., ch. M-31, autorisant les perquisitions.

Les faits

Les faits qui ont donné naissance au présent litige sont, dans l'un et l'autre dossier, similaires et peuvent se résumer ainsi. Des autorisations écrites de perquisitionner ont été accordées par des juges de la Cour du Québec, conformément à l'art. 40 de la *Loi sur le ministère du Revenu* (ci-après la «Loi»), suite à des dénonciations assermentées selon lesquelles les intimés auraient, entre autres choses, tenté d'éluder la remise de montants d'argent en vertu de la *Loi concernant la taxe sur les repas et l'hôtellerie*, L.R.Q., ch. T-3. Ces autorisations ont été exécutées aux places d'affaires des sociétés intimées et aux domiciles des intimés Arcuri et Tabah. Plusieurs documents ont été saisis.

Les intimés ont contesté, dans l'un et l'autre dossier, la légalité des mandats de perquisition au moyen de requêtes en évocation, *certiorari* et *mandamus*, afin de faire annuler les autorisations de saisie et leur exécution et d'attaquer la constitutionnalité des art. 40 et 40.1 de la Loi en regard des art. 7 et 8 de la *Charte canadienne des droits et libertés* (ci-après la «*Charte*»), et de l'art. 24.1 de la *Charte des droits et libertés de la personne* du Québec, L.R.Q., ch. C-12. À titre de redressement interlocutoire, les intimés ont joint à leurs recours des requêtes en entiercement de tous les documents saisis afin qu'ils soient scellés et confiés à une tierce partie jusqu'à ce qu'un jugement final soit rendu sur la légalité des mandats de perquisition.

Dans le dossier *143471 Canada Inc.*, le juge Hannan, de la Cour supérieure du Québec, a accueilli, le 7 novembre 1990, la requête en entiercement des documents saisis pour valoir jusqu'à ce qu'un jugement soit rendu en première instance sur

R.D.F.Q. 104. On February 10, 1992 Croteau J. of the Quebec Superior Court dismissed the motion in evocation, *certiorari* and mandamus and concluded that s. 40 of the Act was constitutional: [1992] R.D.F.Q. 48. The respondents appealed that decision and asked the Court of Appeal to issue an order impounding the seized documents for the duration of the proceedings. On March 9, 1992, the Court of Appeal allowed the motion to impound the seized documents: (1992), 32 A.C.W.S. (3d) 226. While this Court's judgment on the appeal from that decision was still under reserve, the Quebec Court of Appeal dismissed the appeal with respect to the action in evocation, *certiorari* and mandamus, on May 18, 1994: J.E. 94-934.

In the *Tabah* case, on June 18, 1991, Marquis J. of the Quebec Superior Court allowed the motion to impound the seized documents until a judgment was rendered on the legality of the search warrants: [1991] R.D.F.Q. 90. The appellants appealed that judgment. On March 9, 1992, the Court of Appeal dismissed their appeal: [1992] R.D.F.Q. 44.

Judgments of the Courts Below

Quebec Superior Court, 143471 Canada Inc. Case, [1990] R.D.F.Q. 104

Hannan J. characterized the motion to impound as an exemption case since it applied only to the respondents, was confined to the documents seized, and related to the offences alleged. In ruling on the validity of the motion he considered the three criteria set out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, namely, whether there was a serious question to be tried, the irreparable harm the respondents might suffer if the motion was dismissed and the balance of convenience.

Hannan J. noted that the first criterion was difficult to apply at the interlocutory stage. He referred to the opinion expressed by Beetz J. in *Metropolitan Stores* that the courts are reluctant to grant an interlocutory injunction unless the public interest

la légalité des mandats de perquisition: [1990] R.D.F.Q. 104. Le 10 février 1992, le juge Croteau, de la Cour supérieure du Québec, rejetait la requête en évocation, *certiorari* et *mandamus* et concluait à la constitutionnalité de l'art. 40 de la Loi: [1992] R.D.F.Q. 48. Les intimés ont porté cette décision en appel et ont demandé à la Cour d'appel de rendre une ordonnance d'entiercement des documents saisis pour valoir durant l'instance. Le 9 mars 1992, la Cour d'appel accueillait la requête en entiercement des documents saisis: (1992), 32 A.C.W.S. (3d) 226. Durant le délibéré de l'appel de cette décision devant notre Cour, la Cour d'appel du Québec rejetait, le 18 mai 1994, l'appel du recours en évocation, *certiorari* et *mandamus*: J.E. 94-934.

Dans le dossier *Tabah*, le juge Marquis, de la Cour supérieure du Québec, a accueilli, le 18 juin 1991, la requête en entiercement des documents saisis jusqu'à ce qu'un jugement intervienne sur la légalité des mandats de perquisition: [1991] R.D.F.Q. 90. Les appelants ont porté cette décision en appel. Le 9 mars 1992, la Cour d'appel rejetait leur pourvoi: [1992] R.D.F.Q. 44.

Les décisions des tribunaux d'instance inférieure

Cour supérieure du Québec, dossier 143471 Canada Inc., [1990] R.D.F.Q. 104

Le juge Hannan a qualifié la demande d'entiercement d'un cas d'exemption à la Loi, puisqu'elle ne visait que les intimés, se limitait aux documents saisis et se rapportait aux infractions alléguées. Afin de se prononcer sur le bien-fondé de la requête, il a examiné les trois critères énoncés dans l'arrêt *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, soit l'existence d'une question sérieuse à trancher, le préjudice irréparable que les intimés étaient susceptibles de subir dans l'éventualité du rejet de la requête et la prépondérance des inconvénients.

Le juge Hannan a souligné que le premier critère était difficile à évaluer au stade interlocutoire. Il s'est reporté à l'opinion que le juge Beetz exprimait dans l'arrêt *Metropolitan Stores*, selon laquelle les tribunaux sont réticents à accorder une

is weighed in the balance of convenience. Relying on *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, and *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, Hannan J. noted that the distinction between the criminal and regulatory contexts with regard to what constitutes a reasonable invasion of privacy was likely to increase that reluctance to order interlocutory relief. He concluded, however, that it was difficult to assess if a *prima facie* case was made out and proposed to review the other criteria.

In determining whether irreparable harm existed, Hannan J. relied on the Quebec Court of Appeal's decision in *Zeppetelli v. Canada*, [1990] 2 C.T.C. 354. In that case the court noted that impoundment was an essential preventive measure for the constitutional protection of privacy against a seizure that might eventually be declared unreasonable. In the court's view refusing the impoundment would cause irreparable harm since the disclosure would be an invasion of privacy and would render the protection conferred by the *Charter* meaningless. Hannan J. considered he was bound by this decision and concluded as follows (at p. 109):

[TRANSLATION] In this unanimous judgment in *Zeppetelli* it is possible to draw the inference that once protection of privacy is sought in a case where the intrusion is allegedly unconstitutional (or at least anti-constitutional), the Court of Appeal considered that the criterion of irreparable harm has been met and, apparently, that the judgment in *Dyment* would support such a conclusion.

With respect to the balance of convenience criterion, Hannan J. pointed out that the exemption sought by the respondents was very limited in its application and did not have the effect of paralysing any other investigation or prosecution for other offences relating to different periods. He noted the comments made by Baudouin J.A. in *Zeppetelli*, *supra*, who pointed out that [TRANSLATION] "as between inconveniences of an essentially administrative nature and those involving a constitution-

injonction interlocutoire, à moins que l'intérêt public ne soit pris en considération dans la balance des inconvénients. S'appuyant sur les arrêts *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627, et *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, le juge Hannan a souligné que l'incidence de la distinction entre les contextes criminel et réglementaire eu égard aux attentes raisonnables en matière de vie privée était susceptible d'aggraver cette réticence à ordonner des redressements interlocutoires. Il a toutefois conclu à la difficulté d'évaluer l'apparence de droit et s'est proposé de réviser les autres critères.

Le juge Hannan s'est fondé sur l'arrêt de la Cour d'appel du Québec dans l'affaire *Zeppetelli c. Canada*, [1990] 2 C.T.C. 354, pour déterminer l'existence d'un préjudice irréparable. Dans cet arrêt, la cour faisait valoir que l'entiercement était une mesure préventive inhérente à la protection constitutionnelle de la vie privée à l'encontre d'une saisie qui pourrait être éventuellement déclarée abusive. Selon la cour, refuser l'entiercement causerait un tort irréparable, puisque la divulgation atteindrait la vie privée et rendrait caduque la protection accordée par la *Charte*. S'estimant lié par cette décision, le juge Hannan a conclu ainsi (à la p. 109):

Dans ce jugement unanime dans la cause *Zeppetelli*, il est possible d'en tirer l'inférence que, une fois la protection de la vie privée recherchée dans une instance où l'intrusion est prétendument inconstitutionnelle (ou au moins anticonstitutionnelle), la Cour d'appel considérait que le critère de préjudice irréparable est présent et, semble-t-il, que le jugement dans l'affaire *Dyment* justifierait une telle conclusion.

En ce qui a trait au critère de la prépondérance des inconvénients, le juge Hannan a souligné que l'exemption recherchée par les intimés était très limitée dans son application et n'avait pas pour effet de paralyser toute autre enquête ou poursuite pour d'autres infractions se rapportant à des périodes différentes. Il a rappelé les propos tenus par le juge Baudouin dans l'arrêt *Zeppetelli*, précité, qui faisait valoir qu'«entre des inconvénients d'ordre essentiellement administratif et ceux qui

ally protected fundamental right, the balance must tip in favour of the latter" (p. 357). Hannan J. came to the following conclusion (at p. 110):

[TRANSLATION] In the present case, where the exceptional stay is restricted to the items already seized, and does not suspend the application of the tax legislation, except in this regard, and where the irreparable harm and balance of convenience are in favour of the applicants until this Court renders a judgment on the motion in evocation, and although the merits of the case are not crystal clear, there is a good basis for granting the present motion to impound.

Quebec Superior Court, Tabah Case, [1991] R.D.F.Q. 90

Like Hannan J., Marquis J. of the Quebec Superior Court relied on *Metropolitan Stores* and *Zeppetelli*, *supra*, in deciding whether to grant the impounding order. He characterized the case as one of exemption since the effect of the motion to impound was only to suspend *pendente lite* the application of the impugned provisions of the Act as they affected the respondents. Marquis J. proceeded to apply the three relevant criteria in determining whether to grant the respondents' motion.

Marquis J. concluded that the respondents met the *prima facie* case criterion since the case raised a serious question. In his view the contention put forward by the appellants was not so immediately obvious as to exclude from consideration that put forward by the respondents. In support of this conclusion he relied on the reasons of Hugessen J.A. of the Federal Court of Appeal in *Baron v. Canada*, [1991] 1 F.C. 688.

Regarding the irreparable harm criterion, Marquis J., after referring to the Court of Appeal's decision in *Zeppetelli*, *supra*, concluded (at p. 96):

[TRANSLATION] While it is true that the seizures have already been made, the evidence shows that the examination of the documents seized is far from being complete. The very purpose of that examination is to identify evidence which might eventually lead to the

touchent un droit fondamental constitutionnellement protégé, la balance doit pencher en faveur des seconds» (p. 357). Le juge Hannan a conclu de la sorte (à la p. 110):

Dans la présente cause, où le sursis d'exemption est restreint aux effets déjà saisis de façon à ne pas suspendre l'application des lois fiscales, sauf en cet aspect, et où le préjudice irréparable et la balance des inconvénients favorisent les requérants, jusqu'à ce que le jugement sur la requête en évocation soit prononcé par cette Cour, et même si le bien-fondé de la cause au mérite n'est pas d'une clarté cristalline, il y a lieu d'accorder la présente requête en entiercement.

Cour supérieure du Québec, dossier Tabah, [1991] R.D.F.Q. 90

À l'instar du juge Hannan, le juge Marquis, de la Cour supérieure du Québec, s'est appuyé sur les arrêts *Metropolitan Stores* et *Zeppetelli*, précités, pour décider de l'opportunité d'ordonner l'entiercement. Il a qualifié l'instance d'un cas d'exemption puisque la requête en entiercement ne visait qu'à suspendre, *pendente lite*, l'application des dispositions contestées de la Loi en regard des intimés. Le juge Marquis a procédé à l'évaluation des trois critères pertinents à la détermination de la requête des intimés.

Le juge Marquis a conclu que les intimés remplissaient le critère de l'apparence de droit puisque le litige soulevait une question sérieuse. Selon lui, la solution proposée par les appelants ne s'imposait pas au point d'affirmer que celle avancée par les intimés ne méritait pas considération. Il s'est appuyé, au soutien de cette conclusion, sur les motifs du juge Hugessen de la Cour d'appel fédérale dans l'arrêt *Baron c. Canada*, [1991] 1 C.F. 688.

En ce qui a trait au critère du préjudice irréparable, après avoir référé à la décision de la Cour d'appel dans l'arrêt *Zeppetelli*, précité, le juge Marquis a conclu (à la p. 96):

S'il est vrai que les saisies sont déjà pratiquées, la preuve révèle que l'étude des documents saisis est loin d'être terminée. Cette étude a précisément pour but la recherche des éléments de preuve qui permettent de poursuivre éventuellement en justice un ou plusieurs des

prosecution of one or more of the [respondents]. It is also this examination of the seized documents which is an invasion of privacy: if the seizures were eventually quashed, irreparable injury would be caused to the [respondents] which could have been prevented by the impoundment.

With respect to the balance of convenience criterion, Marquis J. also relied on the foregoing passage from the Court of Appeal's decision in *Zeppetelli*, which noted that [TRANSLATION] "as between inconveniences of an essentially administrative nature and those involving a constitutionally protected fundamental right, the balance must tip in favour of the latter" (p. 357). On the question of the public interest, he noted that although the public is entitled to have the law respected and to have offenders prosecuted, the appellants' fear — that applications to impound would become so numerous as to paralyze the operation of the Act — was not based on any factual evidence. Accordingly, since the exemption was limited to specific persons and documents and the case raised a serious question, Marquis J. ordered that the documents be impounded until a final judgment was rendered on the legality of the searches.

Quebec Court of Appeal

The Quebec Court of Appeal allowed the motion to impound in the *143471 Canada Inc.* case, relying on the principles set out in *Zeppetelli* and the reasons given in the judgment it rendered the same day in the *Tabah* case. In the latter the Court of Appeal dismissed the appellants' appeal, being of the view that the purpose of the motion to impound was not to suspend the effect of the Act but simply to delay temporarily access to the seized documents, which might also contain information of a personal nature. The judgment was as follows:

[TRANSLATION] Whereas in the present case the purpose of the respondents' motion was not to suspend the effect of the Act, since according to its terms the investigations and other measures undertaken against the respondents can continue and have in fact continued;

Whereas the purpose of the motion was only to suspend, on a purely temporary basis, the appellants' access

[intimés]. Or, c'est aussi cette étude des documents saisis qui porte atteinte à la vie privée: si ces saisies devaient éventuellement être annulées, un tort irréparable serait causé aux [intimés] que l'entiercement aurait pu prévenir.

Quant au critère de la balance des inconvénients, le juge Marquis s'est également appuyé sur le passage précité de la décision de la Cour d'appel dans l'arrêt *Zeppetelli*, qui faisait valoir qu'«entre des inconvénients d'ordre essentiellement administratif et ceux qui touchent un droit fondamental constitutionnellement protégé, la balance doit pencher en faveur des seconds» (p. 357). Sur la question de l'intérêt public, il a noté que bien que les citoyens avaient droit au respect de la loi et à la poursuite des délinquants, la crainte des appelants — un accroissement des recours en entiercement risquant de paralyser la mise en application de la Loi — ne reposait sur aucune donnée factuelle. Ainsi, puisque l'exemption se limitait à des personnes et à des documents déterminés et que le fond du litige soulevait une question sérieuse, le juge Marquis a ordonné l'entiercement des documents jusqu'à ce qu'un jugement final soit rendu sur la légalité des perquisitions.

Cour d'appel du Québec

La Cour d'appel du Québec a accueilli, dans le dossier *143471 Canada Inc.*, la requête en entiercement, se fondant sur les principes posés dans l'affaire *Zeppetelli* et les motifs énoncés dans le jugement qu'elle rendait le jour même dans le dossier *Tabah*. Dans ce dernier, la Cour d'appel a rejeté le pourvoi des appelants, étant d'avis que la requête en entiercement visait non pas à suspendre l'effet de la Loi, mais simplement à retarder temporairement l'accès aux documents saisis, lesquels pouvaient en outre contenir des renseignements de nature personnelle. Voici sa décision:

Considérant qu'en l'espèce, la requête des intimés ne visait pas à suspendre l'effet de la loi, puisqu'aux termes de celle-ci les enquêtes et autres mesures entreprises contre les intimés peuvent se poursuivre et se sont en fait poursuivies;

Considérant que la requête ne visait qu'à faire suspendre, et ce, de manière purement provisoire, l'accès des

to documents, books and registers which might contain personal items of information and so contravene the protection of privacy guaranteed by law;

Whereas, although this Court is not ruling on the reality or existence of the other criteria, the respondents have both in the Superior Court and in this Court demonstrated a *prima facie* case and so met the first condition set out above;

Whereas further the Supreme Court of Canada recently heard two cases on not exactly identical but similar points of law in *Baron v. Canada* and *Kourtessis v. M.N.R.* and those cases are currently reserved;

In view of *Attorney General of Manitoba v. Metropolitan Stores Ltd.*; *Hunter v. Southam Inc.*; *Bâtiments Fafard inc./Fafard Building System Inc. v. R.* [J.E. 91-1611] and *Zeppetelli v. R.*

For these reasons:

Dismisses the appeal with costs.

([1992] R.D.F.Q. 44, at p. 45.)

Analysis

In *Metropolitan Stores*, *supra*, this Court expressly rejected the presumption of constitutional validity of legislation, understood in its literal sense, as it considered it to be "not compatible with the innovative and evolutive character" of the *Charter* (p. 124). The presumption of constitutional validity of legislation is at variance with the flexible and generous interpretation that should be given to the *Charter* in view of the nature of the rights and freedoms entrenched in it: see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. Interlocutory relief was refused in *Metropolitan Stores*, however, and the disputed provisions continued to apply while their constitutionality was being determined. That decision indicates that interlocutory orders suspending the application of legislation will not be granted automatically.

A cautious approach is all the more necessary as the government's activities have ramifications throughout all aspects of life in society. There is

appelants à des documents, livres et registres pouvant contenir des éléments personnels d'information et donc contrevenir à la protection accordée par la loi à la vie privée;

Considérant, sans que cette Cour se prononce sur la réalité ou l'existence des autres critères, que les intimés, tant devant la Cour supérieure que devant cette Cour, ont démontré une apparence de droit satisfaisant ainsi à la première condition énoncée plus haut;

Considérant, en outre, que la Cour suprême du Canada a entendu récemment deux instances portant sur des questions de droit non rigoureusement identiques mais similaires dans les affaires *Baron c. Canada* et *Kourtessis c. M.N.R.* et que ces causes sont à l'heure actuelle en délibéré;

Vu les arrêts *Procureur général du Manitoba c. Metropolitan Stores Ltd.*; *Hunter c. Southam Inc.*; *Bâtiments Fafard inc./Fafard Building System Inc. c. R.* [J.E. 91-1611] et *Zeppetelli c. R.*

Par ces motifs:

Rejette le pourvoi, avec dépens.

([1992] R.D.F.Q. 44, à la p. 45.)

Analyse

Dans l'arrêt *Metropolitan Stores*, précité, notre Cour a expressément rejeté le principe de la présomption de constitutionnalité des lois, entendu dans son sens littéral, le jugeant «incompatible avec le caractère innovateur et évolutif» de la *Charte* (p. 124). La présomption de constitutionnalité des lois s'oppose, en effet, à l'interprétation souple et généreuse que doit recevoir la *Charte*, compte tenu de la nature des droits et libertés qui y sont enchâssés; voir *Renvoi: Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486. Le redressement interlocutoire a toutefois été refusé dans l'affaire *Metropolitan Stores* et l'application des dispositions contestées a suivi son cours durant la détermination de leur constitutionnalité. Cette décision nous enseigne que les ordonnances interlocutoires visant à suspendre l'exécution d'une loi ne seront pas accordées de manière systématique.

Une approche circonspecte est d'autant plus indiquée que les activités de l'administration ont des ramifications dans toutes les sphères de la vie

much other legislation, in addition to taxation statutes, that includes inspection or investigation systems the implementation of which might give rise to applications designed to impede their operation: legislation on the environment, the professions, labour, health and safety and securities transactions are some examples. The orchestration of a large number of activities regulated by the government might be compromised if litigants could easily avoid the application of legislation adopted by democratically elected legislatures, presumably in the public interest.

In addition there is the problem of systemic delays in court challenges. This cannot be ignored in deciding whether to grant interlocutory relief suspending the application of legislation for the duration of the proceedings. In the present appeal the search authorizations were issued in June 1990 in the *143471 Canada Inc.* case and in March 1991 in the *Tabah* case. In the former case the appeal from the motion in evocation, *certiorari* and mandamus was dismissed by the Quebec Court of Appeal on May 18, 1994. In the latter the motion has not yet been dealt with at first instance. A final ruling on the validity of these motions, if it were to be made by this Court, is not to be expected for some time.

In this light, it is necessary to adopt an analytical framework that permits the reconciliation of the rights and freedoms entrenched in the *Charter* with the conduct of governmental affairs. Although this point was not expressly made by the parties, it seems to me entirely appropriate to use the analytical framework developed in *Metropolitan Stores*, even though this appeal does not raise the question of a stay of proceedings or an injunction. If granted, the remedy sought will exempt the respondents for all practical purposes from the application of the provisions of the Act regarding investigations until the legality of the searches has been determined.

The three criteria set out in *Metropolitan Stores* — *prima facie* case, irreparable harm and balance

en société. Outre les lois fiscales, on peut mentionner plusieurs autres régimes législatifs qui sont assortis de systèmes d'inspection ou d'enquête dont la mise en œuvre pourrait donner lieu à des demandes visant à en frustrer l'application: les lois environnementales, les lois professionnelles, les lois du travail, les lois sur la santé et la sécurité et les lois sur les transactions mobilières en sont quelques exemples. L'orchestration d'un grand nombre d'activités réglementées par l'État serait susceptible d'être compromise si les justiciables pouvaient aisément passer outre à l'application de lois adoptées par des législatures démocratiquement élues, présumément dans l'intérêt public.

À cela s'ajoute le problème des lenteurs systémiques des contestations judiciaires. Il ne peut être ignoré lorsqu'il s'agit de décider de l'opportunité d'ordonner un redressement interlocutoire visant à suspendre, durant l'instance, l'application d'une loi. En l'espèce, les autorisations de perquisition ont été accordées en juin 1990 dans le dossier *143471 Canada Inc.*, et en mars 1991 dans le dossier *Tabah*. Dans le premier, l'appel de la requête en évocation, *certiorari* et *mandamus* a été rejeté par la Cour d'appel du Québec le 18 mai 1994. Dans le second, la requête n'a pas encore été tranchée en première instance. Une détermination définitive du bien-fondé de ces requêtes, si elle devait être prononcée par notre Cour, n'est pas à prévoir avant quelque temps.

Dans cette perspective, on comprend la nécessité de recourir à un cadre d'analyse qui permet de réconcilier le respect des droits et libertés enchâssés dans la *Charte* avec la poursuite des activités de l'administration. Bien que ce point n'ait pas été explicitement souligné par les parties, il me semble tout à fait approprié de recourir au cadre d'analyse élaboré dans l'arrêt *Metropolitan Stores*, même s'il ne s'agit pas en l'espèce d'un cas de suspension d'instance ou d'injonction. S'il est accordé, le remède recherché exemptera les intimés, à toute fin pratique, de l'application des dispositions de la Loi concernant les enquêtes jusqu'à ce que la légalité des perquisitions ait été déterminée.

Les trois critères énoncés dans l'arrêt *Metropolitan Stores* — l'apparence de droit, le préjudice

of convenience — have recently been revisited by this Court in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. My colleagues Sopinka and Cory JJ. there made an analysis of the principles with which I entirely agree. There is no need to repeat it except as necessary to explain its application to the present case.

Prima Facie Case

The requirement of a *prima facie* case is explained by the concern with preventing a litigant from avoiding the application of legislation by simply arguing that it is unconstitutional. There must be a mechanism to ensure that frivolous or vexatious actions will not systematically result in interlocutory relief intended to impede the application of legislation. In cases involving a constitutional challenge, particularly when it is based on the *Charter*, the application of this criterion will be more flexible if the public interest is considered in the analysis of the balance of convenience. It will then be sufficient to note that there is a serious question to be tried. This greater flexibility is necessary in view of the inherent difficulties of determining, at the interlocutory stage, the validity of the constitutional challenge, given the limited evidence and the effect that an exemption from or suspension of the application of a statute can have not only on the parties but also on the public interest.

The appellants argue that the provisions authorizing the searches are in accordance with the principles set out in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145. They criticize the Court of Appeal for relying on the fact that *Baron v. Canada*, [1993] 1 S.C.R. 416, and *Kourtessis v. M.N.R.*, [1993] 2 S.C.R. 53, were still reserved at the time it rendered its decision concluding that there was a *prima facie* case. In this Court they argued that there is no longer a *prima facie* case in view of the Court's conclusions in *Baron*.

In the *143471 Canada Inc.* case, although the issue is limited to the constitutionality of ss. 40 and

irréparable et la prépondérance des inconvénients — ont été revus récemment par notre Cour dans l'arrêt *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311. Mes collègues, les juges Sopinka et Cory, ont fait une analyse des principes à laquelle je souscris entièrement. Il n'y a pas lieu d'y revenir, si ce n'est pour en préciser l'application à la présente instance.

L'apparence de droit

L'exigence d'une apparence de droit s'explique par le souci de prévenir qu'un justiciable bénéficie de l'exemption de l'application d'une loi simplement en invoquant son inconstitutionnalité. Il doit, en effet, exister un mécanisme garantissant que les recours futiles ou vexatoires ne donneront pas systématiquement lieu à des mesures interlocutoires visant à frustrer l'application des lois. Dans l'hypothèse d'une contestation de constitutionnalité, particulièrement lorsqu'elle se fonde sur la *Charte*, l'appréciation de ce critère sera assouplie si l'intérêt public est envisagé dans l'analyse de la prépondérance des inconvénients. Il suffira alors de noter l'existence d'une question sérieuse à trancher. Cet assouplissement est nécessaire en raison des difficultés inhérentes de déterminer, au stade interlocutoire, le bien-fondé de la contestation de constitutionnalité, compte tenu de la preuve limitée et de l'incidence que l'exemption ou la suspension de l'application d'une loi peuvent avoir non seulement sur les parties, mais également sur l'intérêt public.

Les appelants prétendent que les dispositions autorisant les perquisitions sont conformes aux principes énoncés dans l'arrêt *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145. Ils reprochent à la Cour d'appel de s'être fondée sur le fait que les arrêts *Baron c. Canada*, [1993] 1 R.C.S. 416, et *Kourtessis c. M.R.N.*, [1993] 2 R.C.S. 53, étaient en délibéré, à l'époque où elle a rendu sa décision, pour conclure à l'apparence de droit. Ils soutiennent devant nous qu'il n'y a plus d'apparence de droit, vu les conclusions de notre Cour dans l'arrêt *Baron*.

Dans le dossier *143471 Canada Inc.*, bien que le litige soit exclusivement circonscrit à la constitu-

40.1 of the Act, the respondents put forward other arguments that s. 40 of the Act is unconstitutional, in addition to those dealt with by this Court in *Baron*. They concede that the latter are now academic. The respondents rely *inter alia* on the fact that there is no requirement to allege the commission of an offence, or the identification of the premises or the things to be seized; on the argument that s. 40 of the Act is unconstitutional since it is the Minister who technically issues the search warrant; on the fact that there is no express requirement that the judge's authorization be given before the warrant is issued or even before the seizure is carried out; and on the combined effect of ss. 40 and 40.1 of the Act and the legality of "fishing expeditions".

The respondents also plead the unconstitutionality of s. 40.1 of the Act, which refers to the "plain view" doctrine, in support of the motion in evocation, *certiorari* and mandamus in the *Tabah* case. This practice has been approved on several occasions by Canadian courts. However, this Court has never ruled on its constitutionality under s. 8 of the *Charter*. Finally, in addition to the argument that the provision authorizing the seizures is unconstitutional, the respondents argue that the information was inadequate and the seizures were unreasonable.

Since this Court has taken a liberal approach to the application of the first criterion, I am prepared to conclude that there is in both cases a *prima facie* case. I hasten to add that the Quebec Court of Appeal could not have come to any other conclusion at the time it dealt with the matter since its decision was rendered when *Baron* and *Kourtessis*, *supra*, were under reserve.

One can certainly question whether the fact that the Quebec Superior Court dismissed the motion in evocation, *certiorari* and mandamus in the *143471 Canada Inc.* case imposes a heavier burden in meeting the first criterion. This argument was made by the appellants, who objected that the Court of Appeal had not applied its own case law on stays of proceedings, by virtue of which a stay will very seldom be ordered when there is no

tionnalité des art. 40 et 40.1 de la Loi, les intimés invoquent d'autres motifs d'inconstitutionnalité de l'art. 40 de la Loi, en sus de ceux dont a disposé notre Cour dans l'arrêt *Baron*. Ils concèdent d'ailleurs que ces derniers sont désormais académiques. Les intimés invoquent, entre autres motifs, l'absence d'exigence d'une référence à l'infraction ou d'une identification des lieux ou des effets à être saisis; l'inconstitutionnalité de l'art. 40 de la Loi en regard du fait que c'est le ministre qui, techniquement, délivre le mandat de perquisition; l'absence d'exigence explicite que l'autorisation du juge soit donnée avant la délivrance du mandat ou même avant l'exécution de la saisie; l'effet combiné des art. 40 et 40.1 de la Loi et la légalité des «fouilles en vrac».

Les intimés plaident également l'inconstitutionnalité de l'art. 40.1 de la Loi, qui réfère à la doctrine du «*plain view*» ou la saisie d'objets à vue, au soutien du recours en évocation, *certiorari* et *mandamus*, dans le dossier *Tabah*. Cette pratique a été validée à quelques reprises par les tribunaux canadiens. Toutefois, notre Cour ne s'est jamais prononcée sur sa constitutionnalité à la lumière de l'art. 8 de la *Charte*. Enfin, les intimés invoquent l'insuffisance de la dénonciation et le caractère abusif des saisies, en sus de l'inconstitutionnalité du texte les autorisant.

Puisque notre Cour s'est montrée peu exigeante dans la démonstration du premier critère, je suis disposé à conclure à l'apparence de droit et ce, à l'égard des deux dossiers. Je m'empresse d'ajouter que la Cour d'appel du Québec ne pouvait faire autrement qu'arriver à cette conclusion à l'époque où elle a tranché la question, sa décision ayant été rendue alors que les affaires *Baron* et *Kourtessis*, précitées, étaient en délibéré.

On peut certes se demander si le rejet du recours en évocation, *certiorari* et *mandamus*, dans le dossier *143471 Canada Inc.*, impose aux intimés un fardeau plus lourd dans la démonstration du premier critère. Cet argument a été soulevé par les appelants, qui reprochent à la Cour d'appel de n'avoir pas appliqué sa propre jurisprudence en matière de sursis, selon laquelle une suspension de procédures ne sera ordonnée qu'exceptionnelle-

apparent defect in the lower court judgment. The dismissal of the motion in evocation, *certiorari* and mandamus by the Superior Court is certainly a relevant factor, but is not, in this case, sufficient to alter the fact that serious questions have been raised by the respondents. I do not think that the precedents regarding stay of proceedings should be applied without qualification when the constitutionality of legislation is challenged under the *Charter*, in view of the importance and complexity of the rights and freedoms it entrenches.

Having thus not been persuaded that the respondents' motions in evocation, *certiorari* and mandamus are frivolous or vexatious, I propose to analyse the other two steps of the test set forth in *Metropolitan Stores*.

Irreparable Harm

The irreparable harm criterion refers to the harm the applicant may suffer if the interlocutory relief is not granted. If there is no harm or it can be adequately compensated for by an award of damages, there will be little reason to exempt the applicant from the application of the law. In *RJR — MacDonald*, *supra*, this Court noted that this view of harm is of limited application when a breach of the *Charter* is alleged. The concept of "irreparable harm" is often associated with that of damages. However, a monetary remedy is not always contemplated in cases where the *Charter* is invoked. This results from the nature of the rights it guarantees and of the parties. That is why the Court held that in most situations the existence of irreparable harm must be presumed. But when the alleged harm itself takes the form of a breach of a right protected by the *Charter*, as it does here, the judge who has the responsibility for ruling on the merits of the interlocutory motion is in the best position to determine its nature and extent and whether it is irreparable.

ment lorsque le jugement de l'instance inférieure n'a pas de faiblesse apparente. Le rejet de la requête en évocation, *certiorari* et *mandamus* par la Cour supérieure est un facteur certes pertinent, mais insuffisant en l'espèce pour éliminer le sérieux des questions soulevées par les intimés. Je ne crois pas que la jurisprudence en matière de sursis devrait être appliquée, sans aucune qualification, lorsque la constitutionnalité d'une disposition législative est contestée en vertu de la *Charte*, compte tenu de l'importance et de la complexité des droits et libertés qu'elle enchâsse.

En conséquence, puisque je ne suis pas convaincu de la frivolité ou du caractère vexatoire des recours en évocation, *certiorari* et *mandamus* des intimés, je me propose d'analyser les deux autres étapes du test énoncé dans l'arrêt *Metropolitan Stores*.

Le préjudice irréparable

Le critère du préjudice irréparable réfère au tort qu'est susceptible d'encourir le requérant dans l'hypothèse où le redressement interlocutoire n'est pas accordé. Si le préjudice est inexistant ou susceptible d'être adéquatement indemnisé par un octroi de dommages-intérêts, il y aura peu d'intérêt à exempter le requérant de l'application de la loi. Dans l'arrêt *RJR — MacDonald*, précité, notre Cour soulignait que cette conception du préjudice est d'application restreinte lorsqu'une violation de la *Charte* est alléguée. La notion de «préjudice irréparable» est souvent associée à celle de dommages-intérêts. Or, une solution pécuniaire n'est pas toujours envisagée dans les instances où la *Charte* est invoquée. Cela tient à la nature des droits qu'elle garantit et à celle des parties qui s'affrontent. C'est la raison pour laquelle la Cour a conclu à la nécessité de présumer, dans la plupart des hypothèses, l'existence d'un préjudice irréparable. Mais, lorsque le préjudice allégué prend lui-même la forme d'une atteinte à un droit protégé par la *Charte*, comme en l'espèce, le juge chargé de se prononcer sur le bien-fondé de la requête interlocutoire est dans une position privilégiée pour en déterminer la nature, l'étendue et le caractère irréparable.

Harm is generally viewed from the standpoint of the person seeking to benefit from the interlocutory relief. Others view it from the standpoint of the person against whom the motion is directed. Although one could at this stage consider the type of harm the Ministère du Revenu might incur if an impounding order were upheld, in my view it is preferable to consider this issue when the balance of convenience is being determined. The same is true of irreparable harm to the public interest. This was the approach taken by this Court in *RJR — MacDonald*, and, as I see it, it is the right one.

Le préjudice est généralement apprécié dans la perspective de celui ou celle qui désire profiter du redressement interlocutoire. D'aucuns l'évaluent dans la perspective de celui ou celle contre qui la requête est dirigée. Bien que l'on puisse, à cette étape, se questionner sur la nature du préjudice qu'est susceptible d'encourir le ministère du Revenu si l'entiercement était maintenu, je suis d'avis qu'il est préférable d'envisager cette question lors de la détermination de la prépondérance des inconvénients. Il en va de même, à mon avis, de celle du préjudice irréparable à l'intérêt public. C'est cette perspective qui a été adoptée par la Cour dans l'arrêt *RJR — MacDonald*, et elle m'apparaît bien fondée.

The respondents contend that if no impounding order is made they will suffer harm since the examination of the contents of the seized documents by the tax authorities will result in an infringement of their right to privacy. Such harm, they say, would by its very nature be irreparable. The respondents argue that if individuals have the right to be protected against state intrusions and to have the legality of such intrusions tested, it follows that the courts have the power — and the duty — to protect the privacy of the documents seized and preserve the *status quo* by ordering that the documents be impounded until the legality of the searches has been determined. The appellants, on the other hand, argue that the respondents would suffer no harm because any reasonable expectations of privacy they might have are limited or perhaps even non-existent.

Les intimés soutiennent qu'en l'absence d'une ordonnance d'entiercement, ils subiront un préjudice de la nature d'une atteinte à leur droit à la vie privée, du fait de la prise de connaissance, par les autorités fiscales, du contenu des documents saisis. Un tel préjudice serait, par sa nature, irréparable. Les intimés font valoir que si les citoyens ont le droit d'être protégés contre les intrusions de l'État et s'ils peuvent en faire réviser la légalité, il s'ensuit que les tribunaux ont le pouvoir — et le devoir — de protéger le caractère privé des documents saisis et de préserver le statu quo en ordonnant leur entiercement jusqu'à ce que soit déterminée la légalité des perquisitions. Les appelants soutiennent, au contraire, que les intimés ne subissent aucun préjudice puisque les attentes raisonnables qu'ils peuvent entretenir en matière de vie privée sont réduites, voire inexistantes.

The conclusion that the respondents will suffer irreparable harm seems at first sight irrefutable, since they are relying on a breach of a constitutionally protected right, the infringement of which is itself an extension of that resulting from the search. This was the view taken by the Quebec Court of Appeal in *Zeppetelli*, *supra*, relied on by Hannan and Marquis JJ. in the case at bar, in concluding that there was irreparable harm. In that case Baudouin J.A. relied on the following passage from this Court's decision in *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 430, in support of the conclu-

La conclusion selon laquelle les intimés subissent un préjudice irréparable semble à première vue incontournable puisque ceux-ci invoquent une atteinte à un droit constitutionnellement protégé dont la violation s'inscrit elle-même dans la continuité de celle engendrée par la perquisition. C'est dans ce sens qu'opinait la Cour d'appel du Québec dans l'arrêt *Zeppetelli*, précité, que les juges Hannan et Marquis ont invoqué dans la présente instance pour conclure à l'existence d'un préjudice irréparable. Dans cette affaire, le juge Baudouin s'est appuyé sur le passage suivant de la décision

sion that if there was no impounding the respondents would suffer irreparable harm:

> One further general point must be made, and that is that if the privacy of the individual is to be protected, we cannot afford to wait to vindicate it only after it has been violated. This is inherent in the notion of being secure against unreasonable searches and seizures. Invasions of privacy must be prevented, and where privacy is outweighed by other societal claims, there must be clear rules setting forth the conditions in which it can be violated. This is especially true of law enforcement, which involves the freedom of the subject. [Emphasis in original.]

In *Zeppetelli* Baudouin J.A. concluded as follows, at p. 356:

> [TRANSLATION] In this case, therefore, impounding is a preventive measure inherent in the constitutional protection of privacy from a seizure which might eventually be found to be unreasonable. According to the rule stated by the Supreme Court, the injury caused would thus be irreparable, as disclosure would be an invasion of privacy and make the protection afforded by the Charter meaningless.

However, the present case can be distinguished from *Dyment*, where the respondent was challenging the seizure of a bodily fluid without prior authorization. The respondents are objecting here to the examination by the tax authorities of the contents of business documents the seizure of which was previously authorized. The existence of irreparable harm cannot be inferred simply because a breach of a right protected by the *Charter* is alleged or because the main proceeding itself involves the infringement of an entrenched right. In the present case not only have the courts not yet made a final ruling on whether the searches are unreasonable, but the Quebec Superior Court dismissed the motion in evocation, *certiorari* and mandamus in the *143471 Canada Inc.* case. It seems wrong to conclude as a matter of principle that the right to privacy must in all circumstances take priority over any other interest, for example over giving effect to legislation adopted in the public interest. Both the right and the alleged infringe-

de notre Cour dans *R. c. Dyment*, [1988] 2 R.C.S. 417, à la p. 430, afin d'étayer le point de vue selon lequel en l'absence d'entiercement, les intimés subiraient un préjudice irréparable:

> Une dernière remarque d'ordre général s'impose, à savoir que si le droit à la vie privée de l'individu doit être protégé, nous ne pouvons nous permettre de ne faire valoir ce droit qu'après qu'il a été violé. Cela est inhérent à la notion de protection contre les fouilles, les perquisitions et les saisies abusives. Il faut empêcher les atteintes au droit à la vie privée et, lorsque d'autres exigences de la société l'emportent sur ce droit, il doit y avoir des règles claires qui énoncent les conditions dans lesquelles il peut être enfreint. Cela est particulièrement vrai en ce qui concerne l'application de la loi, qui met en cause la liberté du sujet. [Souligné dans l'original.]

Le juge Baudouin concluait de la sorte, dans l'arrêt *Zeppetelli*, à la p. 356:

> Dans ce cas donc, l'entiercement est une mesure préventive inhérente à la protection constitutionnelle de la vie privée à l'encontre d'une saisie qui pourrait être éventuellement déclarée abusive. Selon la règle posée par la Cour suprême, le tort causé serait donc irréparable, la divulgation atteignant la vie privée et rendant caduque la protection accordée par la Charte.

La présente instance se distingue toutefois de l'affaire *Dyment*, où l'intimé contestait la saisie, sans autorisation préalable, d'un liquide organique. Les intimés s'opposent ici à la prise de connaissance, par les autorités fiscales, du contenu de documents d'affaires dont la saisie a été préalablement autorisée. Or, l'existence d'un préjudice irréparable ne peut s'inférer simplement parce qu'une atteinte à un droit protégé par la *Charte* est alléguée ou encore parce que l'instance principale met elle-même en cause la violation d'un droit enchâssé. En l'espèce, non seulement les tribunaux n'ont pas encore définitivement statué sur le caractère abusif des perquisitions, mais la Cour supérieure du Québec a rejeté la requête en évocation, *certiorari* et *mandamus* dans le dossier *143471 Canada Inc.* Il m'apparaît fallacieux de conclure, comme question de principe, que le droit à la vie privée doit recevoir, en toute circonstance, la priorité sur tout autre intérêt, par exemple sur le respect et l'application de lois adoptées dans l'intérêt

ment must be placed in context: see *United States of America v. Cotroni*, [1989] 1 S.C.R. 1469, and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. Accordingly, before concluding that the harm is "irreparable", as required by the second criterion, the existence and extent of the harm must be determined, something which the Court of Appeal seems to have failed to do in the case at bar since it simply said that the seized documents might [TRANSLATION] "contain personal items of information and so contravene the protection of privacy guaranteed by law" (p. 45 R.D.F.Q.).

There is considerable merit in the proposition that persons who decide to engage in activities regulated by the government are subject to a diminution of their expectations of privacy. In that case, it can be presumed that they have agreed to be subject to the obligations imposed by the legislature that are inherent in the conduct of such activities; see *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154. While in *McKinlay Transport*, *supra*, this Court was of the view that power given by s. 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, came within the ambit of s. 8 of the *Charter*, it held that the criteria laid down in *Hunter v. Southam Inc.* could be applied more flexibly in a regulatory context. After analysing several lower court decisions, Wilson J. wrote, at p. 647:

> I refer to these cases not to approve or disapprove the results achieved but rather as evidence of the need to take a flexible and purposive approach to s. 8 of the *Charter*. It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review.

McKinlay Transport dealt with the constitutionality of a provision authorizing the tax authorities to require the production of documents. Such a

public. Il est nécessaire de replacer dans son contexte tant le droit que la violation alléguée; voir *États-Unis d'Amérique c. Cotroni*, [1989] 1 R.C.S. 1469, et *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326. Aussi, avant de conclure au caractère «irréparable» du préjudice, condition de satisfaction du second critère, encore faut-il s'assurer de son existence et de sa portée, ce que semble avoir omis de faire la Cour d'appel dans la présente instance, puisqu'elle a simplement affirmé que les documents saisis pouvaient «contenir des éléments personnels d'information et donc contrevenir à la protection accordée par la loi à la vie privée» (p. 45 R.D.F.Q.).

Il y a beaucoup de mérite dans la proposition selon laquelle les personnes qui décident de s'engager dans des activités réglementées par l'État voient leurs attentes en matière de protection de la vie privée considérablement réduites. Dans une telle hypothèse, on peut présumer qu'elles ont accepté d'être assujetties aux obligations imposées par le législateur inhérentes à la conduite de ces activités; voir *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154. Dans l'arrêt *McKinlay Transport*, précité, bien que notre Cour fût d'avis que le pouvoir énoncé au par. 231(3) de la *Loi de l'impôt sur le revenu*, S.R.C. 1952, ch. 148, était visé par l'art. 8 de la *Charte*, elle jugea que les critères de l'arrêt *Hunter c. Southam Inc.* pouvaient être assouplis dans le contexte réglementaire. Après avoir analysé plusieurs décisions d'instances inférieures, le juge Wilson écrivait, à la p. 647 de l'arrêt:

> Je cite ces arrêts non pour en approuver ou désapprouver l'issue mais plutôt pour prouver la nécessité d'une interprétation de l'art. 8 de la *Charte* qui soit souple et fondée sur l'objet visé. J'estime qu'il est conforme à cette interprétation de faire une distinction entre, d'une part, les saisies en matière criminelle ou quasi criminelle auxquelles s'appliquent dans toute leur rigueur les critères énoncés dans l'arrêt *Hunter* et, d'autre part, les saisies en matière administrative et de réglementation, auxquelles peuvent s'appliquer des normes moins strictes selon le texte législatif examiné.

L'arrêt *McKinlay Transport* portait sur la constitutionnalité d'une disposition permettant aux autorités fiscales d'exiger la production de documents.

power, though it was characterizéd as a "seizure" within the meaning of s. 8 of the *Charter*, was nonetheless different from the power to "search". This distinction was the basis for the qualification to the application of the criteria set out in *Hunter v. Southam Inc.* In *Thomson Newspapers*, I underlined that the more invasive character of a search was referable to the importance individuals attached to the inviolability of their homes, and of their workplaces. I added, at p. 522 of the judgment:

The requirement to submit to a search of business premises by agents of the state can therefore amount to a requirement to reveal aspects of one's personal life to the chilling glare of official inspection. It seriously invades the right to be secure against unreasonable search and seizure. This is not the case with a power to order the production of records and documents relevant to the investigation of anti-competitive offences; there the eyes of the state can see no further than the business records it is entitled to demand. [Emphasis in original.]

The reasons of L'Heureux-Dubé J. were essentially to the same effect, at p. 594:

Although they are functional equivalents, a requirement to produce documents impairs considerably less on a corporation's or an individual's privacy than the actual entry into, and search of, its place of business or home. This is especially so, in the case of corporations, since, for the reasons given above, a corporation's privacy interest with respect to a request for documents is relatively low.

Wilson J. also made the point in *McKinlay Transport*, at p. 649:

Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.

Un tel pouvoir, bien qu'il fût qualifié de «saisie» au sens de l'art. 8 de la *Charte*, se distinguait toutefois du pouvoir de «perquisition». Cette distinction est d'ailleurs à l'origine des tempéraments que j'ai apportés dans l'application des critères énoncés dans l'arrêt *Hunter c. Southam Inc.* Dans l'arrêt *Thomson Newspapers*, j'ai souligné que le caractère davantage envahissant d'une perquisition s'expliquait par l'importance que les particuliers accordaient à l'intégrité de leur domicile, tout autant qu'à celle de leur lieu de travail. J'ajoutais, à la p. 522 de cet arrêt:

L'obligation de subir la perquisition des lieux de l'entreprise par des fonctionnaires de l'État peut donc revenir à obliger le particulier à révéler des aspects de sa vie privée au regard froid de fonctionnaires. Cela porte sérieusement atteinte au droit d'être protégé contre les fouilles, les perquisitions et les saisies abusives. On ne peut dire la même chose du pouvoir d'ordonner la production de dossiers et de documents qui ont rapport à l'enquête relative à une infraction contre la concurrence: alors, le regard de l'État s'arrête aux dossiers de l'entreprise qu'il peut exiger. [Souligné dans l'original.]

Les motifs du juge L'Heureux-Dubé étaient sensiblement au même effet, à la p. 594:

Bien que l'un et l'autre soient équivalents sur le plan pratique, l'obligation de produire des documents porte une atteinte beaucoup moins grave à la vie privée d'une société ou d'un particulier que la perquisition de ses bureaux ou de son domicile. Cela est particulièrement vrai dans le cas des sociétés commerciales car, pour les motifs déjà exposés, le droit à la vie privée d'une société commerciale face à une demande de documents est relativement limité.

Le juge Wilson réitérait ce point de vue dans l'arrêt *McKinlay Transport*, à la p. 649:

Ainsi, le fait pour des agents du fisc de pénétrer dans la propriété d'un particulier pour y faire une perquisition et une saisie constitue une immixtion beaucoup plus grande que la simple demande de production de documents. La raison en est que même s'il est possible que le contribuable s'attende peu à ce que son droit à la protection de sa vie privée soit respecté relativement à ses documents commerciaux utiles pour établir son assujettissement à l'impôt, il n'en attache pas moins d'importance au respect de l'inviolabilité de son domicile.

In the case at bar the warrants have already been executed. The question whether the searches were unreasonable is currently before the Quebec courts. In the context of the present appeal the harm claimed by the respondents relates solely to the fact that the tax authorities will learn the content of the documents seized. Any reasonable expectations of privacy the respondents may have regarding the content of those documents are considerably reduced owing to their relevance in establishing the tax profile of their business and the responsibilities they assume as agents of the government in collecting the meals and hotels tax. In this regard, the keeping of several documents seized by the appellants is required by the Act. Section 34(1) provides:

34. (1) Every person who carries on a business or is bound under a fiscal law to deduct, withhold or collect an amount must keep registers and books of account, including an annual inventory in the prescribed manner, at his place of business or residence or at any other place designated by the Minister.

The registers and books shall be kept in the appropriate form and contain information enabling the establishment of the amount that must be deducted, withheld, collected or paid under a fiscal law.

The Act gives the Minister of Revenue certain powers to audit books and registers. Section 38(*a*) of the Act provides:

38. Any person authorized to do so by the Minister may, for every purpose dealing with the application or enforcement of a fiscal law, enter at any suitable time the premises or places in which a business is carried on or property is kept or in which anything is done relating to any business or where books or registers in accordance with a fiscal law are or must be kept.

The person so authorized by the Minister may:

(*a*) audit or examine the books and registers and any account, voucher, letter, telegram or other document which may relate to the information contained or that should be contained in the books or registers or to the amount of any duty that must be paid, deducted, withheld or collected under a fiscal law;

En l'espèce, les mandats ont déjà été exécutés. La détermination du caractère abusif des perquisitions est à l'heure actuelle pendante devant les tribunaux québécois. Dans le cadre du présent recours, le préjudice qu'invoquent les intimés s'intéresse uniquement à la prise de connaissance, par les autorités fiscales, du contenu des documents saisis. Or, les attentes raisonnables que les intimés peuvent entretenir en matière de vie privée à l'égard du contenu de ces documents sont considérablement réduites en raison de leur pertinence dans l'établissement du profil fiscal de leur entreprise et des responsabilités qu'ils assument à titre de mandataires du gouvernement quant à la perception de la taxe sur les repas et l'hôtellerie. À cet égard, la tenue de plusieurs documents saisis par les appelants est exigée par la Loi. L'article 34, par. 1 prévoit:

34. 1. Quiconque exploite une entreprise ou est tenu de déduire, retenir ou percevoir un montant en vertu d'une loi fiscale doit tenir, en la manière prescrite, des registres et des livres de comptes, y compris un inventaire annuel, à son lieu d'affaires ou de résidence ou à tout autre lieu que le ministre désigne.

Ces registres et livres doivent être tenus dans la forme appropriée et renfermer les renseignements permettant d'établir tout montant qui doit être déduit, retenu, perçu ou payé en vertu d'une loi fiscale.

La Loi confère au ministre du Revenu certains pouvoirs de vérification des livres et registres. L'alinéa 38*a*) de la Loi prévoit:

38. Toute personne qui y est autorisée par le ministre peut, pour toute fin ayant trait à l'application ou à l'exécution d'une loi fiscale, pénétrer en tout temps convenable dans tous lieux ou endroits dans lesquels une entreprise est exploitée ou des biens sont gardés ou dans lesquels il se fait quelque chose se rapportant à des affaires quelconques ou dans lesquels sont ou devraient être tenus des livres ou registres en conformité d'une loi fiscale.

La personne ainsi autorisée par le ministre peut:

a) vérifier ou examiner les livres et registres, et tout compte, pièce justificative, lettre, télégramme ou autre document pouvant se rapporter aux renseignements qui se trouvent ou devraient se trouver dans les livres ou registres ou au montant de tout droit qui devrait être payé, déduit, retenu ou perçu en vertu d'une loi fiscale;

Section 39 of the Act gives the Minister of Revenue power to require the production of information and documents:

39. The Minister may, by a formal demand delivered by registered or certified mail or personal service require from any person that he file by registered or certified mail or personal service, within a reasonable delay fixed in the demand:

(*a*) information or additional information, including a return, report or supplementary return or report exigible under a fiscal law, or

(*b*) books, letters, accounts, invoices, financial statements or other documents.

The constitutionality of a similar provision has already been determined by this Court in *McKinlay Transport*, *supra*, as it relates to the expectation of privacy of a taxpayer. In any event, it does not arise in the present case. The way in which the tax authorities obtained copies of the documents does not alter the nature of the information they contain. In either case the same documents are in question. The search warrants in the case at bar and the seizures resulting from their issuance were directed only at the respondents' business documents, production of which may be required under the Act.

The Act further provides that a person may object to the production or seizure of documents containing information protected by professional privilege: see ss. 46 and 53 of the Act respectively. Some of the respondents raised this objection in the present case, and documents seized in the accountants' offices were sealed and entrusted to the prothonotary of the Superior Court pursuant to s. 46 of the Act.

Finally, disclosure of the information contained in the seized documents is itself prohibited by the Act: the tax authorities may not disclose informa-

L'article 39 de la Loi confère au ministre du Revenu le pouvoir d'exiger la production de renseignements et de documents:

39. Le ministre peut, par une demande péremptoire qu'il transmet par poste recommandée ou certifiée ou par signification à personne, exiger d'une personne dans le délai raisonnable qu'il fixe la production par poste recommandée ou certifiée ou par signification à personne:

a) de renseignements ou de renseignements supplémentaires, y compris une déclaration ou un rapport ou une déclaration ou un rapport supplémentaire exigibles en vertu d'une loi fiscale, ou

b) de livres, lettres, comptes, factures, états financiers ou autres documents.

La constitutionnalité d'une disposition analogue a déjà été confirmée par notre Cour dans l'arrêt *McKinlay Transport*, précité, à la lumière des attentes raisonnables qu'un contribuable pouvait entretenir en matière de vie privée. À tout événement, elle ne se pose pas en l'espèce. Mais la manière dont les autorités fiscales ont obtenu copie des documents n'altère pas la nature des informations qu'ils contiennent. Il s'agit, dans l'une ou l'autre hypothèse, des mêmes documents. Dans la présente instance, les mandats de perquisition, de même que les saisies consécutives à leur délivrance, ne visaient que les documents d'affaires des intimés dont la production peut être exigée en vertu de la Loi.

La Loi prévoit en outre qu'une personne peut s'opposer à la production ou à la saisie de documents qui contiennent des renseignements protégés par le secret professionnel; voir, respectivement, les art. 46 et 53 de la Loi. Certains intimés ont fait valoir une telle opposition dans la présente instance et des documents saisis aux bureaux des comptables ont été mis sous scellé et confiés au protonotaire de la Cour supérieure, conformément à l'art. 46 de la Loi.

Enfin, la divulgation des informations contenues dans les documents saisis est elle-même circonscrite par la Loi: les autorités fiscales ne peuvent

tion obtained in the course of their investigation. The first paragraph of s. 69 of the Act provides:

69. All information obtained in the application of a fiscal law is confidential. No public servant shall use such information for any purpose not provided for by law, communicate such information or allow it to be communicated to a person not legally entitled thereto or allow such a person to examine a document containing such information or have access to it.

These provisions minimize the risk that the respondents may suffer harm as a result of the implementation by the tax authorities of the investigative scheme provided by the Act. Their significance cannot be disregarded. They echo the concerns I expressed in *Dyment*, *supra*, at pp. 429-30:

Finally, there is privacy in relation to information. This too is based on the notion of the dignity and integrity of the individual. . . . In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected.

Similarly, in *McKinlay Transport*, *supra*, Wilson J. noted at p. 650:

A taxpayer's privacy interest with regard to these documents *vis-à-vis* the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.

Some may be concerned that the seized documents may contain information of a personal nature. However, that possibility is not, in my view, sufficient to alter the reasonable expectations

divulguer les renseignements obtenus dans le cadre de leur enquête. Le premier alinéa de l'art. 69 de la Loi stipule en effet:

69. Sont confidentiels tous renseignements obtenus dans l'application d'une loi fiscale. Il est interdit à tout fonctionnaire de faire usage d'un tel renseignement à une fin non prévue par la loi, de communiquer ou de permettre que soit communiqué à une personne qui n'y a pas légalement droit un tel renseignement ou de permettre à une telle personne de prendre connaissance d'un document contenant un tel renseignement ou d'y avoir accès.

Ces dispositions minimisent le risque que les intimés subissent un préjudice consécutif à la mise en œuvre, par les autorités fiscales, du régime d'enquête prévu à la Loi. On ne peut ignorer leur importance. Elles font écho aux préoccupations que j'exprimais dans l'arrêt *Dyment*, précité, aux pp. 429 et 430:

Enfin il y a le droit à la vie privée en matière d'information. Cet aspect aussi est fondé sur la notion de dignité et d'intégrité de la personne. [. . .] Dans la société contemporaine tout spécialement, la conservation de renseignements à notre sujet revêt une importance accrue. Il peut arriver, pour une raison ou pour une autre, que nous voulions divulguer ces renseignements ou que nous soyons forcés de le faire, mais les cas abondent où on se doit de protéger les attentes raisonnables de l'individu que ces renseignements seront gardés confidentiellement par ceux à qui ils sont divulgués, et qu'ils ne seront utilisés que pour les fins pour lesquelles ils ont été divulgués.

De même, dans l'arrêt *McKinlay Transport*, précité, le juge Wilson faisait valoir, à la p. 650:

Le droit du contribuable à la protection de sa vie privée à l'égard de ces documents est relativement faible vis-à-vis le Ministre. Ce dernier est absolument incapable de savoir si certains documents sont utiles avant d'avoir eu la possibilité de les examiner. En même temps, le droit du contribuable à la protection de sa vie privée est garanti autant qu'il est possible de le faire puisque l'art. 241 de la Loi interdit la communication de ses documents et des renseignements qu'ils contiennent à d'autres personnes ou organismes.

D'aucuns peuvent craindre que les documents saisis puissent contenir des éléments d'information à caractère personnel. Mais l'existence d'une telle possibilité est, selon moi, insuffisante pour modi-

of privacy of taxpayers in respect of such documents. On the one hand, the Act itself does not permit the seizure of documents containing personal information. Sections 38 and 40 of the Act, as well as s. 39 which authorizes a demand for the production of documents, are directed only at documents the contents of which have some connection with the application of tax legislation to taxpayers. In the highly unlikely event that documents containing information of a personal nature were seized in the course of exercising investigative powers, a taxpayer could always apply to the courts, seeking their exclusion and any other appropriate relief on the ground, for example, that this went beyond the investigators' statutory authority. On the other hand, the respondents themselves have never claimed that documents of that kind were in fact seized in the case at bar. Indeed, the appellants submitted uncontradicted evidence that all the documents seized, including those seized in the private homes of some of the respondents, were covered by the search warrants and related to their business affairs, in particular to the application of the Act to them. This can be seen by examining the written authorizations and the inventory of the documents seized. In the *143471 Canada Inc.* case, for example, the written authorization of the Deputy Minister of Revenue limited the search as follows:

[TRANSLATION] . . . to search for documents, books, registers, papers or things described in the said written authorization from the judge of the Court of Quebec, namely documents, books, registers, papers or things concerning the operation by 143 471 Canada Inc. of its establishment . . . and the collection by it of the tax provided for in the Meals and Hotels Tax Act (R.S.Q., c. T-3) during the period from June 26, 1985 to June 30, 1988, in particular:

(a) general ledger, sales journal, purchases journal, cash receipts journal, cash disbursements journal, subsidiary journals, wages journal, general journal;

(b) extra-accounting registers and work sheets, sales invoices, purchase invoices, financial statements, bank statements, cheques returned paid, deposit

fier les attentes raisonnables que les contribuables peuvent entretenir en matière de vie privée à l'égard de tels documents. D'une part, la Loi elle-même ne permet pas la saisie de documents contenant des renseignements à caractère personnel. Les articles 38 et 40 de la Loi, de même que l'art. 39 qui permet d'exiger la production de documents, ne s'intéressent qu'à ceux dont le contenu a un rapport avec l'assujettissement des contribuables aux lois fiscales. Dans l'éventualité fort hypothétique où des documents contenant des éléments d'information à caractère personnel seraient saisis dans le cadre de l'exercice des pouvoirs d'enquête, un contribuable pourrait toujours s'adresser aux tribunaux pour en demander l'exclusion et tout autre redressement approprié, en invoquant, par exemple, le fait que les enquêteurs ont outrepassé les pouvoirs qui leur sont conférés en vertu de la Loi. D'autre part, les intimés n'ont eux-mêmes jamais prétendu que de tels documents avaient effectivement été saisis en l'espèce. Les appelants ont d'ailleurs présenté une preuve non contredite à l'effet que tous les documents saisis, incluant ceux qui l'ont été au domicile privé de certains intimés, étaient visés par les mandats de perquisition et se rapportaient à leurs affaires commerciales, plus particulièrement à leur assujettissement à la Loi. On peut s'en convaincre en examinant les autorisations écrites et l'inventaire des documents saisis. Dans le dossier *143471 Canada Inc.*, par exemple, l'autorisation écrite du sous-ministre du Revenu limitait ainsi la perquisition:

. . . pour y rechercher les documents, livres, registres, papiers ou choses décrits dans ladite autorisation écrite du juge de la Cour du Québec, à savoir des documents, livres, registres, papiers ou choses relatifs à la tenue par 143 471 Canada Inc. de son établissement . . . et à la perception par elle de la taxe prévue à la Loi concernant la taxe sur les repas et l'hôtellerie (L.R.Q., c. T-3), au cours de la période du 26 juin 1985 au 30 juin 1988, notamment:

a) grand livre général, journal des ventes, journal des achats, journal de caisse-recettes, journal de caisse-déboursés, journaux auxiliaires, journal des salaires, journal général;

b) registres et feuilles de travail extra-comptables, factures de ventes, factures d'achats, états financiers, états de banque, chèques retournés payés, borde-

slips and other supporting documents, including contracts concluded with its customers and all documents appended thereto;

(c) lists, notebooks or other documents containing information relating or that may be related to the sales of 143 471 Canada Inc. or to the collection by it of the meals and hotels tax;

which may serve as evidence of the offence mentioned in the said written authorization by the judge of the Court of Quebec . . .

The documents seized in the search made in the *143471 Canada Inc.* case correspond to those identified in the search warrant: bank statements, journal entries, purchase invoices, cheque stubs, cheques debited, financial statements, wages book, receipt contracts and so on. The same is true of the documents seized in the *Tabah* case, though the written authorizations and corresponding seizures are more detailed since the information indicated several breaches of the Act. In any event both the authorizations to search and the documents seized related only to the respondents' business affairs, in particular those required to conform with the Act, and did not concern any document likely to contain personal information. Further, unless a party complains of the seizure of information of a personal nature I do not think it is desirable for the judge who has the responsibility to rule on the motion to impound to examine the contents of the documents seized in order to determine whether the order is appropriate. That would make his task more onerous in view of the difficulties inherent in determining whether the information contained in the documents seized is personal.

Accordingly, I find it difficult to see how the respondents will suffer irreparable harm if the tax authorities examine the contents of the documents seized. Since the respondents have not established any other harm, I now propose to consider the final stage of the *Metropolitan Stores* test.

reaux de dépôt et autres pièces justificatives, y compris les contrats conclus avec ses clients ainsi que tous documents y annexés;

c) listes, cahiers de notes ou autres documents où figurent des renseignements reliés ou pouvant être reliés aux ventes de 143 471 Canada Inc. ou à la perception par elle de la taxe sur les repas et l'hôtellerie;

pouvant servir de preuve à l'infraction mentionnée dans ladite autorisation écrite du juge de la Cour du Québec . . .

Les documents saisis lors de la perquisition effectuée dans le cadre du dossier *143471 Canada Inc.* correspondent à ceux qui sont identifiés dans le mandat de perquisition: états de banque, écritures de journal, factures d'achats, talons de chèque, chèques débités, états financiers, livre des salaires, contrats de réception, etc. Il en est ainsi des documents saisis dans le dossier *Tabah*, bien que les autorisations écrites et les saisies correspondantes soient plus détaillées, puisque la dénonciation indiquait plusieurs infractions à la Loi. À tout événement, les autorisations de perquisitionner, de même que les documents saisis, ne se rapportaient qu'aux affaires commerciales des intimés, plus particulièrement à leur assujettissement à la Loi, et ne visaient aucun document susceptible de contenir des renseignements à caractère personnel. En outre, à moins qu'une partie se plaigne de la saisie d'information à caractère personnel, je ne crois pas qu'il soit souhaitable que le juge chargé de se prononcer sur l'opportunité d'accorder l'entiercement examine le contenu des documents saisis afin de décider du bien-fondé de l'ordonnance. Ceci risquerait d'alourdir sa tâche, compte tenu des difficultés inhérentes à la détermination du caractère personnel des renseignements contenus dans les documents saisis.

En conséquence, je peux difficilement me convaincre que les intimés subiront un préjudice irréparable si les autorités fiscales prennent connaissance du contenu des documents saisis. Puisque les intimés n'ont fait valoir aucun autre préjudice, je me propose maintenant d'analyser la dernière étape du test de l'arrêt *Metropolitan Stores*.

The Balance of Convenience

The balance of convenience, which constitutes the third criterion relevant in determining whether interlocutory relief should be granted, is designed to weigh the respective hardships the parties may incur depending on whether or not the interlocutory relief is granted.

As the existence of irreparable harm has been ruled out, it is hard to see how the respondents could suffer significant hardship if they were denied the impoundment. As they themselves argue, the only effect of the impounding order is to delay the examination of the documents. It can thus be assumed that at some point or other the respondents will suffer the hardships associated with an investigation by the Ministère du Revenu, whether or not the sections are declared unconstitutional. It should be added that under s. 40.2 of the Act the respondents may obtain copies of the documents seized.

The hardships the appellants are likely to suffer if the impoundment is upheld derive from the delays imposed on the examination of the contents of the seized documents. We may immediately dispose of their effect on the limitations against penal remedies under the Act. Although the impoundment for all practical purposes suspends the investigative proceedings, the actions against the respondents are not jeopardized — at least in theory — since the Act provides that the five-year limitation period may be extended to one year from the date the Minister of Revenue learns of evidence sufficient to justify prosecution; see s. 78 of the Act. In the circumstances it is hardly surprising that the appellants placed no great emphasis on the existence of such harm at the hearing; sufficient proof probably could not come to the knowledge of the Minister of Revenue until he had the documents covered by the order in his possession, after the impounding order was lifted.

The appellants added that if the impounding orders are upheld the resulting delays would jeopardize proof of the offences. In this connection

La prépondérance des inconvénients

La prépondérance des inconvénients, qui constitue le troisième critère pertinent à la détermination de l'opportunité d'accorder un redressement interlocutoire, vise à pondérer les inconvénients respectifs que sont susceptibles d'encourir les parties, selon que le redressement interlocutoire est accordé ou non.

Ayant écarté l'existence d'un préjudice irréparable, il est difficile de concevoir que les intimés encourraient des inconvénients importants si l'entiercement leur était refusé. Comme ils le soutiennent eux-mêmes, l'entiercement n'a pour effet que de retarder l'analyse des documents. On peut donc présumer que les intimés subiront, à un moment ou à un autre, les inconvénients reliés à l'enquête du ministère du Revenu, que les dispositions contestées soient ou non déclarées inconstitutionnelles. Ajoutons que les intimés peuvent, en vertu de l'art. 40.2 de la Loi, obtenir copie des documents saisis.

Les inconvénients que les appelants sont susceptibles de subir, si l'entiercement est maintenu, découlent des délais imposés dans l'examen du contenu des documents saisis. On peut immédiatement disposer de leur incidence sur la prescription des recours pénaux intentés en vertu de la Loi. Si l'entiercement suspend, à toute fin pratique, les procédures d'enquête, les poursuites contre les intimés ne sont toutefois pas compromises — en théorie du moins — puisque la Loi prévoit que la prescription de cinq ans peut être étendue jusqu'à un an de la date où le ministre du Revenu a eu connaissance d'une preuve suffisante pour justifier une poursuite; voir l'art. 78 de la Loi. Dans les circonstances, il n'est guère étonnant que les appelants n'aient pas insisté sur l'existence d'un tel préjudice lors de l'audience: une preuve suffisante ne pourrait vraisemblablement venir à la connaissance du ministre du Revenu qu'au moment où celui-ci aura en sa possession les documents visés par l'ordonnance, après la levée de l'entiercement.

Les appelants ajoutent que si les ordonnances d'entiercement sont maintenues, les délais encourus compromettront la preuve des infractions. Ils

they note the difficulties associated with gathering information, the credibility of witnesses, even with the recovery of fees, interest and fines, in view of the risks that the corporate vehicle might be altered or cease to exist. The respondent 143471 Canada Inc. made an assignment of its property on September 1, 1992. While at the present stage of the proceedings this is speculative, the Court can nevertheless take note of the probable occurrence of such hardships. In *Zeppetelli*, Baudouin J.A. acknowledged that impoundment would prevent the Minister of Revenue [TRANSLATION] "from having access for the moment to a great deal of information which might allow him to build his case and achieve substantive progress on the matter" (p. 357).

The respondents argued that in any case impoundment does not have the effect of suspending the Minister of Revenue's investigative powers: he can complete his evidence by other means. However, this option, which appreciably moderates the effect of the measure, disregards the fact that the Minister of Revenue must adduce proof beyond a reasonable doubt. Not only is this a weighty burden, but the proof of offences is complicated here by the very nature of tax evasion, which requires a comprehensive analysis of the accounting system of the respondent companies. In the circumstances there is nothing to suggest that the Minister of Revenue could make significant progress with his investigation if the impoundment were upheld. Further, if the measure had the negligible effect suggested by the respondents, then the applicability of the test set forth in *Metropolitan Stores* would be open to question.

Even if we admit that these hardships are negligible and of a purely administrative nature, the fact remains that the present case has ramifications that go beyond the immediate interests of the parties, if only because of the mandate underlying the action of the Ministère du Revenu. In such a situation *Metropolitan Stores* invites the courts to take the public interest into account in determining the balance of convenience. In the case at bar the Court of Appeal is not only silent on the point but specifi-

signalent, à cet égard, les difficultés liées à la cueillette de l'information, à la crédibilité des témoins, voire même au recouvrement des droits, intérêts et amendes, compte tenu des risques de modification ou d'abandon du véhicule corporatif. L'intimée 143471 Canada Inc. a d'ailleurs fait cession de ses biens le 1er septembre 1992. Quoique spéculatifs au stade actuel des procédures, la Cour peut néanmoins prendre acte de la réalisation probable de tels inconvénients. Dans l'arrêt *Zeppetelli*, le juge Baudouin reconnaissait que l'entiercement empêcherait le ministre du Revenu d'«avoir accès pour l'instant à une masse d'informations pouvant lui permettre de bâtir sa cause et de faire avancer le dossier au fond» (p. 357).

Les intimés font valoir, à tout événement, que l'entiercement n'a pas pour effet de suspendre les pouvoirs d'enquête du ministre du Revenu; celui-ci pourra parfaire sa preuve par d'autres moyens. Cette possibilité, qui tempère sensiblement l'incidence de la mesure, fait toutefois abstraction du fait que le ministre du Revenu doit présenter une preuve hors de tout doute raisonnable. Non seulement s'agit-il d'un fardeau exigeant, mais la démonstration des infractions est ici compliquée par la nature même de l'évasion fiscale, qui commande une analyse approfondie du système comptable des sociétés intimées. Dans les circonstances, il est illusoire de croire que le ministre du Revenu pourra faire avancer son enquête de manière significative si l'entiercement est maintenu. D'ailleurs, si la mesure avait l'effet négligeable que les intimés lui prêtent, on pourrait questionner l'opportunité de recourir aux critères énoncés dans l'arrêt *Metropolitan Stores*.

Même en admettant le caractère négligeable de ces inconvénients et leur nature purement administrative, il n'en demeure pas moins que le présent litige a une portée qui dépasse l'intérêt immédiat des parties, ne serait-ce qu'en raison du mandat qui sous-tend l'intervention du ministère du Revenu. Dans une telle hypothèse, l'arrêt *Metropolitan Stores* convie les tribunaux à prendre en considération l'intérêt public dans la détermination de la prépondérance des inconvénients. En l'espèce, la

cally refused to rule on [TRANSLATION] "the reality or existence" of this criterion, which is strange to say the least since in the *143471 Canada Inc.* case it was not sitting in appeal from the judgment of Hannan J. In *Zeppetelli* Baudouin J.A. simply stated that [TRANSLATION] "as between inconveniences of an essentially administrative nature and those involving a constitutionally protected fundamental right, the balance must tip in favour of the latter" (p. 357).

In this regard the appellants rely essentially on the public interest in having the Act observed and enforced. The importance of tax legislation clearly needs no elaboration; see *Air Canada v. British Columbia*, [1989] 1 S.C.R. 1161, and *McKinlay Transport*, *supra*. Because such legislation is based on the principle of self-declaration and self-assessment, the existence of mechanisms making it possible to verify whether taxpayers are subject to the Act is essential. The imposition of such controls is all the more necessary for individuals who act as agents of the government. In Quebec the Act imposes on the Ministère du Revenu the duty of supervising the implementation and execution of tax legislation and confers on it all the powers necessary for this purpose. The implementation of the investigative provisions contained in ss. 40 and 40.1 of the Act is essential if the integrity of the tax collection system is to be maintained. These considerations alone are sufficient to meet the public interest criterion. In *RJR — MacDonald* the Court wrote (at p. 346):

In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irrepara-

Cour d'appel est non seulement silencieuse sur cette question, mais elle a spécifiquement refusé de se prononcer sur «la réalité ou l'existence» de ce critère, ce qui est pour le moins curieux, puisque dans le dossier *143471 Canada Inc.*, elle ne siégeait pas en appel de la décision du juge Hannan. Dans l'arrêt *Zeppetelli*, le juge Baudouin énonçait laconiquement qu'«entre des inconvénients d'ordre essentiellement administratif et ceux qui touchent un droit fondamental constitutionnellement protégé, la balance doit pencher en faveur des seconds» (p. 357).

À ce chapitre, les appelants font essentiellement valoir l'intérêt public dans le respect et l'application de la Loi. L'importance des lois fiscales se passe certes de démonstration; voir *Air Canada c. Colombie-Britannique*, [1989] 1 R.C.S. 1161, et *McKinlay Transport*, précité. Parce qu'elles sont fondées sur le principe de l'auto-déclaration et de l'auto-cotisation, l'existence de mécanismes permettant de vérifier l'assujettissement des contribuables à la Loi est essentielle. L'imposition de tels contrôles est d'autant plus indiquée à l'égard des personnes qui agissent en qualité de mandataires du gouvernement. Au Québec, la Loi confie au ministère du Revenu la mission de veiller à l'application et à l'exécution des lois fiscales et lui confère tous les pouvoirs nécessaires à sa réalisation. La mise en œuvre du régime d'enquête prévu aux art. 40 et 40.1 de la Loi est indispensable au maintien de l'intégrité du système de perception des deniers. Ces considérations sont, à elles seules, suffisantes pour remplir le critère de l'intérêt public. Dans l'arrêt *RJR — MacDonald*, la Cour écrivait en effet (à la p. 346):

À notre avis, le concept d'inconvénient doit recevoir une interprétation large dans les cas relevant de la *Charte*. Dans le cas d'un organisme public, le fardeau d'établir le préjudice irréparable à l'intérêt public est moins exigeant que pour un particulier en raison, en partie, de la nature même de l'organisme public et, en partie, de l'action qu'on veut faire interdire. On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait,

ble harm to the public interest would result from the restraint of that action.

The respondents added, however, that the delay in examining the contents of the documents seized causes no injury to the public interest since the interlocutory relief is limited to the present case. The argument in this Court centred on proof of a "flood of actions" since the judgments of the Quebec Court of Appeal in *Zeppetelli* and *Fafard Buildings System Inc. v. R.*, C.A. Montréal, No. 500-10-000409-894, July 10, 1990, J.E. 90-1187. Such proof was viewed as important by both sides in demonstrating the real effect of the impounding order on the public interest.

In my view proof of a flood of actions — or the lack of it — is not determinative of whether or not interlocutory relief should be granted. Depending on the nature and scope of the measure contemplated, as well as the particular circumstances of each case, the court might take note of the impact of a decision exempting a party from the application of a statute on future litigants, who would be tempted to rely on it. In *Metropolitan Stores* Beetz J. wrote (at p. 146):

> The reason why exemption cases are assimilated to suspension cases is the precedential value and exemplary effect of exemption cases. Depending on the nature of the cases, to grant an exemption in the form of a stay to one litigant is often to make it difficult to refuse the same remedy to other litigants who find themselves in essentially the same situation, and to risk provoking a cascade of stays and exemptions, the sum of which make them tantamount to a suspension case.

It is not desirable to impose on the party arguing that an interlocutory application should be dismissed a requirement that he prove the harmful effect of previous orders. How could the threshold of such evidence be determined? Such a burden would not only be likely to trivialize the public interest considerations underlying the balance of

dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public.

Les intimés ajoutent toutefois que le retard dans l'examen du contenu des documents saisis ne préjudicie aucunement l'intérêt public, puisque le redressement interlocutoire est circonscrit au présent litige. L'argumentation devant notre Cour s'est centrée autour de la démonstration d'une «cascade de recours» depuis les arrêts de la Cour d'appel du Québec rendus dans les affaires *Zeppetelli* et *Bâtiments Fafard Inc. c. R.*, C.A. Montréal, n° 500-10-000409-894, 10 juillet 1990, J.E. 90-1187. Une telle preuve a semblé importante de part et d'autre pour démontrer l'incidence réelle de l'ordonnance d'entiercement sur l'intérêt public.

À mon avis, la preuve d'une cascade de recours — ou son absence — n'est pas déterminante sur l'octroi d'un redressement interlocutoire. Selon la nature et la portée de la mesure envisagée, de même que les circonstances particulières à chaque instance, le tribunal pourra prendre acte de l'incidence d'une décision exemptant un justiciable de l'application d'une loi sur les plaideurs éventuels, qui seront tentés de s'en inspirer. Dans l'arrêt *Metropolitan Stores*, le juge Beetz écrivait (à la p. 146):

> Si les cas d'exemption sont assimilés aux cas de suspension, cela tient à la valeur jurisprudentielle et à l'effet exemplaire des cas d'exemption. Suivant la nature des affaires, du moment qu'on accorde à un plaideur une exemption sous la forme d'une suspension d'instance, il est souvent difficile de refuser le même redressement à d'autres justiciables qui se trouvent essentiellement dans la même situation et on court alors le risque de provoquer une avalanche de suspensions d'instance et d'exemptions dont l'ensemble équivaut à un cas de suspension à la loi.

Il n'est pas souhaitable d'imposer à la partie qui plaide le rejet de la requête interlocutoire l'obligation de démontrer l'effet délétère d'ordonnances antérieures. Comment pourrait-on d'ailleurs fixer le seuil d'une telle preuve? Un fardeau semblable non seulement risquerait de banaliser les considérations d'intérêt public qui animent le critère de la

convenience test, it would be at odds with the preventive purpose of interlocutory relief.

The parties drew the Court's attention to about ten decisions on applications to impound documents incidental to a constitutional challenge based on ss. 40 and 40.1 of the Act. Clearly these few decisions are far from suggesting the existence of a "flood of actions". It is significant, however, that all motions to impound subsequent to the decision of the Court of Appeal in *Zeppetelli*, *supra*, have been granted. Needless to say, the orders expressly cited the reasons given by Baudouin J.A. By way of contrast, the applications to impound prior to that decision were denied (except the one in *Ameublement Jeanne Inc. v. Québec (Procureur général)*, Sup. Ct. Montréal, No. 500-05-003335-872, April 15, 1987, which was granted on consent). For example, in *Brochetterie Tino Inc. v. Québec (Procureur général)*, Sup. Ct. Montréal, No. 500-05-008861-898, July 17, 1989, [1989] R.D.F.Q. 98, Lesyk J. wrote (at pp. 3-4):

[TRANSLATION] Granting impoundment of the documents seized would set a precedent in enforcement of the Act that might be followed in seizures of the same kind and might accordingly render ss. 40 and 40.1 of the Act respecting the Ministère du Revenu inoperative for a more or less extended period, with the consequences that might follow for the obligations and duties imposed on the operators of the establishments subject to the Meals and Hotels Tax Act.

Granting the application to impound without extremely sound and exceptional grounds, which do not exist in the present case, would also amount to suspending the application of ss. 40 and 40.1 of the Act respecting the Ministère du Revenu adopted by the democratically elected National Assembly in the common interest. Such impoundment would be likely to temporarily frustrate pursuit of the common interest and would have the effect of preventing the Minister of Revenue from carrying out the duty imposed on him by law, namely of applying tax legislation.

When a Minister of the Crown is prevented from exercising the powers conferred on him by law the pub-

prépondérance des inconvénients, mais s'inscrirait en faux avec le caractère préventif qui sous-tend le redressement interlocutoire.

Les parties ont porté à notre attention une dizaine de décisions sur des requêtes en entiercement de documents, accessoires à une contestation de constitutionnalité fondée sur les art. 40 et 40.1 de la Loi. Il est manifeste que ces quelques décisions sont loin de suggérer l'existence d'une «cascade de recours». Il est toutefois significatif que les requêtes en entiercement postérieures à la décision rendue par la Cour d'appel dans l'affaire *Zeppetelli*, précitée, aient toutes été accueillies. Inutile d'ajouter que les ordonnances invoquaient expressément les motifs exprimés par le juge Baudouin. Par contraste, les demandes d'entiercement antérieures à cet arrêt ont été refusées (à l'exception de celle dans l'affaire *Ameublement Jeanne Inc. c. Québec (Procureur général)*, C.S. Montréal, nº 500-05-003335-872, 15 avril 1987, qui a été accordée de consentement). Par exemple, dans l'affaire *Brochetterie Tino Inc. c. Québec (Procureur général)*, C.S. Montréal, nº 500-05-008861-898, 17 juillet 1989, [1989] R.D.F.Q. 98, le juge Lesyk écrivait (aux pp. 3 et 4):

Accorder l'entiercement des documents saisis constituerait en ce qui a trait à l'application de la loi un précédent susceptible d'être suivi dans les saisies du même genre et de rendre, dès lors, les articles 40 et 40.1 de la Loi sur le ministère du Revenu inopérants pendant une période plus ou moins prolongée avec les conséquences qui pourraient en découler quant aux obligations et devoirs imposés aux exploitants des établissements soumis à la loi concernant la taxe sur les repas et l'hôtellerie.

Accéder à la demande d'entiercement sans motif extrêmement sérieux et exceptionnel, qui ne se trouve pas en l'espèce, équivaudrait aussi à faire suspendre l'application des articles 40 et 40.1 de la Loi sur le ministère du Revenu adoptée par l'Assemblée nationale démocratiquement élue et qui vise le bien commun. Cet entiercement risque de contrecarrer temporairement la poursuite du bien commun et aurait pour effet d'empêcher le ministre du Revenu de s'acquitter de son devoir que la loi lui impose, c'est-à-dire d'appliquer les lois fiscales.

Lorsqu'on empêche un ministre de la Couronne d'exercer les pouvoirs que la Loi lui confère, l'intérêt

lic interest of which the Minister is the guardian suffers irreparable harm.

This approach seems to me to be consistent with the above-cited passages from *RJR — MacDonald* and *Metropolitan Stores*. See also *Restaurant le Gourmet grec Inc. v. Séguin*, Sup. Ct. Montréal, No. 500-05-004272-892, April 5, 1989, [1989] R.D.F.Q. 80, where Brassard J. refused to order impoundment on the ground that the harm alleged by the applicant could not override the public interest.

In any event, although it is not possible to speak of a "flood of actions", the systematic nature of the impounding orders since *Zeppetelli* cannot be ignored, and this can only be enhanced by the Court of Appeal decisions in the present case. To the extent that trial courts are bound by decisions of the Quebec Court of Appeal, it is doubtful whether they have much real manoeuvring room in the exercise of their discretion. Under the present case law it appears that any well-informed litigant can have an investigation suspended by attaching to his motion for evocation, *certiorari* and mandamus a motion to impound the documents seized.

The marginal nature of motions to impound is best explained by the limited number of searches conducted each year. As an indication of the impact of impoundment on the public interest the number of searches is certainly a better yardstick than the total of Quebec taxpayers. The evidence shows that implementation of the investigative powers set out in ss. 40 and 40.1 of the Act is likely to lead to the recovery of large sums estimated at about a hundred million dollars in fees, interest and fines, just for the period from April 1, 1988 to March 31, 1992. The amounts involved in the present cases are also non-negligible since they exceed $250,000, not including, in the *Tabah* case, an amount of some one million dollars which was allegedly not included in calculating income. Further, if we are to believe certain studies estimating at several hundred million dollars the annual losses resulting from tax evasion, the amounts recovered through the implementation of investigative pow-

public dont le ministre est le gardien subit un tort irréparable.

Cette perspective me semble conforme aux passages précités des arrêts *RJR — MacDonald* et *Metropolitan Stores*. Voir également *Restaurant le Gourmet grec Inc. c. Séguin*, C.S. Montréal, nº 500-05-004272-892, 5 avril 1989, [1989] R.D.F.Q. 80, où le juge Brassard a refusé d'ordonner l'entiercement au motif que le préjudice allégué par le requérant ne pouvait avoir préséance sur l'intérêt public.

À tout événement, bien qu'on ne puisse parler d'une «cascade de recours», on ne peut ignorer le caractère systématique des ordonnances d'entiercement depuis l'arrêt *Zeppetelli*, qui ne pourra être que conforté par les décisions de la Cour d'appel en l'espèce. Dans la mesure où les tribunaux de première instance sont liés par les décisions de la Cour d'appel du Québec, on peut questionner la marge de manœuvre réelle dont ils jouissent dans l'exercice de leur discrétion. Dans l'état actuel de la jurisprudence, il appert que n'importe quel plaideur averti pourra faire suspendre l'enquête entreprise, en assortissant son recours en évocation, *certiorari* et *mandamus* d'une requête en entiercement des documents saisis.

Le caractère marginal des requêtes en entiercement s'explique davantage par le nombre modeste de perquisitions effectuées chaque année. S'agissant d'évaluer l'incidence de l'entiercement sur l'intérêt public, le nombre de perquisition est certainement un meilleur barème que le total des contribuables québécois. La preuve démontre que la mise en œuvre des pouvoirs d'enquête énoncés aux art. 40 et 40.1 de la Loi est susceptible de conduire au recouvrement de sommes importantes, qu'on évalue à une centaine de millions de dollars en droits, intérêts et amendes, pour la seule période s'échelonnant du 1er avril 1988 au 31 mars 1992. Les sommes impliquées dans les présents dossiers ne sont d'ailleurs pas négligeables, puisqu'elles dépassent les 250 000 $, sans compter, dans le dossier *Tabah*, un montant d'environ un million de dollars qui n'aurait pas été inclus dans le calcul du revenu. Les sommes récupérées par suite de la mise en œuvre des pouvoirs d'enquête ne sont

ers are only the tip of the iceberg. That being the case, we cannot minimize the importance of ss. 40 and 40.1 of the Act, which form the principal tool available to the Ministère du Revenu to fight tax evasion, not only in dealing with ongoing offences but especially for its deterrent value. In view of the burden of proof — beyond a reasonable doubt — and the difficulties of proof inherent in the nature of offences against the tax laws, even temporarily watering down investigative powers has more than a symbolic effect on the public interest.

The respondents made no arguments regarding the public interest in maintaining impounding orders. It is clear that there is also a public interest in having the government respect the fundamental rights of taxpayers, including the right to privacy and protection against unreasonable intrusions by the government. However, bearing in mind that in the present case the courts have not yet found the intrusion to be unreasonable — a question which will be decided in the principal action, with the appropriate relief if necessary — this aspect cannot have much weight here, especially when considered in light of the comments I have made regarding irreparable harm. In other words, to paraphrase the reasons of my colleagues in *RJR — MacDonald*, the respondents have not persuaded me of the advantages to the public interest of granting impoundment of the documents seized.

Conclusion

For these reasons I would allow the appeal with costs, set aside the decisions of the Court of Appeal and quash the impounding orders.

The judgment of Sopinka, Cory and Iacobucci JJ. was delivered by

CORY J. — In this matter I have had the pleasure of reading the careful reasons of my colleague

d'ailleurs que la pointe de l'iceberg, s'il faut en croire certaines études qui estiment à quelques centaines de millions de dollars les pertes annuelles liées au phénomène de l'évasion fiscale. Dans ce contexte, on ne peut minimiser l'importance des art. 40 et 40.1 de la Loi, qui constituent le principal outil dont dispose le ministère du Revenu pour contrer l'évasion fiscale, non seulement en raison de son caractère immédiatement répressif, mais surtout en raison de sa nature dissuasive. Compte tenu du fardeau — hors de tout doute raisonnable — et des difficultés de preuve inhérentes à la nature des infractions aux lois fiscales, la dilution des pouvoirs d'enquête, fusse-t-elle temporaire, a une incidence plus que symbolique sur l'intérêt public.

Les intimés n'ont avancé aucune prétention en regard de l'intérêt public dans le maintien des ordonnances d'entiercement. Il est manifeste que l'intérêt public réside également dans le respect, par l'administration, des droits fondamentaux des contribuables, dont celui à la vie privée et à la protection contre les intrusions abusives de l'État. Toutefois, gardant à l'esprit qu'en l'espèce, les tribunaux n'ont pas encore déclaré l'intrusion abusive — question qui sera tranchée dans le cadre de l'instance principale avec, le cas échéant, le redressement approprié — cette dimension ne peut avoir beaucoup de poids en l'espèce, surtout lorsqu'appréciée à la lumière des commentaires que j'ai formulés au sujet du préjudice irréparable. En d'autres mots, et pour paraphraser les motifs de mes collègues dans l'arrêt *RJR — MacDonald*, les intimés ne m'ont pas plus convaincu des avantages, pour l'intérêt public, qui découleraient de l'octroi de l'entiercement des documents saisis.

Conclusion

Pour ces motifs, j'accueillerais le pourvoi avec dépens, j'infirmerais les décisions de la Cour d'appel et je casserais les ordonnances d'entiercement.

Version française du jugement des juges Sopinka, Cory et Iacobucci rendu par

LE JUGE CORY — J'ai eu le plaisir, en l'espèce, de lire les motifs approfondis de mon collègue le

La Forest J. I am in complete agreement with his view that the governing principles to be applied in this case are set out in the reasons of this Court in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, and in *RJR — MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. These decisions indicate that in considering an interim measure such as an injunction or an impounding order in the context of a *Charter* challenge to the validity of the underlying law a court must consider three factors. The first, is whether a serious question of law is raised. The second, is whether irreparable harm will be occasioned to the applicant if the interim order is refused. The third, requires the court to consider and weigh in the balance the inconveniences caused to the parties by the interim order.

Further, I am in agreement with my colleague that there is a serious question of law raised in this case. It is in the application of the factors pertaining to irreparable harm and the balance of inconvenience that I differ with his views.

The facts giving rise to this appeal are set out in the reasons of La Forest J. and need not be repeated.

The Nature of the Questioned Orders

At the outset I would observe that the orders in issue on this appeal are discretionary in nature. Like all discretionary decisions, they should be accorded a measure of deference. See, for example, *Hadmor Productions Ltd. v. Hamilton*, [1982] 1 All E.R. 1042; *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, at p. 37; *Metropolitan Stores*, *supra*, at pp. 154-56; and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77. Since I am of the view that the decisions of the judges hearing the original motions were correct, I need not consider the question of deference.

juge La Forest. Je suis parfaitement d'accord avec lui pour dire que les principes directeurs applicables en l'espèce sont ceux que notre Cour a énoncés dans les arrêts *Manitoba (Procureur général) c. Metropolitan Stores Ltd.*, [1987] 1 R.C.S. 110, et *RJR — MacDonald Inc. c. Canada (Procureur général)*, [1994] 1 R.C.S. 311. Suivant ces arrêts, le tribunal doit apprécier trois facteurs lorsqu'il examine une mesure interlocutoire comme l'injonction ou l'ordonnance d'entiercement dans le contexte d'une contestation, fondée sur la *Charte*, de la validité de la loi sous-jacente. Il doit d'abord se demander si une question de droit sérieuse est soulevée et, ensuite, si le refus de l'ordonnance interlocutoire causera au requérant un préjudice irréparable. Enfin, le tribunal doit considérer et apprécier la prépondérance des inconvénients causés aux parties par l'ordonnance interlocutoire.

De plus, je conviens avec mon collègue qu'une question de droit sérieuse est soulevée en l'espèce. C'est dans l'application des facteurs relatifs au préjudice irréparable et à la prépondérance des inconvénients que je m'écarte de son opinion.

Les faits qui ont donné naissance au présent pourvoi sont exposés dans les motifs du juge La Forest et il n'est pas nécessaire de les répéter.

La nature des ordonnances contestées

Au départ, je ferais remarquer que les ordonnances en cause dans le présent pourvoi sont de nature discrétionnaire. Comme c'est le cas pour toute décision discrétionnaire, il y a lieu de faire preuve de retenue à leur égard. Voir, par exemple, les arrêts *Hadmor Productions Ltd. c. Hamilton*, [1982] 1 All E.R. 1042, *Aetna Financial Services Ltd. c. Feigelman*, [1985] 1 R.C.S. 2, à la p. 37, *Metropolitan Stores*, précité, aux pp. 154 à 156, et *Friends of the Oldman River Society c. Canada (Ministre des Transports)*, [1992] 1 R.C.S. 3, aux pp. 76 et 77. Parce qu'à mon avis les décisions des juges qui ont entendu les requêtes initiales étaient correctes, je n'ai pas à me pencher sur la question de la retenue.

Irreparable Harm

There are a number of matters that must be conceded at the outset. The documents seized in this case are commercial in nature. It follows that there cannot be the same privacy interest in those documents that there would be in personal papers. The expectation of privacy in business records is necessarily low. They do not ordinarily contain the type of personal information that lies at the heart of the constitutional protection of privacy. Further, it must be recognized that the state must have the power to regulate business, both for economic reasons and in order to provide protection to the vulnerable individual against private power. This was set out with great cogency by La Forest J. in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 517-18. It follows that since the search in this case was made pursuant to a regulatory statute in the highly regulated field of restaurants and hotels the expectation of privacy must of necessity be diminished.

Those who enter a regulated field must accept regulations as an integral part of their business operations. It has been recognized that there is a significant distinction between searches and seizures effected pursuant to a regulatory statute and searches and seizures made pursuant to the *Criminal Code,* R.S.C., 1985, c. C-46, or statutes of a quasi-criminal nature. This was the view of four of five judges in both *Thomson Newspapers* and in *R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627.

In *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, although there was disagreement as to its application, eight of nine judges affirmed the principle enunciated in *Thompson Newspapers* and *McKinlay Transport* that there is a relevant and significant distinction to be drawn between a statute that is criminal and one which is regulatory in nature when the application of the *Canadian Char-*

Le préjudice irréparable

Il y a un certain nombre de concessions qui doivent être faites au départ. Les documents saisis en l'espèce sont de nature commerciale. Le droit à la vie privée relativement à ces documents ne saurait donc être identique à celui qui se rattache aux documents personnels. L'attente en matière de respect de la vie privée relativement aux documents commerciaux est nécessairement faible. Ceux-ci ne contiennent généralement pas le genre d'information personnelle qui est au cœur de la protection constitutionnelle du droit à la vie privée. De plus, il faut admettre que l'État doit avoir le pouvoir de réglementer le commerce, tant pour des raisons économiques que pour protéger l'individu vulnérable contre un pouvoir de nature privée. C'est ce que le juge La Forest a si éloquemment exprimé dans l'arrêt *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, aux pp. 517 et 518. Aussi, puisqu'en l'espèce la perquisition a été effectuée en application d'une loi de nature réglementaire dans le domaine fort réglementé de la restauration et de l'hôtellerie, l'attente en matière de respect de la vie privée doit nécessairement être réduite.

Ceux qui se lancent dans un domaine réglementé doivent accepter que la réglementation fait partie intégrante de leurs activités commerciales. On a reconnu qu'il existe une distinction marquée entre les fouilles, perquisitions et saisies effectuées conformément à une loi de nature réglementaire et celles fondées sur le *Code criminel*, L.R.C. (1985), ch. C-46, ou des lois de nature quasi criminelles. C'est l'avis qu'ont exprimé quatre des cinq juges dans les arrêts *Thomson Newspapers* et *R. c. McKinlay Transport Ltd.*, [1990] 1 R.C.S. 627.

Dans l'arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, même s'il y avait désaccord quant à son application, huit des neuf juges ont confirmé le principe énoncé dans les arrêts *Thomson Newspapers* et *McKinlay Transport*, selon lequel il faut faire une distinction utile et importante entre une loi criminelle et une loi qui est de nature réglementaire, en examinant l'application

ter of Rights and Freedoms to those statutes is to be considered.

In *Wholesale Travel Group*, I attempted to indicate the basis for the distinction. The distinction can properly be based upon both the licensing concept and the need to protect the vulnerable. In today's complex society, individuals are frequently placed in vulnerable situations. An individual often does not and cannot have the requisite knowledge or training to determine what may be safe and what is dangerous. For example, it is essential that there be regulations to protect the environment from poisonous effluent; to protect individuals from the sale of dangerous products or patent medicines; to ensure there is a reasonable standard of safety in mines, factories, construction sites and all workplaces; to ensure that food is prepared in sanitary conditions and that public and commercial buildings are constructed in a reasonably safe manner. The protection of all, and particularly the vulnerable, by regulation requires that government agencies be authorized to inspect premises and to review books and records. Those who enter a regulated field must be aware of those regulations. By entering that field they have accepted that their business will be regulated.

In *McKinlay Transport*, the majority of this Court held that the *Income Tax Act*, R.S.C. 1952, c. 148, is regulatory in nature, since in the words of Wilson J., at p. 641, "it controls the manner in which income tax is calculated and collected". There, it was held that the purpose of the investigation and enforcement provisions of the Act was not so much to penalize criminal conduct as to secure compliance with the provisions of the Act. The legislation at issue in this case (*An Act respecting the Ministère du Revenu*, R.S.Q., c. M-31) serves the same purpose as the *Income Tax Act* and like that statute is regulatory in nature. There is, then, a relatively low expectation of privacy in the documents seized in this case.

de la *Charte canadienne des droits et libertés* à ces lois.

Dans l'arrêt *Wholesale Travel Group*, j'ai tenté d'expliquer le fondement de cette distinction. Elle peut à bon droit être fondée tant sur la notion de l'acceptation des conditions que sur la nécessité de protéger les personnes vulnérables. Dans la société complexe d'aujourd'hui, les particuliers se trouvent fréquemment en position de vulnérabilité. Il arrive souvent qu'une personne ne possède pas et ne peut pas posséder la connaissance ou la formation requise pour déterminer ce qui est sûr et ce qui ne l'est pas. Par exemple, il est essentiel qu'il y ait des règlements protégeant l'environnement contre les effluents toxiques, protègeant les particuliers contre la vente de produits ou de médicaments brevetés, garantissant l'adoption d'une norme raisonnable de sécurité dans les mines, les usines, les chantiers de construction et tous les lieux de travail, et garantissant que les aliments sont préparés dans des conditions sanitaires et que les immeubles publics et commerciaux sont construits d'une manière raisonnablement sécuritaire. La protection de tous, et en particulier des personnes vulnérables, par règlement requiert que les organismes gouvernementaux soient autorisés à inspecter des lieux et à examiner des livres et dossiers. Ceux qui se lancent dans un domaine réglementé doivent en connaître les règlements et, ce faisant, ils acceptent que leur entreprise soit réglementée.

Dans l'arrêt *McKinlay Transport*, notre Cour à la majorité a conclu que la *Loi de l'impôt sur le revenu*, S.R.C. 1952, ch. 148, est de nature réglementaire car, suivant les propos du juge Wilson, à la p. 641, «elle régit la façon dont l'impôt sur le revenu est calculé et perçu». On y a conclu que les dispositions de la Loi relatives à son application et aux enquêtes ne visent pas tant à punir la conduite criminelle qu'à assurer le respect de la Loi elle-même. La loi ici en cause (*Loi sur le ministère du Revenu*, L.R.Q., ch. M-31) sert une fin identique à celle de la *Loi de l'impôt sur le revenu* et est de nature réglementaire comme cette dernière. L'attente en matière de respect de la vie privée relativement aux documents saisis en l'espèce est donc relativement faible.

With all of that stated and accepted, there still remains some measure of privacy in commercial documents. They will inevitably reveal aspects of the business that the operator would rather have kept private. For example, one supplier may be paid on a COD basis and another 90 days after delivery. These arrangements may have arisen from circumstances which prevailed years ago and have continued without thought of change to the present time. A business would never want to have those arrangements made public. Similarly, the record of wages paid to employees may reflect a higher wage rate to a particularly loyal and trusted employee than to another carrying out the same function. This information too is sensitive and something that the business operator would prefer to keep private. It is true that under the *Act respecting the Ministère du Revenu* the government employees are forbidden to disclose information obtained from the documents. However, the mere fact that the documents have been seized and must be reviewed by the government officers will be a cause for concern for the proprietor of the business.

Ceci étant exposé et admis, il reste qu'une certaine mesure de vie privée est associée aux documents commerciaux. Ils révéleront inévitablement certains aspects de l'entreprise que l'exploitant aurait préféré garder confidentiels. Par exemple, un fournisseur peut être payé à la livraison et un autre, 90 jours après celle-ci. Ces arrangements peuvent avoir été pris dans des circonstances qui existaient il y a plusieurs années et avoir subsisté sans qu'on songe à les adapter au moment présent. Une entreprise ne voudrait jamais qu'ils soient rendus publics. De même, le registre des salaires des employés peut révéler qu'un employé particulièrement loyal et fiable reçoit un salaire supérieur à un autre employé qui occupe le même poste. Il s'agit là d'un renseignement tout aussi délicat que l'exploitant préférerait garder confidentiel. Certes, la *Loi sur le ministère du Revenu* interdit aux employés de l'État de communiquer les renseignements contenus dans les documents. Toutefois, le simple fait que les documents aient été saisis et doivent être examinés par les fonctionnaires de l'État sera un sujet de préoccupation pour le propriétaire de l'entreprise.

It must be remembered that ss. 40 and 40.1 of this Act provide for searches and seizures of a wide range of documents ("books, registers, papers or other things that may be used as evidence of an offence against a fiscal law or a regulation made by the Government under such law"). Thus, the government may seize a far broader range of documents than those required by the Act and its regulations to be prepared and maintained by the business enterprise. As well, the Act allows for searches and seizures of documents in the possession of third parties who are not the subject of an investigation. It was these same factors that led four of the five judges sitting on *McKinlay Transport* to conclude that the compelled production of documents provided for in s. 231(3) of the *Income Tax Act* constituted a seizure for the purposes of s. 8 of the *Charter* because there was, for the proprietor, a privacy interest in the documents. That same reasoning is applicable to the facts presented by these cases.

Il faut se rappeler que les art. 40 et 40.1 de la Loi permettent les perquisitions et les saisies de toute une gamme de documents («livres, registres, papiers ou autres choses pouvant servir de preuve d'une infraction à une loi fiscale ou à un règlement pris par le gouvernement pour son application»). Ainsi, le gouvernement peut saisir une gamme beaucoup plus vaste de documents que ceux qui, en vertu de la Loi et de son règlement d'application, doivent être préparés et conservés par l'entreprise. De même, la Loi permet les perquisitions et les saisies de documents en la possession de tiers qui ne font pas l'objet d'une enquête. Ce sont ces mêmes facteurs qui ont amené quatre des cinq juges siégeant dans *McKinlay Transport* à conclure que la production forcée de documents aux termes du par. 231(3) de la *Loi de l'impôt sur le revenu* constituait une saisie aux fins de l'art. 8 de la *Charte*, parce que le propriétaire avait droit à ce que les documents soient protégés. Le même raisonnement s'applique aux faits des présentes affaires.

The purpose of an interlocutory stay is to preserve the rights of applicants (the respondents before this Court) pending a final determination of a legal question which will affect those rights. Here, the respondents seek not the return of their documents, but simply the maintenance of the orders that they be held by the court pending the determination of this issue. If it is found that the respondents are correct and that the searches and seizures were unconstitutional, then the privacy right will have effectively been lost as a result of the unconstitutional provisions of the Act. Small as it may be, there is such a privacy interest. If it transpires that the respondents are correct in their constitutional contention, then I would think that the loss of that privacy interest would, in itself, constitute irreparable harm.

Yet there is another aspect which I consider to be far more significant in this case. Namely, that the documents were obtained by means of intrusive searches of residential and business premises.

In *Baron v. Canada*, [1993] 1 S.C.R. 416, at p. 444, it was recognized that although characterizations such as "regulatory" and "criminal" are useful for purposes of *Charter* analysis, they do not provide a complete answer. What must always be considered are the values which are at stake on the facts of the particular case. Here, it is true that the search was made pursuant to the provisions of a regulatory statute dealing with the highly regulated business; however, a court must still be concerned with the nature of the physical searches of private premises. Obviously, searches of private property are far more intrusive than a demand for production of documents. The greater the intrusion by the searchers into the business premises and private residences, the greater weight should be attached to the provisions of s. 8 of the *Charter*. Thus, although the privacy interest of an individual in business documents pertaining to a regulated field is relatively low, there remains a very real and significant privacy interest in maintaining the inviolability of residential premises, and to a lesser extent

La suspension interlocutoire a pour objet de maintenir les droits des requérants (en l'espèce, les intimés) jusqu'à ce qu'une décision finale qui affectera ces droits soit rendue sur une question de droit. En l'espèce, les intimés ne demandent pas le retour des documents, mais simplement le maintien des ordonnances qu'ils soient détenus par la cour jusqu'à ce que cette question soit tranchée. Si on conclut que les intimés ont raison et que les perquisitions et les saisies étaient inconstitutionnelles, le droit à la vie privée aura alors été effectivement perdu en raison des dispositions inconstitutionnelles de la Loi. Aussi minime soit-il, ce droit existe. S'il s'avère que la prétention constitutionnelle des intimés est exacte, je croirais alors que la perte de ce droit à la vie privée constituerait elle-même un préjudice irréparable.

Cependant, il y a en l'espèce un autre aspect que je considère beaucoup plus important: les documents ont été obtenus grâce à des perquisitions envahissantes de résidences et de locaux commerciaux.

Dans l'arrêt *Baron c. Canada*, [1993] 1 R.C.S. 416, à la p. 444, on a reconnu que, si la qualification de mesures comme étant «des mesures de réglementation» ou des «mesures pénales» est utile aux fins de l'analyse fondée sur la *Charte*, elle ne répond pas complètement à la question. Ce qu'il faut toujours considérer, ce sont les valeurs qui sont en jeu d'après les faits de l'affaire. En l'espèce, il est vrai que la perquisition a été effectuée conformément aux dispositions d'une loi de nature réglementaire relative à une activité fort réglementée; toutefois, un tribunal doit tout de même se préoccuper de la nature des perquisitions dans des locaux privés. De toute évidence, les perquisitions dans des propriétés privées sont beaucoup plus envahissantes qu'une demande de production de documents. Plus l'intrusion des auteurs de perquisitions dans les locaux d'une entreprise et des résidences privées est grande, plus on devrait accorder de l'importance aux dispositions de l'art. 8 de la *Charte*. Donc, même si le droit qu'un particulier a à ce que des documents commerciaux se rapportant à un domaine réglementé soient protégés est

of business premises. This was recognized by Wilson J. in *McKinlay Transport*, *supra*, at p. 649:

> The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.

It is on this issue that I find that I must take a position diametrically opposed to my colleague. The documents were seized from homes and business premises. The seizure of those documents cannot be divorced from the intrusion into private premises. The search and seizure of the documents are part and parcel of the same sequence of events. They are an integral part of the whole. It should not be said that once the documents are seized it is no longer necessary to consider the intrusion into homes and offices. The documents were obtained as a result of that intrusion. The violation of privacy interest resulting from that intrusion cannot end with the removal of the documents. So long as the documents are held by or on behalf of the appellants there is a continuing violation of the privacy interest of the respondents in their residences and business premises.

The constitutionality of ss. 40 and 40.1 of *An Act respecting the Ministère du Revenu* will be determined in the principal applications to quash the warrants. Should those sections eventually be found to be unconstitutional, then the searches and seizures will have violated the privacy interest of the respondents in their homes and offices. The government will, without authority, have entered

relativement minime, il reste qu'il existe un droit très réel et très important à ce que l'inviolabilité des locaux résidentiels et, dans une moindre mesure, des locaux commerciaux soit respectée. Le juge Wilson reconnaît cela dans l'arrêt *McKinlay Transport*, précité, à la p. 649:

> Plus grande est l'atteinte aux droits à la vie privée des particuliers, plus il est probable que des garanties semblables à celles que l'on trouve dans l'arrêt *Hunter* seront nécessaires. Ainsi, le fait pour des agents du fisc de pénétrer dans la propriété d'un particulier pour y faire une perquisition et une saisie constitue une immixtion beaucoup plus grande que la simple demande de production de documents. La raison en est que même s'il est possible que le contribuable s'attende peu à ce que son droit à la protection de sa vie privée soit respecté relativement à ses documents commerciaux utiles pour établir son assujettissement à l'impôt, il n'en attache pas moins d'importance au respect de l'inviolabilité de son domicile.

C'est sur cette question que je crois qu'il me faut adopter une position diamétralement opposée à celle de mon collègue. Les documents ont été saisis dans des domiciles et des locaux commerciaux. La saisie de ces documents ne peut être dissociée de l'intrusion dans des locaux privés. La perquisition et la saisie de documents font partie de la même chaîne d'événements. Elles font partie intégrante d'un tout. On ne saurait dire qu'une fois que les documents sont saisis, il n'est plus nécessaire de considérer l'intrusion dans les domiciles et les bureaux. Les documents ont été obtenus grâce à cette intrusion. L'atteinte au droit à la vie privée qui résulte de cette intrusion ne peut prendre fin avec le retrait des documents. Tant que les documents sont détenus par les appelants ou pour leur compte, il y a une violation continue du droit à la vie privée dont les intimés jouissent dans leurs résidences et leurs locaux commerciaux.

La constitutionnalité des art. 40 et 40.1 de la *Loi sur le ministère du Revenu* sera déterminée dans les demandes principales d'annulation des mandats. Si jamais ces articles sont jugés inconstitutionnels, les perquisitions et les saisies auront alors violé le droit à la vie privée dont les intimés jouissent dans leurs domiciles et leurs bureaux. Le gouvernement aura, sans autorisation, pénétré dans les

the premises and searched for and seized the documents. Thus the government will have had the continuing possession of the documents in the absence of any authority and in violation of the *Charter*. This, it seems to me, would constitute irreparable damage to the respondents.

The provision for the impounding orders seems eminently fair for all parties. While the documents are impounded they cannot be altered or changed in any way by the respondents. The documents will thus remain protected while the court carries out the judicial function of determining the constitutionality of the legislation. There could be no question of the fairness and efficacy of such an order if the issue could be determined in a reasonable time; say two weeks or two months, or even six months. If the court cannot determine the issue within a reasonable time, then I wonder whether it is the respondents or the government that should suffer as a result of the delays.

In my view, it is irrelevant that the appellants could have lawfully gained possession of these documents by means of a demand made pursuant to ss. 38 or 39 of the Act. The fact remains that they were gained through searches and seizures conducted pursuant to ss. 40 and 40.1. The appellants chose the method of proceeding. They obtained the documents by means of intrusive searches of residential and business premises. The appellants cannot now rely on the fact the documents might have been obtained in some other way.

I cannot accept the appellants' argument that since s. 69 of the Act provides for the confidentiality of tax documents this section will protect the privacy interests of the respondents. Although s. 69 protects the respondents from public release of information contained in the documents, it does not protect them from having their privacy interests in their homes and offices violated by the state. This is the very interest that s. 8 of the *Charter* is aimed at protecting. Section 69 does not adequately protect the respondents' privacy interests in the documents. Nor can I accept that the breach of the privacy interest can be quantified and the respondents compensated in damages. There will

lieux, de même que perquisitionné et saisi des documents. Le gouvernement aura donc eu, sans autorisation et contrairement à la *Charte*, la possession continue des documents. Les intimés en subirait, me semble-t-il, un préjudice irréparable.

Les ordonnances d'entiercement semblent éminemment justes pour toutes les parties. Une fois entiercés, les documents ne peuvent être falsifiés ni modifiés de quelque façon par les intimés. Ils resteront donc protégés pendant que la cour se prononce sur la constitutionnalité de la loi en cause. Il ne saurait être question de l'équité et de l'efficacité d'une telle ordonnance si la question pouvait être résolue dans un délai raisonnable comme, par exemple, deux semaines ou deux mois, voire même six mois. Si la cour ne peut trancher la question dans un délai raisonnable, je me demande qui des intimés ou du gouvernement devrait subir les conséquences du retard.

À mon avis, il importe peu que les appelants aient pu prendre légalement possession de ces documents grâce à une demande fondée sur l'art. 38 ou 39 de la Loi. Il reste que les documents ont été obtenus au moyen des perquisitions et saisies effectuées conformément aux art. 40 et 40.1. Les appelants ont choisi la façon de procéder. Ils ont obtenu les documents en effectuant des perquisitions envahissantes dans des résidences et des locaux commerciaux. Ils ne peuvent maintenant invoquer le fait que les documents auraient pu être obtenus autrement.

Je ne puis retenir l'argument des appelants voulant que l'art. 69 de la Loi protège le droit à la vie privée des intimés puisqu'il prescrit la nature confidentielle des documents fiscaux. Bien que l'art. 69 protège les intimés contre la publication de renseignements contenus dans les documents, il ne les protège pas contre la violation par l'État de leur droit à la vie privée dans leurs domiciles et leurs bureaux. C'est le droit même que l'art. 8 de la *Charte* vise à protéger. L'article 69 ne protège pas suffisamment le droit des intimés à ce que les documents soient protégés. Je ne puis non plus accepter que la violation du droit à la vie privée puisse être quantifiée et que les intimés puissent

always be problems in any attempt to quantify and to compensate the breach of a *Charter* right. The nature of the right to compensation for breaches of *Charter* rights is still highly uncertain. See *RJR — MacDonald*, *supra*, at p. 342.

In summary then, there is some small privacy interest in commercial documents. The seizure by way of intrusive searches of business premises and private residences was and continues to be an integral part of the seizure. The intrusive nature of the search cannot be isolated from the taking of the documents. It is highly speculative to expect that a breach of privacy interests, not only in the documents, but also in the homes and offices of the respondents, could be compensated in damages. Thus, if the respondents are successful in the principal motions, they would suffer irreparable damage if the impounding orders, which constitute a very fair disposition of the matter, were to be set aside. It is then necessary to consider whether the public interest would be harmed by this apparently fair solution.

Balance of Inconveniences

It is under the balance of inconveniences branch of the *Metropolitan Stores* test that this case should really be decided. Obviously, the public interest is a very important consideration in determining whether an interlocutory impounding order should be set aside. What is being considered is a regulatory scheme dealing with the restaurant and hotel business. All who enter this field must be aware of the governmental regulations and know that they must comply with them. Those regulations are of great importance for the health and safety of the public. Thus, there clearly is a public good derived from the regulations. That public good must weigh heavily in the public interest in considering whether the interlocutory impounding orders should be set aside. Further the public good which results from the collection of revenues derived from taxation statutes is obviously a factor that should weigh heavily in assessing the balance of convenience. There is no question that to ensure

être indemnisés au moyen de dommages-intérêts. Il sera toujours difficile de tenter de quantifier et de compenser la violation d'un droit garanti par la *Charte*. La nature du droit à une indemnisation pour la violation de tels droits est encore fort incertaine. Voir *RJR — MacDonald*, précité, à la p. 342.

En résumé donc, il existe un droit minime à ce que les documents commerciaux soient protégés. La saisie effectuée au moyen de perquisitions envahissantes dans des locaux commerciaux et des résidences privées continue de faire partie intégrante de la saisie. La nature envahissante de la perquisition ne peut être dissociée de la saisie des documents. Le pari que la violation du droit à la vie privée non seulement à l'égard des documents, mais également dans les domiciles et les bureaux des intimés, pourrait être indemnisée au moyen de dommages-intérêts, est très risqué. Par conséquent, si leurs requêtes principales sont accueillies et si les ordonnances d'entiercement, qui constituent une solution très juste du problème, sont annulées, les intimés subiront un préjudice irréparable. Il est donc nécessaire de considérer si cette solution apparemment juste nuirait à l'intérêt public.

La prépondérance des inconvénients

C'est en fonction du volet de la prépondérance des inconvénients du critère énoncé dans l'arrêt *Metropolitan Stores* qu'il y a vraiment lieu de trancher la présente affaire. De toute évidence, l'intérêt public est un facteur très important pour déterminer s'il y a lieu d'annuler une ordonnance interlocutoire d'entiercement. C'est le régime de réglementation de la restauration et de l'hôtellerie qui est examiné. Tous ceux qui se lancent dans ce domaine doivent connaître la réglementation gouvernementale et la façon de la respecter. Cette réglementation est d'une grande importance pour la santé et la sécurité du public. Il en découle donc manifestement un bien pour le public qui, dans l'intérêt public, doit peser lourd lorsqu'il s'agit de savoir si les ordonnances interlocutoires d'entiercement devraient être annulées. En outre, le bien pour le public qui résulte de la perception des revenus engendrés par les lois fiscales devrait certainement peser lourd dans l'appréciation de la prépon-

compliance with any taxation legislation powers of investigation and enforcement are essential. These are all factors to be taken into account and considered to be favourable to the position of the Ministère du Revenu.

With all that recognized, it still must be determined whether the holding in escrow of the documents seized pending the determination of the constitutional validity of the search provisions of the Act should be upheld in light of the remaining privacy interest in those documents and in the homes and offices of the respondents. My colleague begins his analysis of the balance of inconveniences by observing that the impounding orders will merely delay the appellants' opportunity to look at the documents seized. Therefore, he continues, it can be presumed that the respondents will at one time or another suffer the inconveniences related to the investigation by the Ministère du Revenu (i.e., the appellants seeing the documents seized). With respect, I disagree. His approach assumes that the respondents will lose the main applications to quash the warrants. Any remedy in the nature of an interlocutory stay or impounding order is predicated on the possibility that the party applying for the stay will eventually be successful. Obviously, if the respondents are successful in the main applications, then they will not suffer a violation of their privacy interests. As I have observed, the impounding orders protect both the integrity of the documents and the privacy interest of the respondents. The impounding order is an eminently sensible interlocutory measure, provided that it does not harm the public interest.

What then is the detriment that the Ministère du Revenu will suffer if the impounding orders are upheld? After a review of the evidence provided in this case, I have come to the conclusion that the Ministère du Revenu and the public interest in the enforcement of taxation statutes would suffer little, if at all, from the granting and maintaining of these orders.

dérance des inconvénients. Il n'y a pas de doute que le respect d'une loi fiscale requiert l'existence de pouvoirs d'enquête et d'application. Ce sont tous là des facteurs dont il faut tenir compte et qui sont considérés comme favorables à la position du ministère du Revenu.

Une fois tout cela admis, il reste à déterminer si l'entiercement des documents saisis, jusqu'à ce qu'on se soit prononcé sur la constitutionnalité des dispositions de la Loi relatives à la perquisition, devrait être maintenu compte tenu du droit à la vie privée qui subsiste à l'égard de ces documents et des domiciles et bureaux des intimés. Mon collègue commence son analyse de la prépondérance des inconvénients en faisant remarquer que les ordonnances d'entiercement retarderont simplement le moment où les appelants pourront consulter les documents saisis. Par conséquent, ajoute-t-il, on peut présumer que les intimés subiront à un moment donné les inconvénients de l'enquête du ministère du Revenu (c'est-à-dire la consultation par les appelants des documents saisis). En toute déférence, je ne suis pas d'accord. Mon collègue tient pour acquis que les intimés verront rejetées leurs demandes principales d'annulation des mandats. Toute réparation de la nature d'une suspension interlocutoire ou d'une ordonnance d'entiercement est fondée sur la possibilité que la partie qui demande la suspension aura éventuellement gain de cause. De toute évidence, si les intimés voient leurs demandes principales accueillies, leur droit à la vie privée ne sera pas violé. Comme je l'ai souligné, les ordonnances d'entiercement protègent à la fois l'intégrité des documents et le droit à la vie privée des intimés. L'ordonnance d'entiercement est une mesure interlocutoire fort raisonnable, pourvu qu'elle ne nuise pas à l'intérêt public.

Quel est donc l'inconvénient que le ministère du Revenu subira si les ordonnances d'entiercement sont maintenues? Après avoir examiné la preuve produite en l'espèce, j'en suis venu à la conclusion que le ministère du Revenu et l'intérêt du public dans l'application des lois fiscales se ressentiraient peu ou pas du tout de la délivrance et du maintien de ces ordonnances.

Quite simply, the evidence does not support the appellants' submission that the orders in these cases will paralyse the enforcement of taxation statutes in the province. The appellants are still at liberty to carry out searches and effect seizures. The appellants can still investigate and proceed under other sections of the Act, specifically ss. 38 and 39. Accepting, for the purpose of argument, the appellants' contention that this case will act as a precedent, it must be observed that there are so few searches and seizures carried out each year under taxation statutes in the province that this case is still one of exemption and not of suspension. In *RJR — MacDonald*, *supra*, it was held that the onus of demonstrating harm to the public interest is a relatively low one for government authorities opposing interlocutory orders. The following appears at p. 346:

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. [Emphasis added.]

However, the public interest will not always be harmed by granting a stay, particularly where the case in one of exemption rather than suspension (at p. 346):

> Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores*, it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely.

The sole adverse effect of the impounding orders is that the appellants will not be able to see the documents seized until the constitutionality of the legislation is determined. The evidence indi-

Tout simplement, la preuve n'étaye pas la prétention des appelants que les ordonnances en l'espèce paralyseront l'application des lois fiscales dans la province. Les appelants demeurent libres d'effectuer des perquisitions et des saisies. Ils peuvent encore enquêter et agir en vertu d'autres dispositions de la Loi, particulièrement les art. 38 et 39. Si on accepte, pour les fins de la discussion, la prétention des appelants que la présente affaire fera figure de précédent, il faut remarquer que le nombre de perquisitions et de saisies effectuées chaque année sous le régime des lois fiscales dans la province est si peu élevé que le présent pourvoi demeure un cas d'exemption et non de suspension. Dans l'arrêt *RJR — MacDonald*, précité, on a conclu que le fardeau d'établir l'existence d'un préjudice pour l'intérêt public est relativement peu exigeant pour les autorités gouvernementales qui s'opposent aux ordonnances interlocutoires. Voici ce qu'on peut lire, à la p. 346:

> On pourra presque toujours satisfaire au critère en établissant simplement que l'organisme a le devoir de favoriser ou de protéger l'intérêt public et en indiquant que c'est dans cette sphère de responsabilité que se situent le texte législatif, le règlement ou l'activité contestés. Si l'on a satisfait à ces exigences minimales, le tribunal devrait, dans la plupart des cas, supposer que l'interdiction de l'action causera un préjudice irréparable à l'intérêt public. [Je souligne.]

Cependant, l'intérêt public ne subira pas toujours un préjudice du fait d'une suspension, en particulier lorsqu'il s'agit d'un cas d'exemption et non de suspension (à la p. 346):

> L'examen de l'intérêt public peut également être touché par d'autres facteurs. Dans *Metropolitan Stores*, on a fait remarquer que les considérations d'intérêt public ont davantage de poids dans les cas de «suspension» que dans les cas d'«exemption». La raison en est que l'atteinte à l'intérêt public est beaucoup moins probable dans le cas où un groupe restreint et distinct de requérants est exempté de l'application de certaines dispositions d'une loi que dans le cas où l'application de la loi est suspendue dans sa totalité.

Les ordonnances d'entiercement ont pour seul effet préjudiciable d'empêcher les appelants de consulter les documents saisis jusqu'à ce qu'on se soit prononcé sur la constitutionnalité de la loi en

cates that this may delay the investigation in two ways. First the documents seized may well contain evidence which can be used in the prosecution. Secondly, the documents seized may enable the investigators to find additional evidence in the form of witnesses and other documents. The evidence does support the appellants' submission that the delay caused by the impounding orders may make it more difficult for the investigators to find more evidence in the form of other documents and witnesses when the orders are lifted.

However, the evidence also establishes that there are some avenues of investigation which can still be pursued while the impounding orders are in place. Further, it is clear that very few searches are conducted in a year. Quebec has approximately 4.2 million individual taxpayers, 240,000 corporate taxpayers, 223,000 employers, and 302,000 "agents". Despite the large base of taxpayers, the Ministère du Revenu of Quebec, carries out only some 45 investigations per year under all taxation legislation. Further, only some 25 searches and seizures are carried out in these 45 annual investigations. These statistics clearly indicate that the impounding orders will not curtail the investigative process.

The appellants further allege that it is confronted with a problem by the systematic granting of impounding orders with respect to documents seized pursuant to s. 40 of the Act. The appellants refer to eight cases, including the two which are the subject of this appeal.

Those cases are as follows: *Ameublement Jeanne Inc. v. Québec (Procureur général),* Sup. Ct. Montréal, No. 500-05-003335-872, granted April 15, 1987; *Brochetterie Tino Inc. v. Québec (Procureur général),* Sup. Ct. Montréal, No. 500-05-008861-898, denied July 17, 1989, [1989] R.D.F.Q. 98; *Restaurant le Gourmet grec Inc. v. Séguin,* Sup. Ct. Montréal, No. 500-05-004272-

cause. La preuve révèle que cela risque de retarder l'enquête de deux façons. Premièrement, il est bien possible que les documents saisis contiennent des éléments de preuve susceptibles d'être utilisés dans le cadre des poursuites. Deuxièmement, les documents saisis peuvent permettre aux enquêteurs de trouver des éléments de preuve supplémentaires sous la forme de témoins et d'autres documents. La preuve étaye effectivement la prétention des appelants que le retard causé par les ordonnances d'entiercement est susceptible de rendre plus difficile pour les enquêteurs de trouver des éléments de preuve supplémentaires sous la forme d'autres documents et de témoins, une fois les ordonnances levées.

Toutefois, la preuve établit également qu'il est possible de recourir à d'autres méthodes d'enquête pendant la durée des ordonnances d'entiercement. En outre, il est clair que très peu de perquisitions sont effectuées chaque année. Le Québec compte approximativement 4,2 millions de particuliers contribuables, 240 000 sociétés contribuables, 223 000 employeurs et 302 000 «mandataires». En dépit de ce nombre élevé de contribuables, le ministère du Revenu du Québec n'effectue qu'environ 45 enquêtes par année en application de toute la législation fiscale. De plus, seules quelque 25 perquisitions et saisies sont effectuées dans le cadre de ces 45 enquêtes, ce qui démontre clairement que les ordonnances d'entiercement ne freineront pas le processus d'enquête.

Les appelants soutiennent par ailleurs qu'il leur est difficile de comprendre pourquoi les ordonnances d'entiercement relatives aux documents saisis conformément à l'art. 40 de la Loi sont accordées systématiquement. Ils mentionnent huit affaires, dont les deux qui font l'objet du présent pourvoi.

Ces affaires sont les suivantes: *Ameublement Jeanne Inc. c. Québec (Procureur général),* C.S. Montréal, nº 500-05-003335-872, accueillie le 15 avril 1987; *Brochetterie Tino Inc. c. Québec (Procureur général),* C.S. Montréal, nº 500-05-008861-898, rejetée le 17 juillet 1989, [1989] R.D.F.Q. 98; *Restaurant le Gourmet grec Inc. c. Séguin,* C.S. Montréal, nº 500-05-004272-892, rejetée le 5 avril

892, denied April 5, 1989, [1989] R.D.F.Q. 80; *Courrier grec du Canada Ltée v. Québec (Procureur général)*, Sup. Ct. Montréal, No. 500-05-002016-895, denied February 24, 1989; the present appeal *143471 Canada Inc.* and *Tabah*; *Cuisines Multiform internationales Inc. v. Angers*, granted January 31, 1992, [1992] R.D.F.Q. 46 (Sup. Ct.), and Sup. Ct. Montréal, No. 500-05-002049-920, granted April 14, 1992, [1992] R.D.F.Q. 126; *Électro Marine Diesel Inc. v. Québec (Procureur général)*, Sup. Ct. Montréal, No. 500-05-005278-922, granted April 28, 1992, [1992] R.D.F.Q. 125. The respondents also brought to the Court's attention *Groupe Shakiba Inc. v. Québec (Procureur général)*, Sup. Ct. Québec, No. 200-05-001644-934, granted June 3, 1993, [1993] R.D.F.Q. 70. These cases reveal that over a six year period, of nine motions, five were granted (one of these, *Ameublement Jeanne Inc.* was on consent), and four were refused.

It is true that these cases reveal that no applications for impounding orders have been denied since the decision of the Court Appeal of Quebec in *Zeppetelli v. Canada*, [1990] 2 C.T.C. 354. However, it is also true that they do not disclose a problem of a flood of impounding orders. The figures reveal not a flood, but at most a very slow and irregular trickle. I cannot accept that the enforcement of taxation statutes in the province of Quebec will be paralysed by impounding orders when the scant number of searches and seizures is compared to the number of taxpayers in the province.

It is not without significance that the Superior Court judges who heard the initial applications for the impounding orders, specifically found that there was no evidence that these orders would paralyse the investigation and prosecution of offences. Marquis J. in the *Tabah* case, [1990] R.D.F.Q. 90, wrote (at p. 96):

[TRANSLATION] The respondents argue that if the present application is granted there will be such an increase in this type of action that eventually enforcement of the Act will be paralyzed.

1989, [1989] R.D.F.Q. 80; *Courrier grec du Canada Ltée c. Québec (Procureur général)*, C.S. Montréal, nº 500-05-002016-895, rejetée le 24 février 1989; le présent pourvoi *143471 Canada Inc.* et *Tabah; Cuisines Multiform internationales Inc. c. Angers*, accueillie le 31 janvier 1992, [1992] R.D.F.Q. 46 (C.S.), et C.S. Montréal, nº 500-05-002049-920, accueillie le 14 avril 1992, [1992] R.D.F.Q. 126; *Électro Marine Diesel Inc. c. Québec (Procureur général)*, C.S. Montréal, nº 500-05-005278-922, accueillie le 28 avril 1992, [1992] R.D.F.Q. 125. Les intimés ont également attiré l'attention de la Cour sur l'affaire *Groupe Shakiba Inc. c. Québec (Procureur général)*, C.S. Québec, nº 200-05-001644-934, accueillie le 3 juin 1993, [1993] R.D.F.Q. 70. Ces affaires révèlent que, sur une période de six ans, des neuf requêtes, cinq ont été accueillies (l'une d'elles, *Ameublement Jeanne Inc.*, avec le consentement des parties), et quatre ont été rejetées.

Il est vrai que ces affaires révèlent qu'aucune demande d'ordonnance d'entiercement n'a été rejetée depuis l'arrêt de la Cour d'appel du Québec *Zeppetelli c. Canada*, [1990] 2 C.T.C. 354. Toutefois, il est également vrai qu'elles ne révèlent aucun problème de cascade d'ordonnances d'entiercement. Les chiffres reflètent tout au plus un filet très mince et irrégulier. Je ne puis accepter que l'application des lois fiscales dans la province de Québec sera paralysée par des ordonnances d'entiercement si on compare le nombre limité de perquisitions et de saisies au nombre de contribuables dans la province.

Il n'est pas sans importance que les juges de la Cour supérieure qui ont entendu les demandes initiales d'ordonnances d'entiercement aient conclu expressément qu'il n'y avait aucune preuve que ces ordonnances paralyseraient l'enquête et les poursuites relatives aux infractions. Dans la décision *Tabah*, [1990] R.D.F.Q. 90, le juge Marquis écrit (à la p. 96):

Les intimés plaident qu'il faut entrevoir un accroissement de tels recours, si la présente requête est accordée, au point éventuellement de produire une paralysie de la mise en application de la loi.

It should be noted in this regard that this is a case concerning the meals and hotels tax. The evidence is that the Department conducts forty-five (45) investigations per year under this Act: twenty-five (25) of these result in searches. To date an impounding order has only been granted once. The fear of Department employees is understandable but is not based on any factual evidence adduced. [Emphasis added.]

Hannan J. in *143471 Canada Inc.*, [1990] R.D.F.Q. 104, wrote (at p. 109):

[TRANSLATION] Clearly this affidavit indicates that the effect of a stay would not be to suspend any other investigation or prosecution of the applicants [respondents before this Court] for any other offence in respect of any other period. It would not have the effect of limiting the application of any tax legislation to any taxpayer or even to the applicants, except for use of the documents subject to the seizure.

Further, there cannot be any suggestion that the orders in these cases were granted on the basis of judicial "rubber stamping". The cases were argued extensively and careful reasons delivered. For example, the argument in the *Tabah* case lasted three days and that in *143471 Canada Inc.* lasted two days. In both cases the reasons given for the orders were careful and detailed.

The evidence clearly establishes that the granting of impounding orders will certainly not paralyse the enforcement of taxation laws in the province of Quebec. Even if in every case where searches were carried out, impounding orders were in fact issued, this would not have the effect of paralysing the enforcement of taxation legislation. It must be remembered that the impounding orders do not prevent searches. They do no more than delay the appellants viewing the documents seized. It cannot be said that the impounding orders in this case so interfere with the enforcement of taxation laws as to seriously harm the public interest. I think it unlikely that citizens will consider that they can break taxation laws with impunity when searches and seizures can still take place. Obviously, the balance of convenience would be very different if the respondents were seeking to have the carrying out of searches and seizures pursuant

À ce sujet, rappelons qu'il s'agit ici d'une affaire qui porte sur la taxe sur les repas et l'hôtellerie. La preuve est à l'effet que le ministère effectue quarante-cinq (45) enquêtes par année en vertu de cette loi: vingt-cinq (25) d'entre elles donnent lieu à des perquisitions. À date, l'entiercement a été accordé une seule fois. L'appréhension des fonctionnaires du ministère est compréhensible sans pour autant reposer sur des données factuelles mises en preuve. [Je souligne.]

Dans la décision *143471 Canada Inc.*, [1990] R.D.F.Q. 104, le juge Hannan écrit (à la p. 109):

Évidemment, de cet *affidavit* on peut apprendre que l'effet d'un sursis n'aurait pas pour effet de geler toute autre enquête ou poursuite des requérantes [parties intimées devant notre Cour] pour toute autre infraction pour n'importe quelle autre période. Il n'aurait pas pour effet de restreindre l'application de toute loi fiscale à tout contribuable ou même aux requérants, exception faite de l'utilisation des documents sous le coup de la saisie.

En outre, on ne saurait donner à entendre que les ordonnances en l'espèce ont été accordées sans discussion par les tribunaux. Les affaires ont été plaidées longuement et des motifs approfondis ont été prononcés. Par exemple, la plaidoirie dans l'affaire *Tabah* a duré trois jours et, dans l'affaire *143471 Canada Inc.*, deux jours. Dans les deux cas, les motifs prononcés à l'appui de l'ordonnance étaient approfondis et détaillés.

La preuve établit clairement que la délivrance des ordonnances d'entiercement ne paralysera certainement pas l'application des lois fiscales au Québec. Même si, dans tous les cas où des perquisitions ont été effectuées, des ordonnances d'entiercement étaient effectivement rendues, l'application de la législation fiscale ne s'en trouverait pas paralysée. Il faut se rappeler que les ordonnances d'entiercement n'empêchent pas les perquisitions. Elles ne font que retarder le moment où les appelants pourront consulter les documents saisis. On ne peut pas dire que les ordonnances d'entiercement en l'espèce ont entravé l'application des lois fiscales au point de nuire gravement à l'intérêt public. J'estime qu'il est peu probable que les citoyens considéreront qu'ils peuvent enfreindre impunément les lois fiscales lorsque des perquisitions et des saisies sont encore possibles. De toute évidence, la prépondérance des inconvénients

to ss. 40 and 40.1 of the Act enjoined. Here, the respondents seek no more than the maintenance of the impounding orders. Further, like La Forest J., I would conclude that the limitation period for laying charges will not run while the impounding orders are in effect. In the circumstances, I can reach no other conclusion than that the balance of convenience favours the respondents.

I agree with my colleague that the presence or absence of a flood of applications is not determinative in deciding whether an interlocutory order should be granted. The nature and scope of the order requested, as well as the circumstances of each case will determine whether the court hearing the application should be concerned about a flood of similar requests. However, those concerns cannot be based on mere speculation. In my view, for a court to act based upon those concerns, there must be a substantial risk that there will be a flood of requests.

In this case, the evidence simply does not support the proposition that there is a probability, or even a real possibility, let alone a substantial risk, that there would be a flood of similar requests as a result of granting these applications.

My colleague suggests at the end of his reasons that there is an onus on an applicant for an interlocutory stay or impounding order (the respondents before this Court) to show that granting the stay or impounding order forwards the public interest. The discussion in *RJR — MacDonald* at pp. 343-47 on which my colleague relies does not hold that in all cases an applicant for a stay must show that granting such an order is in the public interest. As a general rule all an applicant need show is that the public interest is not hurt by the order. What that passage considers is the situation where an applicant argues not only that its own private interest but also the public interest will be hurt by the refusal of a stay. In those circumstances, the private applicant has a higher threshold than the government respondent to establish

serait tout autre si les intimés demandaient l'interdiction des perquisitions et des saisies fondées sur les art. 40 et 40.1 de la Loi. Ici, les intimés ne demandent que le maintien des ordonnances d'entiercement. De plus, à l'instar du juge La Forest, je conclurais que le délai de prescription relatif au dépôt d'accusations ne courra pas pendant la durée des ordonnances d'entiercement. Dans ces circonstances, je ne puis que conclure que la prépondérance des inconvénients favorise les intimés.

Je conviens avec mon collègue que l'existence ou non d'une cascade de demandes n'est pas déterminante pour ce qui est de savoir s'il y a lieu d'accorder une ordonnance interlocutoire. Ce sont la nature et la portée de l'ordonnance demandée, de même que les circonstances de chaque cas, qui détermineront si le tribunal qui entend la demande devrait s'inquiéter d'une avalanche de requêtes semblables. Ces inquiétudes ne sauraient toutefois être fondées sur de simples conjectures. Pour qu'un tribunal agisse en fonction de ces inquiétudes, il doit, à mon avis, exister un risque important d'avalanche de requêtes.

En l'espèce, la preuve n'appuie simplement pas la proposition qu'il existe une probabilité, ou même une possibilité réelle, et encore moins un risque important, qu'il y ait une avalanche de requêtes semblables si les demandes en cause sont accueillies.

Mon collègue affirme, à la fin de ses motifs, qu'il incombe au requérant qui demande la suspension interlocutoire ou l'ordonnance d'entiercement (les intimés en l'espèce) de démontrer que la suspension ou l'ordonnance d'entiercement sert l'intérêt public. On ne conclut pas, dans l'analyse effectuée aux pp. 343 à 347 de l'arrêt *RJR — MacDonald*, sur laquelle mon collègue se fonde, que le requérant qui demande la suspension doit dans tous les cas démontrer qu'il est dans l'intérêt public d'accorder une telle ordonnance. En règle générale, le requérant n'a qu'à démontrer que l'ordonnance ne nuit pas à l'intérêt public. Ce passage renvoie au cas où le requérant fait valoir que le refus de la suspension nuira non seulement à son propre intérêt privé, mais encore à l'intérêt public. Dans ces circonstances, le particulier qui fait la

that the public interest is served by its position. That is not this case. While in a general sense it can be said that there is a public interest in preventing unconstitutional searches, the respondents in this case do not rely on that public interest to support the impounding orders. Rather, they rely on their own privacy interests, and the fact that the public interest will not be harmed by granting the impounding orders. Thus, the respondents in this case only have to show that granting the orders will not harm the public interest, not that granting the orders will forward the public interest. This the respondents have done.

In summary, the evidence establishes that there is no serious interference with the enforcement of taxation statutes resulting from the granting of the impounding orders. There is then, no interference with the public interest and on this basis the impounding orders should be upheld. Further, even if it can be said that in a certain sense, the irreparable harm the respondents would suffer from the refusal of the impounding orders is small, since there is no significant interference with the public interest, the impounding orders should be upheld.

Delay

As I have indicated, if the judicial system could deal with the constitutional issue within a relatively short period, there would be no question that the impounding order would be the fairest and most reasonable method of proceeding. The prosecution would be protected, since the documents seized would be in safe keeping and could not be altered or changed. At the same time, the respondents' privacy interest in the documents, small though it may be, would be protected. How long is reasonable? Obviously, if the delay were a matter of weeks there would be no problem. Just as clearly, if the determination could be made within six months, there could be no significant prejudice suffered by anyone. It seems the delay will be longer than that in the province of Quebec. Judges of the Trial Division and the Court of Appeal work well and diligently under the pressure of an ever increasing case load. Courts and judges can do no

demande doit satisfaire à des exigences minimales plus élevées que le gouvernement intimé pour établir que l'intérêt public est servi par sa position. Ce n'est pas le cas en l'espèce. Si, de façon générale, on peut dire qu'il est dans l'intérêt public d'empêcher les perquisitions inconstitutionnelles, les intimés en l'espèce n'invoquent pas cet intérêt public pour justifier les ordonnances d'entiercement. Ils font plutôt valoir leur propre droit à la vie privée et le fait que les ordonnances d'entiercement ne nuiront pas à l'intérêt public. Les intimés en l'espèce n'ont donc qu'à démontrer que la délivrance des ordonnances ne nuira pas à l'intérêt public, et non pas qu'elle le servira. C'est ce que les intimés ont fait.

En résumé, la preuve établit qu'aucune ingérence grave dans l'application des lois fiscales ne résulte de la délivrance des ordonnances d'entiercement. Il n'y a donc pas atteinte à l'intérêt public et, pour ce motif, il y a lieu de maintenir les ordonnances d'entiercement. De plus, même si l'on peut soutenir que, dans un certain sens, le préjudice irréparable que le rejet des ordonnances d'entiercement causerait aux intimés est minime, il y a lieu de maintenir les ordonnances d'entiercement puisqu'il n'y a pas d'atteinte grave à l'intérêt public.

Délai

Comme je l'ai indiqué, si le système judiciaire pouvait trancher la question constitutionnelle dans un délai relativement bref, il est évident que l'ordonnance d'entiercement serait la façon de procéder la plus juste et la plus raisonnable. La poursuite serait protégée car les documents saisis seraient gardés en sécurité et ne risqueraient pas d'être falsifiés ou modifiés. De même, le droit des intimés à ce que les documents soient protégés, aussi minime soit-il, serait garanti. Quel délai est raisonnable? Manifestement, s'il s'agissait de semaines, il n'y aurait aucun problème. De même, si la décision pouvait être prise dans les six mois, personne ne subirait de préjudice grave. Il semble que le délai sera plus long dans la province de Québec. Les juges de première instance et de la Cour d'appel travaillent bien et diligemment sous le poids d'une charge de travail qui s'alourdit sans cesse. Les tribunaux et les juges ne peuvent faire plus.

more. Who then should bear the responsibility for that delay? Surely it should not be the individual, where as in this case, a serious question of law is raised as to the constitutional validity of search and seizure provisions of the legislation. The respondents should not suffer as a result of judicial delay. Ordinarily I would trust that this matter could be expedited and disposed of by the Court of Appeal of Quebec as expeditiously as possible. This Court has been advised that the Court of Appeal of Quebec granted the request of the respondent 143471 Canada Inc. to expedite the hearing of the appeal. The appeal was heard April 13, 1994. The Court of Appeal of Quebec dismissed the appeal on May 18, 1994, J.E. 94-934. I would expect that the application of Tabah would be bound by this decision. As a result it is not necessary to consider a direction to expedite the hearing of the appeal in *143471 Canada Inc.* or the application in *Tabah.*

Qui donc devrait assumer la responsabilité du délai? Sûrement pas le particulier, lorsque, comme en l'espèce, une question de droit sérieuse est soulevée quant à la constitutionnalité des dispositions de la loi qui portent sur les perquisitions et les saisies. Les intimés ne devraient pas souffrir du retard causé par les tribunaux. Normalement, je compterais que cette affaire pourrait être activée et tranchée par la Cour d'appel du Québec aussi rapidement que possible. Notre Cour a appris que la Cour d'appel du Québec a fait droit à la requête de l'intimée 143471 Canada Inc. visant à hâter l'audition de l'appel. L'appel a été entendu le 13 avril 1994 et la Cour d'appel du Québec l'a rejeté le 18 mai 1994, J.E. 94-934. Je m'attendrais à ce que cette décision s'applique à la demande de Tabah. En définitive, il n'est pas nécessaire d'examiner une directive enjoignant de hâter l'audition de l'appel dans l'affaire *143471 Canada Inc.*, ou celle de la demande effectuée dans *Tabah.*

Disposition

In the result, I would dismiss the appeal with costs.

Appeal dismissed with costs, LA FOREST, L'HEUREUX-DUBÉ *and* MCLACHLIN JJ. *dissenting.*

Solicitors for the appellants: Veillette & Associés, Montréal.

Solicitors for the respondents: Phillips & Vineberg, Montréal.

Solicitors for the respondent Hétu: Woods Brouillette Des Marais, Montréal.

Dispositif

En définitive, je suis d'avis de rejeter le pourvoi avec dépens.

Pourvoi rejeté avec dépens, les juges LA FOREST, L'HEUREUX-DUBÉ *et* MCLACHLIN *sont dissidents.*

Procureurs des appelants: Veillette & Associés, Montréal.

Procureurs des intimés: Phillips & Vineberg, Montréal.

Procureurs de l'intimé Hétu: Woods Brouillette Des Marais, Montréal.

Tab 15

1991 CarswellOnt 427
Ontario Court of Justice (General Division) [Divisional Court]

820099 Ontario Inc. v. Harold E. Ballard Ltd.

1991 CarswellOnt 427, [1991] O.J. No. 480, 26 A.C.W.S. (3d) 627, 2 W.D.C.P. (2d) 209, 49 C.P.C. (2d) 239, 50 O.A.C. 254

Re HAROLD E. BALLARD LIMITED; 820099 ONTARIO INC. and WILLIAM O.S. BALLARD v. HAROLD E. BALLARD LIMITED, JOHN DONALD CRUMP, DONALD P. GIFFIN and STEVE A. STAVRO (Executors of Estate of HAROLD E. BALLARD), JOHN DONALD CRUMP, DONALD P. GIFFIN and STEVE A. STAVRO (Trustees of the HAROLD E. BALLARD TRUST), JOHN DONALD CRUMP and DONALD P. GIFFIN

Montgomery J.

Heard: April 3, 1991
Judgment: April 4, 1991
Docket: Docs. 164/91; RE1305/90

Counsel: *Bryan Finlay, Q.C.*, for moving parties (appellants in appeal/respondents on s. 247 application).
James A. Hodgson and *H.M. DesBrisay*, for responding parties (respondents in appeal/ applicants on s. 247 application).

Subject: Civil Practice and Procedure

Motion for stay of execution pending appeal.

***Montgomery J.*:**

1 This is a motion brought by Harold E. Ballard Limited ("HEBL"), John Donald Crump ("Crump"), Donald P. Giffin ("Giffin") and Steve A. Stavro ("Stavro") as executors of the estate of Harold E. Ballard (the "estate") and trustees of the Harold E. Ballard Trust (the "trust"), and Crump and Giffin in their personal capacities (collectively the "appellants") for an order staying the judgment of Mr. Justice Farley made March 1, 1991 in an application under s. 247 of the *Business Corporations Act, 1982*, S.O. 1982, c. 4 (the "OBCA") by William O.S. Ballard ("William") and 820099 Ontario Inc. ("820099") (collectively the "respondents").

2 William is the owner of 34 common shares in the capital of HEBL. 820099 is the holder of an option to purchase the shares of HEBL owned by William and his brother Harold, Jr. By notice of application issued on June 1, 1990, William and 820099 complained that between December 1988 and April 1990, the directors of HEBL, Harold E. Ballard ("Harold, Sr."), Crump and Giffin conducted the affairs of HEBL in a manner which was oppressive and which unfairly disregarded and was unfairly prejudicial to their interests contrary to s. 247 of the OBCA. In particular, William and 820099 complained about four major transactions which affected the capital structure of HEBL.

3 Mr. Justice Farley found that each of the transactions about which William and 820099 had complained was oppressive. He found that there was no justification for the company's purchase of real property from Harold, Sr. He found that the purpose advanced for the MLGL share transaction did not withstand scrutiny and he saw no legitimate basis for the purchase for cancellation of Harold, Jr.'s shares, which burdened the company with a substantial debt which it cannot service.

4 At p. 151 of his reasons, Farley J. said:

> I find that there has been an aggregation of matters of which William rightly complains.
>
> Individually they cannot be excused, collectively they are overwhelming. They demand rectification. I find that I must grant the applicants [William and 820099] relief of some nature to allow them to maintain as much as possible their original position.

5 Mr. Justice Farley therefore ordered the following relief:

> (a) audited financial statements for 1988 and 1989 were to be supplied to William with unaudited financials for 1990 and further interims until an annual meeting was held. In addition, William was to be advised forthwith of any material changes in HEBL's financial position, on a continuous basis up to and including the date of the annual meeting;
>
> (b) HEBL was to hold forthwith an annual meeting to elect a slate of directors made up of one nominee from William, one from the estate (which could not be Crump or Giffin) and one neutral person to be selected by the nominees or, if they could not agree on that person, the court was to appoint someone;
>
> (c) the real estate, MLGL share transaction and the debt cancellation were declared null and void, and the 38 common shares issued as a result of them were to be cancelled;
>
> (d) the purchase of Harold, Jr.'s shares was allowed to stand, but to reduce the debt incurred to effect it, a valuation of the assets and shares of HEBL was to commence

immediately. The new board was directed to determine how much capital HEBL had to raise to pay off its pressing debts. Common shares of HEBL were then to be offered to each of William and the estate to raise this capital.

6 Since the reasons for judgment of Farley J. were given on March 1, a notice of appeal has been filed and dates fixed for hearing the appeal in the Divisional Court on June 10, 11 and 12.

7 On February 11, Justice Farley granted an injunction until final disposition of the appeal which provides that HEBL shall not issue any shares or share changes or amalgamation and shall not encumber shares except in normal commercial terms to a financial institution. On February 14, Farley J. heard an application to vary the injunction to allow a contemplated transaction between executors.

8 The bona fides of the appeal is accepted and not an issue among the parties. No affidavit material was filed by the applicant.

9 William became a director of HEBL in 1970 and continued until December 5, 1988, when he was removed without justification and replaced by Giffin. This facilitated the three transactions which Farley J. found to be a nullity created in secret without advising William. William is a 33 per cent shareholder in HEBL if the Farley judgment is not upheld; if it is upheld, William is a 49 per cent shareholder in HEBL.

10 The only harm to the applicant if a stay is denied is that legal and accounting expense will be incurred in unwinding the three transactions Farley J. held to be void and this money would be wasted if Farley is overruled. Also, it is said that valuation would be done needlessly.

11 There is affidavit material before me from William expressing concern about the continued conduct of the executors of the estate. While I accept Mr. Finlay's argument that reliance on newspaper articles is of little or no assistance to the Court, the letter of Mr. Ted Rogers is supportive of William's concerns. If a stay is granted and the present directors of HEBL are left in place, there is reason for William to be apprehensive about changes in the board of directors of MLGL. It is clear that William still has not been kept apprised of what the executors are doing.

12 In my view, a stay will create prejudice to William in not getting financial information. To date, he has not received the information ordered by Farley J. Farley J. found the oppression so overwhelming that he set up an independent board. How can such a caretaker board hurt the applicant pending appeal?

13 Farley J. said that Crump and Giffin could attend meetings of the caretaker board.

14 The principles governing the grant of a stay of judgment pending appeal were set out by Mr. Justice Middleton in *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1923), 55 O.L.R. 127 (C.A.), a case dealing with an appeal to the Privy Council from a decision granting the plaintiffs an injunction restraining the defendants from selling corn flakes in Ontario. In dismissing the request for a stay of judgment pending appeal, His Lordship stated that the principles governing a grant of a stay of execution were similar to those governing the grant of an interim injunction. At p. 132, His Lordship said [O.L.R.]:

> There is a wide distinction between cases in which the refusal of a stay will render an appeal nugatory, and cases in which one of the parties must suffer inconvenience and possibly some substantial pecuniary loss. I am inclined to think that it will be found that the refusal of a stay under certain circumstances does not arise from absence of jurisdiction so much as from the view taken that the case is one in which it would be improper to exercise the latent power. In all cases in which the stay will impose little suffering upon the respondent, and this can be compensated by payment of actual damages which admit of easy and substantially accurate computation and in which on the other hand grievous loss and irremediable harm will be done the appellant if the stay is refused, the operation of the judgment ought to be stayed. The principle then is the same as that applied in the case of the application for an interim injunction — the balance of convenience, with an added factor of the greatest weight, the actual adjudication that has taken place, and which must be regarded as *prima facie* right.

And further at 133:

> Sir W. Page Wood, L.J., in *Walford v. Walford* (1868), L.R. 3 Ch. 812, 814, says:
>
> > The usual course is to stay proceedings pending an appeal only when the proceedings would cause irreparable injury to the appellant. Mere inconvenience and annoyance is not enough to induce the Court to take away from the successful party the benefit of his decree.

And at 135:

> On the other hand, to refuse a stay may mean serious loss to the defendants if they in the end succeed. I cannot see my way to intervene. The defendants must suffer the loss incident to the fact that they are now in the position of unsuccessful litigants. When business firms litigate business matters, loss to one or both litigants is inevitable. The mere fact that there is litigation prevents expenditure in business development; for this there is no remedy. When a decision is reversed for error, in many cases the erroneous judgment has done much harm that cannot be compensated; and, while I fully recognise the obligation of the courts to do the utmost to devise some way of avoiding, so far

as possible, this evil consequence, I can see no justification for casting the burden and risk on the litigant who is so far successful. This motion was argued upon the footing indicated, a claim to a stay as of right on the one side and a denial of any right on the other. If the defendants can now devise and submit any scheme by which the plaintiffs can be adequately protected, I am ready to hear counsel further.

15 Mr. Finlay relies on the decisions of the Court in *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1987), 21 C.P.C. (2d) 260, 23 O.A.C. 378 (C.A.).

16 The facts there are distinguishable. To refuse a stay could have put hundreds out of work in an operating mine. Our case involves simply a holding company. I find the case of no application.

17 I am not satisfied that refusal of a stay would seriously prejudice the applicant. I am satisfied that the granting of a stay would prejudice the respondent William Ballard. Leaving the present directors of HEBL in place will still keep William in the dark about HEBL's financial status. It also leaves the door open to the present directors to remove the independent directors on the board of MLGL.

18 It has been agreed between the parties that the Court may stay cancellation of the 38 shares of HEBL pending the appeal but as a term the estate cannot vote those shares without leave of the Court. Subject to this item and any others the parties may agree upon to be incorporated in the formal order, this application is dismissed with costs to the respondents.

Motion dismissed.

Tab 16

Date: 20080131

Docket: A-37-08

Citation: 2008 FCA 40

Present: **RICHARD C.J.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CANADIAN COUNCIL FOR REFUGEES,
CANADIAN COUNCIL OF CHURCHES,
AMNESTY INTERNATIONAL, and
JOHN DOE

Respondents

Heard at Ottawa, Ontario, on January 30, 2008.

Order delivered at Ottawa, Ontario, on January 31, 2008.

REASONS FOR ORDER BY: RICHARD C.J.

Date: 20080131

Docket: A-37-08

Citation: 2008 FCA 40

Present: **RICHARD C.J.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES, AMNESTY INTERNATIONAL, and JOHN DOE

Respondents

REASONS FOR ORDER

[1] The appellant, who was the respondent in the Federal Court, seeks an Order staying the Judgment of Justice Phelan dated January 17, 2008 allowing the respondents' application for a declaration invalidating the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) (*Canadian Council for Refugees v. Canada*, [2007] F.C.J. No. 1583, 2007 FC 1262).

[2] The STCA is an agreement pursuant to subsection 102(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims. The essence of the STCA is expressed at article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry [...] and makes a refugee status claim". Similar agreements between European Union (EU) member states have existed for many years.

[3] Justice Phelan held that the Governor in Council exceeded its jurisdiction when it adopted Regulations designating the U.S. a safe third country and putting into operation the STCA, as he was of the view that the U.S. did not comply with its non-refoulement obligations under article 33 of the *Convention relating to the Status of Refugee*, 189 U.N.T.S. 150 (April 22, 1954), or the *Refugee Convention* (RC), and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987) or *Convention against Torture* (CAT). He further held that the return of a refugee claimant from Canada for a refugee determination by the U.S. asylum and refugee system would violate sections 7 and 15 of the *Charter of Rights and Freedoms* (*Charter*) because of the U.S.'s apparent failure to comply with its non-refoulement obligations.

[4] Justice Phelan's judgment will become effective on February 1, 2008, at which point the STCA, which has been in effect since December 2004, will cease to operate in Canada.

[5] The appellant seeks an Order to stay Justice Phelan's judgment until such time as this Court has had an opportunity to consider and render its decision.

[6] The appellant submits that the requirements of a stay have been met as: there are serious issues to be determined, the appellant will suffer irreparable harm and the balance of convenience favours the appellant. The appellant also requests that this proceeding be expedited.

[7] A brief history of the STCA between Canada and the United States and its implementation in Canada is found in the affidavit of Bruce A. Scoffield sworn September 19, 2006 which was filed in the proceedings before Justice Phelan. Mr. Scoffield is the Director for Operational Coordination in the International Region, Citizenship and Immigration Canada.

> Canada and the U.S. have a long history of cooperation relating to the movement of persons across their shared border. A formal joint commitment to bilateral responsibility sharing came in 1995 through the adoption of the "Shared Border Accord" ("SBA"). In December 1995, a preliminary draft of a responsibility sharing agreement based on the Safe Third Country concept was made public. [...] (para. 16)
>
> [...]
>
> This joint commitment was reaffirmed on December 12, 2001 when the then Minister of Foreign Affairs, the Honourable John Manley, and the Director of the U.S. Office of Homeland Security, Governor Tom Ridge, announced the "Smart Border Declaration" and associated Action Plan. The Declaration and Action Plan committed the two governments to collaborative efforts to enhance the security of our shared border while facilitating the legitimate flow of people and goods. One of the thirty-two specific commitments agreed in the Action Plan was the negotiation of a bilateral safe third country agreement. (para. 19)
>
> [...]
>
> Canada and the U.S. signed the Agreement on December 5, 2002. In its preamble, the two governments set out their objectives related to international cooperation, burden and responsibility sharing. The two governments recognized that the sharing of responsibility for

refugee protection must include access to a full and faire refugee status determination in order to guarantee the effective implementation of the Refugee Convention and the Convention against Torture. [...] (para. 24)

The Agreement applies to situations where a refugee claim is made to one party by a refugee claimant who arrives at a land border port of entry directly from the territory of the other party. The Agreement generally assigns responsibility for adjudicating refugee claims in such cases to the "country of last presence". [...] For the moment, the Agreement is limited in application to refugee claims made at ports of entry where the movement of refugee claimants across the border can easily be observed and the country of last presence can readily be established. [...] (para. 25)

Following a final round of negotiations on the Agreement in the fall of 2002, authority was sought, further to *IRPA* s. 102(1)(a), to designate the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and approval of the Agreement and authority to sign it was al so requested. *IRPA* s. 102(2) required that the Governor in Council consider four factors when considering designating a country as safe. These are: (1) whether it is a party to the Refugee Convention and the Convention against Torture; (2) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention against Torture; (3) its human rights record; and (4) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection. (para. 26)

[...]

Draft implementing regulations were pre-published in the *Canada Gazette Part I* on October 26, 2002. During the public comment period, the government received input from academics, members of the legal community and NGOs. The UNHCR also provided comments relating to the draft regulations. [...] In November 2002, the House of Commons Standing Committee on Citizenship and Immigration held hearings on the draft regulations, and subsequently released a report recommending a number of amendments. The government response to that report was tabled in the Hose of Commons on May 1, 2003, and noted that the Government accepted, in whole or in part, twelve out of seventeen recommendations made by the committee. [...] (para. 28)

[...]

Final regulations were published in the *Canada Gazette Part II* on November 3, 2004. [...] (para. 31)

Two additional rounds of consultations were undertaken by the Government prior to implementation of the Agreement, focusing on the development of operational instructions and manuals. [...] (para. 32)

[...]

A monitoring plan for UNHCR staff in both Canada and the U.S. was jointly agreed upon by each government. UNHCR's mandate under this plan is to assess whether implementation of the Agreement is consistent with its terms and principles as well as with international refugee law. [...](para. 34)

[...]

The UNHCR is presently engaged with the two governments in a review of the first year of the Agreement's implementation which addresses, *inter alia*, specific observations and recommendations made by UNHCR as a result of its monitoring activities. Although the review is not yet final, UNHCR's Representative did provide an overview of UNHCR's assessment of the Agreement's first year to the Standing Committee on Citizenship and Immigration when he appeared as a witness on May 29, 2006. In his remarks, Mr. Asadi noted that overall UNHCR's findings were positive. (para. 36)

[...]

In response to a question from a member of the Committee, Mr. Asadi went on to state that "We consider the U.S. to be a safe country. Otherwise we would have not agreed to do this monitoring and we would have said so at the very beginning." [...] (para. 38)

[...]

Distinct from the monitoring and oversight of implementation of the Agreement itself is the Government's continuing review of the factors relevant to the designation of the U.S. as a safe third country. Prior to the signing of the Agreement and since its implementation, the Government has continued to monitor developments in U.S. law and policy which could have an impact on the integrity of the Agreement, as mandated by the November 2004 Order in Council on directives for ensuring a continuing review of factors set out in s. 102(3) of *IRPA* with respect to countries designated under s. 102(1)(a) of *IRPA*. The Government makes use of numerous sources of information to this end, including academic and NGO commentary, diplomatic reporting from Canadian missions in the U.S., our ongoing dialogue with the UNHCR, and regular exchanges with American officials. [...] (para. 42)

[8] In summary, Canada and the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner.

[9] The Governor in Council (GIC) promulgated regulations under the authority of subsections 102(1) and 5(1) of the *IRPA* to implement the STCA. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter.

[10] The respondents in this appeal, the applicants in the proceeding before Justice Phelan, three advocacy groups and one individual, challenged the validity of the GIC's designations of the U.S. as a safe third country.

[11] Justice Phelan declared the regulations *ultra vires* and contrary to sections 7 and 15 of the *Charter* on the ground that the U.S. is not a safe third country that complies with the non-refoulement requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*.

[12] The result of invalidating sections 159.1-159.7 of the *Immigration Refugee Protection Regulations* is the termination of the operation of the STCA in Canada.

[13] In allowing the application, Justice Phelan certified the following questions:

1. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?

2. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?

3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(*e*) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

[14] The appellant has appealed the judgment by a notice of appeal dated January 18, 2008. The appellant brings this motion under Rule 398(1)(*b*) of the *Federal Court Rules* for a stay of the Judgment pending the determination of the appeal, and seeks an Order expediting the appeal proceedings.

[15] This Court has authority to grant a stay pending an appeal before it, including the stay of an order that declares legislation to be invalid or that infringes the *Charter* pending a final determination of the issues.

[16] Rule 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, as amended, permits this Court to stay an Order of the Federal Court:

398.(1) On the motion of a person against whom an order has been made,	**398.**(1) Sur requête d'une personne contre laquelle une ordonnance a été rendue :

(a) where the order has not been appealed, the court that made the order may order that it be stayed; or (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.	a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance; b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

[17] Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

[18] A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311).

Serious Issue

[19] Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

[20] In addition to the certified questions, the applicant for a stay raises other issues concerning the judge's findings of fact.

[21] The respondents do not dispute that there are serious issues raised in this case based on the questions certified by Justice Phelan. However, they do not accept the further issues raised by the appellant.

[22] The issues raised on appeal are not frivolous or vexatious. Therefore, the applicant has satisfied the first stage of the three-fold test for a stay.

Irreparable Harm

[23] Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

[24] The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81).

[25] The Supreme Court of Canada has held that the public interest is to be widely construed in *Charter* cases:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned

> legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights (emphasis added) (*RJR-MacDonald*, para. 73).

[26] As noted by the Supreme Court of Canada in *RJR-MacDonald*, above, the public interest considerations will weigh more heavily in a suspension case than in an exemption case where the public interest is more likely to be detrimentally affected. Since the operation of the STCA would be suspended by the operation of the judge's order, this is clearly a suspension case.

[27] The applicant for a stay alleges that the appellant will suffer irreparable harm in other respects, which can be summarized as the likelihood of an influx of refugees into Canada from the United States and the corresponding negative impact on border services. This allegation is supported by the affidavit of George Bowles sworn on December 17, 2007.

[28] The respondents claim that irreparable harm does not exist merely when there will be administrative inconvenience or expense.

[29] The respondents submit that the appellant will not suffer irreparable harm if Justice Phelan's declaration is permitted to take effect. In the alternative, the respondents submit that irreparable

harm will be suffered on both sides, but that the harm to the respondents outweighs any alleged harm claimed by the appellant. However, at this second stage of the test, the Court is called upon to consider the harm that the applicant will suffer if the stay is not granted.

[30] I am satisfied that the applicant for a stay has satisfied the second requirement of the three-stage test.

Balance of convenience

[31] Since the applicant is a government institution, the Court must consider the applicant's inconvenience as well as the respondents' convenience.

[32] Once there is some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the government's responsibility for promoting the public interest, a legislative scheme under attack is presumed to benefit the public interest, *RJR-MacDonald*, above, at paras. 71-80.

[33] These principles were subsequently reiterated in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, at para. 9:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law – in this case the spending limits imposed by s. 350 of the Act – is directed to the public good and serves a valid [page 771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR—MacDonald was of s. 2(b). **The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult**

> **matter.** It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (emphasis added).

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

[35] The public interest groups, who are the respondents in this application for a stay, will suffer no personal harm. The respondent, John Doe, has been living in the United States since 2000 and his claim for protection is still pending.

[36] However, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald*, above, at para. 66).

[37] When a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR-MacDonald*, above, at para. 68).

[38] The respondents relied on three affidavits (the Moreno affidavit, the Giantonio affidavit and the Benatta affidavit) to demonstrate the public interest component of their position.

[39] The Moreno affidavit states that she was granted refugee status in Canada but that her common-law partner was not and was returned to the U.S. and detained. He was subsequently

deported to Honduras and three months later he was killed. There is no evidence that he made a refugee claim in the U.S. or of the circumstances surrounding his deportation.

[40] Patrick Giantonio is the Executive Director of the Vermont Refugee Assistance. He gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the STCA and were deported back to Columbia by the U.S. There is no information concerning the proceedings followed in the U.S.

[41] The Benatta affidavit establishes that, on the same day Mr. Benatta's U.S. asylum claim was rejected in December 2001, he was indicted for possession of false documents. These charges were subsequently dropped by a judge who described them as "a shame". However, Mr. Benatta remained in detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection.

[42] A further affidavit filed by the applicant for a stay (the Soskin affidavit) discloses that Mr. Benatta did get a hearing for his asylum application in the U.S. on two occasions. By Statement of Claim dated July 16, 2007 filed in the Ontario Superior Court of Justice, Mr. Benatta commenced an action against The Queen in Right of Canada and various government agencies claiming damages arising out of his alleged illegal transfer to authorities in the U.S. This claim has yet to be adjudicated.

[43] The affidavit of David Martin, a professor of law at the University of Virginia, with over 27 years of experience in the study and practice of U.S. immigration and refugee law, sworn July 31, 2006 and filed on behalf of the applicant for a stay, states as follows:

> 229. Therefore, although there have been some unfortunate and misguided steps taken by the U.S. government or certain of its personnel in the treatment of prisoners in government custody, the U.S. legal system ultimately responded and has now set forth explicit laws and rulings both forbidding cruel, inhuman, and degrading treatment and dictating that detainees are covered, at a minimum, by common Article 3 of the Geneva Conventions.

[44] The three affidavits filed by the respondents do not establish that the public interest is at risk in accordance with the standard established by the Supreme Court of Canada.

[45] In his reasons for judgment, Justice Phelan identified three issues, which individually and collectively undermine the reasonableness of the GIC's conclusion of U.S. compliance: 1) the rigid application of the one-year bar to refugee claims; 2) the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion; 3) the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (Reasons for Judgment, para. 239).

[46] The respondents argue that, for the time being at least, this decision represents the law. However, it is this very decision that is the subject of an appeal and constitutional review in this Court.

[47] At the hearing, counsel for the respondents suggested as an alternative to a stay of the Order of Justice Phelan that the Court consider granting a stay exempting the groups referred to by Justice Phelan in paragraph 239 of his reasons from the application of the STCA.

[48] Counsel for the applicant for a stay argued that this proposal would have the same effect as a suspension of the Regulations.

[49] Counsel for the applicant for a stay noted that the STCA has been in effect now for more than three years (December 29, 2004 to January 18, 2008).

[50] Applying the principles enunciated in the decisions of the Supreme Court of Canada and without pre-judging the outcome of any appeal, I am satisfied that the public interest in maintaining in place the Regulations made pursuant to legislative authority pending complete constitutional review outweighs any detriment.

[51] I find that the balance of convenience favours granting the stay pending the appeal from the judgment of the Federal Court.

Disposition

[52] I conclude that the issues in this appeal deserve full appellate review on their merits before ordering a suspension of the *Safe Third Country Agreement* between the Government of Canada and

the Government of the United States of America (U.S.) and that the application for a stay should be granted.

[53] Accordingly, the Judgment of Justice Phelan dated January 17, 2008 (Reasons for Judgment 2007 FC 1262, November 29, 2007) invalidating the Regulations implementing the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) will be stayed until such time as this Court has heard and determined the appeal.

[54] The respondents agree with the appellant that it would be in the interest of justice to expedite this appeal and the Court so orders. Accordingly, counsel for the parties to the appeal will provide the Court with a schedule for the timely completion of the steps in the appeal together with a requisition for a hearing.

"J. Richard"

Chief Justice

FEDERAL COURT OF APPEAL
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-37-08
(APPEAL FROM A JUDGMENT OF JUSTICE PHELAN DATED JANUARY 17, 2008.)	
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES, AMNESTY INTERNATIONAL, and JOHN DOE
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	January 30, 2008
REASONS FOR ORDER BY:	Richard C.J.
DATED:	January 31, 2008

APPEARANCES:

Mr. Greg G. George Ms. Matina Karvellas	FOR THE APPELLANT
Ms. Barbara Jackman Mr. Andrew Brouwer Ms. Leigh Salsberg	FOR THE RESPONDENTS (CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES and JOHN DOE)

SOLICITORS OF RECORD:

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Jackman & Associates Toronto, Ontario	FOR THE RESPONDENTS (CANADIAN COUNCIL FOR REFUGEES, CANADIAN COUNCIL OF CHURCHES and JOHN DOE)

18p

Tab 17

Paras Cited: 46, 56, 84-86, 95

CITATION: Council of Canadians v. Canada (Attorney General), 2015 ONSC 4601
COURT FILE NO.: CV-14-513961
DATE: 20150717

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE COUNCIL OF CANADIANS, THE CANADIAN FEDERATION OF STUDENTS, JESSICA McCORMICK, PEGGY WALSH CRAIG, and SANDRA McEWING Applicants	*Steven Shrybman, Louis Century and Lucy Chislett*, for the Applicants
– and –	
HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA Respondent	*Christine Mohr and Andrea Bourke*, for the Respondent
– and –	
CHIEF ELECTORAL OFFICER OF CANADA and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION Intervenors	*Nadia Effendi*, for the Chief Electoral Officer of Canada *Brendan van Niejenhuis and Justin Safayeni*, for The British Columbia Civil Liberties Association

HEARD at Toronto: July 2 and 3, 2015

REASONS FOR DECISION

STINSON J.

Introduction

> *"Every citizen of Canada has the right to vote in an election of members of the House of Commons… ."*[1]
>
> *"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 right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside."*[2]
>
> *"There is a fine balance between facilitating the franchise and protecting an election's integrity. To preserve public trust in the electoral system, this balance has to be defined, understood and respected."*[3]

[1] This case involves an examination of Parliament's most recent efforts at finding the balance between facilitating the exercise of Canadians' right to vote and prescribing appropriate procedures for the conduct of federal elections. It also involves a consideration of the role of the courts in granting interim relief at the early stages of the judicial process, when litigants challenge the constitutionality of electoral legislation.

[2] A federal election is scheduled to take place in Canada not later than October 19, 2015, a little more than three months from now. In anticipation of that event, the applicants have brought a motion for an interlocutory injunction to suspend the operation of one provision of the *Fair Elections Act* ("*FEA*")[4] pending the outcome of an application commenced by them seeking a declaration that a number of provisions of the *FEA* are unconstitutional. That application, and this injunction motion, are founded on the applicants' assertion that various aspects of the *FEA* contravene the *Canadian Charter of Rights and Freedoms*. While this decision will address the availability of the injunctive relief sought, the ultimate determination of the constitutionality of the challenged legislation will not be made until the full application can be argued, something the parties agree could not be accomplished before the upcoming election.

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[1] *Canadian Charter of Rights and Freedoms*, s. 3.
[2] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519 ("*Sauvé # 2*"), at paras. 1, 9, per McLachlin C.J.C.
[3] Harry Neufeld, *Compliance Review – Interim Report*: *A Review of Compliance with Election Day Registration and Voting Process Rules*, report commissioned by Elections Canada following the 2011 General Election (January 15, 2013), at p. 34.
[4] *An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts*, S.C. 2014, c. 12.

[3] The full application hearing will entail a much broader examination of various changes enacted by the *FEA* than arise on this injunction motion, which is concerned with one specific amendment. A great deal more evidence will be placed before the court for that hearing. It will also include submissions by the parties, and a possible determination by the court, concerning whether, if the legislation violates s.3 of the *Charter*, it can be justified by the government under s.1.[5] The parties' evidence and arguments at this preliminary stage of the litigation did not address s.1. Instead, they were confined to the availability and suitability of an interim determination whether one particular amendment that would otherwise form part of the rules governing the upcoming election should remain in place or be suspended pending the final decision as to its constitutionality.

Overview

[4] The regime for the conduct of federal elections in Canada is governed by the *Canada Elections Act* ("*CEA*").[6] That statute contains a comprehensive code of the rules and procedures concerning the electoral process, including electoral rights, registration of electors, and election procedures and vote counting. It empowers the Chief Electoral Officer ("CEO") to exercise general direction and supervision of elections and to perform all functions necessary for the administration of the *CEA*. In the past, among other things, the CEO has used that authority to conduct public outreach and voter education programs, and also to prescribe the types of identity documents that may be accepted at polling stations to establish voters' identities and addresses.

[5] The *CEA* has a long history. It has been the subject of many reviews and studies, by the CEO and others under his direction, and by parliamentary committees. It has also been the subject of a large number of legislative amendments over the years. It has been examined by the courts on numerous occasions, both as to its interpretation and application and also as to its constitutionality. For example, at one stage the *CEA* prohibited all prison inmates from voting in federal elections, regardless of the length of their sentences. This section was found by the courts to be unconstitutional as an unjustified denial of the right to vote guaranteed by s.3 of the *Charter.*[7] Parliament responded to that litigation by enacting a new provision that denied the right to vote to all inmates serving sentences of two years or more. It, too, was found to be unconstitutional and was not saved by s.1 of the *Charter*.[8]

[6] In 2007, by means of Bill C-31, Parliament enacted changes to the *CEA* imposing new voter identification requirements on electors. Prior to these changes, an elector on the list of

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[5] Section 1 reads: "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."
[6] S.C. 2000, c. 9.
[7] *Sauvé v. Canada (Attorney General),* [1993] 2 S.C.R. 438 ("*Sauvé #1*").
[8] *Sauvé #2,* note 2 above.

electors did not have to produce identification in order to vote, but rather only needed to state his or her name and address to the clerk at the polling station. The new identification requirements were challenged as a violation of the unqualified right to vote guaranteed by s.3 of the *Charter*. In *Henry v. Canada (Attorney General),*[9] the changes were found to violate s.3 because they interfered with the right of those citizens who were unable to produce the required documentation to play a meaningful role in the electoral process by precluding them from voting. The impugned provisions were found to be lawful under s.1 of the *Charter,* however, because the limitations (and an accompanying provision that made it possible for voters who lacked the required identification documents to establish their identity by way of vouching by another qualified elector) constituted a reasonable and demonstrably justifiable limit on the right to vote.

[7] In June 2014, Parliament enacted Bill C-23, the *FEA*, which amended various provisions of the *CEA*. Among the changes implemented were revisions to the rules and procedures concerning proof of identity and residence address by electors at the polling station when they attend to cast their vote. The changes expressly prohibited the use by voters on the list of electors of the Elections Canada-issued Voter Information Card ("VIC") to prove their identity and address. As well, the former vouching process was replaced by a so-called "attestation" process, which is limited to proving address (but not identity) by this means.

[8] As matters stand now, in order to obtain a ballot to vote in a federal election, all electors, including those on the list of electors, must have identification document(s) to prove their identity and residence. For most electors, this simply means producing a valid driver's licence. According to the applicants' evidence, however, nearly four million Canadians do not have a driver's licence, and because few will carry with them any other document showing their current address, many may have difficulty providing the proof of name and address now required by the amended *CEA*. The applicants contend that those most affected are youth, Aboriginals, elderly electors in care facilities, homeless electors and the thousands of electors who will move during the election period.

[9] The applicants assert that for such electors, prior to the passage of the *FEA*, the *CEA* contained various safeguards that facilitated their exercise of their democratic franchise. These included the authority of the CEO to implement public education and information programs to inform Canadians about the electoral process and their democratic rights, and to determine and authorize the kinds of identification documents that electors could use to prove their identity and residence (including the VIC) and the former vouching process. The applicants complain that the *FEA* curtailed or eliminated these powers. They argue that, without recourse to these safeguards, the administrative burden of obtaining a ballot will effectively deprive eligible electors (including many on the list of electors) of their right to vote in the next election, and for certain groups of eligible electors, their equality rights as well. The constitutionality of these various

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[9] 2010 BCSC 610 ("*Henry BCSC*"), aff'd 2014 BCCA 30 ("*Henry BCCA"*).

changes – including whether they violate s.3 or whether they are saved by s.1 of the *Charter* – will be determined in the main application.

[10] In this preliminary injunction motion, the applicants seek to restore the authority of the CEO to authorize electors to use their VIC to prove their identity and address. They therefore ask the court to suspend the operation of s.46(3) of the *FEA*, the provision by which the *CEA* was amended by Parliament to prohibit the CEO from accepting the VIC as proof by electors of their identity or address as part of the voting process, for purposes of the upcoming federal election.

The parties

[11] This proceeding has been commenced by an alliance of parties. They are the Council of Canadians, the Canadian Federation of Students, Jessica McCormick, Peggy Walsh Craig, and Sandra McEwing. The Council of Canadians is a non-partisan citizens' interest group. The Canadian Federation of Students is a national federation of student organizations representing over half a million students from over 80 university and college student unions across Canada. Jessica McCormick was, at the time this application was commenced, the national chairperson of the Canadian Federation of Students. Peggy Walsh Craig and Sandra McEwing are eligible voters in the electoral districts of Nipissing-Timiskaming and Winnipeg South respectively.

[12] The respondent, the Attorney General of Canada ("AGC"), represents the Government of Canada.

[13] After the litigation was commenced, two parties were added as intervenors, at their own instance. One is the CEO, who filed affidavit evidence concerning the role and function of his office and the administration of the electoral process, and the ongoing review and assessment by Elections Canada (the independent, non-partisan agency responsible for conducting federal elections and referendums) of the electoral process in Canada.

[14] The other intervenor is the British Columbia Civil Liberties Association ("BCCLA"), a non-profit and non-partisan advocacy group whose objects include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. BCCLA supported the position of the applicants.

The legal regime governing federal elections: the *Canada Elections Act* and the *Fair Elections Act*

Overview of the Canadian electoral system

[15] Canada's electoral system is a single member plurality system, referred to as "first past the post." In this system, one Member of Parliament is elected in each defined electoral district or riding to represent residents of that riding. It is therefore essential to ensure that only eligible voters residing in an electoral district be permitted to vote and that each elector votes only once.

[16] Section 3 of the *CEA* provides that an individual is qualified as an elector if he or she is 18 years old and a Canadian citizen on polling day. Section 6 provides that all qualified electors

are entitled to be included on the list of electors for the polling division in which they are ordinarily resident and that an individual is entitled to vote at the polling station for that polling division. Section 8 defines a person's residence for the purpose of voting as the place an individual adopts as his/her dwelling place, and that he/she intends to return to. This could include a shelter, long term care facility, university residence, or family home.

[17] A qualified elector must be registered on the National Register of Electors ("NRE") in order to cast a ballot. The list of eligible electors for each polling station is generated from the NRE, which is a permanent list maintained by Elections Canada that is updated on an ongoing basis through cooperation with federal and provincial agencies, including the Canada Revenue Agency, Citizenship and Immigration Canada, provincial and territorial drivers' licence agencies, and the bodies that prepare provincial and territorial voting lists. The NRE includes the name, sex, date of birth, civic address, mailing address and unique identifier for each registered voter. Eligible electors who are not on the NRE may register to be added to it online or by mail. They may also register to be added in person at an advance poll or at a polling station on election day.

[18] According to the most recent information available on the Elections Canada website, there are approximately 25 million Canadians listed on the NRE. As of November 2014, 92.4% of eligible electors were included in the NRE and, of all eligible electors, 84% were listed at their correct address.

[19] Once writs of election are issued, the NRE is used to generate a list of eligible voters for each polling division. This list is then revised throughout the revision period (from 33 days before election day until 6 days before election day). Revision activities are aimed at improving the accuracy of the NRE, and include door knocking by revising agents, usually targeted to high mobility neighbourhoods, student neighbourhoods, nursing homes and chronic care facilities.

[20] The preliminary list of electors generated by the NRE is sent to the Returning Officers who are responsible for each electoral district. Pursuant to s.95 of the *CEA,* each Returning Officer then sends a Confirmation of Registration (also known as a Voter Information Card or VIC) to all the individuals listed on the preliminary list of electors not later than 24 days before the election. Not later than the fifth day before election day, pursuant to s.102 of the *CEA*, a VIC is sent to every individual who is added to the list of electors during the revision period. In this fashion, electors whose names were omitted from the preliminary list but who have since registered to vote will also receive a VIC.

[21] The VIC contains the following information: the location of the polling station, the voting hours on election day, the location and hours for advance polls, a contact number, and notification that proof of identification and residence is required at the polls. The VIC is addressed to the named individual voter (or to "The Elector") at the indicated residence address.

[22] After the seventh day before election day and no later than the third day before election day, Returning Officers must prepare the official list of electors for each polling division for use

on election day. The list of electors for that polling division is sent to the Deputy Returning Officer in charge of that polling division and is used on election day.

Voter identification on election day

[23] As previously mentioned, prior to the 2007 amendments to the *CEA* effected by Bill C-31, an elector whose name was on the list of electors was not required to present any identification documents at a polling station in order to obtain a ballot. The identification requirements implemented in 2007 were found in s.143 of the *CEA*. That section, as it read prior to the most recent amendments enacted by the *FEA*, provided that in order to vote, an elector was required to establish his or her identity and residence in one of three ways:

> (1) by showing one piece of government-issued photo identification that established the elector's name and address (i.e. a driver's licence); or
>
> (2) by showing two pieces of identification authorized by the CEO, both of which established the elector's name and one of which established the elector's name and address; or
>
> (3) by having another elector from the same polling division "vouch" for him or her.

[24] In relation to the "two pieces of identification" mentioned in the old s.143(2), the CEO was previously empowered under s.143(2.1) to authorize as a piece of identification "any document, regardless of who issued it." Pursuant to that power, the CEO authorized 47 documents for use in this manner, some of which could be used to prove identity and others which could be used to prove residence.

[25] Examples of items that could be used to prove one's name included a health card, social insurance card, birth certificate, passport, Certificate of Indian Status, Certificate of Canadian Citizenship or citizenship card, credit/debit card with elector's name, employee card issued by employer, old age security identification card, student ID card, library card, a label on a prescription bottle or a hospital bracelet.

[26] Examples of items that could be used to prove one's name and address included a utility bill, bank statement, credit card statement, government cheque or cheque stub, residential lease, tax assessment, or a letter of confirmation of residence issued by a college, university, shelter, or long-term care facility.

[27] Prior to the *FEA,* if an elector was unable to obtain or produce any of the documents above, then that elector could still establish his or her identity and address by means of "vouching." The vouching process put in place by Bill C-31 in 2007, therefore, enabled a person without any proof of identity or address whatsoever still to cast a ballot. Such a person would attend the polling station on election day accompanied by another registered elector who lived in the same polling division and who could attest to her his or her identity and residence. The elector who was being vouched for was required to be orally advised of the qualifications for

electors prior to taking the prescribed oath. An elector was only permitted to vouch for one other person.

Past use of the VIC

[28] Historically, electors have been encouraged to bring the VIC to the polls on election day to help election officials readily determine the elector's polling division and/or riding. Following the January 2006 election, however, concerns were raised over the potential misuse of VICs. For example, in one riding, due to inaccuracies in the NRE, a small number of electors was permitted to vote in a riding where they did not reside, because they had received VICs addressed to their business addresses, in error. This and other issues prompted a review of the *CEA* by the House of Commons Standing Committee on Procedure and House Affairs ("PROC"), which focussed on the integrity and accuracy of the NRE, voter identification and voter fraud.

[29] In its report, PROC expressed concern about VICs being left in apartment lobbies or being discarded. PROC recommended the introduction of identification requirements and expressly indicated that VICs should not entitle a person to cast a ballot. In response to the PROC recommendations, Parliament enacted Bill C-31, which implemented the rules regarding voter identification that were the subject of the *Charter* challenge in *Henry*.[10] Those amendments did not, however, address the potential use of the VIC as a means of voter identification.

VIC pilot projects

[30] Following the 2007 amendments, the CEO addressed the question of what types of identification documents would suffice to meet the new requirements. In a November 2010 by-election, Elections Canada undertook a pilot project in which the CEO authorized the use of VICs to prove residence or identity at limited polling stations that served seniors, Aboriginals, and students. The elector was required to have one additional authorized piece of identification. The purpose of the pilot project was to facilitate voting by persons who might otherwise have difficulty meeting the new identification requirements on election day.

[31] The VIC pilot project was expanded during the 2011 general election to include 900,000 individuals in the same target groups. Approximately 400,000 of these persons used VICs to prove either identity or residence, though it is unknown how many used the VIC to prove residence and how many used it to prove identity. It is also unknown how many electors used the VIC in conjunction with a driver's licence, which would have rendered the VIC unnecessary as a piece of identification.

[32] Due to the perceived success of the pilot projects, the CEO made it clear that he intended to authorize the VIC for use by all electors in the next general election as part of the process by which they could establish identity or residence.

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[10] *Henry BCSC*, note 9 above; *Henry BCCA*, note 9 above.

The impugned *FEA* provision

[33] Following the 2011 general election, more concerns were raised about the integrity of electoral procedures. Elections Canada responded by commissioning an independent review of the extent, causes, and potential solutions to perceived problems of non-compliance with administrative rules and procedures by election officials at polling stations.[11] Subsequently, the Government introduced Bill C-23, the *FEA*. Bill C-23 was widely debated and discussed and, prior to its enactment, was the subject of several amendments.

[34] The specific provision of the *FEA* that is the subject of this injunction motion is s.46(3). It modified s.143 of the *CEA* and eliminated the authority of the CEO to allow the VIC to be used as a means of proving identity and residence at the polling station.

[35] The old and new versions of s.143(2), setting out the identification requirements for voting and registration, read as follows:

Old	New
s.143(2)(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or (b) two pieces of identification **authorized by the Chief Electoral Officer** each of which establish the elector's name and at least one of which establishes the elector's address.	s.143(2)(a) one piece of identification issued by a Canadian government, whether federal, provincial or local, or an agency of that government, that contains a photograph of the elector and his or her name and address; or (b) two pieces of **identification of a type authorized under subsection 2.1**, each of which establishes the elector's name and at least one of which establishes the elector's address.

[36] The old and new versions of s.143(2.1) read as follows:

[11] The Compliance Review – Interim Report authored by Harry Neufeld and cited at note 3 above was prepared as part of this process.

Old	New
s.143(2.1) For greater certainty, the Chief Electoral Officer may authorize as a piece of identification for the purposes of paragraph (2)*(b)* any document, regardless of who issued it.	s.143(2.1) The Chief Electoral Officer may authorize types of identification for the purposes of paragraph (2)(*b*). For greater certainty, any document — **other than a notice of confirmation of registration sent under section 95 or 102** — regardless of who issued the document, may be authorized.

[37] By means of this injunction motion, the applicants seek to stay the implementation of s.46(3) of the *FEA* and the consequent changes to s.143 of the *CEA* in advance of the upcoming general election. The effect of the injunction, therefore, would be to restore the discretion of the CEO to authorize the VIC as an identity and residence proving document should he so wish. The CEO has indicated that, should the court grant the interlocutory relief sought by the applicants, he intends to take the necessary steps to add the VIC to the approved list of identification documents, and to conduct the election on this basis.

The legal test for interlocutory injunctions to restrain the implementation of legislation on grounds of unconstitutionality

[38] The term "interlocutory injunction" is used to describe a court order that temporarily directs a party to do or refrain from doing a particular thing, before the court has a chance to decide the case on the merits following a full hearing. In the context of interlocutory injunctions that are sought on the grounds that certain government action is unlawful, such an order may be sought to stay or suspend the implementation of that new law or policy on the basis that it might eventually be found to infringe other laws, such as the *Charter.* Thus, an interlocutory injunction may be sought when there is insufficient time to undertake a full examination of the propriety of a new law or policy, but there is a concern that it will cause real and irreparable harm in the period before the legal process may be completed.

[39] It is important to acknowledge that, as a judge hearing and deciding a preliminary motion such as this, I am constrained in several ways. First, I must recognize that I do not have at hand all the information and arguments that will be available when the case is fully argued. Secondly, and in part due to the factor I have just mentioned, my comments on the evidence and the merits of the case must be viewed as preliminary only and not determinative of the merits of the underlying arguments or my view of the merits. As stated by the Supreme Court of Canada in

RJR-Macdonald v. Canada,[12] "a prolonged examination of the merits is generally neither necessary nor desirable" at the interlocutory injunction stage.

[40] Because the judge is being asked at an early stage in the proceedings to issue an order that will temporarily - and, potentially, significantly - affect the parties' legal rights, at a time before the parties have the opportunity to gather and present all their evidence and arguments and without the benefit of a full hearing, the courts have developed a well-recognized test to be applied when this type of judicial relief is sought. The party seeking the interim relief must satisfy the following requirements: (1) there is a serious issue to be tried; (2) irreparable harm would befall the applicant if the injunction were not granted; (3) the balance of convenience favours granting the injunction.[13]

[41] The first step in the analysis, therefore, requires the court to make a preliminary assessment of the merits of the case to ensure that there is a **"serious issue to be tried."** The threshold to establish that there is a serious issue to be tried is a low one[14] and can be satisfied upon demonstrating that the claim is not frivolous or vexatious.[15]

[42] According to the Supreme Court in *RJR,* this low threshold is especially appropriate in *Charter* cases because it is difficult and undesirable to decide complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding. Thus, courts are not to undertake a s.1 analysis at this stage.[16] Further, courts should not attempt to make a tentative determination on the merits given the incomplete evidentiary record available.[17]

[43] Despite this low threshold for finding there is a serious issue, the Court in *RJR* notes that a more searching inquiry should be taken into the seriousness of the issue if the relief sought is final relief.[18]

[44] While the urgency of the relief sought is a factor to consider at this stage, according to *Sharpe on Injunctions*,[19] "urgency will not, however, always cause a court to overcome the

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[12] [1994] 1 S.C.R. 311 ("*RJR*"), at para. 50.
[13] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 ("*Metropolitan Stores*"); *RJR*, note 12 above.
[14] *RJR,* note 12 above, at para. 55.
[15] *RJR*, note 12 above, at para. 49.
[16] *RJR*, note 12 above, at para. 61. An analysis under s.1 of the *Charter* involves an enquiry into whether, despite a breach of a *Charter* right, a law may be found to be valid on the ground that it is demonstrably justifiable as a reasonable limit in a free and democratic society. See, generally, *R. v. Oakes*, [1986] 1 S.C.R. 103.
[17] *RJR,* note 12 above, at para. 50; *Metropolitan Stores,* note 13 above, at para. 42.
[18] *RJR*, note 12 above, at para. 51.

reluctance to decide the merits at the interlocutory stage, particularly where enforcing an injunction would raise other complex issues of public administration."

[45] The second step in the analysis requires the court to determine whether the **applicant would suffer irreparable harm** if the injunction request were refused.

[46] At this stage, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.[20] The harm to the respondent or to the public interest should be considered at the third stage, not at the second.[21]

[47] "Irreparable" refers to the nature of the harm suffered: it is harm which either cannot be quantified in monetary terms or which cannot be cured.[22]

[48] The final element of the test is the so-called **balance of convenience**, sometimes described as the balance of inconvenience. In determining the balance of convenience, the court assesses which of the parties would suffer greater harm from the grant or refusal of the remedy pending a decision on the merits.

[49] In all constitutional cases, the public interest is a "special factor" which must be considered in assessing where the balance of convenience lies: the court in *RJR* noted that the public interest must be given "the weight it should carry."[23]

[50] "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[24]

[51] While the government does not have a monopoly on the public interest,[25] the onus of demonstrating irreparable harm to a public authority is less than that of a private applicant. The test will usually be satisfied upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation was

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[19] Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, 4th ed. (Toronto: Canada Law Book, 2012), at 3-76 ("*Sharpe on Injunctions"*).
[20] *RJR,* note 12 above, at para. 63.
[21] *RJR,* note 12 above, at para. 62.
[22] *RJR,* note 12 above, at para. 64.
[23] *RJR*, note 12 above, at para. 69.
[24] *RJR,* note 12 above, at para. 71.
[25] *RJR,* note 12 above, at para. 70.

enacted pursuant to that responsibility. The court should usually assume that irreparable harm to the public interest would result from the staying the implementation of that legislation.[26]

[52] When the nature and declared purpose of legislation is to promote the public interest, a motions court should not investigate whether the legislation actually has such an effect. It must be assumed to do so. As stated in *Sharpe on Injunctions*:

> A constitutional challenge has implications for the public at large. If interlocutory injunctions were granted too readily in constitutional cases, suspending the operation of duly enacted laws prior to a determination on the merits of their constitutional validity, the orderly function of government and the application of laws enacted by democratically elected legislatures for the common good could be disrupted. [27]

[53] In order to overcome the assumed benefit to the public interest arising from the continued application of duly enacted legislation, an applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.[28] When a private applicant alleges that the public interest is at risk, that harm must be demonstrated.

Positions of the Parties

Applicants

[54] The applicants contend that their case meets all three elements of the test for interlocutory relief.

[55] In relation to the first branch, a serious issue to be tried, they submit that any restriction to or limitation on the right to vote, including identification requirements, is a violation of s.3 of the *Charter*. By imposing stricter identification requirements than those which were enacted by the 2007 amendments to the *CEA* (which were themselves found to breach s.3, although upheld under s.1 of the *Charter*) the changes made by the *FEA* are liable to be set aside as unconstitutional. The specific prohibition against the use of the VIC as an acceptable form of identification, the argument continues, is a further unjustifiable and unlawful limitation on the right to vote, and therefore liable to be set aside, too. These questions demonstrate that the applicants' case does involve serious issues, and thus the first branch of the test is satisfied.

[56] In relation to the second branch of the test, irreparable harm, the applicants submit that disenfranchisement is, by definition, an irreparable harm. Once an election has been held, the constitutional right to vote in that election will be gone and the right of those who were unable to

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[26] *RJR,* note 12 above, at para. 76.
[27] Sharpe, *Injunctions and Specific Performance*, note 19 above, at 3-78.
[28] *RJR,* note 12 above, at para. 85.

vote due to the impugned limitations will be lost forever. Those citizens will have lost the right to participate in the selection of the new Members of Parliament who will thereafter govern them. The applicants argue that eliminating the CEO's discretion to authorize the VIC as an acceptable form of identification will result in effective denial of the right to vote of thousands of Canadians, harm to the integrity of the electoral process through the possibility that lost votes will have affected the election result, and harm to the legitimacy of Canadian democracy. The applicants submit that the test of irreparable harm is easily met.

[57] In relation to the third element of the injunction test, balance of convenience, the applicants contend that the demonstrated public interest in favour of granting an injunction outweighs the presumed public interest in favor of upholding the impugned provisions. They submit that the risk arising from disenfranchising electors by prohibiting the use of the VIC at the next election is greater than the risk of someone making unlawful use of a VIC. Further, the risk of harm to public confidence in the electoral process due to prohibiting the use of the VIC is greater than that which would arise from allowing the CEO to authorize the use of the VIC. Section 3 *Charter* rights have "special importance" and thus limits on the right to vote require careful examination. Since the evidence in this case supports the conclusion that the impugned provisions imperil the right to vote, which denies individuals their democratic rights and undermines the legitimacy of Canadian democracy, this public interest rebuts the presumed public interest in enforcing a duly enacted law.

[58] Finally, the applicants submit that the risk of harm asserted by the government is unsubstantiated and remote. They argue that there is no evidence demonstrating that restoring the discretion of the CEO to authorize the use of the VIC would compromise the government's objectives of protecting against fraud and upholding the integrity of the electoral system, given that there are safeguards against abuse: the VIC must be accompanied by another authorized piece of identification proving identity and the *CEA* contains significant criminal sanctions for fraud. Given that the right to vote is a fundamentally important right that cannot be lightly interfered with, where the right to vote is at stake, the courts should be willing to grant an injunction despite their reluctance to grant interlocutory injunctions in other elections cases.

BCCLA

[59] BCCLA intervenes in support of the applicants' position, in particular focusing on the balance of convenience. It argues that there should be no public interest presumption in election cases due to the expansive nature of the s.3 *Charter* right and its foundational importance in our legal system. The ability to vote a legislature into power grounds and legitimizes the laws that legislature enacts and laws that purport to curtail voting rights therefore undermine the very source of their legitimacy.

[60] The BCCLA also points out that, while there have been no instances of a court granting an interlocutory injunction in an elections case, this does not mean that the court does not have the authority to do so in a proper case. In *Harper v. Canada (Attorney General)*,[29] the majority noted that injunctions against the enforcement of a law on grounds of alleged unconstitutionality will succeed "in clear cases." BCCLA submits that this is a clear case requiring court intervention in light of the serious risk of disenfranchisement to tens of thousands of individuals.

Chief Electoral Officer

[61] The CEO intervened in order to provide background information relating to the electoral system and the impact of any interlocutory injunction on election preparedness. The CEO took no position on the merits of the case.

[62] The CEO stated that, if this court were to restore his discretion to authorize the VIC as an identity and residence-proving document, he would add it to the list of acceptable documents for the upcoming general election.

[63] The CEO also emphasized that his office has been preparing poll instruction manuals and other materials for the upcoming election in compliance with the *CEA* as amended by the *FEA*. Consequently, modifications to some materials will be required if the implementation of s.46(3) is suspended. In particular, the content of the VICs, which have already been printed in "template" form, will need to be modified to remove the statement that they cannot be used as an identification document at the polls. It is highly unlikely that there is sufficient time to reprint the template VICs entirely, so the alternative now is to cover that statement with black ink.

Respondent AGC

[64] The respondent AGC submits that the applicants have failed to satisfy any of the elements of the test for injunctive relief.

[65] First, the respondent argues that there is no serious issue as to whether s.46(3) of the *FEA* infringes s.3 of the *Charter*. The crux of this submission by the respondent is that electors do not have a *Charter* right to prove their identity or residence by using the VIC. Moreover, the respondent submits that the applicants have not demonstrated a causal link between the removal of CEO's discretion to authorize the VIC and any alleged inability of electors to vote.

[66] The respondent further argues that no irreparable harm will result from denying injunctive relief. Authorizing the use of the VIC will not be a panacea for students, the homeless, Aboriginals, or the elderly, and is no more enfranchising than any of the other 47 options to prove identification which are authorized by the CEO. The respondent submits that the

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[29] *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764 (*Harper #1*), at para. 9.

applicants have provided no substantial evidence that those who used the VIC to vote in the pilot projects would have otherwise been unable to cast a ballot. In fact, individuals who have difficulty proving their address due to high mobility will also be the least likely to receive a VIC, since they are the least likely to be registered on the NRE. Finally, the safeguards in the *CEA*, such as letters of confirmation of residence and the attestation procedure, provide meaningful options for those individuals who lack driver's licences or other residence-proving documents.

[67] In relation to the final element of the test, balance of convenience, the respondent contends that it is not open to this court to issue an interlocutory injunction in an election case, because the court is bound by *stare decisis* to follow the decisions of higher courts on this issue. The respondent argues that those courts have made it clear that there is a rule against granting interlocutory relief in election cases, and that I am bound by that rule.

[68] The respondent also argues that the court should apply the presumption that the legislation was enacted in the public interest, and thus the balance of convenience favours refusing the injunction. That presumption exists to ensure that courts do not overstep their proper role by suspending the operation of legislation before public authorities can fully and fairly respond. In election cases, where the constitutionality of the impugned provisions has not been fully examined, there is a heightened need to follow the presumption that the duly enacted legislative provisions are in the public interest pending a full hearing on the merits.

Issues and Analysis

Serious issue to be tried

[69] As previously mentioned, the threshold to establish a serious issue to be tried is a low one that may be satisfied upon demonstrating that the claim is not frivolous or vexatious. This low threshold is especially appropriate in *Charter* cases where there is limited available evidence at the interlocutory motion stage.

[70] In *Henry BCSC*,[30] and *Henry BCCA*,[31] the courts found that the previous voter identification requirements that were enacted by Parliament in the 2007 reforms to the *CEA* violated s.3 of the *Charter*. Given that the changes enacted by the *FEA* impose even stricter requirements for voter identification, it is logical to infer that they, too, would be found to violate s.3. The prohibition against the use of the VIC to establish identity or residence is, arguably, a further restriction on access to the polls since it restricts the means by which voters may establish their identity or residence in order to obtain a ballot.

[71] The respondent AGC argues that there is no serious issue that s.46(3) of the *FEA* infringes the *Charter* because it does not bar any qualified elector from casting a ballot and the

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[30] Note 9 above.
[31] Note 9 above.

government is not constitutionally obligated to make voting "convenient." In short, the respondent contends, there is no "constitutional right" to prove one's identity or residence by use of the VIC. It argues that the regime as enacted provides for a variety of methods for the elector to establish his or her identity and address. Thus, it says, the applicants' argument amounts to saying that precluding an elector from using the VIC is in and of itself sufficient to make the entire regime unconstitutional.

[72] The respondent's arguments highlight the fact that a determination of the VIC usage issue implicates the entire voter identification regime in the *CEA* and also raises evidentiary questions. At this interlocutory stage, however, the court does not have the benefit of all the evidence. Moreover, only s.46(3) is in question here, while other provisions of the *FEA* will be challenged in the full application. This demonstrates the difficulties faced by the court when considering a constitutional challenge to a subset of the elements of a legislative scheme at the interlocutory stage. In my view, only by assessing the regime as a whole can the significance and constitutionality of the various elements be weighed and considered in a proper context.

[73] The extent to which the prohibition against use of the VIC for purposes of establishing identity or residence further restricts voting rights, and in particular those of specific categories of electors, will depend upon the findings of the judge who hears the full application. Similarly, the question whether the new regime may be justified and upheld under s.1 of the *Charter* is a question for the applications judge. Suffice to say at this stage that these are not frivolous questions. At this juncture, therefore, and in particular in light of the low threshold applicable to this element of the test, I find that the applicants have demonstrated that their case raises a serious question to be tried.

Irreparable harm

[74] In *Frank v. Canada (Attorney General),*[32] the court was asked to grant a stay of a judgment of a lower court pending the disposition of an appeal to the Ontario Court of Appeal. The granting of a stay pending appeal has the effect of suspending the operation of a court order or decision until the full hearing and disposition of the appeal. Such a motion to stay requires the court to consider the same three-part test as a motion for an interlocutory injunction, namely, a serious question to be determined, irreparable harm and the balance of convenience.

[75] *Frank ONCA*[33] involved a constitutional challenge to the provisions of the *CEA* that suspended the voting rights of citizens who had been non-residents for five years or more, until they re-established residence in Canada. At the lower court level, after hearing the full application (not just an interlocutory motion), Penny J. held that the impugned provisions violated s.3 of the *Charter* and were not saved by s.1. He therefore made an order extending the

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[32] *Frank v. Canada (Attorney General),* 2014 ONCA 485, 12 O.R. (3d) 732 ("*Frank ONCA*").
[33] Note 32 above.

vote to all Canadian citizens resident outside Canada, regardless of the length of time they had lived outside Canada.

[76] The Attorney General commenced an appeal from the decision of Penny J., and sought a stay of his judgment pending the outcome of the appeal. The effect of a stay pending the appeal, therefore, would have been to restore the operation of the previous law and thus to prevent affected non-residents from voting while the appeal was pending. In his decision refusing the request for a stay, Sharpe J.A. recognized that disenfranchisement is an irreparable harm, writing:

> Once the election has passed, the constitutional right to vote in that election will be lost forever. If the election is decided by one or very few votes and if the judgment is affirmed on appeal, the stay requested by the Attorney General will have improperly disenfranchised voters whose vote could have changed the result of the election. That would constitute irreparable harm to the non-resident voters and to the public.[34]

[77] The respondent AGC submits that there is no evidence that eliminating the CEO's ability to authorize the VIC for voter identification purposes will disenfranchise anybody. It argues that the applicants have failed to establish a "causal link" between removing the CEO's authority to authorize the VIC and an impairment of their clients' ability to vote.

[78] Before me, extensive submissions were devoted to the merits of the case, that is, the evidence for or against the disenfranchising effects of s.46(3). It is not my function at this stage to decide the merits of the application. For the purposes of demonstrating irreparable harm, it is sufficient for the applicants to provide some evidence to support the conclusion that removing the VIC option could have the effect of disenfranchising electors, as a consequence of which irreparable harm will follow.

[79] The evidentiary record contains opinion evidence relating to the potential disenfranchisement of students, the homeless, the elderly, and those who may move during the election period. There is also evidence that the CEO has viewed (and used) the VIC as a means to enable various groups of electors to exercise their right to vote. A key mandate of the CEO is to facilitate voting. It may thus be argued that prohibiting the CEO from authorizing the VIC is an impairment of the facilitation of the right to vote. The more that the CEO's facilitation of the right to vote is impaired, the more difficult it is for people to vote. This would support the implication that s.46(3) may infringe or impair the voting rights of certain qualified electors and thus prevent them from voting.

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[34] *Frank ONCA,* note 32 above, at para 22.

[80] Bearing in mind that the same test of irreparable harm applies to the case I am deciding, in my view, the comments of Sharpe J.A. in *Frank ONCA*[35] quoted above apply equally to this case. In making that comment I am not overlooking the potential evidentiary and causation hurdles that the applicants will need to overcome to succeed in the main application. That said, if the interlocutory injunction is refused, and if the impugned provision (s.46(3) of the *FEA*) is ultimately found to be unconstitutional, there will be no way to restore the right of improperly disenfranchised voters to participate in a past election. In the words of Sharpe J.A. "[t]hat would constitute irreparable harm."

[81] I therefore conclude that the applicants have met the second branch of the test.

Balance of convenience

[82] I turn now to the final branch of the test for granting an interlocutory injunction: does the balance of convenience favour granting or refusing the relief sought by the applicants? The concern, of course, is that granting injunctive relief on a preliminary basis may be akin to granting judgment without affording the defendant the opportunity to mount a proper defence, something our justice system ordinarily avoids. Thus, the mere fact that the moving party has satisfied the "serious question to be tried" and the "irreparable harm" branches of the test does not mean the court should intervene, unless the court concludes that this final hurdle has been cleared.

[83] For the reasons previously discussed, in assessing the balance of convenience in the context of a motion for injunctive relief that would temporarily suspend the operation of a duly enacted law, ordinarily I should assume that the public interest would be served by upholding the legislation, pending full review of all parties' evidence and arguments. The applicants argue, however, that because voting rights – guaranteed by s.3 of the *Charter* – are in issue here, the public interest of ensuring broad participation in the electoral process should trump the public interest in applying the statute enacted by Parliament in the discharge of its constitutional responsibility to legislate the rules governing the conduct of elections.

[84] There is strong and long-standing appellate authority, however, stating that it is inappropriate to grant interlocutory relief in elections cases on the grounds of a constitutional challenge to electoral legislation. Indeed, the applicants acknowledged that there is no case in which an interlocutory injunction has been granted to stay the implementation of changes to the *CEA*. All of the decided cases relied upon by the applicants to demonstrate interlocutory relief in constitutional challenges involved legislation that did not relate to elections.

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[35] *Frank ONCA*, note 32 above.

[85] In the leading case of *Harper #1*[36] the Supreme Court considered the balance of convenience on a motion to stay an interlocutory injunction that had been granted by lower courts on the basis of an argument that certain *CEA* spending limitations were unconstitutional. In that case the Court said:

> This application is governed by the principles set forth in previous cases. On appeal the applicant Harper may seek alteration of these principles, but for the moment they govern. Applying these principles, the balance of convenience in this case favours granting the stay of the injunction. One of these principles is the rule against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes: *Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124; see also *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, per Beetz J., at p. 144; *Haig v. Canada*, [1993] 2 S.C.R. 995. In this case, allowing the injunction to stay in place will in effect give Mr. Harper the ultimate relief he seeks in his action, at least with respect to the current election. The trial judge, however, did not address this factor, nor the case law which addresses it.
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> It may also be noted that, in *Thomson Newspapers Co. v. Canada (Attorney General)*, S.C.C., No. 25593, May 7, 1997 (published in the Bulletin of Proceedings of the Supreme Court of Canada, 1997, at p. 882), this Court refused to grant a stay suspending the enforcement of the provisions mandating publication bans on opinion polls set forth in the *Canada Elections Act*, R.S.C., 1985, c. E-2, s. 322.1. In so doing, the Court relied on its previous decision in *Gould*, supra. The Court refused the stay even though the ultimate decision found the poll prohibition to be unconstitutional.[37]

[86] There is a long line of cases in which courts have stated that it is inappropriate to grant what would amount to final relief in relation to a pending election on an interlocutory basis, beginning with *Gould v. Attorney General of Canada*.[38] In my view, the relief sought on this

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[36] *Harper # 1*, note 29 above. In this case, the lower court had granted interlocutory injunctive relief that had the effect of suspending certain provisions of the *CEA* in the run-up to a pending election. The Supreme Court was asked to review that decision on an interlocutory basis and thus to decide whether it should remain in effect pending the hearing of the full appeal. In applying the same approach later followed by Sharpe J.A. in *Frank ONCA*, note 32 above, the Supreme Court considered the balance of convenience in granting or refusing the stay of the lower court order. The Court held that the rule against granting injunctive relief to suspend electoral laws meant that the balance of convenience favoured staying the lower court order.

[37] *Harper # 1*, note 29 above, at paras 7 and 8.

[38] *Gould v. Attorney General of Canada*, [1984] 2 S.C.R. 124, affirming [1984] 1 F.C. 1133 at p. 1140.

motion – the suspension of the prohibition against use of the VIC for identification purposes in the upcoming election – would be tantamount to final relief in relation to that topic for purposes of the upcoming election.

[87] Since the first pronouncement in *Gould*, Canadian courts have adhered to the rule against granting final relief in interlocutory proceedings involving constitutional challenges in elections cases. In *Metropolitan Stores,*[39] the Supreme Court cited *Gould* with approval and added that:

> Such cautious restraint respects the rights of both parties to a full trial… to think that the question of constitutional validity can be determined at the interlocutory stage is to ignore the many hazards of litigation, constitutional or otherwise … at this stage, even in cases where the plaintiff has a serious question to be tried or even a prima facie case, the court is generally much too uncertain as to the facts and the law to be in a position to decide the merits.

[88] Following this authority, in *Figueroa v. Canada (Attorney General),*[40] the Divisional Court overturned an injunction in an election case on the basis that the motion judge had failed to adhere to the binding precedent to this effect. There, the court wrote: "the public interest in the uniform, fair and orderly conduct of election procedures requires that cases like this be decided after a trial, not before a trial."[41]

[89] More recent decisions have continued to follow this rule, at times despite the judge's opinion that the injunction might have been warranted, but for the prohibition. For example, in *Tan v. British Columbia (Chief Electoral Officer)*,[42] Maczko J. of the British Columbia Supreme Court wrote: "were it not for the admonition of the Supreme Court of Canada, I might well have granted the injunction in this case. However, taking the law as it is following *Harper,* I do not consider it open to me to grant the injunction."

[90] Again, in *British Columbia Teachers' Federation v. British Columbia (Attorney General),*[43] the court referred to and ultimately followed *Harper #1*, stating:

> At para. 7, McLachlin C.J. referred to the principle against granting the equivalent of final relief in interlocutory challenges to electoral statutes, even in the course of elections governed by those statutes. It is apparent that to grant

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[39] *Metropolitan Stores,* note 13 above, at paras. 46, 47-50.
[40] *Figueroa v. Canada (Attorney General)* (1997), 34 O.R. (3d) 59 (Div. Ct.).
[41] *Figueroa*, note 40 above, at p. 61.
[42] *Tan v. British Columbia (Chief Electoral Officer)*, 2001 BCSC 704, 90 B.C.L.R. (3d) 372, at para. 17.
[43] *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2008 BCSC 1769, at para. 10.

> the injunction sought in the present case would, in effect, give the plaintiffs the ultimate relief they seek in this action, at least with respect to the upcoming election.

[91] One of the cornerstones of our common law system is the concept of *stare decisis* (Latin for "to stand by things decided"), also known as the doctrine of precedent, "under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."[44] In the case of higher court decisions on a particular legal point, lower courts are bound to follow them. To depart from this concept and to decide cases without regard to established lines of authority would be to invite chaos and uncertainty into our judicial system. Even where there may be a persuasive argument to depart from a higher court precedent, the Supreme Court has recently reminded us that it is inappropriate for a lower court to 'strike out on its own.' In *Canada v. Craig,*[45] the Court observed that, in situations where a party urges a lower court to depart from established precedent, the role of the lower court must be limited to writing reasons as to why the existing precedent is problematic, while remaining bound to follow it until it is modified or changed by a decision of the higher court.

[92] More importantly, I am not persuaded that the precedent articulated in *Gould* and *Harper #1* is problematic. To the contrary, in my view the logic behind the rule against granting final relief at the interlocutory stage in elections cases is exemplified by the facts of the present case, for the following reasons.

[93] First and foremost, on this motion I am faced with a limited evidentiary record and I am being asked to stay the operation of only one provision of many that will be challenged on the full application. The identification provisions in the *CEA* are a cohesive scheme. Whether the effects of s.46(3) of the *FEA* will be held to be unconstitutional in light of other changes (including those made to the vouching procedure, for instance) is a question that is not before me.

[94] Where, as here, a reforming statute makes multiple changes to the legislation, to pick and choose among them without considering the overall scheme runs the risk of unfairly isolating or highlighting concerns arising out of one specific provision without considering the impact and context provided by the rest, and the potential justification that may be found to exist in light of the whole. Given the public interest presumption of the validity of duly enacted legislation, it is inappropriate to venture a guess as to the constitutionality of provisions not before me, or to determine the constitutionality of an entire scheme in light of one provision. As McLachlin

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[44] *Black's Law Dictionary,* 7th ed, *sub verbo* "precedent."
[45] 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 18, 21.

C.J.C. commented in *Harper,* interference by the court may be appropriate in the "clearest of cases." However, given the issues raised, this is not such a case.[46]

[95] Secondly, it is problematic to change the rules for elections at the last minute through the blunt instrument of judicial intervention. Such action might harm public confidence and could lead to further errors in the election process. There are many actors in an election: parties, candidates, campaign workers, volunteers, election officials and staff, and electors themselves. Parties' and candidates' election strategies and election day plans are formulated having regard to the known and established rules of engagement. In order to be fair to all, any changes must be fully known and fairly implemented. Late changes in election rules run the risk of unfairness or, at the very least, the perception of unfairness.

[96] Third, the rule against granting final relief in interlocutory proceedings involving constitutional challenges to electoral laws is informed by the risk of creating difficulties in the legislative scheme without considering the potential justification arguments that might be made under s.1 of the *Charter* and further without allowing Parliament the opportunity to respond. This, too, runs the risk of unfairness and decreasing public confidence in the electoral process.

[97] One example of such a risk was raised by me during the course of argument, when it became evident that under s.106(1)(d) of the *CEA* as it currently stands, a registered elector who is visited at his or her home by a Revising Officer during the revision period may register other occupants of the premises without providing any proof of their identity (upon the taking of an oath). Those occupants will then be added to the list of electors and will receive VICs in the mail. If the VIC is authorized as an identity and address-proving document, then the very document being used to prove identity and address at the polling station may have been obtained without any proof of identity or address in the first place. Arguably, this is a potential "soft spot" that would result from the relief being sought on this motion. In turn, it may support the rationale for Parliament's decision that VICs should not be used to prove identity and residence. This is a matter that the respondent should be entitled to address by way of a s.1 argument, or by way of a legislative response should the court ultimately determine that s.46(3) is unconstitutional.

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[46] An example of such a case was posited by Beetz J. of the Supreme Court in *Metropolitan Stores*, note 13 above, where at para. 49 he wrote: "There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(a) of the *Canadian Charter of Rights and Freedoms*, could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards,* [1984] 2 S.C.R. 66, at p. 88. It is trite to say that these cases are exceptional."

[98] As McLachlin C.J.C. further commented in *Harper*, "the determination of the constitutionality will turn on the application of s. 1 of the *Charter*, which is always a complex factual and legal analysis."[47] This reinforces the rationale behind the rule against granting interlocutory relief in constitutional challenges to electoral statutes.

[99] The applicants have stressed the importance of ensuring the integrity of the electoral process and guarding against disenfranchisement, which would undermine public confidence in the process. However, as stated at the beginning of this decision, preserving public trust in the electoral process involves a balancing between enabling electors to vote and ensuring the integrity of the system. As the majority of the Supreme Court stated with reference to the *CEA* in *Opitz v. Wrzesnewskyj*:[48]

> While enfranchisement is one of the cornerstones of the Act, it is not free-standing. Protecting the integrity of the process is also a central purpose of the Act. The same procedures that enable entitled voters to cast their ballots also serve the purpose of preventing those not entitled from casting ballots. These safeguards address the potential for fraud, corruption, and illegal practices, and the public's perception of the integrity of the electoral process…. Fair and consistent observance of the statutory safeguards serves to enhance the public's faith and confidence in fair elections and in the government itself, both of which are essential to an effective democracy.

[100] In light of all of the foregoing considerations, I find that the balance of convenience does not favour granting injunctive relief. It follows that the applicants' motion cannot succeed.

Summary of conclusions and disposition

[101] For the reasons set out above, and applying the well-established legal test for granting pre-trial injunctions, my analysis leads me to the following conclusions:

> (a) the complaint of the applicants that s.46(3) of the *Fair Elections Act* is unconstitutional because it prohibits the Chief Electoral Officer from authorizing the Voter Information Card as a form of voter identification on election day raises a serious question that warrants a full hearing;
>
> (b) based on the evidence to date, there is a risk that some individuals who would otherwise rely on the Voter Information Card to enable them to vote will be unable to do so due to s.46(3), which would result in irreparable harm due to their inability to exercise their right to vote in that fashion;

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[47] *Harper #1*, note 29 above, at para. 4.
[48] *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 S.C.R. 76, at para. 38.

(c) despite the above, established principles that govern the availability of injunctions, including the rule against temporarily suspending properly enacted electoral legislation in the run-up to an election, dictate that the court should not stay the operation of the disputed law without a full hearing on the merits, something the parties agree cannot be accomplished before the upcoming federal election.

[102] I therefore conclude that the motion of the applicants must be dismissed.

[103] As agreed by the parties, the issue of costs of the motion (as between the applicants and the respondent AGC) will be reserved to be decided by the judge who ultimately hears and decides the main application. Under the terms of their intervention, no costs are recoverable by the intervenors.

[104] Finally, I express my thanks to all counsel for the thorough and professional fashion in which they presented their arguments to the court.

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Stinson J.

Released: July 17, 2015

Paras Cited: 46, 56, 84-86, 95

CITATION: Council of Canadians v. Canada (Attorney General), 2015 ONSC 4601
COURT FILE NO.: CV-14-513961
DATE: 20150717

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE COUNCIL OF CANADIANS, THE CANADIAN FEDERATION OF STUDENTS, JESSICA McCORMICK, PEGGY WALSH CRAIG, and SANDRA McEWING

Applicants

– and –

HER MAJESTY IN RIGHT OF CANADA AS REPRESENTED BY THE ATTORNEY GENERAL OF CANADA

Respondent

– and –

CHIEF ELECTORAL OFFICER OF CANADA and THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

Intervenors

REASONS FOR DECISION

Stinson J.

Released: July 17, 2015

Tab 18

Federal Court of Appeal

Citation: Re A.-G. Canada and Gould
Date: 1984-08-31

Thurlow C.J., Mahoney and Marceau JJ.

Counsel:
Duff Friesen, Q.C., and *Seymour I. Mender*, for appellants.
Fergus O'Connor, for respondent.

[1] THURLOW C.J. (dissenting):—This appeal is from an order of the Trial Division which, on an interlocutory application in an action for declaratory relief, granted a mandatory injunction requiring that the respondent, a person undergoing punishment as an inmate in a penitentiary for the commission of a criminal offence, be permitted to vote in the federal general election to be held on September 4, 1984, that his vote be counted in the electoral district of Hamilton-Wentworth, where his name has been registered on the voters' list, and that the returning officer for that electoral district issue a proxy certificate authorizing a named person to vote as proxy for and on behalf of the respondent.

[2] The issue in the appeal revolves around the question of the validity since the coming into force of the *Canadian Charter of Rights and Freedoms*, of para. 14(4)(*e*) of the *Canada Elections Act*, R.S.C. 1970, c. 14 (1st Supp.), a provision which disqualifies persons in the position of the respondent from voting in federal elections. But the validity of para. 14(4)(*e*) is not the issue. The issue, as I see it, is whether in the particular circumstances disclosed by the material before the court the injunction should have been granted when the validity of para. 14(4)(*e*) had not been finally determined.

[3] Section 3 of the Charter, under the heading "Democratic Rights", provides that:

> 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.

[4] That the respondent is a citizen of Canada is not in issue. It is, however, provided in s. 1 that:

> 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.

[5] Subsection 52(1) of the *Constitution Act, 1982* declares that:

> 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.

[6] It is in this context that para. 14(4)(*e*) of the *Canada Elections Act*, a provision which

had been in effect some years before the Charter, comes into play. It provides that:

> 14(4) the following persons are not qualified to vote at an election, and shall not vote at an election:
>
> • • • • •
>
> (*e*) every person undergoing punishment as an inmate in any penal institution for the commission of any offence;

[7] That the respondent falls within this provision is beyond dispute, as is also the fact that, subject to the effect of s. 1 of the Charter, para. 14(4)(*e*) of the *Canada Elections Act* conflicts with s. 3 of the Charter.

[8] The basis of the decision of the learned trial judge, as I read it, is that as the respondent is a citizen of Canada his right under s. 3 to vote in the election is established, subject only to the appellants being able to establish at a trial that the limitation of the right to vote embodied in para. 14(4)(*e*) of the *Canada Elections Act* is demonstrably justified in a free and democratic society within the meaning of s. 1 of the Charter, that such evidence on that point as was before the court was not of such a nature as to weaken in a significant way the respondent's *prima facie* case and that the balance of convenience favoured the granting of the injunction since the appellants had virtually "nothing to lose" by the granting of the injunction, which would require but a simple procedure, while the loss to the applicant if the injunction were not granted would be the denial of at least a *prima facie* constitutionally guaranteed right.

[9] It may be noted that, while the appellants have little or nothing to lose by the injunction and the respondent would irrevocably lose his right to vote in the election if the injunction were to be refused, and while his action in its entirety would probably become moot some months hence on the termination of his sentence, the effect of granting the injunction would have been to confer on him a right to which he was not entitled if it were to be held eventually that para. 14(4)(*e*) was valid and effective to deny him the right to vote.

[10] I agree with the criticisms and views expressed by the learned trial judge as to the weakness of the evidence led to show that a serious case could be made out that the limitation of para. 14(4)(*e*) is demonstrably justified in a free and democratic society. She was obviously not impressed by the evidence. I share her view. The impression I have of it is that when that is all that could be put before the court to show a serious case, after four years of work on the question, it becomes apparent that the case for maintaining the validity of the disqualification as enacted can scarcely be regarded as a serious one.

[11] In such circumstances then should the court treat it seriously? Should the court irrevocably deprive the respondent of a constitutional right to which he appears to be entitled by denying the injunction in order to give the appellants an opportunity, which probably will not arise, to show he is not entitled, when all the appellants can offer to show that they have a case, is weak? I think not. Even less do I think this court should interfere with the exercise of the discretion of the trial judge in the circumstances.

[12] Situations in which a court will be justified in granting an injunction, the substantial effect of which will be to determine and enforce a right before it has been tried and finally decided, must, of necessity, be rare because to enforce the right when its existence is challenged and has not been finally determined is contrary to our legal tradition. On the other hand, it seems to me that even this tradition may have to give way where the effect of denying immediate enforcement of a probable but fleeting right is to decide it irrevocably against the right and in favour of a much weaker, if not forlorn, case. In such a situation, in my view, a court should not, as the learned trial judge put it, back away from granting relief where it considers it just to do so.

[13] When it is necessary, the court, as it seems to me, must be prepared to be innovative in devising procedures and means, not heretofore employed, to enforce rights guaranteed by the Charter. That the court has the power to devise procedures to make the law effective is apparent from the development in recent years of "Mareva" and "Anton Piller" procedures.

[14] For these reasons as well as those given by the learned trial judge, with which I am in substantial agreement, I would dismiss the appeal.

[15] MAHONEY J.:—This is an appeal from an order of the Trial Division requiring the appellants to make arrangements to permit the respondent to vote in next Tuesday's federal general election notwithstanding that the respondent is not qualified to vote by reason of s. 14(4)(*e*) of the *Canada Elections Act*, R.S.C. 1970, c. 14 (1st Supp.). The order is an interlocutory mandatory injunction granted in an action seeking a declaration that s. 14(4)(*e*) is invalid by reason of s. 3 of the *Canadian Charter of Rights and Freedoms.* Section 3 is to be read together with s. 1.

[16] These provisions are:

> 14(4) The following persons are not qualified to vote at an election, and shall not vote at an election:
>
> • • • • •
>
> (*e*) every person undergoing punishment as an inmate in any penal institution for the commission of any offence;
>
> • • • • •
>
> 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.

Section 14(4)(*e*) plainly cannot stand unless, by virtue of s. 1 of the Charter, it is found to be a reasonable limit demonstrably justified in a free and democratic society. That is the serious issue to be tried. That is what the trial will be all about.

[17] To treat the action as affecting only the rights of the respondent is to ignore reality. If s. 14(4)(*e*) is found to be invalid in whole or part, it will, to that extent, be invalid as to every incarcerated prisoner in Canada. That is why, with respect, I think the learned trial judge erred in dealing with it as though the application before her was a conventional application for an interlocutory injunction to be disposed of taking account of the balance of convenience as between only the respondent and appellants.

[18] The order made authorizes the respondent to conduct himself and requires him to be treated as though the law he seeks to have declared invalid were now invalid notwithstanding that it remains in full force and effect and will so remain unless and until, after trial, the declaration sought is made. That went far beyond a determination that there is a serious issue to be tried. It required more than the usual determination, in disposing of an application for an interlocutory injunction, that the balance of convenience dictated that the *status quo ante* be maintained or the *statuts quo ante* be restored pending disposition of the action after trial. It was a determination that the respondent, without having had his action tried, is entitled to act and be treated as though he had already won. The order implies and is based on a finding that the respondent has, in fact, the right he claims and that s. 14(4)(*e*) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional. The proper purpose of an interlocutory injunction is to preserve or restore the *status quo*, not to give the plaintiff his remedy, until trial.

[19] In my opinion the learned trial judge erred in law in making the order she did on an interlocutory application. I would allow the appeal and set the order of the Trial Division aside with costs, here and in the Trial Division, if asked for.

[20] MARCEAU J.:—I am in agreement with Mr. Justice Mahoney.

[21] I agree with Mr. Justice Mahoney that this appeal should be granted and I respectfully adopt as mine the reasons he gave for reaching that conclusion.

[22] Appeal allowed.

[23] NOTE: An application for leave to appeal to the Supreme Court of Canada from the above judgment was granted and the appeal was dismissed by the court (Dickson C.J.C., Estey, McIntyre, Wilson and Le Dain JJ.) on September 4, 1984. The following reasons for judgment were delivered orally by

[24] THE CHIEF JUSTICE:—We grant an order abridging the time normally required for service of process in these proceedings.

[25] We grant leave to appeal the decision of the Federal Court of Appeal rendered August 31, 1984.

[26] In our view, however, this appeal fails. We generally share the views expressed by Mr. Justice Mahoney speaking for the majority of the Federal Court of Appeal. The appeal is accordingly dismissed.

Tab 19

1997 CarswellOnt 1782
Ontario Court of Justice (General Division) [Divisional Court]

Figueroa v. Canada (Attorney General)

1997 CarswellOnt 1782, [1997] O.J. No. 1998, 100 O.A.C. 232,
147 D.L.R. (4th) 765, 34 O.R. (3d) 59, 71 A.C.W.S. (3d) 487

Miguel Figueroa, Plaintiff (Respondent on appeal) and The Attorney General of Canada, Defendant (Appellant on appeal)

O'Leary, Archie, Campbell and Cosgrove JJ.

Oral reasons: May 13, 1997
Docket: 370/97

Counsel: *Peter Rosenthal* and *Malcolm Davidson*, for the Plaintiff (Respondent on appeal) Miguel Figueroa.
Alan S. Davis and *Gail Sinclair*, for the Defendant (Appellant on appeal) The Attorney General of Canada.
Christopher D. Bredt and *Benjamin T. Glustein*, for the Intervenor, Jean Pierre Kingsley, the Chief Electoral Officer.

Subject: Public; Civil Practice and Procedure

MOTION by defendant for leave to appeal, and if leave granted, appeal from order dated May 8, 1997 granting candidate right to have political party designation printed beside or beneath his name on ballot in federal general election.

Campbell J. **(orally):**

1 Leave to appeal is sought against the term of the order of a General Division Judge on May 8, 1997 made against The Attorney General for Canada that Mr. Figueroa should be entitled to have printed beside or beneath his name on the ballot paper in the Federal General Election scheduled for June 2, 1997, his political party designation, notwithstanding the prohibition in s. 100 (2) of *The Canada Elections Act* against listing his party if it fields less than fifty candidates. Leave is granted pursuant to Rule 13.01 to The Chief Electoral Officer to intervene as a party in the application for leave to appeal and if leave be granted as a party to the appeal in any further proceedings in the appeal. Leave to appeal is granted on the grounds

that the order is in apparent conflict with the principles in *Gould v. Attorney General for Canada*, [1984] 2 S.C.R. 124,

that there is reason to believe the order is incorrect because it was made against a party who does not have the capacity to carry out the order and who was not before the court as a party

that the proposed appeal involves matters of general public importance about the proper role of the courts in granting orders on the eve of scheduled elections in respect of their management.

We are advised that May 15 is the last possible day to decide how the ballots are to be printed for the June 2 election. It is therefore necessary to decide this case today without delaying for more extensive reasons for judgment.

2 The practical effect of the order appealed from, although it is in form simply a term of the adjournment of the motion for summary judgment, is to grant an injunction giving the candidate, without a trial, the very final relief he seeks. It amounts to a final order determining the rights of the parties without any proper trial. In *Gould v. Canada (Attorney General)*, [1984] 2 S.C.R. 124 (S.C.C.), the prisoner voting case, the Supreme Court of Canada agreed generally with the decision of Mahoney J.A. He held it was generally inappropriate to decide questions like this without a proper trial on the eve of an election [1984] 1 F.C. 1133 (Fed. C.A.), at 1140.

It was a determination that the respondent [the party challenging the election laws] was entitled to act and be treated as though he had already won.

The order implies and is based on a finding that the respondent has, in fact, the right he claims and that paragraph 14 (4) (e) is invalid to the extent claimed. That is an interim declaration of right and, with respect, is not a declaration that can properly be made before trial. The defendant in an action is as entitled to a full and fair trial as is the plaintiff and that is equally so when the issue is constitutional. The proper purpose of an interlocutory injunction is to preserve or restore the *status quo*, not to give the plaintiff his remedy, until trial.

Although there are some factual distinctions between this case and *Gould* including the number of people directly effected, the principle is the same. It is generally inappropriate for the court in cases decided on the eve of elections to grant what amounts to final relief without a proper trial. We are not persuaded that any difference in detail between this case and *Gould*compels any departure from its principle.

3 The public interest in the uniform, fair and orderly conduct of election procedures requires that cases like this be decided after a trial not before a trial. Similarly situated candidates should have similar rights across the country rather than giving individual candidates a different set of rules by way of *ad hoc* judicial *fiat* in individual cases.

4 On that basis alone the appeal should be granted.

5 There is another reason to grant the appeal. It was fundamentally wrong for the motions judge to make an order against the Government which has no power to set the ballot. The Chief Electoral Officer, who has exclusive power to set the ballot, was not a party to the proceedings before the motions judge who had no jurisdiction over him.

6 There is also under s. 18 of the *Federal Court Act*, R.S.C. 10 (2nd Supp.) a serious question as to whether the Ontario Superior Court has jurisdiction to make an order that may be tantamount to a mandatory order against The Chief Electoral Officer, an order that may be within the exclusive statutory jurisdiction of the Federal Court. This difficult issue can only be decided after full argument and an opportunity to be heard by the directly affected parties.

7 For these reasons the appeal is allowed and paragraph 2 (c) of the order is set aside.

8 Costs to The Attorney General fixed at $3,500.

Motion granted; appeal allowed.

Tab 20

Paras Cited: 37, 50, 51, 72

Miguel Figueroa *Appellant*

v.

Attorney General of Canada *Respondent*

and

Attorney General of Quebec *Intervener*

INDEXED AS: FIGUEROA *v.* CANADA (ATTORNEY GENERAL)

Neutral citation: 2003 SCC 37.

File No.: 28194.

2002: November 5; 2003: June 27.

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

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

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).

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

Miguel Figueroa *Appelant*

c.

Procureur général du Canada *Intimé*

et

Procureur général du Québec *Intervenant*

RÉPERTORIÉ : FIGUEROA *c.* CANADA (PROCUREUR GÉNÉRAL)

Référence neutre : 2003 CSC 37.

N^{o} du greffe : 28194.

2002 : 5 novembre; 2003 : 27 juin.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Droit constitutionnel — Charte des droits — Droits démocratiques des citoyens — Droit de vote — Éligibilité à la Chambre des communes et aux assemblées législatives provinciales — Droit de participer utilement au processus électoral — Dispositions de la Loi électorale du Canada obligeant les partis politiques à présenter des candidats dans au moins 50 circonscriptions électorales pour avoir droit à certains avantages — Ces dispositions portent-elles atteinte au droit de voter aux élections ou de se porter candidat à l'occasion de celles-ci? — Dans l'affirmative, l'atteinte est-elle justifiée? — Charte canadienne des droits et libertés, art. 1, 3 — Loi électorale du Canada, L.R.C. 1985, ch. E-2, art. 24(2), 24(3), 28(2).

Suivant la *Loi électorale du Canada*, tout parti politique qui désire être enregistré doit présenter un candidat dans au moins 50 circonscriptions électorales s'il veut obtenir et maintenir son enregistrement. Les partis politiques enregistrés bénéficient d'un certain nombre d'avantages, y compris le droit pour leurs candidats de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales, le droit de remettre à leur parti les fonds non dépensés pendant la campagne électorale et celui d'inscrire leur appartenance politique sur les bulletins de vote. L'appelant a contesté la constitutionnalité de l'obligation de présenter au moins 50 candidats. La juge de première instance a estimé que cette exigence

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

était incompatible avec l'art. 3 de la *Charte canadienne des droits et libertés* et que cette atteinte ne pouvait être justifiée conformément à l'article premier de la *Charte*. La Cour d'appel a jugé que le critère des 50 candidatures n'était pas incompatible avec l'art. 3 de la *Charte*, sauf dans la mesure où il empêchait les candidats des partis non enregistrés d'inscrire leur appartenance politique sur les bulletins de vote.

Arrêt : Le pourvoi est accueilli. Les paragraphes 24(2), 24(3) et 28(2) de la *Loi électorale du Canada* sont déclarés inconstitutionnels. L'effet de la déclaration d'inconstitutionnalité est suspendu pendant une période de 12 mois.

La juge en chef McLachlin et les juges Iacobucci, Major, Bastarache, Binnie et Arbour : Bien que, suivant le texte de l'art. 3, cette disposition n'accorde que le droit de voter et de se porter candidat aux élections, les tribunaux ne doivent pas se limiter au texte de la disposition dans l'analyse fondée sur la *Charte*, mais ils doivent recourir à une interprétation libérale et téléologique. L'objet de l'art. 3 est la représentation effective. Cet article doit être interprété en fonction du droit de tout citoyen de jouer un rôle important dans le processus électoral, et non en fonction de l'élection d'une forme de gouvernement en particulier. Il s'agit d'un droit de participation, qui évoque uniquement le droit de participer au processus électoral. Cette définition permet d'éviter les interprétations trop restrictives de l'art. 3 et tient compte des raisons pour lesquelles la participation individuelle au processus électoral est importante, notamment le respect de la diversité des opinions et la capacité de chacun de renforcer la qualité de la démocratie. Un large débat politique permet à notre société de demeurer ouverte, de bénéficier d'une vaste gamme d'opinions et d'élaborer une politique sociale qui tient compte des besoins et des intérêts d'un large éventail de citoyens. La participation au processus électoral possède une valeur intrinsèque indépendamment du résultat des élections. Le droit de briguer les suffrages des électeurs offre aux candidats la possibilité de présenter certaines idées et opinions à l'électorat et le droit de vote permet aux citoyens de manifester leur appui à l'égard de ces idées et opinions. La démocratie est une forme de gouvernement où le pouvoir souverain appartient à la population dans son ensemble et où tout citoyen doit avoir la possibilité réelle de prendre part au gouvernement du pays en participant à l'élection de représentants.

Le droit de tout citoyen de jouer un rôle important dans le processus électoral ne saurait être limité par des intérêts collectifs opposés. L'examen de la proportionnalité, dans lequel sont pris en considération des avantages liés à d'autres valeurs démocratiques, doit être effectué

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

dans le cadre de l'analyse fondée sur l'article premier, où les limites apportées au droit concerné doivent être justifiées. L'analyse applicable ne varie pas en fonction de la nature de l'atteinte reprochée. De plus, les droits garantis par l'art. 3 ne sont pas relatifs au sens où le sont ceux prévus aux art. 7 et 8 de la *Charte*. Le fait que l'on détermine la teneur implicite de l'art. 3 en fonction d'énoncés restrictifs tels le droit des électeurs d'être raisonnablement informés ou le droit des candidats à une possibilité raisonnable d'exposer leur position indique seulement que l'art. 3 ne garantit pas aux citoyens le droit de jouer un rôle illimité dans le processus électoral. L'agrégation des préférences politiques n'est pas un facteur qu'il y a lieu de constitutionnaliser.

Les membres et les partisans des partis politiques qui présentent moins de 50 candidats participent utilement au processus électoral. L'aptitude d'un parti politique à contribuer valablement au processus électoral ne dépend pas de sa capacité de constituer pour l'électorat une véritable « solution de rechange » au gouvernement sortant. Les partis politiques sont beaucoup plus à même que tout citoyen de participer au débat public auquel donne lieu le processus électoral et ils servent de véhicules permettant à chaque citoyen de participer à la vie politique du pays. Tous les partis politiques sont en mesure de faire valoir, dans ce débat politique, des intérêts et des préoccupations uniques, et les partis marginaux ou régionaux ont tendance à soulever des questions que n'ont pas retenues les partis nationaux. Les partis politiques permettent également aux citoyens de s'exprimer sur les politiques du gouvernement et le bon fonctionnement de celui-ci. Chaque voix accordée à un parti accroît la probabilité que son programme sera pris en compte par ceux qui mettent en œuvre les politiques, et les votes en faveur d'un parti politique n'ayant pas satisfait au critère des 50 candidatures constituent un élément essentiel d'une démocratie vigoureuse et dynamique.

Le fait de refuser aux candidats des partis qui ne satisfont pas au critère des 50 candidatures le droit de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales et de remettre à leur parti respectif les fonds électoraux non dépensés compromet le droit de tout citoyen de participer utilement au processus électoral. L'article 3 impose au Parlement l'obligation de s'abstenir de renforcer la capacité d'un citoyen de participer au processus électoral d'une manière qui compromette le droit d'un autre citoyen de participer utilement à ce processus. Les partis politiques qui satisfont à cette condition disposent de ressources plus considérables pour communiquer leurs idées et leurs opinions que ceux qui ne la respectent pas. Le critère des 50 candidatures porte en conséquence atteinte aux droits garantis par l'art. 3 de la *Charte* en diminuant la capacité des membres et des

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.

partisans des partis défavorisés par ce critère de présenter des idées et des opinions dans le débat public auquel donne lieu le processus électoral. En outre, pour voter conformément à ses préférences, un citoyen doit disposer d'information lui permettant d'évaluer le programme de chacun des partis. Les dispositions contestées portent atteinte au droit à l'information protégé par l'art. 3.

Le fait d'interdire aux candidats des partis qui ne satisfont pas au critère des 50 candidatures d'inscrire leur appartenance politique sur les bulletins de vote viole également l'art. 3. Premièrement, le refus de cet avantage réduit la capacité des citoyens de prendre part au débat électoral, puisqu'il existe un lien étroit entre la capacité d'un parti politique d'influencer les politiques d'intérêt général et l'appui qu'il recueille à l'occasion d'un scrutin donné. Deuxièmement, ce refus porte également atteinte au droit de tout citoyen de faire un choix éclairé et de voter selon ses préférences. La mention de l'appartenance à un parti est un élément d'information important et, en l'absence d'indication de l'appartenance politique d'un candidat sur le bulletin de vote, certains candidats pourraient être incapables de voter pour le candidat qui aurait autrement leur préférence.

La validité des dispositions attentatoires n'est pas sauvegardée par l'article premier de la *Charte*. Bien que l'objectif consistant à assurer le rapport coût-efficacité du régime de crédits d'impôt constitue une préoccupation urgente et réelle, l'obligation de présenter 50 candidats ne respecte pas le volet relatif à la proportionnalité du critère énoncé dans l'arrêt *Oakes*. En ce qui concerne l'interdiction faite aux candidats de remettre à leur parti respectif les fonds électoraux non dépensés et d'inscrire leur appartenance politique sur les bulletins de vote, il n'existe aucun lien que ce soit entre le critère des 50 candidatures et l'objectif susmentionné. L'interdiction faite à certains partis politiques de remettre des reçus fiscaux pour les dons recueillis en dehors des périodes électorales ne présente pas non plus de lien rationnel avec cet objectif. Il n'existe au mieux qu'un lien ténu entre une disposition n'ayant aucune incidence sur le nombre de citoyens ayant droit au crédit d'impôt ou sur le montant de ce crédit et l'objectif en cause. De plus, le gouvernement n'a présenté aucun élément de preuve établissant que l'application du critère des 50 candidatures accroît effectivement l'efficacité du régime de crédits d'impôt du point de vue du rapport coût-efficacité. Les dispositions contestées ne satisfont pas au critère de l'atteinte minimale, étant donné que la réduction du coût du régime de crédits d'impôt pourrait être réalisée sans violer l'art. 3. Qui plus est, les effets bénéfiques de cette réduction des coûts ne l'emportent pas sur les effets préjudiciables des dispositions contestées.

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

Bien que la protection de l'intégrité du processus électoral soit une préoccupation urgente et réelle dans un État libre et démocratique, cet objectif ne saurait justifier de refuser aux candidats le droit d'inscrire leur appartenance politique sur les bulletins de vote. Cette constatation vaut également pour le refus d'accorder le droit de remettre des reçus fiscaux et celui de remettre au parti les fonds électoraux non dépensés. De plus, même si le refus de ces deux avantages prévient l'utilisation à mauvais escient du système de financement électoral, les dispositions contestées ne respectent pas le critère de l'atteinte minimale. Dans aucun de ces cas, le gouvernement n'a pu établir qu'il lui serait impossible d'obtenir le même résultat sans violer l'art. 3 de la *Charte*.

Enfin, le fait de dire que l'objectif consiste à faire en sorte que le résultat du processus électoral soit viable compte tenu de notre régime de gouvernement responsable est problématique. Quoi qu'il en soit, la règle exigeant 50 candidatures ne satisfait pas au critère du lien rationnel et il n'a pas été démontré que les effets bénéfiques de cette exigence l'emportent sur ses effets préjudiciables.

Les juges Gonthier, LeBel et Deschamps : Bien que la capacité de jouer un rôle important dans le processus électoral soit une valeur fondamentale déterminant le contenu de l'art. 3, le fait de se demander seulement si les dispositions législatives contestées portent atteinte à cette capacité minimise la complexité des notions de représentation effective et de participation utile au processus électoral. Ces concepts comprennent des principes liés et opposés. La démarche appropriée consiste à définir le droit en cause au moyen d'une analyse contextuelle et historique. En tant que composantes du régime de réglementation et de reconnaissance des partis politiques, les dispositions législatives contestées favorisent le respect d'importantes valeurs démocratiques. L'obligation de présenter un minimum de 50 candidats tend à avantager les partis bénéficiant de larges appuis et favorise l'agrégation de la volonté politique. La place qu'elles occupent dans notre histoire et dans nos institutions témoigne de l'importance de ces valeurs, qui, en principe, pourraient être favorisées au détriment, dans une certaine mesure, de la participation individuelle. En l'espèce, toutefois, les dispositions législatives contestées vont trop loin et elles sont incompatibles avec l'art. 3.

La participation individuelle revêt une importance capitale, mais l'art. 3 porte aussi sur la représentation des collectivités. La participation utile au processus électoral suppose la formation de groupes politiques et d'alliances entre des groupes représentant des collectivités. L'article 3 doit recevoir une interprétation qui s'accorde avec nos traditions politiques. Il est difficile de concilier une démarche à caractère purement individualiste avec les

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

valeurs propres à la politique canadienne. La participation ne perd pas son caractère utile chaque fois qu'une mesure gouvernementale a sur elle un effet préjudiciable, et des dispositions législatives peuvent entraver la participation individuelle sans nécessairement empêcher les citoyens de se faire entendre utilement.

L'affaiblissement d'un aspect de la représentation effective peut en définitive se traduire par une représentation plus effective, ce qui indique que la représentation effective se compose de différents éléments. De même, la notion de participation utile au processus démocratique comporte elle aussi un certain nombre d'aspects. La participation en tant que membre d'un groupe peut être aussi utile que la participation en tant qu'individu. L'accroissement des possibilités de participation du premier type se fait presque inévitablement au détriment de la participation individuelle. La question consiste à se demander si on a affaibli de façon déraisonnable la capacité de participation du citoyen visé, en d'autres mots si on a restreint à tel point la possibilité de ce citoyen de choisir librement ou de participer à une bataille équitable dans le processus politique qu'il ne conserve plus vraiment la possibilité de participer utilement au processus démocratique.

L'analyse relative à la violation ne prend pas fin après la conclusion qu'il y a atteinte à la capacité de participer utilement au processus électoral. Il faut s'interroger sur la gravité de l'atteinte et sur sa raison d'être, en tenant compte de tous les facteurs contextuels pertinents. Une certaine forme de mise en balance des valeurs opposées demeure appropriée pour définir les droits et valeurs protégés et, pour réaliser l'analyse complète de la proportionnalité, il faut prendre en considération les valeurs opposées qu'on retrouve à l'art. 3. Pour décider s'il y a eu violation de l'art. 3, il faut reconnaître la nécessité d'établir un compromis adéquat entre les diverses forces opposées qui, ensemble, caractérisent la participation utile au processus démocratique. Le contenu et la portée de tout droit garanti par la *Charte* sont déterminés par rapport à l'objet du droit en question, qui peut se rattacher à des préoccupations individuelles et à des préoccupations collectives. L'article 3 ne crée pas un droit « relatif », mais son contenu implicite est précisé à l'aide d'expressions restrictives. L'article 3 garantit que les électeurs sont raisonnablement informés et que les candidats bénéficient d'une possibilité raisonnable d'exposer leurs positions. Il faut tenir compte de ces garanties implicites pour que la disposition puisse produire son plein effet. Il est impossible d'appréhender le sens de l'art. 3 sans se référer au contexte social et systémique de cette disposition. L'exercice des droits garantis par l'art. 3 requiert l'intervention de l'État. Cet article impose à l'État l'obligation d'instaurer un système électoral pourvoyant à

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

l'établissement d'un gouvernement démocratique correspondant aux choix des électeurs canadiens. Pour bien apprécier ce système, il faut se demander dans quelle mesure il sert adéquatement la société canadienne dans son ensemble et les groupes qui forment notre tissu social. Dans cette analyse, il faut se demander si le système électoral pourvoit à la représentation effective des citoyens et leur permet de participer utilement au processus démocratique, à la lumière des valeurs opposées, notamment les valeurs sociales et collectives, que comportent ces deux notions. Cet examen ne correspond pas à l'analyse effectuée pour l'application de l'article premier, mais il dépend néanmoins de la réponse à la question de savoir si la mesure en cause produit des avantages correspondants liés à d'autres valeurs démocratiques et si elle se traduit en définitive par une privation du droit de participer utilement au processus démocratique.

La règle des 50 candidatures renforce un aspect de la représentation effective que l'on peut valablement mettre en équilibre avec la valeur que constitue la participation individuelle. Elle renforce l'agrégation des préférences politiques et favorise la cohésion, valeurs intimement liées au rôle que jouent les partis politiques dans le système électoral canadien. L'obligation de présenter au moins 50 candidats dans une élection renforce les importantes valeurs démocratiques que sont l'obligation de rendre compte, la communication politique et la participation populaire et elle ne peut être dissociée de son contexte lors de l'examen de sa constitutionnalité.

L'établissement d'une procédure de reconnaissance légale des partis exige que l'on définisse en quoi consiste un parti. Les partis élaborent des politiques et se disputent la faveur des électeurs. Le régime d'enregistrement est lié au rôle que jouent les partis en tant que participants aux élections et le fait d'offrir les avantages découlant de l'enregistrement à des groupes qui n'entendent pas rivaliser sérieusement avec les autres participants aux élections risque de compromettre la réalisation des objectifs du régime. Toutefois, la règle des 50 candidatures exclut certains partis qui participent réellement au processus électoral, en plus de limiter les possibilités pour les citoyens d'appuyer des petits partis. Il serait possible de renforcer les valeurs démocratiques sans exiger de la présentation d'un nombre aussi élevé de candidats.

Les inégalités de notre système électoral ne sont pas acceptables du seul fait qu'elles ont des précédents dans l'histoire; par ailleurs, une institution n'est pas constitutionnelle simplement parce qu'elle existe. Notre infrastructure électorale a été délibérément aménagée de façon à accorder des avantages aux mouvements politiques traditionnels. Notre mode de scrutin tend à produire des gouvernements majoritaires et témoigne d'une

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.

préférence pour les partis bénéficiant de larges appuis. Le gouvernement dispose d'une assez grande latitude pour décider comment structurer le système électoral et il possède le privilège de décider de favoriser l'agrégation de la volonté politique et la cohésion. Ces valeurs doivent être prises en compte et l'examen de notre histoire et de nos institutions actuelles fait ressortir l'existence d'une philosophie qui reconnaît d'autres valeurs en plus de la participation individuelle. Dans la mesure où elle respecte les limites fixées par le droit de participer utilement au processus électoral, la décision de choisir une forme de représentation démocratique donnée est une question à l'égard de laquelle notre Cour ne doit pas intervenir. Entre également en jeu un troisième facteur, la représentation régionale, qui est un aspect de la représentation effective et de la participation utile au processus électoral. La représentation régionale peut elle aussi s'opposer, en tant que valeur équivalente, à la participation individuelle. Quoique son importance ne doive pas être exagérée, la représentation régionale est une des valeurs qui doit être prise en considération pour définir la notion de représentation utile et pour déterminer si une mesure gouvernementale viole l'art. 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 under-inclusive 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.

La règle des 50 candidatures viole l'art. 3 en privant certains candidats et leurs partisans de la possibilité de participer utilement au processus démocratique. Elle représente un fardeau pour les partis qui sont déterminés à faire campagne sérieusement dans quelques circonscriptions et elle n'est pas l'outil idéal pour réaliser l'agrégation des préférences politiques ou pour aider à identifier les véritables partis déterminés à participer à la course électorale et possédant un programme politique sérieux. La présentation d'un candidat dans une circonscription n'indique pas nécessairement que le parti jouit d'appuis dans cette circonscription. La règle est toutefois vulnérable aux manipulations et elle peut s'avérer trop inclusive et trop exclusive. Elle a permis l'enregistrement de partis considérés comme des mouvements très éloignés des tendances politiques traditionnelles de la politique canadienne ou qui ne défendent qu'une seule cause. Elle peut exclure des partis qui possèdent un programme politique élaboré et qui sont réellement intéressés à participer à la course électorale. Enfin, la règle des 50 candidatures contrevient au principe de la représentation régionale et produit des effets distincts selon les régions, puisque ce n'est qu'en Ontario et au Québec que peut être enregistré un parti défendant les intérêts d'une seule province.

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

Les justifications avancées par le gouvernement ont été examinées dans le volet relatif à l'atteinte de l'analyse et la conclusion que les dispositions législatives violent l'art. 3 revient essentiellement à conclure qu'elles sont incompatibles avec les valeurs de la démocratie canadienne. Si on procédait à l'analyse complète requise par

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.

Explained: *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158; **referred to:** *R. v. Oakes*, [1986] 1 S.C.R. 103; *Dixon v. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Haig v. Canada*, [1993] 2 S.C.R. 995; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *Switzman v. Elbling*, [1957] S.C.R. 285; *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145; *Schachter v. Canada*, [1992] 2 S.C.R. 679; *Egan v. Canada*, [1995] 2 S.C.R. 513; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3.

By LeBel J.

Distinguished: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68; *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876; **referred to:** *Reference re Provincial Electoral*

l'article premier, il n'y aurait aucune raison de mettre en doute le caractère urgent et réel des objectifs du législateur. Les valeurs renforcées par les dispositions législatives contestées sont compatibles avec quelques-uns des principes fondamentaux d'une société libre et démocratique, et le fait de favoriser les grands partis pourrait ne pas être incompatible avec ces principes. La Couronne ne devrait pas être tenue de démontrer que le système électoral adopté par le Parlement conduit à une bien meilleure administration du pays qu'un autre système, car il est difficile d'imaginer comment elle pourrait faire la preuve de cette thèse. De plus, la définition d'un bon gouvernement ou d'un meilleur gouvernement ne devrait pas être arrêtée au moyen d'une norme juridique. En suggérant que la motivation à la base des dispositions législatives contestées puisse elle-même ne pas être légitime, notre Cour risque d'élargir indûment la portée du contrôle judiciaire de la structure du système électoral. Quel que soit le système adopté, il doit respecter le droit de tout individu de participer utilement au processus démocratique. Toutefois, ce droit ne doit pas être défini de façon trop rigide.

Jurisprudence

Citée par le juge Iacobucci

Arrêt interprété : *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158; **arrêts mentionnés :** *R. c. Oakes*, [1986] 1 R.C.S. 103; *Dixon c. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *Haig c. Canada*, [1993] 2 R.C.S. 995; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877; *Sauvé c. Canada (Directeur général des élections)*, [2002] 3 R.C.S. 519, 2002 CSC 68; *R. c. Keegstra*, [1990] 3 R.C.S. 697; *Switzman c. Elbling*, [1957] R.C.S. 285; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569; *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451; *Vriend c. Alberta*, [1998] 1 R.C.S. 493; *M. c. H.*, [1999] 2 R.C.S. 3; *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145; *Schachter c. Canada*, [1992] 2 R.C.S. 679; *Egan c. Canada*, [1995] 2 R.C.S. 513; *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3.

Citée par le juge LeBel

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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.

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

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Peter Rosenthal et *Kikelola Roach*, pour l'appelant.

Roslyn J. Levine, *c.r.*, *Gail Sinclair* et *Peter Hajecek*, pour l'intimé.

Dominique A. Jobin et *Sébastien Arès*, pour l'intervenant.

Version française du jugement de la juge en chef McLachlin et des juges Iacobucci, Major, Bastarache, Binnie et Arbour rendu par

LE JUGE IACOBUCCI —

I. Introduction

Le présent pourvoi soulève des questions fondamentales en ce qui concerne le processus démocratique dans notre pays. Il porte plus particulièrement sur l'objet et la portée de l'art. 3 de la *Charte canadienne des droits et libertés*, qui dispose que tout citoyen a le droit de vote et est éligible aux élections législatives fédérales ou provinciales. Il s'agit de décider si contreviennent à l'art. 3 de la *Charte* les dispositions législatives fédérales qui n'accordent certains avantages qu'aux seuls partis

political 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

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.

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

politiques ayant présenté des candidats dans au moins 50 circonscriptions électorales. J'estime qu'il y a violation de l'art. 3 et, en conséquence, je suis d'avis d'accueillir le pourvoi.

II. Contexte législatif

Suivant la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2 (la « *Loi électorale* »), tout parti politique qui désire être enregistré doit satisfaire à un certain nombre de conditions. Il doit compter au moins 100 membres et nommer un chef, un agent principal ainsi qu'un vérificateur. Ces conditions ne sont pas en litige dans le présent pourvoi. 2

En l'espèce, la condition litigieuse est celle exigeant que le parti présente un candidat dans au moins 50 circonscriptions électorales s'il veut obtenir et maintenir son enregistrement. Les deux dispositions législatives contestées sont les suivantes : 3

24. . . .

(2) Au reçu d'une demande d'enregistrement d'un parti politique en conformité avec le paragraphe (1), le directeur général des élections étudie la demande, décide si le parti peut être enregistré en vertu du présent article et informe le chef du parti que :

a) le parti pourra être enregistré quand, en conformité avec l'alinéa (3)*a*) ou *b*), cinquante candidats auront été officiellement présentés par le parti;

b) dans les autres cas, le parti ne pourra être enregistré.

(3) Le directeur général des élections enregistre le parti politique dont il a informé le chef, conformément à l'alinéa (2)*a*), qu'il pourra être enregistré dans l'un ou l'autre des cas suivants :

a) la demande d'enregistrement est produite dans la période commençant le lendemain du jour du scrutin d'une élection générale et se terminant le soixantième jour avant l'émission des brefs de la prochaine élection générale, le lendemain du jour où le parti aura officiellement présenté des candidats dans cinquante circonscriptions en vue de cette prochaine élection générale;

b) la demande d'enregistrement est produite dans la période commençant le cinquante-neuvième jour

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"),

avant l'émission des brefs d'une élection générale et se terminant le jour du scrutin à cette élection, le lendemain du jour où le parti aura officiellement présenté des candidats dans cinquante circonscriptions à l'élection générale qui suit celle qui tombe dans cette période.

Si le parti politique ne peut présenter cinquante candidats en conformité avec l'alinéa *a*) ou *b*), le directeur général des élections doit informer le chef du parti que le parti ne peut être enregistré.

28. . . .

(2) Le directeur général des élections doit, lors d'une élection générale, à la fin des présentations, radier le parti enregistré qui n'avait pas, à la fin des présentations, de candidat dans au moins cinquante circonscriptions.

Les partis politiques enregistrés bénéficient d'un certain nombre d'avantages. Par exemple, un parti enregistré a droit à du temps d'antenne gratuit, il peut acheter du temps d'antenne réservé et il a droit au remboursement partiel des dépenses électorales lorsqu'il recueille un pourcentage donné des suffrages. La constitutionnalité du refus de ces avantages aux partis politiques qui ne présentent pas au moins 50 candidats n'est pas en litige en l'espèce. Les seuls avantages examinés dans le présent pourvoi sont le droit des partis politiques de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales, ainsi que le droit des candidats de remettre à leur parti (plutôt qu'au gouvernement) les fonds non dépensés pendant la campagne électorale et celui d'inscrire leur appartenance politique sur les bulletins de vote.

Le droit d'un parti de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales est prévu au par. 127(3) de la *Loi de l'impôt sur le revenu*, L.R.C. 1985, ch. 1 (5e suppl.) :

127. . . .

(3) Il peut être déduit de l'impôt payable par ailleurs par un contribuable en vertu de la présente partie, pour une année d'imposition, au titre du total des montants dont chacun est une contribution monétaire versée par le contribuable, au cours de l'année, à un parti enregistré ou à un candidat confirmé, pour l'élection d'un ou de plusieurs députés à la Chambre des communes du Canada (appelé « le total » au présent article) :

(*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.

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,

a) 75 % du total lorsque celui-ci ne dépasse pas 200 $;

b) 150 $ plus 50 % de la différence entre 200 $ et le total si celui-ci dépasse 200 $ sans dépasser 550 $;

c) le moindre des montants suivants :

(i) 325 $ plus 33 1/3 % de la différence entre 550 $ et le total si celui-ci dépasse 550 $,

(ii) 500 $,

si le versement de chaque contribution monétaire comprise dans le total est prouvé par la présentation au ministre d'un reçu signé d'un agent enregistré du parti enregistré ou de l'agent officiel du candidat confirmé, selon le cas, qui contient les renseignements requis.

6 L'article 232 de la *Loi électorale* dispose que les candidats peuvent remettre à leur parti — plutôt qu'au receveur général — les fonds électoraux non dépensés :

232. Lorsque le total de l'argent reçu par :

a) un agent officiel d'un candidat en vertu de l'alinéa 217(1)*b*);

b) un agent officiel en vertu des articles 241 à 247;

c) un candidat à titre de remboursement, en vertu de la présente loi, du dépôt qu'il devait faire en conformité avec l'alinéa 81(1)*j*),

est supérieur au total du dépôt visé à l'alinéa 81(1)*j*) et des dépenses suivantes engagées par le candidat relativement à l'élection :

d) ses dépenses d'élection et toutes les dépenses raisonnables qui découlent de l'élection;

e) ses dépenses personnelles;

f) la partie des honoraires du vérificateur qui excède le montant payé en application de l'alinéa 243(4)*b*) ou du paragraphe 244(2);

g) les frais relatifs à un recomptage, en conformité avec le paragraphe 171(1) ou les articles 176 à 184, des votes dans la circonscription, dans la mesure où ces frais dépassent le montant payé par le receveur général au candidat en conformité avec le paragraphe 171(5),

l'agent officiel remet cet excédent :

(*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 political 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.

h) lorsque les bulletins de vote indiquent que l'appartenance politique du candidat est un parti enregistré, à une organisation ou association locale des membres du parti dans la circonscription du candidat ou, à l'agent enregistré du parti;

i) dans les autres cas, au receveur général,

selon la dernière éventualité qui se réalise, dans le mois qui suit la réception, par l'agent officiel du candidat du remboursement visé au paragraphe 243(4) relativement aux dépenses électorales du candidat ou dans les deux mois qui suivent le dépôt, par l'agent officiel, du rapport concernant les dépenses d'élection relatives au candidat.

Enfin, l'article 100 de la *Loi électorale* dispose que les candidats peuvent inscrire leur appartenance politique sur les bulletins de vote :

100. (1) Tous les bulletins de vote doivent répondre à la même description et se ressembler le plus possible, et chaque bulletin de vote doit être un document imprimé où :

a) sont inscrits les noms des candidats, suivant l'ordre alphabétique de leur nom de famille et tels qu'ils figurent sur leur bulletin de présentation respectif;

b) est indiquée, après ou sous le nom de chaque candidat, son appartenance politique, s'il en est, telle qu'elle est donnée, en vertu de l'article 81, au moment de la présentation de ce candidat;

. . .

(2) Nonobstant le paragraphe (1), lorsque, avant ou après la présentation d'un candidat, le directeur général des élections radie du registre le parti enregistré que ce candidat a inscrit au titre de son appartenance politique dans l'acte écrit qu'il a déposé en conformité avec l'alinéa 81(1)*h*), les bulletins de vote de la circonscription pour laquelle le candidat a été présenté ne peuvent indiquer, après ou sous son nom, aucune appartenance politique ni le mot « indépendant ».

Ces dispositions ont pour effet que les candidats des partis politiques qui n'ont pas présenté 50 candidats ne peuvent pas délivrer de reçus fiscaux pour les dons recueillis en dehors des périodes électorales, ni remettre à leur parti respectif les fonds électoraux non dépensés ou inscrire leur appartenance politique sur les bulletins de vote.

III. Judicial History

A. *Ontario Court (General Division)* (1999), 43 O.R. (3d) 728

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.

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.

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.

III. Historique des procédures judiciaires

A. *Cour de l'Ontario (Division générale)* (1999), 43 O.R. (3d) 728

9 La juge Molloy a estimé que le droit de vote emportait implicitement celui de voter à des élections justes et démocratiques, où tous les participants sont traités sur un pied d'égalité. Les valeurs à la base de la *Charte* commandent que tous les citoyens, sans distinction, puissent exercer les droits démocratiques. Par conséquent, lorsque le gouvernement décide d'accorder un avantage à un parti politique, cet avantage doit également être offert à tous les autres partis. Étant donné que, en raison de la limite de 50 candidats, seuls certains partis politiques ont droit aux avantages en cause, la juge Molloy a estimé que cette exigence est incompatible avec le droit de tout citoyen de se présenter aux élections et qu'elle est également incompatible avec l'art. 3 de la *Charte* en ce qu'elle prive les électeurs de l'information nécessaire pour faire un choix éclairé. La juge a conclu que le droit de voter emporte celui d'être informé de l'appartenance politique de chacun des candidats.

10 La juge Molloy a ensuite estimé que cette atteinte à l'art. 3 ne pouvait être justifiée conformément à l'article premier de la *Charte*, puisque l'objectif déclaré de la distinction faite entre les partis en fonction de l'appui dont ils bénéficient n'était pas urgent et réel. Le fait de réserver des avantages aux partis politiques jouissant d'un large appui est l'antithèse même d'une véritable démocratie. De plus, d'affirmer la juge, même si cet objectif pouvait être qualifié d'urgent et de réel, la mesure législative ne satisferait pas au critère de l'arrêt *Oakes*, puisqu'il n'existe pas de lien rationnel entre l'exigence et cet objectif, la présentation d'un minimum de 50 candidats ne constituant pas une mesure exacte de l'appui populaire.

11 La juge Molloy a donc ordonné que l'on fasse une interprétation atténuante de la disposition exigeant 50 candidatures, de sorte qu'un parti comptant au moins deux candidats puisse être enregistré. Le procureur général a appelé de cette décision à la Cour d'appel de l'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 becomes 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

B. *Cour d'appel de l'Ontario* (2000), 50 O.R. (3d) 161

Selon le juge Doherty, la juge Molloy a eu tort de conclure que le droit garanti à l'art. 3 crée une obligation générale d'équité prescrivant d'étendre à tous les partis politiques les avantages accordés à certains d'entre eux. À son avis, la question de savoir si le critère des 50 candidatures porte atteinte à l'art. 3 de la *Charte* doit être tranchée au regard de l'objet de cette disposition, soit la protection du droit à une [TRADUCTION] « représentation effective » (par. 69). En conséquence, il s'agit de décider si le traitement favorable réservé aux partis politiques qui présentent des candidats dans au moins 50 circonscriptions électorales est incompatible avec le droit à une représentation effective.

De l'avis du juge Doherty, la représentation effective est la finalité que l'on attend du processus électoral. Selon ce point de vue, un parti politique n'est vraiment en mesure de favoriser la représentation effective que s'il rivalise pour la préférence des électeurs à l'échelle nationale et qu'il leur donne la possibilité de participer au choix du gouvernement. En conséquence, une disposition législative qui confère des avantages à certains partis politiques dans le but de favoriser la représentation effective établit à juste titre une distinction entre (i) les partis dont la participation au processus est suffisamment importante pour servir cet objectif et (ii) les partis dont la participation est si minime qu'elle ne saurait être en mesure de le servir. Le juge Doherty a conclu que la présentation de 50 candidats était un moyen acceptable de mesurer ce niveau de participation.

Pour ce qui concerne le droit des candidats d'inscrire leur appartenance politique sur le bulletin de vote, le juge Doherty a estimé que le droit des citoyens à une représentation effective emporte celui de pouvoir faire un choix éclairé, rationnel. L'indication de l'appartenance politique étant un aspect essentiel de l'exercice de ce droit, la reconnaissance de cet avantage aux seuls candidats des partis enregistrés constitue une atteinte à l'art. 3 de la *Charte*. Il a ajouté que cette atteinte ne pouvait être justifiée conformément à l'article premier. Bien que l'objectif consistant à veiller à ce que l'infor-

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.

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

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*.

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.

mation figurant sur le bulletin de vote n'induise pas l'électeur en erreur ni ne sème la confusion dans son esprit soit urgent et réel, la condition requérant la présentation d'au moins 50 candidats ne respecte pas le critère de l'atteinte minimale, du fait que l'interdiction s'applique même dans les cas où il n'y a aucun risque que la mention de l'appartenance politique du candidat ne sème la confusion chez les électeurs ou ne les trompe.

15 Le juge Doherty a en conséquence statué que la disposition obligeant les partis politiques à présenter au moins 50 candidats pour obtenir la qualité de parti enregistré n'est pas incompatible avec l'art. 3 de la *Charte*, sauf dans la mesure où elle empêche le candidat d'un parti non enregistré d'inscrire son appartenance politique sur le bulletin de vote.

IV. Questions en litige

16 Notre Cour doit décider si les par. 24(2), 24(3) et 28(2) de la *Loi électorale* portent atteinte à l'art. 3 de la *Charte*, du fait que, suivant ces dispositions, un parti politique doit présenter un candidat dans au moins 50 circonscriptions électorales pour que ses candidats puissent délivrer des reçus fiscaux à l'égard des dons recueillis en dehors des périodes électorales, puissent lui remettre les fonds électoraux non dépensés et puissent inscrire leur appartenance politique sur les bulletins de vote — et, dans l'affirmative, s'il s'agit d'une atteinte raisonnable et dont la justification peut se démontrer conformément à l'article premier de la *Charte*.

17 L'appelant soutient également que les par. 24(2), 24(3) et 28(2) de la *Loi électorale* violent l'al. 2*d*) et le par. 15(1) de la *Charte*, et que ces atteintes ne peuvent être justifiées conformément à l'article premier. Ayant conclu que le présent pourvoi peut être tranché en vertu du seul art. 3 de la *Charte*, j'estime inutile d'examiner ces prétentions. Je tiens également à souligner que le présent pourvoi porte principalement sur la participation au processus électoral qui précède le processus parlementaire. Par conséquent, la façon dont le Parlement détermine quels partis politiques ont la qualité de partis officiels à la Chambre des communes n'est pas en litige en l'espèce.

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

V. Analyse

A. *Le critère des 50 candidatures porte-t-il atteinte à l'art. 3 de la Charte?*

La première question qu'il faut trancher en l'espèce est de savoir si le refus de permettre aux candidats de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales, de remettre à leur parti respectif les fonds électoraux non dépensés et d'inscrire leur appartenance politique sur les bulletins de vote portent atteinte à l'art. 3 de la *Charte*. Pour répondre à cette question, notre Cour doit accomplir deux tâches. Premièrement, elle doit définir l'objet de l'art. 3 de la *Charte* et, deuxièmement, elle doit apprécier le bien-fondé de ce critère à la lumière de cette définition, et décider si celui-ci porte atteinte à l'art. 3 de la *Charte*.

(1) L'article 3 de la *Charte*

L'article 3 de la *Charte* dispose que « [t]out citoyen canadien a le droit de vote et est éligible aux élections législatives fédérales ou provinciales ». De prime abord, sa portée est relativement étroite : il n'accorde que le droit de voter et de briguer les suffrages lors de l'élection des députés du Parlement et des assemblées législatives provinciales. Toutefois, dans l'analyse fondée sur la *Charte*, les tribunaux ne doivent pas se limiter au texte de la disposition. Pour reprendre les propos de la juge en chef McLachlin de la Cour suprême de la Colombie-Britannique (maintenant Juge en chef de notre Cour), [TRADUCTION] « [l]e [droit de vote] ne s'entend pas que du simple droit de déposer son bulletin de vote dans l'urne » : *Dixon c. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, p. 403.

Afin de bien circonscrire la portée de l'art. 3, notre Cour doit tout d'abord dégager l'objet de cette disposition. Comme l'a écrit le juge Dickson (plus tard Juge en chef) dans l'arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 344, « . . . l'interprétation [d'une disposition de la *Charte*] doit être libérale plutôt que formaliste et viser à réaliser l'objet de la garantie et à assurer que les citoyens bénéficient pleinement de la protection accordée par la *Charte* ». Les tribunaux appelés à délimiter la portée d'un droit garanti par la *Charte* doivent recourir à

legislation is in harmony with the purposes of the *Charter*.

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.

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.

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

une interprétation libérale et téléologique, de façon à concilier les dispositions législatives régulièrement édictées avec les objectifs de la *Charte*.

21 C'est dans l'affaire *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158 (« *Renvoi concernant la Saskatchewan* »), que notre Cour s'est penchée pour la première fois sur l'objet de l'art. 3. Concluant que cet article n'exige pas l'égalité absolue du nombre d'électeurs (pouvoir électoral), la juge McLachlin a estimé que cet objet était la « représentation effective » (p. 183). Notre Cour a par la suite confirmé, à de nombreuses reprises, que tel était l'objet de l'art. 3 : voir *Haig c. Canada*, [1993] 2 R.C.S. 995; *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876; *Thomson Newspapers Co. c. Canada (Procureur général)*, [1998] 1 R.C.S. 877.

22 La Cour d'appel de l'Ontario a conclu que la représentation effective est [TRADUCTION] « la finalité attendue du processus électoral » (par. 80). En particulier, la cour a jugé qu'il y a représentation effective lorsque le processus électoral aboutit à la formation d'un gouvernement majoritaire ayant présenté des candidats et agrégé les préférences des électeurs à l'échelle nationale. Selon ce point de vue, seuls les partis politiques aptes à agréger les préférences à l'échelle nationale et à gouverner le pays après le scrutin permettent la réalisation de cet objectif. Le parti qui ne participe pas aux élections dans le but de former le gouvernement ou, du moins, de remporter un nombre substantiel de sièges au Parlement n'est pas en mesure de favoriser la représentation effective. Il ne serait donc pas inapproprié de refuser des avantages aux partis politiques dont la participation au processus démocratique n'est pas de nature à favoriser la représentation effective.

23 En toute déférence, telle n'est pas mon interprétation des propos de la juge McLachlin, dans le *Renvoi concernant la Saskatchewan*, précité, selon lesquels l'objet de l'art. 3 est la représentation effective. Selon moi, elle ne faisait pas allusion à un intérêt collectif à ce que le processus électoral aboutisse à l'élection d'un gouvernement

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

majoritaire. Ma collègue insistait plutôt sur le droit de chaque citoyen à un représentant efficace au sein des assemblées législatives. Elle a écrit ceci, à la p. 183 :

> Je conclus que l'objet du droit de vote garanti à l'art. 3 de la *Charte* n'est pas l'égalité du pouvoir électoral en soi mais le droit à une « représentation effective ». Notre démocratie est une démocratie représentative. Chaque citoyen a le droit d'être représenté au sein du gouvernement. La représentation suppose la possibilité pour les électeurs d'avoir voix aux délibérations du gouvernement aussi bien que leur droit d'attirer l'attention de leur député sur leurs griefs et leurs préoccupations. [Premier soulignement ajouté; deuxième soulignement dans l'original.]

Dans cette affaire, la question n'était pas de savoir si la dérogation à la parité absolue des électeurs pouvait être justifiée par les avantages qu'elle conférait aux électeurs des régions rurales, mais si elle était incompatible avec le droit des électeurs des régions urbaines à un représentant efficace à l'assemblée législative. Notre Cour a conclu que la dérogation était compatible avec l'art. 3, non pas parce qu'elle assurait une représentation plus effective aux électeurs des régions rurales, mais bien parce qu'elle ne portait pas atteinte au droit des électeurs des régions urbaines à un représentant efficace à l'assemblée législative.

En conséquence, je ne suis pas d'accord avec la conclusion du juge LeBel (au par. 117) selon laquelle le *Renvoi concernant la Saskatchewan* a établi que l'affaiblissement d'un aspect de la représentation effective (la parité) peut en définitive se traduire par une représentation plus effective. Notre Cour a plutôt dit qu'il est erroné de confondre le droit de tout citoyen à la représentation effective et le droit à la parité absolue des électeurs. Comme l'a écrit la juge McLachlin, à la p. 181 de l'arrêt susmentionné, « des considérations telles que la géographie sociale et physique peuvent avoir une incidence sur la valeur du droit de vote des citoyens » (je souligne). Le *Renvoi concernant la Saskatchewan* nous enseigne qu'il peut être nécessaire de prendre en considération un large éventail de facteurs sociaux pour décider si une dérogation à la parité absolue des électeurs porte de fait atteinte au droit de tout citoyen à la représentation effective. Une dérogation

of each citizen to effective representation, it does not infringe s. 3.

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 legislation 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*.

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

à la parité absolue des électeurs qui ne porte pas atteinte au droit de tout citoyen à la représentation effective ne viole pas l'art. 3.

25 Cependant, le droit à la représentation effective vise davantage que le droit à un représentant efficace au Parlement ou à l'assemblée législative. Dans l'arrêt *Haig*, précité, p. 1031, exprimant alors l'opinion majoritaire de la Cour, la juge L'Heureux-Dubé a résumé ainsi les propos de la juge McLachlin concernant l'objet de l'art. 3 :

> Évidemment, dans une société démocratique, l'étendue du droit de vote énoncé à l'art. 3 doit correspondre aux valeurs propres à un État démocratique. Le juge McLachlin, au nom de la majorité, a conclu, à la p. 183, que c'est le système canadien de représentation effective qui constitue l'essence de la garantie :
>
> > . . . l'objet du droit de vote garanti à l'art. 3 de la *Charte* n'est pas l'égalité du pouvoir électoral en soi mais le droit à une « représentation effective ». Notre démocratie est une démocratie représentative. Chaque citoyen a le droit d'être représenté au sein du gouvernement. La représentation suppose la possibilité pour les électeurs d'avoir voix aux délibérations du gouvernement aussi bien que leur droit d'attirer l'attention de leur député sur leurs griefs et leurs préoccupations. . .
>
> L'article 3 de la *Charte* a donc pour objet d'accorder à tous les citoyens canadiens le droit de jouer un rôle important dans l'élection de députés qui, eux, sont chargés de prendre des décisions qui seront consacrées dans des lois dont ils auront à rendre compte auprès de leurs électeurs. [Premier soulignement dans l'original; deuxième soulignement ajouté.]

Comme l'indique cet extrait, notre Cour a déjà jugé que l'art. 3 a pour objet de conférer à tout citoyen non seulement le droit d'être représenté par un député fédéral ou provincial et d'élire ce député, mais aussi celui de jouer un rôle significatif dans le processus électoral. Voilà, à mon sens, un énoncé plus complet de l'objet véritable de l'art. 3 de la *Charte.*

26 Le fait que les droits garantis par l'art. 3 sont des droits de participation étaye la thèse que l'art. 3 doit être interprété en fonction du droit de tout citoyen de jouer un rôle significatif dans le processus électoral, et non en fonction de l'élection d'une forme de gouvernement en particulier. L'article ne fait pas état

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 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.

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

de la composition du Parlement ou de l'assemblée législative au terme de l'élection, mais uniquement du droit de tout citoyen à un certain degré de participation au processus électoral. Il ressort donc du texte même de l'art. 3 que l'élément central de cette disposition est le droit de tout citoyen de participer au processus électoral. Il en découle que le droit de tout citoyen de participer à la vie politique du pays revêt une importance fondamentale dans une société libre et démocratique et que l'art. 3 doit être interprété d'une manière propre à faire en sorte que la teneur de ce droit de participation corresponde à l'importance de la participation individuelle à l'élection des députés dans un État libre et démocratique. Définir l'objectif de cette disposition en fonction du droit de tout citoyen de jouer un rôle significatif dans le processus électoral, et non en fonction de la composition du Parlement ou de l'assemblée législative au terme de l'élection, protège davantage contre les interprétations trop restrictives le droit de participation que garantit expressément l'art. 3.

Le fait d'interpréter l'art. 3 d'une manière s'attachant au droit de tout citoyen de jouer un rôle significatif dans le processus électoral tient également compte des raisons de tous ordres pour lesquelles la participation individuelle au processus électoral revêt une importance aussi grande dans une société libre et démocratique. Comme l'a dit le juge en chef Dickson dans *R. c. Oakes*, [1986] 1 R.C.S. 103, p. 136 :

> Les tribunaux doivent être guidés par des valeurs et des principes essentiels à une société libre et démocratique, lesquels comprennent, selon moi, le respect de la dignité inhérente de l'être humain, la promotion de la justice et de l'égalité sociales, l'acceptation d'une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société.

Dans cet extrait, le juge en chef Dickson traitait de l'article premier. Toutefois, comme la prise en compte de l'expression « une société libre et démocratique » est essentielle pour mieux comprendre l'art. 3, ce passage indique que l'interprétation qu'il convient de donner de cette disposition est celle qui favorise le respect des valeurs et principes propres à un État libre et démocratique, notamment le respect

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.

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.

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

de la diversité des croyances et des opinions. Le fait de définir l'objet de l'art. 3 en se référant au droit de tout citoyen de participer utilement au processus électoral tient davantage compte de la capacité de chacun de renforcer la qualité de la démocratie dans notre pays en participant au processus électoral.

28 Comme l'a souvent reconnu notre Cour, la libre circulation d'opinions et d'idées variées revêt une importance fondamentale dans une société libre et démocratique. Dans *R. c. Keegstra*, [1990] 3 R.C.S. 697, p. 763-764, le juge en chef Dickson a décrit en ces termes le lien entre la libre circulation d'opinions et d'idées variées et les valeurs essentielles d'une société libre et démocratique :

> Le lien entre la liberté d'expression et le processus politique est peut-être la cheville ouvrière de la garantie énoncée à l'al. 2*b*), et ce lien tient dans une large mesure à l'engagement du Canada envers la démocratie. La liberté d'expression est un aspect crucial de cet engagement démocratique, non pas simplement parce qu'elle permet de choisir les meilleures politiques parmi la vaste gamme des possibilités offertes, mais en outre parce qu'elle contribue à assurer un processus politique ouvert à la participation de tous. Cette possibilité d'y participer doit reposer dans une mesure importante sur la notion que tous méritent le même respect et la même dignité. L'État ne saurait en conséquence entraver l'expression d'une opinion politique ni la condamner sans nuire jusqu'à un certain point au caractère ouvert de la démocratie canadienne et au principe connexe de l'égalité de tous.

Plus simplement, un large débat politique permet à notre société de demeurer ouverte et de bénéficier d'une vaste gamme d'idées et d'opinions : voir *Switzman c. Elbling*, [1957] R.C.S. 285, p. 326; *SDGMR c. Dolphin Delivery Ltd.*, [1986] 2 R.C.S. 573, p. 583; *Edmonton Journal c. Alberta (Procureur général)*, [1989] 2 R.C.S. 1326, p. 1336; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, par. 23. À son tour, cette situation en sorte fait non seulement que les décideurs disposent d'une vaste gamme de solutions, mais également que la politique sociale tient compte des besoins et des intérêts d'un large éventail de citoyens.

29 Il s'ensuit donc que la participation au processus électoral possède une valeur intrinsèque indépendamment de son effet sur le résultat concret des élections. Certes, il est vrai que le processus électoral est

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

le moyen utilisé pour élire les députés et former les gouvernements, mais il constitue également le principal moyen permettant au citoyen ordinaire de participer au débat public qui précède l'établissement de la politique sociale. Le droit de briguer les suffrages des électeurs offre à tout citoyen la possibilité de présenter certaines idées et opinions et d'offrir à l'électorat une option politique viable. Le droit de vote permet à tout citoyen de manifester son appui à l'égard des idées et opinions auxquelles souscrit un candidat donné. Dans chacun des cas, les droits démocratiques consacrés à l'art. 3 font en sorte que tout citoyen a la possibilité d'exprimer une opinion sur l'élaboration de la politique sociale et le fonctionnement des institutions publiques en participant au processus électoral.

En dernière analyse, je crois que dans l'arrêt *Haig*, précité, notre Cour a eu raison de définir l'art. 3 en fonction du droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Évidemment, la démocratie est une forme de gouvernement où le pouvoir souverain appartient à la population dans son ensemble. Dans notre système démocratique, cela veut dire que tout citoyen doit avoir la possibilité réelle de prendre part au gouvernement du pays en participant à l'élection de représentants. Fondamentalement, l'art. 3 a selon moi pour objet d'encourager et de protéger le droit de tout citoyen de jouer un rôle significatif dans la vie politique du pays. Sans un tel droit, notre système ne serait pas véritablement démocratique.

Pour cette raison, je ne peux souscrire à l'opinion du juge LeBel selon laquelle il est opportun, à cette étape de l'analyse, de mettre en balance le droit de tout citoyen de jouer un rôle significatif dans le processus électoral avec d'autres valeurs démocratiques, comme l'agrégation des préférences politiques. Une loi censée favoriser l'agrégation des préférences politiques peut faire progresser certains intérêts collectifs, mais elle ne bénéficie pas à tous les citoyens, particulièrement ceux dont les intérêts ne sont pas partagées par les partis politiques traditionnels. L'analyse de la proportionnalité préconisée par le juge LeBel permet donc clairement que, au moment de déterminer s'il y a atteinte, on mette en balance des intérêts collectifs et le droit de tout

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.

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.

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

citoyen de jouer un rôle significatif dans le processus électoral. Pour que l'État puisse porter atteinte à ce droit en vue de renforcer d'autres valeurs, il doit justifier cette atteinte conformément à l'article premier.

32 Cette interprétation est compatible avec le principe bien établi voulant que la restriction d'un droit individuel garanti par la *Charte* doive être justifiée conformément à l'article premier. Comme l'a maintes fois affirmé notre Cour, cette règle vaut autant pour l'art. 3 que pour les autres dispositions de la *Charte* : voir, par exemple, *Harvey*, précité, p. 897, et *Sauvé c. Canada (Directeur général des élections)*, [2002] 3 R.C.S. 519, 2002 CSC 68, où la juge en chef McLachlin a écrit, au par. 11, que la portée de l'art. 3 « ne devrait pas être limitée par des intérêts collectifs opposés ». Le juge LeBel fait une distinction entre la présente affaire et les arrêts *Harvey* et *Sauvé*, au motif que, dans ces deux derniers cas, le droit de voter ou de briguer les suffrages des électeurs était littéralement écarté, alors que la présente affaire porte sur les conditions d'exercice de ces droits par les citoyens. À son avis, une loi qui porte sur les conditions régissant la participation des citoyens à un scrutin en tant qu'électeurs ou candidats mais n'entre pas directement en conflit avec le sens ordinaire de l'art. 3 commande un autre type d'analyse, une analyse exigeant la mise en balance de valeurs opposées.

33 En toute déférence, je ne crois pas que l'analyse applicable varie en fonction de la nature de l'atteinte reprochée. Selon moi, la seule différence réside dans la preuve. Au risque de me répéter, l'art. 3 a pour objet de protéger le droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Lorsque la disposition contestée est incompatible avec le libellé exprès de l'art. 3, il n'est pas nécessaire de tenir compte du contexte social ou politique en général pour décider si la disposition viole ce droit. Il est clair et net qu'elle a cet effet. Toutefois, lorsque la disposition contestée touche aux conditions dans lesquelles le citoyen exerce ce droit, il n'est pas aussi clair qu'elle produit cet effet. Par conséquent, il peut être nécessaire de considérer un large éventail de facteurs, dont la géographique sociale ou physique, pour décider si la disposition litigieuse porte

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

atteinte au droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Toutefois, dans ni l'un ni l'autre de ces cas, ce droit ne saurait être limité par des intérêts collectifs opposés. Ces intérêts seront examinés dans le cadre de l'analyse fondée sur l'article premier.

Comme ce qui précède tend à l'indiquer, je ne crois pas que le droit de jouer un rôle significatif dans le processus électoral soit un droit « relatif » au même titre que le droit à la vie, à la liberté et à la sécurité de sa personne, auquel il ne peut être porté atteinte qu'en conformité avec les principes de justice fondamentale (art. 7) ou le droit à la protection contre les fouilles, les perquisitions ou les saisies abusives (art. 8). Il convient de signaler que le texte des art. 7 et 8 commande lui-même une certaine mise en balance. Par conséquent, il est non seulement opportun, mais obligatoire, de reconnaître ce fait pour dégager le sens de ces dispositions : voir, par exemple, les arrêts *R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, et *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, auxquels renvoie mon collègue.

Selon le juge LeBel, le fait que l'on détermine la teneur implicite de l'art. 3 en fonction d'énoncés restrictifs (le droit des électeurs d'être « raisonnablement informés de tous les choix possibles » ou le droit des partis, des candidats et des candidates à « une possibilité raisonnable [. . .] d'exposer leur position » (*Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569, par. 47 (je souligne)), indique que la mise en balance des intérêts individuels et collectifs, qui est opportune dans le contexte des droits expressément « relatifs », vaut également pour l'art. 3, sauf lorsqu'une inhabilité totale est en cause.

À mon sens, l'emploi de tels termes ne permet pas de conclure que le droit de tout citoyen de jouer un rôle significatif dans le processus électoral doit être mis en balance avec des valeurs opposées, tel l'intérêt qu'a la collectivité à ce que soient agrégées les préférences politiques. Ces termes suggèrent plutôt que l'objet de l'art. 3 est de protéger le droit de tout citoyen de jouer non pas un rôle illimité mais

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 capacity 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.

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?

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

un rôle significatif dans le processus électoral; le seul fait qu'une disposition législative rompe avec la parité absolue des électeurs ou limite la participation du citoyen au processus électoral ne permet pas à lui seul de conclure que cette disposition porte atteinte au droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Toutefois, une disposition qui entrave concrètement la capacité de tout citoyen de jouer un tel rôle est incompatible avec l'art. 3. Tout avantage correspondant lié à d'autres valeurs démocratiques que le droit de tout citoyen de jouer un rôle significatif dans le processus électoral doit être pris en compte dans l'analyse fondée sur l'article premier.

37 Enfin, même si certains aspects du système électoral actuel favorisent l'agrégation des préférences politiques, je ne crois pas qu'il y ait lieu de constitutionnaliser ce facteur. Dans ses motifs, le juge LeBel fait valoir que le système uninominal majoritaire à un tour favorise les principaux partis ayant agrégé les préférences politiques à l'échelle nationale. Tel est peut-être le cas en effet. Le système électoral actuel reflète certaines valeurs politiques, mais cela ne veut pas dire que ces valeurs sont consacrées par la *Charte* ou qu'il est opportun de les mettre en balance avec le droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Après tout, la *Charte* ne précise aucunement le type de système électoral dans le cadre duquel doit être exercé le droit de voter ou de briguer les suffrages des électeurs. Ce fait tend à indiquer que l'art. 3 n'a pas pour objet de protéger les valeurs ou objectifs que pourrait comporter notre système électoral actuel, mais bien de protéger le droit de tout citoyen de jouer un rôle significatif dans le processus électoral, quel que soit ce processus.

(2) Le critère des 50 candidatures viole-t-il l'art. 3?

38 En conséquence, il s'agit essentiellement de décider si le critère des 50 candidatures empêche les citoyens de jouer individuellement un rôle significatif dans le processus électoral. Pour répondre à cette question, notre Cour doit au préalable en trancher deux autres. Premièrement, les membres et les partisans des partis politiques qui présentent moins

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

de 50 candidats jouent-ils un rôle significatif dans le processus électoral? Dans l'affirmative, le fait d'interdire à ces partis politiques de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales et de refuser aux candidats de ces partis le droit de leur remettre les fonds électoraux non dépensés et celui d'inscrire leur appartenance politique sur les bulletins de vote nuit-il à la capacité des membres et des partisans des partis en question de jouer un rôle significatif dans le processus électoral?

a) *Le rôle des partis politiques présentant des candidats dans moins de 50 circonscriptions électorales*

Selon la Cour d'appel, un parti politique ne joue son rôle fondamental que lorsque son degré de participation au processus électoral permet de conclure qu'il aspire à gouverner le pays après les élections. J'arrive quant à moi à la conclusion que l'aptitude d'un parti politique à contribuer valablement au processus électoral ne dépend pas de sa capacité de constituer pour l'électorat une véritable « solution de rechange ». Au contraire, les partis politiques permettent aux citoyens de participer utilement au processus électoral pour des raisons qui transcendent leur capacité (ou incapacité) de gouverner le pays après le scrutin. Indépendamment de leur capacité d'influencer ou non l'issue du scrutin, les partis politiques constituent à la fois un véhicule et une tribune permettant aux citoyens de participer utilement au processus électoral.

Relativement à la capacité des partis politiques de constituer un véhicule favorisant la participation utile des citoyens au processus électoral, il importe de signaler que les partis politiques sont beaucoup plus à même que tout citoyen de participer au débat public auquel donne lieu le processus électoral. En agissant comme représentant, au nom de leurs membres et de leurs partisans, les partis politiques servent de véhicules permettant à chaque citoyen de participer à la vie politique du pays. Grâce aux partis politiques, les idées et les opinions de leurs membres et de leurs partisans sont effectivement débattues publiquement dans le cadre du processus

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.

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.

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.

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

électoral et présentées à l'électorat comme une solution de rechange valable. Si ces idées et ces opinions ne sont pas retenues par le gouvernement élu, ce ne sera pas faute d'avoir été considérées, mais faute d'avoir reçu un appui suffisant de la part du public.

41 Il importe de souligner que les grands partis politiques ne sont pas les seuls à pouvoir jouer ce rôle. Il est sans doute vrai que ces partis sont à même de participer plus activement au débat public au cours de l'élection, mais il ne s'ensuit pas que la capacité d'un parti à présenter les idées et les opinions de ses membres et de ses partisans pendant le processus électoral dépend de sa capacité de constituer pour l'électorat une « solution de rechange ». Tous les partis politiques, petits ou grands, sont en mesure de faire valoir, dans ce débat politique, des intérêts et des préoccupations uniques, et, en conséquence, ils sont capables d'agir comme véhicule permettant aux citoyens de participer au débat public qui inspire l'établissement de la politique sociale.

42 À titre d'exemple, les partis marginaux ou régionaux se dissocient généralement des courants de pensée dominants et présentent à l'ensemble de la population des questions et des préoccupations que n'ont pas retenues les partis nationaux. Peut-être ont-ils une influence moins grande que ces derniers, mais ils peuvent néanmoins offrir aux citoyens dont les préférences ne figurent pas dans les programmes politiques des partis nationaux un moyen efficace de participer au processus électoral. Il est préférable pour un citoyen que ses idées et ses préoccupations soient introduites dans le débat électoral par un parti politique doté d'une présence géographique restreinte plutôt que totalement exclues de ce débat.

43 Relativement à leur capacité de constituer une tribune propre à permettre aux citoyens de participer utilement au processus électoral, par leur participation à ce processus les partis politiques permettent également aux citoyens de s'exprimer sur les politiques gouvernementales et le bon fonctionnement des institutions publiques. Un vote en faveur d'un candidat présenté par un parti donné

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

est un témoignage d'appui en faveur du programme ou des orientations que défend ce parti. La participation des partis politiques contribue ainsi à permettre aux citoyens de s'exprimer, par l'exercice du droit de vote, sur le genre de pays qu'ils désirent.

La capacité d'un parti politique de donner aux citoyens la possibilité de faire valoir leur point de vue sur les politiques gouvernementales et le bon fonctionnement des institutions publiques ne dépend pas, rappelons-le, de ses chances de former le gouvernement du pays après les élections. Comme l'indique le paragraphe précédent, la participation des électeurs ne se résume pas à élire les députés. Indépendamment de son effet sur l'issue du scrutin, la voix accordée à un candidat est un témoignage d'appui envers une orientation politique ou un programme donné. Que cette voix contribue ou non à l'élection du candidat, chaque vote en faveur de l'orientation politique ou du programme en question accroît la probabilité que les décideurs tiennent compte, sinon dans l'immédiat, peut-être à un moment ultérieur, des problèmes et préoccupations qui sont à l'origine de la mesure.

Il n'y a en conséquence aucune raison de croire que les partis politiques ne satisfaisant pas au critère des 50 candidatures n'offrent pas aux citoyens une tribune leur permettant de jouer un rôle significatif dans le processus électoral. Il n'y a pas de corrélation entre la capacité d'un parti politique de constituer pour l'électorat une solution de rechange au gouvernement sortant et sa capacité d'élaborer un programme politique distinct et de le soumettre à la population en général. À chaque scrutin, un nombre appréciable de citoyens votent pour des candidats présentés par des partis enregistrés, sachant pourtant fort bien que ces candidats n'ont dans les faits aucune chance d'être élus au Parlement — ou que le parti auquel ils appartiennent n'a pas réellement de chance de remporter la majorité des sièges à la Chambre des communes. Tout comme ces votes ne sont pas des « votes gaspillés », les votes en faveur d'un parti politique n'ayant pas satisfait au critère des 50 candidatures ne sont pas non plus « gaspillés ». Parce qu'ils sont l'expression publique de

integral component of a vital and dynamic democracy.

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*

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

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

l'appui accordé par un citoyen à certaines orientations et opinions, ils constituent un élément essentiel d'une démocratie vigoureuse et dynamique.

46 J'arrive donc à la conclusion que les membres et les partisans des partis politiques qui présentent des candidats dans moins de 50 circonscriptions électorales jouent effectivement un rôle significatif dans le processus électoral. Ces partis servent à la fois de véhicule permettant à des citoyens de participer au débat électoral et de tribune où peut s'exprimer l'appui en faveur de programmes politiques différents de ceux adoptés par les partis bénéficiant de larges appuis. La question qui se pose dès lors est de savoir si le critère des 50 candidatures porte atteinte au droit de ces citoyens de jouer un rôle significatif dans le processus électoral.

b) *L'effet du critère des 50 candidatures*

47 Comme il a été expliqué précédemment, l'application de cette condition a pour effet que seuls les partis ayant présenté un candidat dans au moins 50 circonscriptions électorales bénéficient des avantages de l'enregistrement. Sont en litige dans le présent pourvoi le droit des candidats de délivrer des reçus fiscaux pour les dons recueillis en dehors des périodes électorales, de remettre à leur parti respectif les fonds électoraux non dépensés et d'inscrire leur appartenance politique sur les bulletins de vote. Notre Cour doit décider si le refus de ces avantages aux candidats des partis qui ne satisfont pas au critère des 50 candidatures compromet le droit de tout citoyen de participer utilement au processus électoral. J'estime que cette condition a précisément cet effet dans chaque cas.

(i) Le droit de délivrer des reçus fiscaux et de conserver les fonds électoraux non dépensés

48 D'entrée de jeu, je tiens à souligner que je ne crois pas que l'art. 3 impose au législateur l'obligation distincte d'accorder aux partis politiques le droit de délivrer des reçus fiscaux pour les dons reçus en dehors des périodes électorales et aux candidats celui de remettre à leur parti respectif les fonds électoraux non dépensés. Cet article interdit au législateur de porter atteinte au droit de tout citoyen de jouer un rôle significatif dans le processus

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.

électoral; il ne l'oblige pas à édicter des dispositions ayant pour effet d'accroître la capacité des partis politiques de lever des fonds leur permettant de faire connaître au grand public les idées et les opinions de leurs membres et de leurs partisans. Cependant, il convient d'examiner le bien-fondé d'un texte de loi qui accorde un avantage à certains partis politiques et non aux autres. En l'espèce, c'est uniquement parce que le législateur fédéral a accordé les avantages susmentionnés aux partis politiques qui satisfont au critère des 50 candidatures que son refus de reconnaître les mêmes avantages aux partis politiques qui ne respectent pas cette condition constitue une atteinte à l'art. 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.

Le fondement de cette conclusion est assez simple. Étant donné le caractère compétitif du processus électoral, la capacité d'un citoyen d'y participer est intimement liée à celle des autres citoyens de le faire eux aussi. Cette situation s'explique par le fait que les tribunes disponibles pour le discours politique sont limitées. Si une personne « hurle » ses opinions ou occupe un espace disproportionné sur les tribunes populaires, il devient alors extrêmement difficile pour les autres intéressés de prendre part au débat. Autrement dit, il est possible que la voix de certaines personnes soit étouffée par celles des participants disposant de ressources supérieures pour communiquer leurs idées et leurs opinions à la population en général.

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*.

J'arrive donc à la conclusion que l'art. 3 impose au Parlement l'obligation de s'abstenir de renforcer la capacité d'un citoyen de participer au processus électoral d'une manière qui compromette le droit d'un autre citoyen de participer utilement à ce processus. Dans le cas où une disposition législative accorde un avantage à certains citoyens mais pas à d'autres, il est nécessaire d'examiner attentivement son effet sur les seconds. Est incompatible avec l'art. 3 de la *Charte* toute disposition portant atteinte au droit de certains citoyens de jouer un rôle significatif dans le débat social que suscite le processus électoral.

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.

En d'autres termes, il faut analyser la disposition en cause pour s'assurer que le législateur n'a pas porté atteinte au droit de tout citoyen de participer à

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.

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

un scrutin équitable. Comme l'a souligné notre Cour dans *Libman*, précité, par. 47, l'équité des élections est une valeur démocratique fondamentale :

> Le principe d'équité en matière électorale découle directement d'un principe consacré par la Constitution, soit le principe d'égalité politique des citoyens et citoyennes. [. . .] Les élections n'ont de caractère juste et équitable que si tous les citoyens et citoyennes sont raisonnablement informés de tous les choix possibles et que l'on donne une possibilité raisonnable aux partis, aux candidats et candidates d'exposer leur position . . .

Il importe de rappeler qu'équité n'est pas synonyme d'égalité formelle : voir le *Renvoi concernant la Saskatchewan*, précité, où notre Cour a jugé que l'art. 3 n'exigeait pas la parité absolue des électeurs. Pour qu'il y ait atteinte à l'art. 3, il ne suffit pas qu'une loi établisse une distinction entre un citoyen et un autre ou entre un parti politique et un autre. La différence de traitement doit aussi avoir un effet défavorable sur le droit du demandeur de jouer un rôle significatif dans le processus électoral.

Le fait que seuls les partis politiques ayant présenté un candidat dans au moins 50 circonscriptions électorales sont habilités à délivrer des reçus fiscaux pour les dons reçus en dehors des périodes électorales a pour effet que ces partis sont à même de recueillir plus de fonds qu'ils ne pourraient le faire s'ils ne bénéficiaient pas de cet avantage. De plus, le fait que seuls ces partis ont le droit de conserver les fonds électoraux non dépensés, plutôt que de les remettre au receveur général, produit le même effet. Bref, dans les deux cas, les partis qui satisfont à cette condition disposent de ressources plus considérables pour communiquer leurs idées et leurs opinions à la population en général. À l'inverse, il va de soi qu'il est encore plus difficile pour les partis qui ne présentent pas 50 candidats de faire connaître leurs idées et leurs points de vue. Comme notre Cour l'a souligné dans l'arrêt *Libman*, précité, par. 47, il y a déjà lieu de craindre que les partis les mieux nantis accaparent le débat électoral et ne privent leurs opposants de la possibilité raisonnable de s'exprimer et d'être entendus. Une disposition législative qui accroît cette disparité augmente le risque que les partis traditionnels — qui sont en conséquence capables de

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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

lever davantage de fonds mais aussi d'en conserver davantage — n'étouffent les voix déjà faibles des partis politiques jouissant d'appuis restreints sur le plan géographique.

Cette situation réduit à son tour la capacité des membres et des partisans de ces partis de jouer un rôle significatif dans le processus électoral. Comme il a été indiqué plus tôt, les partis politiques offrent aux citoyens un moyen de participer à ce processus; ils constituent le principal mécanisme par lequel les citoyens introduisent leurs propres idées et opinions dans le débat public auquel donne lieu l'élection. Un texte de loi qui creuse l'écart entre les différents partis politiques, du point de vue de la capacité de prendre part à ce débat, a pour effet de permettre à certains de disposer d'un véhicule plus efficace que les autres de faire connaître leurs idées et leurs opinions. Le critère des 50 candidatures porte en conséquence atteinte aux droits garantis par l'art. 3 de la *Charte* en diminuant la capacité des membres et des partisans des partis défavorisés de présenter des idées et des opinions dans le débat public auquel donne lieu le processus électoral.

Le refus d'accorder ces avantages produit en outre un effet préjudiciable plus général. Le droit des citoyens de jouer un rôle significatif dans le processus électoral emporte pour chacun d'eux le droit d'exercer son droit de vote d'une manière reflétant exactement ses préférences. Pour ce faire, les citoyens doivent être en mesure de comparer les forces et les faiblesses relatives du programme de chacun des partis et, pour évaluer ainsi chacun des partis, les électeurs doivent avoir accès à de l'information sur chaque candidat. En conséquence, un texte de loi qui creuse encore plus l'écart qui existe entre les divers politiques du point de vue de leur capacité de communiquer leurs positions au grand public contrevient à l'art. 3. Tel est pourtant exactement l'effet du refus d'accorder aux partis politiques qui ne satisfont pas au critère des 50 candidatures le droit de délivrer des reçus fiscaux à l'égard des dons reçus en dehors des périodes électorales et de conserver les fonds électoraux non dépensés. Du fait qu'il réduit la capacité des partis marginaux ou régionaux de présenter à la population leurs idées et leurs opinions, le refus de ces avantages porte

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

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.

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

atteinte aux droits des citoyens de disposer d'informations susceptibles d'influencer la manière dont ils exerceront leur droit de vote.

(ii) Interdiction d'inscrire l'appartenance politique du candidat sur les bulletins de vote

55 En empêchant un candidat d'inscrire son appartenance politique sur les bulletins de vote, le critère des 50 candidatures compromet également le droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Premièrement, le refus de cet avantage aux partis qui ne satisfont pas à cette condition réduit la capacité des citoyens de prendre part au débat électoral. Il existe un lien étroit entre la capacité des membres et des partisans d'un parti politique d'influencer les politiques d'intérêt général et l'appui que recueille ce parti à l'occasion d'un scrutin donné. Même lorsque le parti ne fait élire aucun député, plus il obtient de voix, plus il y a de chances que d'autres citoyens et le gouvernement élu prennent au sérieux les idées et les opinions qu'il défend. Un texte de loi qui a pour effet de réduire le nombre de voix que le candidat d'un parti est susceptible d'obtenir restreint par le fait même la capacité des membres et des partisans de ce parti de prendre part au débat public en participant à l'élection des députés. Pour les raisons exposées ci-après, j'arrive à la conclusion que le refus de permettre à un candidat d'inscrire son appartenance politique sur les bulletins de vote produit cet effet.

56 Comme l'a signalé la juge Molloy, les partis politiques jouent un rôle si important dans notre système démocratique que le choix d'un candidat par certains électeurs s'appuie en grande partie, sinon exclusivement, sur l'identité du parti auquel il appartient. En effet, bon nombre d'électeurs ignorent tout de l'identité personnelle ou du parcours du candidat en faveur duquel ils désirent voter. Si le bulletin de vote ne précise pas l'appartenance politique d'un candidat, il est possible que certains électeurs soient incapables de voter pour le candidat qui aurait autrement leur préférence. De plus, il se peut également que des électeurs qui connaissent l'identité du candidat d'un parti donné seront, pour cette raison, dissuadés de voter en faveur d'un parti

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.

non enregistré. Vu la visibilité dont jouissent les partis politiques dans notre système de démocratie représentative, l'appartenance à un parti reconnu officiellement confère un énorme avantage à ses candidats. Pour certains électeurs, l'absence de toute indication de l'appartenance politique d'un candidat peut faire d'un candidat présenté par un parti comptant moins de 50 candidats un choix moins intéressant. Cette absence d'identification peut donner l'impression que le candidat n'appartient pas à un parti politique ou que le parti auquel il appartient n'est pas un parti politique légitime. Dans chaque cas, l'interdiction faite aux candidats d'inscrire leur appartenance politique réduit la capacité des partis non enregistrés de rivaliser pour la faveur des électeurs.

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.

Pour des raisons analogues, cette interdiction porte également atteinte au droit de tout citoyen de faire un choix éclairé entre les différents candidats. Les électeurs ont de meilleures chances de faire un tel choix lorsqu'ils disposent de renseignements sensiblement équivalents en qualité et en quantité à l'égard de chacun des candidats. Dans notre système démocratique, le programme politique d'un candidat correspond étroitement à celui du parti auquel il appartient, de sorte que la mention de l'appartenance politique du candidat constitue un élément d'information important. Par conséquent, toute disposition législative qui permet à certains candidats de préciser leur appartenance politique, mais en empêche d'autres de le faire, est incompatible avec le droit de tout citoyen d'exercer son droit de vote d'une manière qui reflète exactement ses préférences véritables. Une telle disposition viole l'art. 3 parce que, du fait de son application, les électeurs connaissent mieux le programme politique de certains candidats que celui des autres.

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 require-

Pour ces motifs, je conclus que le critère des 50 candidatures viole l'art. 3 de la *Charte*. Elle réduit la capacité des citoyens d'influencer la politique sociale en introduisant leurs idées et leurs opinions dans le débat public par leur participation au processus électoral. Elle mine aussi la capacité des citoyens d'exercer leur droit de vote d'une manière qui reflète exactement leurs préférences. Dans chaque cas, la condition contestée est incompatible avec l'objet

ment 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?*

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.

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.

même de l'art. 3 de la *Charte*, savoir la protection du droit de tout citoyen de jouer un rôle significatif dans le processus électoral.

B. *La validité des dispositions attentatoires est-elle sauvegardée par l'article premier de la Charte?*

59 Pour justifier, au regard de l'article premier, l'atteinte portée à un droit garanti par la *Charte*, le gouvernement doit démontrer qu'il s'agit d'une limite raisonnable et justifiée dans le cadre d'une société libre et démocratique. Cette démonstration requiert une analyse en deux volets, conforme aux principes exposés dans l'affaire *Oakes*, précitée, et d'autres arrêts pertinents : *Vriend c. Alberta*, [1998] 1 R.C.S. 493, *Thomson Newspapers*, précité, et *M. c. H.*, [1999] 2 R.C.S. 3. La charge de la preuve incombe au gouvernement pendant toute l'analyse. Tout d'abord, ce dernier doit prouver que la disposition contestée vise un objectif suffisamment urgent et réel pour justifier la violation d'un droit constitutionnel. Il ne doit pas s'agir d'un objectif « peu importan[t] » ni « contrair[e] aux principes qui constituent l'essence même d'une société libre et démocratique » : *Oakes*, précité, p. 138. Une fois cette preuve faite, le gouvernement doit établir que l'atteinte est proportionnée, savoir qu'il existe un lien rationnel entre la disposition législative et l'objectif visé, que la disposition porte le moins possible atteinte au droit constitutionnel en cause et que ses effets bénéfiques l'emportent sur ses effets préjudiciables.

60 Avant d'amorcer cette analyse, je tiens à rappeler que, en cas de contestation de restrictions apportées aux droits garantis par l'art. 3 de la *Charte*, les tribunaux doivent se livrer à un examen approfondi du bien-fondé de ces limites et non faire montre de déférence : *Sauvé*, précité, par. 9. Comme l'a souligné notre Cour dans cet arrêt, les droits prévus à l'art. 3 font partie des droits garantis par la *Charte* auxquels il est interdit de déroger en invoquant l'art. 33 de ce texte. Ce fait indique bien à quel point l'art. 3 est un élément fondamental de notre système démocratique et le grand soin avec lequel il faut décider si le gouvernement a justifié ou non la violation de cette disposition.

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

Dans son mémoire, le procureur général du Canada soutient que l'objectif visé par l'application du critère des 50 candidatures consiste [TRADUCTION] « à accroître l'efficacité des élections au Canada, à la fois leur déroulement *et* leur résultat » (en italique dans l'original). Plus précisément, il fait valoir que ce critère vise trois objectifs distincts : (i) accroître l'efficacité du processus électoral; (ii) préserver l'intégrité du système de financement électoral; (iii) faire en sorte que le processus permette de produire un résultat viable eu égard à notre forme de gouvernement responsable. Afin d'analyser plus exhaustivement l'argument du gouvernement fédéral fondé sur l'article premier, je vais examiner ces objectifs séparément. Dans chaque cas, je vais me demander d'abord s'il s'agit d'un objectif urgent et réel et, deuxièmement, si la violation respecte le critère de la proportionnalité.

(1) Amélioration du processus électoral

Le premier objectif invoqué par le procureur général est l'amélioration du processus électoral grâce au financement public des partis politiques. Dans la mesure où il s'agit effectivement de l'objectif visé par le critère des 50 candidatures, l'objectif en question est urgent et réel. Le financement public des partis politiques contribue, sous un certain nombre de rapports, à l'amélioration de notre système démocratique.

Pour que le processus électoral fonctionne efficacement, il faut que les partis politiques aient accès à des ressources financières considérables. Pour les raisons examinées précédemment, il est essentiel que les électeurs soient bien informés. Les électeurs qui ne sont pas bien informés ne peuvent exercer leur droit de vote d'une manière reflétant leurs préférences véritables. Toutefois, les partis politiques ne peuvent informer convenablement les électeurs que s'ils ont accès à des ressources financières suffisantes pour leur permettre de communiquer leurs idées à l'ensemble de la population. D'aucuns prétendraient qu'il est bénéfique non seulement que les partis politiques disposent de ressources financières suffisantes, mais aussi qu'un pourcentage important

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.

de ces ressources viennent de citoyens ordinaires. La loi actuelle repose sur la prémisse selon laquelle les candidats qui reçoivent de modestes contributions d'un grand nombre de sources, y compris de personne physiques, sont plus redevables envers les citoyens dont ils défendent les intérêts en définitive que les candidats qui recueillent des sommes plus considérables d'un nombre plus restreint de sources, notamment d'entreprises et de syndicats : *Rapport du Comité des dépenses électorales* (le « Comité Barbeau ») (1966), p. 36-37.

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.

64 En conséquence, je reconnais qu'un texte de loi qui vise à encourager les citoyens à faire des dons aux partis politiques contribue à la réalisation d'un objectif urgent et réel. Cependant, ce n'est pas la validité d'un texte de loi qui encourage les citoyens à faire des dons aux partis politiques qui est en cause. Un texte de loi qui interdit à certains partis politiques de remettre des reçus fiscaux à l'égard des dons recueillis en dehors des périodes électorales ou de conserver les fonds électoraux non dépensés n'incite pas les citoyens à contribuer au financement des partis politiques, mais dissuade activement de le faire les membres et les partisans de ces partis politiques. Il n'existe aucun lien entre l'obligation de présenter 50 candidats et l'objectif consistant à améliorer le processus électoral grâce au financement public des partis politiques.

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

65 Bien que l'objectif général consistant à « améliorer le processus électoral grâce au financement public des partis politiques » ne soit par conséquent pas suffisant pour justifier les mesures législatives contestées, il est possible que l'objectif plus précis qui consiste à améliorer le processus électoral sur le plan, pourrait-on dire, du rapport coût-efficacité satisfasse au critère énoncé dans l'arrêt *Oakes*. Tout d'abord, je suis réticent à conclure que l'objectif visant à assurer le rapport coût-efficacité du régime de crédits d'impôt est suffisamment urgent et réel pour justifier la violation d'un droit garanti par la *Charte*. Il n'y a pas de différence réelle entre la violation d'un droit constitutionnel pour favoriser la réalisation économique d'un objectif par ailleurs valide et la violation d'un droit constitutionnel par souci d'économie des derniers publics. Toutefois, il n'est pas certain que

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.

l'économie des deniers publics constitue un objectif suffisamment urgent et réel pour satisfaire le volet pertinent du critère énoncé dans *Oakes*. Comme l'a dit le juge en chef Lamer dans l'arrêt *Schachter c. Canada*, [1992] 2 R.C.S. 679, p. 709, « les considérations financières ne p[euv]ent servir à justifier une violation dans le cadre de l'analyse fondée sur l'article premier » : voir également *Egan c. Canada*, [1995] 2 R.C.S. 513, par. 99, et *Renvoi relatif à la rémunération des juges de la Cour provinciale de l'Île-du-Prince-Édouard*, [1997] 3 R.C.S. 3.

Par ailleurs, je ne voudrais pas écarter la possibilité que, dans certains cas, l'effet possible sur les deniers publics soit suffisamment important pour justifier la restriction de certains droits des citoyens. Par conséquent, pour les besoins de la présente analyse, j'estime prudent de reconnaître que le fait d'assurer le rapport coût-efficacité du régime de crédits d'impôt constitue une préoccupation urgente et réelle. Dès lors, il faut se demander si l'application du critère des 50 candidatures est une mesure proportionnée, c'est-à-dire s'il s'agit d'un moyen acceptable d'assurer le rapport coût-efficacité du régime de financement des élections. Plus précisément, cette exigence a-t-elle un lien rationnel avec l'objectif visé, porte-t-elle le moins possible atteinte à l'art. 3 et ses effets bénéfiques sont-ils plus importants que ses effets préjudiciables sur les droits constitutionnels des citoyens?

En ce qui concerne l'interdiction faite aux candidats de remettre à leur parti respectif les fonds électoraux non dépensés et d'inscrire leur appartenance politique sur les bulletins de vote, il est impossible de discerner quelque lien que ce soit entre le critère des 50 candidatures et l'objectif visant à assurer le rapport coût-efficacité du financement public des élections. Aucun de ces avantages n'a pour but d'encourager les citoyens à faire des dons aux partis politiques. Il est par conséquent impossible de conclure que le refus d'accorder ces avantages vise à assurer le rapport coût-efficacité du régime de financement public des élections. Cet objectif ne saurait justifier de refuser aux candidats le droit de remettre à leur parti respectif les fonds électoraux non dépensés et d'inscrire leur appartenance politique sur les bulletins de vote.

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.

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.

68 À première vue, l'interdiction fait à certains partis politiques de remettre des reçus fiscaux pour les dons recueillis en dehors des périodes électorales présente un lien rationnel avec l'objectif consistant à assurer le rapport coût-efficacité du régime de financement public des élections. Après tout, chaque crédit d'impôt accordé diminue d'autant les recettes fiscales de l'État. Il importe toutefois de signaler que le critère des 50 candidatures n'a aucun effet sur la ponction globale que pourrait opérer le régime de crédits d'impôt sur les deniers publics. En effet, malgré l'existence de ce critère, il demeure possible à tout citoyen d'obtenir le crédit maximal de 500 $ pour les dons faits à des partis politiques, puisque la *Loi électorale du Canada* n'empêche personne de faire un don à un parti politique enregistré. Au mieux, il n'existe qu'un lien ténu entre une disposition n'ayant aucune incidence sur le nombre de citoyens ayant droit au crédit d'impôt ou sur le montant de ce crédit et l'objectif qui consiste à assurer le rapport coût-efficacité du régime de crédits d'impôt. De plus, le gouvernement n'a présenté aucun élément de preuve au soutien de sa prétention que l'application du critère des 50 candidatures accroît effectivement l'efficacité du régime de crédits d'impôt du point de vue du rapport coût-efficacité. J'estime donc que le volet exigeant l'existence d'un lien rationnel n'est pas satisfait.

69 Même si le gouvernement était en mesure de prouver l'existence d'un lien rationnel entre le critère des 50 candidatures et l'objectif invoqué, la mesure législative contestée ne satisferait pas au critère de l'atteinte minimale. Si le Parlement estime que le coût du régime de crédits d'impôt est extrêmement élevé, un moyen plus approprié de corriger ce problème serait de réduire la somme qu'un contribuable peut déduire au titre des dons à des partis politiques. Non seulement cette mesure contribuerait-elle plus efficacement à abaisser le coût du régime de crédits d'impôt, mais elle permettrait également de réaliser cet objectif sans porter atteinte au droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Lorsqu'un objectif peut être réalisé sans violer les droits garantis par la *Charte*, la mesure attentatoire ne respecte pas le volet atteinte minimale du critère établi dans l'arrêt *Oakes*.

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 indicating 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

Enfin, même si les deux premiers volets du critère de la proportionnalité étaient respectés, les effets bénéfiques de la réduction du coût du régime de crédits d'impôt ne l'emporteraient quand même pas sur les effets préjudiciables de cette mesure sur le droit de tout citoyen de jouer un rôle significatif dans le processus électoral. Le droit de prendre part à l'élection des députés est l'une des pierres angulaires d'un État libre et démocratique : voir *Sauvé*, précité, par. 58, où la juge en chef McLachlin a dit que la violation de l'art. 3 sape la légitimité du gouvernement et son efficacité. Les effets préjudiciables de la violation de l'art. 3 sont considérables. Par contre, le gouvernement n'a présenté aucun élément de preuve indiquant que le critère des 50 candidatures permet au Trésor public de réaliser des économies substantielles. D'ailleurs, comme les partis politiques qui présentent moins de 50 candidats disposent généralement d'appuis relativement restreints, il est permis de penser que le pourcentage des dons recueillis par les partis non enregistrés est relativement minime et que l'économie pour le Trésor public est en conséquence relativement minime. Si le droit des citoyens de jouer un rôle significatif dans le processus électoral doit être restreint pour des raisons d'ordre fiscal, il faudrait que les économies en résultant soient beaucoup plus importantes que celles découlant du refus de permettre aux partis non enregistrés de remettre aux citoyens des reçus fiscaux pour les dons recueillis en dehors des périodes électorales.

(2) Préserver l'intégrité du système de financement électoral

Le procureur général fait valoir que le critère des 50 candidatures a pour deuxième objectif de préserver l'intégrité du système de financement électoral. Il prétend que ce nombre minimal est nécessaire pour éviter que les tiers partis qui ne poursuivent pas d'intérêt véritable en participant au processus électoral n'utilisent à mauvais escient le système de financement électoral.

Notre Cour a, dans une affaire antérieure, jugé que la protection de l'intégrité du processus électoral est une préoccupation urgente et réelle dans un État libre et démocratique. Dans l'arrêt *Harvey*, précité, qui concernait la constitutionnalité de

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.

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.

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

dispositions législatives provinciales rendant inhabile à occuper la charge de député pendant une période de cinq ans tout membre de l'Assemblée législative du Nouveau-Brunswick reconnu coupable d'une infraction à la *Loi électorale* du Nouveau-Brunswick, L.R.N.-B. 1973, ch. E-3, le juge La Forest a dit ce qui suit, au par. 38 :

> Je ne doute pas que la loi contestée ait principalement pour but de maintenir et de renforcer l'intégrité du processus électoral. Je ne doute pas non plus qu'un tel objectif soit toujours une préoccupation urgente et réelle de toute société qui prétend suivre les préceptes d'une société libre et démocratique.
>
> Il ne faut pas que les mécanismes et les règles qui régissent le processus de formation des gouvernements soient trop vulnérables. Comme le financement électoral est un élément essentiel de ce processus, il est très important de protéger l'intégrité de ce régime. Veiller à ce que les fonds recueillis conformément à la *Loi électorale* ne soient pas utilisés à mauvais escient est un objectif constitutionnellement valide.

73 Il faut maintenant se demander s'il existe un lien rationnel entre la disposition contestée et cet objectif constitutionnellement valide : le gouvernement a-t-il établi l'existence d'un lien rationnel entre le critère des 50 candidatures et l'objectif consistant à protéger l'intégrité du système de financement électoral? Ici encore, il est clair, d'entrée de jeu, que cet objectif ne saurait justifier de refuser aux candidats le droit d'inscrire leur appartenance politique sur les bulletins de vote. Le refus de ce droit n'a tout simplement aucun lien avec le système de financement électoral et contribue encore moins à protéger l'intégrité de celui-ci. Bien que cela ne soit peut-être pas aussi évident, cette constatation vaut également pour le refus d'accorder le droit de remettre des reçus fiscaux et celui de remettre au parti les fonds électoraux non dépensés.

74 Relativement au refus d'accorder le droit de remettre des reçus fiscaux, le procureur général prétend que le critère des 50 candidatures a pour effet d'empêcher les organisations qui n'ont pas d'intérêt véritable à participer au processus électoral de collecter des fonds en application du par. 127(3) de la *Loi de l'impôt sur le revenu*. Cette prétention

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

paraît comporter deux facettes. La première est que l'omission de satisfaire au critère des 50 candidatures indique qu'un parti politique n'est pas vraiment intéressé à participer au processus électoral. La seconde est que cette exigence dissuade activement les organisations qui ne poursuivent pas d'objectif électoral de chercher à obtenir la qualité de parti enregistré à seule fin de pouvoir remettre des reçus fiscaux. Aucune des facettes de cette prétention ne permet de conclure à l'existence d'un lien rationnel entre l'exigence en cause et l'objectif énoncé.

Premièrement, l'argument voulant que l'omission de satisfaire au critère des 50 candidatures établisse qu'un parti politique n'est pas vraiment intéressé à participer au processus électoral n'a absolument aucun fondement. Pour toutes les raisons examinées précédemment, il n'est pas nécessaire qu'un parti politique présente un candidat dans au moins 50 circonscriptions électorales pour jouer un rôle significatif dans le processus électoral. L'histoire électorale révèle que des partis politiques qui présentaient et, dans certains cas, faisaient élire un grand nombre de candidats ont subséquemment été incapables de satisfaire au critère des 50 candidatures. Récemment, le Parti communiste du Canada en 1993 et le Parti Crédit social du Canada en 1988 n'ont pas été en mesure de satisfaire à ce critère. Comme le montrent ces exemples, le critère des 50 candidatures n'est pas un mécanisme approprié pour décider si une organisation est un parti politique légitime, qui a véritablement l'intention de prendre part au processus électoral.

Le gouvernement n'a pas non plus prouvé que le critère empêche des tiers ou des groupes de pression de présenter des candidats à seule fin d'obtenir le droit de remettre des reçus fiscaux pour les dons recueillis en dehors des périodes électorales. Premièrement, soulignons que tous les candidats, qu'ils soient présentés par un parti enregistré ou non, ont le droit de remettre des reçus fiscaux pour les dons recueillis pendant la campagne électorale. S'il n'est pas déjà arrivé que des tiers ou des groupes de pression présentent des candidats afin d'obtenir cet avantage, il semble peu probable qu'ils le fassent pour obtenir le droit de remettre des reçus fiscaux pour les dons recueillis en dehors des

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.

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.

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

périodes électorales. De plus, un parti enregistré doit s'acquitter d'un nombre appréciable d'obligations, notamment présenter des états financiers vérifiés, un rapport vérifié des opérations et un rapport vérifié des dépenses électorales. Vu l'absence de preuve indiquant que ces obligations ne sont pas suffisantes pour empêcher des tiers de chercher à obtenir la qualité de parti enregistré à seule fin de profiter indûment du régime de crédits d'impôt, rien ne permet de conclure que le critère des 50 candidatures favorise la réalisation de l'objectif consistant à prévenir l'utilisation à mauvais escient du système de financement électoral.

77 Pour ce qui est du refus d'accorder aux candidats le droit de remettre à leur parti respectif les fonds électoraux non dépensés, l'intimé plaide que le critère des 50 candidatures est nécessaire parce que les partis non enregistrés ne sont pas assujettis aux obligations prévues par la *Loi électorale* en matière de déclaration. Il s'agit là toutefois d'un argument entièrement circulaire. Après tout, l'existence du critère en question est la seule raison pour laquelle les partis qui présentent moins de 50 candidats ne sont pas assujettis aux obligations de déclaration. Si ces obligations protègent déjà contre les risques d'utilisation à mauvais escient des fonds électoraux non dépensés, il est inutile d'obliger certains partis à remettre ces fonds au receveur général. Par ailleurs, si ces obligations ne permettent pas de prévenir ce genre d'abus, l'application du critère des 50 candidatures contribue certes très peu à la protection de l'intégrité du système de financement électoral. En effet, l'obligation de remettre au receveur général une portion extrêmement minime des fonds électoraux ne protège pas l'intégrité du système de financement électoral.

78 De plus, même si le refus d'accorder le droit de remettre des reçus fiscaux et le droit de conserver les fonds électoraux non dépensés prévient l'utilisation à mauvais escient du système de financement électoral, les dispositions contestées ne satisfont pas au critère de l'atteinte minimale. Dans chaque cas, le gouvernement n'a pas établi qu'il lui serait impossible d'obtenir le même résultat sans violer l'art. 3 de la *Charte*. Pensons par exemple aux vérificateurs et autres enquêteurs dont dispose actuellement l'État.

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.

Il n'y a aucune raison de croire que le recours à des vérificateurs ne permettrait pas tout autant, sinon davantage, de détecter et, partant, d'empêcher l'emploi à mauvais escient des fonds recueillis dans le cadre du système de financement électoral. Après tout, ce comportement est précisément le genre de méfait que les vérificateurs sont entraînés à mettre au jour et que l'État peut à bon droit criminaliser afin de préserver l'intégrité du système de financement électoral. L'inférence logique est que l'on pourrait obtenir exactement le même résultat par l'application de règles strictes en matière de dépenses et par le recours à des vérificateurs. Lorsqu'il est possible d'obtenir le même résultat sans violer la *Charte*, le critère de l'atteinte minimale n'est pas respecté.

(3) Ensuring a Viable Outcome for Our Form of Responsible Government

(3) Assurer l'obtention d'un résultat viable eu égard à notre régime de gouvernement responsable

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.

L'intimé invoque un troisième objectif, soit celui de faire en sorte que le résultat du processus électoral soit viable compte tenu de notre régime de gouvernement responsable. L'intimé soutient essentiellement que, considéré d'un point de vue non partisan, un certain type de résultat convient davantage à notre système démocratique. Ce que paraît privilégier l'intimé est la formation d'un gouvernement majoritaire ayant agrégé les préférences des citoyens à l'échelle nationale. Selon l'intimé, un gouvernement majoritaire est plus efficace qu'un gouvernement issu de la coalition de plusieurs partis politiques. Selon ce point de vue, un texte de loi qui favorise la formation de gouvernements majoritaires contribue à la réalisation d'un objectif urgent et réel.

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

Le fait d'exprimer ainsi cet objectif est extrêmement problématique, étant donné que, pour favoriser sa réalisation, il faut adopter une loi qui porte au droit des citoyens de jouer un rôle significatif dans le processus électoral une atteinte telle qu'elle accroît la probabilité que soient élus les candidats de partis d'envergure nationale, et qui réduit par le fait même les chances que soient élus les candidats de partis marginaux ou régionaux. Comme il a été indiqué plus tôt, le juge en chef Dickson a conclu dans l'arrêt *Oakes*, précité, que l'objectif de

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.

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.

la loi contestée ne doit pas être « contraire » aux principes qui constituent l'essence même d'une société libre et démocratique. L'adoption d'une loi dans le but exprès de réduire les chances qu'une certaine catégorie de candidats se fasse élire est non seulement contraire aux principes d'une société libre et démocratique, mais elle constitue l'antithèse de ces principes. Par conséquent, il est difficile d'admettre qu'un objectif consistant à faire en sorte que le processus électoral aboutisse à un résultat donné puisse être un objectif suffisamment urgent et réel pour justifier la violation de la *Charte*.

81 N'est pas également sans soulever de difficultés la prétention de l'intimé selon laquelle un gouvernement majoritaire ayant agrégé les préférences des citoyens à l'échelle nationale constitue la seule forme de gouvernement viable dans notre système de démocratie. De 1882 à 1983, le parlement britannique a connu neuf gouvernements minoritaires. Au Canada, il y a eu huit gouvernements minoritaires au fédéral et quelques-uns à l'échelle provinciale. Le procureur général du Canada n'a présenté aucun élément de preuve indiquant que les gouvernements minoritaires sont moins démocratiques que les gouvernements majoritaires ou que les premiers gouvernent moins efficacement que les seconds. Je tiens toutefois à souligner que je ne veux pas dire par là que le législateur doit opter pour un système électoral qui, selon notre Cour, permettra l'élection d'un « bon » ou d'un « meilleur » gouvernement. Abstraction faite de la *Charte*, le choix d'un processus électoral donné est, comme le dit le juge LeBel, une décision politique — à l'égard de laquelle notre Cour ne doit pas intervenir. Mais lorsque le législateur porte atteinte au droit de chaque citoyen de jouer un rôle significatif dans ce processus, il doit être en mesure de préciser l'objectif urgent et réel qu'il cherche à favoriser. En l'absence de motifs impérieux de soutenir qu'un résultat particulier donnera lieu à l'élection d'un meilleur gouvernement, rien ne permet de conclure que la loi visant à obtenir ce résultat favorise la réalisation d'un objectif suffisamment urgent et réel pour justifier une atteinte au droit de chaque citoyen de jouer un rôle significatif dans le processus électoral.

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.

Toutefois, il est toujours possible de faire valoir qu'il existe, globalement, des avantages à l'élection de gouvernements majoritaires. Par exemple, il est possible que la continuité et la stabilité associées à de tels gouvernements se traduisent par une meilleure administration. Le fait qu'il soit plus facile aux gouvernements majoritaires de mettre en œuvre leurs politiques peut avoir pour effet que ces gouvernements soient à même de réaliser plus efficacement leurs objectifs que les gouvernements de coalition, autre facteur entraînant une meilleure administration. On plaide parfois qu'il s'agit d'un avantage du modèle de démocratie parlementaire du Parlement de Westminster, évoqué dans le préambule de la *Loi constitutionnelle de 1867*, qui dote le Canada d'« une constitution reposant sur les mêmes principes que celle du Royaume-Uni ». Il se peut également que certains avantages tiennent à des facteurs uniques à l'environnement politique canadien. Ou peut-être est-ce simplement qu'il s'agit d'un système auquel les Canadiens se sont habitués — et que la confiance du public dans le gouvernement est inversement proportionnelle à la fragmentation du Parlement. Par conséquent, même si l'élection d'un gouvernement national fort n'est pas le seul résultat viable du processus électoral, il est à tout le moins possible que certains avantages découlent de la formation d'un gouvernement majoritaire ayant agrégé les préférences à l'échelle nationale.

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

Toutefois, même si j'étais disposé à reconnaître que les avantages globaux associés à la formation d'un gouvernement majoritaire sont suffisamment importants pour justifier une atteinte au droit de tout citoyen de jouer un rôle significatif dans le processus électoral, de sérieuses difficultés demeurent. Pour les raisons exposées précédemment, je conclus que les dispositions législatives contestées ne respectent pas l'aspect proportionnalité du critère établi dans *Oakes*. En conséquence, j'estime prudent de ne pas répondre en l'espèce à la question de savoir si l'élection d'un gouvernement majoritaire est un objectif urgent et réel. Même si l'objectif qui consisterait à faire en sorte que le processus électoral aboutisse à un résultat donné soulève des difficultés d'ordre conceptuel, je n'écarte pas entièrement la possibilité que l'État puisse établir que sa thèse selon laquelle

majority governments are more effective than minority governments.

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.

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.

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

des gouvernements majoritaires sont plus efficaces que des gouvernements minoritaires repose sur des fondements raisonnables.

84 Relativement au volet proportionnalité du critère établi dans *Oakes*, il faut d'abord déterminer si le critère des 50 candidatures a un lien rationnel avec l'objectif avancé. À première vue, les dispositions législatives en cause semblent avoir un lien rationnel avec l'objectif qui consiste à élire des gouvernements majoritaires. Après tout, la raison pour laquelle il a été jugé que ces dispositions violent l'art. 3 est dans une large mesure le fait qu'elles confèrent un avantage aux parties disposant de larges appuis sur le plan géographique. La logique semble indiquer qu'un texte de loi qui rend difficile pour les partis régionaux ou marginaux la tâche de recueillir des appuis et de gagner du terrain politiquement a un lien rationnel avec l'objectif qui consiste à accroître la probabilité que le gouvernement élu soit majoritaire.

85 Facteur important, il n'y a aucune preuve que le critère des 50 candidatures contribue à cette situation. Il est tout aussi possible, voire probable, que la plupart des électeurs estiment que les programmes des partis politiques non enregistrés ne tiennent pas compte de leurs intérêts ou qu'ils préfèrent voter pour un parti qui possède une possibilité réelle de remporter un nombre important de sièges. De fait, il paraît peu probable que l'élimination du critère des 50 candidatures aurait un effet appréciable, voire quelque effet que ce soit, sur la probabilité que soit élu un gouvernement majoritaire, maintenant ou dans un avenir rapproché. La menace la plus vraisemblable à l'élection de gouvernements majoritaires est non pas la participation au processus électoral des partis qui ne satisfont pas au critère des 50 candidatures, mais plutôt la prolifération des partis politiques enregistrés en général. Toutefois, la *Loi électorale* ne limite d'aucune façon le nombre des partis politiques pouvant obtenir le statut de parti enregistré.

86 En l'absence de preuve que la participation en tant que parti politique à part entière des partis ne satisfaisant pas au critère des 50 candidatures

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

réduirait dans les faits la probabilité que le processus électoral aboutisse à l'élection d'un gouvernement majoritaire, le critère ne peut raisonnablement être considéré comme ayant pour effet de favoriser la réalisation de l'objectif énoncé. Pour ce seul motif, même si l'objectif en question était urgent et réel, le critère des 50 candidatures ne satisferait pas au premier volet du critère de la proportionnalité, savoir celui du lien rationnel.

Cependant, même si l'intimé pouvait établir que le critère des 50 candidatures a un effet concret sur la probabilité que les élections donnent lieu à la formation de gouvernements majoritaires, je conclurais néanmoins que les dispositions législatives contestées ne respectent pas le troisième volet du critère de la proportionnalité, à savoir celui du lien rationnel. Le gouvernement n'a pas démontré que les effets bénéfiques de ces dispositions l'emportent sur leurs effets préjudiciables.

D'une part, les effets préjudiciables des dispositions législatives contestées sont substantiels. Comme nous l'avons vu plus tôt, ces dispositions ont une incidence appréciable sur la capacité des candidats des partis non enregistrés de communiquer leurs idées aux électeurs. Cette situation a à son tour pour effet de réduire la capacité des citoyens d'introduire des idées et des opinions dans le débat public auquel donne lieu le processus électoral et d'exercer leur droit de vote d'une manière qui reflète leurs préférences. Il ne s'agit pas là cependant du seul effet du critère des 50 candidatures. Si les dispositions législatives ont, en fait, un lien rationnel avec l'objectif énoncé, il ne leur suffit pas pour favoriser la réalisation de cet objectif de porter simplement atteinte au droit de chaque citoyen de jouer un rôle significatif dans ce processus électoral. Cette atteinte doit être telle qu'elle entraîne non seulement l'élection de candidats qui, sans elle, ne l'auraient pas été, mais également l'élection de gouvernements majoritaires. Comme il a été indiqué précédemment, il est difficile de concilier des mesures législatives visant à produire cet effet avec les principes fondamentaux d'une société libre et démocratique. Les dispositions législatives qui violent l'art. 3 dans ce but causent un grave préjudice

individual participants and the integrity of the electoral process itself.

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

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.

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, although 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

à la fois aux participants du processus électoral et à l'intégrité du processus lui-même.

89 Des dispositions produisant des effets aussi préjudiciables seraient difficiles à justifier. L'État devrait faire état d'effets bénéfiques l'emportant sur ces effets préjudiciables très sérieux. Plus particulièrement, il appartient à l'État d'établir, au moyen d'éléments de preuve ou d'arguments, que l'élection d'un gouvernement majoritaire est de nature à assurer une bien meilleure administration du pays que l'élection d'un gouvernement minoritaire. L'État ne s'est pas acquitté de ce fardeau de preuve. Il n'a pas apporté suffisamment d'éléments de preuve établissant que l'élection d'un gouvernement majoritaire aura des avantages qui feront plus que compenser les effets préjudiciables découlant des dispositions législatives qui violent l'art. 3 dans le but de garantir que le processus électoral aboutisse à l'élection d'un gouvernement qui ne serait pas élu sans cette violation. Il n'a pas avancé non plus d'arguments permettant de conclure en ce sens. En l'absence d'éléments de preuve ou d'arguments étayant cette thèse, il est impossible de conclure que les dispositions législatives contestées sont justifiées dans le cadre d'une société libre et démocratique.

VI. Dispositif

90 En dernière analyse, j'estime que le critère des 50 candidatures est incompatible avec le droit de chaque citoyen de jouer un rôle significatif dans le processus électoral, et que l'État n'a pas justifié la violation de ce droit.

91 Toutefois, avant de trancher le pourvoi, je considère important de souligner que la présente décision ne signifie pas que le fait de réserver un traitement différent à certains partis politiques entraînera dans tous les cas une violation de l'art. 3. Elle ne signifie pas non plus qu'il ne sera jamais possible de justifier une violation de l'art. 3 découlant d'un tel traitement distinct. Par conséquent, quoique la présente décision ait une incidence sur les articles de la *Loi électorale* donnant droit à du temps d'antenne gratuit, permettant d'acheter le temps d'antenne réservé et accordant le droit au remboursement partiel des

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

dépenses électorales moyennant l'obtention d'un pourcentage donné des votes, je ne me prononce pas sur la constitutionnalité des dispositions refusant ces avantages. Pour statuer sur cette question, il pourrait être nécessaire de considérer des facteurs qui n'ont pas été examinés dans le présent pourvoi.

Se pose en outre la question du nombre de candidats en deçà duquel il serait justifié de refuser les trois avantages discutés en l'espèce. Essentiellement, il ressort des présents motifs qu'aucun seuil n'est acceptable. Je tiens toutefois à souligner qu'une modification apportée récemment à la *Loi électorale* abaisse le nombre de candidats qu'un parti doit présenter pour que l'appartenance politique des candidats puisse être inscrite sur les bulletins de vote : L.C. 2001, ch. 21, art. 12. Sous l'effet de cette modification, un parti politique n'est tenu de présenter que 12 candidats pour que ceux-ci puissent préciser leur appartenance politique sur les bulletins de vote. Notre Cour n'est évidemment pas appelée à statuer sur la constitutionnalité de la disposition ainsi modifiée. Il pourrait fort bien arriver que l'État puisse faire valoir d'autres objectifs qui justifieraient l'obligation de présenter au moins 12 candidats. Je me contenterai toutefois de dire que ceux avancés invoqués en l'espèce ne sauraient justifier quelque seuil que ce soit et, a fortiori, un nombre minimal de 50 candidatures.

En définitive, le pourvoi est accueilli avec dépens et les par. 24(2), 24(3) et 28(2) de la *Loi électorale* sont déclarés inconstitutionnels. L'effet de la déclaration d'inconstitutionnalité est suspendu pendant 12 mois afin de permettre au gouvernement de se conformer aux présents motifs.

Les questions constitutionnelles reçoivent les réponses suivantes :

1. Est-ce que l'al. 24(3)*a*) et le par. 28(2) de la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2 (maintenant le par. 370(1) et l'art. 385 respectivement de L.C. 2000, ch. 9) limitent les droits garantis par l'art. 3 de la *Charte canadienne des droits et libertés* aux candidats ou partisans des partis politiques non enregistrés du fait que, suivant ces

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*?

dispositions, un parti doit présenter un candidat dans au moins 50 circonscriptions électorales à chaque élection générale pour devenir un parti politique enregistré et le rester?

Réponse : Oui.

2. Si la réponse à la question 1 est affirmative, cette limite est-elle, au sens de l'article premier de la *Charte*, une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

Réponse : Non.

3. Est-ce que l'al. 24(3)*a*) et le par. 28(2) de la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2 (maintenant le par. 370(1) et l'art. 385 respectivement de L.C. 2000, ch. 9) limitent les droits garantis par le par. 15(1) de la *Charte* aux candidats ou partisans des partis politiques non enregistrés du fait que, suivant ces dispositions, un parti doit présenter un candidat dans au moins 50 circonscriptions électorales à chaque élection générale pour devenir un parti politique enregistré et le rester?

Réponse : Il n'est pas nécessaire de répondre à cette question.

4. Si la réponse à la question 3 est affirmative, cette limite est-elle, au sens de l'article premier de la *Charte*, une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

Réponse : Il n'est pas nécessaire de répondre à cette question.

5. Est-ce que l'al. 24(3)*a*) et le par. 28(2) de la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2 (maintenant le par. 370(1) et l'art. 385 respectivement de L.C. 2000, ch. 9) limitent les droits garantis par l'al. 2*d*) de la *Charte* aux candidats ou partisans des partis politiques non enregistrés du fait que, suivant ces dispositions, un parti doit présenter un candidat dans au moins 50 circonscriptions électorales à chaque élection générale pour devenir un parti politique enregistré et le rester?

Réponse : Il n'est pas nécessaire de répondre à cette question.

6. Si la réponse à la question 5 est affirmative, cette limite est-elle, au sens de l'article premier de la *Charte*, une limite raisonnable dont la justification peut se démontrer dans le cadre d'une société libre et démocratique?

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

Réponse : Il n'est pas nécessaire de répondre à cette question.

Version française des motifs des juges Gonthier, LeBel et Deschamps rendus par

Le juge LeBel —

I. Introduction

Dans le présent pourvoi, notre Cour doit se prononcer sur d'importantes questions sur le sens des droits démocratiques garantis par la *Charte canadienne des droits et libertés*. Nous devons, pour la première fois, examiner ce que l'expression « représentation effective » signifie en dehors du contexte de la délimitation des circonscriptions électorales. Je souscris dans une large mesure à l'opinion des juges majoritaires, notamment au dispositif du juge Iacobucci, à la réparation qu'il propose et à l'accent mis sur la notion de « participation utile » au processus démocratique comme valeur fondamentale servant à déterminer le contenu de l'art. 3 de la *Charte*. Toutefois, je tiens à exprimer des réserves concernant la méthodologie utilisée par mon collègue pour statuer sur l'existence de la violation de l'art. 3.

À mon avis, la question déterminante dans le volet de l'analyse relatif à l'atteinte ne saurait se limiter à se demander si la mesure contestée « empêche les citoyens de jouer individuellement un rôle significatif dans le processus électoral » (le juge Iacobucci, par. 38). Formulée ainsi, la question minimise la complexité des notions de représentation effective et de participation utile. Ces concepts aux multiples facettes ne peuvent se réduire aux aspects purement individualistes de la participation politique; ils comprennent plutôt de nombreux principes étroitement liés et souvent opposés. D'ailleurs, le juge Iacobucci lui-même indique, au par. 36, que « le seul fait qu'une disposition législative [. . .] limite la participation du citoyen au processus électoral » ne suffit pas pour établir qu'il y a violation de l'art. 3.

La démarche appropriée consiste à appliquer le modèle analytique qui se dégage de la jurisprudence de notre Cour et des tribunaux inférieurs en matière

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.

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.

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"*

I agree with Iacobucci J. that s. 3 gives every Canadian citizen the right to meaningful participation

de circonscriptions électorales. La méthodologie développée dans ces affaires reconnaît que le droit de vote comprend de nombreux facteurs et que seule une analyse contextuelle et historique permet de préciser le contenu de ce droit.

98 L'application de cette démarche contextuelle et historique aux faits de l'espèce amène à conclure que les dispositions législatives contestées favorisent le respect d'importantes valeurs démocratiques. Ces dispositions font partie du régime de réglementation et de reconnaissance juridique formelle des partis politiques prévu par la *Loi électorale du Canada*, L.R.C. 1985, ch. E-2. Ce régime accroît l'efficacité du système de partis politiques, lequel constitue à son tour une composante importante de notre forme démocratique de gouvernement. L'obligation de présenter un minimum de 50 candidats tend à avantager les partis bénéficiant de larges appuis, ce qui favorise la cohésion et l'agrégation de la volonté politique. L'importance de ces valeurs, si profondément enracinées dans notre culture politique canadienne, ressort de la place qu'elles occupent dans notre histoire et dans nos institutions actuelles.

99 En principe, les valeurs renforcées par les dispositions contestées pourraient être favorisées au détriment, dans une certaine mesure, de la participation individuelle. En l'espèce, toutefois, les dispositions législatives vont trop loin parce qu'elles créent de l'injustice tant entre les électeurs qu'entre les différentes régions du pays. Au bout du compte, les dispositions contestées entrent en conflit avec le droit de participer utilement au processus démocratique et sont incompatibles avec l'art. 3. Cependant, avant d'exposer les motifs qui m'amènent à cette conclusion, je dois d'abord définir la principale question en jeu dans le présent pourvoi, à savoir la notion de participation utile au processus démocratique.

II. L'analyse

A. *La question principale : la définition de « participation utile » au processus démocratique*

100 À l'instar du juge Iacobucci, j'estime que l'art. 3 donne à tout citoyen canadien le droit de

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.

participer utilement à des élections libres et équitables. Sans ce droit, aucun système de gouvernement véritablement démocratique ne peut être établi ni durer. Les choix politiques des citoyens ne peuvent être concrétisés que si ces derniers ont la possibilité de participer utilement au processus démocratique. Mon désaccord avec la majorité porte sur la façon de définir ce droit à la participation utile au processus démocratique.

Je ne saurais souscrire à une démarche qui ne tient compte que des aspects strictement individuels de la participation au processus politique. Bien que je reconnaisse l'importance capitale de la participation individuelle, l'art. 3 porte aussi intrinsèquement sur la représentation des collectivités : tant les différentes collectivités qui tissent la société canadienne que la collectivité plus large formée de l'ensemble des Canadiens. La participation au processus électoral suppose en général que des particuliers interviennent à titre de membres de groupes politiques, et les alliances formées à l'intérieur de ces groupes et entre plusieurs groupes peuvent se traduire par une participation plus utile des citoyens et une meilleure représentation des collectivités et des préférences politiques nationales. Ne pas tenir compte des aspects d'ordre collectif de l'art. 3 risque de donner une image déformée du droit de vote.

De plus, il est important d'accorder une attention particulière au contexte dans lequel les droits démocratiques sont exercés, ainsi qu'à l'histoire des institutions politiques canadiennes. À mon avis, l'art. 3 doit recevoir une interprétation qui s'accorde avec nos traditions politiques. Il est difficile de concilier une démarche à caractère purement individualiste avec les valeurs propres à la politique canadienne. Voilà pourquoi une analyse qui se limite strictement aux aspects individuels du droit semble s'éloigner de la démarche adoptée par notre Cour dans l'arrêt *Renvoi : Circonscriptions électorales provinciales (Sask.)*, [1991] 2 R.C.S. 158 (« *Renvoi concernant la Saskatchewan* »), où il a été reconnu que le contexte de notre tradition politique et de nos pratiques bien établies en la matière constitue une source où les droits consacrés à l'art. 3 puisent leur sens.

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.

103 Chaque citoyen a le droit de participer utilement au processus démocratique, mais cette participation ne perd pas son caractère utile chaque fois qu'une mesure gouvernementale a sur elle un effet préjudiciable. Des dispositions législatives peuvent, jusqu'à un certain point, entraver la participation individuelle ou y porter atteinte sans nécessairement empêcher les citoyens de se faire entendre utilement. (En fait, il est difficile d'imaginer un système électoral qui ne restreint pas, de quelque manière que ce soit, la liberté de participation individuelle de tout citoyen.) De tels compromis peuvent être acceptables lorsque leur nécessité se fonde sur des raisons pragmatiques ou lorsqu'on s'en sert pour favoriser d'autres valeurs démocratiques, qui peuvent être liées aux aspects d'ordre collectif, communautaire ou systémique de l'art. 3. Il faut reconnaître comme il se doit les valeurs opposées parmi lesquelles le gouvernement doit choisir pour élaborer le système électoral, de manière à ne pas donner à penser que la Constitution oblige à maximiser une valeur certes importante, savoir la participation individuelle, à l'exclusion de toute autre.

B. *The Saskatchewan Reference*

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

B. *Le Renvoi concernant la Saskatchewan*

104 Jusqu'à maintenant, la plupart des arrêts portant sur l'art. 3 concernaient des dispositions législatives qui privaient directement du droit de vote un groupe de personnes en particulier (les détenus dans *Sauvé c. Canada (Directeur général des élections)*, [2002] 3 R.C.S. 519, 2002 CSC 68; les personnes frappées d'incapacité mentale dans *Conseil canadien des droits des personnes handicapées c. Canada*, [1988] 3 C.F. 622 (1re inst.); les juges nommés par le gouvernement fédéral dans *Muldoon c. Canada*, [1988] 3 C.F. 628 (1re inst.); les électeurs absents dans *Re Hoogbruin and Attorney-General of British Columbia* (1985), 24 D.L.R. (4th) 718 (C.A.C.-B.); et les personnes déclarées coupables d'infractions se rapportant à des manœuvres électorales frauduleuses dans *Harvey c. Nouveau-Brunswick (Procureur général)*, [1996] 2 R.C.S. 876). Dans ces affaires, les dispositions législatives attaquées contrevenaient expressément au texte de l'art. 3, qui dispose que tout citoyen du Canada a le droit de vote et est éligible aux élections législatives fédérales ou provinciales. Il fallait donc naturellement se demander, au regard de

Paras Cited: 37, 50, 51, 72

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.

l'article premier, si les dispositions restreignant ces droits étaient compatibles avec les valeurs démocratiques canadiennes.

Notre Cour n'a été saisie qu'à une seule autre occasion d'une affaire où on contestait, sur le fondement de l'art. 3 de la *Charte*, une disposition législative qui régissait le processus électoral sans priver expressément qui que ce soit du droit de voter ou du droit de présenter sa candidature. Il s'agit du *Renvoi concernant la Saskatchewan*, précité. On contestait la délimitation des circonscriptions électorales de l'assemblée législative de la Saskatchewan. Cette délimitation fixait un nombre précis de circonscriptions rurales, nordiques et urbaines et créait entre les différents types de circonscription des écarts importants quant au nombre d'électeurs par circonscription. Par exemple, une des circonscriptions du Nord de la province comptait 6 309 électeurs, alors que le nombre de ceux-ci dans une des circonscriptions urbaines atteignait 12 567. En conséquence, dans les faits, un vote dans la première circonscription possédait environ deux fois plus de « poids » qu'un vote dans la seconde.

Notre Cour a reconnu que l'art. 3 garantit davantage que le [TRADUCTION] « simple droit de déposer son bulletin de vote dans l'urne », pour reprendre les propos formulés par l'actuelle Juge en chef de notre Cour lorsqu'elle occupait cette fonction à la Cour suprême de la Colombie-Britannique (*Dixon c. British Columbia (Attorney General)*, [1989] 4 W.W.R. 393, p. 403). Pour prendre tout son sens, le droit de vote doit être exercé dans un système électoral qui accorde une importance réelle au vote de chaque citoyen. En conséquence, la garantie de l'art. 3 inclut nécessairement, de façon implicite, des éléments aussi fondamentaux que le droit au secret du scrutin et le droit à ce que le vote soit honnêtement compté et enregistré (*Renvoi concernant la Saskatchewan*, précité, p. 165, le juge Cory, dissident mais non sur ce point). Toutefois, cette disposition a une portée plus étendue. En effet, elle suppose que tout citoyen canadien a droit à une « représentation effective » dans le processus démocratique. J'ajouterais que la représentation effective ne se réalise que si chaque citoyen jouit de la possibilité de participer utilement aux élections.

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).

107 L'essence même du droit de vote consiste dans la possibilité pour les citoyens de voter dans des élections justes. Comme l'a reconnu notre Cour dans le *Renvoi concernant la Saskatchewan*, cela signifie que le vote de chaque citoyen doit avoir un poids relativement égal à celui de tous les autres : « Le système qui dilue indûment le vote d'un citoyen comparativement à celui d'un autre, court le risque d'offrir une représentation inadéquate au citoyen dont le vote a été affaibli » (*Renvoi concernant la Saskatchewan*, précité, p. 183).

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).

108 Toutefois, la parité électorale n'est pas la raison d'être de l'art. 3, mais uniquement l'un des facteurs — quoique d'importance cruciale — dont il faut tenir compte pour décider si une représentation effective est assurée. La juge McLachlin a décrit deux situations dans lesquelles on peut déroger à la parité électorale sans contrevenir à l'art. 3 : lorsque des considérations d'ordre pragmatique exigent une telle dérogation et lorsque que cette dérogation permet d'« assurer une représentation plus effective » (*Renvoi concernant la Saskatchewan*, précité, p. 185). Elle a conclu que la représentation effective ne se définit pas uniquement par l'équité parmi les électeurs, mais aussi par d'autres valeurs démocratiques susceptibles d'entrer en conflit avec la parité électorale — le problème particulier dans ce cas était d'assurer la représentation adéquate des régions éloignées et à faible densité de population. La juge McLachlin a souligné que ces valeurs démocratiques contraires et opposées pouvaient inclure « les caractéristiques géographiques, l'histoire et les intérêts de la collectivité et la représentation des groupes minoritaires », et que cette liste n'était pas exhaustive (*Renvoi concernant la Saskatchewan*, précité, p. 184).

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*

109 Des juridictions inférieures ont appliqué les principes énoncés dans le *Renvoi concernant la Saskatchewan* et élaboré une méthodologie sophistiquée pour évaluer la constitutionnalité de circonscriptions électorales : voir *MacKinnon c. Prince Edward Island* (1993), 104 Nfld. & P.E.I.R. 232 (C.S.Î.-P.-É.); *Reference re Electoral Boundaries Commission Act (Alberta)* (1991), 83

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

Alta. L.R. (2d) 210 (C.A.) (« *Renvoi concernant l'Alberta* »); et *Reference re Electoral Divisions Statutes Amendment Act, 1993 (Alberta)* (1994), 24 Alta. L.R. (3d) 1 (C.A.). Les tribunaux ont commenté la complexité de cette tâche. Celle-ci, en effet, requiert la conciliation de valeurs démocratiques, qui coexistent en état de tension et même, parfois, s'opposent directement.

Par exemple, dans le *Renvoi concernant l'Alberta*, précité, la Cour d'appel de cette province a fait observer, à la p. 216, que [TRADUCTION] « les facteurs pertinents pour l'application des principes de parité et de représentation effective sont à la fois complexes et contradictoires, situation qui exige une certaine conciliation ». La loi en cause dans ce renvoi visait à éviter l'établissement de divisions rigides entre les régions urbaines et rurales. Le comité législatif qui a recommandé cette approche croyait que de telles divisions incitaient les électeurs des régions urbaines et rurales à défendre leurs intérêts en se considérant comme des adversaires. La Cour d'appel a signalé que cette situation illustrait la difficulté de l'application de la notion de représentation effective. Le fait de garantir aux minorités la possibilité de se faire entendre de manière effective est certes une valeur démocratique importante, mais l'établissement d'un large consensus l'est tout autant. La cour a donné l'explication suivante de cette difficulté, à la p. 216 :

> [TRADUCTION] Si chaque groupe de la société qui possède des intérêts communs a la possibilité d'élire son propre député, les membres de ces groupes pourraient ne pas être incités à développer la compréhension et le respect mutuels essentiels à une saine vie démocratique. Le fait de partager des représentants peut favoriser le respect mutuel, tout comme il peut étouffer la voix de ceux qui deviennent des minorités permanentes.

C. *L'application du Renvoi concernant la Saskatchewan au présent pourvoi*

Dans le présent pourvoi, notre Cour est à nouveau appelée à examiner des dispositions législatives qui affectent l'exercice des droits démocratiques sans les refuser expressément. Pour la première fois, cependant, elle doit le faire en dehors du contexte bien balisé de la délimitation des circonscriptions

privileges and obligations that parties are subject to in our electoral system.

électorales. En l'espèce, le contexte pertinent se trouve celui de la réglementation des partis politiques et du système de privilèges et d'obligations régissant ces derniers dans notre système électoral.

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.

112 L'affaire soulève des questions complexes, qui ne se posent pas dans le contexte de la délimitation des circonscriptions électorales. Les partis politiques et leurs candidats ressentent l'effet direct de la réglementation des partis. Ainsi, le présent pourvoi fait intervenir le deuxième droit énoncé à l'art. 3, soit l'éligibilité aux élections législatives fédérales ou provinciales (ou, plus simplement, le droit de se porter candidat). Le droit de vote est également en cause, puisque l'inégalité du traitement réservé aux partis politiques signifie que leurs partisans eux aussi sont indirectement traités de manière inégale. Parce qu'une mesure incitant les électeurs à appuyer les partis enregistrés décourage de ce fait l'appui aux partis non enregistrés, les dispositions législatives contestées restreignent la liberté qu'ont les électeurs de choisir à quel parti donner leur appui.

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.

113 La valeur essentielle sur laquelle repose la présente contestation constitutionnelle n'est pas l'égalité du vote de chaque électeur en soi, mais plutôt le traitement égal et juste des partis politiques qui se disputent ces votes. La portée des questions que nous devons trancher dépasse donc considérablement celle des problèmes déjà examinés par notre Cour dans le *Renvoi concernant la Saskatchewan*. Ces questions demeurent néanmoins étroitement liées. En effet, comme je l'ai mentionné plus tôt, cet arrêt fournit un modèle d'analyse constitutionnelle qui peut être appliqué aux questions soulevées dans le présent pourvoi.

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.

114 L'arrêt *Renvoi concernant la Saskatchewan* étaye la thèse selon laquelle la seule existence d'effets préjudiciables à la capacité d'un particulier de participer au processus démocratique ne revient pas à lui refuser la participation utile à ce processus ou la représentation effective. Pour décider si de telles mesures entrent en conflit avec l'art. 3, il faut préciser leur nature et apprécier leurs effets dans le contexte global du système politique.

Dilution of some citizens' voting power as compared to that of others clearly has an adverse effect

115 La réduction du poids relatif du vote de certains citoyens par rapport au poids du vote des autres

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 underrepresented 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,

entraîne manifestement un effet préjudiciable sur la capacité des citoyens qui sont victimes de ce désavantage de participer au processus politique. Il ne les empêche pas entièrement d'y participer, mais il leur impose un désavantage. Il est vrai, comme le souligne mon collègue, que la délimitation des circonscriptions examinée dans le *Renvoi concernant la Saskatchewan* favorisait la représentation effective ainsi que les droits de participation de certains citoyens, en l'occurrence ceux habitant des collectivités situées dans des régions éloignées ou des limites géographiques précises et ceux appartenant à des collectivités minoritaires. Toutefois, ces mesures réduisaient le poids du vote des citoyens des circonscriptions urbaines par rapport à celui des électeurs des circonscriptions rurales ou nordiques et, de ce fait, portaient atteinte à la capacité des premiers de participer au processus démocratique.

Il serait en conséquence préférable de préciser que la délimitation des circonscriptions électorales en cause dans le *Renvoi concernant la Saskatchewan* portait atteinte à un aspect de la représentation effective — soit la représentation de l'électeur urbain considéré en tant que citoyen dont le vote est censé avoir la même importance que celui de tout autre électeur. Par contre, parce qu'elles favorisaient un autre aspect de la représentation effective de l'électeur habitant en région nordique, cette délimitation permettait à cette personne de jouir d'une représentation plus effective en tant que membre d'une telle collectivité. En l'absence de mesures de cette nature, l'identité collective des électeurs des régions nordiques serait sous-représentée comparativement à celle des électeurs urbains, parce que la loi du nombre pourrait étouffer les intérêts de la collectivité la moins populeuse. Pourtant, considérées comme des individus plutôt que comme des membres de leur collectivité respective, ces deux personnes seraient plus équitablement représentées si le vote de chacune d'elles avait le même « poids ».

Dans le *Renvoi concernant la Saskatchewan*, notre Cour a reconnu que l'affaiblissement d'un aspect de la représentation effective (parité) peut en définitive se traduire par une représentation plus effective. La reconnaissance de cet aspect de la question tend à indiquer que la représentation

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 alternatives, 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.

effective ne peut se réduire à une seule valeur, mais qu'au contraire elle se compose de différents éléments. Les citoyens peuvent faire des choix politiques qui correspondent à leurs intérêts en tant qu'individus, ou ils peuvent considérer plus important d'être représentés en tant que membres d'une communauté partageant des intérêts, communauté qui peut être étendue ou restreinte. L'obligation constitutionnelle d'assurer la représentation effective de cette complexe mosaïque d'intérêts peut être respectée au moyen d'un éventail assez large de solutions, qui organiseront chacune les divers éléments en jeu selon différentes combinaisons ou priorités. Par exemple, si une province découpait ses circonscriptions électorales pour qu'elles comptent un nombre aussi égal que possible d'électeurs, cet arrangement pourrait (selon le contexte et les faits du litige) s'avérer tout aussi acceptable au regard de l'art. 3 qu'une carte électorale conçue pour accroître le pouvoir électoral des collectivités minoritaires.

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.

118 La notion de participation utile au processus démocratique, tout comme celle de représentation effective, comporte un certain nombre d'aspects. La participation en tant que membre d'une collectivité ou d'un groupe (un parti politique par exemple) peut être aussi utile — parfois même davantage peut-être — que la participation en tant qu'individu, et l'accroissement des possibilités de participation du premier type se fait presque inévitablement au détriment des valeurs liées à la participation purement individuelle. On cherche, dans la conception du système électoral, à établir un équilibre approprié entre les nombreuses vertus que peuvent posséder les régimes démocratiques. De tels choix reposent sur des jugements de valeur politiques, décisions qui sont la prérogative du législateur, dans la mesure où elles n'ont pas pour effet de nier la possibilité de participer utilement au processus démocratique.

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

119 Afin de déterminer s'il y a eu atteinte, il ne faut pas s'attacher au seul fait que la capacité d'une personne donnée de participer au processus électoral a subi des effets préjudiciables. Nous devons apprécier la gravité de ces effets et nous assurer qu'ils reposent sur un motif valable — c'est-à-dire lié à des exigences d'ordre pragmatique, au renforcement d'autres aspects de la participation politique

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.

ou à l'établissement en général d'une représentation plus effective. La question n'est pas de savoir si la capacité de participation du citoyen visé a été affaiblie de quelque manière que ce soit, mais de savoir si l'affaiblissement est déraisonnable. Un affaiblissement déraisonnable survient lorsque la mesure contestée, considérée dans son contexte et compte tenu de son effet sur tous les aspects de la participation, restreint à tel point la possibilité de ce citoyen de choisir librement ou de participer à une bataille équitable dans le processus politique qu'il ne conserve plus vraiment la possibilité de participer utilement au processus démocratique.

D. *Competing Values and Proportional Analysis Within Section 3*

D. *Valeurs opposées et analyse fondée sur la proportionnalité dans le contexte de l'art. 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.

Je souscris entièrement à l'opinion du juge Iacobucci selon laquelle les dispositions contestées de la *Loi électorale du Canada* portent atteinte à la capacité de certains citoyens de participer au processus électoral. Les dispositions en cause dans le présent pourvoi accordent des avantages aux partis qui satisfont à certaines conditions, notamment l'obligation de présenter des candidats dans au moins 50 circonscriptions électorales. Bien que l'intention première du législateur puisse être d'aider les partis enregistrés à communiquer efficacement leur message à l'électorat et à représenter plus efficacement les opinions de leurs partisans, j'accepte le raisonnement de mon collègue selon lequel la mesure diminue inévitablement l'aptitude des partis qui ne satisfont pas au critère des 50 candidatures à atteindre ces mêmes objectifs. Comme l'explique le juge Iacobucci, cette situation s'explique par le caractère compétitif des élections. Une mesure conçue pour accorder un avantage à certains joueurs impose nécessairement un désavantage aux autres; chacune de ces deux constatations découle de l'autre.

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.

Toutefois, l'analyse relative à la violation ne s'arrête pas là. À mon avis, l'inégalité de la position des partis dans la bataille électorale que provoque l'application du critère des 50 candidatures s'apparente à l'inégalité du pouvoir de l'électorat habitant des circonscriptions ne comptant pas le même nombre d'électeurs. Après avoir établi

All the relevant contextual factors must be taken into account in the determination of whether meaningful participation has been denied.

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.

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.

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.

l'existence d'effets préjudiciables à certains participants, nous devons donc maintenant nous interroger sur leur gravité et leur raison d'être. Tous les facteurs contextuels pertinents doivent être pris en compte pour déterminer si on empêche l'intéressé de participer utilement au processus électoral.

122 Voici comment j'estime qu'il convient d'effectuer l'analyse complète et nuancée du sens de l'art. 3 et de l'étendue de la protection qu'il garantit. Après avoir dûment tenu compte des diverses valeurs opposées qu'englobe l'art. 3, il faut examiner soigneusement la mesure contestée et se demander si l'équilibre établi par l'État dans le cas en question respecte l'art. 3 et les notions de participation utile au processus électoral et de représentation effective.

123 Un tel examen prend naturellement la forme d'une analyse de la proportionnalité, qui consiste à découvrir comment la mesure affaiblit un ou plusieurs aspects de la participation au processus démocratique, et à soupeser cet effet préjudiciable de la mesure et ses effets bénéfiques en tant que moyen de renforcer d'autres aspects de la participation au processus électoral. Comme la forme de cette analyse ressemble à celle utilisée pour l'article premier, il s'avère nécessaire de répondre à l'affirmation (figurant au par. 31 de l'opinion majoritaire) selon laquelle il n'est pas indiqué de mettre en balance des intérêts collectifs et des droits individuels pour déterminer s'il y a violation de l'art. 3.

124 Je reconnais que la mise en balance d'intérêts collectifs et de droits garantis par l'art. 3 devrait se faire uniquement dans l'analyse fondée sur l'article premier, mais une certaine forme de mise en équilibre des valeurs opposées ou d'appréciation de la proportionnalité demeure appropriée pour définir ces droits, à ce stade-ci de l'analyse de la nature des droits garantis. Cette étape de l'analyse précède toute conclusion quant à l'existence d'une violation des droits individuels garantis par l'art. 3. C'est seulement après que cette question a été tranchée que se pose celle de la mise en balance des intérêts collectifs et des droits garantis par l'art. 3.

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

Dans ses motifs, mon collègue rejette la thèse de la pertinence des valeurs autres que purement individualistes pour déterminer la portée de l'art. 3. Il faut admettre que, à prime abord, cette position semble être appuyée par certains énoncés antérieurs de notre Cour, mais une analyse plus approfondie de la jurisprudence de notre Cour conduit à une conclusion différente. Dans l'arrêt *Sauvé*, précité, la Juge en chef a rejeté l'argument du gouvernement voulant qu'une loi qui prive des prisonniers fédéraux du droit de vote puisse être compatible avec l'art. 3, et elle a jugé, au par. 11, que « l'art. 3 doit être interprété littéralement et que sa portée ne devrait pas être limitée par des intérêts collectifs opposés ». Dans l'arrêt *Harvey*, précité, le gouvernement avait plaidé qu'une loi rendant inhabiles à voter ou à occuper la charge de député provincial les personnes déclarées coupables d'infractions liées à des manœuvres frauduleuses restait compatible avec les limites inhérentes à l'art. 3, parce que cette législation contribuait à garantir l'intégrité du processus électoral, jouant ainsi un rôle dans l'établissement d'une représentation effective. Bien que le juge La Forest (qui s'exprimait pour la majorité) ait qualifié ces arguments de convaincants au premier abord, il a rejeté la thèse du gouvernement parce qu'elle contredisait le texte clair de l'art. 3 et parce que l'accepter « reviendrait à retrancher de l'article premier la pondération des intérêts, pour ensuite l'incorporer à l'art. 3 de la *Charte* » (*Harvey*, par. 29).

Toutefois, les arrêts *Sauvé* et *Harvey* se distinguent de l'espèce parce qu'ils portaient sur des dispositions qui retiraient totalement à certains citoyens le droit de voter ou de se porter candidats à des élections. De fait, au par. 25 de l'arrêt *Harvey*, le juge La Forest a indiqué que la méthode utilisée par notre Cour dans le *Renvoi concernant la Saskatchewan* était « à l'opposé » de celle qu'elle avait appliquée dans les affaires concernant « certaines inhabilités légales frappant les électeurs ». Les arrêts *Sauvé* et *Harvey* appartenaient à ce dernier groupe, mais la présente affaire n'en fait pas partie. Des mesures gouvernementales qui influent sur les conditions dans lesquelles les citoyens votent ou se portent candidat à une élection font intervenir l'art. 3 sans aller directement à l'encontre de ses termes

forces that together define meaningful participation.

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).

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.

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

clairs, comme le font les interdictions expresses. À ce titre, ces mesures commandent donc un autre genre d'analyse. Avant de décider si une violation du droit protégé a été commise, il nous faut reconnaître la nécessité d'établir un compromis adéquat entre les diverses forces opposées qui, ensemble, caractérisent la participation utile au processus démocratique.

127 Une telle mise en équilibre pour définir la portée d'un droit garanti par la *Charte* ne présente rien d'inhabituel. Ce genre d'analyse est devenue courante dans les affaires portant sur certains droits garantis par la *Charte* — particulièrement ceux que le professeur Hogg qualifie de [TRADUCTION] « droits relatifs », c'est-à-dire des droits qui [TRADUCTION] « suivant leur libellé même, sont restreints par des notions tels le caractère raisonnable ou la régularité » (P. W. Hogg, *Constitutional Law of Canada* (éd. pour étudiants 2002), p. 804).

128 L'article 7 de la *Charte*, par exemple, précise que les droits qui y sont garantis peuvent être limités par une mesure étatique conforme aux principes de justice fondamentale. L'expression « les principes de justice fondamentale » fait intervenir des principes opposés qui, pour reprendre les termes utilisés par le juge Iacobucci, existent en « tension dynamique » les uns avec les autres (*R. c. S. (R.J.)*, [1995] 1 R.C.S. 451, par. 108). Si l'on conclut qu'une mesure législative entre en conflit avec l'un des principes de justice fondamentale, l'étape suivante de l'analyse consiste à se demander si cette mesure renforce quelque autre principe opposé et à considérer globalement l'interaction des différents principes pour décider, en bout de ligne, si la mesure législative respecte ou non l'art. 7.

129 De même, l'article 8 garantit le droit d'être protégé contre les fouilles, perquisitions et saisies « abusives ». Pour déterminer ce qui est « raisonnable » dans ce contexte, les tribunaux mettent habituellement en balance le droit d'une personne de ne pas être importunée et l'intérêt du gouvernement à enquêter sur les crimes et à appliquer la loi (voir *Hunter c. Southam Inc.*, [1984] 2 R.C.S. 145, p. 159-160). Dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S.

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

668, la juge McLachlin et le juge Iacobucci ont souligné, au par. 86, que « [l]e caractère approprié de l'évaluation dépend [. . .] de la nature des intérêts en jeu dans un contexte particulier et de la place qu'ils occupent dans nos traditions juridiques et politiques ».

Le contenu et la portée de tout droit garanti par la *Charte*, même lorsque le texte du droit en question ne comprend pas de termes restrictifs tel le mot « raisonnable », sont déterminés par rapport à l'objet du droit en question. L'objet d'un droit peut non seulement se relier à des intérêts purement individualistes mais également à des préoccupations que partagent les membres d'une collectivité ou d'un groupe. Par exemple, on définit le droit à la liberté d'association garanti par l'al. 2*d*) de la *Charte* « essentiellement [comme] un outil d'accomplissement personnel et de réalisation de l'individu » (*R. c. Advance Cutting & Coring Ltd.*, [2001] 3 R.C.S. 209, 2001 CSC 70, par. 170). Toutefois, notre Cour a également reconnu les dimensions sociale et collective de ce droit en précisant qu'il avait pour but de « protéger la poursuite collective d'objectifs communs » (*Lavigne c. Syndicat des employés de la fonction publique de l'Ontario*, [1991] 2 R.C.S. 211, p. 252). Par ailleurs, le droit à l'égalité garanti par l'art. 15 de la *Charte* est défini expressément comme un droit individuel, mais la notion de protection contre la discrimination demeure fonction (comme le démontrent les motifs de discrimination énumérés au par. 15(1)) de l'appartenance de l'individu à certains groupes sociaux et aux liens qui existent entre les groupes minoritaires et la société canadienne.

Les arrêts dont j'ai fait état fournissent des enseignements fort pertinents en ce qui concerne l'art. 3. Cet article ne crée pas un droit « relatif » au sens où il comporterait des interdictions expresses de voter ou de se présenter comme candidat à une élection. Toutefois, si l'on tient compte des garanties additionnelles qui sont nécessairement incluses de façon implicite pour que le texte même de la disposition puisse produire son plein effet, la situation est différente. Nous désignons ce contenu implicite à l'aide des expressions restrictives suivantes : « représentation effective » et

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.

« participation utile ». L'article 3 assure que les électeurs sont « raisonnablement informés de tous les choix possibles » et que les candidats bénéficient d'« une possibilité raisonnable [. . .] d'exposer leur position » (*Libman c. Québec (Procureur général)*, [1997] 3 R.C.S. 569, par. 47 (je souligne)). « [L]e droit de jouer un rôle important dans l'élection de députés » est un aspect central de l'art. 3 (*Haig c. Canada*, [1993] 2 R.C.S. 995, p. 1031 (je souligne)). L'utilisation régulière de termes restrictifs par notre Cour pour décrire la portée de l'art. 3 confirme que l'analyse applicable à l'égard des droits explicitement « relatifs » s'applique également en l'espèce, sauf lorsque des inhabilités expresses sont en cause.

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.

132 Pour déterminer s'il y a eu violation de l'art. 3 dans une situation donnée, il faut se rappeler que la notion de représentation comporte différents aspects et que certains de ceux-ci ne se concilient pas facilement. L'expression « tension dynamique » utilisée par le juge Iacobucci s'applique avec autant de justesse dans le présent contexte qu'à l'égard de l'art. 7. De plus, tout comme pour l'analyse fondée sur l'art. 8 de la *Charte*, l'analyse fondée sur l'art. 3 s'effectue en toute conscience de nos traditions juridiques et politiques.

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

133 En outre, bien que, à l'instar de l'al. 2*d*) et l'art. 15, l'art. 3 crée en définitive un droit appartenant à chaque citoyen individuellement, il est impossible d'appréhender le sens de cette disposition sans se référer à son contexte social et systémique. Le droit de voter et celui de briguer les suffrages des électeurs ne correspondent pas au modèle classique du droit individuel négatif de ne pas être importuné par le gouvernement. Les citoyens ne sauraient exercer par eux-mêmes les droits garantis par l'art. 3 sans intervention de l'État. L'article 3 impose plutôt à l'État l'obligation positive d'instaurer un système électoral qui, à son tour, assure l'existence d'un gouvernement démocratique correspondant aux choix des électeurs canadiens. L'appréciation de ce système au regard des idéaux constitutionnels de représentation effective et de participation utile au processus démocratique exige qu'on se demande dans quelle mesure il sert adéquatement la société canadienne dans son ensemble et les groupes qui

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

forment notre tissu social. Pour évaluer le caractère équitable du système, on doit alors comparer la situation du citoyen concerné à celle des autres. Les droits garantis par l'art. 3 conservent certes un caractère individuel effectif, mais leur portée est fonction de leur contexte social et relationnel.

Après avoir conclu que les dispositions législatives contestées réduisent la capacité de certaines personnes de participer au processus démocratique, il faut ensuite rechercher si, en conséquence, le système électoral viole la norme constitutionnelle garantissant la représentation effective et la participation utile, et ce au regard toujours des valeurs opposées — y compris les valeurs sociales et collectives — que comportent ces deux notions. Cet examen doit prendre la forme d'une analyse de la proportionnalité, mais je ne l'assimile pas à la mise en balance des intérêts collectifs et des droits individuels effectuée pour l'application de l'article premier. Au contraire, je suis d'avis que le droit individuel de participer utilement au processus démocratique comporte plusieurs aspects, ou plusieurs principes opposés. Lorsqu'une mesure gouvernementale porte atteinte à l'un de ces principes, la compatibilité de cette mesure avec l'art. 3 dépend de la réponse à la question de savoir si elle produit des avantages correspondants liés à d'autres valeurs démocratiques et si, une fois ces avantages et ces désavantages considérés globalement, cette mesure se traduit en définitive par une privation du droit de participer utilement au processus démocratique.

Pour les motifs exposés par le juge Iacobucci, je reconnais comme lui que les dispositions en litige dans le présent pourvoi portent atteinte à la capacité de certains citoyens de participer au processus démocratique. L'étape suivante consiste à se demander si ces dispositions renforcent l'une ou l'autre des valeurs opposées qui contribuent à favoriser la participation utile au processus démocratique et la représentation effective.

E. *Les valeurs démocratiques renforcées par les dispositions législatives*

De façon générale, on doit admettre que le fait de réserver certains privilèges aux partis qui présentent au moins 50 candidats dans une élection confère un

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.

avantage dans la course électorale aux grands partis politiques disposant d'appuis plus larges sur le plan géographique. Sans pouvoir passer sous silence les conséquences préjudiciables de ce traitement favorable pour les petits partis et pour les partis dont l'appui est concentré dans un nombre relativement restreint de circonscriptions, ainsi que le caractère inéquitable de telles mesures à l'égard des candidats de ces partis et pour leurs partisans, ce traitement favorable renforce toutefois un aspect de la représentation effective que l'on peut valablement mettre en équilibre avec la valeur que constitue la participation individuelle.

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 he 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.

137 En effet, la règle des 50 candidatures tend à canaliser l'appui des électeurs vers les partis qui s'efforcent d'établir en leur sein des compromis et consensus pour devenir des mouvements politiques traditionnels jouissant de larges appuis. Je décrirais la valeur renforcée par cette mesure comme étant l'agrégation de préférences politiques, ou la recherche de la cohésion par rapport à la fragmentation. La Cour d'appel de l'Alberta a fait allusion à cet aspect des modèles de représentation démocratique dans le *Renvoi concernant l'Alberta*, précité, lorsqu'elle a écrit que [TRADUCTION] « [l]e fait de partager des représentants » favorisait « la compréhension et le respect mutuels essentiels à une saine vie démocratique » (p. 216). Dans le contexte du présent pourvoi, cette valeur est intimement liée au rôle que jouent les partis politiques dans le système électoral canadien.

F. *The Value of the Party System*

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.

F. *La valeur du système de partis politiques*

138 Les partis politiques forment des institutions fondamentales du système canadien de gouvernement représentatif et responsable — c'est-à-dire un gouvernement où les lois sont adoptées par les représentants élus par le peuple et où l'exécutif est responsable devant l'assemblée législative et jouit de la confiance de la majorité des députés.

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

139 Dans le rapport qu'elle a publié en 1991 (*Pour une démocratie électorale renouvelée : Rapport final*, vol. 1), la Commission royale sur la réforme électorale et le financement des partis (la « Commission Lortie ») a souligné que les partis politiques jouent un rôle de premier plan dans la politique canadienne

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).

depuis la lutte livrée durant la première moitié du 19e siècle pour l'instauration d'un système de gouvernement responsable au Canada, et qu'ils sont devenus solidement enracinés dans la société canadienne — contrairement à leurs homologues britanniques qui, à l'époque, constituaient principalement des factions parlementaires. Au moment de la Confédération, les partis étaient devenus « essentiels au fonctionnement efficace d'un gouvernement responsable et considérés comme le pivot de la mobilisation et de la participation des citoyens à la vie politique » (Rapport de la Commission Lortie, vol. 1, p. 220).

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.

Comme mon collègue le fait remarquer au par. 39, l'existence des partis politiques renforce la représentation en permettant aux citoyens de participer à la vie politique d'une manière plus efficace que s'ils agissaient seuls, sans les bénéfices qu'offre le système des partis politiques sur les plans de la coordination, de la structure et de la coopération. Les partis renseignent les électeurs sur les questions importantes et leur offrent des choix électoraux concrets.

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).

La forme de gouvernement responsable qui existe au Canada reflète également le rôle central que jouent les partis politiques. La Constitution confie formellement au gouverneur général le pouvoir de désigner le premier ministre et le cabinet mais, par convention, il nomme invariablement le chef du parti qui a obtenu la majorité des sièges au Parlement (en supposant qu'un parti ait effectivement obtenu la majorité) au poste de premier ministre et, suivant les recommandations de ce dernier, il nomme les autres ministres (voir Hogg, *op. cit.*, p. 255; H. Brun et G. Tremblay, *Droit constitutionnel* (4e éd. 2002), p. 374-379). La Commission Lortie a qualifié le système des partis politiques de fondement du régime de gouvernement responsable, en soulignant qu'il se caractérise « par la représentation parlementaire, qui autorise la formation d'un gouvernement directement responsable devant les élus et élues », et que, en structurant les choix électoraux, les partis offrent à la population la possibilité de décider qui formera le gouvernement (Rapport de la Commission Lortie, vol. 1, p. 217).

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).

142 Dans son rapport publié en 1991, la Commission Lortie a consacré un chapitre complet à l'étude du rôle des partis politiques. Le titre de ce chapitre, « La primauté des partis dans le système politique canadien », résume bien le point de vue de la Commission sur le rôle crucial que jouent les partis politiques dans notre système démocratique. D'affirmer la Commission, les « rôles multiples et essentiels que remplissent les partis dans le fonctionnement de la démocratie justifient leur primauté au sein de notre système politique » (Rapport de la Commission Lortie, vol. 1, p. 215). Celle-ci a mentionné trois rôles essentiels que jouent les partis politiques : structurer les choix électoraux de manière à donner un sens au vote; offrir à la population des mécanismes qui lui assurent une participation politique accrue; organiser le travail des élus et élues au Parlement et contribuer ainsi à l'efficacité de notre régime de gouvernement responsable (vol. 1, p. 217).

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*).

143 Les partis sont devenus des acteurs tellement importants dans notre système politique que, bien qu'ils demeurent des organisations privées auxquelles les citoyens sont libres d'adhérer, ils ont acquis également certaines caractéristiques propres aux institutions publiques. Il était donc prévisible que l'identification et la réglementation des partis deviennent des fonctions relevant du droit électoral canadien; d'ailleurs, il est plutôt étonnant que l'existence des partis politiques n'ait pas été reconnue dans la législation électorale fédérale avant 1970. La reconnaissance formelle des partis dans la *Loi électorale du Canada* est survenue à la suite des recommandations formulées par le Comité des dépenses électorales (le « Comité Barbeau ») dans le rapport qu'il a publié en 1966 (*Rapport du Comité des dépenses électorales*).

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

144 Comme l'a souligné le Comité Barbeau, seules les levées de fonds et les dépenses des candidats étaient réglementées avant les modifications apportées à la *Loi électorale du Canada*, et ce même si les partis jouaient un rôle très important dans l'organisation du financement politique. En d'autres mots, le financement des élections demeurait dans les faits virtuellement non réglementé. Le Comité considérait que l'absence d'encadrement effectif,

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

par l'État, du financement des partis politiques menaçait sérieusement la bonne marche du système démocratique. Cette situation créait des occasions de corruption et augmentait le risque que les partis et les législateurs n'agissent pas en conformité avec l'intérêt public.

Une partie de la solution que proposait le Comité Barbeau pour résoudre ces problèmes consistait à créer un registre officiel des partis politiques. Les partis enregistrés seraient tenus de rendre compte de leurs activités, plus précisément de divulguer l'origine de leurs fonds et la manière dont ceux-ci sont dépensés. Afin de réduire la portée des distorsions créées par d'importantes contributions émanant de sources privées, le Comité recommandait l'octroi de subventions publiques pour aider au paiement des dépenses de base de la campagne électorale. Il proposait également d'accorder des incitations fiscales pour les contributions individuelles versées aux partis politiques, afin d'augmenter la participation du public en multipliant les sources des contributions politiques. Le Comité suggérait aussi que l'appartenance des candidats aux partis politiques enregistrés figure sur le bulletin de vote, mesure qui fournirait aux électeurs des renseignements plus complets sur les candidats. Ces avantages ne seraient offerts qu'aux partis respectant entièrement les conditions d'enregistrement (voir *Rapport du Comité des dépenses électorales*, p. 39-51). Bon nombre des recommandations formulées par le Comité Barbeau ont été adoptées à l'occasion d'importantes modifications apportées à la *Loi électorale du Canada* en 1970 et 1974.

La présentation d'au moins 50 candidats dans une élection, qui constitue l'une des conditions d'enregistrement d'un parti, fait partie du cadre de reconnaissance et de réglementation des partis politiques qui a été mis en place par suite des propositions du Comité Barbeau. Le régime général dans lequel s'inscrit cette condition a amélioré notre système électoral et renforce les importantes valeurs démocratiques que sont l'obligation de rendre compte, la communication politique et la participation populaire. Quoique les dispositions législatives contestées ne puissent, évidemment,

from its context for the purposes of constitutional scrutiny.

tirer leur validité constitutionnelle des dispositions connexes de la *Loi électorale du Canada*, elles ne peuvent être dissociées de leur contexte dans le cadre de l'examen de leur constitutionnalité.

G. *Competing in a Relatively High Number of Ridings as a Criterion for Registration*

G. *La présentation de candidats dans un nombre relativement élevé de circonscriptions comme condition d'enregistrement*

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.

147 L'établissement d'une procédure de reconnaissance légale d'un parti exige de définir juridiquement en quoi consiste un parti. Les conditions d'enregistrement prévues par la *Loi électorale du Canada* visent à faire en sorte que les partis respectent l'obligation qui leur incombe de rendre compte de leurs revenus et dépenses, et aussi, objectif peut-être plus controversé, à faire en sorte que les avantages accordés aux partis enregistrés soient réservés aux organisations qui s'acquittent réellement des fonctions des partis politiques dans notre système électoral. C'est sous cet éclairage que l'obligation de présenter 50 candidats doit être considérée.

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

148 Deux fonctions principales peuvent être attribuées aux partis politiques : influer sur l'élaboration des politiques en lançant des idées et en influençant les programmes politiques; participer aux élections afin d'obtenir une place au sein du Parlement ou de l'assemblée législative. Ces fonctions sont souvent interreliées, mais c'est davantage la deuxième qui distingue les partis politiques des autres participants au débat politique. En effet, comme l'a souligné la Commission Lortie, les partis politiques partagent la première fonction avec les groupes d'intérêts — organisations qui communiquent des idées à la population et cherchent à orienter les programmes politiques et à influencer les politiques gouvernementales, souvent à l'égard d'une seule question ou d'un ensemble de questions, mais qui ne briguent pas les suffrages des électeurs (Rapport de la Commission Lortie, vol. 1, p. 230-231). Le régime d'enregistrement et les objectifs d'intérêt public que soutient celui-ci sont liés au rôle que jouent les partis en tant que participants aux élections. De fait, bon nombre des avantages découlant de l'enregistrement ne présentent pratiquement aucun intérêt en dehors du contexte électoral, bien que certains — par exemple les crédits d'impôt accordés aux donateurs —

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

pourraient attirer des groupes qui n'entendent pas rivaliser sérieusement avec les autres participants aux élections. L'octroi de ces avantages à de tels groupes, en plus de les accorder aux véritables partis politiques, risque de compromettre la réalisation des objectifs du régime d'enregistrement.

Pour ces motifs, je suis d'avis que l'obligation de présenter au moins un candidat, et peut-être davantage, pour satisfaire aux conditions d'enregistrement imposées aux partis politiques ne soulève pas de graves inquiétudes sur le plan constitutionnel. La reconnaissance officielle des partis pourrait difficilement être efficace sans cette obligation. La présentation de candidats et la participation à la course électorale constituent des aspects fondamentaux de la vie des partis politiques tenant à leur nature même, par comparaison aux autres types d'associations politiques, les groupes d'intérêts par exemple.

Toutefois, même si les objectifs mentionnés par le Comité Barbeau offrent un début d'explication de la règle des 50 candidatures, ils n'indiquent pas complètement pourquoi les partis devraient être tenus de présenter des candidats dans un nombre relativement élevé de circonscriptions. Il est certain que cette règle exclut certains partis qui participent réellement au processus électoral (et ne sont pas de simples groupes d'intérêts), mais qui, pour des raisons stratégiques valables, décident de concentrer les ressources dont ils disposent pour leur campagne dans un nombre restreint de circonscriptions. En d'autres termes, il serait possible de renforcer les valeurs démocratiques que le Comité Barbeau a jugé importantes dans un régime d'enregistrement des partis politiques, sans pour autant faire de la présentation d'un nombre de candidats aussi élevé que 50 un préalable à la reconnaissance d'un parti. Se pose donc la question de savoir s'il est possible d'affirmer que cet aspect particulier du régime renforce la représentation effective d'une quelconque manière. Pour répondre à cette question, je reviens à la valeur mentionnée précédemment : l'agrégation des préférences politiques.

Exiger que les partis enregistrés participent à la course électorale dans un nombre relativement élevé de circonscriptions tend à faire en sorte que le

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*

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

système favorise davantage les grands partis et ceux qui jouissent d'appuis géographiquement étendus. La Commission Lortie a considéré que la règle des 50 candidatures constituait un moyen approprié d'identifier les partis aptes à participer à la course électorale à l'échelle nationale (vol. 1, p. 259) :

> Un parti qui nomme des candidats et candidates dans 50 circonscriptions démontre qu'il veut sérieusement s'engager dans la compétition électorale, à un niveau qui témoigne du succès relativement large de son programme. L'expérience acquise depuis 1974 a montré qu'un tel niveau ne rend l'enregistrement ni trop difficile, ni trop facile à obtenir. Nous pensons que ce seuil devrait continuer de servir de référence pour déterminer quels partis devraient être enregistrés aux termes de la *Loi électorale*.

La présentation de 50 candidats démontre deux choses au sujet d'un parti (comme l'a souligné la Commission Lortie) : un degré élevé de participation à la course électorale et un large attrait pour l'électorat. Par conséquent, la règle favorise les partis établis possédant des appuis étendus dans l'électorat. Un système qui profite à de tels partis présente toutefois certains inconvénients en ce qu'il limite les possibilités pour les citoyens d'appuyer des petits partis dont le programme pourrait correspondre davantage à leurs priorités sur le plan politique. Par contre, il privilégie une valeur qui contribue à définir la représentation effective au Canada, soit l'agrégation de la volonté politique et le renforcement de la cohésion de celle-ci par rapport à l'esprit de « factionalisme ».

H. *L'agrégation des préférences politiques en tant que valeur présente dans l'histoire et les institutions politiques canadiennes*

Comme l'a fait observer la Juge en chef actuelle dans le *Renvoi concernant la Saskatchewan*, précité, p. 185, « [l]es circonstances qui ont mené à l'adoption de la *Charte* contredisent toute intention de rejeter les institutions démocratiques existantes ». Je souscris aux affirmations de la juge McLachlin (maintenant Juge en chef) dans cette affaire selon lesquelles les inégalités de notre système électoral ne sont pas acceptables du seul fait qu'elles ont des précédents dans l'histoire, et une institution n'est pas constitutionnelle simplement parce qu'elle

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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).

existe. Tout comme ma collègue, je suis également d'avis que nous devrions considérer les institutions passées et présentes comme le sol dans lequel est enraciné « l'arbre » qu'est la Constitution du Canada, tout en reconnaissant que cet arbre « doit pouvoir croître pour faire face à l'avenir » (*Renvoi concernant la Saskatchewan*, précité, 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.

Ma conclusion que l'agrégation des préférences politiques et la cohésion font partie intégrante des différentes valeurs qui contribuent à définir les droits démocratiques au Canada s'appuie sur des aspects de notre histoire et de nos institutions actuelles. Notre système politique se caractérise, tant historiquement que de nos jours, par d'autres aspects importants qui correspondent à ce modèle favorisant l'agrégation des préférences politiques. Le continuum des régimes politiques démocratiques est constitué à une extrémité des systèmes représentant les citoyens d'une manière plus variée et fragmentée et à l'autre des systèmes où seulement un petit nombre de partis traditionnels ont une présence notable dans l'arène politique. Le système canadien se rapproche de cette seconde extrémité de ce continuum. Cette situation ne provient pas du hasard, mais résulte en partie du fait que notre infrastructure électorale a été délibérément aménagée de façon que les mouvements politiques traditionnels jouissent d'avantages par ailleurs refusés aux partis situés en périphérie du monde politique.

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"

L'exemple le plus frappant se retrouve sans doute dans la structure de notre mode de scrutin. Le Canada est l'une des rares grandes démocraties à avoir conservé le système uninominal majoritaire à un tour (le « système majoritaire») de Westminster. De nombreuses autres démocraties utilisent la représentation proportionnelle ou une certaine forme de système mixte. En comparaison de ces systèmes, le système majoritaire tend à favoriser les partis traditionnels qui représentent les opinions agrégées d'un large segment de la société, et à défavoriser les petits partis qui constituent des véhicules de dissidence, défendent des questions précises ou peuvent être les précurseurs de futurs mouvements politiques traditionnels. Cette situation n'empêche pas complètement des partis du deuxième groupe

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 H. Milner, ed., *Making Every Vote Count: Reassessing Canada's Electoral System* (1999), 19, at p. 21).

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.

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

de participer au processus démocratique, mais ces derniers éprouvent en conséquence plus de difficultés à rivaliser avec leurs adversaires. Parmi les systèmes électoraux en vigueur dans les démocraties, le système majoritaire est le moins « équitable » ou proportionnel, en ce qu'il crée de la distorsion dans la façon dont les votes se traduisent en sièges, et ce au bénéfice des grands partis (H. MacIvor, « A Brief Introduction to Electoral Reform », dans H. Milner, dir., *Making Every Vote Count : Reassessing Canada's Electoral System* (1999), 19, p. 21).

155 Par contre, le système majoritaire possède des vertus moins présentes dans les systèmes proportionnels ou mixtes. Par exemple, certains avantages découlent du fait que le système majoritaire tend à l'inflation des majorités électorales, produisant ainsi plus facilement des gouvernements majoritaires. Je reconnais que, comme le souligne mon collègue, le système majoritaire peut entraîner la constitution de gouvernements de coalition et que cela s'est produit au Canada à quelques reprises. Néanmoins, le système majoritaire demeure plus susceptible que les autres systèmes électoraux de produire un gouvernement majoritaire, alors que la représentation proportionnelle conduit presque invariablement à des coalitions (MacIvor, *loc. cit.*, p. 28-29). La notion de gouvernement majoritaire reste ainsi étroitement liée à la tradition canadienne de gouvernement responsable, puisqu'un parti donné, dirigé par un chef unique dont on connaît l'identité, doit répondre des politiques gouvernementales (MacIvor, *loc. cit.*, p. 29). Je ne prétends pas par là, je tiens à le préciser, qu'un gouvernement responsable ne saurait exister lorsqu'un gouvernement de coalition ou minoritaire est élu. J'affirme seulement qu'on peut raisonnablement considérer que, dans notre système politique particulier, les gouvernements majoritaires présentent certains avantages à cet égard. Des observateurs notent également que le système majoritaire et les gouvernements majoritaires qu'il favorise assurent une plus grande stabilité en comparaison des formes les plus pures de systèmes proportionnels.

156 Dans les systèmes majoritaires, les partis qui obtiennent le plus de succès représentent une vaste alliance formée de différentes communautés d'intérêts. Notre système électoral favorise donc la

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".

création de coalitions à l'intérieur d'un même parti plutôt qu'entre divers partis (alors que, dans les systèmes de représentation proportionnelle, à l'opposé, les coalitions sont typiquement créées entre partis afin de former un gouvernement après l'élection). Un politicologue affirme que, conjugué aux particularités de la scène politique canadienne, le système majoritaire favorise l'émergence de [TRADUCTION] « partis centristes et accommodants », particulièrement aptes à représenter les électeurs d'un pays caractérisé par sa diversité régionale, linguistique et culturelle :

> [TRADUCTION] La lutte avait pour objectif le centre, où convergeaient les principaux partis dotés de politiques et d'un leadership qui, si le parti avait vraiment l'intention d'accéder au pouvoir et d'y rester, tendaient davantage à accommoder les rivalités et les différences linguistiques qu'à les exacerber ou à les exploiter politiquement.

(J. C. Courtney, « Electoral Reform and Canada's Parties », dans Milner, *op. cit.*, 91, p. 99)

Le caractère souhaitable d'un système de partis centristes et accommodants pour un éventail étendu d'opinions ainsi que des vertus qui se rattachent aux gouvernements majoritaires ne saurait toutefois être assimilé à des vérités universellement admises. Les opinions que j'ai exposées constituent des jugements de valeur qui sont l'objet de débats vigoureux. Plusieurs auteurs et activistes politiques critiquent notre système électoral et en exigent la réforme. Simplement, j'affirme qu'on peut raisonnablement considérer que le système majoritaire possède la principale vertu qu'on lui prête, soit celle de favoriser un centre fort et de limiter la création de factions. Puisque notre système électoral majoritaire constitue l'une des principales institutions politiques au Canada, on peut conclure raisonnablement que cette vertu demeure compatible avec certaines valeurs de notre culture démocratique — même si, compte tenu du fait que la notion de démocratie au Canada englobe bon nombre de valeurs opposées, elle entre en conflit avec d'autres. Divers aspects de la structure de notre système politique semblent ainsi exprimer une préférence pour le genre de partis dont le programme a obtenu, pour reprendre les termes de la Commission Lortie, un « succès relativement large » (p. 259).

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.

158 Je tiens à souligner que je n'entends pas me prononcer d'aucune façon sur la compatibilité de notre système électoral avec l'art. 3 de la *Charte*. Toute contestation de ce système devra être examinée en fonction du fond du litige où la question se soulèvera. Je ne souhaite pas non plus donner l'impression que je considère la stabilité, les gouvernements majoritaires ou l'agrégation des préférences politiques comme des éléments plus importants que la possibilité équitable de participer au processus démocratique. Néanmoins, dans les limites établies par la Constitution, le législateur a le privilège de décider de favoriser ces valeurs par rapport à d'autres valeurs démocratiques. Je voudrais encore moins que l'on interprète mes propos comme signifiant que la Constitution prescrit le système majoritaire ou tout autre aspect du système électoral qui favorise les grands partis. Au contraire, à mon avis, le gouvernement dispose d'une assez grande latitude pour décider comment structurer le système électoral et comment agencer les différentes valeurs opposées qui sont en jeu.

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.

159 La valeur que constitue l'agrégation des préférences politiques se reflète dans certaines institutions politiques fondamentales au Canada. En conséquence, il convient d'en tenir compte (quoique, manifestement, elle ne doive pas être la seule valeur prise en considération) pour dégager le sens de la notion de « représentation effective » et les limites que l'art. 3 impose quant aux choix que peut faire le gouvernement.

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 participation — including the value of aggregation of political will, which has been a hallmark of the Canadian political system for so long.

160 L'histoire et les institutions actuelles nous aident à reconnaître les principes philosophiques qui sous-tendent l'évolution du droit de vote dans notre pays (*Renvoi concernant la Saskatchewan*, précité, p. 181). Cette philosophie semble, selon moi, reconnaître d'autres valeurs en plus de la participation individuelle — notamment l'agrégation de la volonté politique, qui constitue depuis très longtemps un trait distinctif du système politique canadien.

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

161 Le droit que possède toute personne de participer utilement au processus démocratique délimite ce qui est permis, mais, en deçà de cette limite, il existe un certain nombre de solutions reflétant des

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.

variantes très différentes — bien que toutes aussi acceptables les unes que les autres — de la représentation démocratique. Dans la mesure où il respecte les limites fixées par la Constitution, le choix entre ces diverses solutions doit être considéré comme une question de préférence politique et philosophique à l'égard de laquelle notre Cour ne doit pas intervenir. La Constitution du Canada n'exige pas un système électoral démocratique particulier — que ce soit un système favorisant la proportionnalité et les aspects individuels de la participation au processus démocratique ou un système insistant davantage sur le centrisme et l'agrégation des préférences politiques — et ne commande pas que ce système soit immuable. Elle oblige toutefois les tribunaux à faire preuve de vigilance et à veiller à ce que le système choisi n'affaiblisse pas indûment l'une ou l'autre des valeurs qu'englobe la notion de la représentation effective — surtout la valeur essentielle que constitue la participation individuelle à des élections équitables dans le respect du principe de l'égalité relative.

I. *Regional Representation*

I. *La représentation régionale*

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.

Jusqu'à maintenant, j'ai examiné deux aspects de la représentation qui sont visés par les dispositions contestées en l'espèce : la participation individuelle, que les dispositions contestées affaiblissent, et l'agrégation des préférences politiques, que ces dernières tendent plutôt à renforcer. À mon avis, un troisième facteur entre également en jeu : la représentation régionale.

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

À la lumière de l'histoire canadienne, des institutions politiques actuelles et de certains énoncés de notre Cour, il appert qu'un des éléments de la représentation effective est l'intérêt des citoyens d'être représentés en tant que membres d'une collectivité définie en fonction d'une région ou d'un territoire. Cet argument peut sembler difficile à concilier avec ma position selon laquelle l'agrégation des intérêts et la création d'alliances entre des collectivités distinctes constituent également une valeur qui joue un rôle dans la définition de la démocratie canadienne. Cette difficulté illustre selon moi la nature complexe et même quelque peu paradoxale de la notion de participation utile au processus démocratique, qui

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.

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).

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

représente un compromis entre des objectifs opposés. La représentation régionale ou géographique peut elle aussi s'opposer, en tant que valeur équivalente, à la participation individuelle, comme cela se produit lorsque le vote de certains électeurs se voit accorder plus de poids que celui des autres afin de garantir aux régions moins populeuses la possibilité de se faire entendre plus efficacement.

164 Notre système fédéraliste représente peut-être la manifestation la plus remarquable de l'importance attachée à la représentation politique des intérêts régionaux au Canada. Le fédéralisme a été adopté à l'occasion de la Confédération, malgré les pressions exercées par certains politiciens en faveur de la création d'une « union législative » — c'est-à-dire un gouvernement central unique élu par la majorité de la population canadienne. Les partisans de l'union législative ont fini par concéder que ni le Bas-Canada ni les provinces maritimes n'accepteraient ce genre d'arrangement, où le poids de l'ensemble de la population risquerait d'étouffer et d'éliminer leurs collectivités distinctes. Au cours des débats qui se sont déroulés au Parlement relativement à la Confédération, sir John A. Macdonald a d'ailleurs déclaré que « toute proposition qui impliquerait l'absorption de l'individualité du Bas-Canada, ne serait pas reçue avec faveur par le peuple de cette section » et, dans les provinces maritimes, bien que la langue et le système juridique fussent les mêmes que dans le Haut-Canada, « il n'y avait [. . .] aucun désir de perdre leur individualité comme nation » (discours de John A. Macdonald, lundi le 6 février 1865, cité dans *Débats parlementaires sur la question de la Confédération* (1865), p. 30).

165 Macdonald et les autres Pères de la Confédération ont reconnu que la possibilité même d'une union dépendait d'un compromis entre le gouvernement du pays par une majorité nationale et le maintien de l'« individualité » des diverses collectivités politiques formant la nouvelle nation. Le fédéralisme était perçu non seulement comme une solution pragmatique mais également comme une mesure nécessaire pour garantir l'équité aux différentes collectivités régionales. En conséquence, dans le *Renvoi relatif à la sécession du Québec*, [1998] 2

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

R.C.S. 217 (« *Renvoi sur la sécession* »), par. 43, notre Cour a noté le partage des pouvoirs comme « une reconnaissance juridique de la diversité des premiers membres de la Confédération, et [qu']il témoignait du souci de respecter cette diversité au sein d'une seule et même nation ».

Une autre institution qui incarne ce principe de la représentation régionale est le Sénat, où les sièges sont répartis entre les quatre régions de notre pays. Même à la Chambre des communes, les intérêts régionaux jouent un rôle dans la répartition des sièges. Selon la « clause relative au Sénat » (art. 51A) ajoutée en 1915 à la formule initiale de représentation prévue par la *Loi constitutionnelle de 1867*, aucune province ne peut avoir moins de sièges à la Chambre des communes qu'elle n'en possède au Sénat (à l'époque, cette modification a eu pour effet de garantir quatre sièges à l'Île-du-Prince-Édouard même si, selon les anciennes règles, sa population ne lui aurait permis d'en obtenir que trois).

Ces caractéristiques de l'histoire et des institutions politiques du Canada confirment que la notion de représentation démocratique équitable dans notre pays inclut la représentation des intérêts particuliers des groupes régionaux. Cette conclusion est, selon moi, étayée par certains énoncés de notre Cour sur le lien entre le fédéralisme et la démocratie, particulièrement dans le *Renvoi sur la sécession*. Notre Cour a alors affirmé que les principes à la base de la Constitution, y compris le fédéralisme et la démocratie, existaient en symbiose : « [a]ucun de ces principes ne peut être défini en faisant abstraction des autres, et aucun de ces principes ne peut empêcher ou exclure l'application d'aucun autre » (par. 49). Cette affirmation suggère que le fédéralisme — et l'attention qu'il porte à la protection des intérêts particuliers des groupes régionaux — contribue à définir la démocratie canadienne.

En cette ère marquée par la *Charte*, certains prétendent que l'importance du régionalisme et du fédéralisme a été atténuée par la confirmation de la suprématie de l'individu et par la protection des communautés minoritaires définies en fonction de caractéristiques communes comme le sexe ou la race (voir A. C. Cairns, « The Charter and the

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*."

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*

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

Constitution Act, 1982 », dans R. S. Blair et J. T. McLeod, dir., *The Canadian Political Tradition : Basic Readings* (2e éd. 1993), 62). Néanmoins, le fédéralisme et la représentation régionale demeurent des notions importantes pour définir la nature des droits politiques au Canada. On ne peut saisir la nature des droits individuels et démocratiques garantis par la *Charte* sans tenir compte de cet aspect de la culture politique dans laquelle les droits sont enracinés. Comme l'a fait observer J.-F. Gaudreault-DesBiens (« La *Charte canadienne des droits et libertés* et le fédéralisme : quelques remarques sur les vingt premières années d'une relation mbiguë », [2003] *R. du B.* 271, p. 297) : « [l]e fédéralisme participe directement au type particulier de démocratie qui existe au Canada. Sa présence est en quelque sorte encodée dans l'idée même de démocratie à laquelle renvoie l'article premier [et, j'ajouterais, par les droits démocratiques garantis à l'art. 3] de la *Charte.* »

169 Ces observations paraissent indiquer que l'un des éléments du droit de participer utilement au processus démocratique s'identifie au droit de se faire entendre en tant que membre d'une collectivité régionale. La garantie constitutionnelle de représentation effective emporte le droit de tout électeur à un certain degré de reconnaissance de ses intérêts en tant que résident du Manitoba, d'une province maritime ou du Québec, et elle sous-entend l'existence d'une égalité relative minimale entre les différentes provinces et régions du pays qui ne peut être entièrement écartée par une majorité numérique à l'échelle nationale. Cet aspect de la représentation effective ne doit pas être élevé au niveau d'un droit absolu. Sa valeur ne devrait pas être exagérée au risque d'éclipser des préoccupations fondamentales telle l'équité entre les électeurs. Il s'agit toutefois d'une des valeurs qui doit être prise en compte pour définir la notion de représentation utile et pour déterminer si la mesure gouvernementale viole l'art. 3.

J. *L'évaluation de la règle des 50 candidatures*

170 J'examinerai maintenant l'application de ces principes aux dispositions législatives visées par la présente contestation constitutionnelle. Compte tenu de tous les facteurs pertinents, j'estime que la

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

condition exigeant la présentation d'au moins 50 candidats, qui doit être respectée pour bénéficier des avantages en litige dans le présent pourvoi, nuit à la compétitivité de certains candidats et porte atteinte à la liberté de choix de leurs partisans, à un point tel qu'elle prive ces personnes de la possibilité de participer utilement au processus démocratique.

Le juge Iacobucci a fort pertinemment démontré que cette mesure réduisait la capacité de certaines personnes de participer au processus politique. Les sanctions prévues en cas de non-respect du critère des 50 candidatures sont assez sévères, et elles imposent un désavantage considérable aux partis qui perdent leur enregistrement. L'intimé soutient qu'il est assez facile aux partis de satisfaire à ce critère. Après les modifications législatives apportées en 2000, le dépôt de 1 000 $ demandé à l'égard de chaque candidat est maintenant entièrement remboursé moyennant respect des obligations prévues en matière de déclaration, de sorte qu'il suffit au parti d'emprunter 50 000 $ et de recueillir le nombre requis de signatures pour présenter 50 candidats. D'un point de vue strictement financier, ces obstacles ne sont sans doute pas difficiles à surmonter. Toutefois, l'obligation de présenter 50 candidats représente une contrariété et un fardeau pour les partis qui sont déterminés à faire campagne sérieusement dans quelques circonscriptions. En effet, elle les oblige — à seule fin d'obtenir leur inscription dans le registre — à présenter un contingent de candidats dans d'autres circonscriptions où ils n'ont pas l'intention de mener une véritable campagne.

Par ailleurs, du fait qu'elles profitent aux partis traditionnels disposant de larges appuis, les dispositions législatives contestées contribuent à l'importante valeur démocratique qu'est l'agrégation des préférences politiques. Elles contribuent également dans une certaine mesure à la réalisation des objectifs louables formulés par le Comité Barbeau, du fait qu'elles aident à identifier les véritables partis, ceux qui sont déterminés à participer à la course électorale et qui possèdent un programme politique sérieux.

Toutefois, la règle des 50 candidatures n'est pas l'outil idéal pour réaliser ces objectifs. En général,

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.

il existe un certain lien entre la décision d'un parti de présenter un candidat dans une circonscription donnée et l'ampleur de l'appui dont jouit ce parti à cet endroit, mais la présentation d'un candidat n'indique pas nécessairement que le parti jouit d'appuis dans cette circonscription. La règle reste toutefois vulnérable aux manipulations et elle peut s'avérer à la fois trop inclusive et trop exclusive. En effet, elle a permis l'enregistrement de partis qui, du moins pour un certain nombre de citoyens canadiens, seraient considérés comme des mouvements très éloignés des tendances politiques traditionnelles de la politique canadienne ou qui ne défendent qu'une seule cause. Elle peut également exclure des partis qui possèdent un programme politique élaboré et qui sont réellement intéressés à participer à la course électorale. Le Parti communiste du Canada, rayé du registre en 1993 (et réinscrit en 2000), en est un exemple : il participe depuis longtemps aux élections et il a même connu certains succès électoraux, et, bien que son programme électoral ne se situe certes pas dans le courant dominant de la politique canadienne, il est fondé sur l'une des principales philosophies politiques du monde.

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'".

174 Enfin, la règle des 50 candidatures contrevient au principe de la représentation régionale en raison de l'effet différent qu'elle produit dans diverses provinces et régions du pays. Comme le souligne l'appelant dans son mémoire, cette règle [TRADUCTION] « encourage la formation d'un Bloc Québécois ou d'un Western Canada Concept mais empêche, dans les faits, la création d'un "Bloc BC" ou un "Atlantic Canada Concept" ».

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

175 Au moment de l'adoption du régime d'enregistrement, le gouvernement avait initialement proposé un seuil plus élevé, soit 75 candidats, affirmant que l'enregistrement était destiné uniquement aux partis dits « nationa[ux] » (*Débats de la Chambre des communes*, vol. VIII, 2e sess., 28e lég., 23 juin 1970, p. 8509, propos de l'hon. Donald Macdonald). Selon le professeur Aucoin, témoin expert de la Couronne, le gouvernement a reconnu qu'un parti pouvait satisfaire à cette exigence en présentant uniquement des candidats en Ontario, mais qu'il [TRADUCTION] « était prêt à accepter ce risque ». Un comité législatif a proposé une modification

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

retenant le seuil moins élevé de 10 pour cent des circonscriptions, mais une modification fixant le seuil de 50 candidats a finalement été adoptée. Il s'agissait d'un compromis entre les deux positions. Comme l'a fait observer le professeur Aucoin dans son affidavit, [TRADUCTION] « le fait que le gouvernement était disposé à accepter un compromis de 50 candidats signifie qu'il était prêt à accepter la possibilité qu'un parti soit formé en présentant des candidats seulement au Québec ».

Sans égard aux considérations pragmatiques qui militaient en faveur de ce compromis, ce dernier a créé une situation injuste pour les provinces autres que l'Ontario et le Québec. Une règle qui favorise les partis représentant des intérêts à l'échelle nationale peut, sous réserve de ses autres effets, constituer une restriction acceptable. Toutefois, n'est pas conforme au principe selon lequel la Constitution garantit un degré minimal d'égalité entre les différentes provinces et régions du pays une règle qui, bien que censée réserver les privilèges de l'enregistrement aux partis nationaux, permet dans les faits — mais uniquement dans les deux provinces les plus populeuses — l'enregistrement de partis défendant les intérêts d'une seule province. En considérant la question du point de vue de l'électeur habitant (par exemple) une des provinces maritimes, on constate que cette mesure pourrait être perçue comme un avantage accordé par le gouvernement aux provinces centrales. Elle vient en effet renforcer l'avantage que leur confère déjà leur population plus nombreuse, et qui porte une atteinte si grande à son importance politique, comparativement à celle d'un électeur québécois ou ontarien, qu'elle prive concrètement l'électeur des autres provinces de son droit de participer utilement au processus démocratique et de son droit à une représentation effective.

Pour ces motifs, je souscris à l'opinion de mon collègue selon laquelle les dispositions législatives contestées violent l'art. 3 et je suis d'accord avec la réparation qu'il propose.

K. *La justification et le rôle institutionnel de notre Cour*

À mon avis, les justifications avancées par le gouvernement à l'égard de la règle des 50 candidatures

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".

sont pertinentes dans le volet de l'analyse relatif à l'atteinte, et j'en ai dûment tenu compte dans ce contexte. En conséquence, il reste peu à dire pour défendre les dispositions législatives au regard de l'article premier. Je n'écarte pas la possibilité que, dans une autre affaire, une atteinte non expresse à l'art. 3 puisse être justifiée par des préoccupations collectives urgentes et réelles. En l'espèce toutefois, ma conclusion que les dispositions législatives violent l'art. 3 revient essentiellement à conclure qu'elles sont incompatibles avec les valeurs de la démocratie canadienne. Il est en conséquence difficile d'imaginer comment leur « justification p[ourrait] se démontrer dans le cadre d'une société libre et démocratique ».

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.

179 Cependant, si je devais procéder à l'analyse complète requise par l'article premier, je ne verrais aucune raison de mettre en doute le caractère urgent et réel des objectifs du gouvernement. À mon avis, nous ne sommes pas en présence d'une de ces rares affaires où l'objet même de la loi est contraire aux normes constitutionnelles ou démocratiques.

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.

180 Je considère discutable la suggestion selon laquelle le fait de favoriser les grands partis jouissant de larges appuis par rapport aux partis marginaux est incompatible avec les principes qui font partie intégrante d'une société libre et démocratique et même qu'elle va à l'encontre de ces principes. Comme je l'ai fait remarquer plus tôt, notre système électoral tend à récompenser les partis qui ont une clientèle appartenant aux tendances politiques traditionnelles et qui jouissent d'appuis dans les diverses régions du pays, et à pénaliser ceux dont la clientèle partage des intérêts plus restreints. Il s'agit là d'une caractéristique de la démocratie canadienne qui ressort clairement de la structure des principales institutions politiques. Elle a contribué au développement de la tradition de centrisme et de création de coalitions au sein des partis politiques, situation qui a permis qu'une nation très diversifiée et soumise à de nombreuses pressions politiques centrifuges comme le Canada soit néanmoins gouvernée d'une manière harmonieuse et démocratique. Les valeurs ainsi renforcées par les dispositions législatives contestées demeurent compatibles avec quelques-uns des principes fondamentaux qui constituent les assises de notre société libre et démocratique.

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 importantly, 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.

En outre, je comprends difficilement pourquoi la Couronne devrait être tenue de démontrer que le système électoral adopté par le Parlement conduit à « une bien meilleure administration du pays » (le juge Iacobucci, par. 89) qu'un autre système. Mes réserves ne découlent pas seulement du fait qu'il est difficile d'imaginer comment on réussirait à prouver de façon empirique qu'une forme de gouvernement est meilleure qu'une autre. Mais, considération plus importante encore, la définition d'un « bon » gouvernement ou d'un « meilleur » gouvernement ne devrait pas être arrêtée au moyen d'une norme juridique. Il s'agit d'une question qui peut susciter — et qui de fait suscite — de vifs désaccord entre des personnes raisonnables. De fait, l'existence de désaccords sur cette question représente souvent l'une des caractéristiques distinctives d'une démocratie. Ces remarques tiennent évidemment compte du fait que les Canadiens sont acquis, tant du point de vue des traditions politiques que sur le plan constitutionnel, à une forme de gouvernement démocratique. Toutefois, dans la catégorie des gouvernements démocratiques, plusieurs variantes présentent des caractéristiques différentes. Le choix de l'une d'entre elles de préférence à l'autre exprime alors une option entre des valeurs politiques concurrentes.

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

En suggérant que la motivation à la base des dispositions législatives contestées puisse elle-même ne pas être légitime, notre Cour risque d'élargir indûment la portée du contrôle judiciaire de la structure du système électoral. Il faut selon moi faire montre de prudence afin de ne pas brouiller la distinction entre les rôles respectifs de notre Cour et du législateur dans l'examen d'une question qui, malgré ses dimensions juridiques évidentes, demeure en outre éminemment politique. Dans certaines limites, qu'il incombe au pouvoir judiciaire de fixer, la conciliation de valeurs démocratiques opposées et le choix entre différents systèmes électoraux démocratiques relèvent avant tout du débat politique et du processus législatif. Ces limites doivent être considérées comme assez larges. À l'intérieur de celles-ci, les citoyens doivent disposer d'une assez grande latitude, qui leur permette de choisir, par l'entremise des députés qu'ils ont élus, des règles et des institu-

democratic right to meaningful participation and diminish others.

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.*

Appeal allowed with costs.

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.

tions qui renforcent certains aspects du droit démocratique de participer utilement au processus démocratique, même si elles en affaiblissent d'autres.

183 La *Charte* prescrit que, quel que soit le système électoral adopté, celui-ci doit respecter le droit de tout individu de participer utilement au processus démocratique. Toutefois, il faudrait prendre soin de ne pas définir ce droit de façon trop rigide, de crainte d'empêcher la tenue d'un débat politique légitime sur les différents enjeux d'une réforme du système électoral. La possibilité d'un dialogue entre les tribunaux et les législateurs quant au sens à donner au droit de vote pourrait être indûment restreinte si notre Cour déclare que certaines valeurs, bien qu'appartenant depuis longtemps à notre tradition politique, ne doivent pas être prises en considération dans l'interprétation et l'application de l'art. 3 de la *Charte.*

Pourvoi accueilli avec dépens.

Procureurs de l'appelant : Roach, Schwartz & Associates, Toronto.

Procureur de l'intimé : Procureur général du Canada, Toronto.

Procureur de l'intervenant : Procureur général du Québec, Sainte-Foy.

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Court File No. CV-18-00603633-0000
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ROCCO ACHAMPONG Applicant (Respondent in appeal)	-and-	**ONTARIO** Respondent (Appellant)	-and-	**CITY OF TORONTO** Respondent (Respondent in Appeal)
CITY OF TORONTO Applicant (Respondent in appeal)	-and-	**ATTORNEY GENERAL** Respondent (Appellant)		
CHRIS MOISE *et al* Applicant (Respondent in appeal)	-and-	**ATTORNEY GENERAL** Respondent (Appellant)	-and-	**CITY OF TORONTO** Respondent (Respondent in Appeal)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE INTERVENORS JENNIFER HOLLETT et al. (RESPONDENTS IN APPEAL) (STAY PENDING APPEAL)

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