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SUPREME COURT OF CANADA

CITATION: Toronto (City) *v.* Ontario (Attorney General), 2021 SCC 34

APPEAL HEARD: March 16, 2021
JUDGMENT RENDERED: October 1, 2021
DOCKET: 38921

BETWEEN:

City of Toronto
Appellant

and

Attorney General of Ontario
Respondent

- and -

Attorney General of Canada, Attorney General of British Columbia, Toronto District School Board, Cityplace Residents' Association, Canadian Constitution Foundation, International Commission of Jurists (Canada), Federation of Canadian Municipalities, Durham Community Legal Clinic, Centre for Free Expression at Ryerson University, Canadian Civil Liberties Association, Art Eggleton, Barbara Hall, David Miller, John Sewell, David Asper Centre for Constitutional Rights, Progress Toronto, Métis Nation of Ontario, Métis Nation of Alberta and Fair Voting British Columbia
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 85) Wagner C.J. and Brown J. (Moldaver, Côté and Rowe JJ. concurring)

DISSENTING REASONS: (paras. 86 to 186) Abella J. (Karakatsanis, Martin and Kasirer JJ. concurring)

City of Toronto *Appellant*

v.

Attorney General of Ontario *Respondent*

and

Attorney General of Canada,
Attorney General of British Columbia,
Toronto District School Board,
Cityplace Residents' Association,
Canadian Constitution Foundation,
International Commission of Jurists (Canada),
Federation of Canadian Municipalities,
Durham Community Legal Clinic,
Centre for Free Expression at Ryerson University,
Canadian Civil Liberties Association,
Art Eggleton,
Barbara Hall,
David Miller,
John Sewell,
David Asper Centre for Constitutional Rights,
Progress Toronto,
Métis Nation of Ontario,
Métis Nation of Alberta and
Fair Voting British Columbia *Interveners*

Indexed as: Toronto (City) *v.* Ontario (Attorney General)

2021 SCC 34

File No.: 38921.

2021: March 16; 2021: October 1.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Freedom of expression —Municipal elections — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation limits electoral participants' right to freedom of expression and, if so, whether limitation justified — Canadian Charter of Rights and Freedoms, ss. 1, 2(b) — Better Local Government Act, 2018, S.O. 2018, c. 11.

Constitutional law — Unwritten constitutional principles — Democracy — Province enacting legislation redrawing municipality's electoral ward boundaries and reducing number of wards during election campaign — Whether legislation unconstitutional for violating unwritten constitutional principle of democracy.

On May 1, 2018, the City of Toronto municipal election campaign commenced and nominations opened in preparation for an election day on October 22, 2018. On July 27, 2018, the closing day for nominations, Ontario announced its intention to introduce legislation reducing the size of Toronto City Council. On August 14, 2018, the *Better Local Government Act, 2018*, came into force, reducing the number of wards from 47 to 25.

The City and two groups of private individuals challenged the constitutionality of the *Act* and applied for orders restoring the 47-ward structure. The application judge found that the *Act* limited the municipal candidates' right to freedom of expression under s. 2(b) of the *Charter* and municipal voters' s. 2(b) right to effective representation. He held that these limits could not be justified under s. 1 of the *Charter* and set aside the impugned provisions of the *Act*. Ontario appealed and moved to stay the judgment pending appeal. The Court of Appeal granted the stay and, on October 22, 2018, the municipal election proceeded on the basis of the 25-ward structure created by the *Act*. The Court of Appeal later allowed the appeal, finding no limit on freedom of expression. The majority held that the City had advanced a positive rights claim, which was not properly grounded in s. 2(b) of the *Charter*, and concluded that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression and in finding that the right to effective representation applies to municipal elections and bears any influence over the s. 2(b) analysis. The majority also held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*, nor do they limit provincial legislative authority over municipal institutions.

Held (Abella, Karakatsanis, Martin and Kasirer JJ. dissenting): The appeal should be dismissed.

Per **Wagner** C.J. and Moldaver, Côté, **Brown** and Rowe JJ.: Ontario acted constitutionally. The *Act* imposed no limit on freedom of expression. Further, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can the unwritten constitutional principle of democracy be used to narrow provincial authority under s. 92(8) of the *Constitution Act, 1867*, or to read municipalities into s. 3 of the *Charter*.

A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts. Section 2(b) of the *Charter*,

which provides that everyone has the fundamental freedoms of thought, belief, opinion and expression, including freedom of the press and other media of communication, has been interpreted as generally imposing a negative obligation rather than a positive obligation of protection or assistance. A claim is properly characterized as negative where the claimant seeks freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage. Such claims of right under s. 2(b) are considered under the framework established in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927.

However, as explained in *Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Many constitutional rights have both positive and negative dimensions and this is so for s. 2(b). Central to whether s. 2(b) has been limited is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right.

In the context of positive claims under s. 2(b), where a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression, the applicable framework is that of *Baier*. As held in *Baier*, to succeed, a positive claim must satisfy the following three factors first set forth in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016: (1) the claim should be grounded in freedom of expression, rather than in access to a particular statutory regime; (2) the claimant must demonstrate that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression; and (3) the government must be responsible for the inability to exercise the fundamental freedom. These factors set an elevated threshold for positive claims and can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This single question, a salutary clarification of the *Baier* test, emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is effectively precluded. While meaningful expression need not be rendered absolutely impossible, effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases.

In the present case, the City has not established a limit on s. 2(b). The City's claim is a claim for access to a particular statutory platform, and is thus, in substance, a positive claim. The *Baier* framework therefore applies, and the City had to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. The candidates and their supporters had 69 days to re-orient their messages and freely express themselves according to the new ward structure. The *Act* imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression. Some of the candidates' prior expression may have lost its relevance, but something more than diminished effectiveness is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression may rise to the level of a substantial interference with freedom of expression. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

Furthermore, the unwritten constitutional principle of democracy cannot be used as a device for invalidating otherwise valid provincial legislation such as the impugned provisions of the *Act*. Unwritten principles are part of the law of the Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Their legal force lies in their representation of general principles within which the constitutional order operates and, therefore, by which the Constitution's written terms — its provisions — are to be given effect. In practical terms, unwritten constitutional principles may assist courts in only two distinct but related ways.

First, they may be used in the interpretation of constitutional provisions. Where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing the character and the larger objects of the *Charter* itself, the language chosen to articulate the specific right or freedom, and the historical origins of the concepts enshrined. Where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. Structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent.

Neither of these functions support the application of unwritten constitutional principles as an independent basis for invalidating legislation. On the contrary, unwritten constitutional principles, such as democracy, a principle by which the Constitution is to be understood and interpreted, strongly favour upholding the validity of legislation that conforms to the text of the Constitution. Subject to the *Charter*, a province, under s. 92(8) of the *Constitution Act, 1867*, has absolute and unfettered legal power to legislate with respect to municipalities. This plenary jurisdiction is unrestricted by any constitutional principle.

As for s. 3 of the *Charter*, it guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it does not extend to municipal elections. Effective representation is not a principle of s. 2(b) of the *Charter*, nor can the concept be imported wholesale into s. 2(b). Section 3 and its requirement of effective representation also cannot be made relevant to the current case by using the democratic principle. Section 3 democratic rights were not extended to candidates or electors to municipal councils. The absence of municipalities in the constitutional text is not a gap to be addressed judicially; rather, it is a deliberate omission. The text of the Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

Per **Abella**, Karakatsanis, Martin and Kasirer JJ. (dissenting): The appeal should be allowed and the application judge's declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter* restored. Changing the municipal wards in the middle of an ongoing municipal election was unconstitutional.

When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection.

A stable election period is crucial to electoral fairness and meaningful political discourse. As such, state interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including participation in social and political decision-making.

A two-part test for adjudicating freedom of expression claims was established in *Irwin Toy*. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second asks whether the government action, in purpose or effect, interfered with freedom of expression.

The legal framework set out in *Baier*, which was designed to address under inclusive statutory regimes, only applies to claims placing an obligation on government to provide individuals with a particular platform for expression. Claims of government interference with expressive rights that attach to an electoral process are the kind of claims governed by the *Irwin Toy* framework.

The distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus. They also have negative dimensions because they sometimes require the state not to intervene. A unified purposive approach has been adopted to rights claims, whether the claim is about freedom from government interference in order to exercise a right, or the right to governmental action in order to get access to it. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*. There is therefore no reason to superimpose onto the constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes.

In the present case, the s. 2(b) claim is about government interference with the expressive rights that attach to the electoral process and it is precisely the kind of claim that is governed by the *Irwin Toy* framework. Applying that framework, it is clear that the timing of the legislation, by interfering with political discourse in the middle of an election, violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries during an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse. The *Act* eradicated nearly half of the active election campaigns, and required candidates to file a change of ward notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance. The timing of the *Act* breathed instability into the election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern.

The limitation on s. 2(b) rights in this case was the *timing* of the legislative changes. Ontario offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. In the absence of any evidence or explanation for the timing of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society.

As for the role of unwritten constitutional principles, there is disagreement with the majority's observations circumscribing their scope and power in a way that reads down the Court's binding jurisprudence. Unwritten constitutional principles may be used to invalidate legislation. The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources. Canada's Constitution, as a result, embraces unwritten as well as written rules. Unwritten constitutional principles have been held to be the lifeblood of the Constitution and the vital unstated assumptions upon which the text is based. They are not merely "context" or "backdrop" to the text. On the contrary, they are the Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*. Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles.

Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions. The legislative bodies in Canada must conform to these basic structural imperatives and can in no way override them. Accordingly, unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with the Constitution's internal architecture or basic constitutional structure. This would undoubtedly be a rare case; however, to foreclose the possibility that unwritten principles can be used to invalidate legislation in all circumstances is imprudent. It not only contradicts the Court's jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it.

Unwritten constitutional principles are the foundational organizing principles of the Constitution and have full legal force. They serve to give effect to the structure of the Constitution and function as independent bases upon which to attack the validity of legislation since they have the same legal status as the text. Unwritten constitutional principles not only give meaning and effect to constitutional text and inform the language chosen to articulate the specific right or freedom, they assist in developing an evolutionary understanding of the rights and freedoms guaranteed in the Constitution, which have long been described as a living tree capable of growth and expansion. Unwritten constitutional principles are a key part of what makes the tree grow. They are also substantive legal rules in their own right. In appropriate cases, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional.

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By Abella J. (dissenting)

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APPEAL from a judgment of the Ontario Court of Appeal (MacPherson, Tulloch, Miller, Nordheimer and Harvison Young JJ.A.), 2019 ONCA 732, 146 O.R. (3d) 705, 439 D.L.R. (4th) 292, 442 C.R.R. (2d) 348, 92 M.P.L.R. (5th) 1, [2019] O.J. No. 4741 (QL), 2019 CarswellOnt 14847 (WL Can.), setting aside a decision of Belobaba J., 2018 ONSC 5151, 142 O.R. (3d) 336, 416 C.R.R. (2d) 132, 80 M.P.L.R. (5th) 1, [2018] O.J. No. 4596 (QL), 2018 CarswellOnt 14928 (WL Can.). Appeal dismissed, Abella, Karakatsanis, Martin and Kasirer JJ. dissenting.

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The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

THE CHIEF JUSTICE AND BROWN J. —

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I. Introduction

[1] While cast as a claim of right under s. 2(b) of the *Canadian Charter of Rights and Freedoms*, this appeal, fundamentally, concerns the exercise of provincial legislative authority over municipalities. The issue, simply put, is whether and how the Constitution of Canada restrains a provincial legislature from changing the conditions by and under which campaigns for elected municipal councils are conducted.

[2] Section 92(8) of the *Constitution Act, 1867* assigns to provinces exclusive legislative authority regarding "Municipal Institutions in the Province". Municipalities incorporated under this authority therefore hold delegated provincial powers; like school boards or other creatures of provincial statute, they do not have independent constitutional status (*Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, 2000 SCC 45, [2000] 2 S.C.R. 409, at paras. 33-34). The province has "absolute and unfettered legal power to do with them as it wills" (*Ontario English Catholic Teachers' Assn. v. Ontario (Attorney General)*, 2001 SCC 15, [2001] 1 S.C.R. 470, at para. 58, quoting with approval Campbell J. in *Ontario*

Public School Boards' Assn. v. Ontario (Attorney General) (1997), 1997 CanLII 12352 (ON SC), 151 D.L.R. (4th) 346 (Ont. C.J. (Gen. Div.)), at p. 361). No constitutional norms or conventions prevent a province from making changes to municipal institutions without municipal consent (*East York (Borough) v. Ontario* (1997), 1997 CanLII 1316 (ON CA), 36 O.R. (3d) 733 (C.A.), at pp. 737-38, per Abella J.A.). And "it is not for this Court to create constitutional rights in respect of a third order of government where the words of the Constitution read in context do not do so" (*Baier v. Alberta*, 2007 SCC 31, [2007] 2 S.C.R. 673, at para. 39).

[3] Aside from one reference to s. 92(8) — and an acknowledgement that the Province of Ontario had constitutional authority to act as it did in this case — our colleague Abella J. all but ignores this decisive constitutional context (para. 112). And yet, these considerations loom large here. After the closing of a nomination period for elections to the Toronto City Council, the Province legislated a new, reduced ward structure for the City of Toronto and a correspondingly reduced Council. The City says that doing so was unconstitutional, because it limited the s. 2(b) *Charter* rights of electoral participants and violated the unwritten constitutional principle of democracy. It also, says the City, ran afoul of the constitutional requirements of effective representation, which it says flow from s. 2(b) of the *Charter* and s. 92(8) of the *Constitution Act, 1867* by virtue of that same unwritten constitutional principle of democracy.

[4] None of these arguments have merit, and we would dismiss the City's appeal. In our view, the Province acted constitutionally. As to the s. 2(b) claim, the City seeks access to a statutory platform which must be considered under the framework stated in *Baier*. The change to the ward structure did not prevent electoral participants from engaging in further political expression on election issues under the new ward structure in the 69 days between the *Act* coming into force and the election day. There was no substantial interference with the claimants' freedom of expression and thus no limitation of s. 2(b).

[5] Nor did the *Act* otherwise violate the Constitution. Unwritten constitutional principles cannot in themselves ground a declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, and there is no freestanding right to effective representation outside s. 3 of the *Charter*. Further, the unwritten constitutional principle of democracy cannot be used to narrow provincial authority under s. 92(8), or to read municipalities into s. 3.

II. Background

[6] In 2013, the City of Toronto engaged consultants to conduct the Toronto Ward Boundary Review of Toronto's then 44-ward structure. They recommended an expanded 47-ward structure, which the City adopted in 2016.

[7] On May 1, 2018, the City of Toronto campaign commenced and nominations opened in preparation for an election day on October 22, 2018. By the close of nominations on July 27, 2018, just over 500 candidates had registered to run in the 47 wards. That same day, the Government of Ontario announced its intention to introduce legislation reducing the size of Toronto City Council to 25 wards. On August 14, 2018, the *Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), came into force, reducing the number of wards from 47 to 25 (based on the boundaries of the federal electoral districts), and extending the nomination period to September 14.

[8] The City and two groups of private individuals applied on an urgent basis to the Ontario Superior Court of Justice challenging the constitutionality of these measures and seeking orders restoring the 47-ward structure. They argued that the *Act* breached *Charter* guarantees of freedom of expression, freedom of association, and equality, and that it violated the unwritten constitutional principles of democracy and the rule of law.

[9] The application judge agreed, finding two limits on s. 2(b) of the *Charter* (2018 ONSC 5151, 142 O.R. (3d) 336). First, he found that the *Act* limited the municipal candidates' s. 2(b) right to freedom of expression, a conclusion largely tied to the timing of the *Act*, enacted as it was during the election campaign. Secondly, he found that the *Act* limited municipal voters' s. 2(b) right to effective representation — despite the fact that effective representation is a principle of s. 3 (and not s. 2(b)) of the *Charter* — due to his conclusion that the ward population sizes brought about by the *Act* were too large to allow councillors to effectively represent their constituents. Neither of these limits could, he further held, be justified under s. 1 and he set aside the impugned provisions of the *Act*. As a result, the election was to proceed on the basis of the 47-ward system.

[10] The Province appealed and moved to stay the judgment pending appeal. The Court of Appeal for Ontario granted the stay on September 19, 2018, concluding that there was a strong likelihood that the Province's appeal would be successful and, on October 22, 2018, the Toronto municipal election proceeded on the basis of the 25-ward structure created by the *Act* (2018 ONCA 761, 142 O.R. (3d) 481). No issue is taken with the integrity of the election or the results thereof.

[11] When the Court of Appeal decided the Province's appeal on its merits, it divided. While the dissenters would have invalidated the *Act* as unjustifiably limiting freedom of expression, the majority allowed the appeal, finding no such limit (2019 ONCA 732, 146 O.R. (3d) 705). The City had advanced a positive rights claim — that is, a claim for a particular platform and not protection from state interference with the conveyance of a message. Consistent with the *Baier* framework governing such claims, the majority applied the factors stated in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, [2001] 3 S.C.R. 1016, to conclude that the claim was not properly grounded in s. 2(b) of the *Charter*, and that the application judge had erred in finding that the *Act* substantially interfered with the candidates' freedom of expression. Further, he had erred in finding that the right to effective representation — guaranteed by s. 3 — applies to municipal elections and bears any influence over the s. 2(b) analysis. Finally, the majority held that unwritten constitutional principles do not confer upon the judiciary power to invalidate legislation that does not otherwise infringe the *Charter*; nor do they limit provincial legislative authority over municipal institutions. Though unwritten constitutional principles are sometimes used to fill gaps in the Constitution, no such gap exists here.

[12] The Court of Appeal appears to have granted the City public interest standing to argue the appeal (para. 28). The City's standing was not challenged before this Court.

III. Issues

[13] Two issues arise from the foregoing. First, did the *Act* limit (unjustifiably or at all) the freedom of expression of candidates and/or voters participating in the 2018 Toronto municipal election? And secondly, can the unwritten constitutional principle of democracy be applied, either to narrow provincial legislative authority over municipal institutions or to require effective representation in those institutions, so as to invalidate the *Act*?

IV. Analysis

A. *Freedom of Expression*

(1) Principles of *Charter* Interpretation in the Context of Section 2(b)

[14] This appeal hinges on the scope of s. 2(b) of the *Charter*, which provides that everyone has the fundamental freedoms "of thought, belief, opinion and expression, including freedom of the press and other media of communication". A purposive interpretation of *Charter* rights must begin with, and be rooted in, the text (*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32, at paras. 8-10) and not overshoot the purpose of the right but place it in its appropriate linguistic, philosophic and historical contexts (*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344). Yet, it is undeniable that s. 2(b) has traditionally been interpreted expansively (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 976; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 765-67). Indeed, s. 2(b) has been interpreted so broadly that the framework has been criticized for setting too low a bar for establishing a s. 2(b) limitation, such that any consideration of its substantive reach and bounds is generally consigned to the limitations analysis under s. 1 (K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 174, citing M. Plaxton and C. Mathen, "Developments in Constitutional Law: The 2009-2010 Term" (2010), 52 *S.C.L.R.* (2d) 65). Following *Irwin Toy*, then, if an activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of "expression" (p. 969). Further, if the purpose or effect of the impugned governmental action is to control attempts to convey meaning through that activity, a limit on expressive freedom will be shown (p. 972).

[15] Freedom of expression is not, however, presently recognized as being without internal limits. Activities may fall outside the scope of s. 2(b) where the method of the activity itself — such as violence — or the location of that activity is not consonant with *Charter* protection (*Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 60 and 62).

[16] Further, and of particular significance to this appeal, s. 2(b) has been interpreted as "generally impos[ing] a negative obligation . . . rather than a positive obligation of protection or assistance" (*Baier*, at para. 20 (emphasis added), citing *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1035). A claim is properly characterized as negative where the claimant seeks "freedom from government legislation or action suppressing an expressive activity in which people would otherwise be free to engage" (*Baier*, at para. 35 (emphasis added)). Such claims of right under s. 2(b) are considered under this Court's *Irwin Toy* framework.

[17] In *Baier*, however, this Court explained that s. 2(b) may, in certain circumstances, impose positive obligations on the government to facilitate expression. Put differently, while s. 2(b) typically "prohibits gags", it can also, in rare and narrowly circumscribed cases, "compel the distribution of megaphones" (para. 21, quoting *Haig*, at p. 1035). Hence the Court of Appeal's statement in this case that "[f]reedom of expression is respected, in the main, if governments simply *refrain* from actions that would be an unjustified interference with it", and that positive claims under s. 2(b) may be recognized in only "exceptional and narrow" circumstances (paras. 42 and 48 (emphasis in original)).

[18] Central to whether s. 2(b) was limited by the Province here is, therefore, the appropriate characterization of the claim as between a negative and positive claim of right. In *Baier*, this Court shielded positive claims from the *Irwin Toy* framework and subjected them to an elevated threshold. This is necessary, given the ease with which claimants can typically show a limit to free expression under the *Irwin Toy* test. An elevated threshold for positive claims narrows the circumstances in which a government or legislature must legislate or otherwise act to support freedom of expression. To consider positive claims under *Irwin Toy* would be to force the government to justify, under s. 1, any decisions *not* to provide particular statutory platforms for expression.

[19] The *Baier* framework is therefore not confined, as our colleague suggests, "to address[ing] underinclusive statutory regimes" (para. 148). This Court could not have been clearer in *Baier* that it applies "where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(*b*)" (para. 30). Were it otherwise — that is, were *Baier*'s application limited to cases of underinclusion — claims seeking the creation or extension of a statutory platform for expression would be considered under *Baier* while claims seeking the preservation of that same platform would be considered under *Irwin Toy*. This is illogical. *Baier*'s reach extends beyond cases of underinclusion or exclusion, and categorically limits the "obligation[s] on government to provide individuals with a particular platform for expression" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 35). This reflects the separation of powers; choices about whether and how to design a statutory or regulatory platform are best left to the elected orders of the state.

[20] We should not be taken as suggesting that s. 2(b) is to be understood as conferring a right that is wholly positive or wholly negative. Many constitutional rights have both positive and negative dimensions and the *Baier* framework explicitly recognizes that this is so for s. 2(b). But the distinction between those positive and negative dimensions remains important when considering the nature of *the obligation* that the claim seeks to impose upon the state: a "right's positive dimensions require government to act in certain ways, whereas its negative dimensions require government to refrain from acting in other ways" (P. Macklem, "Aboriginal Rights and State Obligations" (1997), 36 *Alta. L. Rev.* 97, at p. 101; see also A. Sen, *The Idea of Justice* (2009), at p. 282). For instance, would the claim, if accepted, require government action, or is the claim concerned with restrictions on the content or meaning of expression? And, were the claim rejected, would it deny the claimant access to a particular platform for expression on a subject, or would it preclude altogether the possibility of conveying

expression on that subject? While in *Haig*, L'Heureux-Dubé J. correctly noted that the distinction between positive and negative entitlements is "not always clearly made, nor . . . always helpful", she nevertheless distinguished typical negative claims from those that might require "positive governmental action" (p. 1039). This is the distinction with which we concern ourselves here.

[21] This appeal therefore presents an opportunity to affirm and clarify the application of *Baier* to positive claims under s. 2(b). *Baier* remains good law in the context of s. 2(b). It adopts a framework for analysis first set forth in *Dunmore*, which itself decided a claim under s. 2(d) (freedom of association). We need not decide here whether *Dunmore* remains applicable to s. 2(d) claims (an open question, given the decisions of this Court in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, and *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, [2015] 1 S.C.R. 3). It suffices here for us to affirm *Baier* as a useful and necessary framework in the context of positive s. 2(b) claims (although, as we will explain, we would simplify the framework).

(2) The *Baier* Framework

[22] The *Baier* framework applies if a claimant seeks to impose an obligation on the government (or legislature) to provide access to a particular statutory or regulatory platform for expression (para. 30; *Greater Vancouver Transportation Authority*, at para. 35). Here, therefore, if the City's claim would require the government or legislature to enact legislation or promulgate regulations, or otherwise act to provide a particular statutory or regulatory platform, it is advancing a positive claim (*Baier*, at para. 35).

[23] In *Baier*, this Court held that, to succeed, a positive claim must satisfy the three *Dunmore* factors: (1) Is the claim grounded in freedom of expression, rather than in access to a particular statutory regime? (2) Has the claimant demonstrated that lack of access to a statutory regime has the effect of a substantial interference with freedom of expression, or has the purpose of infringing freedom of expression? (3) Is the government responsible for the inability to exercise the fundamental freedom?

[24] These factors set an elevated threshold for positive claims. The first factor asks what the claimant is really seeking — in other words, whether the claim is grounded in freedom of expression or whether it merely seeks access to a statutory regime. Likewise, the second factor — which requires that the claimant establish a *substantial* interference with freedom of expression — sets a higher threshold than that stated in *Irwin Toy*, which asks only whether "the purpose or effect of the government action in question was to restrict freedom of expression" (p. 971; see also *Baier*, at paras. 27-28 and 45).

[25] So understood, these factors can usefully be distilled to a single core question: is the claim grounded in the fundamental *Charter* freedom of expression, such that, by denying access to a statutory platform or by otherwise failing to act, the government has either substantially interfered with freedom of expression, or had the purpose of interfering with freedom of expression? This is, to be clear, a single question which emphasizes the elevated threshold in the second *Dunmore* factor while encompassing the considerations of the first and third factors. Given what we see as the significant overlap among the factors — particularly between the first and second — this is, in our view, a salutary clarification of the *Baier* test, entirely consistent with this Court's approach in *Baier* and *Greater Vancouver Transportation Authority*. To be clear, s. 2(b) does not remove the authority that a legislature has to create or modify statutory platforms, because it does not include the right to access any statutory platform in particular. However, when a legislature chooses to provide such a platform, then it must comply with the *Charter* (*Haig*, at p. 1041).

[26] If, therefore, a claimant can demonstrate that, by denying access to a statutory platform, the government has substantially interfered with freedom of expression or acted with the purpose of doing so, the claim may proceed. Despite being a positive claim, the claimant has demonstrated a limit to its s. 2(b) right, and — subject to justification of such limit under s. 1 — government action or legislation may be required.

[27] There is no suggestion here that the Province acted *with the purpose* of interfering with freedom of expression, and we therefore confine our observations here to the claim presented — that is, a claim that a law has had *the effect* of substantially interfering with freedom of expression. In our view, a substantial interference with freedom of expression occurs where lack of access to a statutory platform has the effect of radically frustrating expression to such an extent that meaningful expression is "effectively preclude[d]" (*Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at para. 33). While meaningful expression need not be rendered absolutely impossible, we stress that effective preclusion represents an exceedingly high bar that would be met only in extreme and rare cases (*Baier*, at para. 27; *Dunmore*, at para. 25). For example, a statutory reduction of the length of an election campaign to two days may well, as a practical matter, be shown to have the effect of constituting a substantial interference with freedom of expression. In such a case, meaningful expression may very well be found to be effectively precluded.

[28] The height of this bar of effective preclusion is demonstrated by *Baier*. There, legislation was amended to prohibit school employees from running for election as school trustees, and the Court — applying the *Dunmore* factors — concluded that no substantial interference with freedom of expression was demonstrated. The claim was grounded merely in access to a particular statutory platform governing school trusteeship, rather than a substantial interference with freedom of expression. And, in any event, there was no interference, substantial or otherwise, with the appellants' ability to express views on matters relating to the education system. Their exclusion from the statutory scheme deprived them only of one particular *means* of such expression (paras. 44 and 48).

(3) Application

(a) *Nature of the Claim*

[29] The first question to answer in deciding this appeal is whether the City advances a positive claim. There are two ways in which the City's claim can be understood. Each leads to the conclusion that the claim is, in substance, a

positive claim that must, therefore, show a substantial interference with freedom of expression.

[30] The first possible view of the City's claim is that of *restoring an earlier statutory platform*, specifically the 47-ward structure. That this is so is evident from the City's requested disposition, which asks that the next municipal election be conducted under the previous framework (A.F., at para. 152). The City, then, would have the Province act (either by enacting new legislation or repealing the impugned provisions of the *Act*) to restore the previous statutory platform. This reveals a straightforward positive claim. The fact that the City and the participants in the election had previously enjoyed access to the 47-ward structure is of no legal significance. In *Baier*, this Court viewed a claim for restoring the status quo as a positive claim, equating it with a demand to legislate a framework for the first time. Such an approach is necessary to prevent fettering; "[t]o hold otherwise would mean that once a government had created a statutory platform, it could never change or repeal it without infringing s. 2(*b*)" (para. 36).

[31] The second possible view of the City's claim is that of *maintaining an existing statutory platform*. The City frames its claim as asking the Province, once a municipal election period commences, to ensure access to whatever election platform existed at that time. In the City's view, what is otherwise political expression becomes what it calls "electoral expression" during an election period (A.F., at para. 54). Protection of this "electoral expression", it says, requires the maintenance of the particular electoral framework that was in place at the beginning of the electoral period. Framed thusly, the City's claim that the impugned provisions of the *Act* limited s. 2(b) turns squarely on the *timing* of the *Act*. Indeed, at the hearing of this appeal, the City conceded that barring any other potential issues, the Province was constitutionally permitted to enact this same legislation in the week *following* the election. Further, the City requested — in the event that this Court finds only that the timing of the *Act* was unconstitutional — a declaration to that effect, rather than a remedy that would restore the previous 47-ward structure.

[32] The City's focus on the timing of the *Act* cannot, however, convert its positive claim into a negative one. While its claim is couched in language of non-interference — something that superficially resembles a negative claim to be considered under the *Irwin Toy* framework — the City does not seek protection of electoral participants' expression from restrictions tied to content or meaning (as was the case, for example, in *Greater Vancouver Transportation Authority*); rather, it seeks a particular platform (being whatever council structure existed at the outset of the campaign) by which to channel, and around which to structure, that expression.

[33] So understood, the claim is akin to that rejected in *Baier*. The only point of distinction is that *Baier* involved a request for a specific type of legislative regime (i.e., one that permitted school employees to run for and serve as school board trustees), while the claim in this case is for temporary protection — that is, for the duration of the campaign — of whatever particular type of election structure existed at the outset of the election period. But, for the purposes of deciding constitutionality, there is no difference between the present case and a hypothetical scenario in which the Province were to scrap the ongoing election and replace it with a completely new platform with a different structure and a reasonable campaign period altogether. Here, the City is able to frame its claim only in terms of non-interference because the *Act* modified the existing structure without scrapping it. But the ultimate result is the same. The City's claim is still a claim for access to a particular statutory platform; the precise disposition requested simply depends on whatever electoral framework is in place at the outset of the election process. It is thus a positive claim. Because municipal elections are merely statutory platforms without a constitutional basis, provinces can — subject to the elevated threshold of a substantial interference — change the rules as they wish.

[34] To hold otherwise would be to contemplate an unprecedented statutory freeze on provincial jurisdiction under s. 92(8), temporarily constitutionalizing a particular statutory platform for the duration of an election. What would normally be considered a positive claim under s. 2(b) would effectively transform into a negative claim for that period of time. This is constitutionally dubious, nonsensical, and even futile since the duration of such a freeze would depend entirely on the length of the election, over which the Province itself has ultimate authority. With respect, our colleague Abella J. ignores these concerns in holding that *Irwin Toy* ought to apply to a claim such as this. Provincial authority to legislate a change to Toronto's ward structure is accepted, but on our colleague's understanding this authority is operative only some of the time (para. 112). Combined with her broad articulation of the *Irwin Toy* threshold in this context — whether legislation "destabiliz[es] the opportunity for meaningful reciprocal discourse" — such an understanding would effectively freeze legislative authority to even tangentially affect a municipal election for the duration of the campaign (para. 115). Such a freeze sits awkwardly with the plenary authority that provinces enjoy under s. 92(8) of the *Constitution Act, 1867*.

[35] In sum, the City advances a positive claim and the *Baier* framework applies.

(b) *Application of Baier*

[36] As explained above, the *Baier* framework asks whether the claimant demonstrated that, by denying access to a statutory regime, the government has substantially interfered with freedom of expression. To repeat, this is a demanding threshold, requiring the City to show that the *Act* radically frustrated the expression of election participants such that meaningful expression was effectively precluded. In our view, the City cannot do so and therefore has not established a limit on s. 2(b).

[37] Here, the candidates and their supporters had 69 days — longer than most federal and provincial election campaigns — to re-orient their messages and freely express themselves according to the new ward structure. (Our colleague Abella J. is simply incorrect to suggest, at para. 104, that only one month of the campaign remained. It was twice that.) The *Act* did not prevent candidates from engaging in further political speech under the new structure. Candidates continued to campaign vigorously, canvassing and debating about issues unrelated to the impugned provisions, the size of council or the ward boundaries. And even had they not, nothing in the *Act* prevented them from doing so. It imposed no restrictions on the content or meaning of the messages that participants could convey. Many of the challengers who continued to campaign ultimately had, by any measure, successful campaigns, raising significant amounts of money and receiving significant numbers of votes. This would not have been possible had their s. 2(b) rights been so radically frustrated so as to effectively preclude meaningful expression.

[38] It is of course likely that some of the candidates' prior expression may have lost its relevance; pamphlets or other campaign paraphernalia with an old ward designation on them, for instance, had to be revised or discarded. But, with the new ward structure — and larger ward populations — came higher campaign expenditure limits, so candidates were able to raise more funds over the 69 days they had left in the campaign. This is, therefore, a complaint that the prior expression of the candidates was no longer meaningful or helpful in their project to secure election. It is, at its root, a complaint about diminished *effectiveness*.

[39] While diminished effectiveness might be enough to amount to a limit of s. 2(b) in its traditional negative orientation — see, for instance, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, at para. 15, per McLachlin C.J. and Major J., dissenting in part, but not on this point, and *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569 — more is required under the *Baier* framework. In the context of a positive claim, only extreme government action that extinguishes the effectiveness of expression — for instance, instituting a two-day electoral campaign — may rise to the level of a substantial interference with freedom of expression; such an act may effectively preclude meaningful expression in the context of the election. That is simply not what happened here. Section 2(b) is not a guarantee of the effectiveness or continued relevance of a message, or that campaign materials otherwise retain their usefulness throughout the campaign.

[40] Even accepting that the change in structure diminished the effectiveness of the electoral candidates' prior political speech by rendering some of their 47-ward campaign communications less relevant, this does not rise to the level of substantial interference. Again, the campaign that took place over 69 days following the imposition of the 25-ward system was vigorously contested by candidates whose freedom of expression was clearly not radically frustrated. We acknowledge that the application judge found a substantial interference with freedom of expression (para. 32). There are, however, three problems with his finding. First, this finding was made in the context of legal error, since he erroneously applied the *Irwin Toy* framework for a negative claim. Secondly, and relatedly, the reasons of the judge make clear that this finding was tied to the diminished effectiveness of the candidates' expression, something that, as explained, is simply insufficient to show a limit on freedom of expression under the *Baier* framework. Finally, given the truncated timelines of the matter at first instance, the judge was required to make this finding on a limited factual record. With the benefit of fresh evidence adduced by the Province and admitted at this Court, it is clear that the candidates were not effectively precluded from expressing themselves in the context of the campaign. They conducted vigorous, hard-fought campaigns about the issues that mattered to them.

[41] The City says that the expression at issue here — again, what it calls "electoral expression" — is uniquely connected to, and dependent on, the framework of the election itself. Therefore, it says, the scope of s. 2(b) encompasses not only the expression itself but also the structure of the election. Put thusly, however, the claim is not dissimilar to the "unique role" of school trusteeship claimed by the appellants, and rejected by the Court, in *Baier*. Claiming a unique role or dependence on a statutory platform is not the same as claiming a fundamental freedom (*Baier*, at para. 44). Doing so is simply to seek access to that statutory platform. That is what the City seeks here.

[42] In sum, the *Baier* threshold is not met here. The *Act* imposed no limit on freedom of expression.

[43] Having found no limit to s. 2(b), we need not consider s. 1. We note, however, that our colleague Abella J. decides s. 1 against the Province on the basis that it "offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election" (para. 161). This ignores the Province's written and oral submissions that the newly elected government proceeded expeditiously so as to be able to implement these changes within the time constraints of its own elected mandate, rather than wait four years until the next municipal election (R.F., at para. 149; transcript, at pp. 111-12).

(c) *Effective Representation*

[44] The City also says that the impugned provisions of the *Act* infringe "effective representation", an incident of the guarantee contained in s. 3 of the *Charter* which, the City says, can be imported into s. 2(b).

[45] Section 3 guarantees citizens the right to vote and run for office in provincial and federal elections, and includes a right to effective representation. The text of s. 3 makes clear, however, that it guarantees "only the right to vote in elections of representatives of the federal and the provincial legislative assemblies" (*Haig*, at p. 1031 (emphasis added)) and "does not extend to municipal elections" (p. 1031 (emphasis added), citing P. W. Hogg, *Constitutional Law of Canada* (3rd ed. 1992), vol. 2, at p. 42-2). Simply put, ss. 2(b) and 3 record distinct rights which must be given independent meaning (*Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877, at paras. 79-80; *Harper*, at para. 67). Effective representation is not a principle of s. 2(b), nor can the concept be imported wholesale from a different *Charter* right.

[46] In any event, effective representation connotes *voter parity* which, while not exhaustive of the requirements of effective representation, is the overarching concern and the condition of "prime importance" (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 184). What matters is the *relative population* of the wards, *not* their *absolute size*. To hold otherwise implies keeping the population of wards relatively constant by increasing the number of councillors to keep pace with population growth, a notion unknown to Canadian law (in s. 3 or elsewhere) and which would not be without its own difficulties, including potentially unwieldly growth in the size of Toronto City Council (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at pp. 298-99; J. C. Courtney, *Commissioned Ridings: Designing Canada's Electoral Districts* (2001), at pp. 15 and 19).

[47] And *even were* effective representation to apply as a consideration here, we would not find that the principle has been violated due only to the larger population sizes of the wards created by the *Act*. It is not disputed that the 25-ward structure of the *Act* enhanced voter parity, relative to the 47-ward structure preferred by the City (which was not even designed to achieve voter parity until 2026) (A.F., at para. 150; R.F., at paras. 35, 38, 133, 143 and 148). Indeed, the Toronto Ward Boundary Review's reasoning for having rejected the 25-ward structure was criticized on this very basis (R.R. (short), vol. II, at pp. 65, 69, 72-73 and 77-78). While the principle of effective representation encompasses more than simple voter parity, those who rely upon the principle of effective representation here fail to identify any other factors — geography,

community history, community interests and minority representation — that could conceivably justify a departure from parity (see *Reference re Prov. Electoral Boundaries (Sask.)*, at p. 184).

B. *Democracy*

[48] The second issue on appeal is whether the impugned provisions of the *Act* are unconstitutional for violating the unwritten constitutional principle of democracy. Specifically, the City argues that the change in ward structure violated the unwritten principle of democracy by denying voters effective representation and disrupting the election process (A.F., at para. 105). It therefore asks the Court to use the democratic principle as a basis for invalidating otherwise valid provincial legislation. It says this is made possible by drawing from this Court's s. 3 jurisprudence and from the concept of effective representation, and by viewing the principle as limiting provincial competence under s. 92(8). Conversely, and echoing the Court of Appeal on this point, the Attorney General of Ontario says that the unwritten constitutional principle of democracy cannot be used as a device for invalidating legislation, independently of written constitutional provisions and the law governing them. For the reasons that follow, the Attorney General is correct.

(1) Interpretive and Gap-Filling Roles of Unwritten Constitutional Principles

[49] The Constitution of Canada embodies written and unwritten norms. This Court has recognized that our Constitution describes an architecture of the institutions of state and of their relationship to citizens that connotes certain underlying principles (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 93; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at paras. 50-51). These principles, such as democracy and the rule of law, "infuse our Constitution" (*Secession Reference*, at para. 50). Although not recorded outside of "oblique reference[s]" in the preamble to the *Constitution Act, 1867* and to the *Constitution Act, 1982* (para. 51), these principles are "foundational" (para. 49), without which "it would be impossible to conceive of our constitutional structure" (para. 51). These principles have "full legal force" and may give rise to substantive legal obligations (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753, at p. 845). "[L]ike all principles of political morality, [they] can guide and constrain the decision-making of the executive and legislative branches" (C.A. reasons, at para. 84, citing *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473, at para. 52).

[50] Unwritten principles are therefore part of *the law* of our Constitution, in the sense that they form part of the context and backdrop to the Constitution's written terms. Our colleague Abella J. seizes upon a statement from a dissenting opinion in *Reference re Resolution to Amend the Constitution* to support the proposition that "full legal force" necessarily includes the power to invalidate legislation. But the complete passage in *Reference re Resolution to Amend the Constitution*, and the jurisprudence cited therein, demonstrates that Martland and Ritchie JJ. are discussing *federalism* —— and, while specific aspects of federalism may be unwritten and judicially developed, it is indisputable that federalism has a strong textual basis. Nor does our colleague's reliance upon *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725 (at para. 176), support the capacity of unwritten constitutional principles to invalidate legislation, since the finding there was that granting exclusive jurisdiction to the youth court would infringe ss. 96 to 101 and 129 of the *Constitution Act, 1867*. Regardless, any uncertainty on the question of whether unwritten constitutional principles may invalidate legislation that may have remained after the *Reference re Resolution to Amend the Constitution* and the *Secession Reference* was, as we will explain, fully put to rest in *Imperial Tobacco*.

[51] Further, the authorities she cites as "recogniz[ing] that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government" (para. 166) do not support the proposition that unwritten constitutional principles can be applied to invalidate legislation. Indeed, it is quite the contrary — for example, in *R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373, at para. 41, the Supreme Court of the United Kingdom stated that the constitutional principle of parliamentary sovereignty means that *legislation itself* ("laws enacted by the Crown in Parliament"), under the Constitution of the United Kingdom, remains "the supreme form of law". While courts in the United Kingdom may find primary legislation to be inconsistent with the *European Convention on Human Rights*, 213 U.N.T.S. 221, they may only issue a declaration of incompatibility (*Human Rights Act 1998* (U.K.), 1998, c. 42, s. 4); they have not used unwritten constitutional principles to invalidate legislation.

[52] Our colleague is concerned about the "rare case" where "legislation [that] elides the reach of any express constitutional provision . . . is fundamentally at odds with our Constitution's 'internal architecture' or 'basic constitutional structure'" and recourse must be had to unwritten constitutional principles (para. 170, quoting *Secession Reference*, at para. 50, and *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57). But it is inconceivable that legislation which is repugnant to our "basic constitutional structure" would not infringe the Constitution itself. And that structure, recorded in the Constitution's text (as we discuss below), is interpreted with the aid of unwritten constitutional principles. This is clear from the context of Martland and Ritchie JJ.'s statement that unwritten principles have "full legal force in the sense of being employed to strike down legislative enactments" (*Reference re Resolution to Amend the Constitution*, at p. 845). As noted above, that case was about federalism, as was the jurisprudence cited in support of their statement; Martland and Ritchie JJ. were describing the "constitutional requirements that are derived from the federal character of Canada's Constitution" (pp. 844-45 (emphasis added)). And this is precisely the point —— while the specific aspects of federalism at issue there may not have been found in the express terms of the Constitution, *federalism is*.

[53] To explain, federalism is fully enshrined *in the structure* of our Constitution, because it is enshrined *in the text* that is constitutive thereof —— particularly, but not exclusively, in ss. 91 and 92 of the *Constitution Act, 1867*. Structures are not comprised of unattached externalities; they are embodiments of their constituent, conjoined parts. The structure of our Constitution is identified by way of its actual provisions, recorded in its text. This is why our colleague can offer no example of legislation that would undermine the structure of the Constitution that cannot be addressed as we propose, which is via purposive textual interpretation. It is also why, once "constitutional structure" is properly understood, it becomes clear that, when our colleague invokes "constitutional structure", she is in substance inviting judicial invalidation of legislation in a manner that is wholly untethered from that structure.

[54] Ultimately, what "full legal force" means is dependent on the particular context. Any legal instrument or device, such as a contract or a will or a rule, has "full legal force" within its proper ambit. Our colleague's position — that because unwritten constitutional principles have "full legal force", they must necessarily be capable of invalidating legislation — assumes the answer to the preliminary but essential question: what *is* the "full legal force" of *unwritten constitutional principles*? And in our view, *because* they are unwritten, their "full legal force" is realized *not* in *supplementing* the written text of our Constitution as "provisions of the Constitution" with which no law may be inconsistent and remain of "force or effect" under s. 52(1) of the *Constitution Act, 1982*. Unwritten constitutional principles are not "provisions of the Constitution". Their legal force lies in their representation of general principles within which our constitutional order operates and, therefore, by which the Constitution's written terms — its *provisions* — are to be given effect. In practical terms, this means that unwritten constitutional principles may assist courts in only two distinct but related ways.

[55] First, they may be used in the interpretation of constitutional provisions. Indeed, that is the "full legal force" that this Court described in *Secession Reference* (para. 54). In this way, the unwritten constitutional principles of judicial independence and the rule of law have aided in the interpretation of ss. 96 to 100 of the *Constitution Act, 1867*, which have come to safeguard the core jurisdiction of the courts which fall within the scope of those provisions (*Provincial Court Judges Reference*, at paras. 88-89; *MacMillan Bloedel*, at paras. 10-11 and 27-28; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59, [2014] 3 S.C.R. 31, at paras. 29-33). When applied to *Charter* rights, unwritten principles assist with purposive interpretation, informing "the character and the larger objects of the *Charter* itself, . . . the language chosen to articulate the specific right or freedom, [and] the historical origins of the concepts enshrined" (*Quebec (Attorney General)*, at para. 7, quoting *Big M Drug Mart Ltd.*, at p. 344; see also *R. v. Poulin*, 2019 SCC 47, at para. 32).

[56] Secondly, and relatedly, unwritten principles can be used to develop structural doctrines unstated in the written Constitution *per se*, but necessary to the coherence of, and flowing by implication from, its architecture. In this way, structural doctrines can fill gaps and address important questions on which the text of the Constitution is silent, such as the doctrine of full faith and credit (*Morguard Investments Ltd. v. De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 S.C.R. 1077; *Hunt v. T&N plc*, 1993 CanLII 43 (SCC), [1993] 4 S.C.R. 289); the doctrine of paramountcy (*Huson v. The Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145); the remedy of suspended declarations of invalidity (*Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721); and the obligations to negotiate that would follow a declaration of secession by a province (*Secession Reference*).

[57] Neither of these functions support the proposition advanced by the City that the force of unwritten principles extends to invalidating legislation. Indeed, the truth of the matter is to the contrary. Attempts to apply unwritten constitutional principles in such a manner as an independent basis to invalidate legislation, whether alone or in combination, suffer from a normative and a practical deficiency, each related to the other, and each fatal on its own.

[58] First, such attempts trespass into legislative authority to amend the Constitution, thereby raising fundamental concerns about the legitimacy of judicial review and distorting the separation of powers (*Imperial Tobacco*, at paras. 53-54, 60 and 64-67; J. Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2002), 27 *Queen's L.J.* 389, at pp. 427-32). Our colleague's approach, which invites the use of unwritten constitutional principles in a manner that is wholly untethered from the text, ignores this fundamental concern.

[59] Secondly, unwritten constitutional principles are "highly abstract" and "[u]nlike the rights enumerated in the *Charter* — rights whose textual formulations were debated, refined and ultimately resolved by the committees and legislative assemblies entrusted with constitution-making authority — the concep[t] of democracy . . . ha[s] no canonical formulatio[n]" (C.A. reasons, at para. 85). Unlike the written text of the Constitution, then, which "promotes legal certainty and predictability" in the exercise of judicial review (*Secession Reference*, at para. 53), the nebulous nature of the unwritten principles makes them susceptible to be interpreted so as to "render many of our written constitutional rights redundant and, in doing so, undermine the delimitation of those rights chosen by our constitutional framers" (*Imperial Tobacco*, at para. 65). Accordingly, there is good reason to insist that "protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box" (para. 66). In our view, this statement should be understood as covering all possible bases for claims of right (i.e., "unjust or unfair" *or otherwise normatively deficient*).

[60] We add this. Were a court to rely on unwritten constitutional principles, in whole or in part, to invalidate legislation, the consequences of this judicial error would be of particular significance given two provisions of our *Charter*. First, s. 33 preserves a limited right of legislative override. Where, therefore, a court invalidates legislation using s. 2(b) of the *Charter*, the legislature may give continued effect to *its* understanding of what the Constitution requires by invoking s. 33 and by meeting its stated conditions (D. Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in G. Sigalet, G. Webber and R. Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (2019), 209, at p. 232). Were, however, a court to rely *not* on s. 2(b) but *instead* upon an unwritten constitutional principle to invalidate legislation, this undeniable aspect of the constitutional bargain would effectively be undone, since s. 33 applies to permit legislation to operate "notwithstanding a provision included in section 2 or sections 7 to 15" *only*. Secondly, s. 1 provides a basis for the state to justify limits on "the rights and freedoms set out" in the *Charter*. Unwritten constitutional principles, being *unwritten*, are not "set out" in the *Charter*. To find, therefore, that they can ground a constitutional violation would afford the state no corresponding justificatory mechanism.

[61] Our colleague says that the application of s. 33 "is not directly before us" (para. 182). As the City has advanced its claim on the basis of s. 2(b), coupled with the unwritten principle of democracy, the prospect of circumventing s. 33's application to the invalidation of legislation under s. 2(b) by recourse to unwritten constitutional principles is indeed squarely before us.

[62] We note an important caveat to the foregoing. The unwritten constitutional principle of the honour of the Crown is *sui generis*. As correctly noted in submissions of the interveners the Métis Nation of Ontario and the Métis Nation of Alberta, the honour of the Crown arises from the assertion of Crown sovereignty over pre-existing Aboriginal societies (*Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511, at para. 32), and from the unique relationship between the Crown and Indigenous peoples (*Guerin v. The Queen*, 1984 CanLII 25 (SCC), [1984] 2 S.C.R. 335, at

p. 385). We need not decide here whether the principle is capable of grounding the constitutional invalidation of legislation, but if it is, it is unique in this regard.

[63] In sum, and contrary to the submissions of the City, unwritten constitutional principles cannot serve as bases for invalidating legislation. A careful review of the Court's jurisprudence supports this conclusion.

(a) *The Provincial Court Judges Reference*

[64] In the *Provincial Court Judges Reference*, this Court considered whether judicial independence, "an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*" (para. 109), restricted the extent to which a provincial government could reduce the salaries of provincial court judges. That principle, the Court held, emerged from the reading together of s. 11(d) of the *Charter*, and the preamble and ss. 96 to 100 of the *Constitution Act, 1867* (para. 124). For the majority, Lamer C.J. was explicit in emphasizing the merely *interpretive* role of the unwritten constitutional principle of judicial independence in supplementing the text of ss. 96 and 100:

> The point which emerges from this brief discussion is that the interpretation of ss. 96 and 100 has come a long way from what those provisions actually say. This jurisprudential evolution undermines the force of the argument that the written text of the Constitution is comprehensive and definitive in its protection of judicial independence. The only way to explain the interpretation of ss. 96 and 100, in fact, is by reference to a deeper set of unwritten understandings which are not found on the face of the document itself. [First and second emphasis added; third emphasis in original; para. 89.]

[65] In other words, where the constitutional text is not itself sufficiently definitive or comprehensive to furnish the answer to a constitutional question, a court may use unwritten constitutional principles as interpretive aids. This is an approach that resorts to unwritten constitutional principles where necessary in order to give meaning and effect to constitutional text. It is thus not dissimilar to this Court's approach to purposive constitutional interpretation, which begins with and is grounded in the text (*Quebec (Attorney General)*, at paras. 8-10); unwritten constitutional principles inform the purpose of the provisions of the text, thus guiding the purposive definition (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 84). To be clear, this must be a textually faithful exercise; the text remains of primordial significance to identifying the purpose of a right, being "the first indicator of purpose" (*Quebec (Attorney General)*, at para. 11), and the application of constitutional principles to the interpretive exercise may not allow a court to overshoot that purpose (paras. 4 and 10-11). More particularly, and as the Court affirmed in *Quebec (Attorney General)*, the Constitution "is not 'an empty vessel to be filled with whatever meaning we might wish from time to time'" (para. 9, quoting *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 394). Rather, constitutional interpretation "must first and foremost have reference to, and be constrained by, [its] text" (para. 9).

[66] Our colleague resists this, notwithstanding the clear direction in *Quebec (Attorney General)* regarding the centrality to the interpretational exercise of constitutional text. Indeed, her approach is completely the opposite: far from being the primary element of the Constitution whose interpretation can be informed by unwritten constitutional principles, the text *itself* "emanates" from those principles, and thus it is *the principles* which are paramount (para. 168). This is entirely inconsistent with the *Provincial Court Judges Reference*, upon which she relies. Lamer C.J. applied the unwritten constitutional principle of judicial independence to guide his interpretation of the scope of provincial authority under s. 92(14) of the *Constitution Act, 1867* and to fill a gap where provincial courts dealing with non-criminal matters were concerned (paras. 107-8). None of this supports applying unwritten constitutional principles as bases for invalidating legislation.

(b) *The Secession Reference*

[67] In *Secession Reference*, this Court said:

> Underlying constitutional principles may in certain circumstances give rise to substantive legal obligations (have "full legal force", as we described it in [*Reference re Resolution to Amend the Constitution*], *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. [para. 54]

A faithful reading of this passage must acknowledge the force ascribed to unwritten constitutional principles. Of significance, however, is that such force was conditioned by the nature of the questions posed in the reference — the conditions for secession of a province from Confederation — which the Court was called upon to answer. The case combined "legal and constitutional questions of the utmost subtlety and complexity with political questions of great sensitivity" (para. 1, quoting *Reference re Manitoba Language Rights*, at p. 728) to which the Court proposed an answer (being an obligation to negotiate in some circumstances) which, while constituting a "legal framework" in the form of a set of rules to legitimize secession, was enforceable only *politically* as "it would be for the democratically elected leadership of the various participants to resolve their differences" (para. 101 (emphasis added); see also Elliot, at p. 97).

[68] Of course, the Court made clear that it had identified "binding obligations under the Constitution of Canada" (para. 153), and that a breach of those obligations would occasion "serious legal repercussions" (para. 102). But the Court also acknowledged the "non-justiciability of [the] political issues" involved (para. 102), which meant that the Court could have "no supervisory role" over the political negotiations (para. 100). Recognizing that the "reconciliation of the various legitimate constitutional interests is necessarily committed to the political rather than the judicial realm" (para. 153), the Court fashioned rules in the event of whose breach the "appropriate recourse" would lie in "the workings of the political process rather than the courts" (para. 102). This is another instance of the separation of powers: courts do not supervise the legislature or the executive as to political process.

[69] Nothing, therefore, in the *Secession Reference* supports the proposition that unwritten constitutional principles can serve as an independent basis to invalidate legislation. While the obligations for the respective parties in that case had legal force by way of a judicial declaration, how that declaration would be given effect — that is, *enforced* — was deemed a question of political process, not legal process. Here again, as in the case of constitutional interpretation, the structural gap-filling role of unwritten constitutional principles was not and, we say, could not, be applied to *invalidate* legislation in the sense of declaring it under s. 52 to be of no force or effect.

(c) *Babcock and Imperial Tobacco*

[70] At issue in *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3, was the constitutionality of a provision of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, that allowed for an exception to disclosure, in litigation, based on Cabinet confidence. The respondents argued that the provision was *ultra vires* Parliament due to its inconsistency with the unwritten constitutional principles of the rule of law, judicial independence, and the separation of powers (by allowing the executive to prevent disclosure of evidence of its own unconstitutional conduct). McLachlin C.J., writing for the majority, held that "[a]lthough the unwritten constitutional principles are capable of limiting government actions, . . . they do not do so in this case" (para. 54 (emphasis added)). She reached this conclusion on the basis that "unwritten principles must be balanced against the principle of Parliamentary sovereignty" (para. 55), concluding:

> It is well within the power of the legislature to enact laws, even laws which some would consider draconian, as long as it does not fundamentally alter or interfere with the relationship between the courts and the other branches of government. [para. 57]

[71] McLachlin C.J.'s statement that unwritten constitutional principles are "capable of limiting government actions" was later explained by this Court in *Imperial Tobacco*. There, legislation authorizing action by the Province of British Columbia against tobacco manufacturers was challenged on the basis that it was inconsistent with, *inter alia*, the unwritten constitutional principle of the rule of law. For the Court, Major J. unequivocally rejected the appellants' proposed use of the rule of law to invalidate legislation for two reasons, only one of which is of relevance here:

> . . . the appellants' arguments overlook the fact that several constitutional principles other than the rule of law that have been recognized by this Court — most notably democracy and constitutionalism — very strongly favour upholding the validity of legislation that conforms to the express terms of the Constitution (and to the requirements, such as judicial independence, that flow by necessary implication from those terms). Put differently, the appellants' arguments fail to recognize that in a constitutional democracy such as ours, protection from legislation that some might view as unjust or unfair properly lies not in the amorphous underlying principles of our Constitution, but in its text and the ballot box. [Emphasis added; para. 66.]

[72] In other words, unwritten constitutional principles are indeterminate, such that they could be in theory deployed *not only* in service of *invalidating* legislation, but of *upholding* it. Major J. continued: the recognition of an unwritten constitutional principle such as the rule of law "is not an invitation to trivialize or supplant the Constitution's written terms", nor "is it a tool by which to avoid legislative initiatives of which one is not in favour. On the contrary, it requires that courts give effect to the Constitution's text, and apply, by whatever its terms, legislation that conforms to that text" (para. 67). From this, it follows that the statement in *Babcock* that unwritten constitutional principles are "capable of limiting government actions" is to be understood in a narrow and particular sense: legislative measures are restrained by the unwritten principle of the rule of law, "but only in the sense that they must comply with legislated requirements as to manner and form (i.e., the procedures by which legislation is to be enacted, amended and repealed)" (*Imperial Tobacco*, at para. 60). Again, this understanding of unwritten constitutional principles precludes entirely their application to invalidate legislation under s. 52.

[73] This, we would add, is a complete answer to our colleague Abella J.'s assertions that this Court has "never, to date, limited" the role of unwritten constitutional principles, and that their interpretive role is not "narrowly constrained by textualism" (paras. 171 and 179). Our colleague reads *Imperial Tobacco* as narrowing the use of one specific unwritten constitutional principle —— the rule of law —— and not unwritten constitutional principles generally. But the problem of indeterminacy would inevitably arise with the use of *any* unwritten constitutional principle to invalidate legislation. *Imperial Tobacco* thus unequivocally affirmed both a narrow interpretive role for unwritten principles, and the primacy of the text in constitutional adjudication.

(d) *Trial Lawyers Association of British Columbia*

[74] In *Trial Lawyers Association of British Columbia*, this Court was called upon to decide the constitutionality of court hearing fees imposed by British Columbia that denied some people access to the courts. For the majority, McLachlin C.J. held that those fees, enacted pursuant to s. 92(14) of the *Constitution Act, 1867*, violated s. 96 of the *Constitution Act, 1867* as they impermissibly infringed on the jurisdiction of superior courts by denying some people access to the courts (paras. 1-2). In *obiter*, she added that the connection between s. 96 and access to justice was "further supported by considerations relating to the rule of law" (para. 38), as "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (para. 38, quoting *B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 230). This was, she said, "consistent with the approach adopted by Major J. in *Imperial Tobacco*" (para. 37):

> The legislation here at issue — the imposition of hearing fees — must conform not only to the express terms of the Constitution, but to the "requirements . . . that flow by necessary implication from those terms" (para. 66). The right of Canadians to access the superior courts flows by necessary implication from the express terms of s. 96 of the *Constitution Act, 1867* as we have seen. It follows that the province does not have the power under s. 92(14) to enact legislation that prevents people from accessing the courts. [Emphasis added; para. 37.]

[75] In our view, McLachlin C.J.'s invocation of Major J.'s "necessary implication" threshold from *Imperial Tobacco* signifies that, where unwritten constitutional principles are used as interpretive aids, their substantive legal force must arise by necessary implication from the Constitution's text. We therefore see nothing in this that is inconsistent with the *Provincial Court Judges Reference* and, in particular, with the limited scope of application of unwritten constitutional principles. The rule of law was used in *Trial Lawyers Association of British Columbia* as an interpretive aid to s. 96, which in turn was used to narrow provincial legislative authority under s. 92(14). The rule of law was not being used as an independent basis for invalidating the impugned court fees. In this way, McLachlin C.J.'s reasoning simply reflects a purposive interpretation of s. 96 informed by unwritten constitutional principles.

(2) Relevance of the Democratic Principle to Municipal Elections

[76] Democracy is, in light of the foregoing, a principle by which our Constitution is to be understood and interpreted. Though not explicitly identified in the text, the basic structure of our Constitution — including its establishment of the House of Commons and of provincial legislatures — connotes certain freely elected, representative, and democratic political institutions (*Secession Reference*, at para. 62).

[77] The democratic principle has both individual and institutional dimensions (para. 61). It embraces not only the process of representative and responsible government and the right of citizens to participate in that process at the provincial and federal levels, but also substantive goals including the promotion of self-government (paras. 64-65). So understood, the democratic principle sits alongside and indeed overlaps with other unwritten constitutional principles that this Court has recognized, including federalism and the rule of law (paras. 66-67).

[78] In this case, the democratic principle is relevant as a guide to the interpretation of the constitutional text. It supports an understanding of free expression as including political expression made in furtherance of a political campaign (*Reference re Prov. Electoral Boundaries (Sask.)*; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100; *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285; *OPSEU*). But it cannot be used in a manner that goes beyond this interpretive role. In particular, it cannot be used as an independent basis to invalidate legislation.

(a) *Section 92(8) of the Constitution Act, 1867*

[79] The structure of neither the *Constitution Act, 1867* nor the *Constitution Act, 1982* requires by necessary implication the circumscription of provincial lawmaking authority under s. 92(8) in the manner proposed. Subject to the *Charter*, the province has "absolute and unfettered legal power" to legislate with respect to municipalities (*Ontario English Catholic Teachers' Assn.*, at para. 58). And this Court cannot grant constitutional status to a third order of government "where the words of the Constitution read in context do not do so" (*Baier*, at para. 39).

[80] Indeed, the City's submissions neglect the fact, recognized in the passage from *Imperial Tobacco*, at para. 66, cited above, that unwritten constitutional principles other than the rule of law that have been recognized by this Court, including democracy and constitutionalism, strongly favour *upholding* the validity of legislation that conforms to the text of the Constitution. It follows that the unwritten constitutional principle of democracy cannot be used to narrow legislative competence under s. 92(8); as this Court has recognized, the provinces have plenary jurisdiction under this head of power, unrestricted by any constitutional principle (*Public School Boards' Assn. of Alberta*).

(b) *Section 3 of the Charter*

[81] Nor can the democratic principle be used to make s. 3 of the *Charter* — including its requirement of effective representation — relevant to the current case. There is no open question of constitutional interpretation here. Section 3 democratic rights were not extended to candidates or electors to municipal councils. This is not a gap to be addressed judicially. The absence of municipalities in the constitutional text is, on the contrary, a deliberate omission (*Imperial Tobacco*, at para. 65). As the intervener the Federation of Canadian Municipalities argues, municipalities (or at least chartered towns) predate the *Magna Carta* (1215). Their existence and importance would have been known to the framers in 1867. The constitutional status of municipalities, and whether they ought to enjoy greater independence from the provinces, was a topic of debate during patriation (*House of Commons Debates*, vol. X, 1st Sess., 32nd Parl., June 15, 1981, at p. 10585). In the end, municipalities were not constitutionalized, either in amendments to the *Constitution Act, 1867* or by reference in the democratic rights enshrined in the *Charter*.

[82] Unlike in the *Provincial Court Judges Reference*, therefore, there is no textual basis for an underlying constitutional principle that would confer constitutional status on municipalities, or municipal elections. The entitlement to vote in elections to bodies not mentioned in s. 3 is therefore a matter for Parliament and provincial legislatures (*Haig*, at p. 1033; *Baier*, at para. 39). Again, and like the school boards at issue in *Baier*, municipalities are mere creatures of statute who exercise whatever powers, through officers appointed by whatever process, that provincial legislatures consider fit. Were the unwritten democratic principle applied to require *all* elections to conform to the requirements of s. 3 (including municipal elections, and not just elections to the House of Commons or provincial legislatures), the text of s. 3 would be rendered substantially irrelevant and redundant (*Imperial Tobacco*, at para. 65). To repeat: the withholding of constitutional status for municipalities, and their absence from the text of s. 3, was the product of a deliberate omission, not a gap. The City's submissions ignore that application of the democratic principle is properly applied to *interpreting* constitutional text, and not *amending* it or *subverting* its limits by ignoring "the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation" (*Quebec (Attorney General)*, at para. 4). It is not for the Court to do by "interpretation" what the framers of our Constitution chose not to do by enshrinement, or their successors by amendment.

(3) Conclusion on the Democratic Principle

[83] Even had the City established that the *Act* was inconsistent with the principle of democracy, it follows from the foregoing discussion that a court could not rely on that inconsistency to find the *Act* unconstitutional. The *Act* was enacted pursuant to a valid legislative process and the Province had no obligation to consult with the City before it introduced the legislation, or to introduce the legislation at a particular time. (As the application judge correctly noted, the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, does not impose an immutable obligation to consult since the Province could enact the *Act* and overrule its previous enactment. Moreover, the related *Toronto-Ontario Cooperation and Consultation Agreement* did not bind the Province in law.)

[84] In short, and despite their value as interpretive aids, unwritten constitutional principles cannot be used as bases for invalidating legislation, nor can they be applied to support recognizing a right to democratic municipal elections by narrowing the grant to provinces of law-making power over municipal institutions in s. 92(8) of the *Constitution Act, 1867*. Nor can they be applied to judicially amend the text of s. 3 of the *Charter* to require municipal elections or particular forms thereof. The text of our Constitution makes clear that municipal institutions lack constitutional status, leaving no open question of constitutional interpretation to be addressed and, accordingly, no role to be played by the unwritten principles.

V. Conclusion

[85] We would dismiss the appeal.

The reasons of Abella, Karakatsanis, Martin and Kasirer JJ. were delivered by

ABELLA J. —

[86] Elections are to democracy what breathing is to life, and fair elections are what breathe life into healthy democracies. They give the public a voice into the laws and policies they are governed by, and a chance to choose who will make those laws and policies. It is a process of reciprocal political discourse.

[87] The rules of an election, including the electoral boundaries and the timelines for campaigns, structure the process of reciprocal dialogue between candidates and voters in their electoral districts. The final act of voting, itself a form of political expression, is the culmination of the process of deliberative engagement throughout an election period. The stability of the electoral process is therefore crucial not only to political legitimacy, but also to the rights of candidates and voters to meaningfully engage in the political discourse necessary for voters to cast an informed vote, and for those elected to govern in response to the expressed views of the electorate.

[88] The 2018 Toronto municipal election had been underway for three and a half months when the Province of Ontario enacted legislation that radically redrew the City of Toronto's electoral ward boundaries by reducing the number of wards from 47 to 25. Nominations had closed, campaigns were in full swing, and voters had been notified of who wanted to represent them and why.

[89] The issue in this appeal is not whether the Province had the legal authority to change the municipal wards. It is whether the Province could do so in the middle of an ongoing municipal election, thereby destabilizing the foundations of the electoral process and interfering with the ability of candidates and voters to engage in meaningful political discourse during the period leading up to voting day.

[90] Completely revamping the electoral process in the middle of an election was unprecedented in Canadian history. The question is whether it was also unconstitutional. In my respectful view, it was.

Background

[91] In June 2013, City Council approved a Toronto Ward Boundary Review under its authority to establish, change or dissolve wards (*City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 128(1)). The mandate of the Boundary Review was "to bring a recommendation to Toronto City Council on a ward boundary configuration that respects the principle of 'effective representation'" (Canadian Urban Institute, *Draw the Line: Toronto Ward Boundary Review Project Work Plan, Civic Engagement & Public Consultation Strategy*, April 28, 2014 (online), at p. 1). At the time, there were 44 wards in the City of Toronto.

[92] Over the next nearly four years, the Boundary Review conducted research, held public hearings, and consulted extensively. External consultants were hired who developed recommendations, organized extensive stakeholder consultations, held meetings with City Council and the Mayor's staff, and individually interviewed members of the 2010-2014 City Council and new 2014-2018 members. Altogether, they held over 100 face-to-face meetings with City Council, school boards and other stakeholders, as well as 24 public meetings and information sessions.

[93] The four year process resulted in seven reports. A draft of each report was reviewed by an outside five-person Advisory Panel. The Boundary Review's *Options Report*, in August 2015, analyzed eight options for drawing new ward boundaries, concluding that five options met the requirement of effective representation. Of particular significance to this appeal, one of the rejected options was redesigning the wards to mirror the 25 federal electoral districts.

[94] The Boundary Review's *Final Report*, in May 2016, recommended *increasing* the number of wards from 44 to 47.

[95] At the direction of the Executive Committee of City Council, two further reports were prepared by the Boundary Review in 2016, one in August and one in October. Among other options, the 25 federal electoral district proposal was again examined. Those reports again recommended the 47-ward structure, concluding that applying the boundaries of the 25 federal electoral districts would not achieve effective representation or resolve significant population imbalances, in part, since they were based on the 2011 census and were expected to be redrawn after the 2021 census. The Boundary Review, on the other hand, was based on population estimates for 2026 "to ensure that any new ward structure will last for several elections and constant ward boundary reviews are not required" (*Additional Information Report*, August 2016 (online), at p. 10).

[96] City Council adopted the 47-ward structure in November 2016, which was enacted through By-laws Nos. 267-2017 and 464-2017 in March and April 2017. The goal was to create a stable electoral framework for multiple elections. The By-laws were intended to govern the City of Toronto's municipal elections from 2018 to 2026, and, possibly, 2030.

[97] The 47-ward structure was appealed to the Ontario Municipal Board by various individuals, including those seeking to have the city divided into wards that mirrored the 25 federal electoral districts. After seven days of hearings, a majority of the Board rejected the appeals and approved the By-laws on December 15, 2017 (*Di Ciano v. Toronto (City)*, 2017 CanLII 85757). In its decision, the Board explained why it found the By-laws to be reasonable:

> The Board finds that the work undertaken by the [Boundary Review] culminating in the By-laws setting out a 47-ward structure was comprehensive. The ward structure delineated in the By-laws provides for effective representation and corrects the current population imbalance amongst the existing 44 wards. The decision made by Council to adopt the By-laws was defensible, fair and reasonable. The decision by Council to implement a 47-ward structure does not diverge from the principles of voter equity and effective representation. In this regard, there is nothing unreasonable in the decision of Council. [para. 51]

[98] An application was made to the Divisional Court for leave to appeal the Board's decision by two individuals who had unsuccessfully argued before the Board that the 25 federal electoral districts should be implemented. On March 6, 2018, the motion was dismissed (*Natale v. City of Toronto*, 2018 ONSC 1475, 1 O.M.T.R. 349). Swinton J. concluded that the Board applied the correct governing principle, namely, "effective representation":

> Setting electoral boundaries is an exercise that requires a weighing of many policy considerations. The Board heard from a number of expert witnesses over the course of a seven day hearing. It considered relative voter parity as well as other factors. It concluded that communities of interest are best respected in a 47 ward structure. It also noted that a 25 ward structure could increase voter population in the wards "resulting in a significant impact on the capacity to represent". [Citations omitted; para. 10.]

[99] On May 1, 2018, nominations opened for candidates seeking election in Toronto's 47 wards.

[100] On June 7, 2018, a new provincial government was elected. On the day that nominations for City Council closed, July 27, 2018, the Premier, Doug Ford, announced that the government intended to introduce legislation that would reduce the size of Toronto's City Council from 47 to 25 councillors.

[101] The Boundary Review had researched the issue of effective representation for nearly 4 years, concluding that the 25 federal electoral districts would not achieve effective representation and would have an insignificant difference in terms of voter parity. Ontario did not conduct any redistricting studies or send the proposed legislation to Committee for consultation before it was enacted.

[102] The legislation was introduced for the first reading in the Legislative Assembly on July 30, 2018 and came into force on August 14, 2018, 69 days before the scheduled election date. The election had been underway for three and a half months. By then, thousands of candidates had signed up and 509 were certified and actively campaigning in Toronto's 47 wards.

[103] The nomination period was extended to September 14, 2018, but the election date remained the same — October 22, 2018. That gave candidates, all of whom would have to seek new nominations or notify the City Clerk of their intention to continue in the race by filing a change of ward notification form, just over one month to campaign in the new wards. Until nominations closed again on September 14, 2018, candidates and voters were in legal limbo awaiting the passage of regulations for the new electoral regime and the adjudication of a constitutional challenge to the mid-election changes that gave rise to this appeal. It was only after nominations closed that voters and candidates had a full picture of which candidates were running and in what wards.

[104] The new one-month campaign period was also characterized by the disruptive impact of abruptly changing the number, size and boundaries of the wards. Candidates who had been canvassing, responding to local issues, incurring expenses and developing community relationships were now faced with deciding whether and where to run. The old wards were eradicated, many of the new ones were almost twice as large, the populations were different, and there was only one month left to change wards, meet the new constituencies, learn what their concerns were, and engage with them on those issues.

[105] In the absence of any notice or additional time to fundraise, many previously certified candidates could no longer afford to run in these new and larger wards. Certified candidates had until September 14, 2018 to file a change of ward notification form or else their nominations would be deemed to be withdrawn (*Better Local Government Act, 2018*, S.O. 2018, c. 11 ("*Act*"), Sch. 3, s. 1; *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sch., s. 10.1(8)). When the present constitutional challenge was decided only days before that deadline, only 293 of the 509 previously certified candidates had taken the necessary steps to continue in the race. In the end, more than half of the previously certified candidates dropped out of the race before voting day.

[106] The City of Toronto and a number of candidates and electors applied to the Ontario Superior Court of Justice for an order declaring the legislation reducing the number of wards from 47 to 25 of no force or effect, pursuant to s. 52(1) of the *Constitution Act, 1982*.

[107] On September 10, 2018, Belobaba J. held that the *Act* was unconstitutional, infringing the rights of both candidates and voters under s. 2(b) of the *Canadian Charter of Rights and Freedoms* (2018 ONSC 5151, 142 O.R. (3d) 336). He held that the legislation violated the expressive rights of candidates by radically redrawing ward boundaries mid-election, and that it breached the rights of voters to cast a vote that could result in effective representation by doubling the population sizes of the wards.

[108] On September 19, 2018, the Ontario Court of Appeal ordered an interim stay of Belobaba J.'s order, meaning that the election would take place based on the new 25-ward structure (2018 ONCA 761, 142 O.R. (3d) 481). It took place on October 22, 2018.

[109] On September 19, 2019, the Court of Appeal allowed the appeal from Belobaba J.'s order (2019 ONCA 732, 146 O.R. (3d) 705). Writing for a 3-2 majority, Miller J.A. held that Belobaba J. "impermissibly extended the scope [of] s. 2(b)" to protect the effectiveness of efforts to convey political messages and to include a right to effective representation.

[110] In dissent at the Court of Appeal, MacPherson J.A. held that the timing of the *Act* infringed s. 2(b), concluding that "[b]y extinguishing almost half of the city's existing wards midway through an active election, Ontario blew up the efforts, aspirations and campaign materials of hundreds of aspiring candidates, and the reciprocal engagement of many informed voters".

[111] I agree with MacPherson J.A.

Analysis

[112] Under s. 92(8) of the *Constitution Act, 1867*, the provinces have exclusive jurisdiction over "Municipal Institutions in the Province". The question therefore of whether the Province has the authority to legislate a change in Toronto's ward structure is not the issue in this appeal. The issue is whether this *timing* mid-way through a municipal election was in violation of s. 2(b) of the *Charter*, which states:

> **2** Everyone has the following fundamental freedoms:
>
> . . .
>
> **(b)** freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

[113] The 2018 Toronto municipal election had already been underway for three and a half months when the number, size and boundaries of all the wards were changed.

[114] It is entirely beside the point to observe that elected municipal councils are creatures of statute. Section 2(b) of the *Charter* applies with equal vigour to protect political discourse during a municipal election as a federal or provincial one. When a province chooses to vest certain powers in a democratic municipality, municipal elections invariably become the locus of deliberative engagement on those delegated policy issues. It is incumbent on a provincial legislature to respect the rights of its citizens to engage in meaningful dialogue on municipal issues during an election period and, in particular, the rights of candidates and voters to engage in meaningful exchanges before voting day.

[115] When a democratic election takes place in Canada, including a municipal election, freedom of expression protects the rights of candidates and voters to meaningfully express their views and engage in reciprocal political discourse on the path to voting day. That is at the core of political expression, which in turn is at the core of what is protected by s. 2(b) of the *Charter*. When the state enacts legislation that has the effect of destabilizing the opportunity for meaningful reciprocal discourse, it is enacting legislation that interferes with the Constitution.

[116] Municipal elections have been a part of political life in Canada since before Confederation, and municipalities are a crucial level of government. The 1996 Greater Toronto Area Task Force explained their significance, emphasizing that "services should be delivered by local municipalities to ensure maximum efficiency and responsiveness to local needs and preferences" (*Greater Toronto*, at p. 174; see also D. Siegel, "Ontario", in A. Sancton and R. Young, eds., *Foundations of Governance: Municipal Government in Canada's Provinces* (2009), 20, at p. 22; A. Flynn, "Operative Subsidiarity and Municipal Authority: The Case of Toronto's Ward Boundary Review" (2019), 56 *Osgoode Hall L.J.* 271, at pp. 275-76). As Professor Kristin R. Good explains, municipalities are not "mere 'creatures of the provinces'", they are

> important democratic governments in their own right. The variations in multicultural policy making in Canadian cities are evidence that local choices, policies, and politics matter. Municipalities are important vehicles of the democratic will of local communities as well as important sites of multicultural democratic citizenship.
>
> (*Municipalities and Multiculturalism: The Politics of Immigration in Toronto and Vancouver* (2009), at p. 5)

[117] The democratically accountable character of municipalities is well established in our jurisprudence. In *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, La Forest J. wrote that "municipal councils are democratically elected by members of the general public and are accountable to their constituents in a manner analogous to that in which Parliament and the provincial legislatures are accountable to the electorates" (para. 51). Similarly, in *Catalyst Paper*

Corp. v. North Cowichan (District), 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, McLachlin C.J. recognized that municipal councillors "serve the people who elected them and to whom they are ultimately accountable" (para. 19).

[118] The increasing significance of municipal governance has been accompanied by an increasingly generous interpretation of municipal powers. Writing for a unanimous Court in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19 (CanLII), [2004] 1 S.C.R. 485, Bastarache J. observed that "[t]he evolution of the modern municipality has produced a shift in the proper approach to the interpretation of statutes empowering municipalities" (para. 6). And in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 (CanLII), [2001] 2 S.C.R. 241, L'Heureux-Dubé J. confirmed that "law-making and implementation are often best achieved at a level of government that is . . . closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity" (para. 3; see also *Nanaimo (City) v. Rascal Trucking Ltd.*, 2000 SCC 13 (CanLII), [2000] 1 S.C.R. 342).

[119] These cases built on McLachlin J.'s dissent in *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CanLII 115 (SCC), [1994] 1 S.C.R. 231, which stressed the "fundamental axiom" that

> courts must accord proper respect to the *democratic responsibilities of elected municipal officials and the rights of those who elect them*. This is important to the continued healthy functioning of democracy at the municipal level. If municipalities are to be able to respond to the needs and wishes of their citizens, they must be given broad jurisdiction to make local decisions reflecting local values. [Emphasis added; p. 245.]

[120] The reciprocal relationship between the democratic responsibilities of elected municipal officials and the rights of those who elected them is crucial. It requires what Duff C.J. called "the free public discussion of affairs" so that two sets of duties can be discharged — the duties of elected members "to the electors", and of electors "in the election of their representatives" (*Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, at p. 133; see also *Switzman v. Elbling*, 1957 CanLII 2 (SCC), [1957] S.C.R. 285, at pp. 306 and 326-27; *RWDSU v. Dolphin Delivery Ltd.*, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573, at p. 583).

[121] How then does all this relate to the rights in s. 2(b) of the *Charter*? Because in dealing with municipal elections, we are dealing with the political processes of democratic government and it is undeniable that s. 2(b) protects "the political discourse fundamental to democracy" (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at para. 23; see also *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at p. 765).

[122] In *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, this Court held that one of the three underlying principles of the s. 2(b) right is that "participation in social and political decision-making is to be fostered and encouraged" (p. 976). Professors P. W. Hogg and W. K. Wright have referred to political expression as being "at the core of s. 2(b)", and curtailed under s. 1 "only in service of the most compelling governmental interest" (*Constitutional Law of Canada* (5th ed. Supp.), at p. 43-9).

[123] This brings us to the central issue in this appeal, namely, whether the timing of the legislation, in redrawing and reducing the number of wards from 47 to 25 in the middle of an election, infringed the expressive rights protected by s. 2(b) of the *Charter*.

[124] *Irwin Toy* established a two-part test for adjudicating freedom of expression claims. The first asks whether the activity is within the sphere of conduct protected by freedom of expression. If the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee. The second part asks whether the government action, in purpose or effect, interfered with freedom of expression.

[125] Dealing with the first part, the "activity" at the heart of this appeal is the expression of political views and the reciprocal political discourse among electoral participants during an election period, which engages the rights of both those seeking election and those deciding whom to elect. Political discourse undoubtedly has expressive content, and therefore, *prima facie* falls within the scope of the guarantee. Dickson C.J. in *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, noted that

> *[t]he 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. [Emphasis added; pp. 763-64.]

[126] The second part of the test, namely, whether the state action interfered with the right in purpose or effect, is not, with respect, particularly complicated either. This Court's jurisprudence under s. 2(b) of the *Charter* has usually arisen in circumstances where the *purpose* of the government action was to restrict expression by regulating who can speak, what they can say or how their messages can be heard.[1] The case before us, on the other hand, deals with whether the *effect* of the legislation — redrawing the ward boundaries and cutting the number of wards nearly in half mid-election — was to interfere with these expressive activities.

[127] Freedom of expression does not simply protect the right to speak; it also protects the right to communicate with one another (R. Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 3-4). The words of Marshall J., in dissent, resonate with the reciprocal nature of expression:

> . . . the right to speak and hear — including the right to inform others and to be informed about public issues — are inextricably part of [the First Amendment]. The freedom to speak and the freedom to hear are inseparable; they are two sides of the same coin. But the coin itself is the process of thought and discussion. The activity of speakers becoming listeners and listeners becoming speakers in the vital interchange of thought is the "means indispensable to the discovery and spread of political truth." [Citations omitted.]
>
> (*Kleindienst v. Mandel*, 408 U.S. 753 (1972), at p. 775)

[128] In the electoral context, freedom of expression involves the rights of both candidates and voters to reciprocal deliberative engagement. The right to disseminate and receive information connected with elections has long been recognized as integral to the democratic principles underlying freedom of expression, and as a result, has attracted robust protection (see e.g. *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827; *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General)*, 2017 SCC 6 (CanLII), [2017] 1 S.C.R. 93; see also K. Roach and D. Schneiderman, "Freedom of Expression in Canada" (2013), 61 *S.C.L.R.* (2d) 429; J. Weinrib, "What is the Purpose of Freedom of Expression?" (2009), 67 *U.T. Fac. L. Rev.* 165).

[129] Political expression during an election period is always "taking place within and being constrained by the legal and institutional framework of an election" (Y. Dawood, "The Right to Vote and Freedom of Expression in Political Process Cases Under the Charter" (2021), 100 *S.C.L.R.* (2d) 105, at p. 131). In *Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569, this Court explained that elections and referendums are "procedural structure[s] allowing for public discussion of political issues essential to governing", which serve to ensure "a reasonable opportunity to speak and be heard" and "the right of electors to be adequately informed of all the political positions advanced by the candidates and by the various political parties" (paras. 46-47).

[130] The Intervener, the David Asper Centre for Constitutional Rights, cogently explained how there are different aspects of an election, each of which requires protection:

> Election campaigns provide a special forum for voters and candidates to interact with each other. Citizens engage in the democratic process when they identify issues, test policy positions, bring incumbents to account, and assess new candidates' skills, policies and positions. All exercises of expression, at each and every stage of the electoral process — not only the final act of voting — must receive consistent and robust *Charter* protection. [Footnotes omitted.]
>
> (I.F., at para. 8)

[131] The democratic dialogue that occurs throughout an election period is crucial to the formation of public opinion and the ability to cast an informed vote. The process of deliberative engagement during an election period was aptly described by Professor Saul Zipkin:

> . . . the electoral process is the primary site in which the representative relationship is constructed. Indeed, "[c]ampaigns . . . are a main point —perhaps *the* main point — of contact between officials and the populace over matters of public policy." The period in which the putative representative goes before the voters for their approval is a time of creating that relationship, calling for special attention to the proper functioning of the democratic process at that time. As the representative relationship is historically a matter of constitutional concern, and is shaped by political activity and speech in the electoral setting, we might broaden the narrow focus on ballot-casting in our assessment of the democratic process. [Emphasis in original; footnotes omitted.]
>
> ("The Election Period and Regulation of the Democratic Process" (2010), 18 *Wm. & Mary Bill Rts. J.* 533, at pp. 545-46; see also A. Bhagwat and J. Weinstein, "Freedom of Expression and Democracy", in A. Stone and F. Schauer, eds., *The Oxford Handbook of Freedom of Speech* (2021), 82; N. Urbinati, "Free Speech as the Citizen's Right", in R. C. Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014), 125.)

[132] An election is a process of allowing candidates and voters, as both speakers and listeners, to participate in reciprocal discourse so that their respective views can be fully expressed and heard. It is only through this process of free public discussion and debate that an informed vote can be cast, and ultimately, those elected can be responsive to the views of the electorate.

[133] State interference with individual and collective political expression in the context of an election strikes at the heart of the democratic values that freedom of expression seeks to protect, including "participation in social and political decision-making" (*Irwin Toy*, at p. 976). The *Irwin Toy* test is, as a result and as discussed later in these reasons, the appropriate legal framework for adjudicating the present claim of state interference with political expression during an election period.

[134] A stable election period is crucial to electoral fairness and meaningful political discourse. Redrawing the number, size and boundaries of electoral wards during this period destabilizes the process by "[i]nterrupting an election mid-campaign to change the rules of the game, including the electoral districts upon which candidates have crafted their campaigns and voters will have their preferences channelled" (M. Pal, "The Unwritten Principle of Democracy" (2019), 65 *McGill L.J.* 269, at p. 302).

[135] For three and a half months, candidates and voters engaged in political dialogue within the legal and institutional structure created in advance of the 2018 municipal election after years of research, public engagement and, finally, endorsement from the Ontario Municipal Board.

[136] After the *Act* came into force, candidates and voters found themselves in a suddenly altered electoral landscape. The *Act* eradicated nearly half of the active election campaigns, requiring those candidates to file a change of ward

notification form to continue in the race. The redrawing of ward boundaries meant that candidates needed to reach new voters with new priorities. Campaign materials such as lawn signs or advertisements for abolished wards "no longer play[ed] the function of electoral expression given the change to the underlying institutional context within which that expression [was] taking place" (Dawood, at p. 132). Voters who had received campaign information, learned about candidates' mandates and engaged with them based on the 47-ward structure had their democratic participation put into abeyance.

[137] The impact on some of the candidates and voters provides illuminating metaphors. One candidate, for example, Dyanoosh Youssefi, explained that she had been canvassing, e-mailing and organizing since the beginning of the campaign for 12-15 hours per day and all of her efforts had "focused on the concerns and the needs of the approximately 55,000 residents of Ward 14" (A.R., vol. XV, at p. 80). Ward 14 was abolished by the *Act*.

[138] Another candidate, Chiara Padovani, who had been campaigning in Ward 11, described the effect of combining Ward 11 and Ward 12 into a new Ward 5:

> Even before my registration as a candidate for the 2018 election, I engaged in substantial efforts to engage community members around important local issues in Ward 11 for over a one and a half year period such as flooding, road safety, and tenant rights. As a result, I . . . know where residents feel there should be additional speedbumps, crosswalks, and reduction in speed limits. I do not have this type of knowledge for any other ward, including Ward 12.
>
> . . .
>
> If I had notice of the change in ward boundaries prior to the commencement of the campaign, I would have been able to plan my ground strategy, and I would have attempted to gain a deeper knowledge of the local issues affecting residents in Ward 12 by actively canvassing in that ward. At this point, it will be impossible for me to carry out double the amount of canvassing that I have completed with the limited time remaining.
>
> (A.R., vol. XI, at pp. 15-16)

[139] Ever since the 47-ward structure was enacted in 2017, Chris Moise, a Black and openly gay candidate, had been organizing a campaign in Ward 25. He had decided to run in Ward 25 because it encompassed the Gay Village and Yorkville. These were communities he felt he could meaningfully serve based on his experiences as a School Board Trustee for the area, an LGBTQ activist, a former police officer with an interest in police relations with the Black and LGBTQ communities in the Village, and a resident and property owner in Yorkville. When the legislation abolished Ward 25, he dropped out of the race because he could not pivot his campaign on such short notice to either the new Ward 13, which excluded Yorkville where he lived, or the new Ward 11, which had only a very small geographical overlap with the previous Ward 25 and excluded the Village where he had the most meaningful connections and policy goals.

[140] Another candidate, Jennifer Hollett, explained the effect of the two week "legal limbo" (A.R., vol. XI, at p. 144) before the legislation received Royal Assent:

> Even after [the legislation] passed, my campaign team was uncertain what was going to happen to our campaign funds, and whether those funds could be transferred to a new campaign, or whether those funds could be refunded. It was only when regulations made pursuant to the Minister's powers in [the legislation] were passed that we received any direction. The effect of that uncertainty is that my team did not make any campaign expenditures after July 27.
>
> . . .
>
> The voters I speak with are confused. They understand that the rules have changed, but do not understand why those rules have changed and how. Instead of discussing municipal issues in the campaign, such as transit and safer streets, residents are asking about ward boundary changes and how they affect them. [pp. 145-46]

[141] Megann Wilson, another candidate and participant in the Women Win TO's training program, described the ensuing uncertainty vividly:

> Since . . . the imposition of a 25-ward model, I have struggled to engage with residents on my platform, or key issues and policies in the ward. Many residents are simply tired of the changing wards, and no longer know what ward they live in — and that is what I spend my time talking to residents about when I am canvassing. In my view, the level of confusion in my ward will make it more difficult for voters to make a good decision about what candidate to vote for since electors are not even aware of what ward they now live in let alone who the candidates are, given the sudden changes. Further, as a result of lack of communication to residents about the new ward boundaries, I have found myself having to fill that gap while canvassing residents — a significant distraction from the municipal issues I am trying to engage residents about.
>
> As a result of [the legislation] I am hindered in getting to the root of municipal issues affecting electors while I am canvassing. I am now spending most of my time with voters explaining the changes to the ward boundaries, and discussing the provincial politics that led to these sudden changes. Time with prospective voters is precious for all candidates and [the legislation] has interrupted my ability to engage directly with voters about my platform and my ideas for the ward and its residents.
>
> (A.R., vol. X, at p. 132)

[142] Since the *Act* did not reset campaign finance limits, new candidates entered the race with untapped campaign spending limits, while candidates who had already been campaigning lost what they had invested in now-defunct districts and continued in the race on a reduced budget. Some previously certified candidates stopped producing campaign materials entirely

due to the uncertainty surrounding the transfer of campaign funds and expenditures to a new campaign. Others could not afford to compete in the new and larger wards. As one campaign volunteer described:

> We do not know whether a donor who donated the maximum amount to a Ward 23 candidacy can now make a fresh donation to a Ward 13 candidacy. This is important because funds were spent on materials for the Ward 23 candidacy that are no longer useable. . . . It will likely not be possible to undertake sufficient fundraising to replace all of the items that are no longer usable, particularly given the limited amount of time in the campaign. Prior donors will likely not be able or willing to donate again, and it is unlikely we will be able to find enough new donors to produce sufficient new materials for a fresh campaign for a much larger ward area, particularly compared to more well-resourced incumbents.
>
> (A.R., vol. IX, at p. 125)

[143] Voters, too, were affected. One voter, Ish Aderonmu, explained the consequence of candidates dropping out of the race as "deeply disappointing . . . as an elector who has been working to advance one of these campaigns, expressing myself politically for the first time" (A.R., vol. IX, at p. 124). Another voter, who had endorsed a candidate who dropped out of the race, conveyed that "his own political expression has been compromised" and that "candidates remaining in the race are dealing with making major changes to their campaigns, and are not available to discuss [important] issues with him" (A.R., vol. IX, at p. 104).

[144] It is important to remember the timeline. Nominations opened on May 1, 2018, and closed on July 27, 2018. On the same day that nominations closed, the government announced that it intended to introduce new legislation, cutting the wards nearly in half and radically redrawing ward boundaries mid-election. No one knew what the impact of the new boundaries would be. Candidates did not know how the new electoral wards would affect their campaigns, and voters had no idea who their new candidates would be. All this after being in an ongoing electoral process for almost three months.

[145] The new legislation came into force two weeks later on August 14, 2018. By then, candidates had been campaigning and engaging with voters for 105 days in the existing 47 wards. Candidates who had developed mandates to respond to the specific needs and interests of their wards had their campaign efforts eradicated, along with their opportunity to meaningfully engage with the right voters on those issues. Voters who had formed opinions, been persuaded on issues, refined their preferences and expressed their views to their preferred representatives had their political expression thwarted. Some candidates persevered; others dropped out of the race. Volunteers quit, campaign endorsements were rescinded and confusion ensued.

[146] Nominations were extended to September 14, leaving only five weeks — from the date that nominations closed, solidifying which candidates were running and in what wards — for an election that was supposed to last nearly six months. More importantly, those five weeks were marred by the destabilizing impact of the timing of the legislation in the middle of an election that was technically 60 percent complete. The additional month for *new* candidates to seek nomination could not undo the damage and uncertainty that the change had created for candidates who had already been certified and voters who had already participated in three and a half months of deliberative engagement.

[147] The timing of the *Act*, in the middle of an ongoing election, breathed instability into the 2018 municipal election, undermining the ability of candidates and voters in their wards to meaningfully discuss and inform one another of their views on matters of local concern. For the remaining campaign period, candidates spent more time on doorsteps discussing the confusing state of affairs with voters than the relevant political issues. The timing of the legislation, by interfering with political discourse in the middle of an election, was a clear breach of s. 2(b) of the *Charter*.

[148] With respect, this leaves no role for the legal framework set out in *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673. It was designed to address underinclusive statutory regimes. The line of authority preceding *Baier* involved claims by individuals or groups seeking inclusion in an existing statutory regime, alleging that the absence of government support for them constituted a substantial interference with their exercise of a fundamental freedom.[2] The *Baier* framework was originally developed for an underinclusive labour relations regime in *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, and then modified for an allegedly underinclusive school board trustee election regime in *Baier*. The framework specifically refers to "claims of underinclusion", "exclusion from a statutory regime" and "underinclusive state action" (*Dunmore*, at paras. 24-26; *Baier*, at paras. 27-30). It has no relevance to the legal or factual issues in this case.

[149] The *Baier* framework was, additionally, confined to its unique circumstances by this Court's subsequent decision in *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295. Writing for a 7-1 majority, Deschamps J. explained that *Baier* "summarized the criteria for identifying the limited circumstances in which s. 2(*b*) requires the government to extend an underinclusive means of, or 'platform' for, expression to a particular group or individual" (para. 30). She also cautioned against extending *Baier* beyond these narrow confines:

> . . . taken out of context, [*Baier*] could be construed as transforming many freedom of expression cases into "positive rights claims". Expression in public places invariably involves some form of government support or enablement. Streets, parks and other public places are often created or maintained by government legislation or action. If government support or enablement were all that was required to trigger a "positive rights analysis", it could be argued that a claim brought by demonstrators seeking access to a public park should be dealt with under the *Baier* analysis because to give effect to such a claim would require the government to enable the expression by providing the necessary resource (i.e., the place). But to argue this would be to misconstrue *Baier*.
>
> When the reasons in *Baier* are read as a whole, it is clear that "support or enablement" must be tied to a claim requiring the government to provide a particular means of expression. In *Baier*, a *distinction* was drawn between *placing an obligation on government to provide individuals with a particular platform for expression* and *protecting*

> *the underlying freedom of expression of those who are free to participate in expression on a platform* (para. 42). [Emphasis added; paras. 34-35.]

[150] The *Baier* test has no application to this appeal. As Deschamps J.'s full quote shows, it is clear that *Baier* only applies to claims "placing an obligation on government to provide individuals with a particular platform for expression". *Irwin Toy*, on the other hand, applies to claims that are about "protecting the underlying freedom of expression of those who are free to participate in expression on a platform", like the case before us.

[151] None of the claimants involved in this case was excluded from participating in the 2018 Toronto municipal election, nor did they claim that s. 2(b) of the *Charter* requires the Province to provide them with a municipal election so that they can express themselves. The s. 2(b) claim in this case is about government interference with the expressive rights that attach to an electoral process. This is precisely the kind of claim that is governed by the *Irwin Toy* framework, not *Baier* (*Baier*, at para. 42; *Greater Vancouver Transportation Authority*, at para. 35; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815, at para. 31).

[152] In any event, the distinction between positive and negative rights is an unhelpful lens for adjudicating *Charter* claims. During nearly four decades of *Charter* litigation, this Court has recognized that rights and freedoms have both positive and negative dimensions. That recognition has led the Court to adopt a unified purposive approach to rights claims, whether the claim is about freedom *from* government interference in order to exercise a right, or the right *to* governmental action in order to get access to it.[3] To paraphrase Gertrude Stein, a right is a right is a right. The threshold does not vary with the nature of the claim to a right. Each right has its own definitional scope and is subject to the proportionality analysis under s. 1 of the *Charter*.

[153] All rights have positive dimensions since they exist within, and are enforced by, a positive state apparatus (S. Fredman, "Human Rights Transformed: Positive Duties and Positive Rights", [2006] *P.L.* 498, at p. 503; J. Rawls, *Political Liberalism* (exp. ed. 2005), at pp. 361-62; A. Sen, *The Idea of Justice* (2009), at p. 228). They also have negative dimensions because they sometimes require the state *not* to intervene. The distinction "is notoriously difficult to make . . . . Appropriate verbal manipulations can easily move most cases across the line" (S. F. Kreimer, "Allocational Sanctions: The Problem of Negative Rights in a Positive State" (1984), 132 *U. Pa. L. Rev.* 1293, at p. 1325).

[154] It is true that freedom of expression was once described by L'Heureux-Dubé J. in *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, as prohibiting "gags" but not compelling "the distribution of megaphones" (p. 1035; see also K. Chan, "Constitutionalizing the Registered Charity Regime: Reflections on *Canada Without Poverty*" (2020), 6 *C.J.C.C.L.* 151, at p. 173). But even in *Haig* — a precursor to *Baier* — L'Heureux-Dubé J. acknowledged that this was an artificial distinction that is "not always clearly made, nor . . . always helpful" (p. 1039; see also *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at pp. 666-68, per L'Heureux-Dubé J., concurring).

[155] There is no reason to superimpose onto our constitutional structure the additional hurdle of dividing rights into positive and negative ones for analytic purposes. Dividing the rights "baby" in half is not Solomonic wisdom, it is a jurisprudential sleight-of-hand that promotes confusion rather than rights protection.

[156] The purpose of the s. 2(b) right is not merely to restrain the government from interfering with expression, but also to cultivate public discourse "as an instrument of democratic government" (Hogg and Wright, at p. 43-8; see also Weinrib). Political discourse is at the heart of s. 2(b). Protecting the integrity of reciprocal political discourse among candidates and voters during an election period is therefore integral to s. 2(b)'s purpose. Elevating the legal threshold, as the majority proposes to do by applying *Baier*, adds a gratuitous hurdle, making it harder to prove a breach of this core aspect of s. 2(b) than other expressive activities. What should be applied instead is the foundational framework in *Irwin Toy*, which simply asks whether the activity in question falls within the scope of s. 2(b) and whether the government action, in purpose or effect, interfered with that expressive activity.

[157] Applying that framework, it is clear that the timing of the legislation violated s. 2(b) of the *Charter*. By radically redrawing electoral boundaries *during* an active election that was almost two-thirds complete, the legislation interfered with the rights of all participants in the electoral process to engage in meaningful reciprocal political discourse.

[158] This brings us to s. 1 of the *Charter*. The purpose of the s. 1 analysis is to determine whether the state can justify the *limitation* as "demonstrably justified in a free and democratic society" (*Charter*, s. 1; *Fraser v. Canada (Attorney General)*, 2020 SCC 28, at para. 125). The limitation on s. 2(b) rights in this case was the timing of the legislative changes.

[159] But rather than explaining the purpose and justification for the *timing* of the changes, Ontario relied on the pressing and substantial objectives of the changes themselves as the basis for the s. 1 analysis, saying they were to achieve voter parity, improve efficiency and save costs. This was set out in the press release announcing the proposed legislation, which stated: "We ran on a commitment to restore accountability and trust, to reduce the size and cost of government, including an end to the culture of waste and mismanagement" (Office of the Premier, *Ontario's Government for the People Announces Reforms to Deliver Better Local Government*, July 27, 2018 (online)). And at the second reading of the legislation, the Minister of Municipal Affairs and Housing, the Hon. Steve Clark, declared:

> During the recent provincial election campaign, my caucus colleagues and I heard very strongly from Ontarians that they want us to respect those taxpayers' dollars. We heard very clearly from Ontarians that government is supposed to work for them. I think Ontario sent a very clear message on June 7 that they want a government that looks after those taxpayers' dollars, and that is exactly what we're doing with this bill.
>
> So, Speaker, I want to get into some of the details of the bill, and specifically I want to talk first about the city of Toronto. The bill, if passed, would reduce the size of Toronto city council to 25 councillors from the present 47 plus the mayor. This would give the taxpayers of Toronto a streamlined, more effective council that is ready to work quickly and puts the needs of everyday people first.

> (Legislative Assembly of Ontario, *Official Report of Debates (Hansard)*, No. 14, 1st Sess., 42nd Parl., August 2, 2018, at p. 605)

[160] Leaving aside that voter parity was hardly mentioned in the legislative debates, this Court has never found voter parity to be the electoral lodestar, asserting, on the contrary, that the values of a free and democratic society "are better met by an electoral system that focuses on effective representation than by one that focuses on mathematical parity" (*Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 188).

[161] But of overriding significance, the government offered no explanation, let alone a pressing and substantial one, for why the changes were made in the middle of an ongoing election. There was no hint of urgency, nor any overwhelming immediate policy need.

[162] In the absence of any evidence or explanation for the *timing* of the *Act*, no pressing and substantial objective exists for this limitation and it cannot, therefore, be justified in a free and democratic society. The legislation is, as a result, an unjustified breach of s. 2(b).

[163] While this dispenses with the merits of the appeal, the majority's observations circumscribing the scope and power of unwritten constitutional principles in a way that reads down this Court's binding jurisprudence warrants a response.

[164] In the *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217 ("*Secession Reference*"), the Court identified the unwritten constitutional principles of democracy, judicial independence, federalism, constitutionalism and the rule of law, and the protection of minorities. These principles are derived from the preamble to the *Constitution Act, 1867*, which describes our Constitution as "a Constitution similar in Principle to that of the United Kingdom" (*Secession Reference*, at paras. 44-49; see also P. C. Oliver, "'A Constitution Similar in Principle to That of the United Kingdom': The Preamble, Constitutional Principles, and a Sustainable Jurisprudence" (2019), 65 *McGill L.J.* 207).

[165] The precedential Constitution of the United Kingdom is not a written document, but is comprised of unwritten norms, Acts of Parliament, Crown prerogative, conventions, custom of Parliament, and judicial decisions, among other sources (Oliver, at p. 216; M. Rowe and N. Déplanche, "Canada's Unwritten Constitutional Order: Conventions and Structural Analysis" (2020), 98 *Can. Bar Rev.* 430, at p. 438). Our Constitution, as a result, "embraces unwritte[n] as well as written rules" (*Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3 ("*Provincial Judges Reference*"), at para. 92, per Lamer C.J.).

[166] It is notable that many Parliamentary systems, notwithstanding their different constitutional arrangements, have also recognized that unwritten constitutional principles have full legal force and can serve as substantive limitations on all branches of government.[4]

[167] Unwritten constitutional principles have been held to be the "lifeblood" of our Constitution (*Secession Reference*, at para. 51) and the "vital unstated assumptions upon which the text is based" (para. 49). They are so foundational that including them in the written text "might have appeared redundant, even silly, to the framers" (para. 62).

[168] Unwritten constitutional principles are not, as the majority suggests, merely "context" or "backdrop" to the text. On the contrary, unwritten principles are our Constitution's most basic normative commitments from which specific textual provisions derive. The specific written provisions are "elaborations of the underlying, unwritten, and organizing principles found in the preamble to the *Constitution Act, 1867*" (*Provincial Judges Reference*, at para. 107; see also *Switzman*, at p. 306, per Rand J.). Constitutional text emanates from underlying principles, but it will not always be exhaustive of those principles. In other words, the text is not exhaustive of our Constitution (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319, at p. 378, per McLachlin J.).

[169] Apart from written provisions of the Constitution, principles deriving from the Constitution's basic structure may constrain government action. Those principles exist independently of and, as in the case of implied fundamental rights before the promulgation of the *Charter*, prior to the enactment of express constitutional provisions (see e.g. *Reference re Alberta Statutes*, per Duff C.J.; *Switzman*, at pp. 327-28, per Abbott J.; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, per Beetz J.). As Beetz J. wrote for the majority in *OPSEU*, at p. 57, "quite apart from *Charter* considerations, the legislative bodies in this country must conform to these basic structural imperatives and can in no way override them":

> There is no doubt in my mind 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. In the words of Duff C.J. in *Reference re Alberta Statutes,* at p. 133, "such institutions derive their efficacy from the free public discussion of affairs . . . ." and, in those of Abbott J. in *Switzman v. Elbling,* at p. 328, neither a provincial legislature nor Parliament itself can "abrogate this right of discussion and debate". Speaking more generally, I hold that neither Parliament nor the provincial legislatures may enact legislation the effect of which would be to substantially interfere with the operation of this basic constitutional structure. [p. 57]

[170] This leads inescapably to the conclusion — supported by this Court's jurisprudence until today — that unwritten principles may be used to invalidate legislation if a case arises where legislation elides the reach of any express constitutional provision but is fundamentally at odds with our Constitution's "internal architecture" or "basic constitutional structure" (*Secession Reference*, at para. 50; *OPSEU*, at p. 57). This would undoubtedly be a rare case. But with respect, the majority's decision to foreclose the possibility that unwritten principles be used to invalidate legislation in all circumstances, when the issue on appeal does not require them to make such a sweeping statement, is imprudent. It not only contradicts our jurisprudence, it is fundamentally inconsistent with the case law confirming that unwritten constitutional principles can be used

to review legislation for constitutional compliance. Reviewing legislation for constitutional compliance means upholding, revising or rejecting it. Otherwise, there is no point to reviewing it.

[171] In the *Secession Reference*, a unanimous Court confirmed that "[u]nderlying 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" (para. 54, quoting *Reference re Resolution to Amend the Constitution*, 1981 CanLII 25 (SCC), [1981] 1 S.C.R. 753 ("*Patriation Reference*"); see also *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3, at para. 54, per McLachlin C.J.). That means they can be used to assess state action for constitutional compliance, which in turn can lead to endorsing, rejecting, limiting or expanding the acts of the executive or legislative branches of government. Again, with respect, we have never, to date, limited their role in the manner the majority proposes.

[172] The Court's reference to *Patriation Reference* dispels any doubt as to what it meant when it said that these principles have "full legal force". In the passage cited approvingly from the *Patriation Reference*, Martland and Ritchie JJ., dissenting in part, explained that unwritten constitutional principles "*have been* accorded full legal force in the sense of *being employed to strike down legislative enactments*" (p. 845 (emphasis added)). While Martland and Ritchie JJ. dissented in the result in the *Patriation Reference*, they cited judgments in support of the principle of federalism that remain good law and were viewed as necessary to "preserving the integrity of the federal structure" (p. 821), notably *Attorney-General for Canada v. Attorney-General for Ontario*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326 (P.C.), and *Attorney General of Nova Scotia v. Attorney General of Canada*, 1950 CanLII 26 (SCC), [1951] S.C.R. 31 (see also *Secession Reference*, at para. 81, citing *Reference re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54, at p. 71). In other words, structural doctrine helps identify what the unwritten principles *are*, it does not limit their role.

[173] This Court expressly endorsed the unwritten principles of democracy as the "baseline against which the framers of our Constitution, and subsequently, our elected representatives under it, have always operated" (*Secession Reference*, at para. 62); the rule of law as "a fundamental postulate of our constitutional structure" (*Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 142, per Rand J.), "the very foundation of the *Charter*" (*B.C.G.E.U. v. British Columbia (Attorney General)*, 1988 CanLII 3 (SCC), [1988] 2 S.C.R. 214, at p. 229, per Dickson C.J.), and the source of judicial authority to override legislative intent "where giving effect to that intent is precluded by the rule of law" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 23); federalism as "a foundational principle of the Canadian Constitution" (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 3, per Wagner C.J.); and judicial independence as a "constitutional imperative" in light of "the central place that courts hold within the Canadian system of government" (*Provincial Judges Reference*, at para. 108). And of course, the unwritten constitutional principle of the honour of the Crown has been affirmed by this Court and accorded full legal force (*Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 (CanLII), [2010] 3 S.C.R. 103, at para. 42, per Binnie J.; *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII), [2004] 3 S.C.R. 511, at para. 16, per McLachlin C.J.).

[174] In the *Provincial Judges Reference*, this Court relied, in part, on the unwritten constitutional principle of judicial independence to strike down legislative provisions in various provincial statutes. The issue was whether the principle of judicial independence restricts the manner and extent to which provincial legislatures can reduce the salaries of provincial court judges. While the principle of judicial independence finds expression in s. 11(d) of the *Charter*, which guarantees the right of an accused to an independent tribunal, and ss. 96 to 100 of the *Constitution Act, 1867*, which govern superior courts in the province, the unwritten principle of judicial independence was used to fill a gap in the written text to cover provincial courts in circumstances not covered by the express provisions. Writing for the majority, Lamer C.J. held that

> [j]udicial independence is an unwritten norm, recognized and affirmed by the preamble to the *Constitution Act, 1867*. In fact, it is in that preamble, which serves as the grand entrance hall to the castle of the Constitution, that the true source of our commitment to this foundational principle is located. [para. 109]

[175] In *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, this Court invoked the unwritten principle of the rule of law to create a novel constitutional remedy — the suspended declaration of constitutional invalidity. The Court developed this remedy notwithstanding that the text of s. 52(1) of the *Constitution Act, 1982* states that unconstitutional laws are "of no force or effect" suggesting, when interpreted technically and in isolation from underlying constitutional principles, that declarations of invalidity can only be given immediate effect. As Karakatsanis J. wrote for the majority in *Ontario (Attorney General) v. G*, 2020 SCC 38, although s. 52(1) "does not explicitly provide the authority to suspend a declaration, in adjudicating constitutional issues, courts 'may have regard to unwritten postulates which form the very foundation of the Constitution of Canada'" (para. 120, quoting *Manitoba Language Rights*, at p. 752).

[176] Beyond the Reference context, in *MacMillan Bloedel Ltd. v. Simpson*, 1995 CanLII 57 (SCC), [1995] 4 S.C.R. 725, this Court used the rule of law principle to read down s. 47(2) of the *Young Offenders Act*, R.S.C. 1985, c. Y-1, which granted youth courts exclusive jurisdiction over contempt of court by a young person, so as not to oust the jurisdiction of superior courts. Writing for the majority, Lamer C.J. held that Parliament cannot remove the contempt power from a superior court without infringing "the principle of the rule of law recognized both in the preamble and in all our conventions of governance" (para. 41).

[177] And in *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII), [2014] 3 S.C.R. 31, this Court struck down a regulation imposing hearing fees that were found to deny people access to the courts based in part on the unwritten constitutional principle of the rule of law, and relatedly, access to justice.

[178] The majority's emphasis on the "primordial significance" of constitutional text is utterly inconsistent with this Court's repeated declarations that *unwritten* constitutional principles are the foundational organizing principles of our Constitution and have full legal force. Being unwritten means there is no text. They serve to give effect to the structure of our Constitution and "function as independent bases upon which to attack the validity of legislation . . . since they have the same legal status as the text" (R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at p. 95; see also H.-R. Zhou, "Legal Principles, Constitutional Principles, and Judicial Review" (2019), 67 *Am. J. Comp. L.* 889, at p. 924). By definition, an emphasis on the words of the Constitution demotes unwritten principles to a diluted role. "Full legal force" means full legal force, independent of the written text.

[179] Unwritten constitutional principles do not only "give meaning and effect to constitutional text" and inform "the language chosen to articulate the specific right or freedom", they also assist in developing an evolutionary understanding of the rights and freedoms guaranteed in our Constitution, which this Court has long described as "a living tree capable of growth and expansion" (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 156, quoting *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136). Unwritten constitutional principles are a key part of what makes the tree grow (*Secession Reference*, at para. 52; *Provincial Judges Reference*, at para. 106). This Court has never held that the interpretive role of unwritten constitutional principles is narrowly constrained by textualism.

[180] Unwritten constitutional principles are, additionally, substantive legal rules in their own right. As Lamer C.J. wrote in the *Provincial Judges Reference*:

> [The preamble] recognizes and affirms the basic principles which are the very source of the substantive provisions of the *Constitution Act, 1867*. As I have said above, those provisions merely elaborate those organizing principles in the institutional apparatus they create or contemplate. As such, *the preamble is not only a key to construing the express provisions of the Constitution Act, 1867, but also invites the use of those organizing principles to fill out gaps in the express terms of the constitutional scheme*. It is the means by which the underlying logic of the Act can be given *the force of law*. [Emphasis added; para. 95.]

[181] Professor Mark D. Walters effectively explained why the role of unwritten constitutional principles has not been limited as the majority suggests:

> The relationship between unwritten and written constitutional law in Canada may be conceived in different ways. At one point, Chief Justice Antonio Lamer observed that the role of unwritten principles is "to fill out gaps in the express terms of the constitutional scheme." This statement might suggest that judges are just reading between the lines in order to make the text complete. Or, to use another metaphor, judges are constructing bridges over the waters that separate islands of constitutional text, creating a unified and useable surface.
>
> *But the gap-filling and bridge metaphors do not capture fully the theory of unwritten constitutionalism as it has developed in the Canadian cases*. . . . We must alter the bridge metaphor accordingly: The textual islands are merely the exposed parts of a vast seabed visible beneath the surrounding waters, and the bridges constructed by judges between these islands are actually causeways moulded from natural materials brought to the surface from this single underlying foundation. *The constitutional text is not just supplemented by unwritten principles; it rests upon them.* [Emphasis added; footnote omitted.]
>
> ("Written Constitutions and Unwritten Constitutionalism", in G. Huscroft, ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008 (reprinted 2010)), 245, at pp. 264-65)

[182] It is also difficult to understand the need for the majority's conclusion that using unwritten constitutional principles to strike down legislation would circumvent the legislative override power in s. 33 of the *Charter*. This question is not directly before us.

[183] Finally, I see no merit to the majority's argument that courts cannot declare legislation invalid on the basis of unwritten constitutional principles because s. 52(1) of the *Constitution Act, 1982* only applies to written text. This argument extinguishes the entire jurisprudence establishing that unwritten principles have full legal force. Section 52(1) provides that "any law that is inconsistent with the *provisions* of the Constitution is . . . of no force or effect". The majority's reading of s. 52(1), like much of the rest of its analysis, is a highly technical exegetical exercise designed to overturn our binding authority establishing that unwritten constitutional principles are a full constitutional partner with the text, including for the purposes of s. 52 (*New Brunswick Broadcasting Co.*, at pp. 375-78; *Manitoba Language Rights*, at p. 752; *Ontario (Attorney General) v. G*, at para. 120).

[184] It is true that in *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49 (CanLII), [2005] 2 S.C.R. 473, the Court questioned whether the rule of law could be used to invalidate legislation based on its content, but this was based on the specific contours of one unwritten principle, not unwritten principles in general. The Court did not constrain the reach of judicial independence, the other unwritten constitutional principle raised in that case. As Major J. explained in describing the limits of the content of the rule of law:

> . . . it is difficult to conceive of how the rule of law could be used as a basis for invalidating legislation such as the Act based on its content. That is because none of the principles that the rule of law embraces speak directly to the terms of legislation. The first principle requires that legislation be applied to all those, including government officials, to whom it, by its terms, applies. The second principle means that legislation must exist. And the third principle, which overlaps somewhat with the first and second, requires that state officials' actions be legally founded. See R. Elliot, "References, Structural Argumentation and the Organizing Principles of Canada's Constitution" (2001), 80 *Can. Bar Rev.* 67, at pp. 114-15. [para. 59]

Never, however, has this Court, until now, foreclosed the possibility of *all* unwritten constitutional principles ever invalidating legislation.

[185] The inevitable consequence of this Court's decades-long recognition that unwritten constitutional principles have "full legal force" and "constitute substantive limitations" on all branches of government is that, in an appropriate case, they may well continue to serve, as they have done in the past, as the basis for declaring legislation unconstitutional (*Secession Reference*, at para. 54; see also Elliot, at p. 95; (A.) J. Johnson, "The *Judges Reference* and the *Secession Reference* at Twenty: Reassessing the Supreme Court of Canada's Unfinished Unwritten Constitutional Principles Project" (2019), 56 *Alta. L. Rev.* 1077, at p. 1082; P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982)). There is no need, as a result, to constrain

the role of unwritten constitutional principles and newly declare that their full legal force does not include the ability, in appropriate circumstances, to declare legislation to be constitutionally invalid.

[186] I would allow the appeal and restore Belobaba J.'s declaration that the timing of the *Act* unjustifiably infringed s. 2(b) of the *Charter*.

Appeal dismissed, Abella, Karakatsanis, Martin *and* Kasirer JJ. *dissenting.*

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Solicitor for the intervener Fair Voting British Columbia: Nicolas M. Rouleau, Toronto.

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[1] This Court's jurisprudence has involved, for example, restrictions on: **publication** (*Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877; *R. v. Bryan*, 2007 SCC 12 (CanLII), [2007] 1 S.C.R. 527); **obscene content** (*R. v. Butler*, 1992 CanLII 124 (SCC), [1992] 1 S.C.R. 452; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 (CanLII), [2000] 2 S.C.R. 1120); **advertising** (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31 (CanLII), [2009] 2 S.C.R. 295); **language** (*Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *Devine v. Quebec (Attorney General)*, 1988 CanLII 20 (SCC), [1988] 2 S.C.R. 790); **harmful content** (*R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697); **manner or place of expression** (*Committee for the Commonwealth of Canada v. Canada*, 1991 CanLII 119 (SCC), [1991] 1 S.C.R. 139; *Ramsden v. Peterborough (City)*, 1993 CanLII 60 (SCC), [1993] 2 S.C.R. 1084; *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62 (CanLII), [2005] 3 S.C.R. 141); **who can participate in a statutory platform for expression** (*Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995; *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627; *Baier v. Alberta*, 2007 SCC 31 (CanLII), [2007] 2 S.C.R. 673); **voluntary expression** (such as mandatory letters of reference or public health warnings) (*Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *Canada (Attorney General) v. JTI-Macdonald Corp.*, 2007 SCC 30 (CanLII), [2007] 2 S.C.R. 610); **expenditures on expression** (*Libman v. Quebec (Attorney General)*, 1997 CanLII 326 (SCC), [1997] 3 S.C.R. 569; *Harper v. Canada (Attorney General)*, 2004 SCC 33 (CanLII), [2004] 1 S.C.R. 827); or **access to information** (such as court proceedings or government documents) (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480; *Vancouver Sun (Re)*,

2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), [2010] 1 S.C.R. 815). This case does not fall into any of these categories.

[2] *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995 (s. 2(b) challenge to exclusion of Quebec resident from federal referendum); *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627 (s. 2(b) challenge to exclusion of Native Women's Association of Canada from federal funding to present on Charlottetown Accord); *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989, overruled by *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (s. 2(d) challenge to exclusion of RCMP members from labour relations legislation); *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016 (s. 2(d) challenge to exclusion of agricultural workers from labour relations legislation).

[3] The same legal standard has applied to claims with respect to: **freedom of association under s. 2(d)** (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 S.C.R. 391 (right to collective bargaining); *Ontario (Attorney General) v. Fraser*, [2011] 2 S.C.R. 3 (right to good faith bargaining); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 (CanLII), [2015] 1 S.C.R. 3 (right to statutory protections for collective bargaining)); the **right to life, liberty and security of the person under s. 7** (*Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII), [2015] 1 S.C.R. 331 (physician-assisted dying); *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 (abortion); *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 (CanLII), [2011] 3 S.C.R. 134 (safe injection facility)); and **equality under s. 15** (*Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624 (interpretation services for deaf hospital patients); *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493 (legislative protection against discrimination on the basis of sexual orientation)), to name a few examples.

[4] See also other jurisdictions in which unwritten constitutional principles have been accorded full legal force in the sense of being employed to invalidate legislative or executive action: **United Kingdom** (*R. (on the application of Miller) v. Prime Minister*, [2019] UKSC 41, [2020] A.C. 373 (parliamentary sovereignty and accountability); *R. (on the application of Jackson) v. Attorney General*, [2005] UKHL 56, [2006] 1 A.C. 262, at para. 102, per Lord Steyn (judicial independence); *R. (Privacy International) v. Investigatory Powers Tribunal*, [2019] UKSC 22, [2020] A.C. 491, at paras. 100 and 144, per Lord Carnwath (judicial independence and rule of law); *AXA General Insurance Ltd. v. HM Advocate*, [2011] UKSC 46, [2012] 1 A.C. 868, at para. 51, per Lord Hope (judicial independence and rule of law)); **Australia** (*Brandy v. Human Rights and Equal Opportunity Commission* (1995), 183 C.L.R. 245 (H.C.) (judicial independence); *Kable v. Director of Public Prosecutions (NSW)* (1996), 189 C.L.R. 51 (H.C.) (federalism); *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997), 190 C.L.R. 410 (H.C.) (federalism); *Lange v. Australian Broadcasting Corporation* (1997), 189 C.L.R. 520 (H.C.) (freedom of political communication); *Roach v. Electoral Commissioner*, [2007] HCA 43, 233 C.L.R. 162 (the right to vote)); **South Africa** (*South African Association of Personal Injury Lawyers v. Heath*, [2000] ZACC 22, 2001 (1) S.A. 883 (separation of powers); *Fedsure Life Assurance Ltd. v. Greater Johannesburg Transitional Metropolitan Council*, [1998] ZACC 17, 1999 (1) S.A. 374, at para. 58 (legality)); **Germany** (*Elfes Case*, BVerfG, 1 BvR 253/56, Decision of January 16, 1957 (rule of law and social welfare state)); and **India** (*Kesavananda v. State of Kerala*, A.I.R. 1973 S.C. 1461, at pp. 1899-1900 (secularism, democracy and individual freedom)).

11.	*Cambie Surgeries Corporation v British Columbia (Attorney General)*, 2020 BCSC 1310 (excerpt) paras 1 – 23; 2045-2064.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Cambie Surgeries Corporation v. British Columbia (Attorney General),* 2020 BCSC 1310

Date: 20200910
Docket: S090663
Registry: Vancouver

Between:

Cambie Surgeries Corporation, Chris Chiavatti, Mandy Martens, Krystiana Corrado, Walid Khalfallah by his litigation guardian Debbie Waitkus, and Specialist Referral Clinic (Vancouver) Inc.

Plaintiffs

And:

Attorney General of British Columbia

Defendant

And:

Dr. Duncan Etches, Dr. Robert Woollard, Glyn Townson, Thomas McGregor, British Columbia Friends of Medicare Society, Canadian Doctors for Medicare, Mariël Schooff, Daphne Lang, Joyce Hamer, Myrna Allison, and the British Columbia Anesthesiologists' Society

Intervenors

And:

The Attorney General of Canada

Pursuant to the *Constitutional Question Act*

Before: The Honourable Mr. Justice Steeves

Reasons for Judgment

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Appearing on behalf of the British Columbia Anesthesiologists' Society:	Dr. R. Orfaly
Place and Dates of Trial:	Vancouver, B.C. September 6-9; 12-16; 19-23, 2016 October 3-7; 11-14; 17-21; 31, 2016 November 1-4; 7; 14-18; 28-30, 2016 December 1-2; 5-9; 12-14, 2016 January 16-19; 23-24; 26-27, 2017 February 6-10; 14; 21; 23-24, 2017 March 6-10; 13-17, 2017 April 3; 5-6; 10, 2017 April 9-13; 16-20; 23-26, 2018 May 30-31, 2018 June 11-15; 28, 2018 July 3-5; 9; 11-13, 2018 September 4-5; 11; 14; 17-19, 2018 October 1; 3-5, 2018 November 19-20, 2018 December 3, 2018 February 4-8; 12-13; 20-22, 2019 March 4; 6; 8; 15, 2019 April 8; 12; 15-17; 29-30, 2019 May 1; 6-10; 13-16; 27; 29, 2019 June 4-6; 10-11; 13; 17-21, 2019 July 9-12; 15-19, 2019 November 18-22; 25-29, 2019 December 2, 2019 February 25-28, 2020

Place and Date of Judgment: Vancouver, B.C.
September 10, 2020

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SUMMARY OF JUDGMENT

[1] The plaintiffs claim that ss. 14, 17, 18 and 45 of the *Medicare Protection Act* ("*MPA*") violate their rights under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") and that these violations cannot be saved under s. 1 of the *Charter* (paras. 24-27, 30).

[2] Section 14 of the *MPA* provides the mechanism of payment to physicians registered under the public provincial health insurance plan (Medical Services Plan or "MSP") for services rendered to beneficiaries of the public plan (paras. 25, 2003-2020). Sections 17 and 18 of the *MPA* set limits on the prices that physicians can charge MSP for the provision of medically required or necessary services they provide to beneficiaries of British Columbia's public health insurance plan (paras. 25, 2005-2029, 2041). Section 45 prohibits the sale of private health insurance to beneficiaries of the public plan for medically necessary services that are covered under the plan (paras. 2030-2033, 2041).

[3] There is currently private and legal healthcare in British Columbia (paras. 352-355). This includes services not covered under the *MPA* and services under the *MPA* provided by private clinics under contract with health authorities (paras. 353-355). There has also been private healthcare over the last 20 years that the plaintiffs admit has been illegal, being contrary to ss. 17 and 18 of the *MPA* (paras. 356-357, 361, 368-387, 2124-2144). This illegal healthcare is the subject of this litigation.

[4] The plaintiffs submit it is unconstitutional to prevent patients from accessing private medically necessary healthcare, including private surgeries, when they are unable to access timely care in the

public system (paras. 26-27, 68-69, 73-76). They do not say that the introduction of duplicative private healthcare in British Columbia would necessarily decrease wait times in the public system (paras. 27, 2310). This is consistent with the expert evidence in this trial and there is in fact expert evidence that wait times would actually increase (paras. 2308-2349).

[5] The plaintiffs accept that a previous decision regarding a prohibition against duplicative private healthcare insurance in Québec (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35) is not binding in British Columbia but they say it is persuasive (paras. 27, 1395, 1496). In any event, they acknowledge that the law on s. 7 of the *Charter* has developed since *Chaoulli* through later decisions of the Supreme Court of Canada (paras. 1395, 1496).

[6] The defendant British Columbia, Canada, the Patient Intervenors and the Coalition Intervenors oppose the plaintiffs' claim (para. 28). The intervenor British Columbia Association of Anesthesiologists' Society takes no position on the plaintiffs' claim but emphasizes certain aspects of wait times in British Columbia that are consistent with the plaintiffs' allegations (para. 28).

[7] A claim challenging a law under s. 7 of the *Charter* has two stages (paras. 1372-1375). First, a person making a claim challenging a law under s. 7 must establish that the impugned law deprives the person of the right to life, the right to liberty or the right of the security of the person (paras. 1376-1379). Second, if there has been a deprivation of a right under s. 7, then the person making the claim must also demonstrate that the deprivation is not in accordance with the principles of fundamental justice (paras. 1380-1384).

[8] In this case, under the first stage of s. 7 of the *Charter*, in the reasons that follow, I find that the plaintiffs have established that unreasonable wait times engage the right to security of the person for some patients, including two of the individual plaintiffs, one of the non-party witnesses and other persons similarly situated (paras. 1807-1942). However, under the second stage of s. 7, I find that the plaintiffs have not established that the right to security of the person has been deprived contrary to the principles of fundamental justice (paras. 1943-2803). Accordingly, the plaintiffs' claim under s. 7 is dismissed (para. 2803).

[9] The legal and factual basis for my decision under the first stage of s. 7 of the *Charter* includes a conclusion that some patients suffering from non-urgent, deteriorating conditions and waiting for elective surgeries do not receive care in a timely manner (paras. 1807-1886). These patients are assigned a timeframe (or benchmark) by their physicians as part of the triaging process within which they ought to have surgery to avoid an increased risk of harm (paras. 1282-1339). The province's wait time data shows that there are some patients in most surgical categories who are waiting beyond the benchmark assigned for their condition because of lack of capacity in the public system (paras. 1645-1664).

[10] Based on expert evidence, I find that for some patients waiting beyond their assigned benchmark for their elective surgery increases the risk of deterioration and reduced surgical outcomes (paras. 1665-1708). The wait is clinically significant to their health and wellbeing (paras. 1807-1886). I conclude that in these situations denying patients the ability to avoid unreasonable wait times violates their right to security of the person (paras. 1931-1942).

[11] Sections 17, 18(3) and 45 of the *MPA* do not prohibit private healthcare (para. 1899). Sections 17 and 18(3) deal with billing practices by physicians. More specifically they prohibit some physicians and healthcare facilities, who are providing medically necessary services covered by the public plan, from charging user fees and billing MSP beyond the MSP schedule (paras. 2021-2022). Section 45 prohibits the sale of private health insurance to MSP beneficiaries for medically necessary services covered by the public plan (paras. 2032, 2081, 2568, 2696). Nevertheless, these provisions are intended to prevent, and in fact do prevent, the emergence of a duplicative private healthcare system in British Columbia by restricting the prices physicians can charge patients and the scope of private funding for healthcare (paras. 1899-1906).

[12] The impugned provisions do not engage the right to life or the right to liberty under s. 7 (paras. 1748-1768). The expert evidence (including from the plaintiffs' experts) is that timely and high quality care is provided to patients with urgent and emergent conditions where there is risk to life or limb, and there is no evidence of any deaths caused by waiting in British Columbia (paras. 1748-1763). Therefore, the right to life is not engaged (para. 1763). The liberty interest is not engaged because the challenged provisions of the MPA do not deny patients the freedom to accept or reject medical treatment (paras. 1764-1768).

[13] The second stage under s. 7 is to consider whether the plaintiffs have demonstrated that the deprivation of security of the person is contrary to the principles of fundamental justice (paras. 1380-1384). They are the principles against arbitrariness, overbreadth and gross disproportionality (paras. 1380-1384).

[14] Weighing the totality of the evidence (including extensive expert evidence) I find that the impugned provisions are not arbitrary (paras. 2662-2670). The purpose of the impugned provisions is to preserve and ensure the sustainability of a universal public healthcare system that ensures access to necessary medical care is based on need and not on an individual's ability to pay (paras. 1969-2044). The combined effect of the impugned provisions is one of supressing and discouraging the emergence of a parallel duplicative private healthcare system for the financing and provision of necessary medical services to MSP beneficiaries (paras. 2042-2044, 2082).

[15] The evidence demonstrates that there are multiple connections or rational connections between the purpose and effect of the impugned provisions of the *MPA* (paras. 2065-2670). These include rational bases for concluding that the introduction of duplicative private healthcare would increase demand for public care, reduce the capacity of the public system to offer medical care, increase the public system's costs, create perverse incentives for physicians, increase the risk of ethical lapses related to conflicts between the private and public practices of physicians, undermine political support for the public system, and exacerbate inequity in access to medically necessary care (paras. 2274-2670). Indeed, it would create a second tier of preferential healthcare where access is contingent on a person's ability to pay. As a result, the impugned provisions are not contrary to the principle against arbitrariness (paras. 2065-2670).

[16] As well, the expert evidence (including from the plaintiffs' experts) is that duplicative private healthcare would not decrease wait times in the public system and there is expert evidence that wait times would actually increase (paras. 2308-2349). This would cause further inequitable access to timely care.

[17] The impugned provisions are not overbroad or grossly disproportionate (paras. 2671-2784). They do not capture conduct unrelated to their purpose, nor is their effect totally out of sync with their purpose (paras. 2671-2784).

[18] For these reasons, I conclude the impugned provisions do not violate the s. 7 rights of the plaintiffs or other similarly situated patients in the public system.

[19] The plaintiffs' s. 15 claim also fails (paras. 2804-2874). The impugned provisions do not confer a benefit or impose a burden that draws a discriminatory distinction based on an enumerated or analogous ground (paras. 2847-2859). There is also no evidence to suggest that the impugned provisions have a disproportionate adverse impact on the elderly, the very young or the disabled as alleged by the plaintiffs (para. 2860). I have also declined to consider the plaintiffs' novel "interest-based" theory relating to s. 15 (paras. 2861-2869).

[20] Since I have not found a breach of ss. 7 or 15 of the *Charter*, it is not necessary to consider whether the impugned provisions are justified under s. 1 of the *Charter* (para. 2875). Nevertheless, the unique nature and legal issues of this case make it appropriate to comment on s. 1 (para. 2876).

[21] In the context of a complex social program such as healthcare where there is a need to balance conflicting interests and claims over limited resources, a high degree of deference is owed to the government under s. 1 (paras. 2885-2893, 2898, 2922, 2931, 2936). Bearing this in mind, I find that the objectives of the impugned provisions, preserving and ensuring the sustainability of the universal public healthcare system and ensuring access to necessary medical services is based on need and not the ability to pay, are pressing and substantial (paras. 2895-2903). I also find that there is a rational connection between deterring the emergence of a competitive duplicative private healthcare system and these objectives (paras. 2904-2909). Finally, the evidence also supports the defendant's claim that the impugned provisions are minimally impairing and their effects are proportionate to their objectives (paras. 2910-2934).

[22] Thus, even if I had found a violation of ss. 7 or 15 of the *Charter*, I would have nonetheless concluded that the impugned provisions are a reasonable limit on those rights and are demonstrably justified in a free and democratic society under s. 1 (paras. 2935-2937).

[23] The plaintiffs' claim is dismissed (paras. 2938-2940).

[2044] The question that remains to be determined is whether these suppression measures and their effects, especially the third effect, are arbitrary, overbroad or grossly disproportionate in relation to their purpose and therefore offend the principles of fundamental justice. I now turn to consider whether some deference to government is appropriate in the case of the *MPA* with respect to the principles of fundamental justice and I then turn to the application of each of the principles in the circumstances of the subject claim.

(iv) Is deference applicable?

[2045] The defendant submits that "[o]ne reason why the plaintiffs are not able to establish a breach of a principle of fundamental justice is because their challenge is brought in the context of the administration of the public health care system, rather than in the administration of the justice system."[36]

[2046] Essentially, the defendant (and Canada) submit that s. 7 rights have traditionally been restricted to the administration of justice, primarily criminal law. The defendant accepts that the scope under s. 7 has broadened along with the development of the jurisprudence. However, they say that, when assessing regulatory schemes related to the administration of social programs, such as healthcare, the evidentiary burden becomes more onerous on the claimant. Put another way, some deference to government is to be given by the courts in these situations. Among other reasons, the defendant says that this is because s. 7 does not encompass positive rights or obligations on the state to provide individuals with a certain level of welfare.

[2047] The defendant relies on the comments of the Alberta Court of Appeal in *Allen v. Alberta*, 2015 ABCA 277 (leave to appeal ref'd [2015] S.C.C.A. No. 461) where the court commented that the text of s. 7 of the *Charter* indicates it was never intended or drafted to apply to the review of social and economic policies. The court adopted and discussed a previous decision from Ontario:

> [34] The Ontario Court of Appeal highlighted the problem of attempting to constitutionalize social policies in *Tanudjaja v Canada (A.G.)*, 2014 ONCA 852, 123 OR (3d) 161, leave to appeal denied, June 25, 2015, SCC #36283. That case involved an assertion of a free-standing constitutional right to "adequate housing", and amounted to an open invitation to the courts to take charge of housing policy in Ontario. In holding that the issue was not even justiciable, the majority noted:
>
> > 33 Finally, there is no judicially discoverable and manageable standard for assessing in general whether housing policy is adequate or whether insufficient priority has been given in general to the needs of the homeless. This is not a question that can be resolved by application of law, but rather it engages the accountability of the legislatures. Issues of broad economic policy and priorities are unsuited to judicial review. Here the court is not asked to engage in a "court-like" function but rather to embark on a course more resembling a public inquiry into the adequacy of housing policy.
>
> While *Tanudjaja* was premised on allegations of unconstitutional inaction, the analytical issues are no less acute when an existing social policy is challenged.

[2048] What the Court of Appeal of Alberta was warning against in *Allen* is a different situation than in the subject claim, and echoes some of the points made by the Ontario Court of Appeal in *R. v. Michaud,* 2015 ONCA 585 (leave to appeal ref'd [2015] S.C.C.A. No. 450) discussed above. The concern in *Allen*, as I read the judgment, is with claims which effectively ask the court to design social policy and assess broad and complex social and economic programs. In *Tanudjaja v. Canada (Attorney General),* 2014 ONCA 852 (leave to appeal ref'd [2015] S.C.C.A. No. 39) the majority upheld the motion judge's decision to strike the appellants' application on the basis it was plain and obvious they could not succeed because their application disclosed no reasonable cause of action and was not justiciable. The motion judge concluded that it was not a violation of s. 7 of the *Charter* when Canada and Ontario failed to implement adequate social housing policies. The plaintiffs' claim was considered to be a political challenge to the overall approach of the federal and provincial governments towards housing rather than a challenge to a particular law or state action.

[2049] In the subject claim there are elements of challenges to public healthcare as a broad policy issue, at least to the extent that under the *MPA* duplicative private healthcare as contemplated by the plaintiffs is not permitted. And more than once I have had to caution the plaintiffs that this is a trial and not a Royal Commission (including in evidentiary rulings; for example, 2016 BCSC 1390 at para. 41). Nonetheless, the core of the claim here and virtually all of the plaintiffs' submissions are a specific challenge to four

provisions of the *MPA*. The defendant did not challenge them as not justiciable before or early in the trial and they do not challenge them now.

[2050] I also note that the plaintiffs here acknowledge that, as stated in *Chaoulli*, "[t]he *Charter* does not confer a freestanding constitutional right to health care" (at para. 104). The plaintiffs do not seek a general declaration from this court to the contrary. Nor do they seek any remedies in the form of expanding or improving the public healthcare system or increasing public expenditure on healthcare. Indeed, as I understand the plaintiffs' claim, it is very much framed as a negative right to be free from state interference. The plaintiffs' claim is that when necessary medical care cannot be provided within a reasonable timeframe in the public system it is unconstitutional for the government to employ measures that have the effect of denying patients the ability to seek timely care outside of the public system. Their claim is, therefore, a very different one than the one in *Tanudjaja.*

[2051] To be clear, the issue before this court is not whether the single-payer public model is the best approach to providing quality healthcare to Canadians. The only issue before this court is whether, when the provincial Legislature translated this policy into law, including through the impugned provisions, it limited the rights of patients in a manner that complies with the *Charter*.

[2052] As a final comment on *Tanudjaja,* there is some discussion in the authorities and among scholars about the scope of the rights in s. 7 of the *Charter*. Some have criticized *Tanudjaja* and other s. 7 authorities, including *Chaoulli*, because they did not acknowledge the rights to life, liberty and security of the person as providing positive rights to housing and healthcare.[37] In addition, Justice Arbour in her dissent in *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84, concluded that s. 7 rights have a positive dimension for basic issues of health and security (at paras. 357-358). While the majority of the Supreme Court of Canada in *Gosselin* disagreed with her reasoning, I note they also said that "[o]ne day s. 7 may be interpreted to include positive obligations" (at para. 82). Accordingly, the scope of the rights under s. 7 may be considered unsettled.

[2053] I am also mindful that, to the extent certain aspects of this litigation draw the court to enter the "policy debate," I must be vigilant about the limitations of the court. I address below instances where I decline the plaintiffs' invitations for the court to engage in designing what would essentially be an alternative healthcare regulatory model.

[2054] Returning to the defendant's submission, if the point is that there is a different standard of proof under s. 7 of the *Charter* between criminal proceedings and ones where complex social legislation is at issue, previous decisions appear to have taken a different view.

[2055] It may be recalled that in *Chaoulli* one of the differences between the majority and the minority was the significance to be given to the decision in *R. v. Morgentaler,* 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30. The minority distinguished that case as a criminal one (at para. 167). On the other hand Justices Major and Bastarache and Chief Justice McLachlin, three of the four majority justices, concluded that the fact *Morgentaler* was a criminal case was irrelevant (at para. 119). In a later judgment the Supreme Court of Canada took the same position as the majority justices in *Chaoulli*. They adopted the following from Professor Hamish Stewart: "... the principles of fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings. [Emphasis in original.]" (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 at para. 18, quoting Hamish Stewart, "Is Indefinite Detention of Terrorist Suspects Really Constitutional?" (2005), 54 *U.N.B.L.J.* 235 at p. 242).

[2056] Further, as the review of the jurisprudence above clearly shows, the Supreme Court of Canada has previously extended the reach of s. 7 to include state actions outside the criminal context that interfere with the right of individuals to life, liberty and security of the person (for example, *Chaoulli*). As stated in *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44, reasonable people can disagree about how drug addiction should be treated but in s. 7 cases the issue is "simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter"* (at para. 105).

[2057] I conclude that, whether a claimant is challenging the prostitution provisions in the *Criminal Code* (as in *Bedford*) or laws regulating the provision of healthcare (as in *Chaoulli*), the legal test under s. 7 is one and the same. More importantly, it seems to me that the principles of fundamental justice cannot mean one thing in a criminal case and then something else in, for example, a civil case.

[2058] Returning to the issue of deference, the Supreme Court of Canada stated in *Bedford* that deference can arise at the second stage of the s. 7 analysis under the principles of fundamental justice. It is not appropriate at the first stage of the s. 7 analysis because "deference cannot insulate legislation that creates serious harmful effects from the charge that they negatively impact security of the person under s. 7 of the *Charter*" (at para. 90).

[2059] Apart from that reference in *Bedford,* the authorities discuss deference in the context of s. 1 of the *Charter*. I adopt some of the discussion in those cases as applicable to deference under s. 7 of the *Charter*. I also note that there are significant differences between ss. 1 and 7, not least the fact that the onus of proof switches from the plaintiffs to the defendant under s. 1 only after an infringement of s. 7 has been established (*R. v. Malmo-Levine; R. v. Caine,* 2003 SCC 74 at para. 97). The onus lies with the applicants at all stages of the s. 7 analysis.

[2060] Looking at the s. 1 cases, in *Michaud* the Ontario Court of Appeal noted that deference to government varies with the social context because legislative solutions to social problems may be "incompletely understood" by the courts (at para. 105, quoting *RJR-MacDonald Inc. v. Canada (Attorney General),* 1995 CanLII 64 (SCC), [1995] 3 S.C.R.199 at para. 135). And in *Stoffman v. Vancouver General Hospital,* 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483 Justice La Forest discussed deference under s. 1. La Forest J. distinguished deference in the context of criminal cases where the state is the "singular antagonist" of the person whose rights have been violated from cases where legislation is being defended, which concern "the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources" (at pp 521-522; citing *Irwin Toy Ltd. v. Quebec (Attorney General*), 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927 at p. 994). In addition (at pp. 526-528):

> In approaching the question whether Regulation 5.04 and the policy by which it was implemented violated the respondents' s. 15 rights "as little as possible", I would reiterate what I have said above regarding the special considerations that apply in cases concerned with measures that relate directly to the allocation of resources or that attempt to strike a balance between competing social groups. In such cases, neither the experience of judges nor the institutional limitations of judicial decision making prepares a court to make a precise determination as to where the balance between legislative objective and the protection of individual or group rights and freedoms is to be drawn. As the majority of this Court observed in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 993:
>
> > ... in matching means to ends and asking whether rights or freedoms are impaired as little as possible, a legislature mediating between the claims of competing groups will be forced to strike a balance without the benefit of absolute certainty concerning how that balance is best struck.
>
> Accordingly, it is only appropriate that the courts have exhibited considerable flexibility in assessing legislation of this sort through the lens of s. 1 of the *Charter.* That is so not only out of recognition of the difficulty of the choice that has to be made but also because such legislation impacts on many different and interrelated aspects of society and government policy. It is also because there are inherent advantages in a democratic society of having representative institutions deal with matters such as the division of scarce social resources between competing groups. This was expressly recognized in *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*. There the majority put it this way, at pp. 993-94:
>
> > When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function. For example, when "regulating industry or business it is open to the legislature to restrict its legislative reforms to sectors in which there appear to be particularly urgent concerns or to constituencies that seem especially needy" (*Edwards Books and Art Ltd.*, *supra*, at p. 772).
>
> In short, as the Court went on to say, the question is whether the hospital authorities had *a* reasonable basis for concluding that it impaired the relevant right as little as possible in its attempts to achieve its pressing and substantial objectives. The following statement from *Irwin Toy Ltd. v. Quebec (Attorney General)*, *supra*, at p. 994, regarding the limitation of freedom of expression that was there in question is of general application:

> In the instant case, the Court is called upon to assess competing social science evidence respecting the appropriate means for addressing the problem of children's advertising. The question is whether the government had a reasonable basis, on the evidence tendered, for concluding that the ban on all advertising directed at children impaired freedom of expression as little as possible given the government's pressing and substantial objective. [Emphasis added.]
>
> [Emphasis in original.]

[2061] The complexity of some claims described in *Stoffman* is amply demonstrated in the subject claim. As will be seen below, in this litigation there are questions about the weighing of social and economic data which at times may even be contradictory. Such data is assessed and prioritized by government, which applies competing scientific theories and makes policy decisions about how best to balance conflicting interests and distribute limited public resources. Ultimately, as in the case of the *MPA*, this process ends up in legislation. I review below those policy issues in light of the expert evidence and the literature in areas such as health economics to assess whether there are rational connections between the purposes of the impugned provisions of the *MPA* and their effects.

[2062] A further complication is that, at the level of individual patients, medical judgements are made by physicians and others in the triaging process about prioritizing the care of a patient. This may result in another patient with a lower priority waiting longer for care. These are primarily medical issues and the courts are not qualified or authorized to decide them. Nor can the courts assess the broad range of patient circumstances in the context of limited resources to find the maximum benefit to society at large (paraphrasing *Irwin Toy* at pp. 993-994, cited in *Chaoulli* at para. 94). The role of the *MPA* is to regulate the policy issues underlying these matters so as to create a structure where medical needs are managed equitably and the ability to pay is not a consideration.

[2063] It seems to me that, generally, I should not be second-guessing the decisions of government as they affect healthcare policy. My role is to adjudicate individual rights under s. 7 of the *Charter*. I conclude that the legislative context and complexity of the healthcare system are relevant considerations which justify some level of deference to the Legislature in the context of the principles of fundamental justice analysis (*Safarzadeh-Markhali* at para. 57). This is not a matter of applying a distinction between laws and policies. It is a matter of recognizing the complexity of social programs. I emphasize that these limits on the court's competence do not alter the legal test or the analytical framework under s. 7 of the *Charter*.

[2064] Accordingly, I conclude that, given the nature of the legislative scheme being challenged by the plaintiffs in the case at bar, some deference must be applied to the government's assessment of the scientific evidence and theories at the second stage of the s. 7 analysis. This is especially true where the evidence suggests that there is scientific uncertainty and the need to engage in complex assessments of potential risks and benefits associated with different policy options.

O. ARBITRARINESS

(a) Introduction

[2065] In their claim the plaintiffs say that ss. 14, 17, 18 and 45 of the *MPA* deprive them of the right to use private medical services as an alternative to public healthcare, especially when faced with significant delays for care in the public system. They say this is a violation of s. 7 of the *Charter* which provides that "everyone has the right to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[2066] I have found above that the impugned provisions deprive some patients with deteriorating medical conditions of their right to security of the person by denying them the ability to access timely private medical services where the public system cannot meet their wait time benchmarks or priority codes associated with their individual diagnoses assigned to them by their treating physicians. This section considers whether that deprivation is in accordance with a principle of fundamental justice -- arbitrariness. The other principles of fundamental justice at issue in this case -- overbreadth and gross disproportionality -- are considered below.

[2067] In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, the Supreme Court of Canada described the arbitrariness analysis as follows:

> [111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.
>
> [Italics emphasis in original; underline emphasis added.]

[2068] In *Carter v. Canada*, 2015 SCC 5, the court described arbitrariness as follows (while citing *Bedford)*:

> [83] The principle of fundamental justice that forbids arbitrariness targets the situation where there is no rational connection between the object of the law and the limit it imposes on life, liberty or security of the person: *Bedford*, at para. 111. An arbitrary law is one that is not capable of fulfilling its objectives. It exacts a constitutional price in terms of rights, without furthering the public good that is said to be the object of the law.
>
> [Emphasis added.]

[2069] As can be seen, the court uses the phrases “no connection,” “direct connection” and “rational connection.” The intention of the court may have been to use these terms synonymously as they are used in the excerpt from *Bedford* above. The phrase “no connection” is arguably broader than “rational connection.”

[2070] But, it is difficult to think of a situation where there could be a direct connection between the object of a law and the s. 7 limits it imposes that is also an irrational connection. Or, that there is no rational connection but somehow there is still a connection sufficient to result in the law not being arbitrary. I am proceeding on the basis that there is little, if any, difference between these phrases.

[2071] In the context of the onus of proof, the need for a rational connection between the effects of the impugned provisions and the purpose of the impugned provisions does not mean that there is some onus on the defendant to prove the rationality of an effect; the onus is always on the plaintiffs to prove that there is no rational connection between the purpose or object of the impugned provisions and their effects.

[2072] Ultimately, as discussed above, the only question for determining whether the impugned provisions are arbitrary is whether their effects bear no rational connection to their legislative purpose. If there is any rational connection between the effects of the impugned provisions and their legislative purpose, then the impugned provisions are not arbitrary. In addition, inquiring into the effectiveness of the impugned provisions has no place at this stage of the analysis.

[2073] As discussed above, the analysis under s. 1 of the *Charter* also has a rational connection component and, as the Supreme Court of Canada has stated, it is “rooted in similar concerns” to the analysis under s. 7 (*Bedford* at para. 128). Nonetheless, ss. 1 and 7 ask different questions and the respective analyses under each are to be kept “analytically distinct” from each other (*Bedford* at paras. 126, 128). Societal interests are to be considered under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society (*R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933 at p. 977, quoted in *R. v. Malmo Levine; R. v. Caine*, 2003 SCC 74 at para. 98).

[2074] In this section I will consider whether there is no rational connection between the effects and the purposes of the impugned provisions. I will discuss some evidentiary issues that arise with respect to the rationales underlying the impugned provisions (i.e., the alleged rational connections between the purpose and effects). There is extensive literature on the health policy issues underlying the legal issues in this case and the evidence includes a large number of expert reports that discuss this literature. I have set out in broad terms the qualifications and opinions of the experts in Schedule IV and I will discuss some of the evidentiary issues arising from the expert evidence.

[2075] I will set out a general discussion of the healthcare policy issues the experts address which are not in dispute. I will then proceed to discuss the issues that are very much in dispute amongst the experts. I will conclude with a discussion of the evidence and conclusions from that evidence.

[2076] Finally, I note that in conducting this analysis I must bear in mind a degree of deference owed to the government at this stage of the analysis and under the specific circumstances of this case, as discussed above. This is especially true with respect to healthcare policy questions over which there is scientific uncertainty (*Bedford* at para. 90; *R. v. Safarzadeh-Markhali*, 2016 SCC 14 at para. 57; *Irwin Toy Ltd. v. Québec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927 at pp. 993-994).

(b) Purpose and effect

[2077] The arbitrariness analysis requires a comparison of the purpose or object of the challenged legislation and its effect or effects. I have discussed above the general purpose of the *MPA* and the purposes of the specific provisions that the plaintiffs challenge. I have also outlined the threefold effects of the impugned provisions. Here I am looking at the connection, if any, between the purposes and the effects of the impugned provisions.

[2078] As above, I have concluded that the purpose of the impugned provisions is twofold: to preserve and ensure the sustainability of a universal publicly funded and managed healthcare system which guarantees that access to all necessary medical care is based on need and not the ability to pay. In order to achieve these two interrelated objectives, the impugned provisions were introduced. The impugned provisions work to supress and discourage the emergence of a duplicative private healthcare system which would, according to the defendant, compete with the public system to its detriment and provide preferential care on the basis of an individual's ability to pay.

[2079] Turning to the specific provisions at issue here, as above, it is unclear how ss. 14, 18(1), and 18(2) are engaged in this case. Section 14 of the *MPA* provides for the billing and payment mechanism for enrolled physicians. Under s. 14, enrolled physicians may bill MSP directly or choose to opt out from MSP billing and bill patients directly instead. Sections 18(1) and 18(2) impose billing restrictions on unenrolled physicians, specifically prohibiting extra billing and user charges in excess of the MSP rate, only when the service is a benefit and provided at a publicly funded medical facility. As I have previously noted, there is no substantive discussion of these provisions in the plaintiffs' final argument. Further, no part of the plaintiffs' claim relates to restrictions on unenrolled physicians.

[2080] With respect to ss. 17 and 18(3), these provisions apply only to enrolled physicians and only when they are providing services that are considered benefits under the *MPA* to MSP beneficiaries. They prohibit physicians and third parties from imposing extra billing or user charges in connection with the rendering of a benefit. The purpose of these provisions is to ensure that MSP beneficiaries have access to medically necessary services based on need and not on their ability (or inability) to pay. The means chosen to achieve such purpose is to restrict charging patients any fees in excess of the MSP rates.

[2081] The purpose of s. 45 is to preserve and sustain a publicly financed and managed universal healthcare system where access, including access to funding of medically necessary care, is determined by need and not the ability to pay. The means chosen to achieve such purpose are to impose a prohibition against the sale of private health insurance for the coverage of medical services that constitute benefits under the *MPA*.

[2082] As described above, the overall effects of the provisions are threefold. The provisions make the emergence of a parallel private healthcare market for medically required services economically non-viable; they supress and discourage the emergence of a parallel private healthcare market that would presumably compete with the public system over the financing and provision of medically required care to MSP beneficiaries; and they create barriers for beneficiaries in terms of accessing private healthcare services outside of the public plan. The combined effect of the impugned provisions is, as described by the defendant, one of supressing and discouraging the emergence of a parallel duplicative private healthcare system for the financing and provision of necessary medical services to MSP beneficiaries.

(c) Connection or rational connection

[2083] The question to be addressed here is whether the plaintiffs have demonstrated that there is no rational connection between supressing and discouraging a duplicative private healthcare system and the purposes of the *MPA*. As set out above, this question, which guides the arbitrariness analysis, arises from the judgments in *Bedford* and *Carter*.

[2084] If the plaintiffs can demonstrate there is no connection or no rational connection, their claim succeeds on the issue of arbitrariness. I would then be required to look at whether that limit on s. 7 rights is justified under s. 1 of the *Charter*. If there is a connection or connections between the purposes and

effects, and the law is therefore not arbitrary, then I must proceed to the issues of overbreadth and gross disproportionality.

(d) Positions of the parties

[2085] The plaintiffs submit that the deprivation of their rights under s. 7 of the *Charter* is arbitrary because there is no connection between the effects of "essentially prohibiting" a duplicative private healthcare market and the purposes of preserving the universal public system, ensuring its sustainability and ensuring that care within the public system is allocated based on need and not the ability to pay. They rely heavily on the reasons of three of the seven justices of the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, for this proposition. They also rely on the fact that other OECD countries allow parallel private healthcare systems to co-exist alongside a universal public system. According to the plaintiffs, the experience in other countries demonstrates that a parallel private healthcare system is "perfectly compatible" with a universal publicly funded system.

[2086] The defendant, on the other hand, submits that the effects of the impugned provisions are strongly connected to the objectives of preserving the universal public system and its sustainability as well as ensuring that access to necessary medical care for MSP beneficiaries is provided on the basis of need and not ability to pay. The defendant further argues that the experience in other jurisdictions only supports the rational connection between the effects of the impugned provisions and their objectives. According to the defendant, the experience in other jurisdictions also demonstrates the potential harms of a duplicative private healthcare system in terms of both equity and the sustainability of the public system. The defendant submits that the evidence is that those who would suffer the most if the impugned provisions are struck, are segments of the population with the greatest healthcare needs. They are unlikely to benefit from a duplicative private healthcare system because of their income/socioeconomic status or their pre-existing medical conditions.

[2087] Ultimately, it is for the plaintiffs to demonstrate that there is no rational connection between the purpose and effects of the impugned provisions. Another way of putting this is that the plaintiffs must show that the rationales behind the impugned provisions (i.e., the alleged rational connection between the purposes and effects), including those articulated by the defendant, are in some sense invalid or irrational. One way of doing so is by showing that the assumptions underlying the rationales for the impugned provisions are incorrect.

[2088] Indeed, this is how the plaintiffs have presented their case. For example, the defendant submits that allowing a duplicative private healthcare market to exist would lead to diversion of resources, namely physicians, from the public system to the private system. The assumption behind this argument is that such a diversion of resources would harm the public system and patients who depend on the public system. The plaintiffs argue in response that there is no empirical evidence that resources in the public system would decrease as a result of permitting duplicative private healthcare. And, in any event, the plaintiffs say as long as overall supply of healthcare, both public and private is increased, then overall healthcare is improved. Therefore, according to the plaintiffs, prohibiting the emergence of a duplicative private healthcare market is not in line with the purpose of the *MPA*. As will be seen there is expert evidence on this and other issues.

[2089] As this example shows, these divergent perspectives reflect not only conflicting interpretations of the empirical evidence considered by the experts but also, at times, fundamentally different approaches to healthcare economics and policy. As part of assessing the rationales of the impugned provisions, I am mindful that the court must be cautious in engaging in an analysis of policy issues. The court does not have the authority nor the competence to design healthcare policy or determine which policy approach makes most sense or is preferable. That is the responsibility of government. When approaching the expert and lay evidence about the rationales underlying the impugned provisions of the *MPA*, I am only determining whether the effects of the provisions are rationally connected to their purposes.

[2090] The disputes between the parties about arbitrariness and the application of healthcare economics and policy includes differing approaches to the evidence on those issues. I next turn to those evidentiary issues.

(e) Evidentiary issues

[2091] As general evidentiary context, given that what the plaintiffs seek to achieve is a reality that has not existed in British Columbia, there are no direct empirical studies or research that determine the likely effects of striking down the impugned provisions. There has been very limited private and illegal

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Date:	2013-12-20
File number:	34788
Other citations:	[2013] ACS no 72 — [2013] FCJ No 72 (QL) — [2013] SCJ No 72 (QL) — [2013] CarswellOnt 17681 — JE 2014-21 — 110 WCB (2d) 753 — 297 CRR (2d) 334 — 303 CCC (3d) 146 — 303 CCC (3d) 3 — 7 CR (7th) 1 — [2014] EXP 30 — 312 OAC 53 — 366 DLR (4th) 237 — 452 NR 1
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Most recent unfavourable mention:	R. v. Albashir, 2021 SCC 48 (CanLII) […] The liberty of these accused is put in jeopardy, **despite the finding in Bedford** that this aspect of the living on the avails offence bears no relation to its purpose. […]

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

DATE: 20131220
DOCKET: 34788

BETWEEN:

Attorney General of Canada
Appellant/Respondent on cross-appeal
and
Terri Jean Bedford, Amy Lebovitch and Valerie Scott
Respondents/Appellants on cross-appeal

AND BETWEEN:

Attorney General of Ontario
Appellant/Respondent on cross-appeal
and
Terri Jean Bedford, Amy Lebovitch and Valerie Scott
Respondents/Appellants on cross-appeal

- and -

Attorney General of Quebec, Pivot Legal Society, Downtown Eastside Sex Workers United Against Violence Society, PACE Society, Secretariat of the Joint United Nations Programme on HIV/AIDS, British Columbia Civil Liberties Association, Evangelical Fellowship of Canada, Canadian HIV/AIDS Legal Network, British Columbia Centre for Excellence in HIV/AIDS, HIV & AIDS Legal Clinic Ontario, Canadian Association of Sexual Assault Centres, Native Women's Association of Canada, Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society, Christian Legal Fellowship, Catholic Civil Rights League, REAL Women of Canada, David Asper Centre for Constitutional Rights, Simone de Beauvoir Institute, AWCEP Asian

Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc.
Interveners

CORAM: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

REASONS FOR JUDGMENT: McLachlin C.J. (LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring)
(paras. 1 to 169)

Canada (Attorney General) *v.* Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101

Attorney General of Canada *Appellant/Respondent on cross-appeal*

v.

Terri Jean Bedford,
Amy Lebovitch and
Valerie Scott *Respondents/Appellants on cross-appeal*

- and -

Attorney General of Ontario *Appellant/Respondent on cross-appeal*

v.

Terri Jean Bedford,
Amy Lebovitch and
Valerie Scott *Respondents/Appellants on cross-appeal*

and

Attorney General of Quebec,
Pivot Legal Society,
Downtown Eastside Sex Workers United Against Violence Society,
PACE Society,
Secretariat of the Joint United Nations Programme on HIV/AIDS,
British Columbia Civil Liberties Association,
Evangelical Fellowship of Canada,
Canadian HIV/AIDS Legal Network,
British Columbia Centre for Excellence in HIV/AIDS,
HIV & AIDS Legal Clinic Ontario,
Canadian Association of Sexual Assault Centres,
Native Women's Association of Canada,
Canadian Association of Elizabeth Fry Societies,
Action ontarienne contre la violence faite aux femmes,
Concertation des luttes contre l'exploitation sexuelle,

Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel, Vancouver Rape Relief Society,
Christian Legal Fellowship, Catholic Civil Rights League,
REAL Women of Canada,
David Asper Centre for Constitutional Rights,
Simone de Beauvoir Institute,
AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution and Aboriginal Legal Services of Toronto Inc. *Interveners*

Indexed as: Canada (Attorney General) *v.* Bedford

2013 SCC 72

File No.: 34788.

2013: June 13; 2013: December 20.[*]

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law — Charter of Rights — Right to security of person — Freedom of expression — Criminal law — Prostitution — Common bawdy-house — Living on avails of prostitution — Communicating in public for purposes of prostitution — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Prostitutes alleging impugned provisions violate s. 7 security of the person rights by preventing implementation of safety measures that could protect them from violent clients — Prostitutes also alleging prohibition on communicating in public for purposes of prostitution infringes freedom of expression guarantee — Canadian Charter of Rights and Freedoms, ss. 1, 2(b), 7 — Criminal Code, R.S.C. 1985, c. C-46, ss. 197(1), 210, 212(1)(j), 213(1)(c).

Courts — Decisions — Stare decisis — Standard of review — Prostitutes challenging constitutionality of prohibitions on bawdy-houses, living on avails of prostitution and communicating in public for purposes of prostitution under Criminal Code — Under what circumstances application judge could revisit conclusions of Supreme Court of Canada in Prostitution Reference which upheld bawdy-house and communicating prohibitions — Degree of deference owed to application judge's findings on social and legislative facts.

B, L and S, current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, which criminalize various activities related to prostitution, infringe their rights under s. 7 of the *Charter*: s. 210 makes it an offence to keep or be in a bawdy-house; s. 212(1)(*j*) prohibits living on the avails of prostitution; and, s. 213(1)(*c*) prohibits communicating in public for the purposes of prostitution. They argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, by preventing them from implementing certain safety measures — such as hiring security guards or "screening" potential clients — that could protect them from violence. B, L and S also alleged that s. 213(1)(*c*) infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

The Ontario Superior Court of Justice granted the application, declaring, without suspension, that each of the impugned *Criminal Code* provisions violated the *Charter* and could not be saved by s. 1. The Ontario Court of Appeal agreed s. 210 was unconstitutional and struck the word "prostitution" from the definition of "common bawdy-house" as it applies to s. 210, however it suspended the declaration of invalidity for 12 months. The court declared that s. 212(1)(*j*) was an unjustifiable violation of s. 7, ordering the reading in of words to clarify that the prohibition on living on the avails of prostitution applies only to those who do so "in circumstances of exploitation". It further held the communicating prohibition under s. 213(1)(*c*) did not violate either s. 2(*b*) or s. 7.

The Attorneys General appeal from the declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. B, L and S cross-appeal on the constitutionality of s. 213(1)(*c*) and in respect of the s. 210 remedy.

Held: The appeals should be dismissed and the cross-appeal allowed. Sections 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) of the *Criminal Code* are declared to be inconsistent with the *Charter*. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only. The declaration of invalidity should be suspended for one year.

The three impugned provisions, primarily concerned with preventing public nuisance as well as the exploitation of prostitutes, do not pass *Charter* muster: they infringe the s. 7 rights of prostitutes by depriving them of security of the person in a manner that is not in accordance with the principles of fundamental justice. It is not necessary to determine whether this Court should depart from or revisit its conclusion in the *Prostitution Reference* that s. 213(1)(*c*) does not violate s. 2(*b*) since it is possible to resolve this case entirely on s. 7 grounds.

The common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. However, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. The threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. In this case, the application judge was entitled to rule on the new legal issues of whether the laws in question violated the security of the person interests under s. 7, as the majority decision of this Court in the *Prostitution Reference* was based on the s. 7 physical liberty interest alone. Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years. The application judge was not, however, entitled to decide the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference* and was binding on her.

The application judge's findings on social and legislative facts are entitled to deference. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

The impugned laws negatively impact security of the person rights of prostitutes and thus engage s. 7. The proper standard of causation is a flexible "sufficient causal connection" standard, as correctly adopted by the application judge. The prohibitions all heighten the risks the applicants face in prostitution — itself a legal activity. They do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks. That causal connection is not negated by the actions of third-party johns and pimps, or prostitutes' so-called choice to engage in prostitution. While some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Moreover, it makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

The applicants have also established that the deprivation of their security of the person is not in accordance with the principles of fundamental justice: principles that attempt to capture basic values underpinning our constitutional order. This case concerns the basic values against arbitrariness (where there is *no connection* between the effect and the object of the law), overbreadth (where the law goes too far and interferes with *some* conduct that bears no connection to its objective), and gross disproportionality (where the effect of the law is grossly disproportionate to the state's objective). These are three distinct principles, but overbreadth is related to arbitrariness, in that the question for both is whether there is no connection between the law's effect and its objective. All three principles compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness; they do not look to how well the law achieves its object, or to how much of the population the law benefits or is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

Applying these principles to the impugned provisions, the negative impact of the bawdy-house prohibition (s. 210) on the applicants' security of the person is grossly disproportionate to its objective of

preventing public nuisance. The harms to prostitutes identified by the courts below, such as being prevented from working in safer fixed indoor locations and from resorting to safe houses, are grossly disproportionate to the deterrence of community disruption. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. Second, the purpose of the living on the avails of prostitution prohibition in s. 212(1)(*j*) is to target pimps and the parasitic, exploitative conduct in which they engage. The law, however, punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes and those who could increase the safety and security of prostitutes, for example, legitimate drivers, managers, or bodyguards. It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes *some* conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is consequently overbroad. Third, the purpose of the communicating prohibition in s. 213(1)(*c*) is not to eliminate street prostitution for its own sake, but to take prostitution off the streets and out of public view in order to prevent the nuisances that street prostitution can cause. The provision's negative impact on the safety and lives of street prostitutes, who are prevented by the communicating prohibition from screening potential clients for intoxication and propensity to violence, is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

While the Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1, some of their arguments under s. 7 are properly addressed at this stage of the analysis. In particular, they attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships. The impugned laws are not saved by s. 1.

Concluding that each of the challenged provisions violates the *Charter* does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime. Considering all the interests at stake, the declaration of invalidity should be suspended for one year.

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Referred to: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458; *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330; *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *R. v. Pierce* (1982), 1982 CanLII 2153 (ON CA), 37 O.R. (2d) 721; *R. v. Worthington* (1972), 1972 CanLII 1334 (ON CA), 10 C.C.C. (2d) 311; *R. v. Downey*, 1992 CanLII 109 (SCC), [1992] 2 S.C.R. 10; *R. v. Grilo* (1991), 1991 CanLII 7241 (ON CA), 2 O.R. (3d) 514; *R. v. Barrow* (2001), 2001 CanLII 8550 (ON CA), 54 O.R. (3d) 417; *R. v. Head* (1987), 1987 CanLII 2823 (BC CA), 59 C.R. (3d) 80; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555; *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57; *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735; *Rockert v. The Queen*, 1978 CanLII 31 (SCC), [1978] 2 S.C.R. 704; *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731; *Shaw v. Director of Public Prosecutions*, [1962] A.C. 220; *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679.

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APPEALS and CROSS-APPEAL from a judgment of the Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.), 2012 ONCA 186, 109 O.R. (3d) 1, 290 O.A.C. 236, 346 D.L.R. (4th) 385, 282 C.C.C. (3d) 1, 256 C.R.R. (2d) 143, 91 C.R. (6th) 257, [2012] O.J. No. 1296 (QL), 2012 CarswellOnt 3557, affirming in part a decision of Himel J., 2010 ONSC 4264, 102 O.R. (3d) 321, 327 D.L.R. (4th) 52, 262 C.C.C. (3d) 129, 217 C.R.R. (2d) 1, 80 C.R. (6th) 256, [2010] O.J. No. 4057 (QL), 2010 CarswellOnt 7249. Appeals dismissed and cross-appeal allowed.

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Brent B. Olthuis, *Megan Vis-Dunbar* and *Michael Sobkin*, for the intervener the British Columbia Civil Liberties Association.

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Janine Benedet and *Fay Faraday*, for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society.

Robert W. Staley, *Ranjan K. Agarwal* and *Amanda C. McLachlan*, for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada.

Joseph J. Arvay, *Q.C.*, and *Cheryl Milne*, for the intervener the David Asper Centre for Constitutional Rights.

Walid Hijazi, for the intervener the Simone de Beauvoir Institute.

Gwendoline Allison, for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution.

Christa Big Canoe and *Emily R. Hill*, for the intervener Aboriginal Legal Services of Toronto Inc.

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V..... Result and Remedy

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — It is not a crime in Canada to sell sex for money. However, it is a crime to keep a bawdy-house, to live on the avails of prostitution or to communicate in public with respect to a proposed act of prostitution. It is argued that these restrictions on prostitution put the safety and lives of prostitutes at risk, and are therefore unconstitutional.

[2] These appeals and the cross-appeal are not about whether prostitution should be legal or not. They are about whether the laws Parliament has enacted on how prostitution may be carried out pass constitutional muster. I conclude that they do not. I would therefore make a suspended declaration of invalidity, returning the question of how to deal with prostitution to Parliament.

I. The Case

[3] Three applicants, all current or former prostitutes, brought an application seeking declarations that three provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, are unconstitutional.

[4] The three impugned provisions criminalize various activities related to prostitution. They are primarily concerned with preventing public nuisance, as well as the exploitation of prostitutes. Section 210 makes it an offence to be an inmate of a bawdy-house, to be found in a bawdy-house without lawful excuse, or to be an owner, landlord, lessor, tenant, or occupier of a place who knowingly permits it to be used as a bawdy-house. Section 212(1)(*j*) makes it an offence to live on the avails of another's prostitution. Section 213(1)(*c*) makes it an offence to either stop or attempt to stop, or communicate or attempt to communicate with, someone in a public place for the purpose of engaging in prostitution or hiring a prostitute.

[5] However, prostitution itself is not illegal. It is not against the law to exchange sex for money. Under the existing regime, Parliament has confined lawful prostitution to two categories: street prostitution and "out-calls" — where the prostitute goes out and meets the client at a designated location, such as the client's home. This reflects a policy choice on Parliament's part. Parliament is not precluded from imposing limits on where and how prostitution may be conducted, as long as it does so in a way that does not infringe the constitutional rights of prostitutes.

[6] The applicants allege that all three provisions infringe s. 7 of the *Canadian Charter of Rights and Freedoms* by preventing prostitutes from implementing certain safety measures — such as hiring security

guards or "screening" potential clients — that could protect them from violent clients. The applicants also allege that s. 213(1)(*c*) infringes s. 2(*b*) of the *Charter*, and that none of the provisions are saved under s. 1.

[7] The backgrounds of the three applicants as revealed in their evidence were reviewed in the application judge's decision (2010 ONSC 4264, 102 O.R. (3d) 321).

[8] Terri Jean Bedford was born in Collingwood, Ontario, in 1959, and as of 2010 had 14 years of experience working as a prostitute in various Canadian cities. She worked as a street prostitute, a massage parlour attendant, an escort, an owner and manager of an escort agency, and a dominatrix. Ms. Bedford had a difficult childhood and adolescence during which she was subjected to various types of abuse. She also encountered brutal violence throughout her career — largely, she stated, while working on the street. In her experience, indoor prostitution is safer than prostitution on the street, although she conceded that safety of an indoor location can vary. Ms. Bedford has been convicted of both keeping and being an inmate of a common bawdy-house, for which she has paid a number of fines and served 15 months in jail.

[9] When she ran an escort service in the 1980s, Ms. Bedford instituted various safety measures, including: ensuring someone else was on location during in-calls, except during appointments with well-known clients; ensuring that women were taken to and from out-call appointments by a boyfriend, husband, or professional driver; if an appointment was at a hotel, calling the hotel to verify the client's name and hotel room number; if an appointment was at a client's home, calling the client's phone to ensure it was the correct number; turning down appointments from clients who sounded intoxicated; and verifying that credit card numbers matched the names of clients. She claimed she was not aware of any incidents of violence by the clientele towards her employees during that time. At some point in the 1990s, Ms. Bedford ran the Bondage Bungalow, where she offered dominatrix services. She also instituted various safety measures at this establishment, and claimed she only experienced one incident of "real violence" (application decision, at para. 30).

[10] Ms. Bedford is not currently working in prostitution but asserted that she would like to return to working as a dominatrix in a secure, indoor location; however, she is concerned that in doing so, she would be exposed to criminal liability. Furthermore, she does not want the people assisting her to be subject to criminal liability due to the living on the avails of prostitution provision.

[11] Amy Lebovitch was born in Montréal in 1979. She comes from a stable background and attended both CEGEP and university. She currently works as a prostitute and has done so since approximately 1997 in various cities in Canada. She worked first as a street prostitute, then as an escort, and later in a fetish house. Ms. Lebovitch considers herself lucky that she was never subjected to violence during her years working on the streets. She moved off the streets to work at the escort agency after seeing other women's injuries and hearing stories of the violence suffered by other street prostitutes. Ms. Lebovitch maintains that she felt safer in an indoor location; she attributed remaining safety issues mainly to poor management. Ms. Lebovitch experienced one notable instance of violence, which she did not report to the police out of fear of police scrutiny and the possibility of criminal charges.

[12] Presently, Ms. Lebovitch primarily works independently out of her home, where she takes various safety precautions, including: making sure client telephone calls are from unblocked numbers; not taking calls from clients who sound drunk, high, or in another manner undesirable; asking for expectations upfront; taking clients' full names and verifying them using directory assistance; getting referrals from regular clients; and calling a third party — her "safe call" — when the client arrives and before he leaves. Ms. Lebovitch fears being charged and convicted under the bawdy-house provisions and the consequent possibility of forfeiture of her home. She says that the fear of criminal charges has caused her to work on the street on occasion. She is also concerned that her partner will be charged with living on the avails of prostitution. She has never been charged with a criminal offence of any kind. Ms. Lebovitch volunteers as the spokesperson for Sex Professionals of Canada ("SPOC"), and she also records information from women calling to report "bad dates" — incidents that ended in violence or theft. Ms. Lebovitch stated that she enjoys her job and does not plan to leave it in the foreseeable future.

[13] Valerie Scott was born in Moncton, New Brunswick, in 1958. She is currently the executive director of SPOC, and she no longer works as a prostitute. In the past, she worked indoors, from her home or in hotel rooms; she also worked as a prostitute on the street, in massage parlours, and she ran a small escort business. She has never been charged with a criminal offence of any kind. When Ms. Scott worked from home, she would screen new clients by meeting them in public locations. She never experienced significant harm working from

home. Around 1984, as awareness about HIV/AIDS increased, Ms. Scott was compelled to work as a street prostitute, since indoor clients felt entitled not to wear condoms. On the street, she was subjected to threats of violence, as well as verbal and physical abuse. Ms. Scott described some precautions street prostitutes took prior to the enactment of the communicating law, including working in pairs or threes and having another prostitute visibly write down the client's licence plate number, so he would know he was traceable if something was to go wrong.

[14] Ms. Scott worked as an activist and, among other things, advocated against Bill C-49 (which included the current communicating provision). Ms. Scott stated that following the enactment of the communicating law, the Canadian Organization for the Rights of Prostitutes ("CORP") began receiving calls from women working in prostitution about the increased enforcement of the laws and the prevalence of bad dates. In response, Ms. Scott was involved in setting up a drop-in and phone centre for prostitutes in Toronto; within the first year, Ms. Scott spoke to approximately 250 prostitutes whose main concerns were client violence and legal matters arising from arrest. In 2000, Ms. Scott formed SPOC to revitalize and continue the work previously done by CORP. As the executive director of this organization, she testified before a Parliamentary Subcommittee on Solicitation Laws in 2005. Over the years, Ms. Scott estimates that she has spoken with approximately 1,500 women working in prostitution. If this challenge is successful, Ms. Scott would like to operate an indoor prostitution business. While she recognizes that clients may be dangerous in both outdoor and indoor locations, she would institute safety precautions such as checking identification of clients, making sure other people are close by during appointments to intervene if needed, and hiring a bodyguard.

[15] The three applicants applied pursuant to rule 14.05(3)(g.1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, for an order that the provisions restricting prostitution are unconstitutional. The evidentiary record consists of over 25,000 pages of evidence in 88 volumes. The affidavit evidence was accompanied by a large volume of studies, reports, newspaper articles, legislation, Hansard and many other documents. Some of the affiants were cross-examined.

II. Legislation

[16] The relevant legislation is as follows:

Canadian Charter of Rights and Freedoms

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
>
> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Criminal Code

> **197.** (1) In this Part,
>
> . . .
>
> "common bawdy-house" means a place that is
>
> (*a*) kept or occupied, or

(*b*) resorted to by one or more persons

for the purpose of prostitution or the practice of acts of indecency;

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

(2) Every one who

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

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

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

is guilty of an offence punishable on summary conviction.

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

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

212. (1) Every one who

. . .

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

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

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

. . .

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

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

III. Prior Decisions

A. *Ontario Superior Court of Justice (Himel J.)*

[17] The application judge, Himel J., concluded that the applicants had private interest standing to challenge the provisions. She held that the decision of this Court upholding the bawdy-house and communicating law in the *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 ("*Prostitution Reference*"), did not prevent her from reviewing their constitutionality because: (1) s. 7 jurisprudence has evolved considerably since 1990; in particular, the doctrines of arbitrariness, overbreadth and gross disproportionality had not yet been fully articulated and therefore were not argued or considered in the

Prostitution Reference; (2) the evidentiary record before her was much richer, based on research not available in 1990; (3) the social, political and economic assumptions underlying the *Prostitution Reference* may no longer be valid; and (4) the type of expression at issue differed from that considered in the *Prostitution Reference*.

[18] In considering the legislative scheme as it exists and the evidence before her, Himel J. found that each of the impugned laws deprived the applicants and others like them of their liberty (by reason of potential imprisonment) and their security of the person (because they increased the risk of injury). The increased risk of violence created by the laws constituted a "sufficient" cause, engaging the security of the person protected by s. 7. She stated:

> With respect to s. 210, the evidence suggests that working in-call is the safest way to sell sex; yet, prostitutes who attempt to increase their level of safety by working in-call face criminal sanction. With respect to s. 212(1)(*j*), prostitution, including legal out-call work, may be made less dangerous if a prostitute is allowed to hire an assistant or a bodyguard; yet, such business relationships are illegal due to the living on the avails of prostitution provision. Finally, s. 213(1)(*c*) prohibits street prostitutes, who are largely the most vulnerable prostitutes and face an alarming amount of violence, from screening clients at an early, and crucial stage of a potential transaction, thereby putting them at an increased risk of violence.
>
> In conclusion, these three provisions prevent prostitutes from taking precautions, some extremely rudimentary, that can decrease the risk of violence towards them. Prostitutes are faced with deciding between their liberty and their security of the person. Thus, while it is ultimately the client who inflicts violence upon a prostitute, in my view the law plays a sufficient contributory role in preventing a prostitute from taking steps that could reduce the risk of such violence. [paras. 361-62]

[19] Himel J. concluded that the deprivation of security thus established was not in accordance with the principles of fundamental justice, notably the requirements that laws not infringe security of the person in a way that is arbitrary, overbroad or grossly disproportionate.

[20] Himel J. found the bawdy-house provision (s. 210) overbroad because it extended to virtually any place and allowed for convictions that were unrelated to the objective of preventing community nuisance. And the harms it inflicted were grossly disproportionate to the few nuisance complaints received. The effect of preventing prostitutes from working in-call at a regular indoor location was to force them to choose between their liberty interest (obeying the law) and their personal security.

[21] Himel J. found the prohibition against living on the avails of prostitution (s. 212(1)(*j*)) arbitrary, overbroad and grossly disproportionate. While targeting exploitation by pimps, the provision encompasses virtually anyone who provides services to prostitutes. Prostitutes are forced to work alone, increasing the risk of harm, or work with people prepared to break the law. It increases reliance on pimps, and is therefore arbitrary. It catches non-exploitative relationships, and is therefore overbroad. And it creates the risk of severe violence from pimps and exploiters, making it grossly disproportionate.

[22] Finally, Himel J. found the prohibition on communicating for the purposes of prostitution (s. 213(1)(*c*)) violates the principle against gross disproportionality. By preventing prostitutes from screening clients — an essential tool for enhancing their safety — it endangers them out of all proportion to the small social benefit it provides. It also infringes the freedom of expression guarantee under s. 2(*b*) of the *Charter*.

[23] Himel J. found that the infringement of the s. 7 and s. 2(*b*) rights imposed by the laws could not be justified under s. 1 of the *Charter*.

[24] In the result, Himel J. declared the communicating and living on the avails offences unconstitutional, without suspension, and rectified the bawdy-house prohibition by striking the word "prostitution" from the definition of "common bawdy-house" in s. 197(1) as it applies to s. 210.

B. *Ontario Court of Appeal (Doherty, Rosenberg, Feldman, MacPherson and Cronk JJ.A.)*

[25] The majority of the Court of Appeal, *per* Doherty, Rosenberg and Feldman J.J.A. (with whom the minority *per* MacPherson J.A. concurred on these issues), agreed with the application judge that the bawdy-house and living on the avails provisions were unconstitutional on the basis that they engaged the security of the person in a way that was not in accordance with the principles of fundamental justice (2012 ONCA 186, 109 O.R. (3d) 1). In particular, the majority found as follows.

[26] The prohibition on bawdy-houses was overbroad and had an impact on security that was grossly disproportionate to any benefit conferred. The court agreed that the word "prostitution" should be struck from the definition of "common bawdy-house". However, it suspended the declaration of invalidity for 12 months.

[27] The prohibition on living on the avails was not arbitrary, as the application judge found, but was overbroad and grossly disproportionate in its effects. However, instead of striking the provision out, the court narrowed the provision by reading in "in circumstances of exploitation" (para. 267).

[28] The majority of the Court of Appeal found the prohibition on communicating in public for the purpose of prostitution was constitutional. While it engaged security of the person, it did so in accordance with the principles of fundamental justice. The provision aims to combat nuisance-related problems caused by street solicitation. It is not arbitrary; it has been effective in protecting residential neighbourhoods from the targeted harms. Nor is it overbroad or grossly disproportionate. In finding the provision grossly disproportionate, the application judge erred by understating the objective in a way that did not reflect the evidence, and by over-emphasizing the impact of the provision on prostitutes' security of the person. The evidence did not establish that inability to communicate with customers contributed to the harm experienced by prostitutes to a degree that made the impact grossly disproportionate to the benefits. The majority also found that it was bound by the *Prostitution Reference*: thus, this provision violated s. 2(*b*) of the *Charter*, but was justified under s. 1 of the *Charter*.

[29] The minority, *per* MacPherson J.A. (dissenting only on this one issue), would have struck down the communicating prohibition under ss. 7 and 1 of the *Charter* as grossly disproportionate to the legislative objective of combatting social nuisance. The minority found that: (1) its effects were equally or more serious than the other provision; (2) the application judge correctly stated the objective of the provision; (3) the record supported the conclusion that screening is an essential tool for safety; (4) beyond screening, the provision adversely impacts safety by forcing prostitutes to work in isolated and dangerous areas; (5) the provision impacts the most vulnerable class of prostitutes, street workers, raising s. 15 equality concerns; (6) the recent decision of this Court in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, supports the conclusion that the provision violates s. 7; and (7) the compounding effect of legislation that drives prostitutes onto the streets and then denies them the ability to evaluate prospective clients supports unconstitutionality. This conclusion made it unnecessary for the minority to consider s. 2(*b*) of the *Charter*.

[30] In the course of arriving at its conclusions, the majority of the Court of Appeal made a number of ancillary observations of importance.

[31] In considering the doctrine of *stare decisis* and whether the application judge was bound by the *Prostitution Reference*, the court adopted a narrow view of when a trial judge can reconsider previous decisions of the Supreme Court of Canada on the basis of changes in the social, economic or political landscapes: the trial judge cannot change the law, but is limited to making findings of fact and credibility to create the necessary evidentiary record which the Supreme Court of Canada can then consider. Reasons that justify a court departing from its own prior decisions cannot justify a lower court revisiting binding authority. This applies to determining what constitutes a reasonable limit on a right under s. 1 of the *Charter* (paras. 75-76).

[32] On the standard of causation required to engage s. 7, the Court of Appeal held that the traditional causation analysis is inappropriate where it is legislation, and not the actions of a government official, that is said to have interfered with a s. 7 interest. Rather, the judge should conduct a practical, pragmatic analysis to determine what the legislation prohibits or requires, its impact on the persons affected, and whether this amounts to an interference with protected rights (paras. 107-9).

[33] On the issue of deference to findings of fact of the application judge, the Court of Appeal held that findings on social and legislative facts are not entitled to appellate deference, while findings on the credibility of affiants and the objectivity of expert witnesses attract deference (paras. 128-31).

[34] Regarding the purpose of the laws, the court rejected the Attorney General of Ontario's submission that there was an overarching legislative objective to eradicate, or at least discourage, prostitution. Rather, the purpose of each of the laws must be independently ascertained with reference to its unique historical context (paras. 165-70).

[35] On the principles of fundamental justice, the Court of Appeal held that arbitrariness, overbreadth, and gross disproportionality each use a different filter to examine the connection between the law and the legislative objective. Arbitrariness is the absence of any link between the objective of the law and its negative impact on security of the person. Overbreadth addresses the situation where the law imposes limits on security of the person that go beyond what is required to achieve its objective. Gross disproportionality describes the case where the effects of the impugned law are so extreme that they cannot be justified by its object (paras. 143-49).

IV. Discussion

[36] The appellant Attorneys General appeal from the Court of Appeal's declaration that ss. 210 and 212(1)(*j*) of the *Code* are unconstitutional. The respondents cross-appeal on the issue of the constitutionality of s. 213(1)(*c*), and in respect of the Court of Appeal's remedy to resolve the unconstitutionality of s. 210.

[37] Before turning to the *Charter* arguments before us, I will first discuss two preliminary issues: (1) whether the 1990 decision in the *Prostitution Reference*, upholding the bawdy-house and communication prohibitions, is binding on trial judges and this Court; and (2) the degree of deference to be accorded to the application judge's findings on social and legislative facts.

A. *Preliminary Issues*

(1) Revisiting the *Prostitution Reference*

[38] Certainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies.

[39] The issue of when, if ever, such precedents may be departed from takes two forms. The first "vertical" question is when, if ever, a lower court may depart from a precedent established by a higher court. The second "horizontal" question is when a court such as the Supreme Court of Canada may depart from its own precedents.

[40] In this case, the precedent in question is the Supreme Court of Canada's 1990 advisory opinion in the *Prostitution Reference*, which upheld the constitutionality of the prohibitions on bawdy-houses and communicating — two of the three provisions challenged in this case. The questions in that case were whether the laws infringed s. 7 or s. 2(*b*) of the *Charter*, and, if so, whether the limit was justified under s. 1. The Court concluded that neither of the impugned laws were inconsistent with s. 7, and that although the communicating law infringed s. 2(*b*), it was a justifiable limit under s. 1 of the *Charter*. While reference opinions may not be legally binding, in practice they have been followed (G. Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960), 6 *McGill L.J.* 168, at p. 175).

[41] The application judge in this case held that she could revisit those conclusions because: the legal issues under s. 7 were different, in light of the evolution of the law in that area; the evidentiary record was richer and provided research not available in 1990; the social, political and economic assumptions underlying the *Prostitution Reference* no longer applied; and the type of expression at issue in that case (commercial expression) differed from the expression at issue in this case (expression promoting safety). The Court of Appeal disagreed with respect to the s. 2(*b*) issue, holding that a trial judge asked to depart from a precedent on the basis of new evidence, or new social, political or economic assumptions, may make findings of fact for consideration by the higher courts, but cannot apply them to arrive at a different conclusion from the previous precedent (para. 76).

[42] In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new

legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).

[44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

[45] It follows that the application judge in this case was entitled to rule on whether the laws in question violated the security of the person interests under s. 7 of the *Charter*. In the *Prostitution Reference*, the majority decision was based on the s. 7 physical liberty interest alone. Only Lamer J., writing for himself, touched on security of the person — and then, only in the context of economic interests. Contrary to the submission of the Attorney General of Canada, whether the s. 7 interest at issue is economic liberty or security of the person is *not* "a distinction without a difference" (A.F., at para. 94). The rights protected by s. 7 are "independent interests, each of which must be given independent significance by the Court" (*R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 52). Furthermore, the principles of fundamental justice considered in the *Prostitution Reference* dealt with vagueness and the permissibility of indirect criminalization. The principles raised in this case — arbitrariness, overbreadth, and gross disproportionality — have, to a large extent, developed only in the last 20 years.

[46] These considerations do not apply to the question of whether the communication provision is a justified limit on freedom of expression. That issue was decided in the *Prostitution Reference*. Re-characterizing the type of expression alleged to be infringed did not convert this argument into a new legal issue, nor did the more current evidentiary record or the shift in attitudes and perspectives amount to a change in the circumstances or evidence that fundamentally shifted the parameters of the debate.

[47] This brings me to the question of whether this Court should depart from its previous decision on the s. 2(*b*) aspect of this case. At heart, this is a balancing exercise, in which the Court must weigh correctness against certainty (*Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at para. 27). In this case, however, it is not necessary to determine whether this Court can depart from its s. 2(*b*) conclusion in the *Prostitution Reference*, since it is possible to resolve the case entirely on s. 7 grounds.

(2) Deference to the Application Judge's Findings on Social and Legislative Facts

[48] The Court of Appeal held that the application judge's findings on social and legislative facts — that is, facts about society at large, established by complex social science evidence — were not entitled to deference. With respect, I cannot agree. As this Court stated in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, appellate courts should not interfere with a trial judge's findings of fact, absent a palpable and overriding error.

[49] When social and legislative evidence is put before a judge of first instance, the judge's duty is to evaluate and weigh that evidence in order to arrive at the conclusions of fact necessary to decide the case. The trial judge is charged with the responsibility of establishing the record on which subsequent appeals are founded. Absent reviewable error in the trial judge's appreciation of the evidence, a court of appeal should not interfere with the trial judge's conclusions on social and legislative facts. This division of labour is basic to our court system. The first instance judge determines the facts; appeal courts review the decision for correctness in law or palpable and overriding error in fact. This applies to social and legislative facts as much as to findings of fact as to what happened in a particular case.

[50] There are two important practical reasons not to depart from the usual standard of review simply because social or legislative facts are at issue.

[51] First, to do so would require the appeal court to duplicate the sometimes time-consuming and tedious work of the first instance judge in reviewing all the material and reconciling differences between the experts, studies and research results. A new set of judges would need to take the hours if not weeks required to intimately appreciate and analyze the evidence. And counsel for the parties would be required to take the appellate judges through all the evidence once again so they could draw their own conclusions. All this would increase the costs and delay in the litigation process. In a review for error — which is what an appeal is — it makes more sense to have counsel point out alleged errors in the trial judge's conclusions on the evidence and confine the court of appeal to determining whether those errors vitiate the trial judge's conclusions.

[52] Second, social and legislative facts may be intertwined with adjudicative facts — that is, the facts of the case at hand — and with issues of credibility of experts. To posit a different standard of review for adjudicative facts and the credibility of affiants and expert witnesses on the one hand, and social and legislative facts on the other (as proposed by the Court of Appeal), is to ask the impossible of courts of appeal. Untangling the different sources of those conclusions and applying different standards of review to them would immensely complicate the appellate task.

[53] As the Attorney General of Canada points out, this Court's decision in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, suggested that legislative fact findings are owed less deference. However, the use of social science evidence in *Charter* litigation has evolved significantly since *RJR-MacDonald* was decided. In the intervening years, this Court has expressed a preference for social science evidence to be presented through an expert witness (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 26-28; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458, at para. 68). The assessment of expert evidence relies heavily on the trial judge (*R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at paras. 62-96). This is particularly so in the wake of the Ontario report by Justice Goudge, which emphasized the role of the trial judge in preventing miscarriages of justice flowing from flawed expert evidence (*Inquiry into Pediatric Forensic Pathology in Ontario: Report*, vol. 3, *Policy and Recommendations* (2008)). The distinction between adjudicative and legislative facts can no longer justify gradations of deference.

[54] This case illustrates the problem. The application judge arrived at her conclusions on the impact of the impugned laws on s. 7 security interests on the basis of the personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records. The Court of Appeal conceded that it must accord deference to her findings of adjudicative facts and the credibility of affiants and experts, but said it owes no deference to findings on social and legislative facts. The task of applying different standards of review when the evidence is intertwined would be daunting.

[55] It is suggested that no deference is required on social and legislative facts because appellate courts are in as good a position to evaluate such evidence as trial judges. If this were so, adjudicative facts presented only in affidavit form would similarly be owed less deference. Yet this Court has been clear that, absent express statutory instruction, there is no middling standard of review for findings of fact (*H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401). Furthermore, this view does not meet the concerns of duplication of effort and the intertwining of such evidence with other kinds of evidence. Nor does it address the point that the appellate task is not to review evidence globally, but rather to review the conclusions the first instance judge has drawn from the evidence.

[56] For these reasons, I am of the view that a no-deference standard of appellate review for social and legislative facts should be rejected. The standard of review for findings of fact — whether adjudicative, social, or legislative — remains palpable and overriding error.

B. *Section 7 Analysis*

[57] In the discussion that follows, I first consider whether the applicants have established that the impugned laws impose limits on security of the person, thus engaging s. 7. I then examine the argument of the appellant Attorneys General that the laws do not cause the alleged harms. I go on to consider whether any limits on security of the person are in accordance with the principles of fundamental justice.

(1) Is Security of the Person Engaged?

[58] Section 7 provides that the state cannot deny a person's right to life, liberty or security of the person, except in accordance with the principles of fundamental justice. At this stage, the question is whether the impugned laws negatively impact or limit the applicants' security of the person, thus bringing them within the ambit of, or engaging, s. 7 of the *Charter*.[†]

[59] Here, the applicants argue that the prohibitions on bawdy-houses, living on the avails of prostitution, and communicating in public for the purposes of prostitution, heighten the risks they face in prostitution — itself a legal activity. The application judge found that the evidence supported this proposition and the Court of Appeal agreed.

[60] For reasons set out below, I am of the same view. The prohibitions at issue do not merely impose conditions on how prostitutes operate. They go a critical step further, by imposing *dangerous* conditions on prostitution; they prevent people engaged in a risky — but legal — activity from taking steps to protect themselves from the risks.

(a) *Sections 197 and 210: Keeping a Common Bawdy-House*

[61] It is not an offence to sell sex for money. The bawdy-house provisions, however, make it an offence to do so in any "place" that is "kept or occupied" or "resorted to" for the purpose of prostitution (ss. 197 and 210(1) of the *Code*). The reach of these provisions is broad. "Place" includes any defined space, even if unenclosed and used only temporarily (s. 197(1) of the *Code*; *R. v. Pierce* (1982), 1982 CanLII 2153 (ON CA), 37 O.R. (2d) 721 (C.A.)). And by definition, it applies even if resorted to by only one person (s. 197(1); *R. v. Worthington* (1972), 1972 CanLII 1334 (ON CA), 10 C.C.C. (2d) 311 (Ont. C.A.)).

[62] The practical effect of s. 210 is to confine lawful prostitution to two categories: street prostitution and out-calls (application decision, at para. 385). In-calls, where the john comes to the prostitute's residence, are prohibited. Out-calls, where the prostitute goes out and meets the client at a designated location, such as the client's home, are allowed. Working on the street is also permitted, though the practice of street prostitution is significantly limited by the prohibition on communicating in public (s. 213(1)(*c*)).

[63] The application judge found, on a balance of probabilities, that the safest form of prostitution is working independently from a fixed location (para. 300). She concluded that indoor work is far less dangerous than street prostitution — a finding that the evidence amply supports. She also concluded that out-call work is not as safe as in-call work, particularly under the current regime where prostitutes are precluded by virtue of the living on the avails provision from hiring a driver or security guard. Since the bawdy-house provision makes the safety-enhancing method of in-call prostitution illegal, the application judge concluded that the bawdy-house prohibition materially increased the risk prostitutes face under the present regime. I agree.

[64] First, the prohibition prevents prostitutes from working in a fixed indoor location, which would be safer than working on the streets or meeting clients at different locations, especially given the current prohibition on hiring drivers or security guards. This, in turn, prevents prostitutes from having a regular clientele and from setting up indoor safeguards like receptionists, assistants, bodyguards and audio room monitoring, which would reduce risks (application decision, at para. 421). Second, it interferes with provision of health checks and preventive health measures. Finally — a point developed in argument before us — the bawdy-house prohibition prevents resort to safe houses, to which prostitutes working on the street can take clients. In Vancouver, for example, "Grandma's House" was established to support street workers in the Downtown Eastside, at about the same time as fears were growing that a serial killer was prowling the streets — fears which materialized in the notorious Robert Pickton. Street prostitutes — who the application judge found are largely the most vulnerable class of prostitutes, and who face an alarming amount of violence (para. 361) — were able to bring clients to Grandma's House. However, charges were laid under s. 210, and although the charges were eventually stayed — four years after they were laid — Grandma's House was shut down (supplementary affidavit of Dr. John Lowman, May 6, 2009, J.A.R., vol. 20, at p. 5744). For some prostitutes, particularly those who are destitute, safe houses such as Grandma's House may be critical. For these people, the ability to work in brothels or hire security, even if those activities were lawful, may be illusory.

[65] I conclude, therefore, that the bawdy-house provision negatively impacts the security of the person of prostitutes and engages s. 7 of the *Charter*.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

[66] Section 212(1)(*j*) criminalizes living on the avails of prostitution of another person, wholly or in part. While targeting parasitic relationships (*R. v. Downey*, 1992 CanLII 109 (SCC), [1992] 2 S.C.R. 10), it has a broad reach. As interpreted by the courts, it makes it a crime for anyone to supply a service to a prostitute, because she is a prostitute (*R. v. Grilo* (1991), 1991 CanLII 7241 (ON CA), 2 O.R. (3d) 514 (C.A.); *R. v. Barrow* (2001), 2001 CanLII 8550 (ON CA), 54 O.R. (3d) 417 (C.A.)). In effect, it prevents a prostitute from hiring bodyguards, drivers and receptionists. The application judge found that by denying prostitutes access to these security-enhancing safeguards, the law prevented them from taking steps to reduce the risks they face and negatively impacted their security of the person (para. 361). As such, she found that the law engages s. 7 of the *Charter*.

[67] The evidence amply supports the judge's conclusion. Hiring drivers, receptionists, and bodyguards, could increase prostitutes' safety (application decision, at para. 421), but the law prevents them from doing so. Accordingly, I conclude that s. 212(1)(*j*) negatively impacts security of the person and engages s. 7.

(c) *Section 213(1)(c): Communicating in a Public Place*

[68] Section 213(1)(*c*) prohibits communicating or attempting to communicate for the purpose of engaging in prostitution or obtaining the sexual services of a prostitute, in a public place or a place open to public view. The provision extends to conduct short of verbal communication by prohibiting stopping or attempting to stop any person for those purposes (*R. v. Head* (1987), 1987 CanLII 2823 (BC CA), 59 C.R. (3d) 80 (B.C.C.A.)).

[69] The application judge found that face-to-face communication is an "essential tool" in enhancing street prostitutes' safety (para. 432). Such communication, which the law prohibits, allows prostitutes to screen prospective clients for intoxication or propensity to violence, which can reduce the risks they face (paras. 301 and 421). This conclusion, based on the evidence before her, sufficed to engage security of the person under s. 7.

[70] The application judge also found that the communicating law has had the effect of displacing prostitutes from familiar areas, where they may be supported by friends and regular customers, to more isolated areas, thereby making them more vulnerable (paras. 331 and 502).

[71] On the evidence accepted by the application judge, the law prohibits communication that would allow street prostitutes to increase their safety. By prohibiting communicating in public for the purpose of prostitution, the law prevents prostitutes from screening clients and setting terms for the use of condoms or safe houses. In these ways, it significantly increases the risks they face.

[72] I conclude that the evidence supports the application judge's conclusion that s. 213(1)(*c*) impacts security of the person and engages s. 7.

(2) A Closer Look at Causation

[73] For the reasons discussed above, the application judge concluded — and I agree — that the impugned laws negatively impact and thus engage security of the person rights of prostitutes. However, the appellant Attorneys General contend that s. 7 is not engaged because there is an insufficient causal connection between the laws and the risks faced by prostitutes. First, they argue that the courts below erroneously measured causation by an attenuated standard. Second, they argue that it is the choice of the applicants to engage in prostitution, rather than the law, that is the causal source of the harms they face. These arguments cannot succeed.

(a) *The Nature of the Required Causal Connection*

[74] Three possible standards for causation are raised for our consideration: (1) "sufficient causal connection", adopted by the application judge (paras. 287-88); (2) a general "impact" approach, adopted by the

Court of Appeal (paras. 108-9); and (3) "active and foreseeable" and "direct" causal connection, urged by the appellant Attorneys General (A.G. of Canada factum, at paras. 64-68; A.G. of Ontario factum, at paras. 12-17).

[75] I conclude that the "sufficient causal connection" standard should prevail. This is a flexible standard, which allows the circumstances of each particular case to be taken into account. Adopted in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, and applied in a number of subsequent cases (see, e.g., *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3), it posits the need for "a sufficient causal connection between the state-caused [effect] and the prejudice suffered by the [claimant]" for s. 7 to be engaged (*Blencoe*, at para. 60 (emphasis added)).

[76] A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21). A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link. Understood in this way, a sufficient causal connection standard is consistent with the substance of the standard that the Court of Appeal applied in this case. While I do not agree with the Court of Appeal that causation is not the appropriate lens for examining whether legislation — as opposed to the conduct of state actors — engages s. 7 security interests, its "practical and pragmatic" inquiry (para. 108) tracks the process followed in cases such as *Blencoe* and *Khadr*.

[77] The Attorney General of Canada argues for a higher standard. The prejudice to the claimant's security interest, he argues, must be active, foreseeable, and a "necessary link" (factum, at paras. 62 and 65). He relies on this Court's statement in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519 (cited by way of contrast in *Blencoe*, at para. 69), that "[i]n the absence of government involvement, Mrs. Rodriguez would not have suffered a deprivation of her s. 7 rights." He also relies on the Court's statement in *Suresh*, at para. 54, that "[a]t least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice". These statements establish that a causal connection is made out when the state action is a foreseeable and necessary cause of the prejudice. They do not, however, establish that this is the only way a causal connection engaging s. 7 of the *Charter* can be demonstrated.

[78] Finally, from a practical perspective, a sufficient causal connection represents a fair and workable threshold for engaging s. 7 of the *Charter*. This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.

(b) *Is the Causal Connection Negated by Choice or the Role of Third Parties?*

[79] The Attorneys General of Canada and Ontario argue that prostitutes choose to engage in an inherently risky activity. They can avoid both the risk inherent in prostitution and any increased risk that the laws impose simply by choosing not to engage in this activity. They say that choice — and not the law — is the real cause of their injury.

[80] The Attorneys General contend that Parliament is entitled to regulate prostitution as it sees fit. Anyone who chooses to sell sex for money must accept these conditions. If the conditions imposed by the law prejudice their security, it is their choice to engage in the activity, not the law, that is the cause.

[81] What the applicants seek, the Attorneys General assert, is a constitutional right to engage in risky commercial activities. Thus the Attorney General of Ontario describes the s. 7 claim in this case as a "veiled assertion of a positive right to vocational safety" (factum, at para. 25).

[82] The Attorneys General rely on this Court's decision in *Malmo-Levine*, which upheld the constitutionality of the prohibition of possession of marijuana on the basis that the recreational use of marijuana was a "lifestyle choice" and that lifestyle choices were not constitutionally protected (para. 185).

[83] The Attorneys General buttress this argument by asserting that if this Court accepts that these laws can be viewed as causing prejudice to the applicants' security, then many other laws that leave open the choice to engage in risky activities by only partially or indirectly regulating those activities will be rendered unconstitutional.

[84] Finally, in a variant on the argument that the impugned laws are not the cause of the applicants' alleged loss of security, the Attorneys General argue that the source of the harm is third parties — the johns who use and abuse prostitutes and the pimps who exploit them.

[85] For the following reasons, I cannot accept the argument that it is not the law, but rather prostitutes' choice and third parties, that cause the risks complained of in this case.

[86] First, while some prostitutes may fit the description of persons who freely choose (or at one time chose) to engage in the risky economic activity of prostitution, many prostitutes have no meaningful choice but to do so. Ms. Bedford herself stated that she initially prostituted herself "to make enough money to at least feed myself" (cross-examination of Ms. Bedford, J.A.R., vol. 2, at p. 92). As the application judge found, street prostitutes, with some exceptions, are a particularly marginalized population (paras. 458 and 472). Whether because of financial desperation, drug addictions, mental illness, or compulsion from pimps, they often have little choice but to sell their bodies for money. Realistically, while they may retain some minimal power of choice — what the Attorney General of Canada called "constrained choice" (transcript, at p. 22) — these are not people who can be said to be truly "choosing" a risky line of business (see *PHS*, at paras. 97-101).

[87] Second, even accepting that there are those who freely choose to engage in prostitution, it must be remembered that prostitution — the exchange of sex for money — is not illegal. The causal question is whether the impugned laws make this lawful activity more dangerous. An analogy could be drawn to a law preventing a cyclist from wearing a helmet. That the cyclist chooses to ride her bike does not diminish the causal role of the law in making that activity riskier. The challenged laws relating to prostitution are no different.

[88] Nor is it accurate to say that the claim in this case is a veiled assertion of a positive right to vocational safety. The applicants are not asking the government to put into place measures making prostitution safe. Rather, they are asking this Court to strike down legislative provisions that aggravate the risk of disease, violence and death.

[89] It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence.

[90] The government's call for deference in addressing the problems associated with prostitution has no role at this stage of the analysis. Calls for deference cannot insulate legislation that creates serious harmful effects from the charge that they negatively impact security of the person under s. 7 of the *Charter*. The question of deference arises under the principles of fundamental justice, not at the early stage of considering whether a person's life, liberty, or security of the person is infringed.

[91] Finally, recognizing that laws with serious harmful effects may engage security of the person does not mean that a host of other criminal laws will be invalidated. Trivial impingements on security of the person do not engage s. 7 (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 59). As already discussed, the applicant must show that the impugned law is sufficiently connected to the prejudice suffered before s. 7 is engaged. And even if s. 7 is found to be engaged, the applicant must then show that the deprivation of security is not in accordance with the principles of fundamental justice.

[92] For all these reasons, I reject the arguments of the Attorneys General that the cause of the harm is not the impugned laws, but rather the actions of third parties and the prostitutes' choice to engage in prostitution. As I concluded above, the laws engage s. 7 of the *Charter*. That conclusion remains undisturbed.

(3) Principles of Fundamental Justice

(a) *The Applicable Norms*

[93] I have concluded that the impugned laws deprive prostitutes of security of the person, engaging s. 7. The remaining step in the s. 7 analysis is to determine whether this deprivation is in accordance with the principles of fundamental justice. If so, s. 7 is not breached.

[94] The principles of fundamental justice set out the minimum requirements that a law that negatively impacts on a person's life, liberty, or security of the person must meet. As Lamer J. put it, "[t]he term 'principles of fundamental justice' is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right" (*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486 ("*Motor Vehicle Reference*"), at p. 512).

[95] The principles of fundamental justice have significantly evolved since the birth of the *Charter*. Initially, the principles of fundamental justice were thought to refer narrowly to principles of natural justice that define procedural fairness. In the *Motor Vehicle Reference*, this Court held otherwise:

> . . . it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice . . . . To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*. [pp. 501-2]

[96] The *Motor Vehicle Reference* recognized that the principles of fundamental justice are about the basic values underpinning our constitutional order. The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty, or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values. Over the years, the jurisprudence has given shape to the content of these basic values. In this case, we are concerned with the basic values against arbitrariness, overbreadth, and gross disproportionality.

[97] The concepts of arbitrariness, overbreadth, and gross disproportionality evolved organically as courts were faced with novel *Charter* claims.

[98] Arbitrariness was used to describe the situation where there is no connection between the effect and the object of the law. In *Morgentaler*, the accused challenged provisions of the *Criminal Code* that required abortions to be approved by a therapeutic abortion committee of an accredited or approved hospital. The purpose of the law was to protect women's health. The majority found that the requirement that all therapeutic abortions take place in accredited hospitals did not contribute to the objective of protecting women's health and, in fact, caused delays that were detrimental to women's health. Thus, the law violated basic values because the effect of the law actually contravened the objective of the law. Beetz J. called this "manifest unfairness" (*Morgentaler*, at p. 120), but later cases interpreted this as an "arbitrariness" analysis (see *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 133, *per* McLachlin C.J. and Major J.).

[99] In *Chaoulli*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. The purpose of the provision was to protect the public health care system and prevent the diversion of resources from the public system. The majority found, on the basis of international evidence, that private health insurance and a public health system could co-exist. Three of the four-judge majority found that the prohibition was "arbitrary" because there was no real connection on the facts between the effect and the objective of the law.

[100] Most recently, in *PHS*, this Court found that the Minister's decision not to extend a safe injection site's exemption from drug possession laws was arbitrary. The purpose of drug possession laws was the protection of health and public safety, and the services provided by the safe injection site actually contributed to these objectives. Thus, the effect of not extending the exemption — that is, prohibiting the safe injection site from operating — was contrary to the objectives of the drug possession laws.

[101] Another way in which laws may violate our basic values is through what the cases have called "overbreadth": the law goes too far and interferes with some conduct that bears no connection to its objective. In *R. v. Heywood*, 1994 CanLII 34 (SCC), [1994] 3 S.C.R. 761, the accused challenged a vagrancy law that prohibited offenders convicted of listed offences from "loitering" in public parks. The majority of the Court found that the law, which aimed to protect children from sexual predators, was overbroad; insofar as the law applied to offenders who did not constitute a danger to children, and insofar as it applied to parks where children were unlikely to be present, it was unrelated to its objective.

[102] In *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, the challenged provisions of the *Criminal Code* prevented an accused who was found unfit to stand trial from receiving an absolute discharge, and subjected the accused to indefinite appearances before a review board. The purpose of the provisions was "to allow for the ongoing treatment or assessment of the accused in order for him or her to become fit for an eventual trial" (para. 41). The Court found that insofar as the law applied to permanently unfit accused, who would never become fit to stand trial, the objective did "not apply" and therefore the law was overbroad (paras. 42-43).

[103] Laws are also in violation of our basic values when the effect of the law is grossly disproportionate to the state's objective. In *Malmo-Levine*, the accused challenged the prohibition on the possession of marijuana on the basis that its effects were grossly disproportionate to its objective. Although the Court agreed that a law with grossly disproportionate effects would violate our basic norms, the Court found that this was not such a case: ". . . the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action" (para. 175).

[104] In *PHS*, this Court found that the Minister's refusal to exempt the safe injection site from drug possession laws was not in accordance with the principles of fundamental justice because the effect of denying health services and increasing the risk of death and disease of injection drug users was grossly disproportionate to the objectives of the drug possession laws, namely public health and safety.

[105] The overarching lesson that emerges from the case law is that laws run afoul of our basic values when the means by which the state seeks to attain its objective is fundamentally flawed, in the sense of being arbitrary, overbroad, or having effects that are grossly disproportionate to the legislative goal. To deprive citizens of life, liberty, or security of the person by laws that violate these norms is not in accordance with the principles of fundamental justice.

[106] As these principles have developed in the jurisprudence, they have not always been applied consistently. The Court of Appeal below pointed to the confusion that has been caused by the "commingling" of arbitrariness, overbreadth, and gross disproportionality (paras. 143-51). This Court itself recently noted the conflation of the principles of overbreadth and gross disproportionality (*R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 38-40; see also *R. v. S.S.C.*, 2008 BCCA 262, 257 B.C.A.C. 57, at para. 72). In short, courts have explored different ways in which laws run afoul of our basic values, using the same words — arbitrariness, overbreadth, and gross disproportionality — in slightly different ways.

[107] Although there is significant overlap between these three principles, and one law may properly be characterized by more than one of them, arbitrariness, overbreadth, and gross disproportionality remain three distinct principles that stem from what Hamish Stewart calls "failures of instrumental rationality" — the situation where the law is "inadequately connected to its objective or in some sense goes too far in seeking to attain it" (*Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2012), at p. 151). As Peter Hogg has explained:

> The doctrines of overbreadth, disproportionality and arbitrariness are all at bottom intended to address what Hamish Stewart calls "failures of instrumental rationality", by which he means that the Court accepts the legislative objective, but scrutinizes the policy instrument enacted as the means to achieve the objective. If the policy instrument is not a rational means to achieve the objective, then the law is dysfunctional in terms of its own objective.

("The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209 (citation omitted))

[108] The case law on arbitrariness, overbreadth and gross disproportionality is directed against two different evils. The first evil is the absence of a connection between the infringement of rights and what the law seeks to achieve — the situation where the law's deprivation of an individual's life, liberty, or security of the person is not connected to the purpose of the law. The first evil is addressed by the norms against arbitrariness and overbreadth, which target the absence of connection between the law's purpose and the s. 7 deprivation.

[109] The second evil lies in depriving a person of life, liberty or security of the person in a manner that is grossly disproportionate to the law's objective. The law's impact on the s. 7 interest is connected to the purpose, but the impact is so severe that it violates our fundamental norms.

[110] Against this background, it may be useful to elaborate on arbitrariness, overbreadth and gross disproportionality.

[111] Arbitrariness asks whether there is a direct connection between the purpose of the law and the impugned effect on the individual, in the sense that the effect on the individual bears some relation to the law's purpose. There must be a rational connection between the object of the measure that causes the s. 7 deprivation, and the limits it imposes on life, liberty, or security of the person (Stewart, at p. 136). A law that imposes limits on these interests in a way that bears *no connection* to its objective arbitrarily impinges on those interests. Thus, in *Chaoulli*, the law was arbitrary because the prohibition of private health insurance was held to be unrelated to the objective of protecting the public health system.

[112] Overbreadth deals with a law that is so broad in scope that it includes *some* conduct that bears no relation to its purpose. In this sense, the law is arbitrary *in part*. At its core, overbreadth addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts. For instance, the law at issue in *Demers* required unfit accused to attend repeated review board hearings. The law was only disconnected from its purpose insofar as it applied to permanently unfit accused; for temporarily unfit accused, the effects were related to the purpose.

[113] Overbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others. Despite this recognition of the scope of the law as a whole, the focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose. For example, where a law is drawn broadly and targets some conduct that bears no relation to its purpose in order to make enforcement more practical, there is still no connection between the purpose of the law and its effect on the *specific individual*. Enforcement practicality may be a justification for an overbroad law, to be analyzed under s. 1 of the *Charter*.

[114] It has been suggested that overbreadth is not truly a distinct principle of fundamental justice. The case law has sometimes said that overbreadth straddles both arbitrariness and gross disproportionality. Thus, in *Heywood*, Cory J. stated: "The effect of overbreadth is that in some applications the law is arbitrary or disproportionate" (p. 793).

[115] And in *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, the companion case to *Malmo-Levine*, Gonthier and Binnie JJ. explained:

> Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out [in *Heywood*], related to arbitrariness. [Emphasis deleted; para. 38.]

[116] In part this debate is semantic. The law has not developed by strict labels, but on a case-by-case basis, as courts identified laws that were inherently bad because they violated our basic values.

[117] Moving forward, however, it may be helpful to think of overbreadth as a distinct principle of fundamental justice related to arbitrariness, in that the question for both is whether there is *no connection* between the effects of a law and its objective. Overbreadth simply allows the court to recognize that the lack of connection arises in a law that goes too far by sweeping conduct into its ambit that bears no relation to its objective.

[118] An ancillary question, which applies to both arbitrariness and overbreadth, concerns how significant the lack of correspondence between the objective of the infringing provision and its effects must be. Questions have arisen as to whether a law is arbitrary or overbroad when its effects are *inconsistent* with its objective, or whether, more broadly, a law is arbitrary or overbroad whenever its effects are *unnecessary* for its objective (see, e.g., *Chaoulli*, at paras. 233-34).

[119] As noted above, the root question is whether the law is inherently bad because there is *no connection*, in whole or in part, between its effects and its purpose. This standard is not easily met. The evidence may, as in *Morgentaler*, show that the effect actually undermines the objective and is therefore "inconsistent" with the objective. Or the evidence may, as in *Chaoulli*, show that there is simply no connection on the facts between the effect and the objective, and the effect is therefore "unnecessary". Regardless of how the judge describes this lack of connection, the ultimate question remains whether the evidence establishes that the law violates basic norms because there is *no connection* between its effect and its purpose. This is a matter to be determined on a case-by-case basis, in light of the evidence.

[120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[121] Gross disproportionality under s. 7 of the *Charter* does *not* consider the beneficial effects of the law for society. It balances the negative effect on the individual against the purpose of the law, *not* against societal benefit that might flow from the law. As this Court said in *Malmo-Levine*:

> In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7. [para. 181]

[122] Thus, gross disproportionality is not concerned with the number of people who experience grossly disproportionate effects; a grossly disproportionate effect on one person is sufficient to violate the norm.

[123] All three principles — arbitrariness, overbreadth, and gross disproportionality — compare the rights infringement caused by the law with the objective of the law, not with the law's effectiveness. That is, they do not look to how well the law achieves its object, or to how much of the population the law benefits. They do not consider ancillary benefits to the general population. Furthermore, none of the principles measure the percentage of the population that is negatively impacted. The analysis is qualitative, not quantitative. The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7.

(b) *The Relationship Between Section 7 and Section 1*

[124] This Court has previously identified parallels between the rules against arbitrariness, overbreadth, and gross disproportionality under s. 7 and elements of the s. 1 analysis for justification of laws that violate *Charter* rights. These parallels should not be allowed to obscure the crucial differences between the two sections.

[125] Section 7 and s. 1 ask different questions. The question under s. 7 is whether the law's negative effect on life, liberty, or security of the person is in accordance with the principles of fundamental justice. With respect to the principles of arbitrariness, overbreadth, and gross disproportionality, the specific questions are whether the law's purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law's purpose. Under s. 1, the question is different — whether the negative impact of a law on the rights of individuals is proportionate to the pressing and substantial goal of the law in furthering the public interest. The question of justification on the basis of an overarching public goal is at the heart of s. 1, but it plays

no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights.

[126] As a consequence of the different questions they address, s. 7 and s. 1 work in different ways. Under s. 1, the government bears the burden of showing that a law that breaches an individual's rights can be justified having regard to the government's goal. Because the question is whether the broader public interest justifies the infringement of individual rights, the law's goal must be pressing and substantial. The "rational connection" branch of the s. 1 analysis asks whether the law was a rational means for the legislature to pursue its objective. "Minimal impairment" asks whether the legislature could have designed a law that infringes rights to a lesser extent; it considers the legislature's reasonable alternatives. At the final stage of the s. 1 analysis, the court is required to weigh the negative impact of the law on people's rights against the beneficial impact of the law in terms of achieving its goal for the greater public good. The impacts are judged both qualitatively and quantitatively. Unlike individual claimants, the Crown is well placed to call the social science and expert evidence required to justify the law's impact in terms of society as a whole.

[127] By contrast, under s. 7, the claimant bears the burden of establishing that the law deprives her of life, liberty or security of the person, in a manner that is not connected to the law's object or in a manner that is grossly disproportionate to the law's object. The inquiry into the purpose of the law focuses on the nature of the object, not on its efficacy. The inquiry into the impact on life, liberty or security of the person is not quantitative — for example, how many people are negatively impacted — but qualitative. An arbitrary, overbroad, or grossly disproportionate impact on one person suffices to establish a breach of s. 7. To require s. 7 claimants to establish the efficacy of the law versus its deleterious consequences on members of society as a whole, would impose the government's s. 1 burden on claimants under s. 7. That cannot be right.

[128] In brief, although the concepts under s. 7 and s. 1 are rooted in similar concerns, they are analytically distinct.

[129] It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the *Charter* (*Motor Vehicle Reference*, at p. 518). The significance of the fundamental rights protected by s. 7 supports this observation. Nevertheless, the jurisprudence has also recognized that there may be some cases where s. 1 has a role to play (see, e.g., *Malmo-Levine*, at paras. 96-98). Depending on the importance of the legislative goal and the nature of the s. 7 infringement in a particular case, the possibility that the government could establish that a s. 7 violation is justified under s. 1 of the *Charter* cannot be discounted.

(4) Do the Impugned Laws Respect the Principles of Fundamental Justice?

(a) *Section 210: The Bawdy-House Prohibition*

(i) The Object of the Provision

[130] The bawdy-house provision has remained essentially unchanged since it was moved to Part V of the *Criminal Code*, "Disorderly Houses, Gaming and Betting", in the 1953-54 *Code* revision (c. 51, s. 182). In *Rockert v. The Queen*, 1978 CanLII 31 (SCC), [1978] 2 S.C.R. 704, Estey J. found "little, if any, doubt" in the authorities that the disorderly house provisions were not directed at the mischief of betting, gaming and prostitution *per se*, but rather at the harm to the community in which such activities were carried on in a notorious and habitual manner (p. 712). This objective can be traced back to the common law origins of the bawdy-house provisions (see, e.g., E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (1817, first published 1644), at pp. 205-6).

[131] The appellant Attorneys General argue that the object of this provision, considered alone and in conjunction with the other prohibitions, is to deter prostitution. The record does not support this contention; on the contrary, it is clear from the legislative record that the purpose of the prohibition is to prevent community harms in the nature of nuisance.

[132] There is no evidence to support a reappraisal of this purpose by Parliament. The doctrine against shifting objectives does not permit a new object to be introduced at this point (*R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731). On its face, the provision is only directed at in-call prostitution, and so cannot be said to aim at deterring prostitution generally. To find that it operates with the other *Criminal Code* provisions to deter prostitution generally is also unwarranted, given their piecemeal evolution and patchwork construction, which leaves out-calls and prostitution itself untouched. I therefore agree with the lower courts that the objectives of the bawdy-house provision are to combat neighbourhood disruption or disorder and to safeguard public health and safety.

(ii) Compliance With the Principles of Fundamental Justice

[133] The courts below considered whether the bawdy-house prohibition is overbroad, or grossly disproportionate.

[134] I agree with them that the negative impact of the bawdy-house prohibition on the applicants' security of the person is grossly disproportionate to its objective. I therefore find it unnecessary to decide whether the prohibition is overbroad insofar as it applies to a single prostitute operating out of her own home (C.A., at para. 204). The application judge found on the evidence that moving to a bawdy-house would improve prostitutes' safety by providing the "safety benefits of proximity to others, familiarity with surroundings, security staff, closed-circuit television and other such monitoring that a permanent indoor location can facilitate" (para. 427). Balancing this against the evidence demonstrating that "complaints about nuisance arising from indoor prostitution establishments are rare" (*ibid.*), she found that the harmful impact of the provision was grossly disproportionate to its purpose.

[135] The Court of Appeal acknowledged that empirical evidence on the subject is difficult to gather, since almost all the studies focus on street prostitution. However, it concluded that the evidence supported the application judge's findings on gross disproportionality — in particular, the evidence of the high homicide rate among prostitutes, with the overwhelming number of victims being street prostitutes. The Court of Appeal agreed that moving indoors amounts to a "basic safety precaution" for prostitutes, one which the bawdy-house provision makes illegal (paras. 206-7).

[136] In my view, this conclusion was not in error. The harms identified by the courts below are grossly disproportionate to the deterrence of community disruption that is the object of the law. Parliament has the power to regulate against nuisances, but not at the cost of the health, safety and lives of prostitutes. A law that prevents street prostitutes from resorting to a safe haven such as Grandma's House while a suspected serial killer prowls the streets, is a law that has lost sight of its purpose.

(b) *Section 212(1)(j): Living on the Avails of Prostitution*

(i) The Object of the Provision

[137] This Court has held, *per* Cory J. for the majority in *Downey*, that the purpose of this provision is to target pimps and the parasitic, exploitative conduct in which they engage:

> It can be seen that the majority of offences outlined in s. 195 are aimed at the procurer who entices, encourages or importunes a person to engage in prostitution. Section 195(1)(*j*) [now s. 212(1)(*j*)] is specifically aimed at those who have an economic stake in the earnings of a prostitute. It has been held correctly I believe that the target of s. 195(1)(*j*) is the person who lives parasitically off a prostitute's earnings. That person is commonly and aptly termed a pimp. [p. 32]

[138] The Attorneys General of Canada and Ontario argue that the true objective of s. 212(1)(*j*) is to target the commercialization of prostitution, and to promote the values of dignity and equality. This characterization of the objective does not accord with *Downey*, and is not supported by the legislative record. It must be rejected.

(ii) Compliance With the Principles of Fundamental Justice

[139] The courts below concluded that the living on the avails provision is overbroad insofar as it captures a number of non-exploitative relationships which are not connected to the law's purpose. The courts below also concluded that the provision's negative effect on the security and safety of prostitutes is grossly disproportionate to its objective of protecting prostitutes from harm.

[140] I agree with the courts below that the living on the avails provision is overbroad.

[141] The provision has been judicially restricted to those who provide a service or good to a prostitute because she is a prostitute, thus excluding grocers and doctors, for instance (*Shaw v. Director of Public Prosecutions*, [1962] A.C. 220 (H.L.)). It also has been held to require that exploitation be proven in the case of a person who lives with the prostitute, in order to exclude people in legitimate domestic relationships with a prostitute (*Grilo*). These refinements render the prohibition narrower than its words might suggest.

[142] The question here is whether the law nevertheless goes too far and thus deprives the applicants of their security of the person in a manner unconnected to the law's objective. The law punishes everyone who lives on the avails of prostitution without distinguishing between those who exploit prostitutes (for example, controlling and abusive pimps) and those who could increase the safety and security of prostitutes (for example, legitimate drivers, managers, or bodyguards). It also includes anyone involved in business with a prostitute, such as accountants or receptionists. In these ways, the law includes some conduct that bears no relation to its purpose of preventing the exploitation of prostitutes. The living on the avails provision is therefore overbroad.

[143] The appellant Attorneys General argue that the line between an exploitative pimp and a prostitute's legitimate driver, manager or bodyguard, blurs in the real world. A relationship that begins on a non-exploitative footing may become exploitative over time. If the provision were tailored more narrowly — for example, by reading in "in circumstances of exploitation" as the Court of Appeal did — evidentiary difficulties may lead to exploiters escaping liability. Relationships of exploitation often involve intimidation and manipulation of the kind that make it very difficult for a prostitute to testify. For these reasons, the Attorneys General argue, the provision must be drawn broadly in order to effectively capture those it targets.

[144] This argument is more appropriately addressed under the s. 1 analysis. As stated above, if a law captures conduct that bears no relation to its purpose, the law is overbroad under s. 7; enforcement practicality is one way the government may justify an overbroad law under s. 1 of the *Charter*.

[145] Having found that the prohibition on living on the avails of prostitution is overbroad, I find it unnecessary to consider whether it is also grossly disproportionate to its object of protecting prostitutes from exploitative relationships.

(c) *Section 213(1)(c): Communicating in Public for the Purposes of Prostitution*

(i) The Object of the Provision

[146] The object of the communicating provision was explained by Dickson C.J. in the *Prostitution Reference*:

> Like Wilson J., I would characterize the legislative objective of s. 195.1(1)(*c*) [now s. 213(1)(*c*)] in the following manner: the provision is meant to address solicitation in public places and, to that end, seeks to eradicate the various forms of social nuisance arising from the public display of the sale of sex. My colleague Lamer J. finds that s. 195.1(1)(*c*) is truly directed towards curbing the exposure of prostitution and related violence, drugs and crime to potentially vulnerable young people, and towards eliminating the victimization and economic disadvantage that prostitution, and especially street soliciting, represents for women. I do not share the view that the legislative objective can be characterized so broadly. In prohibiting sales of sexual services in public, the legislation does not attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary

> reality of prostitution. Rather, in my view, the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view.
>
> The *Criminal Code* provision subject to attack in these proceedings clearly responds to the concerns of home-owners, businesses, and the residents of urban neighbourhoods. Public solicitation for the purposes of prostitution is closely associated with street congestion and noise, oral harassment of non-participants and general detrimental effects on passers-by or bystanders, especially children. [pp. 1134-35]

[147] It is clear from these reasons that the purpose of the communicating provision is not to eliminate street prostitution for its own sake, but to take prostitution "off the streets and out of public view" in order to prevent the nuisances that street prostitution can cause. The *Prostitution Reference* belies the argument of the Attorneys General that Parliament's overall objective in these provisions is to deter prostitution.

(ii) Compliance With the Principles of Fundamental Justice

[148] The application judge concluded that the harm imposed by the prohibition on communicating in public was grossly disproportionate to the provision's object of removing the nuisance of prostitution from the streets. This was based on evidence that she found established that the ability to screen clients was an "essential tool" to avoiding violent or drunken clients (application decision, at para. 432).

[149] The majority of the Court of Appeal found that the application judge erred in her analysis of gross disproportionality by attaching too little importance to the objective of s. 213(1)(*c*), and by incorrectly finding on the evidence that face-to-face communication with a prospective customer is essential to enhancing prostitutes' safety (paras. 306 and 310).

[150] In my view, the Court of Appeal majority's reasoning on this question is problematic, largely for the reasons set out by MacPherson J.A., dissenting in part. Four aspects of the majority's analysis are particularly troubling.

[151] First, in concluding that the application judge accorded too little weight to the legislative objective of s. 213(1)(*c*), the majority of the Court of Appeal criticized her characterization of the object of the provision as targeting "noise, street congestion, and the possibility that the practice of prostitution will interfere with those nearby" (C.A., at para. 306). But the application judge's conclusion was in concert with the object of s. 213(1)(*c*) established by Dickson C.J. in the *Prostitution Reference*, which the majority of the Court of Appeal endorsed earlier in their reasons (para. 286).

[152] Compounding this error, the majority of the Court of Appeal inflated the objective of the prohibition on public communication by referring to "drug possession, drug trafficking, public intoxication, and organized crime" (para. 307), even though Dickson C.J. explicitly *excluded* the exposure of "related violence, drugs and crime" to vulnerable young people from the objectives of s. 213(1)(*c*). At most, the provision's effect on these other issues is an ancillary benefit — and, as such, it should not play into the gross disproportionality analysis, which weighs the actual objective of the provision against its negative impact on the individual's life, liberty and security of the person.

[153] The three remaining concerns with the majority's reasoning relate to the other side of the balance: the assessment of the impact of the provision.

[154] First, the majority of the Court of Appeal erroneously substituted its assessment of the evidence for that of the application judge. It found that the application judge's conclusion that face-to-face communication is essential to enhancing prostitutes' safety was based only on "anecdotal evidence . . . informed by her own common sense" (para. 311). This was linked to its error, discussed above, in according too little deference to the application judge on findings of social and legislative facts. MacPherson J.A. for the minority, correctly countered that the evidence on this point came from both prostitutes' own accounts and from expert assessments, and provided a firm basis for the application judge's conclusion (paras. 348-50).

[155] Second, the majority ignored the law's effect of displacing prostitutes to more secluded, less secure locations. The application judge highlighted this displacement (at para. 331), citing the evidence found in the report of the House of Commons Standing Committee on Justice and Human Rights Subcommittee on Solicitation Laws (*The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (2006)) on the effects of s. 213(1)(*c*). The majority's conclusion that the application judge did not have a proper basis to conclude that face-to-face communication enhances safety may be explained in part by their failure to consider the impact of the provision on displacement.

[156] Related to this is the uncontested fact that the communication ban prevents street workers from bargaining for conditions that would materially reduce their risk, such as condom use and the use of safe houses.

[157] Finally, the majority of the Court of Appeal majority, in rejecting the application judge's conclusions, relied on its own speculative assessment of the impact of s. 213(1)(*c*):

> While it is fair to say that a street prostitute might be able to avoid a "bad date" by negotiating details such as payment, services to be performed and condom use up front, it is equally likely that the customer could pass muster at an early stage, only to turn violent once the transaction is underway. It is also possible that the prostitute may proceed even in the face of perceived danger, either because her judgment is impaired by drugs or alcohol, or because she is so desperate for money that she feels compelled to take the risk. [para. 312]

[158] It is certainly conceivable, as this passage suggests, that some street prostitutes would not refuse a client even if communication revealed potential danger. It is also conceivable that the danger may not be perfectly predicted in advance. However, that does not negate the application judge's finding that communication is an essential tool that can decrease risk. The assessment is qualitative, not quantitative. If screening could have prevented one woman from jumping into Robert Pickton's car, the severity of the harmful effects is established.

[159] In sum, the Court of Appeal wrongly attributed errors in reasoning to the application judge and made a number of errors in considering gross disproportionality. I would restore the application judge's conclusion that s. 213(1)(*c*) is grossly disproportionate. The provision's negative impact on the safety and lives of street prostitutes is a grossly disproportionate response to the possibility of nuisance caused by street prostitution.

C. *Do the Prohibitions Against Communicating in Public Violate Section 2(b) of the Charter?*

[160] Having concluded that the impugned laws violate s. 7, it is unnecessary to consider this question.

D. *Are the Infringements Justified Under Section 1 of the Charter?*

[161] The appellant Attorneys General have not seriously argued that the laws, if found to infringe s. 7, can be justified under s. 1 of the *Charter*. Only the Attorney General of Canada addressed this in his factum, and then, only briefly. I therefore find it unnecessary to engage in a full s. 1 analysis for each of the impugned provisions. However, some of their arguments under s. 7 of the *Charter* are properly addressed at this stage of the analysis.

[162] In particular, the Attorneys General attempt to justify the living on the avails provision on the basis that it must be drafted broadly in order to capture all exploitative relationships, which can be difficult to identify. However, the law not only catches drivers and bodyguards, who may actually be pimps, but it also catches clearly non-exploitative relationships, such as receptionists or accountants who work with prostitutes. The law is therefore not minimally impairing. Nor, at the final stage of the s. 1 inquiry, is the law's effect of preventing prostitutes from taking measures that would increase their safety, and possibly save their lives, outweighed by the law's positive effect of protecting prostitutes from exploitative relationships.

[163] The Attorneys General have not raised any other arguments distinct from those considered under s. 7. I therefore find that the impugned laws are not saved by s. 1 of the *Charter*.

V. Result and Remedy

[164] I would dismiss the appeals and allow the cross-appeal. Section 210, as it relates to prostitution, and ss. 212(1)(*j*) and 213(1)(*c*) are declared to be inconsistent with the *Canadian Charter of Rights and Freedoms* and hence are void. The word "prostitution" is struck from the definition of "common bawdy-house" in s. 197(1) of the *Criminal Code* as it applies to s. 210 only.

[165] I have concluded that each of the challenged provisions, considered independently, suffers from constitutional infirmities that violate the *Charter*. That does not mean that Parliament is precluded from imposing limits on where and how prostitution may be conducted. Prohibitions on keeping a bawdy-house, living on the avails of prostitution and communication related to prostitution are intertwined. They impact on each other. Greater latitude in one measure — for example, permitting prostitutes to obtain the assistance of security personnel — might impact on the constitutionality of another measure — for example, forbidding the nuisances associated with keeping a bawdy-house. The regulation of prostitution is a complex and delicate matter. It will be for Parliament, should it choose to do so, to devise a new approach, reflecting different elements of the existing regime.

[166] This raises the question of whether the declaration of invalidity should be suspended and if so, for how long.

[167] On the one hand, immediate invalidity would leave prostitution totally unregulated while Parliament grapples with the complex and sensitive problem of how to deal with it. How prostitution is regulated is a matter of great public concern, and few countries leave it entirely unregulated. Whether immediate invalidity would pose a danger to the public or imperil the rule of law (the factors for suspension referred to in *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679) may be subject to debate. However, it is clear that moving abruptly from a situation where prostitution is regulated to a situation where it is entirely unregulated would be a matter of great concern to many Canadians.

[168] On the other hand, leaving the prohibitions against bawdy-houses, living on the avails of prostitution and public communication for purposes of prostitution in place in their present form leaves prostitutes at increased risk for the time of the suspension — risks which violate their constitutional right to security of the person.

[169] The choice between suspending the declaration of invalidity and allowing it to take immediate effect is not an easy one. Neither alternative is without difficulty. However, considering all the interests at stake, I conclude that the declaration of invalidity should be suspended for one year.

Appeals dismissed and cross-appeal allowed.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Canada: Attorney General of Canada, Toronto.

Solicitor for the appellant/respondent on cross-appeal the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the respondents/appellants on cross-appeal: Osgoode Hall Law School of York University, Toronto; Sack Goldblatt Mitchell, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitors for the interveners the Pivot Legal Society, the Downtown Eastside Sex Workers United Against Violence Society and the PACE Society: Pivot Legal Society, Vancouver; Arvay Finlay, Vancouver; Janes Freedman Kyle Law Corporation, Vancouver; Ratcliff & Company, North Vancouver; Harper Grey, Vancouver.

Solicitors for the intervener the Secretariat of the Joint United Nations Programme on HIV/AIDS: McCarthy Tétrault, Vancouver.

Solicitors for the intervener the British Columbia Civil Liberties Association: Hunter Litigation Chambers, Vancouver.

Solicitor for the intervener the Evangelical Fellowship of Canada: Evangelical Fellowship of Canada, Ottawa.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, the British Columbia Centre for Excellence in HIV/AIDS and the HIV & AIDS Legal Clinic Ontario: Cooper & Sandler, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto.

Solicitors for the interveners the Canadian Association of Sexual Assault Centres, the Native Women's Association of Canada, the Canadian Association of Elizabeth Fry Societies, Action ontarienne contre la violence faite aux femmes, Concertation des luttes contre l'exploitation sexuelle, Regroupement québécois des Centres d'aide et de lutte contre les agressions à caractère sexuel and the Vancouver Rape Relief Society: University of British Columbia, Vancouver; Fay Faraday, Toronto.

Solicitors for the interveners the Christian Legal Fellowship, the Catholic Civil Rights League and REAL Women of Canada: Bennett Jones, Toronto.

Solicitors for the intervener the David Asper Centre for Constitutional Rights: Arvay Finlay, Vancouver; David Asper Centre for Constitutional Rights, Toronto.

Solicitors for the intervener the Simone de Beauvoir Institute: Desrosiers, Joncas, Massicotte, Montréal.

Solicitors for the intervener the AWCEP Asian Women for Equality Society, operating as Asian Women Coalition Ending Prostitution: Foy Allison Law Group, West Vancouver.

Solicitor for the intervener Aboriginal Legal Services of Toronto Inc.: Aboriginal Legal Services of Toronto Inc., Toronto.

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[*] A judgment was issued on January 17, 2014, amending para. 164 of both versions of the reasons. The amendments are included in these reasons.

[†] The focus is on security of the person, not liberty, for three reasons. First, the *Prostitution Reference* decided that the communicating and bawdy-house provisions engage liberty, and it is binding on this point. The security of the person argument is a novel issue and an important reason why the application judge was able to revisit the *Prostitution Reference*. Second, it is not clear that any of the applicants' personal liberty interests are engaged by the living on the avails provision; rather, they have pleaded that they fear that it could apply to their employees or their loved ones. Lastly, it seems to me that the real gravamen of the complaint is not that *breaking* the law engages the applicants' liberty, but rather that *compliance* with the laws infringes the applicants' security of the person.

13	*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC)

Re B.C. Motor Vehicle Act, 1985 CanLII 81 (SCC), [1985] 2 SCR 486

Date:	1985-12-17
File number:	17590
Other citations:	[1985] ACS no 73 — 36 MVR 240 — 48 CRC (3d) 289 — [1985] SCJ No 73 (QL) — [1985] CarswellBC 398 — JE 86-99 — 15 WCB 343 — 18 CRR 30 — [1986] DLQ 90 — 23 CCC (3d) 289 — 48 CR (3d) 289 — 69 BCLR 145 — [1986] 1 WWR 481 — 24 DLR (4th) 536 — 63 NR 266
Citation:	Re B.C. Motor Vehicle Act, 1985 CanLII 81 (SCC), [1985] 2 SCR 486, <https://canlii.ca/t/dln>, retrieved on 2022-02-27

Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

IN THE MATTER OF the *Constitutional Question Act*, R.S.B.C. 1979, c. 63

AND IN THE MATTER OF the Reference re Section 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, as amended by the *Motor Vehicle Amendment Act, 1982*, 1982 (B.C.), c. 36.

File No.: 17590.

1984: November 15; 1985: December 17.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

on appeal from the court of appeal for british columbia

Constitutional law -- Charter of Rights -- Right to life, liberty and security of the person and right not to be deprived thereof except in accordance with principles of fundamental justice -- Whether or not absolute liability offence with mandatory imprisonment in breach of that right -- Meaning of term "principles of fundamental justice" -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 8, 9, 10, 11, 12, 13, 14 -- Constitution Act, 1982, s. 52 -- Canadian Bill of Rights, s. 2(e) -- Motor Vehicle Act, R.S.B.C. 1979, c. 288, s. 94(1), (2).

Criminal law -- Absolute liability offence with mandatory imprisonment -- Charter right to liberty and right not to be deprived thereof except in accordance

with principles of fundamental justice -- Whether or not offence in breach of that Charter right.

The B.C. *Motor Vehicle Act* provided for minimum periods of imprisonment for the offence of driving on a highway or industrial road without a valid driver's licence or with a licence under suspension. Section 94(2) of the Act, moreover, provided that this offence was one of absolute liability in which guilt was established by the proof of driving, whether or not the

driver knew of the prohibition or suspension. The Court of Appeal, on a reference by the provincial government, found s. 94(2) to be of no force or effect as it was inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*: "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." That decision was appealed to this Court.

Held: The appeal should be dismissed.

Per Dickson C.J. and Beetz, Chouinard, Lamer and Le Dain JJ.: A law with the potential of convicting a person who really has done nothing wrong offends the principles of fundamental justice and violates a person's right to liberty under s. 7 of the *Charter* if imprisonment is available as a penalty.

The analysis of s. 7 was limited to determining the scope of the words "principles of fundamental justice". That phrase is not a protected right but a qualifier to the protected right not to be deprived of "life, liberty and security of the person"; its function is to set the parameters of that right. Interpretation of the term must be with reference to the protected rights but not so as to frustrate or stultify them. An interpretation equating "fundamental justice" with "natural justice" would not only be wrong, in that it would strip the protected interests of most of their content, but also would be inconsistent with the affirmative purposive expression of those rights.

Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. These sections are illustrative of the meaning of "principles of fundamental justice" in criminal or penal law. They recognize principles given expression at common law, by international convention and in the very entrenchment of the *Charter* as essential elements for the administration of justice founded on the dignity and worth of the human person and the rule of law.

The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system. These principles are not limited to procedural guarantees, although many are of that nature. Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 must rest on an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our evolving legal system. The words "principles of fundamental justice", therefore, cannot be given any exhaustive content or simple enumerative definition but will take on concrete meaning as the courts address alleged violations of s. 7.

The Minutes of the Proceedings of the Special Joint Committee were admissible but without much weight given the inherent unreliability of such speeches and statements. The comments of a few public servants, however distinguished, could not be determinative in light of the many actors and the role of the provinces in arriving at the *Charter*. To cast the interpretation of s. 7 in terms of the comments made at the Joint Committee Proceedings would freeze the rights, values and freedoms expressed in the *Charter* as of the moment of adoption and deny it growth and adjustment over time.

The *Canadian Bill of Rights*, too, was of little assistance in construing s. 7. The words "principles of fundamental justice" in s. 2(*e*) of the *Canadian Bill of Rights* are placed explicitly in context of and qualify a "right to a fair hearing". Section 7 of the *Charter* does not create the same

context: the words "principles of fundamental justice" are placed in context of and qualify much more fundamental rights. The distinction was important.

Absolute liability does not *per se* violate s. 7 of the *Charter*. An absolute liability offence violates s. 7 only if and to the extent that it has the potential to deprive life, liberty or the security of the person. There is no need that imprisonment be mandatory. The combination of imprisonment and absolute liability, however, violates s. 7 irrespective of the nature of the offence and can only be salvaged if the authorities demonstrate, under s. 1, such a deprivation to be a justified limit in a free and democratic society. Generally, no imprisonment may be imposed for an absolute liability offence and an offence punishable by imprisonment cannot be an absolute liability offence.

Public interest cannot be a factor in determining if absolute liability offends the principles of fundamental justice but only as a justification under s. 1. Administrative expediency, invoked as a justification for sacrificing s. 7 rights, should only succeed in cases arising out of exceptional conditions such as war, natural disasters or epidemics.

Section 94(2) enacts in the clearest of terms an absolute liability offence for which conviction will result in a person's being deprived of his liberty. Whether or not the provision is of limited or broad effect cannot change the fact that it is in violation of the *Charter* and at best could only be considered under s. 1. Notwithstanding the desirability of keeping bad drivers off the roads or of punishing them, no evidence was adduced demonstrating this end or the risk of imprisonment of a few innocent people to be a reasonable and justifiable limit on s. 7 within the meaning of s. 1 of the *Charter*.

Per McIntyre J.: Section 94(2) of the *Motor Vehicle Act* is inconsistent with s. 7 of the *Charter*. Fundamental justice, as used in the *Charter*, involves more than natural justice, which is largely procedural, and includes a substantive element. On any definition of the term "fundamental justice", the imposition of minimum imprisonment for an offence which may be committed unknowingly and without intent and for which no defence can be made deprives or may deprive of liberty and offends the principles of fundamental justice.

Per Wilson J.: Section 94(2) of the *Motor Vehicle Act* violates s. 7 of the *Charter* and is not saved by s. 1. This is because a mandatory sanction of imprisonment cannot be attached to an absolute liability offence without offending s. 7.

The phrase "in accordance with the principles of fundamental justice" is not a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Rather it protects the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

Section 7 does not affirm a right to the principles of fundamental justice *per se*. Accordingly an absolute liability offence does not offend s. 7 unless it violates the right to either the life, liberty or security of the person through a violation of the principles of fundamental justice.

Section 1 of the *Charter* permits reasonable limits to be placed on the citizen's s. 7 right provided the limits are "prescribed by law" and can be demonstrably justified in a free and democratic society. If these limits are not imposed in accordance with the principles of fundamental justice, however, they can be neither reasonable nor justified under s. 1. The phrase "except in accordance with the principles of fundamental justice" restricts

the government's power to impose limits under s. 1. A limit imposed on the s. 7 right in accordance with the principles of fundamental justice must still meet the tests in s. 1.

The courts must determine the principles which fall under the rubric "principles of fundamental justice". It would seem, however, that the phrase must include the fundamental tenets of our justice system. The framers of the *Charter* obviously deliberately avoided the concepts of "natural justice" and "due process". There seems no good reason to restrict the principles of fundamental justice to procedural matters in light of the reference to the rule of law in the preamble. Indeed, no purpose is achieved by importing the dichotomy between substance and procedure into s. 7.

The principles of sentencing, and especially that the minimum sentence required to obtain the objectives of the system be imposed, were key to determining that s. 94(2) offended fundamental justice. Imprisonment is the most severe sentence imposed by law, apart from death, and is generally reserved as a last resort for occasions when other sanctions cannot achieve the objectives of the system. Mandatory imprisonment for an absolute liability offence committed unknowingly and unwittingly and after the exercise of due diligence is excessive and inhumane. Such sanction offends the principles of fundamental justice embodied in our penal system and accordingly is inconsistent with s. 7 of the *Charter*.

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APPEAL from a judgment of the British Columbia Court of Appeal (1983), 1983 CanLII 268 (BC CA), 42 B.C.L.R. 364, 147 D.L.R. (3d) 539, 4 C.C.C. (3d) 243, 33 C.R. (3d) 22, 5 C.R.R. 148, 19 M.V.R. 63, [1983] 3 W.W.R. 756, in the matter of a reference concerning the constitutional validity of s. 94(2) of the *Motor Vehicle Act* of British Columbia. Appeal dismissed.

Allan Stewart, Q.C., for the appellant the Attorney General of British Columbia.

Graham R. Garton, for the intervener the Attorney General of Canada.

Ian MacDonnell and *M. D. Lepofsky*, for the intervener the Attorney General for Ontario.

Andrew Petter and *James MacPherson*, for the intervener the Attorney General for Saskatchewan.

William Henkel, Q.C., and *D. W. Kinloch*, for the intervener the Attorney General for Alberta.

C. G. Stein, for those contending for a negative answer (respondent).

J. J. Camp and *P. G. Foy*, for the intervener the British Columbia Branch of the Canadian Bar Association.

The judgment of Dickson C.J. and Beetz, Chouinard, Lamer and Le Dain JJ. was delivered by

1. LAMER J.--

Introduction

2. A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms* (*Constitution Act, 1982*, as enacted by the *Canada Act, 1982*, 1982 (U.K.), c. 11).

3. In other words, absolute liability and imprisonment cannot be combined.

The Facts

4. On August 16, 1982, the Lieutenant-Governor in Council of British Columbia referred the following question to the Court of Appeal of that province, by virtue of s. 1 of the *Constitutional Question Act*, R.S.B.C. 1979, c. 63:

> Is s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act, 1982*, consistent with the *Canadian Charter of Rights and Freedoms*?

5. On February 3, 1983, the Court of Appeal handed down reasons in answer to the question in which it stated that s. 94(2) of the Act is inconsistent with the *Canadian Charter of Rights and Freedoms*: (1983), 1983 CanLII 268 (BC CA), 42 B.C.L.R. 364, 147 D.L.R. (3d) 539, 4 C.C.C. (3d) 243, 33 C.R. (3d) 22, 5 C.R.R. 148, 19 M.V.R. 63, [1983] 3 W.W.R. 756. The Attorney General for British Columbia launched an appeal to this Court.

The Legislation

6. *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, s. 94, as amended by the *Motor Vehicle Amendment Act, 1982*, 1982 (B.C.), c. 36, s. 19:

94. (1) A person who drives a motor vehicle on a highway or industrial road while

(a) he is prohibited from driving a motor vehicle under sections 90, 91, 92 or 92.1, or

(b) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the *Motor Vehicle Amendment Act, 1982*,

commits an offence and is liable,

(c) on a first conviction, to a fine of not less than $300 and not more than $2 000 and to imprisonment for not less than 7 days and not more than 6 months, and

(d) on a subsequent conviction, regardless of when the contravention occurred, to a fine Of not less than $300 and not more than $2 000 and to imprisonment for not less than 14 days and not more than one year.

(2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

Canadian Charter of Rights and Freedoms; *Constitution Act, 1982*:

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.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

...

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

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.

The Judgment of the Court of Appeal of British Columbia

7. The Court was of the view that the phrase "principles of fundamental justice" was not restricted to matters of procedure, but extended to substantive law, and that the courts were "therefore called upon, in construing the provisions of s. 7 of the Charter, to have regard to the content of legislation".

8. Relying on the decision of this Court in *R. v. City of Sault Ste. Marie*, 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299, the Court of Appeal found "that s. 94(2) of the Motor Vehicle Act is inconsistent with

the principles of fundamental justice". They did not heed the invitation of counsel opposing the validity of s. 94(2) to declare that, as a result of that decision by our Court, all absolute liability offences violated s. 7 of the *Charter* and could not be salvaged under s. 1. Quite the contrary, the Court of Appeal said that "there are, and will remain, certain public welfare offences, e.g. air and water pollution offences, where the public interest requires that the offences be absolute liability offences". Their finding was predicated on the following reasoning:

> The effect of s. 94(2) is to transform the offence from a mens rea offence to an absolute liability offence, hence giving the defendant no opportunity to prove that his action was due to an honest and reasonable mistake of fact or that he acted without guilty intent. Rather than placing the burden to establish such facts on the defendant and thus making the offence a strict liability offence, the legislature has seen fit to make it an absolute liability offence coupled with a mandatory term of imprisonment.

9. It can therefore be inferred with certainty that, in the Court's view, the combination of mandatory imprisonment and absolute liability was offensive to s. 7. It cannot however be ascertained from their judgment whether the violation was triggered by the requirement of minimum imprisonment or solely by the availability of imprisonment as a sentence.

Section 7

1. Introduction

10. The issue in this case raises fundamental questions of constitutional theory, including the nature and the very legitimacy of constitutional adjudication under the *Charter* as well as the appropriateness of various techniques of constitutional interpretation. I shall deal first with these questions of a more general and theoretical nature as they underlie and have shaped much of the discussion surrounding s. 7.

2. The Nature and Legitimacy of Constitutional Adjudication Under the *Charter*

11. The British Columbia Court of Appeal has written in the present case that the *Constitution Act, 1982* has added a new dimension to the role of the courts in that the courts have now been empowered by s. 52 to consider not only the *vires* of legislation but also to measure the content of legislation against the constitutional requirements of the *Charter*.

12. The novel feature of the *Constitution Act, 1982*, however, is not that it has suddenly empowered courts to consider the content of legislation. This the courts have done for a good many years when adjudicating upon the *vires* of legislation. The initial process in such adjudication has been characterized as "a distillation of the constitutional value represented by the challenged legislation" (Laskin, *Canadian Constitutional Law* (3rd ed. rev. 1969), p. 85), and as identifying "the true meaning of the challenged law" (Lederman (ed.), *The Courts and the Canadian Constitution* (1964), p. 186), and "an abstract of the statute's content" (Professor A. S. Abel, "The Neglected Logic of 91 and 92" (1969), 19 *U. of T. L.J.* 487, p. 490). This process has of necessity involved a measurement of the content of legislation against the requirements of the Constitution, albeit within the more limited sphere of values related to the distribution of powers.

13. 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. Content of legislation has always been considered in constitutional adjudication. Content is now to be equally considered as regards new constitutional issues. Indeed, the values subject to constitutional adjudication now pertain to the rights of individuals as well as the distribution of governmental powers. In short, it is the scope of constitutional adjudication which has been altered rather than its nature, at least, as regards the right to consider the content of legislation.

14. In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution. The words of Dickson J. (as he then was) in *Amax Potash Ltd. v. Government of Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 S.C.R. 576, at p. 590, continue to govern:

> The Courts will not question the wisdom of enactments ... but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power.

15. In this respect, s. 7 is no different than other *Charter* provisions. As the Attorney General for Ontario has noted in his factum:

> Section 7, like most of the other sections in the *Charter*, limits the bounds of legislative action. It is the function of the Court to determine whether the challenged legislation has honoured those boundaries. This process necessitates judicial review of the content of the legislation.

Yet, in the context of s. 7, and in particular, of the interpretation of "principles of fundamental justice", there has prevailed in certain quarters an assumption that all but a narrow construction of s. 7 will inexorably lead the courts to "question the wisdom of enactments", to adjudicate upon the merits of public policy.

16. From this have sprung warnings of the dangers of a judicial "super-legislature" beyond the reach of Parliament, the provincial legislatures and the electorate. The Attorney General for Ontario, in his written argument, stated that,

> ... the judiciary is neither representative of, nor responsive to the electorate on whose behalf, and under whose authority policies are selected and given effect in the laws of the land.

This is an argument which was heard countless times prior to the entrenchment of the *Charter* but which has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

17. The concerns with the bounds of constitutional adjudication explain the characterization of the issue in a narrow and restrictive fashion, *i.e.*, whether the term "principles of fundamental justice" has a substantive or merely procedural content. In my view, the characterization of the issue in such fashion preempts an open-minded approach to determining the meaning of "principles of fundamental justice".

18. The substantive/procedural dichotomy narrows the issue almost to an all-or-nothing proposition. Moreover, it is largely bound up in the American experience with substantive and procedural due process. It imports into the Canadian context American concepts, terminology and jurisprudence, all of which are inextricably linked to problems concerning the nature and legitimacy of adjudication under the U.S. Constitution. That Constitution, it must be remembered, has no s. 52 nor has it the internal checks and balances of ss. 1 and 33. We would, in my view, do our own Constitution a disservice to simply allow the American debate to define the issue for us, all the while ignoring the truly fundamental structural differences between the two constitutions. Finally, the dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap. Such difficulties can and should, when possible, be avoided.

19. The overriding and legitimate concern that courts ought not to question the wisdom of enactments, and the presumption that the legislator could not have intended same, have to some extent distorted the discussion surrounding the meaning of "principles of fundamental justice". This has led to the spectre of a judicial "super-legislature" without a full consideration of the process of constitutional adjudication and the significance of ss. 1 and 33 of the *Charter* and s. 52 of the *Constitution Act, 1982*. This in turn has also led to a narrow characterization of the issue and to the assumption that only a procedural content to "principles of fundamental justice" can prevent the courts from adjudicating upon the merits or wisdom of enactments. If this assumption is accepted, the inevitable corollary, with which I would have to then agree, is that the legislator intended that the words "principles of fundamental justice" refer to procedure only.

20. But I do not share that assumption. Since way back in time and even recently the courts have developed the common law beyond procedural safeguards without interfering with the "merits or wisdom" of enactments (*e.g.*, *Kienapple v. The Queen*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729, entrapment, non-retrospectivity of offences, presumptions against relaxing the burden of proof and persuasion, to give a few examples).

21. The task of the Court is not to choose between substantive or procedural content *per se* but to secure for persons "the full benefit of the *Charter*'s protection" (Dickson J. (as he then was) in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344), under s. 7, while avoiding adjudication of the merits of public policy. This can only be accomplished by a purposive analysis and the articulation (to use the words in *Curr v. The Queen*, 1972 CanLII 15 (SCC), [1972] S.C.R. 889, at p. 899) of "objective and manageable standards" for the operation of the section within such a framework.

22. I propose therefore to approach the interpretation of s. 7 in the manner set forth by Dickson J. in *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, and *R. v. Big M Drug Mart Ltd.*,

supra, and by Le Dain J. in *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613. In *R. v. Big M Drug Mart Ltd.*, Dickson J. wrote at p. 344:

> In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection.

3. The Principles of Fundamental Justice

23. I would first note that I shared the views of Wilson J. in her statement in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 205, that "it is incumbent upon the Court to give meaning to each of the elements, life, liberty and security of the person, which make up the 'right' contained in s. 7". Each of these, in my view, is a distinct though related concept to be construed as such by the courts. It is clear that s. 7 surely protects the right not to be deprived of one's life, liberty and security of the person when that is done in breach of the principles of fundamental justice. The outcome of this case is dependent upon the meaning to be given to that portion of the section which states "and the right not to be deprived thereof except in accordance with the principles of fundamental justice". On the facts of this case it is not necessary to decide whether the section gives any greater protection, such as deciding whether, absent a breach of the principles of fundamental justice, there still can be, given the way the section is structured, a violation of one's rights to life, liberty and security of the person under s. 7. Furthermore, because of the fact that only depreviation of liberty was considered in these proceedings and that no one took issue with the fact that imprisonment is a deprivation of liberty, my analysis of s. 7 will be limited, as was the course taken by all, below and in this Court, to determining the scope of the words "principles of fundamental justice", I will not attempt to give any further content to liberty nor address that of the words life or security of the person.

24. In the framework of a purposive analysis, designed to ascertain the purpose of the s. 7 guarantee and "the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.*, *supra*), it is clear to me that the interests which are meant to be protected by the words "and the right not to be deprived thereof except in accordance with the principles of fundamental justice" of s. 7 are the life, liberty and security of the person. The principles of fundamental justice, on the other hand, are not a protected interest, but rather a qualifier of the right not to be deprived of life, liberty and security of the person.

25. Given that, as the Attorney General for Ontario has acknowledged, "when one reads the phrase 'principles of fundamental justice', a single incontrovertible meaning is not apparent", its meaning must, in my view, be determined by reference to the interests which those words of the section are designed to protect and the particular role of the phrase within the section. As a qualifier, the phrase serves to establish the parameters of the interests but it cannot be interpreted so narrowly as to frustrate or stultify them. For the narrower the meaning given to "principles of fundamental justice" the greater will be the possibility that individuals may be deprived of these most basic rights. This latter result is to be avoided given that the rights involved are as fundamental as those which pertain to the life, liberty and security of the person, the deprivation of which "has the most severe consequences upon an individual" (*R. v. Cadeddu* (1982), 1982 CanLII 2138 (ON SC), 40 O.R. (2d) 128 (H.C.), at p. 139).

26. For these reasons, I am of the view that it would be wrong to interpret the term "fundamental justice" as being synonymous with natural justice as the Attorney General of British Columbia and others have suggested. To do so would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state. Such a result would be inconsistent with the broad, affirmative language in which those rights are expressed and equally inconsistent with the approach adopted by this Court toward the interpretation of *Charter* rights in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, *per* Estey J., and *Hunter v. Southam Inc.*, *supra*.

27. It would mean that the right to liberty would be narrower than the right not to be arbitrarily detained or imprisoned (s. 9), that the right to security of the person would have less content than the right to be secure against unreasonable search or seizure (s. 8). Such an interpretation would give the specific expressions of the "right to life, liberty and security of the person" which are set forth in ss. 8 to 14 greater content than the general concept from which they originate.

28. Sections 8 to 14, in other words, address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7. It would be incongruous to interpret s. 7 more narrowly than the rights in ss. 8 to 14. The alternative, which is to interpret all of ss. 8 to 14 in a "narrow and technical" manner for the sake of congruity, is out of the question (*Law Society of Upper Canada v. Skapinker*, *supra*, at p. 366).

29. Sections 8 to 14 are illustrative of deprivations of those rights to life, liberty and security of the person in breach of the principles of fundamental justice. For they, in effect, illustrate some of the parameters of the "right" to life, liberty and security of the person; they are examples of instances in which the "right" to life, liberty and security of the person would be violated in a manner which is not in accordance with the principles of fundamental justice. To put matters in a different way, ss. 7 to 14 could have been fused into one section, with inserted between the words of s. 7 and the rest of those sections the oft utilised provision in our statutes, "and, without limiting the generality of the foregoing (s. 7) the following shall be deemed to be in violation of a person's rights under this section". Clearly, some of those sections embody principles that are beyond what could be characterized as "procedural".

30. Thus, ss. 8 to 14 provide an invaluable key to the meaning of "principles of fundamental justice". Many have been developed over time as presumptions of the common law, others have found expression in the international conventions on human rights. All have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in "the dignity and worth of the human person" (preamble to the *Canadian Bill of Rights*, R.S.C. 1970, App. III) and on "the rule of law" (preamble to the *Canadian Charter of Rights and Freedoms*).

31. It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.*, ss. 8 to 14, and the character and larger objects of the *Charter* itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.

32. Thus, it seems to me that to replace "fundamental justice" with the term "natural justice" misses the mark entirely. It was, after all, clearly open to the legislator to use the term natural justice, a known term of art, but such was not done. We must, as a general rule, be loath to exchange the terms actually used with terms so obviously avoided.

33. Whatever may have been the degree of synonymy between the two expressions in the past, (which in any event has not been clearly demonstrated by the parties and interveners), as of the last few decades this country has given a precise meaning to the words natural justice for the purpose of delineating the responsibility of adjudicators (in the wide sense of the word) in the field of administrative law.

34. It is, in my view, that precise and somewhat narrow meaning that the legislator avoided, clearly indicating thereby a will to give greater content to the words "principles of fundamental justice", the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity.

4. <u>Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada</u>

35. A number of courts have placed emphasis upon the Minutes of the Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution in the interpretation of "principles of fundamental justice", *e.g.*, *Latham v. Solicitor General of Canada*, 1984 CanLII 2996 (FC), [1984] 2 F.C. 734, 39 C.R. (3d) 78; *Re Mason; Mason v. R. in Right of Canada* (1983), 1983 CanLII 1778 (ON SC), 35 C.R. (3d) 393 (Ont. H.C.); *R. v. Holman* (1982), 28 C.R. (3d) 378 (B.C. Prov. Ct.)

36. In particular, the following passages dealing with the testimony of federal civil servants from the Department of Justice, have been relied upon:

> Mr. Strayer (Assistant Deputy Minister, Public Law):

> Mr. Chairman, it was our belief that the words "fundamental justice" would cover the same thing as what is called procedural due process, that is the meaning of due process in relation to requiring fair procedure. However, it in our view does not cover the concept of what is called substantive due process, which would impose substantive requirements as to policy of the law in question.
>
> This has been most clearly demonstrated in the United States in the area of property, but also in other areas such as the right to life. The term due process has been given the broader concept of meaning both the procedure and substance. Natural justice or fundamental justice in our view does not go beyond the procedural requirements of fairness.
>
> ...
>
> **Mr. Strayer:** The term "fundamental justice" appears to us to be essentially the same thing as natural justice.

Mr. Tassé (Deputy Minister) also said of the phrase "principles of fundamental justice" in testimony before the Committee:

> We assume that the Court would look at that much like a Court would look at the requirements of natural justice, and the concept of natural justice is quite familiar to courts and they have given a good deal of specific meaning to the concept of natural justice. We would think that the Court would find in that phraseology principles of fundamental justice a meaning somewhat like natural justice or inherent fairness.
>
> Courts have been developing the concept of administrative fairness in recent years and they have been able to give a good deal of consideration, certainly to these sorts of concepts and we would expect they could do the same with this.

37. The Honourable Jean Chrétien, then federal Minister of Justice, also indicated to the Committee that, while he thought "fundamental justice marginally more appropriate than natural justice" in s. 7, either term was acceptable to the Government.

(a) Admissibility

38. The first issue which arises is whether the Minutes of the Proceedings and Evidence of the Special Joint Committee may even be considered admissible as extrinsic aids to the interpretation of *Charter* provisions. Such extrinsic materials were traditionally excluded from consideration in constitutional adjudication: *e.g.*, *Gosselin v. The King* (1903), 1903 CanLII 42 (SCC), 33 S.C.R. 255, at p. 264; *Reference re Wartime Leasehold Regulations*, 1950 CanLII 27 (SCC), [1950] S.C.R. 124.

39. In *Reference re Upper Churchill Water Rights Reversion Act*, 1984 CanLII 17 (SCC), [1984] 1 S.C.R. 297, at p. 317, however, McIntyre J. stated that,

> The general exclusionary rule formerly considered to be applicable in dealing with the admissibility of extrinsic evidence in constitutional cases has been set aside or at least greatly modified and relaxed.

40. Indeed, in the reference *Re: Anti-Inflation Act*, 1976 CanLII 16 (SCC), [1976] 2 S.C.R. 373, Laskin C.J. stated, at p. 389:

> ...no general principle of admissibility or inadmissibility can or ought to be propounded by this Court, and ...the questions of resort to

> extrinsic evidence and what kind of extrinsic evidence may be admitted must depend on the constitutional issues on which it is sought adduce such evidence.

41. This approach was adopted by Dickson J. in the reference *Re Residential Tenancies Act, 1979*, 1981 CanLII 24 (SCC), [1981] 1 S.C.R. 714, and McIntyre J. in *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, in which he stated at p. 318:

> It will therefore be open to the Court in a proper case to receive and consider extrinsic evidence on the operation and effect of the legislation.

42. It is to be noted, however, that McIntyre J.'s remarks are in relation to the interpretation of the challenged statutory enactment rather than the interpretation of the Constitution itself. The same is true of the remarks of Laskin C.J. and Dickson J.

43. With respect to the interpretation of the Constitution, however, such extrinsic materials were considered, in at least two cases, by this Court.

44. In *Re: Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 (SCC), [1980] 1 S.C.R. 54, the Court stated, at p. 66:

> It is, we think, proper to consider the historical background which led to the provision which was made in the Act for the creation of the Senate as a part of the apparatus for the enactment of federal legislation. In the debates which occurred at the Quebec Conference in 1864, considerable time was occupied in discussing the provisions respecting the Senate. Its important purpose is stated in the following passages in speeches delivered in the debates on Confederation in the parliament of the province of Canada:

45. The other case is *Attorney General of Canada v. Canadian National Transportation, Ltd.*, 1983 CanLII 36 (SCC), [1983] 2 S.C.R. 206. Laskin C.J., in that case, referred to the pre-Confederation debates in the course of interpreting ss. 91(27) and 92(14) of the *Constitution Act, 1867* (at p. 225).

46. I would adopt this approach when interpreting the *Charter*. Consequently, the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution should, in my view, be considered.

(b) Weight

47. Having said that, however, I nonetheless believe that the logic underlying the reluctance to allow the use of materials such as speeches in Parliament carries considerable force with respect to the Minutes of the Committee as well.

48. In *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, McIntyre J. wrote at p. 319;

> ... I would say that the speeches and public declarations by prominent figures in the public and political life of Newfoundland on this question should not be received as evidence. They represent, no doubt, the considered views of the speakers at the time they were made, but cannot be said to be expressions of the intent of the Legislative Assembly.

49. Professor J. E. Magnet has written in "The Presumption of Constitutionality" (1980), 18 *Osgoode Hall L.J.* 87, at pp. 99-100:

> In an administrative law setting, "The admissibility of ... (factual) evidence (on the issue of legislative intent) ... seems so clear as not to require authority ...."
>
> The transposition of the administrative law principle to a constitutional context is problematic. In the administrative law cases, the issue of intent concerns the intent of a specific person. In the constitutional cases, the issue of intent concerns the legislature, an incorporeal body made up of hundreds of persons. It may be said that such a body, like a corporation, is a legal fiction and has no intention in the relevant sense. It would follow that legislative intent, in the constitutional setting, is a hollow concept.
>
> Largely in consideration of this argument, Canadian courts have developed the rule that, in scrutinizing legislative intent for the purpose of determining constitutional validity, statements by members of the legislature during passage of the challenged Act are irrelevant and inadmissible. Several explanations of the rule have been put forward. Strayer has argued that the rule is sound because legislative motive is irrelevant to constitutional validity: "The essential factual issue here is that of effect...." More convincingly, it has been argued that, considering the way in which the Canadian process of enactment differs from that of the United States, "Hansard gives no convincing proof of what the government intended...." Moreover, by allowing ambiguities in the statute to be resolved by statements in the legislature, ministers would be given power in effect to legislate indirectly by making such statements. "Cabinets already have powers enough without having this added unto them."

50. If speeches and declarations by prominent figures are inherently unreliable (*per* McIntyre J. in *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, at p. 319) and "speeches made in the legislature at the time of enactment of the measure are inadmissible as having little evidential weight" (*per* Dickson J. in the reference *Re: Residential Tenancies Act 1979*, *supra*, at p. 721), the Minutes of the Proceedings of the Special Joint Committee, though admissible, and granted somewhat more weight than speeches should not be given too much weight. The inherent unreliability of such statements and speeches is not altered by the mere fact that they pertain to the *Charter* rather than a statute.

51. Moreover, the simple fact remains that the *Charter* is not the product of a few individual public servants, however distinguished, but of a multiplicity of individuals who played major roles in the negotiating, drafting and adoption of the *Charter*. How can one say with any confidence that within this enormous multiplicity of actors, without forgetting the role of the provinces, the comments of a few federal civil servants can in any way be determinative?

52. Were this Court to accord any significant weight to this testimony, it would in effect be assuming a fact which is nearly impossible of proof, *i.e.*, the intention of the legislative bodies which adopted the *Charter*. In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight.

53. Another danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. Obviously, in the present case, given the proximity in time of the *Charter* debates, such a problem is relatively minor, even though it must be noted that even at this early stage in the life of the *Charter*, a host of issues and questions have been raised which were largely unforeseen at the time of such proceedings. If the newly planted "living tree" which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth. As Estey J. wrote in *Law Society of Upper Canada v. Skapinker*, *supra*, at pp. 366-67:

> Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves. All this has long been with us in the process of developing the institutions of government under the *B.N.A. Act, 1867* (now the *Constitution Act, 1867*). With the *Constitution Act, 1982* comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

5. The *Canadian Bill of Rights*

54. The appellant states that s. 7 "is a blend of s. 1(*a*) and s. 2(*e*) of the *Canadian Bill of Rights*". Considerable emphasis is then placed upon the case of *Duke v. The Queen*, 1972 CanLII 16 (SCC), [1972] S.C.R. 917, in which this Court interpreted the words "principles of fundamental justice" in s. 2(*e*) of the *Canadian Bill of Rights*. Fauteux C.J. noted, at p. 923:

> Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias, and in a judicial temper, and must give to him the opportunity adequately to state his case.

55. However, as Le Dain J. has written in *R. v. Therens*, *supra*, with the implicit support of the majority, at p. 638:

> 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.

And after at pp. 638-39:

> Although it is clear that in several instances, as in the case of s. 10, the framers of the *Charter* adopted the wording of the *Canadian Bill of Rights*, it is also clear that the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection.

. . .

> In considering the relationship of a decision under the *Canadian Bill of Rights* to an issue arising under the *Charter*, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the *Canadian Bill of Rights* because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament. The significance of the new constitutional mandate for judicial review provided by the *Charter* was emphasized by this Court in its recent decisions in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, and *Hunter v. Southam Inc.*, *supra*.

56. This view was also put forward by Wilson J. in her judgment in *Singh v. Minister of Employment and Immigration*, *supra*, with which Dickson C.J. and Lamer J. concurred, at p. 209:

> It seems to me rather that the recent adoption of the *Charter* by Parliament and nine of the ten provinces as part of the Canadian constitutional framework has sent a clear message to the courts that the restrictive attitude which at times characterized their appproach to the *Canadian Bill of Rights* ought to be re-examined.

57. In any event, the *Duke* case is of little assistance in the interpretation of s. 7 of the *Charter*. Section 2(*e*) of the *Canadian Bill of Rights* states:

> **2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to
>
> ...
>
> (*e*) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

58. In section 2(*e*) of the *Canadian Bill of Rights*, the words "principles of fundamental justice" were placed explicitly in the context of, and qualify a "right to a fair hearing". Section 7 of the *Charter* does not create the same context. In section 7, the words "principles of fundamental justice" are placed in the context of, and qualify much more fundamental rights, the "right to life, liberty and security of the person". The distinction is important.

Conclusion

59. I have, in this judgment, undertaken a purposive analysis of the term "principles of fundamental justice" in s. 7 of the *Charter* in accordance with the method established by this Court in *R. v. Big M Drug Mart Ltd.*, *supra*. Accordingly, the point of departure for the analysis has been a consideration of the general objectives of the *Charter* in the light of the general principles of *Charter* interpretation set forth in

Law Society of Upper Canada v. Skapinker, *supra*, and *Hunter v. Southam Inc.*, *supra*. This was followed by a detailed analysis of the language and structure of the section as well as its immediate context within the *Charter*.

60. The main sources of support for the argument that "fundamental justice" is simply synonymous with natural justice have been the Minutes of the Proceedings and Evidence of the Special Joint Committee on the Constitution and the *Canadian Bill of Rights* jurisprudence. In my view, neither the Minutes nor the *Canadian Bill of Rights* jurisprudence are persuasive or of any great force. The historical usage of the term "fundamental justice" is, on the other hand, shrouded in ambiguity. Moreover, not any one of these arguments, taken singly or as a whole, manages to overcome in my respectful view the textual and contextual analyses.

61. Consequently, my conclusion may be summarized as follows:

62. The term "principles of fundamental justice" is not a right, but a qualifier of the right not to be deprived of life, liberty and security of the person; its function is to set the parameters of that right.

63. Sections 8 to 14 address specific deprivations of the "right" to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are therefore illustrative of the meaning, in criminal or penal law, of "principles of fundamental justice"; they represent principles which have been recognized by the common law, the international conventions and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon the belief in the dignity and worth of the human person and the rule of law.

64. Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

65. We should not be surprised to find that many of the principles of fundamental justice are procedural in nature. Our common law has largely been a law of remedies and procedures and, as Frankfurter J. wrote in *McNabb v. United States* 318 U.S. 332 (1942), at p. 347, "the history of liberty has largely been the history of observance of procedural safeguards". This is not to say, however, that the principles of fundamental justice are limited solely to procedural guarantees. Rather, the proper approach to the determination of the principles of fundamental justice is quite simply one in which, as Professor L. Tremblay has written, "future growth will be based on historical roots" ("Section 7 of the Charter: Substantive Due Process?"(1984), 18 *U.B.C.L. Rev.* 201, at p. 254).

66. Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

67. Consequently, those words cannot be given any exhaustive content or simple enumerative definition, but will take on concrete meaning as the courts address alleged violations of s. 7.

68. I now turn to such an analysis of the principle of *mens rea* and absolute liability offences in order to determine the question which has been put to the Court in the present Reference.

Absolute Liability and Fundamental Justice in Penal Law

69. It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*.

70. As Glanville Williams said:

> There is no need here to go into the remote history of *mens rea*; suffice it to say that the requirement of a guilty state of mind (at least for the more serious crimes) had been developed by the time of Coke, which is as far back as the modern lawyer needs to go. "If one shoot at any wild fowl upon a tree, and the arrow killeth any reasonable creature afar off, without any evil intent in him, this is *per infortunium*."

(Glanville Williams, *Criminal Law, The General Part*, 2nd ed. (London, 1961), at p. 30.)

71. One of the many judicial statements on the subject worth mentioning is of the highest authority, *per* Goddard C.J. in *Harding v. Price*, [1948] 1 K.B. 695, at p. 700, where he said:

> The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend v. Wood* (1946), 62 T.L.R. 462, 463: `It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of a crime, the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind'.

72. This view has been adopted by this Court in unmistakable terms in many cases, amongst which the better known are *Beaver v. The Queen*, 1957 CanLII 14 (SCC), [1957] S.C.R. 531, and the most recent and often quoted judgment of Dickson J. writing for the Court in *R. v. City of Sault Ste. Marie*, *supra*.

73. This Court's decision in the latter case is predicated upon a certain number of postulates one of which, given the nature of the rules it elaborates, has to be to the effect that absolute liability in penal law offends the principles of fundamental justice. Those principles are, to use the words of Dickson J., to the effect that "there is a generally held revulsion against punishment of the morally innocent". He also stated that the argument that absolute liability "violates fundamental principles of penal liability" was the most telling argument against absolute liability and one of greater force than those advanced in support thereof.

74. In my view it is because absolute liability offends the principles of fundamental justice that this Court created presumptions against legislatures having intended to enact offences of a regulatory nature falling within that category. This is not to say, however, and to

that extent I am in agreement with the Court of Appeal, that, as a result, absolute liability *per se* offends s. 7 of the *Charter*.

75. A law enacting an absolute liability offence will violate s. 7 of the *Charter* only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

76. Obviously, imprisonment (including probation orders) deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory.

77. I am therefore of the view that the combination of imprisonment and of absolute liability violates s. 7 of the *Charter* and can only be salvaged if the authorities demonstrate under s. 1 that such a deprivation of liberty in breach of those principles of fundamental justice is, in a free and democratic society, under the circumstances, a justified reasonable limit to one's rights under s. 7.

78. As no one has addressed imprisonment as an alternative to the non-payment of a fine, I prefer not to express any views in relation to s. 7 as regards that eventuality as a result of a conviction for an absolute liability offence; nor do I need to address here, given the scope of my finding and the nature of this appeal, minimum imprisonment, whether it offends the *Charter per se* or whether such violation, if any, is dependent upon whether it be for a *mens rea* or strict liability offence. Those issues were not addressed by the court below and it would be unwise to attempt to address them here. It is sufficient and desirable for this appeal to make the findings I have and no more, that is, that no imprisonment may be imposed for an absolute liability offence, and, consequently, given the question put to us, an offence punishable by imprisonment cannot be an absolute liability offence.

79. Before considering s. 94(2) in the light of these findings, I feel we are however compelled to go somewhat further for the following reason. I would not want us to be taken by this conclusion as having inferentially decided that absolute liability may not offend s. 7 as long as imprisonment or probation orders are not available as a sentence. The answer to that question is dependant upon the content given to the words "security of the person". That issue was and is a live one. Indeed, though the question as framed focuses on absolute liability (s. 94(2)) in relation to the whole *Charter*, including the right to security of the person in s. 7, because of the presence of mandatory imprisonment in s. 94(1) only deprivation of liberty was considered. As the effect of imprisonment on the right to liberty is a foregone conclusion, *a fortiori* minimum imprisonment, everyone directed their arguments when discussing s. 7 to considering whether absolute liability violated the principles of fundamental justice, and then subsidiarily argued *pro* or *contra* the effect of s. 1 of the *Charter*.

80. Counsel for those opposing the validity of s. 94(2) took the position in this Court that absolute liability and severe punishment, always referring to imprisonment, violated s. 7 of the *Charter*. From the following passage of the judgment in the Court of Appeal it would appear that counsel for those opposing the validity of the section took the wider position in that Court that all absolute liability offences violated s. 7 because of "punishment of the morally innocent":

> In seeking to persuade the court to that conclusion counsel opposing the validity of s. 94(2) contended all absolute offences are now of no force and effect because of s. 7 of the Charter and that the provisions

of s. 1 of the Charter should not be invoked to sustain them. In support of this submission counsel relied upon the view expressed by Dickson J. in *Sault Ste. Marie* that there was 'a generally held revulsion against punishment of the morally innocent'. They contended that had the Charter been in effect when *Sault Ste. Marie* was decided all absolute liability offences would have been struck down.

We accept without hesitation the statement expressed by the learned justice but do not think it necessarily follows that because of s. 7 of the Charter this category of offence can no longer be legislated. To the contrary, there are, and will remain, certain public welfare offences, e.g., air and water pollution offences, where the public interest requires that the offences be absolute liability offences.

81. While I agree with the Court of Appeal, as I have already mentioned, that absolute liability does not *per se* violate s. 7 of the *Charter*, I am somewhat concerned with leaving without comment the unqualified reference by the Court of Appeal to the requirements of the "public interest".

82. If, by reference to public interest, it was meant that the requirements of public interest for certain types of offences is a factor to be considered in determining whether absolute liability offends the principles of fundamental justice, then I would respectfully disagree; if the public interest is there referred to by the Court as a possible justification under s. 1 of a limitation to the rights protected at s. 7, then I do agree.

83. Indeed, as I said, in penal law, absolute liability always offends the principles of fundamental justice irrespective of the nature of the offence; it offends s. 7 of the *Charter* if as a result, anyone is deprived of his life, liberty or security of the person, irrespective of the requirement of public interest. In such cases it might only be salvaged for reasons of public interest under s. 1.

84. In this latter regard, something might be added.

85. Administrative expediency, absolute liability's main supportive argument, will undoubtedly under s. 1 be invoked and occasionally succeed. Indeed, administrative expediency certainly has its place in administrative law. But when administrative law chooses to call in aid imprisonment through penal law, indeed sometimes criminal law and the added stigma attached to a conviction, exceptional, in my view, will be the case where the liberty or even the security of the person guaranteed under s. 7 should be sacrificed to administrative expediency. Section 1 may, for reasons of administrative expediency, successfully come to the rescue of an otherwise violation of s. 7, but only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.

86. Of course I understand the concern of many as regards corporate offences, specially, as was mentioned by the Court of Appeal, in certain sensitive areas such as the preservation of our vital environment and our natural resources. This concern might well be dispelled were it to be decided, given the proper case, that s. 7 affords protection to human persons only and does not extend to corporations.

87. Even if it be decided that s. 7 does extend to corporations, I think the balancing under s. 1 of the public interest against the financial interests of a corporation would give very different results

from that of balancing public interest and the liberty or security of the person of a human being.

88. Indeed, the public interest as regards "air and water pollution offences" requires that the guilty be dealt with firmly, but the seriousness of the offence does not in my respectful view support the proposition that the innocent human person be open to conviction, quite the contrary.

Section 94(2)

89. No doubt s. 94(2) enacts in the clearest of terms an absolute liability offence, the conviction for which a person will be deprived of his or her liberty, and little more, if anything, need be added. However, I should not want to conclude without addressing an argument raised by the appellant in this Court and considered by the British Columbia Court of Appeal.

90. The appellant argues that, as a result of the case of *R. v. MacDougall*, 1982 CanLII 212 (SCC), [1982] 2 S.C.R. 605, s. 94(2) (the absolute liability provision) is of limited effect. Hence, the section raises "a false impression of a potential for wholesale injustice," says the appellant. In my view, this argument is of little relevance to the determination of this appeal. Whether the provision is of broad or of "limited" effect does not change its nature nor lead to a different characterization for the purpose of determining a violation of s. 7. The question is whether the provision offends s. 7 of the *Charter* at all, rather than whether it does so in "limited" or "wholesale" fashion. At best, this argument may be considered under s. 1.

91. The appellant summarizes the decision in *MacDougall* as establishing that "where an accused is charged with driving a motor vehicle while his licence was cancelled (contrary to a provincial statute) and the revocation in question arose automatically as a matter of law pursuant to a provincial statute, ignorance by the accused of the fact that his licence was revoked is ignorance of law and cannot provide the basis for an acquittal".

92. The respondent, however, distinguishes the *MacDougall* case from the case at bar on two grounds. First, the offence under consideration in *MacDougall* was one of strict liability rather than absolute liability. Secondly, while *MacDougall* "dealt only with a suspension by operation of law, section 94(2) encompasses Court imposed suspensions (section 90(2)), suspensions arising under the `old law' in the absence of the accused, and suspensions imposed by administrative review by the Superintendent of Motor Vehicles requiring delivery of notice (‘old’ act, Section 82(3))". Thus, the respondent concludes that there are "at least three classes of morally innocent persons who are, by Section 94(2) deprived of the opportunity to present a defence of the type outlined by Dickson J. in *Regina v. Sault Ste. Marie*, (1978) 1978 CanLII 11 (SCC), 2 S.C.R. 1299 at 1326".

> The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event.

93. In the final analysis, it seems that both the appellant and the respondent agree that s. 94 will impact upon the right to liberty of a limited number of morally innocent persons. It creates an absolute

liability offence which effects a deprivation of liberty for a limited number of persons. To me, that is sufficient for it to be in violation of s. 7.

Section 1

94. Having found that s. 94(2) offends s. 7 of the *Charter* there remains the question as to whether the appellants have demonstrated that the section is salvaged by the operation of s. 1 of the *Charter*. No evidence was adduced in the Court of Appeal or in this Court. The position in that regard and the argument in support of the operability of s. 94(2) is as follows in appellant's factum:

> If this Court rules that S. 94(2) of the Motor Vehicle Act is inconsistent with S. 7 (or S. 11(d)) of the Charter, then it is submitted that S. 1 of the Charter is applicable. It is submitted that Laskin J. (as he then was) made it clear in *Curr v. The Queen*, supra, that it is within the scope of judicial notice for this Court to recognize that a statutory provision was enacted as part of a legislative scheme aimed at reducing the human and economic cost of bad driving. S. 94 is but part of the overall scheme laid out in the Motor Vehicle Act by which the Legislature is attempting to get bad drivers off the road. S. 94 imposes severe penalties on those who drive while prohibited from driving and those who drive while their driver's licence is suspended.
>
> It is submitted that if S. 94(2) is inconsistent with one of the above-noted provisions of the Charter, then S. 94(2) contains a 'reasonable limit, etc.' within the meaning of S. 1 of the Charter.

95. I do not take issue with the fact that it is highly desirable that "bad drivers" be kept off the road. I do not take issue either with the desirability of punishing severely bad drivers who are in contempt of prohibitions against driving. The bottom line of the question to be addressed here is: whether the Government of British Columbia has demonstrated as justifiable that the risk of imprisonment of a few innocent is, given the desirability of ridding the roads of British Columbia of bad drivers, a reasonable limit in a free and democratic society. That result is to be measured against the offence being one of strict liability open to a defence of due diligence, the success of which does nothing more than let those few who did nothing wrong remain free.

96. As did the Court of Appeal, I find that this demonstration has not been satisfied, indeed, not in the least.

97. In the result, I would dismiss the appeal and answer the question in the negative, as did the Court of Appeal, albeit for somewhat different reasons, and declare s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, as amended by the *Motor Vehicle Amendment Act, 1982*, inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*.

98. Having come to this conclusion, I choose, as did the Court of Appeal, not to address whether the section violates the rights guaranteed under ss. 11(*d*) and 12 of the *Charter*.

The following are the reasons delivered by

99. MCINTYRE J.--I agree with Lamer J. that s. 94(2) of the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, as amended by the *Motor Vehicle Amendment Act, 1982*, (1982) (B.C.), c. 36, s. 19, is inconsistent with s. 7 of the *Canadian Charter of Rights and Freedoms*. I agree that "fundamental justice", as the term is used in the *Charter*, involves more

than natural justice (which is largely procedural) and includes as well a substantive element. I am also of the view that on any definition of the term "fundamental justice" the imposition of minimum imprisonment for an offence in respect of which no defence can be made, and which may be committed unknowingly and with no wrongful intent, deprives or may deprive of liberty and it offends the principles of fundamental justice.

100. I would accordingly dismiss the appeal and answer the constitutional question in the negative.

The following are the reasons delivered by

101. WILSON J.--I agree with my colleague, Mr. Justice Lamer, that s. 94(2) of the *Motor Vehicle Act* violates s. 7 of the *Charter* and is not saved by s. 1. I reach that result, however, by a somewhat different route.

102. I start with a consideration of statutory "offences". These are divisible into offences for which *mens rea* is required and those for which it is not. Statutory offences are subject to a presumption in favour of a *mens rea* requirement as a matter of interpretation, but the courts have increasingly come to accept the proposition that legislatures may create non *mens rea* offences provided they make it clear that the *actus reus* itself is prohibited. This is typically so in the case of the so-called "regulatory" or "public welfare" offences. There is no moral delinquency involved in these offences. They are simply designed to regulate conduct in the public interest.

103. Two questions, therefore, have to be answered on this appeal. The first is do absolute liability offences created by statute *per se* offend the *Charter*? The second is, assuming they do not, can they be attended by mandatory imprisonment or can such a sanction only be attached to true *mens rea* offences? Certainly, in the absence of the *Charter*, legislatures are free to create absolute liability offences and to attach to them any sanctions they please. Does s. 7 of the *Charter* circumscribe their power in this regard?

1. Absolute Liability Offences

104. Section 7 affirms the right to life, liberty and security of the person while at the same time indicating that a person may be deprived of such a right if the deprivation is effected "in accordance with the principles of fundamental justice". I do not view the latter part of the section as a qualification on the right to life, liberty and security of the person in the sense that it limits or modifies that right or defines its parameters. Its purpose seems to me to be the very opposite, namely to protect the right against deprivation or impairment unless such deprivation or impairment is effected in accordance with the principles of fundamental justice.

105. Section 7 does not, however, affirm a right to the principles of fundamental justice *per se*. There must first be found an impairment of the right to life, liberty or security of the person. It must then be determined whether that impairment has been effected in accordance with the principles of fundamental justice. If it has, it passes the threshold test in s. 7 itself but the Court must go on to consider whether it can be sustained under s. 1 as a limit prescribed by law on the s. 7 right which is both reasonable and justified in a free and democratic society. If, however, the limit on the s. 7 right has been effected through a violation of the principles of fundamental justice, the enquiry, in my

view, ends there and the limit cannot be sustained under s. 1. I say this because I do not believe that a limit on the s. 7 right which has been imposed in violation of the principles of fundamental justice can be either "reasonable" or "demonstrably justified in a free and democratic society". The requirement in s. 7 that the principles of fundamental justice be observed seems to me to restrict the legislature's power to impose limits on the s. 7 right under s. 1. It can only limit the s. 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the tests in s. 1.

106. Assuming that I am correct in my analysis of s. 7 and its relationship to s. 1, an absolute liability offence cannot violate s. 7 unless it impairs the right to life, liberty or security of the person. It cannot violate s. 7 because it offends the principles of fundamental justice because they are not protected by s. 7 absent an impairment of the s. 7 right. Leaving aside for the moment the mandatory imprisonment sanction, I cannot find an interference with life, liberty or security of the person in s. 94 of the *Motor Vehicle Act*. It is true that the section prevents citizens from driving their vehicles when their licences are suspended. Citizens are also prevented from driving on the wrong side of the road. Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1. It would be my view, therefore, that absolute liability offences of this type do not *per se* offend s. 7 of the *Charter*.

2. Absolute Liability Plus Mandatory Imprisonment

107. The real question, as I see it, is whether s. 7 of the *Charter* is violated by the attachment of a mandatory imprisonment sanction to an absolute liability offence. Clearly a s. 7 right is interfered with here in that a person convicted of such an offence automatically loses his liberty.

108. In what circumstances then may the citizen be deprived of his right to liberty? Clearly not if he was deprived of it through a process which was procedurally unfair. But is s. 7 limited to that?

109. I would assume that one of the reasons for the rider attached to the right to liberty affirmed in s. 7 is to accommodate the criminal justice system. It will be through the criminal justice system that citizens will typically lose their liberty at the hands of government. The system must not, therefore, cause them to lose their liberty in violation of the principles of fundamental justice. The system must reflect those principles and the validity of the penal provisions must be assessed in relation to them.

110. Since s. 94(2) of the *Motor Vehicle Act* imposes a limit prescribed by law on the s. 7 right, we must determine whether fundamental justice is offended by attaching mandatory imprisonment to an absolute liability offence. Given that we can have statutory non *mens rea* offences, what is repugnant to fundamental justice in imprisoning someone for their commission?

111. At common law imprisonment was reserved for the more serious *mens rea* offences. However, we are dealing here with statutory offences and the legislation must stand unless it violates s. 7. We cannot, in my view, simply state as a bald proposition that absolute liability and imprisonment cannot co-exist in a statutory context. Legislatures can

supersede the common law. The legislature may consider it so important to prevent a particular act from being committed that it absolutely forbids it and, if it is committed, may subject the offender to a penalty whether he has any *mens rea* or not and whether or not he had any intention of breaking the law. Prior to the *Charter* such legislation would have been unassailable. Now it must meet the test of s. 7. Where the legislature has imposed a penalty in the form of mandatory imprisonment for the commission of an absolute liability offence and has done so in clear and unambiguous language, can the legislation survive an attack under s. 7? It is suggested that such legislation cannot survive because it offends the principles of fundamental justice and, in particular, the principle that punishment is inappropriate in the absence of moral culpability.

112. The common law distinguished sharply the conduct of the wrongdoer from his state of mind at the time. Hence the famous maxim referred to by my colleague--*actus non facit reum nisi mens sit rea*. The important thing to note, however, is that while the maxim has always been viewed as identifying the essential ingredients of a crime at common law, its meaning has been subject to a process of historical and juridical development, particularly the concept of *mens rea*. In the earliest beginnings of criminal liability the mental state of the wrongdoer was not considered at all; it was enough that he had done the fell deed: see Holdsworth, *A History of English Law* (1923), vol. 2, pp. 50 *et seq*. At a later stage the accused's state of mind was considered for two distinct purposes, namely (1) to determine whether his conduct was voluntary or involuntary; and (2) to determine whether he realized what the consequences of his conduct might be. But the first purpose was viewed as the key one. It was considerably later in the development of the law of criminal responsibility that the emphasis changed and an appreciation of the consequences of his act became the central focus. The movement towards the concept of the "guilty mind" was not, however, a sudden or dramatic one. This is understandable. The judges of the day found the new rule hard to apply because it was difficult to look into the state of a man's mind. The ecclesiastical authorities, however, had no such problem and legal historians seem to agree that the ecclesiastical influence was largely responsible for moving the focus to the mental element in common law crime: see Holdsworth, *supra*, p. 259.

113. The introduction of concepts of morality into criminal responsibility inevitably led to a sharp distinction between crimes which were *mala in se* and crimes which were merely *mala prohibita*. Blackstone describes crimes which were *mala in se* as offences against "those rights which God and nature have established" (Blackstone, *Commentaries on the Laws of England* (17th ed. by E. Christian, 1830)), p. 53 and crimes which were *mala prohibita* as breaches of "those laws which enjoin only positive duties, and forbid any such things as are not *mala in se*... without any intermixture of moral guilt" (Blackstone, *ibid*., p. 57). This distinction is now pretty well discredited: see Archbold's *Pleading, Evidence & Practice in Criminal Cases*, 30th ed. (1938), p. 900; Allen, *Legal Duties and Other Essays in Jurisprudence* (1931), p. 239. While it is undoubtedly a fact that certain crimes evoke feelings of revulsion and condemnation in the minds of most people, those feelings are now generally perceived as dependent upon a number of variable factors such as environment, education and religious prejudice and are no longer seen as providing a secure basis for the segregation of crimes into two different categories. Quoting from Kenny's *Outlines of Criminal Law*, 16th ed. by J. W. C. Turner, 1952, at pp. 22-23:

> Among the members of any community at a given period, certain offences are by general agreement regarded as especially serious and excite deep

> moral reprobation, whereas other transgressions are regarded as venial and are more or less condoned, especially when they infringe rules of law which are unpopular. It is indeed inevitable that this apportionment of blame should be made. Yet the vague and fluctuating line which in everyday life is drawn between the one group and the other only marks a variation in degree; it is not a boundary which separates things fundamentally alien in kind. Ethical reprobation of homicide, homosexuality, libel, adultery, bigamy and slave trading, to take a few examples, is not the same in all countries, and indeed may vary from section to section of the people in the same country.
>
> ...
>
> This defective classification of crimes clearly formed an unsound premise from which to draw any jurisprudential conclusion but it has an insidious attraction, and in the form of English phrases such as "in itself unlawful" it has penetrated into one or two modern judgments with vitiating effects upon the logic and clarity of the argument.

114. Accepting that a guilty mind was an essential ingredient of a crime at common law, it does not, of course, follow that the same is true of a "crime" created by statute. I have already referred to the presumption against absolute liability as a matter of statutory interpretation. This undoubtedly reflects the common law approach to the nature of crime. It is, however, only a presumption. Provided it does so in clear and unambiguous terms the legislature is free to make a person liable for the *actus reus* with or without *mens rea*.

115. In Kenny's *Outlines of Criminal Law*, *supra*, p. 4, the author highlights the difficulty in identifying any essential characteristics of crimes created by statute. He points out that such crimes originate in the government policy of the day and that, so long as crimes continue to be created by government policy, the nature of statutory crime will elude definition. Lord Atkin adverted to the same difficulty in *Proprietary Articles Trade Association v. Attorney General for Canada*, 1931 CanLII 385 (UK JCPC), [1931] A.C. 310. He stated at p. 324:

> ... the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

116. In *R. v. Pierce Fisheries Ltd.*, 1970 CanLII 178 (SCC), [1971] S.C.R. 5, Ritchie J., speaking for the majority of this Court, said at p. 13:

> Generally speaking, there is a presumption at common law that *mens rea* is an essential ingredient of all cases that are criminal in the true sense, but a consideration of a considerable body of case law on the subject satisfies me that there is a wide category of offences created by statutes enacted for the regulation of individual conduct in the interests of health, convenience, safety and the general welfare of the public which are not subject to any such presumption.

117. There seems to be no doubt that in s. 94 of the *Motor Vehicle Act* the legislature of British Columbia has created such an offence. Subsection (2) expressly precludes the application of any presumption in favour of a *mens rea* requirement. However, as already indicated, I do not believe that any principle of fundamental justice is offended by the

creation of an absolute liability offence absent an impairment of the s. 7 right.

118. Is fundamental justice offended then by the attachment of a mandatory term of imprisonment to the s. 94 offence? Is there something repugnant about imprisoning a person for the commission of an absolute liability offence? Presumably no objection can be taken to attaching penal consequences such as a fine to a validly enacted absolute liability offence, only to penal consequences in the form of imprisonment if this gives rise to a violation of s. 7 of the *Charter*. If it does, then the Court is not only empowered, but obligated by the Constitution, to strike the section down.

119. I have already indicated that in my view a law which interferes with the liberty of the citizen in violation of the principles of fundamental justice cannot be saved by s. 1 as being either reasonable or justified. The concepts are mutually exclusive. This is not, of course, to say that no limits can be put upon the right to life, liberty and security of the person. They clearly can, but only if they are imposed in accordance with the principles of fundamental justice and survive the tests in s. 1 as being reasonable and justified in a free and democratic society. Nor is the government precluded from resort to s. 33 of the *Charter* in order to dispense with the requirements of fundamental justice when, in a case of emergency, it seeks to impose restrictions on the s. 7 right. This, however, will be a policy decision for which the government concerned will be politically accountable to the people. As it is, s. 94 cannot, in my view, be saved by s. 1 if it violates s. 7. The sole question is whether it violates s. 7.

120. My colleague, in finding that s. 94 offends the principles of fundamental justice, has relied heavily upon the common law which precluded punishment in the absence of a guilty mind. We are not, however, dealing with a common law crime here. We are dealing with a statutory offence as to which the legislature has stated in no uncertain terms that guilt is established by proof of the act itself.

121. Unlike my colleague, I do not think that ss. 8 to 14 of the *Charter* shed much light on the interpretation of the phrase "in accordance with the principles of fundamental justice" as used in s. 7. I find them very helpful as illustrating facets of the right to life, liberty and security of the person. I am not ready at this point, however, to equate unreasonableness or arbitrariness or tardiness as used in some of these sections with a violation of the principles of fundamental justice as used in s. 7. Delay, for example, may be explained away or excused or justified on a number of grounds under s. 1. I prefer, therefore, to treat these sections as self-standing provisions, as indeed they are.

122. I approach the interpretive problem raised by the phrase "the principles of fundamental justice" on the assumption that the legislature was very familiar with the concepts of "natural justice" and "due process" and the way in which those phrases had been judicially construed and applied. Yet they chose neither. Instead they chose the phrase "the principles of fundamental justice". What is "fundamental justice"? We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice"? I am not entirely sure. We have been left by the legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of

the person--surely one of the most basic rights in a free and democratic society--then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.

123. It has been argued very forcefully that s. 7 is concerned only with procedural injustice but I have difficulty with that proposition. There is absolutely nothing in the section to support such a limited construction. Indeed, it is hard to see why one's life and liberty should be protected against procedural injustice and not against substantive injustice in a *Charter* that opens with the declaration:

> Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

and sets out the guarantee in broad and general terms as follows:

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

I cannot think that the guaranteed right in s. 7 which is to be subject only to limits which are reasonable and justifiable in a free and democratic society can be taken away by the violation of a principle considered fundamental to our justice system. Certainly the rule of law acknowledged in the preamble as one of the foundations on which our society is built is more than mere procedure. It will be for the courts to determine the principles which fall under the rubric "the principles of fundamental justice". Obviously not all principles of law are covered by the phrase; only those which are basic to our system of justice.

124. I have grave doubts that the dichotomy between substance and procedure which may have served a useful purpose in other areas of the law such as administrative law and private international law should be imported into s. 7 of the *Charter*. In many instances the line between substance and procedure is a very narrow one. For example, the presumption of innocence protected in s. 11(d) *of the Charter* may be viewed as a substantive principle of fundamental justice but it clearly has both a substantive and a procedural aspect. Indeed, any rebuttable presumption of fact may be viewed as procedural, as going primarily to the allocation of the burden of proof. Nevertheless, there is also an interest of substance to be protected by the presumption, namely the right of an accused to be treated as innocent until proved otherwise by the Crown. This right has both a societal and an individual aspect and is clearly fundamental to our justice system. I see no particular virtue in isolating its procedural from its substantive elements or vice versa for purposes of s. 7. A similar analysis may be made of the rule against double jeopardy protected in s. 11(h).

125. How then are we to decide whether attaching a mandatory term of imprisonment to an absolute liability offence created by statute offends a principle of fundamental justice? I believe we must turn to the theory of punishment for the answer.

3. Punishment and Fundamental Justice

126. It is now generally accepted among penologists that there are five main objectives of a penal system: see Nigel Walker, *Sentencing in a Rational Society*, 1969. They are:

(1) to protect offenders and suspected offenders against unofficial retaliation;

(2) to reduce the incidence of crime;

(3) to ensure that offenders atone for their offences;

(4) to keep punishment to the minimum necessary to achieve the objectives of the system; and

(5) to express society's abhorrence of crime.

Apart from death, imprisonment is the most severe sentence imposed by the law and is generally viewed as a last resort i.e., *as appropriate only when it can be shown that no other sanction can achieve the objectives of the system.*

127. The Law Reform Commission of Canada in its Working Paper 11, "Imprisonment and Release", in *Studies on Imprisonment* (1976), states at p. 10:

> Justice requires that the sanction of imprisonment not be disproportionate to the offence, and humanity dictates that it must not be heavier than necessary to achieve its objective.

128. Because of the absolute liability nature of the offence created by s. 94(2) of the *Motor Vehicle Act* a person can be convicted under the section even although he was unaware at the time he was driving that his licence was suspended and was unable to find this out despite the exercise of due diligence. While the legislature may as a matter of government policy make this an offence, and we cannot question its wisdom in this regard, the question is whether it can make it mandatory for the courts to deprive a person convicted of it of his liberty without violating s. 7. This, in turn, depends on whether attaching a mandatory term of imprisonment to an absolute liability offence such as this violates the principles of fundamental justice. I believe that it does. I think the conscience of the court would be shocked and the administration of justice brought into disrepute by such an unreasonable and extravagant penalty. It is totally disproportionate to the offence and quite incompatible with the objective of a penal system referred to in paragraph (4) above.

129. It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system. This is not to say that there is an inherently appropriate relationship between a particular offence and its punishment but rather that there is a scale of offences and punishments into which the particular offence and punishment must fit. Obviously this cannot be done with mathematical precision and many different factors will go into the assessment of the seriousness of a particular offence for purposes of determining the appropriate punishment but it does provide a workable conventional framework for sentencing. Indeed, judges in the exercise of their sentencing discretion have been employing such a scale for over a hundred years.

130. I believe that a mandatory term of imprisonment for an offence committed unknowingly and unwittingly and after the exercise of due diligence is grossly excessive and inhumane. It is not required to

reduce the incidence of the offence. It is beyond anything required to satisfy the need for "atonement". And society, in my opinion, would not be abhorred by an unintentional and unknowing violation of the section. I believe, therefore, that such a sanction offends the principles of fundamental justice embodied in our penal system. Section 94(2) is accordingly inconsistent with s. 7 of the *Charter* and must, to the extent of the inconsistency, be declared of no force and effect under s. 52. I express no view as to whether a mandatory term of imprisonment for such an offence represents an arbitrary imprisonment within the meaning of s. 9 of the *Charter* or "cruel and unusual treatment or punishment" within the meaning of s. 12 because it is not necessary to decide those issues in order to answer the constitutional question posed.

131. I would dismiss the appeal and answer the constitutional question in the negative.

Appeal dismissed. The constitutional question is answered in the negative.

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Solicitor for the intervener the Attorney General of Canada: Roger Tassé, Ottawa.

Solicitor for the intervener the Attorney General for Ontario: Ministry of the Attorney General, Toronto.

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Solicitors for the intervener the British Columbia Branch of the Canadian Bar Association: Ladner, Downs, Vancouver.

14	*Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32

SUPREME COURT OF CANADA

CITATION: Quebec (Attorney General) *v.* 9147-0732 Québec inc., 2020 SCC 32

APPEAL HEARD: January 22, 2020

JUDGMENT RENDERED: November 5, 2020

DOCKET: 38613

BETWEEN:

Attorney General of Quebec and Director of Criminal and Penal Prosecutions

Appellants

and

9147-0732 Québec inc.

Respondent

- and -

Director of Public Prosecutions, Attorney General of Ontario, Association des avocats de la défense de Montréal, British Columbia Civil Liberties Association, Canadian Civil Liberties Association and Canadian Constitution Foundation

Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Kasirer J.

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 48)	Brown and Rowe JJ. (Wagner C.J. and Moldaver and Côté JJ. concurring)
CONCURRING REASONS: (paras. 49 to 137)	Abella J. (Karakatsanis and Martin JJ. concurring)
CONCURRING REASONS: (paras. 138 to 142)	Kasirer J.

QUEBEC (A.G.) *v.* 9147-0732 QUÉBEC INC.

Attorney General of Quebec and
Director of Criminal and Penal Prosecutions *Appellants*

v.

9147-0732 Québec inc. *Respondent*

and

Director of Public Prosecutions,
Attorney General of Ontario,
Association des avocats de la défense de Montréal,
British Columbia Civil Liberties Association,
Canadian Civil Liberties Association and
Canadian Constitution Foundation *Interveners*

Indexed as: Quebec (Attorney General) *v.* 9147-0732 Québec inc.

2020 SCC 32

File No.: 38613.

2020: January 22; 2020: November 5.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Charter of Rights — Cruel and unusual treatment or punishment — Scope and purpose of guarantee — Whether s. 12 of Canadian Charter of Rights and Freedoms protects corporations from cruel and unusual treatment or punishment.

A corporation was found guilty of carrying out construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of Quebec's *Building Act*. Pursuant to s. 197.1 of that Act, the penalty for an offence under s. 46 is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation. Applying this provision, the Court of Québec imposed the then minimum fine for corporations of $30,843. The corporation challenged the constitutionality of the mandatory minimum fine on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12

of the *Charter*. The Court of Québec dismissed the challenge, concluding that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12. On appeal by the corporation, the Quebec Superior Court similarly held that corporations were not covered by s. 12, as the provision's purpose was the protection of human dignity, a notion meant exclusively for natural persons. A majority at the Quebec Court of Appeal, however, allowed the corporation's appeal, concluding that since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them. The dissenting judge was of the view that s. 12 does not apply to corporations.

Held: The appeal should be allowed and the judgment of the Court of Appeal set aside.

Per Wagner C.J. and Moldaver, Côté, **Brown** and **Rowe** JJ.: Section 12 of the *Charter* does not protect corporations from cruel and unusual treatment or punishment because the text "cruel and unusual" denotes protection that only human beings can enjoy. The protective scope of s. 12 is thus limited to human beings. The Court's jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, and the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality.

To claim protection under the *Charter*, a corporation must establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision. The court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The approach is generous, purposive and contextual and should be done in a large and liberal manner. Within the purposive approach, the analysis must begin by considering the text of the provision. While constitutional norms are deliberately expressed in general terms, the words used remain the most primal constraint on judicial review and form the outer bounds of a purposive inquiry. Giving primacy to the text prevents an interpretation that overshoots (or undershoots) the actual purpose of the right. It is not the sole consideration, but treating it as the first indicator of purpose is constitutive of the principles of *Charter* interpretation.

The text of s. 12, particularly the inclusion of "cruel", strongly suggests that the provision is limited to human beings. The ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. The words "cruel and unusual treatment or punishment" refer to human pain and suffering, both physical and mental. An examination of s. 12's historical origins shows that the *Charter* took a different path from its predecessors, the English *Bill of Rights* and the Eighth Amendment of the United States Constitution, by carving off the right not to be denied reasonable bail without just cause from the right to be free from cruel and unusual punishment and by omitting the protection against excessive fines. The protection against cruel and unusual punishment under s. 12 therefore exists as a standalone guarantee. This is highly significant: excessive fines (which a corporation can sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be so excessive as to outrage standards of decency and abhorrent or intolerable to society. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity and cannot apply to treatments or punishments imposed on corporations.

There is agreement with Abella J.'s discussion of related *Charter* rights. However, there is disagreement with the prominence given to international and comparative law in the interpretive process. International and comparative sources play a limited role of providing support or confirmation for the result reached by way of purposive interpretation of *Charter* rights. Their weight and persuasiveness depends on the nature of the source and its relationship to the *Charter*. A principled framework and methodology for considering international and comparative sources in constitutional interpretation is necessary, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants.

The presumption of conformity is the firmly established interpretive principle that the *Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. Binding international instruments carry more weight in the analysis than non-binding instruments, which should be treated as relevant and persuasive but not determinative interpretive tools, and courts drawing from the latter should be careful to explain why they are drawing on a particular source and how it is being used. In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights* are both binding on Canada,

thus triggering the presumption of conformity. However, neither extends protection from cruel and unusual punishment to corporations. While both the *American Convention on Human Rights* and the European *Convention for the Protection of Human Rights and Fundamental Freedoms* have also been found not to extend protection to corporations against cruel and unusual punishment, these instruments are merely persuasive here. International instruments that pre-date the *Charter* can also clearly form part of the historical context of a *Charter* right regardless of whether Canada is a party to such instruments. In this case, the context of the English *Bill of Rights* and the Eighth Amendment is highly relevant as each contained similar but not identical protections as s. 12. As for instruments that post-date the *Charter*, those that do not bind Canada carry much less interpretive weight than those that do. Finally, decisions of foreign and international courts are included among those non-binding sources that are relevant and may be persuasive. However, particular caution should be exercised as the measures in effect in other countries say little about the scope of the rights enshrined in the Canadian *Charter*.

Per **Abella**, Karakatsanis and Martin JJ.: The purpose of s. 12 of the *Charter* is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Determining the scope of s. 12 requires first determining the purpose of the right, which is to be sought by reference to the character and objectives of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and to the principles and values underlying the right. Examining the text of the *Charter* is only the beginning of the interpretive exercise, which is fundamentally different from interpreting a statute. A generous, purposive and contextual approach should be applied so that *Charter* rights can grow and adapt to changing realities. Overemphasizing the plain text of *Charter* rights would make Canadian constitutional law more insular, and creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to protect. Purpose remains the central consideration in interpreting the scope and content of a *Charter* right. While several factors — including the text — can help inform the exercise, the Court has never endorsed a rigid hierarchy among these interpretative guides.

A review of the language used in the Court's s. 12 jurisprudence shows that both the English and French versions capture the same concept, namely, that s. 12 prohibits treatment or punishment that is incompatible with human dignity. Dictionary definitions of "cruel", "cruelty", "cruel and unusual punishment" and "*cruel*" in French, reveal that the ordinary meaning of the words cruel and unusual treatment or punishment in s. 12 centers on human pain and suffering. The fact that the word "everyone" is found in the text of s. 12 cannot, by virtue of its literal meaning, expand the protection to corporations, without any regard for the purpose of the right as protecting human dignity.

The historical origins and values underlying s. 12 of the *Charter* can be traced back to art. 10 of the English *Bill of Rights*, which stipulated that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. The provision was incorporated almost verbatim into the Eighth Amendment of the United States Constitution. In both the English and American contexts, protection for corporations was not contemplated. In the United States, the historical purpose of prohibiting cruel and unusual punishment was to protect the inherent worth and dignity of human beings. In Canada, similar language first appeared in s. 2(*b*) of the *Canadian Bill of Rights*. The wording of that provision and of s. 12 of the *Charter* are almost identical. Like the *Canadian Bill of Rights*, the enactment of the *Charter* was influenced by the events of the Second World War, WWII's shocking indifference to human dignity and the devastating human rights abuses it tolerated resulted in responsive protections in international human rights instruments and in domestic rights guarantees like the *Charter*.

Since Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada's s. 12 prohibition against cruel and unusual treatment with how courts have interpreted the numerous international instruments containing similar provisions. The Court has frequently relied on international and comparative law sources to assist in delineating the breadth and content of *Charter* rights; this is a standard and accepted practice. Both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law. The Court has never required that these sources be separately weighed, nor has it ever applied a hierarchical sliding scale of persuasiveness, segmenting non-binding international and comparative sources into categories worthy of more or less influence. Considering what and how laws and decisions have been applied on related questions by other countries and institutions is part not only of an

ongoing global judicial conversation, but of the epistemological package constitutional courts routinely rely on. Narrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources is a worrying setback.

While s. 12's international siblings vary in language, a common meaning can be ascribed to their various formulations as the phrase "cruel and unusual" is a compendious expression of a norm. The criterion applied to determine whether a punishment is cruel and unusual is whether the punishment prescribed is so excessive as to outrage standards of decency. All of the relevant international sources lead to the irrefutable inference that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering. None of them include protection for corporations. While this international consensus does not dictate the outcome, it provides compelling and relevant interpretive support. A review of foreign domestic law, while not determinative, also supports an interpretation of s. 12 of the *Charter* which excludes protection for corporations. Internationally, it is widely acknowledged that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering.

Looking at the meaning and purpose of the other specific rights and freedoms with which s. 12 is associated, ss. 7 to 14 of the *Charter* are grouped under the heading "Legal Rights". The broad purposes of these legal rights are to preserve the rights of detained individuals, by ensuring they are dealt with fairly and humanely, and to maintain the repute and integrity of the system of justice. Significantly, corporations have been found not to be included under both ss. 7 and 11(*c*).

The purpose of s. 12 is to confer protection on a singularly human level. It is meant to protect human dignity and respect the inherent worth of individuals. Just as corporations cannot experience human reactions such as stress or anxiety, neither can they experience suffering. It would strain the interpretation of cruel and unusual treatment or punishment under s. 12 if a corporation, an artificial entity, could be said to experience it. Since corporations do not fall within the purpose of s. 12, they do not fall within its protective scope.

Per **Kasirer** J.: There is agreement with Abella, Brown and Rowe JJ. that the protection offered by s. 12 of the *Charter* does not extend to corporations. *Charter* rights must be given a large, liberal and purposive interpretation. Starting from the language of s. 12, particularly the word "cruel", the dissenting Court of Appeal judge correctly found that it would distort the ordinary meaning of the words to say that it is possible to be cruel to a corporate entity. Although the scope of s. 12 has been broadened over the years, its evolution is still concerned only with human beings. In his analysis, the dissenting judge relied on sources drawn from domestic, international and English law and on the *Civil Code of Québec*. In this case, it is unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further.

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Act, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3; *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3.

By Abella J.

Applied: *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; **referred to:** *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *R. v. Luxton*, 1990 CanLII 83 (SCC), [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, 1990 CanLII 50 (SCC), [1990] 2 S.C.R. 1385; *R. v. Goltz*, 1991 CanLII 51 (SCC), [1991] 3 S.C.R. 485; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90; *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599; *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779; *R. v. CIP Inc.*, 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843; *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13; *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Eldridge v. British-Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Stillman*, 2019 SCC 40; *R. v. Poulin*, 2019 SCC 47; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158; *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Furman v. Georgia*, 408 U.S. 238 (1972); *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386; *Roper v. Simmons*, 543 U.S. 551 (2005); *Reyes v. The Queen*, [2002] UKPC 11, [2002] 2 A.C. 235; *S. v. Williams*, 1995 (3) S.A. 632; *A newspaper publishing company v. Trinidad and Tobago*, Communication No. 360/1989, U.N. Doc. Supp. No. 40 (A/44/40); *A publication and a printing company v. Trinidad and Tobago*, Communication No. 361/1989, U.N. Doc. Supp. No. 40 (A/44/40); *V.S. v. Belarus*, Communication No. 1749/2008, U.N. Doc. CCPR/C/103/D (2011); *Titularidad de Derechos de las Personas Jurídicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, February 26, 2016; *Kontakt-Information-Therapie v. Austria*, Application No. 11921/86, October 12, 1988, D.R. 57, p. 81; *Identoba v. Georgia*, Application No. 73235/12, May 12, 2015 (HUDOC); *S. v. Makwanyane*, 1995 (3) S.A. 391; *S. v. Dodo*, 2001 (3) S.A. 382; *Taunoa v. Attorney-General*, [2007] NZSC 70, [2008] 1 N.Z.L.R. 429; *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483; *R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425; *R. v. Wholesale Travel Group Inc.*, 1991 CanLII 39 (SCC), [1991] 3 S.C.R. 154; *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *R. v. Amway Corp.*, 1989 CanLII 107 (SCC), [1989] 1 S.C.R. 21.

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APPEAL from a judgment of the Quebec Court of Appeal (Chamberland, Bélanger and Rancourt JJ.A.), 2019 QCCA 373, [2019] AZ-51573754, [2019] J.Q. nº 1443 (QL), 2019 CarswellQue 1425 (WL Can.), setting aside a decision of Dionne J., 2017 QCCS 5240, [2017] AZ-51443312, [2017] J.Q. nº 16310 (QL), 2017 CarswellQue 10451 (WL Can.), which affirmed a decision of Ratté J.C.Q., 2017 QCCQ 1632, [2017] AZ-51373092, [2017] J.Q. nº 2085 (QL), 2017 CarswellQue 1930 (WL Can.). Appeal allowed.

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Laura Élisabeth Trempe and *Marie-Pier Champagne*, for the appellant the Director of Criminal and Penal Prosecutions.

Martin Villa and *Niki Galanopoulos*, for the respondent.

François Lacasse and *Mathieu Stanton*, for the intervener the Director of Public Prosecutions.

Courtney Harris, *Ellen Weis* and *Ravi Amarnath*, for the intervener the Attorney General of Ontario.

Léon H. Moubayed, *Sarah Gorguos* and *Guillaume Charlebois*, for the intervener Association des avocats de la défense de Montréal.

Gib van Ert and *Jessica Magonet*, for the intervener the British Columbia Civil Liberties Association.

Alyssa Tomkins, *Albert Brunet* and *Penelope Simons*, for the intervener the Canadian Civil Liberties Association.

Brandon Kain, *Adam Goldenberg* and *Sébastien Cusson*, for the intervener the Canadian Constitution Foundation.

The judgment of Wagner C.J. and Moldaver, Côté, Brown and Rowe JJ. was delivered by

BROWN AND ROWE JJ. —

I. Overview

[1] This appeal requires this Court to decide whether s. 12 of the *Canadian Charter of Rights and Freedoms* protects corporations from cruel and unusual treatment or punishment. Like our colleagues, we conclude that it does not, because corporations lie beyond s. 12's protective scope. Simply put, the text "cruel and unusual"

denotes protection that "only human beings can enjoy": *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 1004. The protective scope of s. 12 is thus limited to human beings.

[2] This Court's jurisprudence on s. 12, in both its French and English versions, is marked by the concept of human dignity, as our colleagues have noted. And the existence of human beings behind the corporate veil is insufficient to ground a s. 12 claim of right on behalf of a corporate entity, in light of the corporation's separate legal personality. Like our colleagues, and contrary to the majority at the Court of Appeal, we therefore reject the proposition that the effect of a corporation's bankruptcy on its stakeholders should be considered in determining the scope of s. 12.

[3] Despite our agreement in the result, we find it necessary to write separately in order to assert the proper place in constitutional interpretation of foreign and international sources such as those upon which our colleague Abella J. relies in her analysis. If these sources are to be accorded a persuasive character, it must be done by way of a coherent and consistent methodology. Coherence and consistency in a court's reasons are important, because they are critical means by which it may account to the public for the manner in which it exercises its powers. This is particularly so on a matter so fundamental as constitutional interpretation. As Professor Stéphane Beaulac notes, a consistently defined methodology of interpretation is a means of promoting the rule of law, notably through legal predictability: "'Texture ouverte', droit international et interprétation de la Charte canadienne" (2013), 61 *S.C.L.R.* (2d) 191, at pp. 192-93.

[4] We also make a preliminary and more general point on constitutional interpretation. Our colleague Abella J. applies the primacy of constitutional text and considerations of purpose in accordance with the purposive approach adopted in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344, recently affirmed in *R. v. Poulin*, 2019 SCC 47, at para. 32. In doing so, however, she makes several remarks which risk minimizing the primordial significance assigned by this Court's jurisprudence to constitutional text in undertaking purposive interpretation.

[5] Having regard to the decision under appeal, that of the Quebec Court of Appeal, we find Justice Chamberland's dissenting reasons difficult to improve upon. His analysis belies any perceived need to dispose of this matter by referring extensively to international and comparative law. And his textual analysis —— notably on the meaning of "cruel" —— is compelling. As he put it, [TRANSLATION] "[i]t would completely distort the ordinary meaning of the words . . . to say that it is possible to be cruel to a corporate entity": 2019 QCCA 373, at para. 53 (CanLII). His discussion of the other *Big M Drug Mart* factors was also in keeping with this Court's direction on the proper methodology of *Charter* interpretation.

II. Analysis

[6] A summary of relevant facts and judicial history is found in the reasons of Abella J., and we are content to rely on it.

[7] To claim protection under the *Charter*, a corporation —— indeed, any claimant —— must establish that "it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision": *R. v. CIP Inc.*, 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843, at p. 852. In order to make that determination, the court must seek to discern the scope and purpose of the right by way of a purposive interpretation, that is, "by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*": *Big M Drug Mart*, at p. 344; see also *Poulin*, at para. 32. The approach is "generous, purposive and contextual" and should be done in a "large and liberal manner": *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 15; *Caron v. Alberta*, 2015 SCC 56, [2015] 3 S.C.R. 511, at para. 35.

A. *Preliminary Observations on Purposive Interpretation*

[8] This Court has consistently emphasized that, within the purposive approach, the analysis *must begin* by considering the text of the provision. As this Court made clear in *British Columbia (Attorney General) v. Canada (Attorney General)*, 1994 CanLII 81 (SCC), [1994] 2 S.C.R. 41 ("*Vancouver Island Railway*"), "[a]lthough

constitutional terms must be capable of growth, constitutional interpretation must nonetheless begin with the language of the constitutional law or provision in question": p. 88. This was reiterated in *Grant*, where the Court stated that "[a]s for any constitutional provision, the starting point must be the language of the section": para. 15 (emphasis added). Recently, in *Poulin*, the Court yet again affirmed that the first step to interpreting a *Charter* right is to analyze the text of the provision: para. 64.

[9] This is so because constitutional interpretation, being the interpretation *of the text of the Constitution*, must first and foremost have reference to, and be constrained by, that text. Indeed, while constitutional norms are deliberately expressed in general terms, the words used remain "the most primal constraint on judicial review" and form "the outer bounds of a purposive inquiry": B. J. Oliphant, "Taking purposes seriously: The purposive scope and textual bounds of interpretation under the Canadian Charter of Rights and Freedoms" (2015), 65 *U.T.L.J.* 239, at p. 243. The Constitution is not "an empty vessel to be filled with whatever meaning we might wish from time to time": *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313 ("*Re PSERA*"), at p. 394; *Caron*, at para. 36. Significantly, in *Caron*, the Court reiterated this latter passage and reasserted "the primacy of the written text of the Constitution": para. 36; see also para. 37.

[10] Moreover, while *Charter* rights are to be given a purposive interpretation, such interpretation must not overshoot (or, for that matter, undershoot) the actual purpose of the right: *Poulin*, at paras. 53 and 55; *R. v. Stillman*, 2019 SCC 40, at paras. 21 and 126; *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, at paras. 17-18 and 40; *Big M Drug Mart*, at p. 344. Giving primacy to the text — that is, respecting its established significance as the first factor to consider within the purposive approach — prevents such overshooting.

[11] While acknowledging, at para. 71, that language is part of the analysis, and that "the text of the *Charter* matters", our colleague Abella J. stresses the direction in *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145 that the task of interpreting a constitution is fundamentally different from interpreting a statute, and that courts ought "not to read the provisions of the Constitution like a last will and testament lest it become one": p. 155. This felicitous phrase cannot, however, be taken as minimizing the primordial significance of constitutional text as it has since, and repeatedly, been recognized in this Court's jurisprudence: see, e.g., *Caron*, at para. 36; *Vancouver Island Railway*, at p. 88. It is not the sole consideration, but treating it as the first indicator of purpose is not in the least inconsistent with the principles of *Charter* interpretation; it is in fact constitutive of them.

[12] We pause here to emphasize that recognizing the importance of the text in interpreting a *Charter* right purposively does *not* translate into advocating for what our colleague Abella J. calls a "[p]urely textual interpretation" of the Constitution: para. 76, quoting A. Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 19, at p. 83. The notion of "textualism" to which she looks for support diverges substantially from the idea — embodied in our jurisprudence and in our reasons — that the purposive inquiry must begin by examining the text. For instance, the "new textualism" denounced by Aharon Barak is a "system [which] holds that the Constitution and every statute should be understood according to the reading of a reasonable reader at the time of enactment" and in which "[r]eference to the history of the text's creation . . . is not allowed": pp. 82-83. Similarly, the kind of interpretation Lorne Neudorf characterizes as "a purely textual reading" is one where the analysis is strictly restricted to the text of the Constitution: "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J.* 519, at p. 544. These conceptions of constitutional interpretation are not remotely consistent with that which we apply and which our law demands.

[13] Moreover, our colleague Abella J. draws a false dichotomy between the purposive approach and beginning that analysis with the text of the provision. Indeed, beginning with the text is precisely what the precedents of this Court direct us to do. Her assertion that "considering the text as prime [is] unhelpful in interpreting constitutional guarantees" (at para. 75) discards these precedents and the role they have assigned to the text in delimiting an analysis which, we repeat, must also be conducted by reference to the historical context, the larger objects of the *Charter*, and, where applicable, the meaning and purpose of associated *Charter* rights.

[14] Returning to the case at bar, the text of s. 12, particularly the inclusion of "cruel", strongly suggests that the provision is limited to human beings. Justice Chamberland quite rightly emphasized that the ordinary meaning of the word "cruel" does not permit its application to inanimate objects or legal entities such as corporations. As he explained, [TRANSLATION] "[o]ne would not say, it seems to me, that a group of workers who demolish a building using explosives (rather than going about it more gradually, brick by brick, plank by plank) are being cruel to the building. Nor would one say that a group of consumers who boycott a business's products,

creating a real risk that it will be driven into bankruptcy, are being cruel to the company that owns the business": para. 56, fn. 32. We therefore agree with Justice Chamberland (at paras. 51-56), as with our colleague (Abella J.'s reasons, at para. 86), that the words "cruel and unusual treatment or punishment" refer to *human* pain and suffering, both physical and mental.

[15] We note that, in refusing to apply s. 7 of the *Charter* to corporations in *Irwin Toy*, Dickson C.J. and Lamer and Wilson JJ. reasoned in a similar manner, observing that the text of the provision did not permit corporations to be included within its protective scope:

> In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail. To say that bankruptcy and winding up proceedings engage s. 7 would stretch the meaning of the right to life beyond recognition.
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> . . .
>
> . . . A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings. [Emphasis added; pp. 1002-4.]

[16] Relatedly, we also largely agree with our colleague Abella J.'s analysis of s. 12's historical origins, subject to our discussion below on the proper role of international and comparative law in the analysis. We would add that an examination of s. 12's historical origins shows that the *Charter* took a different path from its predecessors. Following an early, related protection in *Magna Carta* (1215), Article 10 of the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2 provided that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Using almost identical text, the Eighth Amendment of the Constitution of the United States provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". In Canada, however, the right not to be denied reasonable bail without just cause was carved off from the right to be free from cruel and unusual punishment, and placed in s. 11(*e*) of the *Charter*. Even more significantly, the protection against "excessive fines" was not retained at all, neither in the *Charter* nor in the *Canadian Bill of Rights*, S.C. 1960, c. 44, as noted by Justice Chamberland: para. 66.

[17] The protection against cruel and unusual punishment under s. 12 of the *Charter* therefore exists as a standalone guarantee. Viewed in light of the historical background noted above, this is highly significant, if not determinative: excessive fines (which a corporation *can* sustain), without more, are not unconstitutional. For a fine to be unconstitutional, it must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society: *R. v. Boudreault*, 2018 SCC 58, [2018] 3 S.C.R. 599, at paras. 45 and 94. This threshold is, in accordance with the purpose of s. 12, inextricably anchored in human dignity. It is a constitutional standard that cannot apply to treatments or punishments imposed on corporations.

[18] Finally, we agree with our colleague's discussion of related *Charter* rights.

B. *The Proper Role of International and Comparative Law in Charter Interpretation*

[19] We differ fundamentally from our colleague Abella J. on the prominence she gives to international and comparative law in the interpretive process. We see this as a significant and unwarranted departure from this Court's jurisprudence. Specifically, her claim that all international and comparative sources have been "indispensable" to Canadian constitutional interpretation (at para. 100) does not hold true when considering this Court's jurisprudence and the varying role and weight it has assigned to different kinds of instruments.

[20] As a constitutional document that was "made in Canada" (Prime Minister Pierre Elliot Trudeau, *Federal-Provincial Conference of First Ministers on the Constitution* (morning session of November 2,

1981), at p. 10), the *Charter* and its provisions are primarily interpreted with regards to Canadian law and history.

[21] This remains unchanged by the purposive approach developed in *Big M Drug Mart*. That judgment makes no reference to international and comparative law, except inasmuch as it relates to the historical origins of the concepts enshrined in the *Charter*.

[22] While this Court has generally accepted that international norms *can* be considered when interpreting domestic norms, they have typically played a limited role of providing *support* or *confirmation* for the result reached by way of purposive interpretation. This makes sense, as Canadian courts interpreting the *Charter* are not bound by the content of international norms. As Professor Beaulac and Dr. Bérard explain:

> [TRANSLATION] In addition to distorting the relationship between the international and domestic legal orders, the suggestion that domestic courts are bound by international normativity is inconsistent with the constitutional mandate and the function of the judiciary, which is to exercise decision-making power under the applicable Canadian and Quebec law. Seeing international law as having persuasive authority is a more appropriate, consistent and effective approach.
>
> . . .
>
> . . . even though international normativity is not binding in domestic law, what it can and, indeed, should do in appropriate circumstances is to influence the interpretation and application of domestic law by our courts. Except among a few zealous supporters of the internationalist cause, there is general agreement that, in this regard, the criterion for referring to international law in domestic law is that of "persuasive authority".
>
> (S. Beaulac and F. Bérard, *Précis d'interprétation législative* (2nd ed. 2014), Chapter 5, at paras. 5 and 36 (emphasis added; footnotes omitted).)

[23] Furthermore, even within that limited supporting or confirming role, the weight and persuasiveness of each of these international norms in the analysis depends on the nature of the source and its relationship to our Constitution. The reason for this is the necessity of preserving the integrity of the Canadian constitutional structure, and Canadian sovereignty. As this Court cautioned in *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, "[t]he interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy": para. 150.

[24] Although this Court has been careful to attach the appropriate weight to international and comparative law in *Charter* interpretation, it has not always explained how or why different international sources are being discussed or relied on, while others are not. The result has been a want of clarity, even confusion, to which, we say with respect, our colleague Abella J. adds by indiscriminately drawing from binding instruments *and* non-binding instruments, instruments that pre-date the *Charter and* instruments that post-date it, and decisions of international tribunals *and* foreign domestic courts, before concluding that, combined, they represent an "international consensus [that] does not dictate the outcome [but] provides compelling and relevant interpretive support": para. 107.

[25] As we will discuss, the various instruments and case law our colleague Abella J. reviews play different roles in the analysis and receive different weight. Treating them all alike — stating that each is "indispensable" and provides "compelling and relevant interpretive support" (at paras. 100 and 107) — actually risks *undermining* the importance of Canada's international obligations:

> The temptation may be great to treat all international law, whether binding on Canada or not, as "optional information" and to disregard the particular interpretative onus that is placed upon courts by the presumption of conformity with Canada's international obligations. There is a significant difference between international law that is binding on Canada and other international norms. The former is not only potentially persuasive but also obligatory. This distinction matters — when we fail to uphold our obligations, we undermine the respect for law internationally. The distinction also provides the rationale

for the traditional common law presumption of conformity with Canada's international obligations as well as for treating differently international norms that do not legally bind Canada.

(J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at p. 41 (emphasis added); see also J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 260.)

[26] We are not alone in expressing concern about the need for structure when citing international and foreign sources. Commentators have called for clarification in this regard, noting that courts should provide "greater analytical rigour" and "approach international law in a principled and coherent manner, providing clarity as to precisely what effect is accorded to international law in a given case and why": Brunnée and Toope, at p. 8; see also the Honourable Mr. Justice R. G. Juriansz, "International Law and Canadian Courts: A Work in Progress" (2008), 25 *N.J.C.L.* 171, at pp. 176 and 178. Specific areas calling for clarification include:

> . . . the standards by which courts will determine whether treaties have been implemented; what role non-binding sources (such as treaties which Canada has signed but not ratified, treaties which Canada has neither signed nor ratified, or "soft law" instruments) should play in interpreting domestic law; and whether these various categories of non-binding sources should be treated differently from one another or Canada's binding international legal obligations.
>
> (Currie, at p. 262)

[27] A principled framework is therefore necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants. Setting out a methodology for considering international and comparative sources recognizes how this Court has treated such sources in practice and provides guidance and clarity. Given the issue raised in this case, our focus is on the use of international and comparative law in constitutional interpretation.

[28] This Court has recognized a role for international and comparative law in interpreting *Charter* rights. However, this role has properly been to *support* or *confirm* an interpretation arrived at through the *Big M Drug Mart* approach; the Court has never relied on such tools to define the scope of *Charter* rights. Respectfully, our colleague Abella J.'s approach represents a marked and worrisome departure from this prudent practice.

[29] This Court (generally, albeit not invariably) has been careful to specify the normative value and weight of different kinds of international sources. Our colleague Abella J.'s approach simply abandons this important practice.

[30] A useful starting point is Dickson C.J.'s guidance in *Re PSERA*. While it appeared in a dissenting opinion, his approach to international and comparative law has since shaped the way this Court treats these sources. His consideration of the scope of s. 2(*d*) of the *Charter* looked first to Canadian and Privy Council jurisprudence and then to U.S. and international law: p. 335. On international sources specifically, he explained:

> The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.
>
> In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. [Emphasis added; pp. 348-49.]

[31] Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified": p. 349

(emphasis added). This proposition has since become a firmly established interpretive principle in *Charter* interpretation, the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64; *Kazemi*, at para. 150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23; *Health Services and Support —— Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70.

[32] Importantly, Dickson C.J. referred to instruments that Canada had *ratified*. In other words, his focus in framing this presumption was on *binding* international instruments, as ratification is the way in which international instruments become binding internationally: see Currie, at pp. 153-54. Similarly, Dickson C.J. explained that in becoming a party to international human rights conventions, "Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*" and that "[t]he content of Canada's international human rights obligations is . . . an important indicia of the meaning of 'the full benefit of the *Charter*'s protection'": p. 349 (emphasis added).

[33] Subsequent case law has continued to tie the presumption of conformity to the language of Canada's international *obligations* or *commitments*: *Ktunaxa*, at para. 65; *Badesha*, at para. 38; *Saskatchewan Federation of Labour*, at paras. 62 and 64-65; *Divito*, at para. 22; *Health Services*, at para. 69.

[34] This Court has explained that the presumption of conformity "operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights": *Kazemi*, at para. 150. But, being a presumption, it is also rebuttable and "does not overthrow clear legislative intent": para. 60.

[35] Dickson C.J.'s approach to *non-binding* sources — treating them as relevant and persuasive, but not determinative, interpretive tools — also holds true: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at para. 80. Non-binding sources notably include international instruments to which Canada is *not* a party. Such instruments do not give rise to the presumption of conformity. They therefore have only persuasive value in *Charter* interpretation.

[36] This is not to say that such instruments are irrelevant. As Professors Brunnée and Toope observe, "[t]here is no reason why Canadian courts should not draw upon these [non-binding] norms so long as they do so in a manner that recognizes their non-binding legal quality": p. 53 (emphasis added); see also G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at p. 350. As our colleague notes, "[t]his Court has frequently relied on [non-binding] international law sources to assist in delineating the breadth and content of *Charter* rights": Abella J.'s reasons, at para. 99 (emphasis added). Respectfully, her subsequent attempt to pull into this jurisdiction the deep divisions that inhabit the jurisprudence of our neighbour is no part of what is at issue here. But more importantly, the cases she relies on support the distinctions we draw in these reasons. Dickson C.J.'s articulation of the presumption of conformity in *Re PSERA* was described as the "template for considering the international legal context" in *Divito*, at para. 22. That passage was similarly cited in *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at p. 1056. Meanwhile, *Burns* and *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, dealt with the meaning of the "principles of fundamental justice," a point we address below in para. 45.

[37] In addition to properly characterizing their use, courts must not allow consideration of such instruments to displace the methodology for *Charter* interpretation set out in *Big M Drug Mart*. This Court has been careful to proceed in this manner. For example, in *Ktunaxa*, the Court first reviewed Canadian case law on the scope of freedom of religion before confirming that scope with reference to binding international instruments: paras. 62-65. It then briefly looked to non-binding instruments that "also" supported the Canadian case law, being careful to specify that the instruments were "not binding on Canada and therefore do not attract the presumption of conformity" but were "important illustrations of how freedom of religion is conceived around the world": para. 66. Similarly, in *Saskatchewan Federation of Labour*, the Court began with Canadian case law on s. 2(*d*) of the *Charter* and its history: paras. 28-55. It then explained that Canada's international human rights obligations "also" mandated protecting the right to strike, with particular emphasis on binding instruments and the presumption of conformity: paras. 62-70. Finally, it noted that its conclusion was "[a]dditionally" supported by foreign domestic law: paras. 71-74.

[38] It follows from all this —— and, specifically, from the presumption of conformity —— that binding instruments necessarily carry more weight in the analysis than non-binding instruments. While resort may be had to both, courts drawing from a non-binding instrument should be careful to explain *why* they are drawing on a particular source and *how* it is being used. We respectfully say that the distinctions we draw are the very reason that "[t]his Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others" (Abella J.'s reasons, at para. 104) and that stating this framework with clarity will not do "a disservice to our Court's ability to continue to consider them with selective discernment": para. 102. Our methodology is firmly rooted in this Court's jurisprudence.

[39] In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("*ICCPR*"), are both binding on Canada, thus triggering the presumption of conformity. However, we agree with our colleague that neither extends protection from cruel and unusual punishment to corporations.

[40] Our colleague's analysis then flows into a consideration of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, adopted by Mexico and nations in the Caribbean and central and South America, and the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221. While we agree that neither instrument has been found to extend protection to corporations against cruel and unusual punishment, we are wary of our colleague Abella J.'s approach, which appears to give these non-binding instruments similar weight to binding ones. We therefore highlight that these instruments are merely persuasive here, and that a court relying upon them should explain *why* it is doing so, and *how* they are being used (that is, what weight is being assigned to them).

[41] Another important distinction is between instruments that pre- and post-date the *Charter*. Within the *Big M Drug Mart* approach itself, courts are called on to consider the "historical origins of the concepts enshrined" in the *Charter* when determining the scope of a *Charter* right: p. 344. International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the "drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them": L. E. Weinrib, "A Primer on International Law and the Canadian Charter" (2006), 21 *N.J.C.L.* 313, at p. 324. In this case, then, the context of the English *Bill of Rights*, and the Eighth Amendment is highly relevant as each contained similar — but, importantly, not identical — protections as s. 12, as we have explained above. Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, and related protocols Canada has ratified: Weinrib, at p. 317.

[42] As for instruments that *post*-date the *Charter*, however, the question becomes once again whether or not they are binding on Canada and, by extension, whether the presumption of conformity is engaged. It can readily be seen that an instrument that post-dates the *Charter* and that does not bind Canada carries much less interpretive weight than one that binds Canada and/or contributed to the development of the *Charter*.

[43] Finally, we turn to decisions of foreign and international courts. In *Re PSERA*, these decisions were included among those non-binding sources that "are relevant and may be persuasive": p. 348. Particular caution should, however, be exercised when referring to what other countries have done domestically, as the measures in effect in other countries say little (if anything at all) about the scope of the rights enshrined in the Canadian *Charter* —— a point stated emphatically by this Court in *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3, at para. 62. As Michel Bastarache explains, "[t]he logic employed by other courts provides guidance to Canadian courts rather than precedents to be followed" and "it is important to note that all foreign decisions ultimately influence Canadian law based on persuasive, rather than binding, authority": "How Internationalization of the Law has Materialized in Canada" (2009), 59 *U.N.B.L.J.* 190, at p. 196.

[44] While our colleague notes that her review of foreign domestic jurisprudence is "not determinative" and "supports" her analysis (Abella J.'s reasons, at para. 118), jurisprudence of foreign and international courts seems to infuse her analysis at various points without an explanation of their role in the interpretive process. Respectfully, her discussion of these sources fails to explain in what way they are instructive, how they are being used, or why the particular sources are being relied on. Indeed, she considers various sources of international and comparative law, and gives them unstated, but seemingly equal, interpretive weight. This is made

most clear at paras. 99-100 of her reasons, where she says that the Court "has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights" and that "both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law". Yet, in line with the distinctions we have drawn, the cases our colleague cites in support of this broad statement largely focus on *binding* instruments: *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157, at para. 58; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 120-21; *Health Services*, at paras. 70-71; *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at p. 1061; *Ktunaxa*, at paras. 64-65; *Saskatchewan Federation of Labour*, at paras. 65-70. As we have already explained, the discussion of non-binding instruments in *Saskatchewan Federation of Labour* and *Ktunaxa* properly served a *confirmatory* function.

[45] Nor can *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, *Re B.C. Motor Vehicle Act*, *Burns*, or *Kazemi* justify relying on non-binding, non-historical instruments for the purposes of *Charter* interpretation in the present case, as those cases required consideration of whether an international consensus existed because of the nature of the questions asked. In *Suresh*, the Court was called on to determine if a peremptory norm of customary international law existed, which necessarily required looking to international sources: paras. 59-75. *Re B.C. Motor Vehicle Act*, *Burns*, and *Kazemi*, meanwhile, were concerned with the principles of fundamental justice under s. 7. Determining these principles may call for an examination into international sources as the analysis requires establishing a "societal consensus": *Kazemi*, at paras. 139 and 150; *Re B.C. Motor Vehicle Act*, at p. 503; *Burns*, at paras. 79-81.

[46] As this Court's jurisprudence amply shows, the normative value and weight of international and comparative sources has been tailored to reflect the nature of the source and its relationship to our Constitution. Reaffirming this guidance cannot reasonably be characterized as "novel", howsoever forceful or overstated our colleague Abella J.'s charges to the contrary.

[47] In all, courts must be careful not to indiscriminately agglomerate the traditional *Big M Drug Mart* factors with international and comparative law. The analysis must be dominated by the former and draw on the latter only as appropriate, accompanied by an explanation of why a non-binding source is being considered and how it is being used, including the persuasive weight being assigned to it. In our respectful view, our colleague Abella J.'s reasons do not conform to this approach. The result is that foreign and international instruments and jurisprudence dominate her analysis, contrary to this Court's teachings on constitutional interpretation. While this change in approach is not determinative in the case at bar, it could very well be in a different one. We therefore find it crucial to reiterate the proper approach to *Charter* interpretation.

III. Conclusion

[48] We would allow the appeal and set aside the judgment of the Court of Appeal.

The reasons of Abella, Karakatsanis and Martin JJ. were delivered by

ABELLA J. —

[49] The *Canadian Charter of Rights and Freedoms* constitutionalized protection for human rights and civil liberties in Canada, entrusting courts with the responsibility for interpreting the meaning of its provisions. Using a contextual approach, the Court has, over time, decided who and what came within the *Charter*'s protective scope.

[50] Section 12 of the *Charter* guarantees the right not to be subjected to cruel and unusual treatment or punishment. This is the first case in which the Court has been asked to determine the scope of s. 12, that is, who or what comes under its protection. This appeal raises the question of whether corporations come within its scope.

[51] In my respectful view, s. 12's purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. Its intended beneficiaries are people, not corporations.

Background

[52] The corporation before the Court, 9147-0732 Québec inc., was found guilty of carrying out construction work as a contractor without holding a current license for that purpose, an offence under s. 46 of the *Building Act*, CQLR, c. B-1.1:

> **46.** No person may act as a building contractor, hold himself out to be such or give cause to believe that he is a building contractor, unless he holds a current licence for that purpose.
>
> No contractor may use, for the carrying out of construction work, the services of another contractor who does not hold a licence for that purpose.

[53] Pursuant to s. 197.1 of the *Building Act*, the penalty for an offence under s. 46 of this statute is a mandatory minimum fine which varies depending on whether the offender is an individual or a corporation:

> **197.1** Any person who contravenes section 46 or 48 by not holding a licence of the appropriate class or subclass is liable to a fine of $5,141 to $25,703 in the case of an individual and $15,422 to $77,108 in the case of a legal person, and any person who contravenes either of those sections by not holding a licence is liable to a fine of $10,281 to $77,108 in the case of an individual and $30,843 to $154,215 in the case of a legal person.[1]

[54] Applying this provision, the Court of Québec imposed the then minimum fine for corporations of $30,843 on 9147-0732 Québec inc.

[55] The corporation challenged the constitutionality of the mandatory minimum fine in s. 197.1 of the *Building Act* on the basis that it offended its right to be protected against cruel and unusual treatment or punishment under s. 12 of the *Charter*.

[56] It did not succeed at the Court of Québec, where Ratté J.C.Q. concluded that expanding the protection of rights intrinsically linked to individuals to include corporate rights would trivialize the protection granted by s. 12 of the *Charter*. In any event, he concluded that the minimum corporate fine at issue, far from being cruel and unusual, represented the norm in penal regulatory law. At the time, no fine had yet been invalidated as cruel and unusual by a higher court, even in the context of individuals.

[57] At the Quebec Superior Court, Dionne J. similarly held that corporations were not covered by s. 12. In his view, s. 12's purpose was the protection of human dignity, a notion clearly meant exclusively for [TRANSLATION] "natural persons".

[58] A majority at the Quebec Court of Appeal allowed the appeal and held that s. 12 can apply to corporations. It found that s. 12's association with human dignity did not prevent its application to corporations, since other *Charter* rights which also protect human dignity — ss. 8 and 11(*b*) of the *Charter* — have been held to apply to corporations. Rather than looking at the purpose of the provision, it adopted a [TRANSLATION] "tangible benefit" approach, focusing on whether a corporation could theoretically benefit from the *Charter* protection in question: "a corporation's ability to derive a tangible benefit from it". This resulted in its conclusion that since corporations could face cruel treatment or punishment through harsh or severe fines, s. 12 could apply to them. It remitted to the Court of Québec the question of whether the particular minimum fine against corporations set out in s. 197.1 of the *Building Act* amounted to cruel and unusual treatment or punishment.

[59] In dissent, Chamberland J.A. was of the view that s. 12 is concerned with human dignity, a concept inapplicable to corporations.

[60] For the following reasons, I agree with Chamberland J.A. that s. 12 does not apply to corporations. I would therefore allow the appeal.

Analysis

[61] This case gives us an opportunity to apply this Court's approach to both constitutional interpretation and the role of international and comparative law in its development. Regrettably, however, the majority has put into question this Court's approach to both. Instead of using the text as the beginning of the search for purpose, the majority has given it "primacy" and assigned a secondary role to the other contextual factors, thereby erasing the difference between constitutional and statutory interpretation. And instead of only relying on the traditional distinction between binding and non-binding international sources, the majority seems to have added a novel requirement: whenever a Canadian court considers non-binding international sources, it must explicitly justify their use, segment them into categories, and attribute a degree of weight to their inclusion, thereby transforming the Court's usual panoramic search for global wisdom into a series of compartmentalized barriers. For constitutional, comparative and international law, this apparent change in direction is a worrying setback.

[62] Section 12 of the *Charter* states:

> **12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[63] Most of this Court's s. 12 jurisprudence has dealt with minimum and indeterminate sentences and the harmful effects of incarceration. The threshold test developed and applied in these and other cases is whether the treatment or punishment of the individual is so "grossly disproportionate" as to "outrage standards of decency", and be "abhorrent or intolerable".[2]

[64] 9147-0732 Québec inc. argued that this is the language that we should apply, since it is broader than the language used in the French version of our s. 12 jurisprudence, which refers to treatment or punishment that is [TRANSLATION] "incompatible with human dignity". This argument, with respect, results from looking at the words literally, in both the English and French versions, without examining them in the context of the cases in which they were decided, thereby creating artificial conceptual schisms instead of linguistic coherence (see Michel Doucet, "Le bilinguisme législatif", in Michel Bastarache and Michel Doucet, eds., *Les droits linguistiques au Canada* (3rd ed. 2013), 179, at p. 281).

[65] A review of the language used in our s. 12 jurisprudence shows that both the English and French versions capture the same concept, namely, that s. 12 prohibits treatment or punishment that is incompatible with human dignity (see *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779, at pp. 811, 815 and 818; *R. v. Boudreault*, 2018 SCC 58 (CanLII), [2018] 3 S.C.R. 599, at paras. 43, 67 and 126). I agree with Chamberland J.A. that [TRANSLATION] "[t]he assertion that no one is to be subjected to cruel [and unusual] treatment or punishment cannot be dissociated from the concept of human dignity" (para. 59). The French and English versions of how this Court has described what is at stake in s. 12 are, therefore, not only reconcilable, they are different ways of expressing the same idea.

[66] 9147-0732 Québec inc. also argued that the scope of s. 12 should be seen to include corporations based on this Court's recent decision in *Boudreault*. Writing for the majority, Martin J. found that the mandatory victim surcharge under s. 737 of the *Criminal Code*, R.S.C. 1985, c. C-46, violated s. 12 of the *Charter* because it caused four interrelated harms to *individuals*: disproportionate financial consequences suffered by the indigent; threat of detention and/or imprisonment; threat of provincial collections efforts; and *de facto* indefinite criminal sanctions (para. 65).

[67] But recognizing the suffering of *individuals* from harsh economic treatment by the state does not lead to the inference that s. 12 protects the economic interests of corporations. To answer that question requires a prior assessment of whether s. 12 applies to a corporation at all. This in turn requires 9147-0732 Québec inc. to "establish that it has an interest falling within the scope of the guarantee, and one which accords with the purpose of that provision" (*R. v. CIP Inc.*, 1992 CanLII 95 (SCC), [1992] 1 S.C.R. 843, at p. 852).

[68] Unlike the approach applied by the majority of the Court of Appeal, with respect, determining the scope requires first determining the *purpose* of the right. A *Charter* right must be interpreted "by an analysis of the purpose of [the] guarantee" (*R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344 (emphasis deleted); *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at pp. 155-57; see also

Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at s. 36.8(c)). *Big M Drug Mart* provides the definitive account of this approach:

> . . . the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. *The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.*
>
> In my view this analysis is to be undertaken, and *the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.* The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, illustrates, *be placed in its proper linguistic, philosophic and historical contexts*. [Underlining in original; italics added; p. 344.]

[69] Most recently, in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, this Court endorsed the purposive approach set out in *Hunter* and *Big M Drug Mart*, describing the interpretive task as follows:

> Before turning to the facts of this appeal, I consider it necessary to review the background to the enactment of s. 23 and the principles that must inform the interpretation of that section.
>
> . . .
>
> The historical and social context at the root of language rights in education makes clear the unique role of s. 23 in Canada's constitutional landscape. In an oft quoted passage, Dickson C.J. illustrated the section's importance by stating that it represents a "linchpin in this nation's commitment to the values of bilingualism and biculturalism" (*Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342, at p. 350). More recently, in *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, 2015 SCC 21, [2015] 2 S.C.R. 139 ("*Rose-des-vents*"), Karakatsanis J. noted that Canada has a bicultural founding character and that its commitment to bilingualism sets it apart among nations (para. 25, citing *Assn. des Parents Francophones (Colombie Britannique) v. British Columbia* (1996), 1996 CanLII 1455 (BC SC), 27 B.C.L.R. (3d) 83 (S.C.), at para. 24).
>
> . . .
>
> I would add that in conducting the analysis under s. 23, a court must bear in mind that this section has three purposes, as it is at once preventive, remedial and unifying in nature. [paras. 4, 12 and 15]

[70] As this passage illustrates, the principles and values underlying the enactment of the *Charter* provision are the primary interpretive tools.

[71] This Court has always made clear that examining the text of the *Charter* is only the beginning of the interpretive exercise, an exercise which is fundamentally different from interpreting a statute. Dickson J. explained the reason for this in *Hunter*:

> 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. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts "not to read the provisions of the Constitution like a last will and testament lest it become one". [p. 155]

Nonetheless, as *Big M Drug Mart* indicated, the text of the *Charter* matters since the purpose of the right in question is to be sought by reference "to the language chosen to articulate the specific right" (p. 344).

[72] This Court has applied the balanced *Big M Drug Mart* framework when interpreting the scope of several *Charter* rights, without elevating the plain text of those guarantees to a factor of special significance. The Court resolved questions about the scope of s. 2(*a*) of the *Charter* without recourse to a dictionary definition of "religion", choosing instead to examine the "historical context" and "purpose" of freedom of religion and conscience (*Big M Drug Mart*, at pp. 344-48; see also *Syndicat Northcrest v. Amselem*, 2004 SCC 47 (CanLII), [2004] 2 S.C.R. 551, at paras. 41-42). In interpreting the presumption of innocence in s. 11(*d*), the Court focused on the "cardinal values" that the right embodies (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 119). And in marking the boundaries of freedom of expression under s. 2(*b*), the Court has always emphasized the "principles and values underlying the freedom", instead of the plain meaning of the term "expression" (see *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 976; see also *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712, at pp. 764-67; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at pp. 727-28; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 499-500; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 53; *R. v. K.R.J.*, 2016 SCC 31 (CanLII), [2016] 1 S.C.R. 906, at paras. 37-38).

[73] This purposive approach to interpreting *Charter* provisions continued in *R. v. Grant*, 2009 SCC 32 (CanLII), [2009] 2 S.C.R. 353, where the Court, while acknowledging that the "starting point" for constitutional interpretation is the language of the right being interpreted, proceeded to endorse the contextual approach from *Big M Drug Mart*, stating that "where questions of interpretation arise, a generous, purposive and contextual approach should be applied" (para. 15; see also para. 16). And more recently in *R. v. Stillman*, 2019 SCC 40, the Court reiterated that:

> A *Charter* right must be understood "in the light of the interests it was meant to protect" (*R. v. Big M Drug Mart Ltd.* . . . at p. 344; see also *Hunter v. Southam Inc.* . . . at p. 157), accounting for "the character and the larger objects of the *Charter* itself", "the language chosen to articulate the specific right or freedom", "the historical origins of the concepts enshrined" and, where applicable, "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (*Big M*, at p. 344). It follows that *Charter* rights are to be interpreted "generous[ly]", aiming to "fulfi[l] the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (*ibid.*). At the same time, it is important not to overshoot the actual purpose of the right or freedom in question (*ibid.*).
>
> (para. 21; see also *R. v. Poulin*, 2019 SCC 47, at para. 32.)

[74] The complete lack of support in our jurisprudence for an approach to constitutional interpretation focused on the primacy of the text is hardly surprising. Because *Charter* rights — like all constitutional rights — are meant to be capable of growth and adaptation (see *Hunter*, at pp. 155-57; *Re B.C. Motor Vehicle Act*, at p. 509; *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, at pp. 365-67; *Reference re Prov. Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at pp. 179-81; Hogg, at s. 15.9(f)), many of them were drafted with vague, open-ended language (see *Hunter*, at p. 154; *Poulin*, at para. 70 (summarizing "evolving, open-ended standards" in the *Charter*, including s. 12)). The text of those provisions may accordingly be of comparatively limited assistance in interpreting their scope.

[75] Not only is considering the text as prime unhelpful in interpreting constitutional guarantees, it could unduly constrain the scope of those rights, or even yield two irreconcilable conclusions leading, for example, to the interpretive triumph of the presence of a comma in expanding gun-owners' rights under the Second Amendment of the United States Constitution in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (see Brittany Occhipinti, "We the Militia of the United States of America: A Reanalysis of the Second Amendment" (2017), 53 *Willamette L. Rev.* 431, at pp. 438-42, discussing *Heller*).

[76] Overemphasizing the plain text of *Charter* rights creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the purposes they were meant to uphold. As one scholar has noted, a "purely textual reading" of the Constitution "cuts against the grain of the living tree" (Lorne Neudorf, "Reassessing the Constitutional Foundation of Delegated Legislation in Canada" (2018), 41 *Dal. L.J.* 519, at p. 544). Aharon Barak has similarly warned that "[p]urely textual interpretation severs the constitution . . . from the fundamental values of society" ("A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002), 116 *Harv. L. Rev.* 19, at p. 83). He advocates a broader approach:

> . . . to arrive at a proper system of interpretation, the horizons of the interpreter need to be widened beyond those of new textualism. The context of the text — the importance of which is noted by new textualism, albeit narrowly — includes society's principles, values, and fundamental views, both at the time of enactment and at the time of interpretation. These and other changes would be necessary to transform new textualism into a proper system of interpretation. At that point, however, it would cease to be new textualism and become purposive interpretation.
>
> (p. 84; see also Jonathan R. Siegel, "The Inexorable Radicalization of Textualism" (2009), 158 *U. Pa. L. Rev.* 117, at pp. 173-75.)

[77] Justice Susanne Baer of the German Constitutional Court has also urged against a narrow focus on constitutional text:

> . . . constitutional text matters, but . . . constitutionalism should not be reduced to mere textualism.
>
> ("Dignity, liberty, equality: A fundamental rights triangle of *constitutionalism*" (2009), 59 *U.T.L.J.* 417, at p. 441)

[78] A textualist approach would also make Canadian constitutional law more insular. Canadian constitutionalism "contains characteristics that make it objectively appealing to foreign constitution-makers and interpreters" (Adam M. Dodek, "The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism" (2004), 17 *N.J.C.L.* 353, at p. 373). Our model of constitutional interpretation is one of those characteristics. As Professor Dodek notes:

> The . . . interpretation given to the Charter by the Supreme Court of Canada has served to reinforce rather than limit its international appeal. Specifically, purposive interpretation accompanied by the conception of a constitution as "a living tree" capable of growth and adaptation to new circumstances are doctrines that have captured the constitutional imaginations of other courts around the world. Outside of Canada, this has made the Canadian constitutional model amendable to various circumstances. Aspects of the Charter have thus proved to be "a living tree" abroad.
>
> ("Canada as Constitutional Exporter: The Rise of the 'Canadian Model' of Constitutionalism" (2007), 36 *S.C.L.R.* (2d) 309, at pp. 321-22)

[79] Professor Karen Eltis makes the further point that the "living tree" approach helps explain Canada's willingness to consider "foreign jurisprudence and international instruments", a subject explored later in these reasons:

> Thus, for instance, *as distinguished from an enduring attachment to originalism*[3] *or textualism in the U.S.*, the living tree approach or the "multicultural values reflected and promoted in Canada's *Charter of Rights and Freedoms* are in fact indicative of a national experience that embraces looking outward to foreign jurisprudence and international instruments as a source of domestic jurisprudence" . . . [Emphasis added; footnote added.]
>
> ("Comparative Constitutional Law and the 'Judicial Role in Times of Terror'" (2010-2011), 28 *N.J.C.L.* 61, at pp. 69-70)

[80] Purpose, in other words, remains the "central" consideration when interpreting the scope and content of a *Charter* right (*Poulin*, at para. 85). Several factors — including the text — can help inform the exercise. But this Court has never endorsed a rigid hierarchy among these interpretative guides. Rather, all of them "can offer useful insights, and the best tools are likely to depend on [the] particular circumstances of the case" (David Landau, "Legal pragmatism and comparative constitutional law", in Gary Jacobsohn and Miguel Schor, eds., *Comparative Constitutional Theory* (2018), 208, at p. 211).

[81] This brings me back to the central question in this appeal: whether the right to be free from "cruel and unusual treatment or punishment" in s. 12 of the *Charter* extends to corporations.

[82] *Black's Law Dictionary* defines "cruelty" as "[t]he intentional and malicious infliction of mental or physical suffering on a living creature, esp. a human; abusive treatment; outrage" ((11th ed. 2019), at p. 475). The term "unusual", is not central to the analysis, but is nonetheless part of the "compendious expression of a norm" (*R. v. Smith (Edward Dewey)*, at p. 1072). It is defined as "[e]xtraordinary; abnormal" and "[d]ifferent from what is reasonably expected" (*Black's Law Dictionary*, at p. 1851). Together, the words "cruel and unusual punishment" are defined as "[p]unishment that is torturous, degrading, inhuman, grossly disproportionate to the crime in question, or otherwise shocking to the moral sense of the community" (*Black's Law Dictionary*, at p. 1490).

[83] The *Oxford English Dictionary* defines "cruel", in relation to persons, as "[d]isposed to inflict suffering; indifferent to or taking pleasure in another's pain or distress, destitute of kindness or compassion; merciless, pitiless, hard-hearted" ((2nd ed. 1989), vol. IV, at p. 78). It is also used to describe actions that are "proceeding from or showing indifference to or pleasure in another's distress" ("cruel", at p. 78). When referring to conditions and circumstances, i.e. treatment or punishment, "cruel" means "[c]ausing or characterized by great suffering; extremely painful or distressing" (p. 78).

[84] Similarly, "cruelty" is defined in the *Oxford English Dictionary* as referring to:

> 1. The quality of being cruel; disposition to inflict suffering, delight in or indifference to the pain or misery of others; mercilessness, hard-heartedness: *esp.* as exhibited in action. Also, with *pl.*, an instance of this, a cruel deed; . . .
>
> 2. Severity of pain; excessive suffering; . . .
>
> 3. Severity, strictness, rigour; . . .
> [p. 79]

[85] The term "*cruel*" is also defined in French by reference to the concept of suffering, which, as Chamberland J.A. noted, cannot be experienced by inanimate entities like corporations:

> [TRANSLATION]
> 1. Taking pleasure in inflicting suffering, in witnessing suffering.
>
> 2. Denoting cruelty; showing the cruelty of humans.
>
> 3. Inflicting suffering through its harshness, its severity.
>
> 4. (Of persons). Without leniency, merciless.
>
> 5. (Of personified things). Inflicting suffering by manifesting a sort of hostility.
>
> 6. (Of persons). Indifferent, insensitive.
>
> (*Le Grand Robert de la langue française* (2nd ed. 2001), at pp. 864-65)

[86] In short, the ordinary meaning of the words cruel and unusual treatment or punishment centers on *human* pain and suffering. As Chamberland J.A., eloquently stated:

> [TRANSLATION] It would completely distort the ordinary meaning of the words, in my view, to say that it is possible to be cruel to a corporate entity.
>
> Cruelty is inflicted on living beings of flesh and blood, be they human beings or animals.
>
> And not on corporations.
>
> Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects without a soul or emotional life.
> [paras. 53-56]

[87] The fact that the word "everyone" is found in the text of s. 12 cannot, by virtue of its literal meaning, expand the protection to corporations, without any regard for the purpose of the right as protecting *human* dignity. It is worth remembering that in *Irwin Toy*, this Court explained that "'[e]veryone' . . . must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings" (p. 1004).

[88] We turn then to the historical origins and values underlying the right, in compliance with Dickson C.J.'s direction in *Oakes*, that the exercise requires "understanding the cardinal values [the provision] embodies" (p. 119).

[89] The values embodied by s. 12 can be traced back to the English *Bill of Rights*, 1688, 1 Will. & Mar. Sess. 2, c. 2, which, in art. 10, stipulated "[t]hat excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted".

[90] The provision was incorporated almost verbatim into the Eighth Amendment of the United States Constitution in 1791, where its purpose was definitively discussed in *Furman v. Georgia*, 408 U.S. 238 (1972), dealing with the constitutionality of the death penalty. Each of the judges in the majority wrote separate reasons explaining why the death penalty constituted cruel and unusual punishment in the cases before the court. Marshall J. reviewed the English antecedents of the clause and concluded that:

> Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. [p. 319]

[91] Brennan J.'s reasons described the Eighth Amendment's primary purpose as protecting the dignity of human beings. He concluded that the state "even as it punishes, must treat its members with respect for their intrinsic worth *as human beings*", explaining that the reason barbaric punishments have been condemned by history "is that *they treat members of the human race as nonhumans*, as objects to be toyed with and discarded" and are "inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity" (pp. 270-73 (emphasis added)).

[92] While there is some debate about the underlying purpose of the English *Bill of Rights* provision, it seems not to be disputed that in both the English and American contexts, protection for corporations was not contemplated. And, it is safe to say that at least in the United States, the historical purpose of prohibiting cruel and unusual punishment was to protect the inherent worth and dignity of *human beings*.

[93] In Canada, similar language first appeared in s. 2(*b*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44, which prohibited "the imposition of cruel and unusual treatment or punishment". The *Canadian Bill of Rights* was adopted in its own historical context, which included a profound emphasis on the need to protect human rights

in a post-Second World War era. As then Professor Walter Tarnopolsky observed, "[n]oticeable interest in, and concern for the protection of certain human rights and fundamental freedoms began to increase in Canada during World War II, possibly as part of a world-wide interest in these values" since "civilized nations could revert to barbarity too easily" (Walter Surma Tarnopolsky, *The Canadian Bill of Rights* (2nd rev. ed. 1975), at p. 3; see also Hogg, at s. 35.1).

[94] The *Canadian Bill of Rights* was introduced as *An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms*. Beyond its title, the *Canadian Bill of Rights*' preamble included specific references to "the dignity and worth of the human person":

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge . . . *the dignity and worth of the human person* . . .
>
> . . .
>
> And being desirous of enshrining these principles and the *human rights* and fundamental freedoms derived from them . . . [Emphasis added.]

[95] The wording of the s. 2(*b*) *Canadian Bill of Rights* provision and s. 12 of the *Charter* are almost identical. However, unlike the *Canadian Bill of Rights*, which is an ordinary statute, albeit of enormous philosophical significance, "the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection" (*R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613, at p. 638).

[96] Like the *Canadian Bill of Rights*, the enactment of the *Charter* was influenced by the events of the Second World War. As Pierre Elliott Trudeau, then Minister of Justice, observed in 1968, these events were "disturbing proof of the need to safeguard the rights of individuals" (*A Canadian Charter of Human Rights* (1968), at pp. 10-11). Discussing "[t]he rights of the individual", Minister Trudeau reminded Canadians that "man [*sic*] has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity" (p. 9). For Trudeau, an entrenched bill of rights would serve to "withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts" (p. 11; see also Lester B. Pearson, "Federalism for the Future: A Statement of Policy by the Government of Canada" (1968), in Anne F. Bayefsky, *Canada's Constitution Act 1982 & Amendments: A Document History* (1989), vol. 1, 61).

[97] World War II's shocking indifference to human dignity and the devastating human rights abuses it tolerated, resulted not only in responsive protections in international human rights instruments, but also in domestic rights guarantees such as the *Canadian Bill of Rights* and, ultimately, the constitutional protection of rights and freedoms in the *Charter*.

[98] Since Canada's rights protections emerged from the same chrysalis of outrage as other countries around the world, it is helpful to compare Canada's prohibition against cruel and unusual treatment or punishment with how courts around the world have interpreted the numerous international human rights instruments containing provisions that closely mirror the language of s. 12. As Professor Dodek points out, since courts face common problems, considering how other courts have addressed them can assist in determining how to exercise judicial discretion ("Comparative Law at the Supreme Court of Canada in 2008: Limited Engagement and Missed Opportunities" (2009), 47 *S.C.L.R.* (2d) 445, at p. 454). In other words, "the search for wisdom is not to be circumscribed by national boundaries" (Hogg, at s. 36.9(c)).

[99] This Court has frequently relied on international law sources to assist in delineating the breadth and content of *Charter* rights (see, e.g., *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47 (CanLII), [2013] 3 S.C.R. 157, at para. 22; *United States v. Burns*, 2001 SCC 7 (CanLII), [2001] 1 S.C.R. 283, at paras. 79-81; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at pp. 1056-57; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at pp. 348-49 (per Dickson C.J., dissenting); *Re B.C. Motor Vehicle Act*, at p. 512). As the majority noted in *Divito*, such sources can often be "instructive in defining the right" (para. 22). International human rights law, in particular, has been described by L'Heureux-Dubé J. as a "critical influence on the interpretation of the scope of the rights

included in the *Charter*" (*Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 70).

[100] In fact, both those sources which are binding and those which are not have proven to be indispensable in almost all areas of the law (*Oakes*, at pp. 120-21; *Reference re Public Service*, at pp. 348-49 (per Dickson C.J., dissenting); *R. v. Smith (Edward Dewey)*, at p. 1061; *Canadian Egg Marketing Agency v. Richardson*, 1997 CanLII 17020 (SCC), [1998] 3 S.C.R. 157, at para. 58; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at paras. 59-75; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 (CanLII), [2007] 2 S.C.R. 391, at para. 70; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 (CanLII), [2014] 3 S.C.R. 176, at para. 129; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4 (CanLII), [2015] 1 S.C.R. 245, at paras. 70-71; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (CanLII), [2017] 2 S.C.R. 386, at paras. 64-67). Significantly, this Court's use of international and comparative sources in the interpretation of the *Charter* has been lauded internationally (see, e.g., Ran Hirschl, "Going Global? Canada as Importer and Exporter of Constitutional Thought", in Richard Albert and David R. Cameron, eds., *Canada in the World: Comparative Perspectives on the Canadian Constitution* (2018), 305).

[101] Consideration of international and comparative sources is a standard and accepted practice in this Court's constitutional interpretation jurisprudence. Between 2000 and 2016, this Court cited 1,791 decisions from foreign courts (Klodian Rado, "The use of non-domestic legal sources in Supreme Court of Canada judgments: Is this the *judicial slowbalization* of the Court?" (2020), 16 *Utrecht L. Rev.* 57 (online), at p. 61). During the same time period, this Court cited treaties on 336 occasions (Rado, at p. 73). Though Canada has not signed the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, this instrument was the second most cited international treaty, and the case law of the European Court of Human Rights — which interprets and applies the European *Convention* — made up one third of the total number of all of this Court's international court citations (Rado, at pp. 72-75). While international and comparative sources are invaluable to this Court's work in all areas of the law,[4] references by this Court to these sources occurred in constitutional cases more than in any other field (Rado, at p. 75).

[102] This is not quantum physics. Non-binding international sources are "relevant and persuasive", not obligatory. Simply put, such sources *attract* adherence rather than command it (Dodek (2009), at p. 446). Presumptively narrowing the significance of international and comparative sources, as the majority suggests, does a disservice to our Court's ability to continue to consider them with selective discernment.

[103] The majority acknowledges that this Court has always been willing to treat non-binding international sources as "relevant and persuasive" in *Charter* interpretation (*United States v. Burns*, at para. 80). However, it inexplicably retreats from this long line of jurisprudence and concludes that non-binding sources should only be used to confirm a pre-established interpretation.

[104] This Court has never required that these sources be sorted by weight before being considered; nor has it ever applied the kind of hierarchical sliding scale of persuasiveness proposed by the majority, segmenting non-binding international and comparative sources into categories worthy of more or less influence. This Court has had no difficulty in the past in deciding which sources it finds to be more relevant and persuasive than others without using a confusing multi-category chart.

[105] It is true that there are those on the United States Supreme Court who have sought to curtail the influence and use of international sources by calling for more particularization about why, how and when those sources are applied (see, for instance, Antonin Scalia, "Keynote Address: Foreign Legal Authority in the Federal Courts" (2004), 98 *A.S.I.L. Proc.* 305, at p. 307; *Roper v. Simmons*, 543 U.S. 551 (2005), at pp. 622-28 (Scalia J., dissenting); Cindy G. Buys, "Burying Our Constitution in the Sand? Evaluating the Ostrich Response to the Use of International and Foreign Law in U.S. Constitutional Interpretation" (2007), 21 *B.Y.U. J. Pub. L.* 1, at pp. 7-8). Justice Scalia, for example, "argues that interpretation ought to be focused solely on U.S. legal materials because of the practical difficulties created by consulting transnational sources" (Ryan C. Black et al., "Upending a Global Debate: An Empirical Analysis of the U.S. Supreme Court's Use of Transnational Law to Interpret Domestic Doctrine" (2014), 103 *Geo. L.J.* 1, at pp. 8-9). On the other hand, others, like Justice Breyer, consider that the use of non-binding sources merely "involves opening your eyes to what is going on elsewhere, taking what you learn for what it is worth, and using it as a point of comparison where doing so will prove helpful" (Black, at pp. 8-9).

[106] Narrowing our approach by putting unnecessary barriers in the way of access to international and comparative sources gratuitously threatens to undermine Canada's leading voice internationally in constitutional adjudication, a role based on its willingness to go wide and deep in the global search for the best intellectual resources it can find, as Professor Ran Hirschl eloquently explains:

> The rise of a confident, distinctly Canadian approach to constitutionalism and a corresponding maturation of the Supreme Court, all enriched by general appreciation of and selective engagements with comparative constitutional ideas, mainly in the area of constitutional rights, brought about a sharp decline in judicial reliance on British constitutional ideals and jurisprudence. . . . These changes are closely linked to the 1982 constitutional makeover, but also to broader transformations in Canada's self-perception, sense of collective identity, and the re-conceptualization of its place in the world.
>
> . . .
>
> . . . a fuller understanding of how Canada has emerged from a humble former British colony into *its current role as comparative constitutional powerhouse* necessitates a broader look at the social and ideational transformation—specifically the profound multicultural and cosmopolitan shift in the national meta-narrative — that Canada has witnessed for more than half a century. [Emphasis added; pp. 305-6 and 317.]

[107] All of the relevant international sources in this case lead to the irrefutable inference that the prohibition against cruel and unusual punishment is about protecting human beings from the infliction of inhuman and degrading punishment. None of them include, or have been held to include, protection for corporations. While this international consensus does not dictate the outcome, it provides compelling and relevant interpretive support. It is part of the development of an international perspective on how rights should be protected, a perspective developed pursuant to the global commitment made in 1945 to internationalize those protections, and a perspective in whose promotion Canada's jurisprudence has played a leading role. Considering what and how laws and decisions have been applied on related questions by other countries and institutions, is part not only of an ongoing global judicial conversation, but of the epistemological package constitutional courts routinely rely on.

[108] Turning then to the international context for assessing the purpose of "cruel and unusual treatment or punishment", we start with Lord Bingham's observation in *Reyes v. The Queen*, [2002] 2 A.C. 235, that while s. 12's international siblings vary in language, a common meaning can be ascribed to their various formulations:

> Despite the semantic difference between the expressions "cruel and unusual treatment or punishment" (as in the Canadian Charter and the constitution of Trinidad and Tobago) and "cruel and unusual punishments" (as in the eighth amendment to the United States Constitution) and "inhuman or degrading treatment or punishment" (as in the European Convention), it seems clear that the essential thrust of these provisions, however expressed, is the same, and their meaning has been assimilated.
>
> (para. 30; see also *S. v. Williams*, 1995 (3) S.A. 632 (C.C.), at para. 35.)

[109] The common meaning ascribed by the Privy Council to the various expressions was the one formulated by Lamer J. in *R. v. Smith (Edward Dewey)*:

> I would agree with Laskin C.J. in [*Miller v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680], where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is . . . "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> (p. 1072; see also *Reyes*, at para. 30.)

[110] Article 5 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". While there does not appear to be any judicial authority directly considering whether art. 5 applies to corporations, there are compelling reasons to believe it does not. As a whole, the *Universal Declaration of Human Rights*, as its title suggests, was intended to apply to human beings (Max Planck Institute for Comparative Public Law and International Law, *Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate "Human" Rights in International Law*, by Silvia Steininger and Jochen von Bernstorff, September 25, 2018 (online), at p. 5). Moreover, its adoption in a post-Second World War context, as well as its preamble which references human dignity, offer no basis to conclude that its art. 5 could apply to corporations.

[111] Article 7 of the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47, which Canada ratified on May 19, 1976, includes the same prohibition against "torture [and] cruel, inhuman or degrading treatment or punishment". The United Nations Human Rights Committee identified the purpose of article 7 as being "to protect both the dignity and the physical and mental integrity of the individual" (*General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) (1992)*, U.N. Doc. HRI/GEN/1/Rev.9, vol. 1, p. 200 (2008), at para. 2). It noted that "[t]he prohibition in art. 7 is complemented by the positive requirements of article 10, paragraph 1, of the [*Covenant*] which stipulates that '[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'" (para. 2).

[112] Since the preamble of the *Covenant* asserts that human rights "derive from the inherent dignity of the human person", it is not surprising that the Human Rights Committee accepts complaints only from people (*A newspaper publishing company v. Trinidad and Tobago*, Communication No. 360/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *A publication and a printing company v. Trinidad and Tobago*, Communication No. 361/1989, reported in U.N. Doc. Supp. No. 40 (A/44/40), at para. 3.2; *V.S. v. Belarus*, Communication No. 1749/2008, reported in U.N. Doc. CCPR/C/103/D (2011), at para. 7.3; *General Comment No. 31; The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13, May 26, 2004, at para. 9).

[113] Article 5(2) of the *American Convention on Human Rights*, 1144 U.N.T.S. 123, which applies to approximately 24 countries in the Americas, similarly provides that: "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person". The language of art. 1(2) states that "for the purposes of this Convention, 'person' means every human being". The Inter-American Court of Human Rights, the adjudicative body responsible for enforcing the *American Convention on Human Rights*, has held that the purpose of the *American Convention* was the "protection of the fundamental rights of human beings" (Angela B. Cornell, "Inter-American Court Recognizes Elevated Status of Trade Unions, Rejects Standing of Corporations" (2017), 3 *Intl Labor Rights Case L.* 39, at p. 40, citing *Titularidad de Derechos de las Personas Juridicas en el Sistema Interamericano de Derechos Humanos*, Advisory Opinion OC-22/16, February 26, 2016, at paras. 42-43).

[114] The European *Convention* is the only international human rights treaty that has been interpreted to include corporate rights (Julian G. Ku, "The Limits of Corporate Rights under International Law" (2012), 12 *Chi. J. Int'l L.* 729, at p. 754).

[115] Notably, however, art. 3, which states that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment", has been held *not* to apply to corporations. In *Kontakt-Information-Therapie v. Austria*, Application No. 11921/86, October 12, 1988, D.R. 57, p. 81 "*KIT*", the European Commission of Human Rights explained this conclusion when it stated that the right not to be subjected to degrading treatment or punishment under art. 3 was "by [its] very nature not susceptible of being exercised" by a corporation (p. 88).

[116] More recently, the European Court of Human Rights, applying *KIT*, called it "inconceivable" that a corporation could complain of attacks to its physical and mental integrity under art. 3 (*Identoba v. Georgia*, Application No. 73235/12, May 12, 2015 (HUDOC), at para. 45).

[117] Article 16(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, which provides that state parties "undertake to prevent in any territory under [their] jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1", has also never been extended to include corporations. Not only does the

preamble recognize that human rights "derive from the inherent dignity of the human person", art. 1 defines torture with reference to "severe pain or suffering, whether physical or mental".

[118] A review of foreign domestic law, while not determinative, also supports an interpretation of s. 12 of the *Charter* which excludes protections for corporations. Section 12(1)(e) of the South African Constitution, for example, mirrors the language in s. 12 of the *Charter*. Interpreting this provision, the South African Constitutional Court concluded that the right of "everyone . . . not to be treated or punished in a cruel, inhuman, or degrading way", rests on the foundation of human dignity. In *Williams*, the Constitutional Court invalidated juvenile whipping provisions, connecting the dots between the Eighth Amendment of the United States Constitution, s. 12 of the Canadian *Charter*, and other international instruments to unite them in protecting "human dignity". As Langa J. observed:

> Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the United States Constitution and in art 12 of the Canadian Charter, or "inhuman or degrading punishment" as in the European Convention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment", as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity. [para. 35]

[119] The Constitutional Court held that juvenile whipping, "involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity" (para. 39; see also *S. v. Makwanyane*, 1995 (3) S.A. 391 (C.C.); *S. v. Dodo*, 2001 (3) S.A. 382 (C.C.)).

[120] The *New Zealand Bill of Rights Act 1990* has a similar provision in s. 9, which states:

> Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.

[121] The New Zealand Supreme Court considered this provision in *Taunoa v. Attorney-General*, [2008] 1 N.Z.L.R. 429, dealing with the treatment of prisoners held under a program operated in Auckland Prison by the Department of Corrections called the "Behaviour Management Regime". Segregation was at the heart of the program, which was known for imposing the most stringent conditions found in the New Zealand prison system. While a majority of the court did not find a breach of s. 9, both the majority and dissent emphasized that the purpose of the provision was to protect the dignity and worth of humans. Tipping J., writing as part of the majority, concluded that while s. 9 was not breached, it should be understood as "prohibiting inhuman treatment, that is, treating a person as less than human" (para. 297). Similarly, McGrath J., in the majority, expressed the view that its purpose is "universal protection against any form of treatment by the State which is incompatible with the dignity and worth of the human person" (para. 338).

[122] Elias C.J., in dissent, found that s. 9, like its equivalents in the United States, Canada and Europe, is concerned with inhuman treatment, which "amounts to denial of humanity" (paras. 79-80). Inhuman treatment, she added, "is treatment that is not fitting for human beings" (para. 80). And in observing that the Canadian *Charter*'s s. 12 provision is a "compendious expression of a norm", Elias C.J. viewed this norm "as proscribing any treatment that is incompatible with humanity" (para. 82).

[123] Internationally, then, it is widely acknowledged that the right to be free from cruel and unusual punishment is intended to protect human dignity by prohibiting degrading, inhuman, or dehumanizing treatment or punishment that causes physical or mental pain and suffering.

[124] This global unity is not surprising. As Professor Anna Grear noted, "international human rights law arguably emerged from an instinct to protect the human — precisely because it is human — as a reaction to the Nazi genocide — at the end of the Second World War" (Anna Grear, "Human Rights — Human Bodies? Some Reflections on Corporate Human Rights Distortion, the Legal Subject, Embodiment and Human Rights Theory" (2006), 17 *Law Critique* 171 (online), at p. 173). Human rights, read in this light, "represent a mode of archetypal resistance to suffering" (Grear, at p. 174). In other words, there is a reason they are called *human* rights.

[125] Ever since *Oakes*, where the Court said it was guided by "respect for the inherent dignity of the human person" as a value essential to a free and democratic society (p. 136), it has explicitly stated that "the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of *human* dignity" (*R. v. Kapp*, 2008 SCC 41 (CanLII), [2008] 2 S.C.R. 483, at para. 21 (emphasis added)).

[126] Turning to s. 12's purpose by looking at "the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*" (*Big M Drug Mart*, at p. 344), s. 12 is grouped, along with ss. 7 to 11 and 13 to 14, under the heading "Legal Rights" ("*Garanties juridiques*"). All legal rights, as Lamer J. declared, "have been recognized as essential elements of a system for the administration of justice which is founded upon a belief in 'the dignity and worth of the human person' (preamble to the *Canadian Bill of Rights* . . .) and on the 'rule of law' (preamble to the *Canadian Charter* . . .)" (*Re B.C. Motor Vehicle Act*, at p. 503).

[127] The broad purposes of the legal rights in ss. 7 to 14 were described by McLachlin J. as being two-fold, "to preserve the rights of the detained individual and to maintain the repute and integrity of our system of justice" (*R. v. Hebert*, 1990 CanLII 118 (SCC), [1990] 2 S.C.R. 151, at p. 179). These rights were "designed to ensure that individuals suspected of crime are dealt with fairly and humanely" (Robert J. Sharpe and Kent Roach, *The Charter of Rights and Freedoms* (6th ed. 2017), at p. 292; see also *Re B.C. Motor Vehicle Act*, at p. 503). They are, as Martin J. has recently put it, "the core tenets of fairness in our criminal justice system" (*Poulin*, at para. 5).

[128] Only ss. 8 and 11(*b*) within the ss. 7 to 14 grouping have been found by this Court to apply to corporations. In *Hunter*, the Court accepted, without discussion or explanation, that the s. 8 right to be secure against unreasonable search or seizure could apply to corporations. Subsequently, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425, at pp. 521-22, La Forest J. noted that an unlawful search or seizure could have a significant impact on the privacy rights of individuals within a corporation. He noted that since "[p]eople . . . think of their own offices as personal space in a manner somewhat akin to the way in which they view their homes, and act accordingly", the requirement to submit to a search of business premises could "amount to a requirement to reveal aspects of one's personal life to the chilling glare of official inspection" (pp. 521-22).

[129] The inference that breaches of s. 8 can have a direct impact on an individual in a corporation, however, is not logically available under s. 12. The individuals within the corporation are not the subject of any treatment or punishment imposed on the corporate entity. This is reinforced by the corporation's separate legal personality, as stressed by Lamer C.J. in *R. v. Wholesale Travel Group Inc.*, 1991 CanLII 39 (SCC), [1991] 3 S.C.R. 154:

> The corporate form of business organization is chosen by individuals because of its numerous advantages (legal and otherwise). Those who cloak themselves in the corporate veil, and who rely on the legal distinction between themselves and the corporate entity when it is to their benefit to do so should not be allowed to deny this distinction in these circumstances (where the distinction is not to their benefit). [pp. 182-83]

[130] In *CIP*, the Court extended the s. 11(*b*) right to be tried within a reasonable time to corporations on the basis that any accused, corporate or human, has, as Stevenson J. said, "a legitimate interest in being tried within a reasonable time", and the right to a fair trial (p. 856; see also pp. 857-59). He acknowledged, however, that some of the harms of a pending criminal accusation, such as "'stigmatization of the accused, loss of privacy, *stress and anxiety* resulting from a multitude of factors, including possible disruption of family, social life and work'" were not "concerns [that] logically appl[ied] to corporate entities" (p. 862 (emphasis added), citing *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, at p. 920). As a result, he concluded that a corporation could not rely on a presumption of prejudice.

[131] Just as corporations cannot experience human reactions such as stress or anxiety, neither can they experience suffering, since, as Chamberland J.A. noted [TRANSLATION] "Suffering, whether physical or mental, is unique to living beings, not corporate entities and inanimate objects" (para. 56).

[132] Significantly, corporations have been found *not* to be included under both ss. 7 and 11(*c*). In *R. v. Amway Corp.*, 1989 CanLII 107 (SCC), [1989] 1 S.C.R. 21, the Court concluded that the s. 11(*c*) right not to be

compelled to be a witness in proceedings does not apply to corporations. Sopinka J. concluded that since a corporation cannot testify, the right of an accused person not to be compelled to be a witness against himself in s. 11(*c*) is not available to a corporation. Applying a purposive interpretation to s. 11(*c*), Sopinka J. was of the view that it was "intended to protect the individual against the affront to dignity and privacy inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth" (p. 40). In his words, "it would strain the interpretation of s. 11(*c*) if an artificial entity were held to be a witness" (p. 39).

[133] In concluding that s. 7, which protects against deprivations of life, liberty and security of the person, does not apply to corporations (*Irwin Toy*, at p. 1004), Dickson C.J. and Lamer and Wilson JJ., for the Court, expressed their resistance to applying s. 7 to corporations as follows:

> In our opinion, a corporation cannot avail itself of the protection offered by s. 7 of the *Charter*. First, we would have to conceive of a manner in which a corporation could be deprived of its "life, liberty or security of the person". We have already noted that it is nonsensical to speak of a corporation being put in jail.
>
> . . .
>
> A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. [pp. 1003-4]

[134] The Court in *Irwin Toy* also concluded that bankruptcy and winding up proceedings did not engage s. 7, because that "would stretch the meaning of the right to life beyond recognition" (p. 1003). And it rejected the argument that corporations should be protected against deprivations of economic liberty:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee. . . . In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section.
>
> That is, read as a whole, it appears to us that this section was intended to confer protection on a *singularly human level*. [Underlining in original; italics added; pp. 1003-4.]

[135] As in *Irwin Toy*, the purpose of s. 12 is to confer protection on a "singularly human level". In line with the global consensus, its purpose is to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals. To paraphrase Sopinka J. in *Amway Corp*., it would strain the interpretation of cruel and unusual treatment or punishment under s. 12 if a corporation, an artificial entity, could be said to experience it.

[136] Corporations are, without question, entitled to robust legal protection, constitutional or otherwise. But protection for a quality it does not have, namely, human dignity or the ability to experience psychological or physical pain and suffering, is a remedy without a right. Since it cannot be said that corporations have an interest that falls within the purpose of the guarantee, they do not fall within s. 12's scope.

[137] Accordingly, I would allow the appeal.

English version of the reasons delivered by

KASIRER J. —

[138] For the reasons given by Chamberland J.A., and with respect for those of a different opinion, I share my colleagues' view that the appeal must be allowed. I fully agree with Chamberland J.A. that the respondent, 9147-0732 Québec inc., a corporation, cannot avail itself of the protection of s. 12 of the *Canadian Charter of Rights and Freedoms* to challenge the constitutionality of s. 197.1 of the *Building Act*, CQLR, c. B-1.1.

[139] Starting, quite rightly, from the language of s. 12, as Abella J. and Brown and Rowe JJ. propose to do in their respective reasons, Chamberland J.A. pointed to the word "cruel" and reasoned that it would distort the ordinary meaning of the words to say that it is possible to be cruel to a corporate entity (2019 QCCA 373, at para. 53 (CanLII)). I agree.

[140] He was careful to adhere to the principle that *Charter* rights must be given a large, liberal and purposive interpretation, a principle whose relevance was emphasized again recently by Wagner C.J. in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2020 SCC 13, at para. 4. At the conclusion of his analysis based primarily on the decisions of this Court, including *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, Chamberland J.A. found that, although the scope of s. 12 has been broadened over the years, [TRANSLATION] "its evolution is still concerned only with human beings (human dignity) and provides no basis . . . for extending its application to corporations" (para. 59). He further reasoned that "[t]he assertion that no one is to be subjected to cruel treatment or punishment cannot be dissociated from the concept of human dignity" (para. 59). In arriving at this interpretation of s. 12 — unassailable, in my opinion — Chamberland J.A. also relied on sources drawn from domestic law and international law, an approach perfectly in keeping with the principles of *Charter* interpretation.

[141] With regard to the ground of appeal that a corporation might enjoy the protection of s. 12 through the natural persons closely related to it, Chamberland J.A. relied on this Court's decisions, but also on English case law and the *Civil Code of Québec*, to explain in a compelling manner that the respondent was [TRANSLATION] "asserting rights here that are not its own" (para. 75). Again, no error has been shown.

[142] In this case, all the relevant factors are to the same effect, indicating that the protection offered by s. 12 does not extend to corporations. I therefore find it unnecessary to consider questions relating to the proper approach to constitutional interpretation or the place of international law and comparative law in that approach any further. In my view, Chamberland J.A.'s reasons permit us to conclude, without saying more, that the appeal must be allowed.

Appeal allowed.

Solicitor for the appellant the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the appellant the Director of Criminal and Penal Prosecutions: Director of Criminal and Penal Prosecutions, Québec.

Solicitors for the respondent: Services juridiques de l'APCHQ inc., Québec.

Solicitors for the intervener the Director of Public Prosecutions: Public Prosecution Service of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener Association des avocats de la défense de Montréal: Davies Ward Phillips & Vineberg, Montréal.

Solicitors for the intervener the British Columbia Civil Liberties Association: Gib van Ert Law, Ottawa.

Solicitors for the intervener the Canadian Civil Liberties Association: Caza Saikaley, Ottawa; University of Ottawa, Faculty of Law, Ottawa.

Solicitors for the intervener the Canadian Constitution Foundation: McCarthy Tétrault, Toronto.

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[1] The current provision states:

197.1 Any person who contravenes section 46 or 48 is guilty of an offence and is liable, as the case may be, to a fine

(1) of $5,841 to $29,200 in the case of an individual and $17,521 to $87,604 in the case of a legal person if the individual or legal person does not hold a licence of the appropriate class or subclass or uses the services of another person who does not hold a licence of the appropriate class or subclass; or

(2) of $11,682 to $87,604 in the case of an individual and $35,041 to $175,206 in the case of a legal person if the individual or legal person does not hold a licence or uses the services of another person who does not hold a licence.

[2] See, e.g., *R. v. Smith (Edward Dewey)*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045; *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; *R. v. Luxton*, 1990 CanLII 83 (SCC), [1990] 2 S.C.R. 711; *Steele v. Mountain Institution*, 1990 CanLII 50 (SCC), [1990] 2 S.C.R. 1385; *R. v. Goltz*, 1991 CanLII 51 (SCC), [1991] 3 S.C.R. 485; *R. v. Morrisey*, 2000 SCC 39 (CanLII), [2000] 2 S.C.R. 90; *R. v. Latimer*, 2001 SCC 1 (CanLII), [2001] 1 S.C.R. 3; *R. v. Ferguson*, 2008 SCC 6 (CanLII), [2008] 1 S.C.R. 96; *R. v. Nur*, 2015 SCC 15 (CanLII), [2015] 1 S.C.R. 773; *R. v Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130; *R. v. Boudreault*, 2018 SCC 58 (CanLII), [2018] 3 S.C.R. 599.

[3] Textualism has been described as a theory which shares "both the philosophy and the partisans of the 'originalist' method of constitutional interpretation" (see Stéphane Beaulac, "Parliamentary Debates in Statutory Interpretation: A Question of Admissibility or of Weight?" (1998), 43 *McGill L.J.* 287, at p. 300).

[4] The Court has cited comparative legal sources in 50 different fields of both public and private law. The 10 fields of law that have generated the highest number of foreign precedents are: constitutional law, torts, criminal law, insurance, intellectual property, civil procedure, administrative law, evidence, courts and labour law (Rado, Figure 5, at p. 69; see also p. 67). Beyond comparative legal sources, the Court has cited international precedents in 13 different fields of both public and private law: constitutional law, immigration law, criminal law, administrative law, torts, labour law, statutes, civil procedure, intellectual property, courts, evidence, international law, contracts (Rado, Figure 6, at p. 76; see also p. 75) as well as international treaties in constitutional law, intellectual property, international law (public and private), immigration law, administrative law, civil procedure, labour law, statutes, arbitration and in 20 other fields of law (Rado, Figure 7, at p. 76).

15	*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313

Reference Re Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 SCR 313

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File number:	19234
Other citations:	[1987] ACS no 10 — [1987] SCJ No 10 (QL) — [1987] DLQ 225 — 28 CRR 305 — 51 Alta LR (2d) 97 — 78 AR 1 — [1987] 3 WWR 577 — AZ-87111020 — 38 DLR (4th) 161 — 74 NR 99
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Most recent unfavourable mention:	Saskatchewan Federation of Labour v. Saskatchewan, 2015 SCC 4 (CanLII), [2015] 1 SCR 245 [...] **Overruled:** Reference re Public Service Employee Relations Act (Alta.), **1987 CanLII 88 (SCC) , [1987] 1 S.C.R. 313** ; referred to: Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia , 2007 SCC 27 , [2007] 2 S.C.R. 391 ; Ontario (Attorney General) v. Fraser , 2011 SCC 20 , [2011] 2 S.C.R. 3 [...]

Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313

IN THE MATTER OF A REFERENCE under section 27(1) of the *Judicature Act*, being chapter J-1 of the Revised Statutes of Alberta, 1980;

AND IN THE MATTER OF the validity of compulsory arbitration provisions found in the *Public Service Employee Relations Act*, the *Labour Relations Act*, and the *Police Officers Collective Bargaining Act*, being chapters P-33, L-1.1 and P-12.05 of the Revised Statutes of Alberta, 1980 respectively;

AND IN THE MATTER OF the exclusion of certain employees from units for collective bargaining

between

Alberta Union of Provincial Employees, Canadian Union of Public Employees and Alberta International Fire Fighters Association
Appellants

and

Attorney General of Manitoba
Intervener for the appellants

v.

Attorney General for Alberta
Respondent

and

Attorney General of Canada, Attorney General for Ontario, Attorney General of Quebec, Attorney General of Nova Scotia, Attorney General of British Columbia, Attorney General of Prince Edward Island, Attorney General for Saskatchewan and Attorney General of Newfoundland *Interveners for the respondent*

INDEXED AS: REFERENCE RE PUBLIC SERVICE EMPLOYEE RELATIONS ACT (ALTA.)

File No.: 19234.

1985: June 27, 28; 1987: April 9.

Present: Dickson C.J. and Beetz, McIntyre, Chouinard*, Wilson, Le Dain and La Forest JJ.

*Chouinard J. took no part in the judgment.

on appeal from the court of appeal for alberta

Constitutional law -- Charter of Rights -- Freedom of association -- Scope of protection in labour relations context -- Provincial legislation prohibiting strikes and lockouts -- Legislation providing for arbitration -- Whether provincial legislation violated s. 2(d) of the Charter -- If so, whether such violation justifiable under s. 1 of the Charter -- Public Service Employee Relations Act, R.S.A. 1980, c. P-33, ss. 48, 49, 50, 55, 93, 94 -- Labour Relations Act, R.S.A. 1980 (Supp.), c. L-1.1, ss. 117.1, 117.2, 117.3, 117.8 -- Police Officers Collective Bargaining Act, S.A. 1983, c. P-12.05, ss. 2(2), 3, 9, 10, 15.

The Lieutenant Governor in Council of Alberta, in accordance with s. 27(1) of the *Judicature Act* of that province, referred to the Alberta Court of Appeal several constitutional questions which raised two main issues: (1) whether the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* of Alberta, which prohibit strikes and impose compulsory arbitration to resolve impasses in collective bargaining, were inconsistent with the *Canadian Charter of Rights and Freedoms*; and (2) whether the provisions of the Acts relating to the conduct of the arbitration and which limit the arbitrability of certain items and require the arbitration board to consider certain factors in making the arbitration award were inconsistent with the *Charter*. The first Act applied to public service employees, the second to firefighters and hospital employees and the third to police officers. The majority of the Court of Appeal of Alberta answered the first issue in the negative and declined to answer the second issue. This appeal is to determine whether the Alberta legislation violates the guarantee of freedom of association in s. 2(*d*) of the *Charter* and, if so, whether such violation can be justified under s. 1.

Held (Dickson C.J. and Wilson J. dissenting): The appeal should be dismissed.

Per Beetz, Le Dain and La Forest JJ.: The challenged provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* were not inconsistent with the *Charter*. The constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike. In considering the meaning that must be given to freedom of association in s. 2(*d*) of the *Charter*, it is essential to keep in mind that this concept must be applied to

a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

In considering whether it is reasonable to ascribe such a sweeping intention to the *Charter*, the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one must be rejected. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

What is in issue here is not the importance of freedom of association in this sense but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought* --the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer--are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that, in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action, this Court should be considering the substitution of its judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

Per McIntyre J.: The freedom of association in s. 2(*d*) of the *Charter* did not give constitutional protection to the right of a trade union to strike as an incident to collective bargaining. Freedom of association under the *Charter* means the freedom to engage collectively in those activities which are constitutionally protected for each individual. It means also the freedom to associate for the purposes of activities which are lawful when performed alone. Freedom of association, however, does not vest independent rights in the group. People cannot, by merely combining together, create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. The group can exercise only the constitutional rights of its members on behalf of those members. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association. Therefore, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual. This definition fully realizes the purpose of freedom of association which is to ensure that various goals may be pursued in common as well as individually. When this definition of freedom of association is

applied, it is clear that freedom of association does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual.

Further, read in the context of the whole *Charter*, s. 2(*d*) cannot support an interpretation of freedom of association which could include a right to strike. Although strikes are commonplace in Canada and have been for many years, the framers of the Constitution did not include a specific reference to the right to strike in the *Charter*. This omission, taken with the fact that the overwhelming preoccupation of the *Charter* is with individual, political, and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike.

Finally, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent vintage. It cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the *Charter*.

Consequently, the provisions of the *Public Service Employee Relations Act*, the *Labour Relations Act* and the *Police Officers Collective Bargaining Act* which prohibited the use of strikes and lockouts were not inconsistent with the provisions of the *Charter* since the *Charter* does not guarantee a right to strike. The provisions of the Acts which related to the conduct of arbitration were also not inconsistent with the *Charter*, since the *Charter* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

Per Dickson C.J. and Wilson J. (dissenting): The purpose of the constitutional guarantee of freedom of association in s. 2(*d*) of the *Charter* is to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. While s. 2(*d*), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status in order to give effective protection to the interests to which the constitutional guarantee is directed and must protect the pursuit of the activities for which the association was formed. What freedom of association seeks to protect, however, is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional licence for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

In the context of labour relations, the guarantee of freedom of association in s. 2(*d*) of the *Charter* includes not only the freedom to form and join associations but also the freedom to bargain collectively and to strike. The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers, and the capacity to bargain collectively has long been recognized as one of the integral and primary

functions of associations of working people. It remains vital to the capacity of individual employees to participate in ensuring equitable and humane working conditions. Under our existing system of industrial relations, the effective constitutional protection of the associational interests of employees in the collective bargaining process also requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*. Indeed, the right of workers to strike is an essential element in the principle of collective bargaining. This is not to say that s. 2(*d*) of the *Charter* entrenches for all time the existing system of labour relations. The area of industrial relations is subject to significant legislative regulation. The point is that this regulation cannot define the scope of the underlying freedom.

In the present case, the three statutes prohibited strikes and defined a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. There is no doubt that the Alberta legislation was aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike is to influence an employer by joint action which would be ineffective if it were carried out by an individual. Therefore, s. 93 of the *Public Service Employee Relations Act*, s. 117.1(2) of the *Labour Relations Act* and s. 3(1) of the *Police Officers Collective Bargaining Act*, which directly abridged the freedom of employees to strike, infringed the guarantee of freedom of association in s. 2(*d*) of the *Charter*.

The limits on freedom of association imposed by these provisions were not justifiable under s. 1 of the *Charter*. The protection of the government from the political pressure of strike action from their employees was not an objective of sufficient importance for the purpose of s. 1 for limiting freedom of association through legislative prohibition of freedom to strike. It has not been shown that all public service employees have a substantial bargaining advantage on account of their employer's governmental status. Nor has it been shown that any political pressure exerted on the government during strikes was of an unusual or peculiarly detrimental nature.

The protection of essential services is a government objective of sufficient importance for the purpose of s. 1, but the government did not demonstrate that this objective justified the limit on freedom of association imposed by the abrogation of the right to strike. The essential quality of police officers and firefighters was obvious and self-evident, and did not have to be proven by evidence. Thus, the Legislature's decision to prevent interruption in police protection and firefighting was rationally connected to the objective of protecting essential services. But the prohibition of the right to strike of all hospital workers and public service employees was too drastic a measure for achieving the object of protecting essential services. Indeed, without some evidentiary basis, it was neither obvious nor self-evident that all those employees performed services "whose interruption would endanger the life, personal safety or health of the whole or part of the population". Section 93 of the *Public Service Employee Relations Act* and s. 117.1(2) of the *Labour Relations Act*, in so far as it pertains to the hospital employees under s. 117.1(1)(b), were too wide to be justified by relating to essential services for the purpose of s. 1.

Further, to impair as little as possible the freedom of association of those affected by a legislative prohibition to strike, such prohibition must also be accompanied by a mechanism for dispute resolution by a third party which would adequately safeguard workers' interest. In the present reference, the arbitration system provided by the Acts was not an adequate replacement for the employees' freedom to strike. While the provisions which required the arbitrator to consider the fiscal policies of the government and the wages

and benefits of private and public unionized and non-unionized employees did not compromise the adequacy of the arbitration procedure, the exclusion of certain subjects from the arbitration process in the *Police Officers Collective Bargaining Act* and the *Public Service Employee Relations Act* did compromise the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. It may be necessary in some circumstances for a government employer to maintain absolute control over aspects of employment through exclusion of certain subjects from arbitration, but the presumption must be against such exclusion to ensure that the effectiveness of an arbitration scheme as a substitute for freedom to strike is not compromised. Here, the government has not satisfied the onus upon it to demonstrate such necessity.

Finally, none of the arbitration schemes in the Acts provided a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a Minister or an administrative board to establish an arbitration board if it is deemed appropriate. Such a discretionary power was an unjustified interference with the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.

In sum, the provisions relating to the arbitration schemes did not themselves limit freedom of association. These provisions, however, with the exception of those requiring the arbitrator to consider certain factors in making the arbitration award, contributed to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 93 of the *Public Service Employee Relations Act*, s. 117.1(2) of the *Labour Relations Act* and s. 3(1) of the *Police Officers Collective Bargaining Act* to be justified under s. 1.

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By Dickson C.J. (dissenting)

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APPEAL from a judgment of the Alberta Court of Appeal (1984), 1984 ABCA 354 (CanLII), 16 D.L.R. (4th) 359, [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 57 A.R. 268, 85 CLLC ¶ 14,027, on a reference made pursuant to s. 27(1)

of the Alberta *Judicature Act*. Appeal dismissed, Dickson C.J. and Wilson J. dissenting.

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The reasons of Dickson C.J. and Wilson J. were delivered by

1. THE CHIEF JUSTICE (dissenting)--This appeal concerns the interpretation of "freedom of association" as guaranteed in s. 2(*d*) of the *Canadian Charter of Rights and Freedoms* in the labour relations context. The central issues raised are (1) whether legislation enacted by the province of Alberta prohibiting strikes infringes s. 2(*d*) of the *Charter*; and (2) if so, whether and under what circumstances legislative limits on the freedom of association are reasonable and demonstrably justified in a free and democratic society for the purposes of s. 1 of the *Charter*.

I

The Reference--Constitutional Questions

2. The Lieutenant Governor in Council of the province of Alberta referred certain questions to the Court of Appeal of Alberta for

an advisory opinion pursuant to s. 27(1) of the *Judicature Act*, R.S.A. 1980, c. J-1:

1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

5. Are the provisions of the *Labour Relations Act* that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

7. Does the *Constitution Act, 1982*, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:

a) an employee who exercises managerial functions;

b) an employee who is employed in a confidential capacity in matters relating to labour relations;

c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;

d) an employee whose interests as a member of a unit for collective bargaining could

conflict with his duties as an employee?

3. A majority of the Court of Appeal of Alberta answered questions 1 to 3 in the negative and did not answer the remaining questions: (1984), 1984 ABCA 354 (CanLII), 16 D.L.R. (4th) 359, [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 57 A.R. 268, 85 CLLC ¶ 14,027. The Alberta Union of Provincial Employees, the Canadian Union of Public Employees and the Alberta International Fire Fighters Association appealed to this Court. The Attorney General of Manitoba intervened in support of the appellants. The Attorney General of Canada and Attorneys General of each of the other provinces except New Brunswick intervened in support of the Attorney General for Alberta.

II

Relevant Statutory and Constitutional Provisions

4. The provisions in question in the *Public Service Employee Relations Act*, R.S.A. 1980, c. P-33, as amended by S.A. 1983, c. 34 and c. 96 (hereinafter *Public Service Act*), apply to public service employees in Alberta; in the *Labour Relations Act*, R.S.A. 1980 (Supp.), c. L-1.1, as amended by S.A. 1983, c. 34, to firefighters and hospital employees; and in the *Police Officers Collective Bargaining Act*, S.A. 1983, c. P-12.05 (hereinafter *Police Officers Act*), to police officers.

5. Constitutional questions 1, 2 and 3 of this Reference concern the constitutionality of prohibiting the use of strikes and replacing them with compulsory arbitration.

6. The scheme of each statute is similar. Though the definition of "strike" varies slightly between the Acts, it is common to all that a strike is a cessation of work, a refusal to work or a refusal to continue to work by two or more persons acting in combination or in concert or in accordance with a common understanding (see: *Public Service Act*, s. 1(q); *Labour Relations Act*, s. 1(1)(u); *Police Officers Act*, s. 1(m)). Each of the Acts prohibits strikes and makes it an offence to strike or promote a strike (see *Public Service Act*, ss. 93 and 95; *Labour Relations Act*, ss. 117.1(2), 117.1(4) and 155; *Police Officers Act*, ss. 3(1) and 46).

7. Each of the statutes includes an arbitration scheme for resolving disputes which arise in the collective bargaining process. If a dispute cannot be resolved, either the employer or the bargaining agent or both may request that an arbitration board be established (*Public Service Act*, s. 49; *Labour Relations Act*, s. 117.2; *Police Officers Act*, s. 9).

8. In the *Public Service Act*, upon request for the establishment of an arbitration board, the Public Service Employee Relations Board may direct the parties to continue collective bargaining, appoint a mediator, or establish an arbitration board depending on its view of the circumstances (s. 50). Under the *Labour Relations Act*, s. 117.3, and the *Police Officers Act*, s. 10, the Minister, on receipt of a request for the establishment of an arbitration board, may (1) direct the parties to continue collective bargaining and may prescribe the procedure or conditions under which collective bargaining is to take place if he or she considers it appropriate, or (2) if satisfied that the dispute is appropriate to refer to an arbitration board, establish an arbitration board.

9. The provisions at issue in questions 4, 5, and 6 of this Reference relate primarily to the arbitrability of certain items and the factors appropriate for consideration by an arbitration board.

10. In the *Public Service Act*, ss. 48 and 55 provide:

> **48**(1) An arbitration board may only consider, and an arbitral award may only deal with, those matters that may be included in a collective agreement.
>
> (2) Notwithstanding subsection (1), none of the following matters may be referred to an arbitration board and provisions in respect of the following matters shall not be contained in the arbitral award of an arbitration board:
>
> (a) the organization of work, the assignment of duties and the determination of the number of employees of an employer;
>
> (b) the systems of job evaluation and the allocation of individual jobs and positions within the systems;
>
> (c) selection, appointment, promotion, training or transfer;
>
> (d) pensions.
>
> **55** To ensure that wages and benefits are fair and reasonable to the employees and employer and are in the best interest of the public, the arbitration board
>
> (a) shall consider, for the period with respect to which the award will apply, the following:
>
> (i) wages and benefits in private and public and unionized and non-unionized employment;
>
> (ii) the continuity and stability of private and public employment, including
>
> (A) employment levels and incidence of layoffs,
>
> (B) incidence of employment at less than normal working hours, and
>
> (C) opportunity for employment;
>
> (iii) any fiscal policies that may be declared from time to time in writing by the Provincial Treasurer for the purposes of this Act;
>
> and
>
> (b) may consider, for the period with respect to which the award will apply, the following:
>
> (i) the terms and conditions of employment in similar occupations outside the employer's employment taking into account any geographic, industrial or other variations that the board considers relevant;
>
> (ii) the need to maintain appropriate relationships in terms and conditions of employment between different classification levels

within an occupation and between occupations in the employer's employment;

(iii) the need to establish terms and conditions of employment that are fair and reasonable in relation to the qualifications required, the work performed, the responsibility assumed and the nature of the services rendered;

(iv) any other factor that it considers relevant to the matter in dispute.

11. Section 117.8 of the *Labour Relations Act* is identical to s. 55 of the *Public Service Act* except in so far as it refers to a "compulsory arbitration board" rather than an "arbitration board".

12. Section 15 of the *Police Officers Act* is also identical to s. 55 of the *Public Service Act* except in so far as it refers to an "interest arbitration board" rather than an "arbitration board".

13. Question 6 of this Reference refers to s. 2(2) of the *Police Officers Act*. This section is unique. A similar provision does not appear in any of the other Acts. Section 2 reads:

2(1) All police officers, except the chief constable and deputy chief constables, have the right

(a) to be members of a police association and to participate in its lawful activities, and

(b) to bargain collectively with the municipality to which they are appointed through a bargaining agent,

except that no police officer shall remain or become a member of a trade union or of an organization that is affiliated, directly or indirectly, with a trade union.

(2) Notwithstanding subsection (1), if an application by a local authority within the meaning of the *Special Forces Pension Act* to bring its police officers under that Act has been granted, there shall be no right to bargain collectively for pension benefits.

Question 7 does not specifically refer to the legislation under review. It is concerned, in a general way, with categories of exclusion from units for collective bargaining, and if it is to be answered, it must be answered in the abstract.

14. The following provisions of the *Charter* are relevant to this appeal.

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

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

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association. [Emphasis added.]

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.

Judgment of the Alberta Court of Appeal

15. The majority of the Court of Appeal of Alberta (Kerans J.A., McGillivray C.J.A., D. C. McDonald J. (*ad hoc*), and Stevenson J.A. concurring) answered questions 1 to 3 of the Reference in the negative, held that no answer was necessary for questions 4 to 6, and that question 7 could not be answered. Belzil J.A., dissenting in part, answered the first six questions in the negative, and question 7 in the affirmative.

16. Kerans J.A. characterized the ultimate question posed in the Reference as whether the imposition of compulsory arbitration in place of strikes and lockouts has interfered with the freedom of association of the workers involved. He held it did not. According to the majority, the provisions of the *Charter* must be interpreted in a broad and liberal manner, consistent with the prescriptions of *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, and in defining a *Charter* right the court need not concern itself with the difficulties that may arise if the right is absolute. Such concerns are more properly dealt with under s. 33 or s. 1 of the *Charter*. Interpretation should not, however, be extreme or extravagant.

17. Applying these principles to the present Reference, the majority concluded that statutory restrictions on strike activity were not an infringement of s. 2(*d*) of the *Charter*. Kerans J.A. wrote that a measure of restraint should be exercised in *Charter* interpretation; courts should not interpret freedom of association as providing *Charter* protection to "all actions by all groups to carry out all group purposes". Moreover, the majority was not persuaded that the prohibition of strikes did in fact limit the freedom of association of public sector employees.

18. Kerans J.A. went on to consider the argument that the "right to organize should be extended ... to include the right to strike in order to give vitality to the right of workers to organize for their mutual benefit". For the purposes of the appeal, Kerans J.A. left open the validity of this proposition, but held that even if it were the appropriate legal standard, the imposition of compulsory arbitration had not been proved in fact to have been detrimental to the vitality of the unions in question. Thus, according to Kerans J.A., the legislative schemes did not interfere with meaningful and effective collective bargaining.

19. The majority declined to answer questions 4 to 6 since the negative answer provided for questions 1 to 3 made it unnecessary to consider the adequacy of the particular statutory arbitration schemes as a replacement for strike action. The majority held that question 7 could not be answered in the abstract because any answer would be dependent on the facts of each particular case.

20. Belzil J.A., in separate reasons, answered the first three questions in a similar way to the majority but came to his answers by a different route. According to him, freedom of association in the *Charter* means that "two or more persons may in concert with each other do what they please *provided they do not harm others* or transgress such reasonable limits prescribed by law as can be demonstrably justified in a

free and democratic society". He characterized strike activity as "the ultimate weapon of coercion of labour" in the collective bargaining process and found it "unthinkable that a charter for the equal protection of the rights and freedoms of all citizens should guarantee to one citizen an inviolable right to harm another, or enlarge the freedom of one citizen to the detriment of the freedom of the other". Accordingly, he found the right to strike to be outside the ambit of the *Charter* and answered questions 1 through 3 in the negative.

21. According to Belzil J.A., questions 4 to 6 were also to be answered in the negative since in his view, the *Charter* did not impose any restriction on the Legislature in specifying what an arbitrator shall or may consider in compulsory arbitration. Belzil J.A. answered question 7 in the affirmative. According to him: "Since collective bargaining by itself, and without resort to strike action, does not cause harm to anyone, any limit on the right of any of the persons in any of the classes mentioned in ss. (a), (b), (c), and (d) of Q. 7, to associate with others in units for collective bargaining is on its face an infringement of the freedom of association guaranteed to each of them by the *Charter*, unless the limit is justified under s. 1". Thus, in Belzil J.A.'s view, collective bargaining is within the domain of the *Charter* though strike activity is not.

IV

Freedom of Association and s. 2(d) *of the Charter*

22. Freedom of association is the freedom to combine together for the pursuit of common purposes or the advancement of common causes. It is one of the fundamental freedoms guaranteed by the *Charter*, a *sine qua non* of any free and democratic society, protecting individuals from the vulnerability of isolation and ensuring the potential of effective participation in society. In every area of human endeavour and throughout history individuals have formed associations for the pursuit of common interests and aspirations. Through association individuals are able to ensure that they have a voice in shaping the circumstances integral to their needs, rights and freedoms.

23. Freedom of association is the cornerstone of modern labour relations. Historically, workers have combined to overcome the inherent inequalities of bargaining power in the employment relationship and to protect themselves from unfair, unsafe, or exploitative working conditions. As the United States Supreme Court stated in *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), at p. 33:

> Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; . . .

The "necessities of the situation" go beyond, of course, the fairness of wages and remunerative concerns, and extend to matters such as health and safety in the work place, hours of work, sexual equality, and other aspects of work fundamental to the dignity and personal liberty of employees.

24. The question in the present case is to what extent freedom of association, as guaranteed by s. 2(*d*) of the *Charter*, protects the

freedom of workers to act in concert, and to bargain and withdraw their services collectively.

1. *The Authorities*

25. Four important jurisprudential sources warrant review. First, an extensive jurisprudence has developed in Canada on the scope of constitutional protection of freedom of association. Second, the Judicial Committee of the Privy Council has addressed the issue. Third, there are a number of United States cases on freedom of association, some of which have been decided in respect to labour relations. And, fourth, freedom of association in the labour relations context has received considerable attention under international law. It is instructive to examine the Privy Council case on freedom of association before reviewing the Canadian jurisprudence because the former has been a point of departure for many of the decisions in Canadian courts under s. 2(*d*) of the *Charter*, and is relied upon heavily by the respondent.

26. In assessing the relevant authorities, it is important to keep three considerations in mind. First, are trade unions accorded any constitutional protection at all?

27. Second, what approach is taken to the nature of freedom of association? More specifically, has the relevant tribunal adopted what I shall refer to as a `constitutive' definition of freedom of association whereby freedom of association entails simply the freedom to combine together but does not extend to the freedom to engage in the activities for which the association was formed? Alternatively, has a wider definition been adopted to the effect that freedom of association embodies both the freedom to join together and the freedom to pursue collective activities? In this appeal, the respondent adopts the former view while the appellants adopt the latter.

28. Third, if the wider definition is adopted, what is the scope of activities protected? Not all activities in pursuit of a collective purpose are constitutionally shielded simply by virtue of the fact that they are done in association. The constitutional principle in forming the appropriate scope of freedom of association, therefore, must be examined to uncover the limitations imposed in different jurisdictions on associational freedom.

(i) The Judicial Committee of the Privy Council

29. The leading case from the Privy Council is *Collymore v. Attorney-General*, [1970] A.C. 538. The issue in *Collymore* was whether the *Industrial Stabilisation Act 1965* of Trinidad and Tobago offended freedom of association as guaranteed by the Constitution of Trinidad and Tobago. Section 1 of the Constitution provides:

> It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ... (*j*) freedom of association and assembly; . . .

Section 2, in so far as it is relevant, states:

> Subject to the provisions of sections 3, 4 and 5 of this Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared . . . .

Under s. 4, Parliament may pass special laws during a public emergency, and under s. 5 Parliament may enact laws which conflict with ss. 1 and 2, subject to certain specified safeguards.

30. Section 34 of the *Industrial Stabilisation Act 1965* prohibited workers from participating in a strike in connection with any trade dispute unless, the dispute having been reported to the Minister of Labour, the Minister has not referred it to the Industrial Court set up under the Act. The appellants were employees of Texaco Trinidad, Inc. and members of the Oilfield Workers' Trade Union. They sought a declaration in the High Court of Trinidad that the Act was *ultra vires* the Parliament of Trinidad and Tobago on the ground that it was inconsistent with the constitutional guarantee of freedom of association. Their application was denied.

31. The appellants appealed to the Court of Appeal and the appeal was dismissed: *Collymore v. Attorney-General* (1967), 12 W.I.R. 5. Upon an extensive review of the history of legal regulation of strikes, Wooding C.J. articulated a limited definition of freedom of association (at p. 15):

> In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.
>
> What is or is not inimical to the peace, order and good government of the country is not for the courts to decide.

32. Similarly, Phillips J.A. found " `this right' [to strike], if it may properly be so called, is something that is in its nature very different from the well-known basic rights or liberties of the subject which derive in England from the `common law'..." (p. 29) and "a logical distinction falls clearly to be drawn between freedom of association strictly so called and freedom to engage in any particular activity of an association" (p. 31). Fraser J.A. held that whether freedom of association included the right to strike depended on whether it was a common law right. He found it was not: "The right to indulge in a concerted stoppage of work which alone can constitute a strike is no more than a statutorily implied exemption from criminal and civil consequences limited in scope to action taken in furtherance or contemplation of a trade dispute" (p. 48).

33. On appeal to the Privy Council, Lord Donovan, speaking for the Court, agreed with Wooding C.J. that freedom of association does not embody the freedom to pursue the objects of an association and cited with approval the passage quoted above. Accordingly, the appeal was dismissed.

34. While the *Collymore* case provides a relevant perspective on the meaning of freedom of association, its applicability to the *Charter* is undermined by the different nature of the constitutional documents. The Constitution of Trinidad and Tobago is more similar in character and function to the *Canadian Bill of Rights* than to the *Charter*, accepting, as it does, a "frozen rights" approach. It recognizes and declares pre-existing rights and freedoms and is not a source of new constitutional

protections. It is for this reason that the courts in *Collymore* were so concerned with ascertaining whether or not the freedom to strike existed at common law prior to the introduction of statutory reform. As elaborated below, the *Charter* ushers in a new era in the protection of fundamental freedoms. We need not ground protection for freedom of association in pre-existing freedoms.

(ii) Canadian Case Law

35. Canadian jurisprudence on the nature and scope of freedom of association is divided. On the one hand, the British Columbia Court of Appeal and the Federal Court of Appeal have endorsed a constitutive definition of freedom of association, concluding that collective bargaining and strike activity are not protected by freedom of association. This approach accords with the *Collymore* case. On the other hand, the Ontario Divisional Court, and the Saskatchewan Court of Appeal have adopted broader definitions, holding that freedom of association includes the freedom to pursue common purposes and to engage in collective activities, and is not merely the freedom to form and join associations.

36. In the British Columbia case, *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 1984 CanLII 750 (BC CA), 10 D.L.R. (4th) 198 (B.C.C.A.), the issue was whether an interlocutory injunction enjoining picketing by the respondent was in breach of the *Charter*'s guarantees of freedom of expression and freedom of association. The case was appealed to this Court but only on the freedom of expression issue: 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573. On the freedom of association issue the majority of the Court of Appeal (Esson and Taggart, JJ.A.), relying on the *Collymore* case, held that "freedom to associate carries with it no constitutional protection of the purposes of the association or means of achieving those purposes" (p. 209). Esson J.A. stated (at pp. 207-08):

> The freedom [of association] is that of the individual (i.e., in the words of s. 2, of "everyone"). It is the freedom to unite, to combine, to enter into union, to create and maintain an organization of persons with a common purpose. One of the classes of association guaranteed by s. 2 is undoubtedly the trade union. Everyone has the right to join a trade union and to pursue, with the other members, the collective interests of the membership. It does not follow that the Charter guarantees the objects and purposes of the union, or the means by which those can be achieved.

The majority concluded that the *Charter*'s guarantee of freedom of association does not affect laws which limit or control picketing.

37. *Dolphin Delivery* and *Collymore* were followed by the Federal Court of Appeal in *Public Service Alliance of Canada v. The Queen*, 1984 CanLII 2981 (FCA), [1984] 2 F.C. 889 (hereinafter *PSAC*) (on appeal to this Court, reasons released concurrently, 1987 CanLII 89 (SCC), [1987] 1 S.C.R. 424). The decision of the Court of Appeal is summarized in detail in this Court's reasons in the case. In brief, the Court of Appeal decided that the *Public Sector Compensation Restraint Act*, S.C. 1980-81-82-83, c. 122, deprived public servants of the right to bargain collectively but that, in doing so, it did not impinge on the *Charter*'s guarantee of freedom of association. According to Mahoney J. (with whom Hugessen J. concurred), at p. 895:

> The right of freedom of association guaranteed by the Charter is the right to enter into consensual arrangements. It protects neither the objects of the association nor the means of attaining those objects.
>
> ...
>
> I do not think it desirable to attempt to catalogue the rights and immunities inherent in a trade union's guaranteed freedom of association. Clearly, collective bargaining is, or should be, the primary means by which organized labour expects to attain its principal object: the economic betterment of its membership. However fundamental, it remains a means and, as such, the right to bargain collectively is not guaranteed by paragraph 2(*d*) of the Charter, which guarantees freedom of association.

Marceau J. agreed with Mahoney J. and his reliance on *Dolphin Delivery* and added (at p. 897): "I fail to see on the basis of which rule of construction, however liberal it may be, one can be able to give to the words `freedom of association' a meaning broad enough to include the right to strike".

38. The trial divisions of a number of provinces have adopted the reasoning in *Collymore*, *Dolphin Delivery* and *PSAC* in interpreting s. 2(*d*) of the *Charter*. See *Newfoundland Association of Public Employees v. The Queen in Right of Newfoundland* (1985), 14 C.R.R. 193 (Nfld. S.C.T.D.); *Re Prime and Manitoba Labour Board* (1983), 1983 CanLII 2940 (MB QB), 3 D.L.R. (4th) 74 (Man. Q.B.), rev'd on other grounds (1984), 1984 CanLII 2936 (MB CA), 8 D.L.R. (4th) 641 (Man. C.A.); *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358 (N.S.S.C.T.D.)

39. In contrast to these decisions are the Ontario and Saskatchewan cases. *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 1983 CanLII 1928 (ON SC), 44 O.R. (2d) 392 (hereinafter *Broadway Manor*) concerned an application for judicial review before the Divisional Court of the Ontario High Court of Justice raising the issue of the validity of the *Inflation Restraint Act, 1982*, S.O. 1982, c. 55. The Labour Relations Board had interpreted s. 13 of that Act as continuing in force, beyond the normal date of termination, collective agreements of public sector employees. Galligan J. disposed of the application on the ground that the Labour Relations Board misconstrued the Act, though he addressed the question whether s. 13 infringed freedom of association "in deference to the substantial argument presented on it, and in view of the fact that my interpretation of s. 13 may not be accepted by others" (p. 406). O'Leary and Smith JJ. were of the view that the Board had correctly interpreted the Act, and disposed of the application on the *Charter* issue.

40. The Divisional Court was unanimous in rejecting the view of freedom of association embodied in *Collymore*. All three judges were of the view that the guarantee of freedom of association in s. 2(*d*) of the *Charter* extended to the activities of associations, and was not limited merely to the joining and formation of associations. Galligan J. explicitly rejected the interpretation of freedom of association in *Collymore*, as inconsistent with "a large and liberal construction". He stated, at p. 409:

> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law....

> The purpose of an association of workers in a union is clear -- it is to advance their common interests. If they are not free to take such lawful steps that they see as reasonable to advance those interests, including bargaining and striking, then as a practical matter their association is a barren and useless thing. I cannot imagine that the Charter was ever intended to guarantee the freedom of association without also guaranteeing the freedom to do that for which the association is intended. I have no hesitation in concluding that in guaranteeing workers' freedom of association the Charter also guarantees at the very least their freedom to organize, to choose their own union, to bargain and to strike.

O'Leary J. said, at p. 445:

> But is the right to strike included in the expression "freedom of association"? The ability to strike, in the absence of some kind of binding conciliation or arbitration, is the only substantial economic weapon available to employees. The right to organize and bargain collectively is only an illusion if the right to strike does not go with it. The main reason that the right to organize and bargain collectively is assured employees is that they may effectively bargain with their employer. To take away an employee's ability to strike so seriously detracts from the benefits of the right to organize and bargain collectively as to make those rights virtually meaningless. If the right to organize and bargain collectively is to have significant value then the right to strike must also be a right included in the expression "freedom of association", and I conclude that it is.

According to Smith J., at p. 463: "The freedom to associate as used in the Charter not being on its face a limited one, includes the freedom to organize, to bargain collectively and, as a necessary corollary, to strike".

41. The *Broadway Manor* case was recently cited with apparent approval by a different panel of the Ontario Divisional Court (Southey, Griffiths and Saunders JJ.) for the proposition that freedom of association includes the right to bargain collectively: *Re Chung and Amalgamated Clothing and Textile Workers' Union* (1986), 1986 CanLII 3999 (ON SCDC), 54 O.R. (2d) 650.

42. In *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 1985 CanLII 184 (SK CA), 19 D.L.R. (4th) 609 (hereinafter the *Dairy Workers* case) a majority of the Saskatchewan Court of Appeal rejected the interpretation of freedom of association in *Collymore*, *Dolphin Delivery*, and *PSAC*, and came to conclusions similar to those of the Divisional Court in *Broadway Manor*. The *Dairy Workers* case is on appeal to this Court and reasons are being released concurrently, 1987 CanLII 90 (SCC), [1987] 1 S.C.R. 460.

43. The issue was whether *The Dairy Workers (Maintenance of Operations) Act*, S.S. 1983-84, c. D-1.1 (Bill No. 44), which prohibited strikes and lockouts in the dairy industry for a certain period, violated s. 2(*d*) of the *Charter*. The majority found it did (Bayda C.J.S. and Cameron J.A.), Brownridge J.A. dissenting. Both members of the majority emphasized the necessary connection between associating for the purpose of collective bargaining and the freedom to bargain collectively and strike. Chief Justice Bayda rejected in strong terms the reasoning in *Collymore*, (pp. 624-26) and concluded that (1) freedom of association is the freedom of an individual "to perform in association without governmental interference any act that he is free to perform alone", and (2) "where an act by definition is incapable of individual performance,

> [an individual] is free to perform the act in association provided the mental component of the act is not to inflict harm" (p. 620). Since an employee is free as an individual to refuse to work, refusal to work by employees in concert is protected by freedom of association. With regard to the second element of freedom of association, the mental element of a strike is to compel an employer to agree to terms and conditions of employment, not to inflict injury. Therefore, a person is free to associate in this manner, and accordingly the prohibition of strike activity in the Act violated freedom of association.

44. Cameron J.A. reached the same conclusion. It was his opinion that, though the weight of authority suggested strike activity was not protected by s. 2(*d*) of the *Charter*, "the emerging framework of principle governing Charter interpretation rather points to its inclusion, especially if we are to be faithful to the call to give these rights and freedoms a `*generous* interpretation . . . suitable to give to individuals the *full measure*' of them" (p. 645). He stated that, if freedom of association protected freedom to form trade unions for the purpose of bargaining, then it must protect freedom to bargain collectively and to strike (pp. 643-44, 647). On this ground Cameron J.A. found freedom of association was abridged by the Act.

45. Brownridge J.A., dissenting, followed the British Columbia Court of Appeal's decision in *Dolphin Delivery* and accordingly held that freedom of association did not protect strike activities.

46. More recently, in *Black v. Law Society of Alberta*, 1986 ABCA 68 (CanLII), [1986] 3 W.W.R. 590 (Alta. C.A.), (application for leave to appeal to this Court granted June 12, 1986, [1986] 1 S.C.R. x), Kerans J.A. has provided further clarification of his approach to freedom of association. This case did not involve a trade union, but rather the associational freedom of lawyers attempting to create an interprovincial law firm. Kerans J.A. adopted the following interpretation (at p. 612):

> ...the special status given to the freedom of association in Canada reflects our tradition about the importance for a free and democratic society of non-governmental organization. In my view, the freedom includes the freedom to associate with others in exercise of Charter-protected rights and also those other rights which--in Canada--are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and a family, pursue an education, or gain a livelihood.

In upholding the freedom of lawyers to pursue a livelihood through association under s. 2(*d*), Kerans J.A. emphasized that the pursuit of a livelihood has been accepted as "an appropriate and vital human ambition", that the relationship was between two humans and that it was not "merely commercial". Thus, according to Kerans J.A., the activities of association warrant constitutional protection if they are related to fundamental human rights and needs.

(iii) United States Jurisprudence

47. To understand the United States case law on the freedom of association, one must be aware of the special nature of the constitutional protection of that freedom. Two features, in particular, distinguish the United States Bill of Rights from the Canadian *Charter vis-à-vis* freedom of association.

48. First, freedom of association is not explicitly protected in the United States Constitution, as it is in the *Charter*. Instead, it has been implied by the judiciary as a necessary derivative of the First Amendment's protection of freedom of speech, "the right of the people to peaceably assemble," and freedom to petition. See, e.g., *Healy v. James*, 408 U.S. 169 (1972); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *NAACP v. Button*, 371 U.S. 415 (1963); *Louisiana ex rel. Gremillion v. NAACP*, 366 U.S. 293 (1961); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The general principle, as developed in the First Amendment jurisprudence of the Supreme Court, is that of freedom "to engage in association for the advancement of beliefs and ideas": *NAACP v. Alabama ex rel. Patterson*, at p. 460. The limited associational purposes protected in the United States are therefore faithful to the derivation of freedom of association from the particular rights and freedoms delineated in the First Amendment.

49. A second important difference between the United States Constitution and the *Charter* is the absence, in the former, of a provision such as s. 1. The balancing of the protection of rights and freedoms with the larger interests of the community, therefore, must be done in the context of defining the right or freedom itself. Whereas a Canadian court could endorse constitutional protection for strike activity, for example, under s. 2(*d*) of the *Charter* and yet still uphold certain limits on the freedom to strike under s. 1, this approach is not open to courts in the United States. Accordingly, one would expect a more limited approach to the delineation of the freedom itself. It is with these two caveats in mind that we turn to an appraisal of the United States position.

50. In the context of this appeal, it is important to note that the United States case law supports in general an approach to the implied freedom of association that protects the activities as well as the formation of an association. As Professor L. H. Tribe states in *American Constitutional Law* (1978), at p. 703, the First Amendment protects "the concerted pursuit of ends that would represent fundamental rights in the context of purely individual activity".

51. Similarly in *Healy v. James*, *supra*, the court emphasized the need to protect the integral activities of an association as a necessary component of freedom of association. In that case the court held that denial by a state college of official recognition to a group of students who wished to form a local chapter of Students for a Democratic Society (S.D.S.) violated First Amendment protection of freedom of association. In coming to its decision, the court stated at pp. 181-82:

> ...the organization's ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students. [Emphasis added.]

Denial of official recognition made it impossible for the organization to engage in the activities necessary to fulfil its purposes and, accordingly, the denial was unconstitutional.

52. Trade unions have also been afforded protection by the First Amendment. Courts have held that the First Amendment includes the "right to organize collectively and to select representatives for the purposes of engaging in collective bargaining": *United Federation of Postal Clerks v. Blount*, 325 F. Supp. 879 (D. D.C. 1971), at p. 883, aff'd 404 U.S. 802

(1971); *Thomas v. Collins*, 323 U.S. 516 (1945); *N.L.R.B. v. Jones & Laughlin Steel Corp.*, *supra*; *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, 336 U.S. 245 (1949). This right has been deemed "fundamental" by the Supreme Court: *N.L.R.B. v. Jones & Laughlin Steel Corp*. The First Amendment also protects the activities of trade unions in respect of securing legal representation for their members: *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217 (1967); *Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1 (1964).

53. Although trade unions and some of their integral activities are considered by the courts to fall within the protection of the First Amendment, freedom to strike does not appear to be unequivocally protected. As the United States Supreme Court stated in *International Union, U.A.W.A. v. Wisconsin Employment Relations Board*, *supra*, at p. 259:

> The right to strike, because of its more serious impact upon the public interest, is more vulnerable to regulation than the right to organize and select representatives for the lawful purposes of collective bargaining . . . .

54. In a similar vein, in *United Federation of Postal Clerks v. Blount*, *supra*, constitutional protection for the right of public employees to strike was rejected. In so doing, the court acknowledged the importance of strikes in the private sector as a means of equalizing bargaining power, but felt that this rationale did not extend to public employees given their potential ability to influence political decisions through strike action.

55. In my view, these decisions illustrate an internal balancing of the implied freedom of association with the public interest at the point of definition of the freedom itself. The cases in which a line was drawn to exclude strike activity from the scope of constitutionally protected associational activities are indicative of the strength of the countervailing concerns (i.e., the public interest) which would find recognition under the *Charter* in s. 1 rather than in defining the scope of s. 2(*d*). When this balancing phenomenon is considered in conjunction with the implied or derivative status of freedom of association, the hesitation of courts to extend freedom of association to include the right to strike in the public sector is understandable.

56. In summary, my understanding of the United States authorities on freedom of association and its application in the context of labour relations is this: Freedom of association is implicitly guaranteed by the First Amendment and protects the concerted pursuit of ends which are explicitly protected by the First Amendment, namely speech, assembly and petition; in the trade union context, the First Amendment's freedom of association protects the right to organize and select representatives for collective bargaining; it also protects the activities of trade unions in respect of securing legal representation for their members; nevertheless, freedom to strike in the public sector is not protected by the implied freedom of association in the First Amendment.

(iv) <u>International Law</u>

57. International law provides a fertile source of insight into the nature and scope of the freedom of association of workers. Since the close of the Second World War, the protection of the fundamental rights

and freedoms of groups and individuals has become a matter of international concern. A body of treaties (or conventions) and customary norms now constitutes an international law of human rights under which the nations of the world have undertaken to adhere to the standards and principles necessary for ensuring freedom, dignity and social justice for their citizens. The *Charter* conforms to the spirit of this contemporary international human rights movement, and it incorporates many of the policies and prescriptions of the various international documents pertaining to human rights. The various sources of international human rights law--declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms--must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

58. In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. As the Canadian judiciary approaches the often general and open textured language of the *Charter*, "the more detailed textual provisions of the treaties may aid in supplying content to such imprecise concepts as the right to life, freedom of association, and even the right to counsel". J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982), 4 *Supreme Court L.R.* 287, at p. 293.

59. Furthermore, Canada is a party to a number of international human rights Conventions which contain provisions similar or identical to those in the *Charter*. Canada has thus obliged itself internationally to ensure within its borders the protection of certain fundamental rights and freedoms which are also contained in the *Charter*. The general principles of constitutional interpretation require that these international obligations be a relevant and persuasive factor in *Charter* interpretation. As this Court stated in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344, interpretation of the *Charter* must be "aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection". The content of Canada's international human rights obligations is, in my view, an important indicia of the meaning of "the full benefit of the *Charter*'s protection". I believe that the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified.

60. In short, though I do not believe the judiciary is bound by the norms of international law in interpreting the *Charter*, these norms provide a relevant and persuasive source for interpretation of the provisions of the *Charter*, especially when they arise out of Canada's international obligations under human rights conventions.

(a) *The United Nations Covenants on Human Rights*

61. In an effort to make more specific the broad principles agreed to under the United Nations *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), two human rights covenants were adopted unanimously by the United Nations General Assembly

on December 16, 1966: the U.N. *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966), and the U.N. *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). Canada acceded to both Covenants on May 19, 1976 and they came into effect on August 19, 1976. Prior to accession the Federal Government obtained the agreement of the provinces, all of whom undertook to take measures for implementation of the Covenants in their respective jurisdictions. See generally, *International Covenant on Economic, Social and Cultural Rights: Report of Canada on Articles 10 to 12* (1982), at pp. 1-8.

62. Both of the Covenants contain explicit provisions relating to freedom of association and trade unions. Article 8 of the U.N. *International Covenant on Economic, Social and Cultural Rights* provides the following:

Article 8

1. The States Parties to the present Covenant undertake to ensure:

(*a*) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(*b*) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(*c*) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security of public order or for the protection of the rights and freedoms of others;

(*d*) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

3. Nothing in this article shall authorize States Parties to the International Labour Organization Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention.

63. Article 8(1)(*c*) extends protection to trade union activities by protecting their right "to function freely". Moreover, explicit reference to strike activity is found in Article 8(1)(*d*). According to it, Canada has undertaken internationally to ensure "The right to strike, provided that it is exercised in conformity with the laws of the particular country". This qualification that the right must be exercised

in conformity with domestic law does not, in my view, allow for legislative abrogation of the right though it would appear to allow for regulation of the right: see *Re Alberta Union of Provincial Employees and the Crown in Right of Alberta* (1980), 1980 CanLII 1108 (AB QB), 120 D.L.R. (3d) 590 (Alta. Q.B.), at p. 597. Article 8(2) provides that the rights in Article 8 can be restricted in respect of members of the armed forces, police, or those involved in the administration of the State. This provision, however, is subject to the non-derogation clause, Article 8(3).

64. The relevant provisions of the U.N. *International Covenant on Civil and Political Rights* are found in Article 22 of that document. They are as follows:

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

Article 22 provides for "freedom of association with others, including the right to form and join trade unions for the protection of [the individual's] interests". Restrictions are justified in certain circumstances under Article 22(2). The third section of Article 22, like Article 8(3) of the *International Covenant on Economic, Social and Cultural Rights*, makes it clear that the article is not to be interpreted as authorizing legislative measures that would prejudice the guarantees of International Labour Organization Convention No. 87 to which I shall now turn.

(b) *International Labour Organization (I.L.O.) Convention No. 87*

65. As a specialized agency of the United Nations, with representatives of labour, management, and government, the I.L.O. is concerned with safeguarding fair and humane conditions of employment. In the present appeal, it is important to consider the *Convention (No. 87) Concerning Freedom of Association and Protection of the Right to Organize*, 67 U.N.T.S. 18 (1948), which was ratified by Canada in 1972 and came into force on March 23, 1972. As of December 31, 1984, 97 states had ratified it. The relevant provisions of Convention No. 87 include the following:

PART I. FREEDOM OF ASSOCIATION

Article 1

Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions.

Article 2

Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.

Article 3

1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.

2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.

Article 4

Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority.

Article 5

Workers' and employers' organisations shall have the right to establish and join federations and confederations and any such organisation, federation or confederation shall have the right to affiliate with international organisations of workers and employers.

Article 6

The provisions of articles 2, 3 and 4 hereof apply to federations and confederations of workers' and employers' organisations.

Article 7

The acquisition of legal personality by workers' and employers' organisations, federations and confederations shall not be made subject to conditions of such a character as to restrict the application of the provisions of articles 2, 3 and 4 hereof.

Article 8

1. In exercising the rights provided for in this Convention workers and employers and their respective organisations, like other persons or organised collectivities, shall respect the law of the land.

2. The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.

Article 9

1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined in national laws or regulations.

2. In accordance with the principle set forth in paragraph 8 of Article 19 of the Constitution of the International Labour Organisation the ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.

Article 10

In this Convention the term `organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers.

PART II. PROTECTION OF THE RIGHT TO ORGANISE

Article 11

Each Member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.

66. These provisions have been interpreted by various I.L.O. bodies including: the Committee on Freedom of Association, established by the Governing Body in 1950-51 to examine complaints of violations of trade union rights; the Committee of Experts, which assesses government reports on the application of I.L.O. standards and conventions in member states; and Commissions of Inquiry, appointed by the Governing Body to investigate particular complaints of non-compliance by member-states. (See generally, N. Valticos, *International Labour Law* (1979).)

67. Interpretations of conventions are only authoritative under the I.L.O. Constitution if rendered by the International Court of Justice (and tribunals under Article 37(2) in lieu thereof) or, it would appear, by Commissions of Inquiry where the dispute is not referred to the Court: see E. Osieke, "The Exercise of the Judicial Function with Respect to the International Labour Organization" (1974-75), 47 *Brit. Y.B. Int'l L.* 315. The decisions of the Committee on Freedom of Association and the Committee of Experts are not binding though, as M. Forde points out, the former "comprise the cornerstone of the international law on trade union freedom and collective bargaining": "The European Convention on Human Rights and Labor Law" (1983), 31 *Am. J. Comp. L.* 301, at p. 302.

68. The general principle to emerge from interpretations of Convention No. 87 by these decision-making bodies is that freedom to form and organize unions, even in the public sector, must include freedom to pursue the essential activities of unions, such as collective bargaining and strikes, subject to reasonable limits. A Commission of Inquiry, appointed to investigate a complaint against Greece, held that strike activity is implicitly protected by Convention No. 87: *I.L.O. Official Bulletin: Special Supplement*, vol. LIV, No. 2, 1971. The Committee of Experts has reached the same conclusion in its deliberations, pointing out that prohibitions on the right to strike may, unless certain conditions are met, violate Convention No. 87:

> 214. In the opinion of the Committee, the principle whereby the right to strike may be limited or prohibited in the public service or in essential services, whether public, semi-public or private, would become meaningless if the legislation defined the public service or essential services too broadly. As the Committee has already mentioned

in previous general surveys, the prohibition should be confined to public servants acting in their capacity as agents of the public authority or to services whose interruption would endanger the life, personal safety or health of the whole or part of the population. Moreover, if strikes are restricted or prohibited in the public service or in essential services, appropriate guarantees must be afforded to protect workers who are thus denied one of the essential means of defending their occupational interests. Restrictions should be offset by adequate impartial and speedy conciliation and arbitration procedures, in which the parties concerned can take part at every stage and in which the awards should in all cases be binding on both parties. Such awards, once rendered, should be rapidly and fully implemented.

(*Freedom of Association and Collective Bargaining: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 4(B)), International Labour Conference, 69th Session, Geneva, International Labour Office, 1983, at p. 66.)

69. These same principles are manifest in the reports of the Freedom of Association Committee of the Governing Body. In a recent summary of principles established by the Freedom of Association Committee in its decisions, the following paragraphs appear:

> 416. A general prohibition of strikes seriously limits the means available to trade unions to further and defend the interests of their members (Article 10 of Convention No. 87) and the right to organise their activities (Article 3).
>
> 417. Where legislation directly or indirectly places an absolute prohibition on strikes the Committee has endorsed the opinion of the Committee of Experts on the Application of Conventions and Recommendations that such a prohibition may constitute an important restriction of the potential activities of trade unions, which would not be in conformity with the generally recognised principles of freedom of association.

> 386. Referring to its recommendation that restrictions on the right to strike would be acceptable if accompanied by conciliation and arbitration procedures, the Committee has made it clear that this recommendation does not refer to the absolute prohibition of the right to strike but to the restriction of that right in essential services or in the public service, in relation to which adequate guarantees should be provided to safeguard the workers' interests.
>
> 387. The substitution by legislative means of compulsory arbitration for the right to strike as a means of resolving labour disputes can only be justified in respect of essential services in the strict sense of the term (i.e. those services whose interruption would endanger the life, personal safety or health of the whole or part of the population).

(*Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O.*, 3rd. ed., Geneva, International Labour Office, 1985).

70. These principles were recently applied in relation to a number of complaints originating in Canada, in particular, in Alberta, Ontario and Newfoundland. A number of the provisions impugned as being in

violation of Convention No. 87 are the subject of this Reference. It is helpful, in the present context, to look at the Freedom of Association Committee's conclusions and recommendations on the provisions relating to prohibitions on strike activity. These conclusions and recommendations were approved unanimously by the I.L.O.'s Governing Body.

71. The complaint (Case No. 1247) was launched by the Canadian Labour Congress on behalf of the Alberta Union of Provincial Employees against the Government of Canada (Alberta). In discussing s. 93 of the *Public Service Act*, which bans strike activity of provincial government employees, the Committee summarized the principles applicable to complaints about infringements of Convention No. 87 as follows:

> 131. The Committee recalls that it has been called to examine the strike ban in a previous case submitted against the Government of Canada/Alberta (Case No. 893, most recently examined in the 204th Report, paras. 121 to 134, approved by the Governing Body at its 214th Session (November 1980).). In that case the Committee recalled that the right to strike, recognised as deriving from Article 3 of the Convention, is an essential means by which workers may defend their occupational interests. It also recalled that, if limitations on strike action are to be applied by legislation, a distinction should be made between publicly-owned undertakings which are genuinely essential, i.e. those which supply services whose interruption would endanger the life, personal safety or health of the whole or part of the population, and those which are not essential in the strict sense of the term. The Governing Body, on the Committee's recommendation, drew the attention of the Government to this principle and suggested to the Government that it consider the possibility of introducing an amendment to the Public Service Employee Relations Act in order to confine the prohibition of strikes to services which are essential in the strict sense of the term. In the present case, the Committee would again draw attention to its previous conclusions on section 93 of the Act.

(*I.L.O. Official Bulletin*, vol. LXVIII, Series B, No. 3, 1985, pp. 34-35.)

The Committee reached similar conclusions in respect of s. 117.1 of the *Labour Relations Act*:

> 132. Linked to this question of restrictions on the right to strike is one of the specific written allegations, namely that an amendment contained in Bill 44 to section 117.1 of the Labour Relations Act prohibits the right to strike of all hospital employees. The Committee notes that this broad exclusion covers kitchen help, janitors, gardeners, etc. but that the Government told the representative of the Director-General that only small groups were affected by section 117.1 and that this question was, in any event, being challenged in the Alberta Court of Appeal and the Canadian Supreme Court. Given that this provision is not sufficiently specific as regards the important qualification of "essential employee", the Committee refers to the principle set out in the above paragraph concerning circumstances in which recourse to strike action may be prohibited. It requests the Government to re-examine section 117.1 so as to confine the prohibition of strikes to services which are essential in the strict sense of the term.

(*I.L.O. Official Bulletin*, *supra*, p. 35.)

(c) *Summary of International Law*

72. The most salient feature of the human rights documents discussed above in the context of this case is the close relationship in each of them between the concept of freedom of association and the organization and activities of labour unions. As a party to these human rights documents, Canada is cognizant of the importance of freedom of association to trade unionism, and has undertaken as a binding international obligation to protect to some extent the associational freedoms of workers within Canada. Both of the U.N. human rights Covenants contain explicit protection of the formation and activities of trade unions subject to reasonable limits. Moreover, there is a clear consensus amongst the I.L.O. adjudicative bodies that Convention No. 87 goes beyond merely protecting the formation of labour unions and provides protection of their essential activities -- that is of collective bargaining and the freedom to strike.

2. *The Meaning of s. 2(d)*

73. At the outset, it should be noted that, contrary to submissions by the respondent and some of the interveners in support, the purpose of s. 2 of the *Charter* must extend beyond merely protecting rights which already existed at the time of the *Charter*'s entrenchment. This point was made clear in *Big M Drug Mart Ltd.*, *supra*. In that case the appellant submitted that "freedom of religion" in the *Charter* had the same meaning as that given it by this Court under the *Canadian Bill of Rights* in *Robertson and Rosetanni v. The Queen*, 1963 CanLII 17 (SCC), [1963] S.C.R. 651. The Court rejected this argument (at pp. 342-44):

> The basis of the majority's interpretation in *Robertson and Rosetanni*, *supra*, is the fact that the language of the *Canadian Bill of Rights* is merely declaratory: by s. 1 of the *Canadian Bill of Rights*, certain existing freedoms are "recognized and declared", including freedom of religion.
>
> ...
>
> It is not necessary to reopen the issue of the meaning of freedom of religion under the *Canadian Bill of Rights*, because whatever the situation under that document, 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 . . . . 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*.

It is clear from *Big M Drug Mart Ltd.*, that the meaning of a provision of the *Charter* is not to be determined solely on the basis of pre-existing rights or freedoms. In the present appeal, therefore, whether or not a right or freedom to strike existed prior to the *Charter*, by virtue of the common law or otherwise is not determinative of the meaning of s. 2(*d*) of the *Charter*.

74. Similarly, the scope of the *Charter*'s provisions is not to be confined by the fact of legislative regulation in a particular subject area. In argument, counsel for the respondent seemed to suggest that if freedom of association were interpreted to include strike activity, this would "constitutionalize" a statutory right. His argument appeared to be premised on the proposition that, because the `right to strike' was a

subject of legislative regulation prior to the *Charter*'s entrenchment, it followed that strike activity could not be a matter for constitutional protection after entrenchment of the *Charter*. While it may be true that the *Charter* was not framed for the purpose of guaranteeing rights conferred by legislative enactment, the view that certain rights and freedoms cannot be protected by the *Charter*'s provisions because they are the subject of statutory regulation is premised on a fundamental misconception about the nature of judicial review under a written constitution.

75. The Constitution is supreme law. Its provisions are not to be circumscribed by what the Legislature has done in the past, but, rather, the activities of the Legislature--past, present and future--must be consistent with the principles set down in the Constitution. As stated in *Reference re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721, at p. 745:

> The 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. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process and unsuffering of laws inconsistent with it.

76. This is not to say, however, that the legislative regulation of collective bargaining and strikes is entirely irrelevant to the manner in which a constitutional freedom to strike may be given effect in particular circumstances: see, on this point, my reasons in the *Dairy Workers* case, released concurrently. But the present case does not involve a challenge to the general labour law of Alberta which permits strike activity, subject to regulation. This appeal concerns the substitution of an entirely different mechanism for resolving labour disputes for particular employees, and one which does not merely regulate the freedom to strike but abrogates it entirely.

77. One further preliminary consideration deserves mention. Section 2 of the *Charter* protects fundamental "freedoms" as opposed to "rights". Although these two terms are sometimes used interchangeably, a conceptual distinction between the two is often drawn. "Rights" are said to impose a corresponding duty or obligation on another party to ensure the protection of the right in question whereas "freedoms" are said to involve simply an absence of interference or constraint. This conceptual approach to the nature of "freedoms" may be too narrow since it fails to acknowledge situations where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms (e.g., regulations limiting the monopolization of the press may be required to ensure freedom of expression and freedom of the press). Nonetheless, for the purposes of this appeal, we need not determine whether "freedom" may impose affirmative duties on the state, because we are faced with a situation where overt government action in the form of legislation is alleged to interfere with the exercise of freedom of association. We are not concerned in this case with any request for affirmative state action.

78. A wide variety of alternative interpretations of freedom of association has been advanced in the jurisprudence summarized above and in argument before this Court.

79. At one extreme is a purely constitutive definition whereby freedom of association entails only a freedom to belong to or form an association. On this view, the constitutional guarantee does not extend beyond protecting the individual's status as a member of an association. It would not protect his or her associational actions.

80. In the trade union context, then, a constitutive definition would find a *prima facie* violation of s. 2(*d*) of the *Charter* in legislation such as s. 2(1) of the *Police Officers Act* which prohibits membership in any organization affiliated with a trade union. But it could find no violation of s. 2(*d*) in respect of legislation which prohibited a concerted refusal to work. Indeed, a wide variety of trade union activities, ranging from the organization of social activities for its members, to the establishment of union pension plans, to the discussion of collective bargaining strategy, could be prohibited by the state without infringing s. 2(*d*).

81. The essentially formal nature of a constitutive approach to freedom of association is equally apparent when one considers other types of associational activity in our society. While the constitutive approach might find a possible violation of s. 2(*d*) in a legislative enactment which prohibited marriage for certain classes of people, it would hold inoffensive an enactment which precluded the same people from engaging in the activities integral to a marriage, such as cohabiting and raising children together. If freedom of association only protects the joining together of persons for common purposes, but not the pursuit of the very activities for which the association was formed, then the freedom is indeed legalistic, ungenerous, indeed vapid.

82. In my view, while it is unquestionable that s. 2(*d*), at a minimum, guarantees the liberty of persons to be in association or belong to an organization, it must extend beyond a concern for associational status to give effective protection to the interests to which the constitutional guarantee is directed. In this respect, it is important to consider the purposive approach to constitutional interpretation mandated by this Court in *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 344:

> This Court has already, in some measure set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.

> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC),

> [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added.]

83. A second approach, the derivative approach, prevalent in the United States, embodies a somewhat more generous definition of freedom of association than the formal, constitutive approach. In the Canadian context, it is suggested by some that associational action which relates specifically to one of the other freedoms enumerated in s. 2 is constitutionally protected, but other associational activity is not.

84. I am unable, however, to accept that freedom of association should be interpreted so restrictively. Section 2(*d*) of the *Charter* provides an explicit and independent guarantee of freedom of association. In this respect it stands in marked contrast to the First Amendment to the American Constitution. The derivative approach would, in my view, largely make surplusage of s. 2(*d*). The associational or collective dimensions of s. 2(*a*) and (*b*) have already been recognized by this Court in *R. v. Big M Drug Mart Ltd.*, *supra*, without resort to s. 2(*d*). The associational aspect of s. 2(*c*) clearly finds adequate protection in the very expression of a freedom of peaceful assembly. What is to be learnt from the United States jurisprudence is not that freedom of association must be restricted to associational activities involving independent constitutional rights, but rather, that the express conferral of a freedom of association is unnecessary if all that is intended is to give effect to the collective enjoyment of other individual freedoms.

85. I am also unimpressed with the argument that the inclusion of s. 2(*d*) with freedoms of a "political" nature requires a narrow or restrictive interpretation of freedom of association. I am unable to regard s. 2 as embodying purely political freedoms. Paragraph (*a*), which protects freedom of conscience and religion is quite clearly not exclusively political in nature. It would, moreover, be unsatisfactory to overlook our Constitution's history of giving special recognition to collectivities or communities of interest other than the government and political parties. Sections 93 and 133 of the *Constitution Act, 1867* and ss. 16-24, 25, 27 and 29 of the *Charter*, dealing variously with denominational schools, language rights, aboriginal rights, and our multicultural heritage implicitly embody an awareness of the importance of various collectivities in the pursuit of educational, linguistic, cultural and social as well as political ends. Just as the individual is incapable of resisting political domination without the support of persons with similar values, so too is he or she, in isolation, incapable of resisting domination, over the long term, in many other aspects of life.

86. Freedom of association is protected in s. 2(*d*) under the rubric of "fundamental" freedoms. In my view, the "fundamental" nature of freedom of association relates to the central importance to the individual of his or her interaction with fellow human beings. The purpose of the constitutional guarantee of freedom of association is, I believe, to recognize the profoundly social nature of human endeavours and to protect the individual from state-enforced isolation in the pursuit of his or her ends. In the famous words of Alexis de Tocqueville in *Democracy in America* (1945), vol. 1, at p. 196:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears ... almost as inalienable in its nature as the right

> of personal liberty. No legislator can attack it without impairing the foundations of society.

As social beings, our freedom to act with others is a primary condition of community life, human progress and civilized society. Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live. As John Stuart Mill stated, "if public spirit, generous sentiments, or true justice and equality are desired, association, not isolation, of interests, is the school in which these excellences are nurtured". (*Principles of Political Economy* (1893), vol. 2, at p. 352.)

87. Freedom of association is most essential in those circumstances where the individual is liable to be prejudiced by the actions of some larger and more powerful entity, like the government or an employer. Association has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations; it has enabled those who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict. T. I. Emerson, "Freedom of Association and Freedom of Expression" (1964), 74 *Yale L.J.* 1 at p. 1, states that:

> More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

88. What freedom of association seeks to protect is not associational activities *qua* particular activities, but the freedom of individuals to interact with, support, and be supported by, their fellow humans in the varied activities in which they choose to engage. But this is not an unlimited constitutional license for all group activity. The mere fact that an activity is capable of being carried out by several people together, as well as individually, does not mean that the activity acquires constitutional protection from legislative prohibition or regulation.

89. I believe that Bayda C.J.S. was right in holding that s. 2(*d*) normally embraces the liberty to do collectively that which one is permitted to do as an individual, a proposition which one American writer, Reena Raggi perceives to be the cornerstone of freedom of association:

> The basic principle for which recognition will be sought in the formulation of an independent constitutional right of association is that whatever action a person can pursue as an individual, freedom of association must ensure he can pursue with others. Only such a principle assures man that, in his struggle to be independent of government control, he will not be crippled simply because on occasion he strives to achieve that independence with the help of others.

("An Independent Right to Freedom of Association" (1977), 12 *Harv. C.R.-C.L.L. Rev.* 1, at p. 15.)

However, it is not in my view correct to regard this proposition as the exclusive touchstone for determining the presence or absence of a violation of s. 2(*d*). Certainly, if a legislature permits an individual to enjoy an

activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association. The proposition articulated by Bayda C.J.S. is therefore a useful test of legislative purpose in some circumstances. There will, however, be occasions when no analogy involving individuals can be found for associational activity, or when a comparison between groups and individuals fails to capture the essence of a possible violation of associational rights. This is precisely the situation in this case. There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is <u>qualitatively</u> rather than quantitatively different. The overarching consideration remains whether a legislative enactment or administrative action interferes with the freedom of persons to join and act with others in common pursuits. The legislative purpose which will render legislation invalid is the attempt to preclude associational conduct because of its concerted or associational nature.

90. I wish to refer to one further concern. It has been suggested that associational activity for the pursuit of economic ends should not be accorded constitutional protection. If by this it is meant that something as fundamental as a person's livelihood or dignity in the workplace is beyond the scope of constitutional protection, I cannot agree. If, on the other hand, it is meant that concerns of an exclusively pecuniary nature are excluded from such protection, such an argument would merit careful consideration. In the present case, however, we are concerned with interests which go far beyond those of a merely pecuniary nature.

91. Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being. Accordingly, the conditions in which a person works are highly significant in shaping the whole compendium of psychological, emotional and physical elements of a person's dignity and self respect. In exploring the personal meaning of employment, Professor David M. Beatty, in his article "Labour is Not a Commodity", in *Studies in Contract Law* (1980), has described it as follows, at p. 324:

> As a vehicle which admits a person to the status of a contributing, productive, member of society, employment is seen as providing recognition of the individual's being engaged in something worthwhile. It gives the individual a sense of significance. By realizing our capabilities and contributing in ways society determines to be useful, employment comes to represent the means by which most members of our community can lay claim to an equal right of respect and of concern from others. It is this institution through which most of us secure much of our self-respect and self-esteem.

92. The role of association has always been vital as a means of protecting the essential needs and interests of working people. Throughout history, workers have associated to overcome their vulnerability as individuals to the strength of their employers. The capacity to bargain collectively has long been recognized as one of the integral and primary functions of associations of working people. While trade unions also fulfil other important social, political and charitable

functions, collective bargaining remains vital to the capacity of individual employees to participate in ensuring fair wages, health and safety protections, and equitable and humane working conditions. As Professor Paul Weiler explains in *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 31:

> An apt way of putting it is to say that good collective bargaining tries to subject the employment relationship and the work environment to the "rule of law". Many theorists of industrial relations believe that this function of protecting the employee from the abuse of managerial power, thereby enhancing the dignity of the worker as a person, is the primary value of collective bargaining, one which entitles the institution to positive encouragement from the law.

93. Professor Weiler goes on to characterize collective bargaining as "intrinsically valuable as an experience in self-government" (p. 33), and writes at p. 32:

> ...collective bargaining is the most significant occasion upon which most of these workers ever participate in making social decisions about matters that are salient to their daily lives. That is the essence of collective bargaining.

A similar rationale for endorsing collective bargaining was advanced in the *Woods Task Force Report on Canadian Industrial Relations* (1968), at p. 96:

> 296. One of the most cherished hopes of those who originally championed the concept of collective bargaining was that it would introduce into the work place some of the basic features of the political democracy that was becoming the hallmark of most of the western world. Traditionally referred to as industrial democracy, it can be described as the substitution of the rule of law for the rule of men in the work place.

94. Closely related to collective bargaining, at least in our existing industrial relations context, is the freedom to strike. A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, *Collective Bargaining Law in Canada* (2nd ed. 1986), describe the requisites of an effective system of collective bargaining as follows at p. 4:

> What are the requirements of an effective system of collective bargaining? From the point of view of employees, such a system requires that they be free to engage in three kinds of activity: to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining.

95. The Woods Task Force Report at p. 129 identifies the work stoppage as the essential ingredient in collective bargaining:

> 408. Strikes and lockouts are an indispensable part of the Canadian industrial relations system and are likely to remain so in our present socio-economic-political society.

At page 138 the Report continues:

> 431. Collective bargaining is the mechanism through which labour and management seek to accommodate their differences, frequently without strife, sometimes through it, and occasionally without success. As imperfect an instrument as it may be , there is no viable substitute in a free society.

At page 175 the Report notes that the acceptance of collective bargaining carries with it a recognition of the right to invoke the economic sanction of the strike. And at page 176, it is said, "The strike has become a part of the whole democratic system".

96. The importance to collective bargaining of the ultimate threat of a strike has also been recognized in the cases. Lord Wright noted in *Crofter Hand Woven Harris Tweed Co. v. Veitch*, [1942] 1 All E.R. 142 (H.L.), at pp. 158-59, "The right of workmen to strike is an essential element in the principle of collective bargaining". As the editors of *Kahn-Freund's Labour and the Law* (3rd ed. 1983), point out in respect of this comment: "If the workers could not, in the last resort, collectively refuse to work, they could not bargain collectively" (p. 292). See also: *Broadway Manor*; *Dairy Workers* case; *Blount*, *per* Wright J. The necessity and lawfulness of strikes has also been acknowledged by this Court: *Perrault v. Gauthier* (1898), 1898 CanLII 37 (SCC), 28 S.C.R. 241, at p. 256; *Canadian Pacific Railway Co. v. Zambri*, 1962 CanLII 11 (SCC), [1962] S.C.R. 609, at pp. 618 and 621.

97. I am satisfied, in sum, that whether or not freedom of association generally extends to protecting associational activity for the pursuit of exclusively pecuniary ends--a question on which I express no opinion--collective bargaining protects important employee interests which cannot be characterized as merely pecuniary in nature. Under our existing system of industrial relations, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw collectively their services, subject to s. 1 of the *Charter*.

3. *Application to the Alberta Legislation*

98. All three enactments prohibit strikes and, as earlier stated, define a strike as a cessation of work or refusal to work by two or more persons acting in combination or in concert or in accordance with a common understanding. What is precluded is a collective refusal to work at the conclusion of a collective agreement. There can be no doubt that the legislation is aimed at foreclosing a particular collective activity because of its associational nature. The very nature of a strike, and its *raison d'être*, is to influence an employer by joint action which would be ineffective if it were carried out by an individual. Professor Harry Arthurs refers, correctly in my respectful opinion, to the "notion of collective action" as "the critical factor" in the definition of "strike": "The Right to Strike in Ontario and the Common Law Provinces of Canada", in the *Proceedings of the Fourth International Symposium on Comparative Law* (1967), at p. 187. It is precisely the individual's interest in joining and acting with others to maximize his or her potential that is protected by s. 2(*d*) of the *Charter*.

99. Section 93 of the *Public Service Act* reads as follows:

> **93**(1) No person or trade union shall cause or attempt to cause a strike by the persons to whom this Act applies.
>
> (2) No person to whom this Act applies shall strike or consent to a strike.

100. Section 117.1(2) of the *Labour Relations Act* states:

> **117.1**(1) ...

(2) No employee to whom this Division applies shall strike.

Section 3(1) of the *Police Officers Act* provides:

> **3**(1) Notwithstanding section 2, no police officer, bargaining agent or person acting on behalf of a bargaining agent shall strike, cause a strike or threaten to cause a strike.

These provisions directly abridge the freedom of employees to strike and thereby infringe the guarantee of freedom of association in s. 2(*d*) of the *Charter*.

V

Section 1

101. The respondent submits that even if any of the legislative provisions at issue in this appeal violates freedom of association as guaranteed by s. 2(*d*) of the *Charter*, it can be upheld under s. 1 of the *Charter*. For ease of reference I repeat s. 1:

> **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.

No question arises as to whether the limits on strike activity and collective bargaining in the legislation in question are "prescribed by law", as the legislation is duly enacted by a properly constituted legislature.

102. It is necessary, however, to determine whether the limits imposed by the provisions in question are "reasonable" and "demonstrably justified in a free and democratic society". Previous cases in this Court have established a number of principles for a s. 1 inquiry. In making a determination under s. 1, a court must be cognizant of an important contextual factor: the application of s. 1 arises in the context of a violation of a constitutionally guaranteed right or freedom. Justice Wilson expressed this principle in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 218:

> It seems to me that it is important to bear in mind that the rights and freedoms set out in the *Charter* are fundamental to the political structure of Canada and are guaranteed by the *Charter* as part of the supreme law of our nation. I think that in determining whether a particular limitation is a reasonable limit prescribed by law which can be "demonstrably justified in a free and democratic society" it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

The onus of demonstrating that a limit on a right or freedom should be upheld under s. 1 is on the party seeking to uphold the limit. The standard of proof is the preponderance of probabilities and, as a general rule, evidence is required to meet this standard: see *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, and authorities therein.

103. The constituent elements of any s. 1 inquiry are as follows. First, the legislative objective, in pursuit of which the measures in question are implemented, must be sufficiently significant to warrant

overriding a constitutionally guaranteed right: it must be related to "concerns which are pressing and substantial in a free and democratic society". Second, the means chosen to advance such an objective must be reasonable and demonstrably justified in a free and democratic society. This requirement of proportionality of means to ends normally has three aspects: a) there must be a rational connection between the measures and the objective they are to serve; b) the measures should impair as little as possible the right or freedom in question; and, c) the deleterious effects of the measures must be justifiable in light of the objective which they are to serve. See *Oakes*, and authorities cited therein.

104. As I understand the respondent's submissions, there are two objectives which the legislation in issue in this Reference is designed to achieve: 1) protection of essential services and 2) protection of government from political pressure through strike action. The question is whether either or both of these are "of sufficient importance to warrant overriding a constitutionally guaranteed right or freedom" (*Big M Drug Mart Ltd.*, *supra*, at p. 352) or, in other words, whether they relate to "pressing and substantial concerns" (*Oakes*, at pp. 138-39). The proportionality of the measures in relation to the objectives must then be assessed.

105. I observe at the outset that the analysis below is limited to assessing the justifications advanced by the province for its legislative action. It is the actual objectives of the Alberta Legislature and not some other legitimate but hypothetical objectives for passing the particular statutes in question that must be scrutinized. It may be that other rationales will be advanced in future cases. The Court has not been asked, in this case, to determine whether economic harm to third parties can justify the abrogation of the freedom to strike. Nor has it been asked to determine whether a universally applicable substitute for the confrontational strike/lockout paradigm of present-day industrial relations would be acceptable. It might be that some alternative scheme, be it a novel one of worker participation in employer decisions through ownership or otherwise, or a more familiar one, such as arbitration, would be acceptable. The Constitution does not freeze into place an existing formula of industrial relations.

1. *The Protection of Essential Services*

106. The protection of services which are truly essential is in my view a legislative objective of sufficient importance for the purpose of s. 1 of the *Charter*. It is, however, necessary to define "essential services" in a manner consistent with the justificatory standards set out in s. 1. The logic of s. 1 in the present circumstances requires that an essential service be one the interruption of which would threaten serious harm to the general public or to a part of the population. In the context of an argument relating to harm of a non-economic nature I find the decisions of the Freedom of Association Committee of the I.L.O. to be helpful and persuasive. These decisions have consistently defined an essential service as a service "whose interruption would endanger the life, personal safety or health of the whole or part of the population" (*Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the I.L.O.*, *supra*). In my view, and without attempting an exhaustive list, persons essential to the maintenance and administration of the rule of law and national security would also be included within the ambit of essential services. Mere inconvenience to members of the public does not fall within the ambit of the essential services justification for abrogating the freedom to strike.

107. Having decided that the protection of essential services is an objective of sufficient importance, it is necessary for the respondent to demonstrate proportionality between the measures adopted and the objective. Four classes of employees are covered by the Acts: public service employees (*Public Service Act*); firefighters and employees of employers who operate approved hospitals under the *Hospitals Act* (*Labour Relations Act*); and police officers (*Police Officers Act*). The government must, as a first step, prove, on a balance of probabilities, that these employees are "essential"; otherwise the abrogation of their freedom to strike would be over-inclusive and unjustified under s. 1.

108. Counsel for the Attorney General for Alberta did not adduce any evidence on this point. He submitted only that essential services must not be interrupted and that, though some of the employees covered by the Acts are not essential, "they are so closely linked to those providing essential services as to make it reasonable that they should be treated in the same way". In *Oakes*, this Court acknowledged that the extent of evidentiary submissions required under s. 1 would vary according to the nature of the case (at p. 138):

> Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit ... I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

109. The essentiality of police officers and firefighters is, in my view, obvious and self-evident, and does not have to be proven by evidence. Interruption in police protection and firefighting would clearly endanger life, personal safety and health. Therefore, I believe the Legislature's decision to prevent such interruptions is rationally connected to the objective of protecting essential services.

110. The situation with respect to employees of employers who operate approved hospitals under the *Hospitals Act* is quite different. Prohibiting the right to strike across the board in hospital employment is too drastic a measure for achieving the object of protecting essential services. It is neither obvious nor self-evident that <u>all</u> bargaining units in hospitals represent workers who provide essential services, or that those who do not provide essential services are "so closely linked" to those who do as to justify similar treatment. As pointed out above, the Freedom of Association Committee of the I.L.O. expressed concern about the overinclusiveness of s. 117.1 of the *Labour Relations Act*:

> 132. The Committee notes that this broad exclusion covers kitchen help, janitors, gardeners, etc. ... Given that this provision is not sufficiently specific as regards the important qualification of "essential employee", the Committee refers to the principle ... concerning circumstances in which recourse to strike action may be prohibited. It requests the Government to re-examine section 117.1 so as to confine the prohibition of strikes to services which are essential in the strict sense of the term.

111. Counsel for the Attorney General has not provided any evidence or information from which it can be concluded on a preponderance of probabilities that services will be interrupted whenever strike activity is undertaken by any of the bargaining units in a hospital. While it may be obvious or self-evident that strikes by certain hospital

employees, such as nurses or doctors, would be inimical to the hospital's ability to dispense proper health care, the same cannot be said for all hospital workers without some evidentiary basis. For this reason, I do not believe it can be maintained that the employees covered by s. 117.1 of the *Labour Relations Act* are all "essential". The provision is too wide to be justified as relating to essential services for the purpose of s. 1.

112. The *Public Service Act* is, in my opinion, a victim of the same defect. The Act applies to employees who are employed by employers described in s. 1(o):

> "employer" means
>
> (i) the Crown in right of Alberta, or
>
> (ii) a corporation, commission, board council or other body, all or a majority of whose members or directors
>
> (A) are designated by an Act of the Legislature,
>
> (B) can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised, or
>
> (C) are in part designated by an Act of the Legislature and in part can be appointed or designated either by the Lieutenant Governor in Council or by a Minister of the Crown in right of Alberta or partly by the Lieutenant Governor in Council and partly by a Minister of the Crown in right of Alberta, whether the power of appointment or designation is exercised or not or is only partially exercised; . . .

To deny all the employees covered by this provision the freedom to strike is, in my view, too drastic a means for securing the purpose of protecting essential services. It is neither obvious nor self-evident that all the employees covered by the *Public Service Act* perform essential services. No evidence was adduced by counsel for the Attorney General on this point. The onus upon the Government of Alberta has not, in my view, been satisfied. To conclude, the limit on freedom of association of public servants imposed by the abrogation of the right to strike in the *Public Service Act* is not justified under s. 1 of the *Charter* on the basis of the essential services argument.

2. *Protection of the Government from Political Pressure Argument*

113. As mentioned above, the respondent advances a second argument for justification under s. 1, namely, that the legislation is necessary to protect the government from the political pressure of strike action by its employees. In other words, even if public servants are not truly essential, the fact that they are employees of the government is sufficient reason for denying them the freedom to strike. I do not find this argument convincing. The respondent has not submitted any evidence from which it can be concluded that collective bargaining and strike activity in the public sector have or will cause undue political pressure on government. Indeed, all across Canada, collective bargaining and freedom to strike have played an important role in public sector labour relations. A survey of *Public Service Collective Bargaining Legislation*

in Canada, prepared by the Alberta Department of Labour and filed by the respondent in the Court of Appeal, indicates that Nova Scotia and Ontario are the only other jurisdictions in Canada which purport to impose a blanket prohibition on public sector strikes. In commenting on the introduction of a full-scale collective bargaining scheme at the federal level in the 1960's, Professor Harry Arthurs states in "Collective Bargaining in the Public Service of Canada: Bold Experiment or Act of Folly" (1969), 67 *Mich. L. Rev.* 971, at p. 974:

> ...one potentially formidable obstacle to federal recognition of the collective bargaining rights of public employees was simply not present in Canada in the mid-1960's. The traditional belief--or myth--that collective bargaining is somehow intrinsically incompatible with the dignity and functions of a sovereign state had been subverted by years of practical experience with labor relations on the private sector model in governmental and quasi-governmental employment.

114. Furthermore, academic debate on the question of sovereignty has occurred primarily in the United States, where a fundamentally different constitutional system prevails: see, for example, Harry H. Wellington and Ralph K. Winter Jr., "The Limits of Collective Bargaining in Public Employment" (1969), 78 *Yale L.J.* 1107; W. B. Cunningham, "Public Employment, Collective Bargaining and the Conventional Wisdom: Canada and U.S.A." (1966), 21 *Ind. Rel.* 406. A number of the academic authorities cited by the respondent in fact support collective bargaining and freedom to strike in the public sector (see for example, Morley Gunderson (ed.), *Collective Bargaining in the Essential and Public Service Sectors* (1975), at p. viii). I find difficult the conclusion that all strike activity by government employees would exert undue political pressure on the government. The dissenting words of Roberts C.J. of the Rhode Island Supreme Court at pp. 448-49 in *School Committee of the Town of Westerly v. Westerly Teachers Ass'n*, 299 A.2d 441 (1973), are helpful in this respect:

> ...I cannot agree that every strike by public employees necessarily threatens the public welfare and governmental paralysis ... The fact is that in many instances strikes by private employees pose the far more serious threat to the public interest than would many of those engaged in by public employees ... In short, it appears to me that to deny all public employees the right to strike because they are employed in the public sector would be arbitrary and unreasonable.

115. In my opinion, the fact of government employment is not a sufficient reason for the purpose of s. 1 for limiting freedom of association through legislative prohibition of freedom to strike. It has not been shown that all public service employees have a substantial bargaining advantage on account of their employer's governmental status. Nor has it been shown that any political pressure exerted on the government during strikes is of an unusual or peculiarly detrimental nature.

3. *Arbitration as a Substitute for Freedom to Strike*

116. As noted above, the provisions relating to police officers and firefighters meet the first test of proportionality: there is a rational connection between prohibiting freedom to strike in these services and the legislative objective of protecting essential services. It is helpful to consider, therefore, whether the measures adopted impair as little as possible the freedom of association of those affected. Clearly, if the freedom to strike were denied and no effective and fair

means for resolving bargaining disputes were put in its place, employees would be denied any input at all in ensuring fair and decent working conditions, and labour relations law would be skewed entirely to the advantage of the employer. It is for this reason that legislative prohibition of freedom to strike must be accompanied by a mechanism for dispute resolution by a third party. I agree with the Alberta International Fire Fighters Association at p. 22 of its factum that "It is generally accepted that employers and employees should be on an equal footing in terms of their positions in strike situations or at compulsory arbitration where the right to strike is withdrawn". The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

117. As noted above, the purpose of the prohibitions of strike activity of police officers and firefighters is to prevent interruptions in essential services. If prohibition of strikes is to be the least drastic means of achieving this purpose it must, in my view, be accompanied by adequate guarantees for safeguarding workers' interests. Any system of conciliation or arbitration must be fair and effective or, in the words of the I.L.O. Committee on Freedom of Association "adequate, impartial and speedy ... in which the parties can take part at every stage": Case No. 1247, *I.L.O. Official Bulletin*, *supra*, at p. 36.

118. The contentious issues in respect to the legislative provisions concerning arbitration are as follows:

(i) they require the arbitrator to consider certain items;

(ii) they limit the arbitrability of certain items; and

(iii) they place discretion in the hands of a minister or agency of the government to decide whether or not a dispute will go to arbitration.

I will deal with each of these in turn.

(i) <u>The Arbitrator Must Consider Certain Items</u>

119. Under the *Public Service Act*, the *Labour Relations Act* and the *Police Officers Act* arbitrators are required to consider (i) the fiscal policies of the government as declared by the Provincial Treasurer in writing (s. 55(a)(iii) of the *Public Service Act*; s. 117.8(a)(iii) of the *Labour Relations Act*; s. 15(a)(iii) of the *Police Officers Act*); and (ii) wages and benefits in private and public unionized and non-unionized employment (s. 55(a)(i) of the *Public Service Act*; s. 117.8(a)(i) of the *Labour Relations Act*; s. 15(a)(i) of the *Police Officers Act*). Counsel for the appellant Alberta International Fire Fighters Association, submits that these provisions offend the obligation of the government to provide fair and adequate safeguards for employees as a substitute for the freedom to strike. The respondent submits that it is not unreasonable for the government to desire that the matters listed be considered by arbitration tribunals. The question, however, is not the desirability or lack thereof of arbitration tribunals considering the enumerated factors but, rather, whether requiring arbitrators to consider these matters detracts from the fairness and effectiveness of the arbitration procedure.

120. The appellants submit that the sections of the *Public Service Act*, the *Labour Relations Act* and the *Police Officers Act* which require government fiscal policy to be taken into account favour the government employer and, thereby, compromise the fairness of the arbitration system. I disagree. In my view the fiscal policy of the government is a measure of the employer's ability to pay, and there is nothing improper in requiring the arbitrator to consider it. The arbitrator is not bound by the statute to take the stated fiscal policy as the conclusive measure of the employer's ability to pay, and it would be open to the unions to make submissions requesting that the arbitrator depart from the fiscal policy.

121. Turning to s. 55(a)(i) of the *Public Service Act*, s. 117.8(a)(i) of the *Labour Relations Act*, and s. 15(a)(i) of the *Police Officers Act*, which require that arbitrators consider the wages and benefits of private and public unionized and non-unionized employees, I do not believe these sections compromise the adequacy of the arbitration system. As Professor K. P. Swan has stated (in *The Search for Meaningful Criteria in Interest Arbitration*, Reprint Series No. 41, Industrial Relations Centre, Queen's University, 1978) at p. 11: "Fairness remains an essentially relative concept, and it therefore depends directly upon the identification of fair comparisons if it is to be meaningful". Under ss. 55(a)(i), 117.8(a)(i) and 15(a)(i) the arbitrator is required to consider, presumably for the sake of comparison, the wages of unionized, non-unionized, public sector and private sector employees. The appellant, Alberta International Fire Fighters Association, implies that ss. 55(a)(i), 117.8(a)(i) and 15(a)(i) mandate an unfair comparison; one that "is bound to result in lowering the wages of the unionized employees". I do not agree. A requirement to establish as broad a comparative base as possible does not, in my view, compromise the fairness of the arbitration, or disadvantage the employees concerned.

(ii) Limiting the Arbitrability of Certain Items

122. Section 48(2) of the *Public Service Act* establishes that certain matters cannot be referred to arbitration or contained in an arbitral award. These matters are generally arbitrable in other labour relations contexts, as is implied by the fact that s. 48(2) operates notwithstanding s. 48(1). Section 2(2) of the *Police Officers Act* denies, under certain circumstances, the right of police officers to bargain collectively for pension benefits. Counsel for the Attorney General submits these provisions satisfy s. 1 of the *Charter* on the grounds that: 1) the matters referred to in s. 48(2)(a), (b), and (c) are traditionally not the subject of collective agreements because they must be under the absolute control of management; 2) pension benefits are the subject of other legislation and cannot, therefore, be bargainable or set by arbitration; and 3) the subjects referred to in s. 48 of the *Public Service Act* are not of obvious vital concern to the employee. Counsel for the Alberta Union of Provincial Employees points out that the matters covered by s. 48 of the *Public Service Act* (and s. 2(2) of the *Police Officers Act*) are common and usual subjects of arbitration, or strike activity in labour relations. As well, counsel rejects the respondent's assertion that the enumerated matters are not ones important to the employees as a collectivity. The Public Service Employee Relations Board, in a number of recent decisions on the arbitrability of items under s. 48(2) of the Act, has held that matters such as the scheduling of normal hours of work and equal pay for work of equal value are not arbitrable under the Act: *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*, November 24, 1982, unreported; *Alberta Union of Provincial Employees v. The Crown in Right of Alberta*, November 12, 1982, unreported.

123. As noted above, an arbitration system must be fair and effective if it is to be adequate in restoring to employees the bargaining power they are denied through prohibition of strike activity. In my opinion, the exclusion of these subjects from the arbitration process compromises the effectiveness of the process as a means of ensuring equal bargaining power in the absence of freedom to strike. Serious doubt is cast upon the fairness and effectiveness of an arbitration scheme where matters which would normally be bargainable are excluded from arbitration. "Given that without some binding mechanism for dispute resolution, meaningful collective bargaining is very unlikely, it seems more reasonable to ensure that the scope of arbitrability is as wide as the scope of bargainability if the bargaining process is to work at all": K. P. Swan, "Safety Belt or Strait-Jacket? Restrictions on the Scope of Public Sector Collective Bargaining", in *Essays in Collective Bargaining and Industrial Democracy* (1983), at p. 36.

124. It may be necessary in some circumstances for a government employer to maintain absolute control over aspects of employment through exclusion of certain subjects from arbitration. The presumption, however, must be against such exclusion to ensure the effectiveness of an arbitration scheme as a substitute for freedom to strike is not compromised. In the present case, the government has not satisfied the onus upon it to demonstrate such necessity.

(iii) <u>The Absence of a Right to go to Arbitration</u>

125. None of the arbitration schemes in the Acts in question in this Reference provides a right to refer a dispute to arbitration. Rather, a discretionary power is placed in a Minister or an administrative board to establish an arbitration board if deemed appropriate: see above, s. 50 of the *Public Service Act*, s. 117.3 of the *Labour Relations Act*, and s. 10 of the *Police Officers Act*. Under s. 50 of the *Public Service Act* the Public Service Employee Relations Board can direct the parties to continue collective bargaining or appoint a mediator instead of establishing an arbitration board. Under s. 117.3 of the *Labour Relations Act* and s. 10 of the *Police Officers Act* the Minister can direct the parties to continue collective bargaining and can prescribe the procedures or conditions under which it is to take place.

126. The respondent makes no submissions in respect of these provisions. In the absence of argument or evidence demonstrative of why such government involvement is necessary in the arbitration process, I believe the legal capacity of a Minister or administrative board to determine when and under what circumstances a dispute is to reach arbitration compromises the fairness and effectiveness of compulsory arbitration as a substitute for the freedom to strike. In effect, under the *Labour Relations Act* and *Police Officers Act* the employer--i.e., the executive branch of government--has absolute authority to determine at what point a dispute should go to arbitration. Such authority considerably undermines the balance of power between employer and employee which the arbitration scheme is designed to promote. Under previous legislation either party had an absolute right to remit the matter to an arbitration board. In the present legislation they do not, and counsel for the respondent has not provided any reasons for this alteration. The discretionary power of a Minister or administrative board to determine whether or not a dispute goes to arbitration is, in my view, an unjustified compromise of the effectiveness of the arbitration procedure in promoting equality of bargaining power between the parties.

4. *Conclusions Regarding s. 1*

127. The analysis under s. 1 can be summarized as follows:

128. 1. The limit on freedom of association as guaranteed by s. 2(*d*) of the *Charter* imposed by s. 93 of the *Public Service Act* is not justified under s. 1 of the *Charter*. It is over-inclusive in respect of those to whom it applies, and the Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

129. 2. The limit on freedom of association as guaranteed by s. 2(*d*) of the *Charter* imposed by s. 117.1 of the *Labour Relations Act* is not justified under s. 1 of the *Charter*. It is over-inclusive in its application to hospital employees, and the Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

130. 3. The limit on freedom of association as guaranteed by s. 2(*d*) of the *Charter* imposed by s. 3 of the *Police Officers Act* is not justified under s. 1 of the *Charter*. The Act's arbitration system is not an adequate replacement for the employees' freedom to strike.

Conclusion

131. The constitutional questions should be answered as follows:

1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: Section 93 limits freedom of association as guaranteed in s. 2(*d*) of the *Charter*. This limit is not justified under s. 1 of the *Charter* because the Act is over-inclusive in its application to employees whose services are not essential, and because the arbitration scheme envisaged in ss. 48, 49, 50 and 55 is not an adequate replacement for the freedom to strike.

132. Sections 49 and 50 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 93 to be justified under s. 1 of the *Charter*.

133. Section 94 does not violate s. 2(*d*) of the *Charter* as it is not directed at associational activity.

2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: Section 117.1(2) limits freedom of association as guaranteed in s. 2(*d*) of the *Charter*. This limit is not justified under s. 1 of the *Charter* because, in so far as it pertains to all hospital employees under s. 117.1(1)(b), the Act is over-inclusive in its application to employees whose services

are not essential, and because the arbitration scheme envisaged in ss. 117.2, 117.3 and 117.8 is not an adequate replacement for the freedom to strike.

134. Sections 117.2 and 117.3 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike, and therefore to the failure of s. 117.1(2) to be justified under s. 1.

135. If the arbitration scheme were adequate, s. 117.1(2) would be justifiable as a reasonable limitation on the freedom of association of the firefighters described in s. 117(1)(a).

3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: Section 3(1) limits freedom of association as guaranteed in s. 2(*d*) of the *Charter*. This limit is not justified under s. 1 of the *Charter* because the arbitration scheme envisaged in ss. 9, 10 and 15 is not an adequate replacement for the freedom to strike.

136. Sections 9 and 10 do not themselves limit freedom of association. However, the absence of a right to refer a dispute to arbitration, which flows from these sections, contributes to the inadequacy of the arbitration scheme as a replacement for the freedom to strike and, therefore, to the failure of s. 3(1) to be justified under s. 1 of the *Charter*.

137. If the arbitration scheme were adequate, s. 3(1) would be justifiable as a reasonable limitation on the freedom of association of police officers.

4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: Those provisions do not themselves violate freedom of association. However s. 48(2), by unreasonably limiting the subject matter of arbitration contributes to the inadequacy of the arbitration system put in place of the freedom to strike and therefore to the failure of the limitation on freedom of association in s. 93 to be justified under s. 1 of the *Charter*. Section 55 neither violates freedom of association nor contributes to the inadequacy of the arbitration scheme.

5. Are the provisions of the *Labour Relations Act* that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent.

Answer: Section 117.8 does not violate freedom of association. Nor does it contribute to the inadequacy of the arbitration system contained in the Act.

6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in

> particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: Section 2(2) limits freedom of association as guaranteed in s. 2(d) *of the Charter* by prohibiting collective bargaining. This limit is not justified under s. 1 of the *Charter*.

138. Section 15 does not violate freedom of association. Nor does it contribute to the inadequacy of the arbitration system contained in the Act.

> 7. Does the *Constitution Act, 1982*, limit the right of the Crown to exclude any one or more of the following classes of its employees from units for collective bargaining:
>
> a) an employee who exercises managerial functions;
>
> b) an employee who is employed in a confidential capacity in matters relating to labour relations;
>
> c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;
>
> d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

139. The Court, on a Reference procedure, need not answer a question that is too vague to admit of a satisfactory answer: see, e.g., *McEvoy v. Attorney General for New Brunswick*, 1983 CanLII 149 (SCC), [1983] 1 S.C.R. 704, at pp. 707-15 and cases cited therein. Accordingly, I agree with Kerans J.A., speaking for the majority in the Court of Appeal:

> It remains only to deal with the question, if we can, in abstract terms. In that regard, I detected little or no disagreement amongst counsel. On the one hand, it seemed self-evident to counsel that a law which forbids somebody to join a union which, in the absence of that law, he could join, limits his freedom of association even in a limited sense because it limits his freedom of expression. On the other hand, the categories mentioned in the question seem to strive to describe employees who, because of the nature of their work, would have a very direct, significant, and immediate conflict between duties owed to fellow members of the unit (assuming that the unit organization demands some measure of solidarity) and the special duties owed to the employer. There was no serious argument offered against the proposition that an exclusion is justified in a free and democratic society if it could be demonstrated that there is a significant conflict of duty on the part of the employees, because, I suppose, the collective-bargaining system as we know otherwise could not work. But, even this statement requires a review of that system under s. 1 which no intervenant undertook or expressed any interest in our undertaking. The real dispute seems to be whether in fact there is, for a given employee under the categories in the legislation, a significant conflict of duty. That, of course, is a fact-issue which we cannot decide, nor are we asked to. In the end, it is impossible to offer any meaningful answer to the question and respectfully I decline to offer any further answer.

Question 7 should not be answered.

140. The appeal should be allowed.

The judgment of Beetz, Le Dain and La Forest JJ. was delivered by

141. LE DAIN J.--The background, the issues and the relevant authority and considerations in this appeal are fully set out in the reasons for judgment of the Chief Justice and Justice McIntyre. I agree with McIntyre J. that the constitutional guarantee of freedom of association in *s. 2(d)* of the *Canadian Charter of Rights and Freedoms* does not include, in the case of a trade union, a guarantee of the right to bargain collectively and the right to strike, and accordingly I would dismiss the appeal and answer the constitutional questions in the manner proposed by him. I wish to indicate, if only briefly, the general considerations that lead me to this conclusion.

142. In considering the meaning that must be given to freedom of association in *s. 2(d)* of the *Charter* it is essential to keep in mind that this concept must be applied to a wide range of associations or organizations of a political, religious, social or economic nature, with a wide variety of objects, as well as activity by which the objects may be pursued. It is in this larger perspective, and not simply with regard to the perceived requirements of a trade union, however important they may be, that one must consider the implications of extending a constitutional guarantee, under the concept of freedom of association, to the right to engage in particular activity on the ground that the activity is essential to give an association meaningful existence.

143. In considering whether it is reasonable to ascribe such a sweeping intention to the *Charter* I reject the premise that without such additional constitutional protection the guarantee of freedom of association would be a meaningless and empty one. Freedom of association is particularly important for the exercise of other fundamental freedoms, such as freedom of expression and freedom of conscience and religion. These afford a wide scope for protected activity in association. Moreover, the freedom to work for the establishment of an association, to belong to an association, to maintain it, and to participate in its lawful activity without penalty or reprisal is not to be taken for granted. That is indicated by its express recognition and protection in labour relations legislation. It is a freedom that has been suppressed in varying degrees from time to time by totalitarian regimes.

144. What is in issue here is not the importance of freedom of association in this sense, which is the one I ascribe to *s. 2(d)* of the *Charter*, but whether particular activity of an association in pursuit of its objects is to be constitutionally protected or left to be regulated by legislative policy. The rights for which constitutional protection is sought[**]--the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer--are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise. It is surprising that in an area in which this Court has affirmed a principle of judicial restraint in the review of administrative action we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights which the Legislature has found it necessary to define and qualify in various ways according to the particular field of labour relations involved. The

resulting necessity of applying s. 1 of the *Charter* to a review of particular legislation in this field demonstrates in my respectful opinion the extent to which the Court becomes involved in a review of legislative policy for which it is really not fitted.

The following are the reasons delivered by

145. MCINTYRE J.--I have read the reasons for judgment prepared in this appeal by the Chief Justice. He has set out in convenient form the facts involved, the constitutional questions referred to the Alberta Court of Appeal by the Lieutenant Governor in Council of the province of Alberta, and the relevant statutory and constitutional provisions bearing on the matters raised. He has in addition summarized the judgments rendered in the Alberta Court of Appeal (1984), 1984 ABCA 354 (CanLII), 16 D.L.R. (4th) 359, [1985] 2 W.W.R. 289, 35 Alta. L.R. (2d) 124, 57 A.R. 268, 85 CLLC ¶ 14,027. It will not be necessary for me to deal further with those matters.

146. The question raised in this appeal, stated in its simplest terms, is whether the *Canadian Charter of Rights and Freedoms* gives constitutional protection to the right of a trade union to strike as an incident to collective bargaining. The issue is not whether strike action is an important activity, nor whether it should be protected at law. The importance of strikes in our present system of labour relations is beyond question and each provincial legislature and the federal Parliament has enacted legislation which recognizes a general right to strike. The question for resolution in this appeal is whether such a right is guaranteed by the *Charter*. If this right is found in the *Charter*, a subsidiary question must be addressed: is the legislation in issue nevertheless "demonstrably justified" under s. 1 of the *Charter*? Since it is my conclusion that the *Charter* does not guarantee the right to strike, I need not consider this subsidiary question.

147. The appellants do not contend that the right to strike is specifically mentioned in the *Charter*. The sole basis of their submission is that this right is a necessary incident to the exercise by a trade union of the freedom of association guaranteed by s. 2(*d*) of the *Charter*. The resolution of this appeal turns then on the meaning of freedom of association in the *Charter*.

Freedom of Association and s. 2(*d*) of the *Charter*

148. Freedom of association is one of the most fundamental rights in a free society. The freedom to mingle, live and work with others gives meaning and value to the lives of individuals and makes organized society possible. The value of freedom of association as a unifying and liberating force can be seen in the fact that historically the conqueror, seeking to control foreign peoples, invariably strikes first at freedom of association in order to eliminate effective opposition. Meetings are forbidden, curfews are enforced, trade and commerce is suppressed, and rigid controls are imposed to isolate and thus debilitate the individual. Conversely, with the restoration of national sovereignty the democratic state moves at once to remove restrictions on freedom of association.

149. It is clear that the importance of freedom of association was recognized by Canadian law prior to the *Charter*. It is equally clear that prior to the *Charter* a provincial Legislature or Parliament acting within its jurisdiction could regulate and control strikes and collective bargaining. The *Charter* has reaffirmed the historical importance of

freedom of association and guaranteed it as an independent right. The courts must now define the range or scope of this right and its relation to other rights, both those grounded in the *Charter* and those existing at law without *Charter* protection.

150. In approaching this task, it must be recognized that the *Charter* should receive a broad and generous construction consistent with its general purpose, (see *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 155). In *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, this Court dealt in some detail with the considerations which should govern an inquiry into the meaning of the rights and freedoms guaranteed by the *Charter*. At page 344, Dickson J. (now C.J.) speaking for the majority, said:

> This Court has already, in some measure, set out the basic approach to be taken in interpreting the *Charter*. In *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, this Court expressed the view that the proper approach to the definition of the rights and freedoms guaranteed by the *Charter* was a purposive one. The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be, as the judgment in *Southam* emphasizes, a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore, as this Court's decision in *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, illustrates, be placed in its proper linguistic, philosophic and historical contexts. [Emphasis added.]

151. It follows that while a liberal and not overly legalistic approach should be taken to constitutional interpretation, the *Charter* should not be regarded as an empty vessel to be filled with whatever meaning we might wish from time to time. The interpretation of the *Charter*, as of all constitutional documents, is constrained by the language, structure, and history of the constitutional text, by constitutional tradition, and by the history, traditions, and underlying philosophies of our society.

The Value of Freedom of Association

152. The starting point of the process of interpretation is an inquiry into the purpose or value of the right at issue. While freedom of association like most other fundamental rights has no single purpose or value, at its core rests a rather simple proposition: the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others. "Man, as Aristotle observed, is a `social animal, formed by nature for living with others', associating with his fellows both to satisfy his desire for social intercourse and to realize common purposes." (L. J. MacFarlane, *The*

Theory and Practice of Human Rights (1985), p. 82.) This thought was echoed in the familiar words of Alexis de Tocqueville:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society.

(*Democracy in America* (1945), vol. 1, at p. 196.)

153. The increasing complexity of modern society, which has diminished the power of the individual to act alone, has greatly increased the importance of freedom of association. In the words of Professor T. I. Emerson in "Freedom of Association and Freedom of Expression" (1964), 74 *Yale L.J.* 1, at p. 1:

> Freedom of association has always been a vital feature of American society. In modern times it has assumed even greater importance. More and more the individual, in order to realize his own capacities or to stand up to the institutionalized forces that surround him, has found it imperative to join with others of like mind in pursuit of common objectives.

A similar point was made by C. Wilfred Jenks, a former Director-General of the I.L.O. (*Human Rights and International Labour Standards* (1960), at p. 49):

> In an age of interdependence and large-scale organisation, in which the individual counts for so little unless he acts in co-operation with his fellows, freedom of association has become the cornerstone of civil liberties and social and economic rights alike. It has long been the bulwark of religious freedom and political liberty; it has increasingly become a necessary condition of economic and social freedom for the ordinary citizen.

154. Our society supports a multiplicity of organized groups, clubs and associations which further many different objectives, religious, political, educational, scientific, recreational, and charitable. This exercise of freedom of association serves more than the individual interest, advances more than the individual cause; it promotes general social goals. Of particular importance is the indispensable role played by freedom of association in the functioning of democracy. Paul Cavalluzzo said in "Freedom of Association and the Right to Bargain Collectively" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at pp. 199-200:

> Secondly, [freedom of association] is an effective check on state action and power. In many ways freedom of association is the most important fundamental freedom because it is the one human right which clearly distinguishes a totalitarian state from a democratic one. In a totalitarian system, the state cannot tolerate group activity because of the powerful check it might have on state power.

Associations serve to educate their members in the operation of democratic institutions. As de Tocqueville noted, *supra*, vol. II, at p. 116:

> ...[individuals] cannot belong to these associations for any length of time without finding out how order is maintained among a large number

> of men and by what contrivance they are made to advance, harmoniously and methodically, to the same object. Thus they learn to surrender their own will to that of all the rest and to make their own exertions subordinate to the common impulse, things which it is not less necessary to know in civil than in political associations. Political associations may therefore be considered as large free schools, where all the members of the community go to learn the general theory of association.

Associations also make possible the effective expression of political views and thus influence the formation of governmental and social policy. As Professor G. Abernathy observed in *The Right of Assembly and Association* (1961), at p. 242:

> ...probably the most obvious service rendered by the institution of association is influencing governmental policy. Concerted action or pressure on governmental agencies has a far greater chance of success than does the sporadic pressure of numerous individuals acting separately.

Freedom of association then serves the interest of the individual, strengthens the general social order, and supports the healthy functioning of democratic government.

155. In considering the constitutional position of freedom of association, it must be recognized that while it advances many group interests and, of course, cannot be exercised alone, it is nonetheless a freedom belonging to the individual and not to the group formed through its exercise. While some provisions in the Constitution involve groups, such as s. 93 of the *Constitution Act, 1867* protecting denominational schools, and s. 25 of the *Charter* referring to existing aboriginal rights, the remaining rights and freedoms are individual rights; they are not concerned with the group as distinct from its members. The group or organization is simply a device adopted by individuals to achieve a fuller realization of individual rights and aspirations. People, by merely combining together, cannot create an entity which has greater constitutional rights and freedoms than they, as individuals, possess. Freedom of association cannot therefore vest independent rights in the group.

156. Many of the scholarly writers on this subject have recognized and stated this proposition. Clyde W. Summers in "Freedom of Association and Compulsory Unionism in Sweden and the United States" (1964), 112 *U. Pa. L. Rev.* 647, at p. 647, said:

> Although commonly asserted by the organization, freedom of association is not simply a collective right vested in the organization for its benefit. Freedom of association is an individual right vested in the individual to enable him to enlarge his personal freedom. Its function is not merely to grant power to groups, but to enrich the individual's participation in the democratic process by his acting through those groups. [Emphasis added.]

Professor Emerson, *supra*, at p. 4, stated:

> ...a theory of association must begin with the individual. In a society governed by democratic principles it is the individual who is the ultimate concern of the social order. His interests and rights are paramount. Association is an extension of individual freedom. It is a

> method of making more effective, of giving greater depth and scope to, the individual's needs, aspirations and liberties.

and Reena Raggi in the article "An Independent Right to Freedom of Association" (1977), 12 *Harv. C.R.-C.L.L. Rev.* 1, stated the position clearly, at pp. 15-16:

> This notion that an association is no more than the sum of its individual members seems essential in a society in which it is "the individual who is the ultimate concern of the social order." In such a society it would hardly seem possible that an abstract entity such as an association should enjoy rights apart from and indeed greater than its individual members; to hold otherwise would contradict the equality of opportunity which is at the heart of this argument for freedom of association.

157. The recognition of this principle in the case at bar is of great significance. The only basis on which it is contended that the *Charter* enshrines a right to strike is that of freedom of association. Collective bargaining is a group concern, a group activity, but the group can exercise only the constitutional rights of its individual members on behalf of those members. If the right asserted is not found in the *Charter* for the individual, it cannot be implied for the group merely by the fact of association. It follows as well that the rights of the individual members of the group cannot be enlarged merely by the fact of association.

The Scope of Freedom of Association in s. 2(*d*)

158. Various theories have been advanced to define freedom of association guaranteed by the Constitution. They range from the very restrictive to the virtually unlimited. To begin with, it has been said that freedom of association is limited to a right to associate with others in common pursuits or for certain purposes. Neither the objects nor the actions of the group are protected by freedom of association. This was the approach adopted in *Collymore v. Attorney-General*, [1970] A.C. 538. The facts of the case have been stated by the Chief Justice and need no repetition here. In its reasons, the Judicial Committee approved the words of Sir Hugh Wooding C.J., of the Court of Appeal of Trinidad and Tobago, which defined freedom of association in these terms, at p. 547:

> ...freedom of association means no more than freedom to enter into consensual arrangements to promote the common-interest objects of the associating group. The objects may be any of many. They may be religious or social, political or philosophical, economic or professional, educational or cultural, sporting or charitable. But the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country.

159. This approach was followed in *Dolphin Delivery Ltd. v. Retail, Wholesale & Department Store Union, Local 580* (1984), 1984 CanLII 750 (BC CA), 10 D.L.R. (4th) 198, (affirmed by this Court on different grounds, 1986 CanLII 5 (SCC), [1986] 2 S.C.R. 573), where Esson J.A., speaking for the British Columbia Court of Appeal on this issue, said, at p. 209:

> The freedom must be intended to protect the right of `everyone' to associate as they please, and to form associations of all kinds, from political parties to hobby clubs. Some will have objects and will be in favour of means of achieving those objects, which the framers of the

> Charter cannot have intended to protect. The freedom to associate carries with it no constitutional protection of the purposes of the association, or means of achieving those purposes.

160. The same approach was followed in *Public Service Alliance of Canada v. The Queen* (*PSAC* judgment delivered concurrently, 1987 CanLII 89 (SCC), [1987] 1 S.C.R. 424), both at trial, 1984 CanLII 2921 (FC), [1984] 2 F.C. 562, and on appeal, 1984 CanLII 2981 (FCA), [1984] 2 F.C. 889. Other cases which have followed the *Collymore* approach include: *Re Prime and Manitoba Labour Board* (1983), 1983 CanLII 2940 (MB QB), 3 D.L.R. (4th) 74 (Man. Q.B.), rev'd on other grounds (1984), 1984 CanLII 2936 (MB CA), 8 D.L.R. (4th) 641 (Man. C.A.); and *Halifax Police Officers and NCO's Association v. City of Halifax* (1984), 11 C.R.R. 358 (N.S.S.C.T.D.)

161. A second approach provides that freedom of association guarantees the collective exercise of constitutional rights or, in other words, the freedom to engage collectively in those activities which are constitutionally protected for each individual. This theory has been adopted in the United States to define the scope of freedom of association under the American Constitution. Professor L. H. Tribe in his treatise, *American Constitutional Law* (1978), describes the American position, as follows, at p. 702:

> ...[freedom of association] is *a right to join with others to pursue goals independently protected by the first amendment*--such as political advocacy, litigation (regarded as a form of advocacy), or religious worship.

Further, in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), Brennan J., writing for the majority of the United States Supreme Court, said, at p. 618:

> ...the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment--speech, assembly, petition for the redress of grievances, and the exercise of religion. The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.

162. It will be seen that this approach guarantees not only the right to associate but as well the right to pursue those objects of association which by their nature have constitutional protection.

163. A third approach postulates that freedom of association stands for the principle that an individual is entitled to do in concert with others that which he may lawfully do alone, and conversely, that individuals and organizations have no right to do in concert what is unlawful when done individually. This approach is supported by Professor Emerson, *supra*, where he states, at p. 4:

> ...as a starting point, an association should be entitled to do whatever an individual can do; conversely, conduct prohibited to an individual by a state can also be prohibited to an association.

A similar view has been expressed by the American scholar, Reena Raggi, *supra*, pp. 15-16, and by Bayda C.J.S. in *Re Retail, Wholesale & Department Store Union, Locals 544, 496, 635 and 955 and Government of Saskatchewan* (1985), 1985 CanLII 184 (SK CA), 19 D.L.R. (4th) 609 (the *Dairy Workers* case), at p. 619:

> Where an act is capable of being performed by a person alone or in association, then only if a person acting alone is forbidden to perform the act, is the person acting in association forbidden.

164. A fourth approach would constitutionally protect collective activities which may be said to be fundamental to our culture and traditions and which by common assent are deserving of protection. This approach was proposed by Kerans J.A. in *Black v. Law Society of Alberta*, 1986 ABCA 68 (CanLII), [1986] 3 W.W.R. 590 (Alta. C.A.) The court held in that case that legislative restrictions against partnerships for the practice of law between Alberta solicitors and non-resident solicitors violated freedom of association. Speaking for himself, Kerans J.A., stated, at p. 612:

> In my view, the freedom [of association] includes the freedom to associate with others in the exercise of Charter-protected rights and also those other rights which--in Canada--are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education or gain a livelihood. [Emphasis added.]

165. A fifth approach rests on the proposition that freedom of association, under s. 2(*d*) of the *Charter*, extends constitutional protection to all activities which are essential to the lawful goals of an association. This approach was advanced in *Re Service Employees' International Union, Local 204 and Broadway Manor Nursing Home* (1983), 1983 CanLII 1928 (ON SC), 44 O.R. (2d) 392 by the Ontario Divisional Court. The court held that freedom of association included the freedom to bargain collectively and to strike, since, in its view, these activities were essential to the objects of a trade union and without them the association would be emasculated. Galligan J. said, at p. 409:

> But I think that freedom of association if it is to be a meaningful freedom must include freedom to engage in conduct which is reasonably consonant with the lawful objects of an association. And I think a lawful object is any object which is not prohibited by law.

And Smith J. said, at p. 463:

> It follows, and it is trite to say I suppose, that the freedom to associate carries with it the freedom to meet to pursue the lawful objects and activities essential to the association's purposes, being in this instance the well-being, economic or otherwise, of its members.

166. The sixth and final approach so far isolated in the cases, and by far the most sweeping, would extend the protection of s. 2(*d*) of the *Charter* to all acts done in association, subject only to limitation under s. 1 of the *Charter*. This is the position suggested by Bayda C.J.S. in the *Dairy Workers* case, *supra*. He said in his reasons for judgment, at pp. 620-21:

> To summarize, a person asserting the freedom of association under para. 2(*d*) is free (apart from s. 1 of the Charter) to perform in association without governmental interference any act that he is free to perform alone. Where an act by definition is incapable of individual performance, he is free to perform the act in association provided the mental component of the act is not to inflict harm. Such then is the "unregulated area" (to use Professor Lederman's expression) relative to the freedom of association. Such is the "sphere of activity within which the law (has guaranteed) to leave me alone", to use the words of the author of *Salmond on Jurisprudence* with an interpolation from s. 1 of the Charter. [Emphasis added.]

167. In presenting these six formulations of the concept of freedom of association, I do not mean to suggest that they are the only ones which might be developed. They do, however, embrace generally the concepts and arguments advanced before the Court. In examining these formulations, I will consider them within the context of the *Charter*, the pre-existing law of Canada, and the circumstances in which freedom of association is asserted.

168. As to the pre-existing law in Canada, it is sufficient to say that freedom of association is not a new right or freedom. It existed in Canada long before the *Charter* was adopted and was recognized as a basic right. It consisted in the liberty of two or more persons to associate together provided that they did not infringe a specific rule of common law or statute by having either an unlawful object or by pursuing their object by unlawful means (see *Halsbury's Laws of England* (3rd ed. 1954), vol. 7, at pp. 195-96; O. Hood Phillips and Paul Jackson, *Constitutional and Administrative Law* (6th ed. 1978), at p. 503). It may be observed as well that freedom of association was recognized and applied in relation to trade unions. The law of Canada and of each province has long recognized that trade unions could, and did, exist as lawful associations with rights and obligations fixed by law and that individuals had the right to belong to, and participate in, the activities of trade unions (see *Collective Bargaining Law in Canada* (2nd ed. 1986), A. W. R. Carrothers, E. E. Palmer and W. B. Rayner, at pp. 1-108).

169. Freedom of association was acknowledged and accepted as part of our social and legal fabric. The *Charter* upon its adoption guaranteed freedom of association as a free-standing right in s. 2(*d*). I do not seek to limit the effect of that guarantee to the law as it stood before adoption. I do, however, suggest that the *Charter* guarantee, which by itself does not in any way define freedom of association, must be construed with reference to the constitutional text and to the nature, history, traditions, and social philosophies of our society. This approach makes relevant consideration of the pre-*Charter* situation and the nature and scope of the rights and obligations the law had ascribed to associations, in this case trade unions, before the adoption of the *Charter*.

170. Turning to the various approaches which have been briefly described above, I would conclude that both the fifth approach (which postulates that freedom of association constitutionally protects all activities which are essential to the lawful goals of an association) and the sixth (which postulates that freedom of association constitutionally protects all activities carried out in association, subject only to reasonable limitation under s. 1 of the *Charter*) are unacceptable definitions of freedom of association.

171. The fifth approach rejects the individual nature of freedom of association. To accept it would be to accord an independent constitutional status to the aims, purposes, and activities of the association, and thereby confer greater constitutional rights upon members of the association than upon non-members. It would extend *Charter* protection to all the activities of an association which are essential to its lawful objects or goals, but, it would not extend an equivalent right to individuals. The *Charter* does not give, nor was it ever intended to give, constitutional protection to all the acts of an individual which are essential to his or her personal goals or objectives. If *Charter* protection is given to an association for its lawful acts and objects, then the *Charter*-protected rights of the association would exceed those of

the individual merely by virtue of the fact of association. The unacceptability of such an approach is clearly demonstrated by Peter Gall in "Freedom of Association and Trade Unions: A Double-Edged Constitutional Sword" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at p. 247:

> A brief example illustrates this point. One of our levels of government may decide to ban the ownership of guns. This would not infringe any individual right under the Charter. But if some individuals have combined to form a gun club, does the Charter's protection of freedom of association mean that the principal activity of the gun club, namely the ownership and use of guns, is now constitutionally protected? One is quickly forced to the conclusion that it does not. The Charter does not protect the right to bear arms, regardless of whether that activity is carried out by an individual or by an association. The mere fact that it is the principal activity of the gun club does not give it a constitutional status. I doubt whether there would be much, if any, disagreement on this point. Thus, by referring to this hypothetical situation we see that the principal activities of associations are not necessarily protected under the concept of freedom of association.

172. The sixth approach, in my opinion, must be rejected as well, for the reasons expressed in respect of the fifth. It would in even more sweeping terms elevate activities to constitutional status merely because they were performed in association. For obvious reasons, the *Charter* does not give constitutional protection to all activities performed by individuals. There is, for instance, no *Charter* protection for the ownership of property, for general commercial activity, or for a host of other lawful activities. And yet, if the sixth approach were adopted, these same activities would receive protection if they were performed by a group rather than by an individual. In my view, such a proposition cannot be accepted. There is simply no justification for according *Charter* protection to an activity merely because it is performed by more than one person. This was recognized by Paul Cavalluzzo, *supra*, at pp. 202-03:

> The problem with this [the sixth] approach is that it sanctifies conduct because it is engaged in by more than one citizen. Although the state is given the opportunity to justify interference under section 1, why should there be constitutional value in numbers? Surely, more is required to reach the threshold of attaining constitutional protection. Freedom of association is not a fundamental freedom because there is some inherent value in group activity. Not all individual expressions are protected by freedom of expression at the threshold stage. Likewise, not all associational conduct is protected by freedom of association.

173. I am also of the view that the fourth approach, which postulates that freedom of association embraces those collective activities which have attained a fundamental status in our society because they are deeply rooted in our culture, traditions, and history, is an unacceptable definition. By focusing on the activity or the conduct itself, this fourth approach ignores the fundamental purpose of the right. The purpose of freedom of association is to ensure that various goals may be pursued in common as well as individually. Freedom of association is not concerned with the particular activities or goals themselves; it is concerned with how activities or goals may be pursued. While activities such as establishing a home, pursuing an education, or gaining a livelihood are important if not fundamental activities, their

importance is not a consequence of their potential collective nature. Their importance flows from the structure and organization of our society and they are as important when pursued individually as they are when pursued collectively. Even institutions such as marriage and the family, which by their nature are collective, do not fall easily or completely under the rubric of freedom of association. For instance, freedom of association would have no bearing on the legal consequences of marriage, such as the control or ownership of matrimonial property. This is not to say that fundamental institutions, such as marriage, will never receive the protection of the *Charter*. The institution of marriage, for example, might well be protected by freedom of association in combination with other rights and freedoms. Freedom of association alone, however, is not concerned with conduct; its purpose is to guarantee that activities and goals may be pursued in common. When this purpose is considered, it is clear that s. 2(*d*) of the *Charter* cannot be interpreted as guaranteeing specific acts or goals, whether or not they are fundamental in our society.

174. Of the remaining approaches, it must surely be accepted that the concept of freedom of association includes at least the right to join with others in lawful, common pursuits and to establish and maintain organizations and associations as set out in the first approach. This is essentially the freedom of association enjoyed prior to the adoption of the *Charter*. It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. This second definition of freedom of association embraces the purposes and values of the freedoms which were identified earlier. For instance, the indispensable role played by freedom of association in the democratic process is fully protected by guaranteeing the collective exercise of freedom of expression. Group advocacy, which is at the heart of all political parties and special interest groups, would be protected under this definition. As well, group expression directed at educating or informing the public would be protected from government interference (see the judgment of this Court in *Dolphin Delivery*, *supra*). Indeed, virtually every group activity which is important to the functioning of democracy would be protected by guaranteeing that freedom of expression can be exercised in association with others. Furthermore, religious groups would receive protection if their activities constituted the collective exercise of freedom of religion. Thus, the principal purposes or values of freedom of association would be realized by interpreting s. 2(*d*) as protecting the collective exercise of the rights enumerated in the *Charter*.

175. One enters upon more controversial ground when considering the third approach which provides that whatever action an individual can lawfully pursue as an individual, freedom of association ensures he can pursue with others. Conversely, individuals and organizations have no constitutional right to do in concert what is unlawful when done alone. This approach is broader than the second, since constitutional protection attaches to all group acts which can be lawfully performed by an individual, whether or not the individual has a constitutional right to perform them. It is true, of course, that in this approach the range of *Charter*-protected activity could be reduced by legislation, because the Legislature has the power to declare what is and what is not lawful activity for the individual. The Legislature, however, would not be able

to attack directly the associational character of the activity, since it would be constitutionally bound to treat groups and individuals alike. A simple example illustrates this point: golf is a lawful but not constitutionally protected activity. Under the third approach, the Legislature could prohibit golf entirely. However, the Legislature could not constitutionally provide that golf could be played in pairs but in no greater number, for this would infringe the *Charter* guarantee of freedom of association. This contrasts with the second approach, which would provide no protection against such legislation, because golf is not a constitutionally protected activity for the individual. Thus, the range of group activity protected by the third approach is greater than that of the second, but the greater range is to some extent illusory because of the power of the Legislature to say what is and what is not lawful activity for the individual. This approach, in my view, is an acceptable interpretation of freedom of association under the *Charter*. It is clear that, unlike the fifth and sixth approaches, this definition of freedom of association does not provide greater constitutional rights for groups than for individuals; it simply ensures that they are treated alike. If the state chooses to prohibit everyone from engaging in an activity and that activity is not protected under the Constitution, freedom of association will not afford any protection to groups engaging in the activity. Freedom of association as an independent right comes into play under this formulation when the state has permitted an individual to engage in an activity and yet forbidden the group from doing so. Moreover, unlike the fourth approach, the inquiry is firmly focussed on the fundamental purpose of freedom of association, namely, to permit the collective pursuit of common goals. As noted by the Chief Justice, at p. 367, "if a legislature permits an individual to enjoy an activity which it forecloses to a collectivity, it may properly be inferred that the legislature intended to prohibit the collective activity because of its collective or associational aspect. Conversely, one may infer from a legislative proscription which applies equally to individuals and groups that the purpose of the legislation was a *bona fide* prohibition of a particular activity because of detrimental qualities inhering in the activity (e.g., criminal conduct), and not merely because of the fact that the activity might sometimes be done in association." Finally, this approach fully realizes the value or purpose of association. Activities which the state permits an individual to pursue may be pursued in a group. Associations engaged in scientific, educational, recreational, and charitable pursuits would receive protection even though these activities or pursuits may not be independently protected by the *Charter*, provided these activities are not forbidden at law to individuals. The objective of guaranteeing the freedom of individuals to unite in organizations of their choice for the pursuit of objects of their choice would be achieved.

176. It follows from this discussion that I interpret freedom of association in s. 2(*d*) of the *Charter* to mean that *Charter* protection will attach to the exercise in association of such rights as have *Charter* protection when exercised by the individual. Furthermore, freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But, since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful for the individual.

177. When this definition of freedom of association is applied, it is clear that it does not guarantee the right to strike. Since the right to strike is not independently protected under the *Charter*, it can receive protection under freedom of association only if it is an activity which is permitted by law to an individual. Accepting this conclusion,

the appellants argue that freedom of association must guarantee the right to strike because individuals may lawfully refuse to work. This position, however, is untenable for two reasons. First, it is not correct to say that it is lawful for an individual employee to cease work during the currency of his contract of employment. Belzil J.A., in the Alberta Court of Appeal, in the case at bar, dealt with this point in these words:

> The argument falters on the premise that cessation of work by one person is lawful. The rationale advanced for that premise is that the courts will not compel a servant to fulfil his contract of service, therefore cessation of work by a servant is lawful. While it is true that the courts will not compel a servant to fulfil his contract of service, the servant is nevertheless bound in law by his contract and may be ordered to pay damages for the unlawful breach of it. It cannot be said that his cessation of work is lawful.

The second reason is simply that there is no analogy whatever between the cessation of work by a single employee and a strike conducted in accordance with modern labour legislation. The individual has, by reason of the cessation of work, either breached or terminated his contract of employment. It is true that the law will not compel the specific performance of the contract by ordering him back to work as this would reduce "the employee to a state tantamount to slavery" (I. Christie, *Employment Law in Canada* (1980), p. 268). But, this is markedly different from a lawful strike. An employee who ceases work does not contemplate a return to work, while employees on strike always contemplate a return to work. In recognition of this fact, the law does not regard a strike as either a breach of contract or a termination of employment. Every province and the federal Parliament has enacted legislation which preserves the employer-employee relationship during a strike (see *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, s. 107(2); *Labour Relations Act*, R.S.A. 1980 (Supp.), c. L-1.1, as amended, s. 1(2); *Labour Code*, R.S.B.C. 1979, c. 212, as amended, s. 1(2); *The Labour Relations Act*, S.M. 1972, c. 75, as amended, s. 2(1); *Industrial Relations Act*, R.S.N.B. 1973, c. I-4, as amended, s. 1(2); *The Labour Relations Act, 1977*, S.N. 1977, c. 64, as amended, s. 2(2); *The Trade Union Act*, S.N.S. 1972, c. 19, as amended, s. 13; *Labour Relations Act*, R.S.O. 1980, c. 228, as amended, s. 1(2); *Labour Act*, R.S.P.E.I. 1974, c. L-1, as amended, s. 8(2); *Labour Code*, R.S.Q. 1977, c. C-27, as amended, s. 110; and *The Trade Union Act*, R.S.S. 1978, c. T-17, as amended s. 2(*f*); and see *Canadian Pacific Railway Co. v. Zambri*, 1962 CanLII 11 (SCC), [1962] S.C.R. 609). Moreover, many statutes provide employees with reinstatement rights following a strike (Ontario, *Labour Relations Act*, s. 73; Quebec, *Labour Code*, s. 110.1; Manitoba, *The Labour Relations Act*, s. 11; and see *Canadian Air Line Pilots' Ass'n and Eastern Provincial Airways Ltd.* (1983), 5 CLRBR (NS) 368) and in the province of Quebec the employer is expressly prohibited from replacing employees who are lawfully on strike (s. 109.1).

178. Modern labour relations legislation has so radically altered the legal relationship between employees and employers in unionized industries that no analogy may be drawn between the lawful actions of individual employees in ceasing to work and the lawful actions of union members in engaging in a strike. As Laskin C.J. stated in *McGavin Toastmaster Ltd. v. Ainscough*, [1976] 1 S.C.R. 718, at p. 725:

> The reality is, and has been for many years now throughout Canada, that individual relationships as between employer and employee have meaning only at the hiring stage and even then there are qualifications which arise by reason of union security clauses in collective agreements. The common law as it applies to individual employment contracts is no longer relevant to employer-employee relations governed by a collective

> agreement which, as the one involved here, deals with discharge, termination of employment, severance pay and a host of other matters that have been negotiated between union and company as the principal parties thereto.

It is apparent, in my view, that interpreting freedom of association to mean that every individual is free to do with others that which he is lawfully entitled to do alone would not entail guaranteeing the right to strike. I am supported in this conclusion by the Chief Justice, who states at p. 367 in his judgment, "There is no individual equivalent to a strike. The refusal to work by one individual does not parallel a collective refusal to work. The latter is qualitatively rather than quantitatively different." Restrictions on strikes are not aimed at and do not interfere with the collective or associational character of trade unions. It is therefore my conclusion that the concept of freedom of association does not extend to the constitutional guarantee of a right to strike. This conclusion is entirely consistent with the general approach of the *Charter* which accords rights and freedoms to the individual but, with a few exceptions noted earlier, does not confer group rights. It is also to be observed that the *Charter*, with the possible exception of s. 6(2)(*b*) (right to earn a livelihood in any province) and s. 6(4), does not concern itself with economic rights. Since trade unions are not one of the groups specifically mentioned by the *Charter*, and are overwhelmingly, though not exclusively, concerned with the economic interests of their members, it would run counter to the overall structure and approach of the *Charter* to accord by implication special constitutional rights to trade unions.

179. Labour relations and the development of the body of law which has grown up around that subject have been for many years one of the major preoccupations of legislators, economic and social writers, and the general public. Strikes are commonplace in Canada and have been for many years. The framers of the Constitution must be presumed to have been aware of these facts. Indeed, questions of collective bargaining and a right to strike were discussed in the *Minutes of Proceedings and Evidence* of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (Issue No. 43, pp. 68-79, January 22, 1981). It is apparent from the deliberations of the Committee that the right to strike was understood to be separate and distinct from the right to bargain collectively. And, while a resolution was proposed for the inclusion of a specific right to bargain collectively, no resolution was proposed for the inclusion of the right to strike. This affords strong support for the proposition that the inclusion of a right to strike was not intended.

180. Specific reference to the right to strike appears in the constitutions of France (in the preamble of the Constitution of the Vth Republic of 1958) and Italy (Article 40). Further, in Japan (Article 28) the rights of trade unions are specifically guaranteed. The framers of the Constitution must be presumed to have been aware of these constitutional provisions. The omission of similar provisions in the *Charter*, taken with the fact that the overwhelming preoccupation of the *Charter* is with individual, political, and democratic rights with conspicuous inattention to economic and property rights, speaks strongly against any implication of a right to strike. Accordingly, if s. 2(*d*) is read in the context of the whole *Charter*, it cannot, in my opinion, support an interpretation of freedom of association which could include a right to strike.

181. Furthermore, it must be recognized that the right to strike accorded by legislation throughout Canada is of relatively recent

vintage. It is truly the product of this century and, in its modern form, is in reality the product of the latter half of this century. It cannot be said that it has become so much a part of our social and historical traditions that it has acquired the status of an immutable, fundamental right, firmly embedded in our traditions, our political and social philosophy. There is then no basis, as suggested in the fourth approach to freedom of association, for implying a constitutional right to strike. It may well be said that labour relations have become a matter of fundamental importance in our society, but every incident of that general topic has not. The right to strike as an element of labour relations has always been the subject of legislative control. It has been abrogated from time to time in special circumstances and is the subject of legal regulation and control in all Canadian jurisdictions. In my view, it cannot be said that at this time it has achieved status as a fundamental right which should be implied in the absence of specific reference in the *Charter*.

182. While I have reached a conclusion and expressed the view that the *Charter* upon its face cannot support an implication of a right to strike, there is as well, in my view, a sound reason grounded in social policy against any such implication. Labour law, as we have seen, is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour--a very powerful socio-economic force--on the one hand, and the employers of labour--an equally powerful socio-economic force--on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance. One group concedes certain interests in exchange for concessions from the other. There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day. Great changes--economic, social, and industrial--are afoot, not only in Canada and in North America, but as well in other parts of the world. Changes in the Canadian national economy, the decline in resource-based as well as heavy industries, the changing patterns of international trade and industry, have resulted in great pressure to reassess the traditional approaches to economic and industrial questions, including questions of labour law and policy. In such countries as Sweden (Prof. Dr. Axel Adlercreutz, *Sweden*, in *International Encyclopaedia for Labour Law and Industrial Relations* (1985), vol. 9, ed.-in-chief Prof. Dr. R. Blanpain) and West Germany (Prof. Dr. Th. Ramm, *Federal Republic of Germany* in *International Encyclopaedia for Labour Law and Industrial Relations* (1979), vol. 5) different directions in labour relations have been taken. It has been said that these changes have led to increased efficiency and job satisfaction. Whatever the result of such steps, however, it is obvious that the immediate direction of labour policy is unclear. It is, however, clear that labour policy can only be developed step by step with, in this country, the Provinces playing their "classic federal role as laboratories for legal experimentation with our industrial relations ailments" (Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at p. 11). The fulfilment of this role in the past has resulted in the growth and development of the body of labour law which now prevails in Canada. The fluid and constantly changing conditions of modern society demand that it continue. To intervene in that dynamic process at this early stage of *Charter* development by implying constitutional protection for a right to strike would, in my view, give to one of the contending forces an economic weapon removed

from and made immune, subject to s. 1, to legislative control which could go far towards freezing the development of labour relations and curtailing that process of evolution necessary to meet the changing circumstances of a modern society in a modern world. This, I repeat, is not to say that a right to strike does not exist at law or that it should be abolished. It merely means that at this stage of our *Charter* development such a right should not have constitutional status which would impair the process of future development in legislative hands. Of particular interest in this connection are the words of Peter Gall in his article, *supra*, at p. 248, where he said:

> Collective bargaining is extremely important in our society and has been for some time now. But will it always be so? Can we confidently predict that 50 or even 20 years from now collective bargaining will still be the primary activity of trade unions? Or will we have adopted some other technique for setting terms and conditions of employment, such as full-scale interest arbitration or greater reliance on legislated standards. If we cannot reject this out of hand, and I do not think we can, then we must seriously question whether collective bargaining is the kind of activity that warrants constitutional status. The Charter enshrines the fundamental principles of individual liberty. The activities of man may change over time, but these principles remain constant. Collective bargaining does not have this same timeless quality, and, accordingly, we should be leery of giving it constitutional protection under the concept of freedom of association. If the drafters had intended to enshrine collective bargaining constitutionally, it would have been a simple matter to do so explicitly. The fact that it was not done explicitly indicates that this was not intended.

183. To constitutionalize a particular feature of labour relations by entrenching a right to strike would have other adverse effects. Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions. If the right to strike is constitutionalized, then its application, its extent, and any questions of its legality, become matters of law. This would inevitably throw the courts back into the field of labour relations and much of the value of specialized labour tribunals would be lost. This point has been commented upon by Professor J. M. Weiler in an article "The Regulation of Strikes and Picketing Under the Charter" in *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986), at pp. 226-27:

The doctrine of exclusive representation is but one of hundreds of critical policy choices made by our legislatures in the evolution of the current system of collective bargaining law in Canada. Others include restrictions of employer and employee free speech, prohibition of strikes during the term of a collective agreement, compulsory grievance arbitration, and 72 hours' notice before a strike or lockout. All these ingredients of collective bargaining law could be attacked as unjustified restrictions of collective bargaining rights. There are examples in many other jurisdictions in Canada and in other democratic industrialized countries where these restrictive aspects of collective bargaining law do not exist. How will a judge determine whether these meet the standards of a free and democratic society?

I won't belabour this point any further. I believe our current system of collective bargaining law regulating the relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as "reasonable" and "justifiable" in a free and democratic society. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.

If collective bargaining were constitutionalized under section 2(*d*), my worry is that judges might be flooded with arguments from litigants who are unhappy with the current tilt in the balance of power between unions, employers, and individual employees in collective bargaining legislation. These litigants will challenge a particular aspect of collective bargaining law, citing vague arguments of democratic, associational, economic, or political rights that will only serve to confuse the judge. Other parties whose interests will be affected by the decision may not receive intervenor status or may not even be aware of the case. It is unlikely that the necessary evidential base to decide the policy issue will be provided. When we consider that collective bargaining law is polycentric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another.

The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public. For 20 years the direction of labour law reform in Canada has been to limit excessive judicial review of specialized labour boards because of the problems that result from absentee management by the judges. At the same time, more original jurisdiction has been provided to labour boards to regulate economic disputes between workers and their employers. For the same reasons that the courts have been increasingly excluded from the role of umpiring collective bargaining disputes, they should not be re-entering the mainstream of labour law development in their capacity as interpreters of concepts such as "freedom of association" in section 2(*d*) of the Charter. The courtroom is not the place to be developing collective bargaining policy.

In summary, my concerns about interpreting freedom of association in section 2(*d*) to "constitutionalize collective bargaining" go beyond the problems that this would present for industrial relations in Canada. I am concerned that if the courts interpret the Charter to include rights that are not expressly provided for and thus are even more difficult to define as to value and scope, they will be overloaded with litigation

under section 1 and two opposite, but equally unhappy, scenarios may result. Some judges might interpret section 1 so aggressively as to initiate the process of remaking large chunks of Canadian law. This might cause the legislators to retaliate by invoking the override provisions in section 33 of the Charter. Alternatively, the courts might take the opposite tack by giving the legislatures too broad an ambit under section 1. In either case, the result might be the trivialization of the rights that were expressly intended to be protected in provisions such as section 2(*d*). Where the Charter is ambiguous as to the extent to which a certain right or freedom is protected, the better approach is for our courts to proceed very cautiously: first, by interpreting section 2 so as to give a limited application to the rights allegedly implicitly protected; then by providing a more searching scrutiny within section 1 of those rights that have expressly been protected in section 2.

184. A further problem will arise from constitutionalizing the right to strike. In every case where a strike occurs and relief is sought in the courts, the question of the application of s. 1 of the *Charter* may be raised to determine whether some attempt to control the right may be permitted. This has occurred in the case at bar. The section 1 inquiry involves the reconsideration by a court of the balance struck by the Legislature in the development of labour policy. The Court is called upon to determine, as a matter of constitutional law, which government services are essential and whether the alternative of arbitration is adequate compensation for the loss of a right to strike. In the *PSAC* case, the Court must decide whether mere postponement of collective bargaining is a reasonable limit, given the Government's substantial interest in reducing inflation and the growth in government expenses. In the *Dairy Workers* case, the Court is asked to decide whether the harm caused to dairy farmers through a closure of the dairies is of sufficient importance to justify prohibiting strike action and lockouts. None of these issues is amenable to principled resolution. There are no clearly correct answers to these questions. They are of a nature peculiarly apposite to the functions of the Legislature. However, if the right to strike is found in the *Charter*, it will be the courts which time and time again will have to resolve these questions, relying only on the evidence and arguments presented by the parties, despite the social implications of each decision. This is a legislative function into which the courts should not intrude. It has been said that the courts, because of the *Charter*, will have to enter the legislative sphere. Where rights are specifically guaranteed in the *Charter*, this may on occasion be true. But where no specific right is found in the *Charter* and the only support for its constitutional guarantee is an implication, the courts should refrain from intrusion into the field of legislation. That is the function of the freely-elected Legislatures and Parliament.

185. I would, therefore, dismiss the appeal and answer the constitutional questions, as follows:

> 1. Are the provisions of the *Public Service Employee Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 49, 50, 93 and 94 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Public Service Employee Relations Act* which prohibit the use of strikes and lockouts are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a right to strike.

2. Are the provisions of the *Labour Relations Act* that provide compulsory arbitration as a mechanism for resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 117.1, 117.2 and 117.3 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Labour Relations Act* which prohibit the use of strikes and lockouts are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a right to strike.

3. Are the provisions of the *Police Officers Collective Bargaining Act* that provide for compulsory arbitration as a mechanism for the resolution of disputes and prohibit the use of lockouts and strikes, in particular, sections 3, 9, and 10 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Police Officers Collective Bargaining Act* which prohibit the use of strikes and lockouts are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a right to strike.

4. Are the provisions of the *Public Service Employee Relations Act* that relate to the conduct of arbitration, in particular sections 48 and 55 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Public Service Employee Relations Act* which relate to the conduct of arbitration are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

5. Are the provisions of the *Labour Relations Act* that relate to the conduct of arbitration, in particular section 117.8 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Labour Relations Act* which relate to the conduct of arbitration are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

6. Are the provisions of the *Police Officers Collective Bargaining Act* that relate to the conduct of arbitration, in particular sections 2(2) and 15 thereof, inconsistent with the *Constitution Act, 1982*, and if so, in what particular or particulars, and to what extent?

Answer: The provisions of the *Police Officers Collective Bargaining Act* which relate to the conduct of arbitration are not inconsistent with the provisions of the *Constitution Act, 1982*, since the *Constitution Act, 1982* does not guarantee a specific form of dispute resolution as a substitute for the right to strike.

7. Does the *Constitution Act, 1982*, limit the right of the Crown to exclude any one or more of the following classes of its

employees from units for collective bargaining:

a) an employee who exercises managerial functions;

b) an employee who is employed in a confidential capacity in matters relating to labour relations;

c) an employee who is employed in a capacity that is essential to the effective functioning of the Legislature, the Executive or the Judiciary;

d) an employee whose interests as a member of a unit for collective bargaining could conflict with his duties as an employee?

Answer: I prefer not to answer this question, for the reasons given by the Chief Justice.

Appeal dismissed, DICKSON C.J. *and* WILSON J. *dissenting.*

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* See Erratum [1987] 2 S.C.R. iv.

** See Erratum [1987] 2 S.C.R. iv.

16	*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1

Suresh v. Canada (Minister of Citizenship and Immigration), 2002 SCC 1 (CanLII), [2002] 1 SCR 3

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Suresh *v*. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1

Manickavasagam Suresh *Appellant*

v.

The Minister of Citizenship and Immigration and the Attorney General of Canada *Respondents*

and

The United Nations High Commissioner for Refugees, Amnesty International, the Canadian Arab Federation, the Canadian Council for Refugees, the Federation of Associations of Canadian Tamils, the Centre for Constitutional Rights, the Canadian Bar Association and the Canadian Council of Churches *Interveners*

Indexed as: Suresh *v*. Canada (Minister of Citizenship and Immigration)

Neutral citation: 2002 SCC 1.

File No.: 27790.

2001: May 22; 2002: January 11.

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

on appeal from the federal court of appeal

Constitutional law — Charter of Rights — Fundamental justice — Immigration — Deportation — Risk of torture — Whether deportation of refugee facing risk of torture contrary to principles of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Vagueness — Whether terms "danger to the security of Canada" and "terrorism" in deportation provisions of immigration legislation unconstitutionally vague — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Freedom of expression — Freedom of association — Whether deportation for membership in terrorist organization infringes freedom of association and freedom of expression — Canadian Charter of Rights and Freedoms, ss. 2(b), 2(d) — Immigration Act, R.S.C. 1985, c. I-2, ss. 19(1), 53(1)(b).

Constitutional law — Charter of Rights — Fundamental justice — Procedural safeguards — Immigration — Convention refugee facing risk of torture if deported — Whether procedural safeguards provided to Convention refugee satisfy requirements of fundamental justice — Canadian Charter of Rights and Freedoms, s. 7 — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

Administrative law — Judicial review — Ministerial decisions — Standard of review — Immigration — Deportation — Approach to be taken in reviewing decisions of Minister of Citizenship and Immigration on whether refugee's presence constitutes danger to security of Canada and whether refugee faces substantial risk of torture upon deportation — Immigration Act, R.S.C. 1985, c. I-2, s. 53(1)(b).

The appellant is a Convention refugee from Sri Lanka who has applied for landed immigrant status. In 1995, the Canadian government detained him and commenced deportation proceedings on security grounds, based on the opinion of the Canadian Security Intelligence Service that he was a member and fundraiser of the Liberation Tigers of Tamil Eelam, an organization alleged to be engaged in terrorist activity in Sri Lanka, and whose members are also subject to torture in Sri Lanka. The Federal Court, Trial Division upheld as reasonable the deportation certificate under s. 40.1 of the *Immigration Act* and, following a deportation hearing, an adjudicator held that the appellant should be deported. The Minister of Citizenship and Immigration, after notifying the appellant that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(*b*) of the Act, issued such an opinion on the basis of an immigration officer's memorandum and concluded that he should be deported. Although the appellant had presented written submissions and documentary evidence to the Minister, he had not been provided with a copy of the immigration officer's memorandum, nor was he provided with an opportunity to respond to it orally or in writing. The appellant applied for judicial review, alleging that: (1) the Minister's decision was unreasonable; (2) the procedures under the Act were unfair; and (3) the Act infringed ss. 7, 2(*b*) and 2(*d*) of the *Canadian Charter of Rights and Freedoms*. The application for judicial review was dismissed on all grounds. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed. The appellant is entitled to a new deportation hearing. The impugned legislation is constitutional.

Deportation to torture may deprive a refugee of the right to liberty, security and perhaps life protected by s. 7 of the *Charter*. Section 7 applies to torture inflicted abroad if there is a sufficient causal connection with Canadian government acts. In determining whether this deprivation is in accordance with the principles of fundamental justice, Canada's interest in combating terrorism must be balanced against the refugee's interest in not being deported to torture.

Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The *Charter* affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the *International Covenant on Civil and*

Political Rights and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*. Article 33 of the *Convention Relating to the Status of Refugees*, which on its face does not categorically reject deportation to torture, should not be used to deny rights that other legal instruments make available to everyone. International law generally rejects deportation to torture, even where national security interests are at stake.

In exercising the discretion conferred by s. 53(1)(*b*) of the *Immigration Act*, the Minister must conform to the principles of fundamental justice under s. 7. Insofar as the Act leaves open the possibility of deportation to torture (a possibility which is not here excluded), the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. Applying these principles, s. 53(1)(*b*) does not violate s. 7 of the *Charter*.

The terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. The term "danger to the security of Canada" in deportation legislation must be given a fair, large and liberal interpretation in accordance with international norms. A person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", grounded on objectively reasonable suspicion based on evidence, and involving substantial threatened harm. Properly defined, the term "danger to the security of Canada" gives those who might come within the ambit of s. 53 fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. While there is no authoritative definition of the term "terrorism" as found in s. 19 of the *Immigration Act*, it is sufficiently settled to permit legal adjudication. Following the *International Convention for the Suppression of the Financing of Terrorism*, "terrorism" in s. 19 of the Act includes any act intended to cause death or bodily injury to a civilian or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its very nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.

Section 19 of the *Immigration Act*, defining the class of persons who may be deported because they constitute a danger to the security of Canada, as incorporated into s. 53 of the Act, does not breach the appellant's constitutional rights of free expression and association. The Minister's discretion to deport under s. 53 is confined to persons who pose a threat to the security of Canada and have been engaged in violence or activities directed at violence. Expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter under the *Charter*. Provided that the Minister exercises her discretion in accordance with the Act, the guarantees of free expression and free association are not violated.

Section 7 of the *Charter* does not require the Minister to conduct a full oral hearing or judicial process. However, a refugee facing deportation to torture under s. 53(1)(*b*) must be informed of the case to be met. Subject to privilege and other valid reasons for reduced disclosure, the material on which the Minister bases her decision must be provided to the refugee. The refugee must be provided with an opportunity to respond in writing to the case presented to the Minister, and to challenge the Minister's information. The refugee is entitled to present evidence and make submissions on: whether his or her continued presence in Canada will be detrimental to Canada under s. 19 of the Act; the risk of torture upon return; and the value of assurances of non-torture by foreign governments. The Minister must provide written reasons for her decision dealing with all relevant issues. These procedural protections apply where the refugee has met the threshold of establishing a *prima facie* case that there may be a risk of torture upon deportation. The appellant has met this threshold. Since he was denied the required procedural safeguards and the denial cannot be justified under s. 1 of the *Charter*, the case is remanded to the Minister for reconsideration.

Although it is unnecessary in this case to review the Minister's decisions on deportation, where such a review is necessary the reviewing court should generally adopt a deferential approach to the Minister's decision on whether a refugee's presence constitutes a danger to the security of Canada. This discretionary decision may only be set aside if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. Likewise, the Minister's decision on whether a refugee faces a substantial risk of torture upon deportation should be overturned only if it is not supported on the evidence or fails to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

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APPEAL from a judgment of the Federal Court of Appeal, 2000 CanLII 17101 (FCA), [2000] 2 F.C. 592, 183 D.L.R. (4th) 629, 252 N.R. 1, 18 Admin. L.R. (3d) 159, 5 Imm. L.R. (3d) 1, [2000] F.C.J. No. 5 (QL), upholding a judgment of the Trial Division (1999), 1999 CanLII 8314 (FC), 173 F.T.R. 1, 50 Imm. L.R. (2d) 183, 65 C.R.R. (3d) 344, [1999] F.C.J. No. 865 (QL). Appeal allowed.

Barbara Jackman and *Ronald Poulton*, for the appellant.

Urszula Kaczmarczyk and *Cheryl D. Mitchell*, for the respondents.

John Terry and *Jennifer A. Orange*, for the intervener the United Nations High Commissioner for Refugees.

Written submissions only by *Michael F. Battista* and *Michael Bossin*, for the intervener Amnesty International.

Audrey Macklin, for the intervener the Canadian Arab Federation.

Jack C. Martin and *Sharryn J. Aiken*, for the intervener the Canadian Council for Refugees.

Written submissions only by *Jamie Cameron*, for the intervener the Federation of Associations of Canadian Tamils.

Written submissions only by *David Cole*, for the intervener the Centre for Constitutional Rights.

David Matas, for the intervener the Canadian Bar Association.

Written submissions only by *Marlys Edwardh* and *Breese Davies*, for the intervener the Canadian Council of Churches.

The following is the judgment delivered by

□

1 THE COURT — In this appeal we hold that Suresh is entitled to a new deportation hearing under the *Immigration Act*, R.S.C. 1985, c. I-2. Suresh came to Canada from Sri Lanka in 1990. He was recognized as a Convention refugee in 1991 and applied for landed immigrant status. In 1995 the government detained him and started proceedings to deport him to Sri Lanka on grounds he was a member and fundraiser for the Liberation Tigers of Tamil Eelam ("LTTE"), an organization alleged to engage in terrorist activity in Sri Lanka. Suresh challenged the order for his deportation on various grounds of substance and procedure. In these reasons we examine the *Immigration Act* and the *Canadian Charter of Rights and Freedoms*, and find that deportation to face torture is generally unconstitutional and that some of the procedures followed in Suresh's case did not meet the required constitutional standards. We therefore conclude that Suresh is entitled to a new hearing.

□

2 The appeal requires us to consider a number of issues: the standard to be applied in reviewing a ministerial decision to deport; whether the *Charter* precludes deportation to a country where the refugee faces torture or death; whether deportation on the basis of mere membership in an alleged terrorist organization unjustifiably infringes the *Charter* rights of free expression and free association; whether "terrorism" and "danger to the security of Canada" are unconstitutionally vague; and whether the deportation scheme contains adequate procedural safeguards to ensure that refugees are not expelled to a risk of torture or death.

□

3 The issues engage concerns and values fundamental to Canada and indeed the world. On the one hand stands the manifest evil of terrorism and the random and arbitrary taking of innocent lives, rippling out in an ever-widening spiral of loss and fear. Governments, expressing the will of the governed, need the legal tools to effectively meet this challenge.

□

4 On the other hand stands the need to ensure that those legal tools do not undermine values that are fundamental to our democratic society — liberty, the rule of law, and the principles of fundamental justice — values that lie at the heart of the Canadian constitutional order and the international instruments that Canada has signed. In the end, it would be a Pyrrhic victory if terrorism were defeated at the cost of sacrificing our commitment to those values. Parliament's challenge is to draft laws that effectively combat terrorism and conform to the requirements of our Constitution and our international commitments.

□

5 We conclude that to deport a refugee to face a substantial risk of torture would generally violate s. 7 of the *Charter*. The Minister of Citizenship and Immigration must exercise her discretion to deport under the *Immigration Act* accordingly. Properly applied, the legislation conforms to the *Charter*. We reject the arguments that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague and that ss. 19 and 53(1)(*b*) of the Act violate the *Charter* guarantees of free expression and free association, and conclude that the Act's impugned procedures, properly followed, are constitutional. We believe these findings leave ample scope to Parliament to adopt new laws and devise new approaches to the pressing problem of terrorism.

□

6 Applying these conclusions, we find that the appellant Suresh made a *prima facie* case showing a substantial risk of torture if deported to Sri Lanka, and that his hearing did not provide the procedural safeguards required to protect his right not to be expelled to a risk of torture or death. This means that the case must be remanded to the Minister for reconsideration. The immediate result is that Suresh will remain in Canada until his new hearing is complete. Parliament's scheme read in light of the Canadian Constitution requires no less.

I. Facts and Judicial Proceedings

□

7 The appellant, Manickavasagam Suresh, was born in 1955. He is a Sri Lankan citizen of Tamil descent. Suresh entered Canada in October 1990, and was recognized as a Convention refugee by the Refugee Division of the Immigration and Refugee Board in April 1991. Recognition as a Convention refugee has a number of legal consequences; the one most directly relevant to this appeal is that, under s. 53(1) of the *Immigration Act*, generally the government may not return ("*refouler*") a Convention refugee "to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion".

□

8 In the summer of 1991, the appellant applied for landed immigrant status in Canada. His application was not finalized because, in late 1995, the Solicitor General of Canada and the Minister of Citizenship and Immigration commenced proceedings to deport Suresh to Sri Lanka on security grounds.

□

9 The first step in the procedure was a certificate under s. 40.1 of the *Immigration Act* alleging that Suresh was inadmissible to Canada on security grounds. The Solicitor General and the Minister filed the certificate with the Federal Court of Canada on October 17, 1995, and Suresh was detained the following day.

□

10 The s. 40.1 certificate was based on the opinion of the Canadian Security Intelligence Service ("CSIS") that Suresh is a member of the LTTE, an organization that, according to CSIS, is engaged in terrorist activity in Sri Lanka and functions in Canada under the auspices of the World Tamil Movement ("WTM"). LTTE supports the cause of Tamils in the ongoing Sri Lankan civil war. The struggle is a protracted and bitter one. The Tamils are in rebellion against the democratically elected government of Sri Lanka. Their grievances are deep-rooted, and atrocities appear to be commonplace on both sides. The conflict has its roots in measures taken by a past government which, in the view of the Tamil minority, deprived it of basic linguistic, cultural and political rights. Subsequent governments have made attempts to accommodate these grievances, find a political solution, and re-establish civilian controls on the security and defence establishments, but a solution has yet to be found.

□

11 Human rights reporting on the practices of the Sri Lanka security forces indicates that the use of torture is widespread, particularly against persons suspected of membership in the LTTE. In a report dated 2001, Amnesty International cites frequent incidents of torture by the police and army, including a report that five labourers arrested on suspicion of involvement with the LTTE were tortured by police. One of them died apparently as a result of the torture.

□

12 The s. 40.1 certificate was referred to the Federal Court for determination "whether the certificate filed by the Minister and the Solicitor General is reasonable on the basis of the evidence and information available" as required by s. 40.1(4)(*d*) — the second step in the deportation procedure. Pursuant to s. 40.1(5), the designated judge is entitled to receive and consider any evidence the judge "sees fit, whether or not the evidence or information is or would be admissible in a court of law".

□

13 In August 1997, after 50 days of hearings, Teitelbaum J. upheld the s. 40.1 certificate, finding it "reasonable" under s. 40.1(4)(*d*) of the Act: (1997), 1997 CanLII 5797 (FC), 140 F.T.R. 88. Specifically, Teitelbaum J. found that: (1) Suresh had been a member of the LTTE since his youth and is now (or was at the time of Teitelbaum J.'s consideration) a member of the LTTE executive; (2) the WTM is part of the LTTE or at least an organization that supports the activities of the LTTE; (3) Suresh obtained refugee status "by wilful misrepresentation of facts" and lacks credibility; (4) there are reasonable grounds to believe the LTTE has committed terrorist acts; and (5) Tamils arrested by Sri Lankan authorities are badly mistreated and in a number of cases the mistreatment bordered on torture.

□

14 A deportation hearing followed — the third step in the deportation procedure. The adjudicator found no reasonable grounds to conclude Suresh was directly engaged in terrorism under s. 19(1)(*f*)(ii), but held that he should be deported on grounds of membership in a terrorist organization under ss. 19(1)(*f*)(iii)(B) and 19(1)(*e*)(iv)(C).

□

15 On the same day, September 17, 1997, the Minister took the fourth step in the deportation process, notifying Suresh that she was considering issuing an opinion declaring him to be a danger to the security of Canada under s. 53(1)(*b*) of the Act, which permits the Minister to deport a refugee on security grounds even where the refugee's "life or freedom" would be threatened by the return. In response to the Minister's notification, Suresh submitted written arguments and documentary evidence, including reports indicating the incidence of torture, disappearances, and killings of suspected members of LTTE.

□

16 Donald Gautier, an immigration officer for Citizenship and Immigration Canada, considered the submissions and recommended that the Minister issue an opinion under s. 53(1)(*b*) that Suresh constituted a danger to the security of Canada. Noting Suresh's links to LTTE, he stated that "[t]o allow Mr. Suresh to remain in this country and continue his activities runs counter to Canada's international commitments in the fight against terrorism". At the same time, Mr. Gautier acknowledged that Mr. Suresh "is not known to have personally committed any acts of violence either in Canada or Sri Lanka" and that his activities on Canadian soil were "non-violent" in nature. Gautier found that Suresh faced a risk on returning to Sri Lanka, but this was difficult to assess; might be tempered by his high profile; and was counterbalanced by Suresh's terrorist activities in Canada. He concluded that, "on balance, there are insufficient humanitarian and compassionate considerations present to warrant extraordinary consideration". Accordingly, on January 6, 1998, the Minister issued an opinion that Suresh constituted a danger to the security of Canada and should be deported pursuant to s. 53(1)(*b*). Suresh was not provided with a copy of Mr. Gautier's memorandum, nor was he provided an opportunity to respond to it orally or in writing. No reasons are required under s. 53(1)(*b*) of the *Immigration Act* and none were given.

□

17 Suresh applied to the Federal Court for judicial review, alleging that the Minister's decision was unreasonable; that the procedures under the Act, which did not require an oral hearing and independent decision-maker, were unfair; and that the Act unconstitutionally violated ss. 7 and 2 of the *Charter*. McKeown J. (1999), 1999 CanLII 8314 (FC), 65 C.R.R. (2d) 344, dismissed the application on all grounds. In his view, the Minister's decision was not unreasonable and the Act was constitutional.

□

18 On the s. 7 challenge, McKeown J. found that the Minister, weighing the risk of exposing Suresh to torture against the danger that Suresh posed to the security of Canada, had satisfied the requirements of fundamental justice. McKeown J. acknowledged that the s. 7 *Charter* analysis should be informed by international law, and by the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36 ("CAT"), in particular. However, the CAT applies only where there are "substantial grounds" to believe that the person in question would be in danger of being tortured. Suresh had not met this test he held, in part because he had not submitted to the Minister a personal statement outlining why he believed he was at risk. McKeown J. concluded that the appellant's expulsion would not "shock the conscience" of Canadians, the test for unconstitutionality under s. 7 of the *Charter*.

□

19 On the s. 2 challenge, McKeown J. found that Suresh's activities as a fundraiser could not be considered "expression" under s. 2(*b*), since those activities were conducted in the service of a violent organization. He also found that Suresh's activities were not protected under s. 2(*d*), since the association in question existed to commit acts of violence. As to Suresh's vagueness arguments, McKeown J. held that neither the term "danger to the security of Canada" nor the term "terrorism" is unconstitutionally vague. Accordingly, McKeown J. dismissed the application.

□

20 Suresh appealed to the Federal Court of Appeal. It too dismissed his application. Robertson J.A., for the court, held that the right under international law to be free from torture was limited by a country's right to expel those who pose a security risk: 2000 CanLII 17101 (FCA), [2000] 2 F.C. 592. He held, at paras. 31-32, that the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 ("*Refugee Convention*"), permits derogation from the prohibition against deportation to torture and that, in any event, Canadian statutory law supersedes customary international law. He agreed with McKeown J. that fundraising to support terrorist violence

was not protected under s. 2. He also agreed that the *Immigration Act* procedures were adequate; in particular, no oral hearing was required to assess the risk of torture upon deportation. Finally, he agreed that neither the term "danger to the security of Canada" nor the term "terrorism" is unconstitutionally vague.

□

21 Robertson J.A. rejected Suresh's argument that s. 53(1)(*b*) of the Act is unconstitutional insofar as it permits the Minister to expel a refugee to torture. He held that while deportation to torture violates s. 7's guarantee of the right to life, liberty and security of the person, the violation was justified under s. 1. The objective of preventing Canada from becoming a haven for terrorist organizations was pressing and substantial and the deportation provision was a proportionate response to that objective bearing in mind the limitations on the power of deportation, its use as a measure of last resort and Canada's international obligations to combat terrorism. Expulsion of a refugee who is a danger to the security of Canada would not violate the sense of justice or "shock the conscience" of most Canadians, notwithstanding that the refugee might face torture on return, because Canada would be neither the first nor the last link in the chain of causation leading to torture, but merely an involuntary intermediary.

□

22 Finally, Robertson J.A. rejected the alternate argument that s. 53(1)(*b*), if constitutional, violated Suresh's s. 7 right to security in its application. The administrative decision to deport Suresh properly considered the risk Suresh posed to Canada, acknowledged the risk of torture Suresh would face upon return to Sri Lanka, noted factors that might reduce the risk, and held that on balance it was outweighed by Canada's interest in its own security.

□

23 Suresh now appeals to this Court.

II. Relevant Constitutional and Statutory Provisions

24 *Canadian Charter of Rights and Freedoms*

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

2. Everyone has the following fundamental freedoms:

. . .

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

. . .

(*d*) freedom of association.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Immigration Act, R.S.C. 1985, c. I-2

19. (1) No person shall be granted admission who is a member of any of the following classes:

. . .

(*e*) persons who there are reasonable grounds to believe

. . .

(iv) are members of an organization that there are reasonable grounds to believe will

. . .

(C) engage in terrorism;

(*f*) persons who there are reasonable grounds to believe

. . .

(ii) have engaged in terrorism, or

(iii) are or were members of an organization that there are reasonable grounds to believe is or was engaged in

. . .

(B) terrorism,

except persons who have satisfied the Minister that their admission would not be detrimental to the national interest;

53. (1) Notwithstanding subsections 52(2) and (3), no person who is determined under this Act or the regulations to be a Convention refugee, nor any person who has been determined to be not eligible to have a claim to be a Convention refugee determined by the Refugee Division on the basis that the person is a person described in paragraph 46.01(1)(*a*), shall be removed from Canada to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion unless

. . .

(*b*) the person is a member of an inadmissible class described in paragraph 19(1)(*e*), (*f*), (*g*), (*j*), (*k*) or (*l*) and the Minister is of the opinion that the person constitutes a danger to the security of Canada;

III. Issues

25 We propose to consider the issues in the following order:

1. What is the appropriate standard of review with respect to ministerial decisions under s. 53(1)(*b*) of the *Immigration Act*?

2. Are the conditions for deportation in the *Immigration Act* constitutional?

   (a) Does the Act permit deportation to torture contrary to the *Charter*?

   (b) Are the terms "danger to the security of Canada" and "terrorism" unconstitutionally vague?

   (c) Does deportation for membership in a terrorist organization unjustifiably violate the *Charter* guarantees of freedom of expression and freedom of association?

3. Are the procedures for deportation set out in the *Immigration Act* constitutionally valid?

4. Examining Suresh's case in light of the conclusions to the foregoing questions, should the Minister's order be set aside and a new hearing ordered?

IV. Analysis

1. Standard of Review

26 This appeal involves a consideration of four types of issues: (1) constitutional review of the provisions of the *Immigration Act*; (2) whether Suresh's presence in Canada constitutes a danger to national security; (3) whether Suresh faces a substantial risk of torture upon return to Sri Lanka; and (4) whether the procedures used by the Minister under the Act were adequate to protect Suresh's constitutional rights.

27 The issues of the constitutionality of the deportation provisions of the *Immigration Act* do not involve review of ministerial decision-making. The fourth issue of the adequacy of the procedures under the Act will be considered separately later in these reasons. At this point, our inquiry is into the standard of review to be applied to the second and third issues — the Minister's decisions on whether Suresh poses a risk to the security of Canada and whether he faces a substantial risk of torture on deportation. The latter was characterized by Robertson J.A. as a constitutional decision and hence requires separate treatment. It is our view that the threshold question is factual, that is whether there is a substantial risk of torture if the appellant is sent back, although this inquiry is mandated by s. 7 of the *Charter*. The constitutional issue is whether it would shock the Canadian conscience to deport Suresh once a substantial risk of torture has been established. This is when s. 7 is engaged. Since we are ordering a new hearing on procedural grounds, we are not required in this appeal to review the Minister's decisions on whether Suresh's presence constitutes a danger to the security of Canada and whether he faces a substantial risk of torture on deportation. However, we offer the following comments to assist courts in future ministerial review.

28 The trial judge and the Court of Appeal rejected Suresh's submission that the highest standard of review should apply to the determination of the rights of refugees. Robertson J.A., while inclined to apply a deferential standard of review to whether Suresh constituted a danger to the security of Canada, concluded that the decision could be maintained on any standard. Robertson J.A. went on to state (at paras. 131-36) that while the Act and the Constitution place constraints on the Minister's exercise of her discretion, these do not extend to a judicially imposed obligation to give particular weight to particular factors. On the question of whether he would face a substantial risk of torture on return, a question that he viewed as constitutional rather than merely one of judicial review, Robertson J.A. did not determine the applicable standard of review, concluding that even on the stringent standard of correctness the Minister's decision should be upheld.

29 The first question is what standard should be adopted with respect to the Minister's decision that a refugee constitutes a danger to the security of Canada. We agree with Robertson J.A. that the reviewing court should adopt a deferential approach to this question and should set aside the Minister's discretionary decision if it is patently unreasonable in the sense that it was made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors. The court should not reweigh the factors or interfere merely because it would have come to a different conclusion.

30 This conclusion is mandated by *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, which reviewed the principles for determining the standard of review according to the functional and pragmatic approach. In *Pushpanathan*, the Court emphasized that the ultimate question is always what the legislature intended. One looks to the language of the statute as well as a number of factors to determine that intention. Here the language of the Act (the Minister must be "of the opinion" that the person constitutes a danger to the security of Canada) suggests a standard of deference. So, on the whole, do the factors to be considered: (1) the presence or absence of a clause negating the right of appeal; (2) the relative

expertise of the decision-maker; (3) the purpose of the provision and the legislation generally; and (4) the nature of the question (*Pushpanathan*, *supra*, at paras. 29-38).

31 The first factor suggests that Parliament intended only a limited right of appeal. Although the Minister's s. 53(1)(*b*) opinion is not protected by a privative clause, it may only be appealed by leave of the Federal Court, Trial Division (s. 82.1(1)), and that leave decision may not itself be appealed (s. 82.2). The second factor, the relative expertise of the decision-maker, again favours deference. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, "[t]he fact that the formal decision-maker is the Minister is a factor militating in favour of deference" (para. 59). The Minister, as noted by Lord Hoffmann in *Secretary of State for the Home Department v. Rehman*, [2001] 3 W.L.R. 877 (H.L.), at para. 62, "has access to special information and expertise in . . . matters [of national security]". The third factor — the purpose of the legislation — again favours deference. This purpose, as discussed in *Pushpanathan*, *supra*, at para. 73, is to permit a "humanitarian balance" of various interests — "the seriousness of the danger posed to Canadian society" on the one hand, and "the danger of persecution upon *refoulement*"on the other. Again, the Minister is in a superior position to a court in making this assessment. Finally, the nature of the case points to deference. The inquiry is highly fact-based and contextual. As in *Baker*, *supra*, at para. 61, the s. 53(1)(*b*) danger opinion "involves a considerable appreciation of the facts of that person's case, and is not one which involves the application or interpretation of definitive legal rules", suggesting it merits a wide degree of deference.

32 These factors suggest that Parliament intended to grant the Minister a broad discretion in issuing a s. 53(1)(*b*) opinion, reviewable only where the Minister makes a patently unreasonable decision. It is true that the question of whether a refugee constitutes a danger to the security of Canada relates to human rights and engages fundamental human interests. However, it is our view that a deferential standard of ministerial review will not prevent human rights issues from being fully addressed, provided proper procedural safeguards are in place and provided that any decision to deport meets the constitutional requirements of the *Charter*.

33 The House of Lords has taken the same view in *Rehman*, *supra*. Lord Hoffmann, following the events of September 11, 2001, added the following postscript to his speech (at para. 62):

> I wrote this speech some three months before the recent events in New York and Washington. They are a reminder that in matters of national security, the cost of failure can be high. This seems to me to underline the need for the judicial arm of government to respect the decisions of ministers of the Crown on the question of whether support for terrorist activities in a foreign country constitutes a threat to national security. It is not only that the executive has access to special information and expertise in these matters. It is also that such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove. [Emphasis added.]

34 It follows that the weighing of relevant factors is not the function of a court reviewing the exercise of ministerial discretion (see, for instance, *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, at p. 607, where Iacobucci J. explained that a reviewing court should not disturb a decision based on a "broad discretion" unless the tribunal has "made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner").

35 The Court's recent decision in *Baker*, *supra*, did not depart from this view. Rather, it confirmed that the pragmatic and functional approach should be applied to all types of administrative decisions in recognition of the fact that a uniform approach to the determination of the proper standard of review is preferable, and that there may be special situations where even traditionally discretionary decisions will best be reviewed according to a standard other than the deferential standard which was universally applied in the past to ministerial decisions (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403).

36 The Court specified in *Baker*, *supra*, that a nuanced approach to determining the appropriate standard of review was necessary given the difficulty in rigidly classifying discretionary and non-discretionary decisions (paras. 54-55). The Court also made it clear in *Baker* that its approach "should not be seen as reducing the level of deference given to decisions of a highly discretionary nature" (para. 56) and, moreover, that any ministerial obligation to consider certain factors "gives the applicant no right to a particular outcome or to the application of a particular legal test" (para. 74). To the extent this Court reviewed the Minister's discretion in that case, its decision was based on the ministerial delegate's failure to comply with self-imposed ministerial guidelines, as reflected in the objectives of the Act, international treaty obligations and, most importantly, a set of published instructions to immigration officers.

37 The passages in *Baker* referring to the "weight" of particular factors (see paras. 68 and 73-75) must be read in this context. It is the Minister who was obliged to give proper weight to the relevant factors and none other. *Baker* does not authorize courts reviewing decisions on the discretionary end of the spectrum to engage in a new weighing process, but draws on an established line of cases concerning the failure of ministerial delegates to consider and weigh implied limitations and/or patently relevant factors: see *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147 (H.L.); *Re Sheehan and Criminal Injuries Compensation Board* (1974), 1974 CanLII 439 (ON CA), 52 D.L.R. (3d) 728 (Ont. C.A.); *Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 S.C.R. 2; *Dagg*, *supra*, at paras. 111-12, *per* La Forest J. (dissenting on other grounds).

38 This standard appropriately reflects the different obligations of Parliament, the Minister and the reviewing court. Parliament's task is to establish the criteria and procedures governing deportation, within the limits of the Constitution. The Minister's task is to make a decision that conforms to Parliament's criteria and procedures as well as the Constitution. The court's task, if called upon to review the Minister's decision, is to determine whether the Minister has exercised her decision-making power within the constraints imposed by Parliament's legislation and the Constitution. If the Minister has considered the appropriate factors in conformity with these constraints, the court must uphold his decision. It cannot set it aside even if it would have weighed the factors differently and arrived at a different conclusion.

39 This brings us to the question of the standard of review of the Minister's decision on whether the refugee faces a substantial risk of torture upon deportation. This question is characterized as constitutional by Robertson J.A., to the extent that the Minister's decision to deport to torture must ultimately conform to s. 7 of the *Charter*: see *Kindler v. Canada (Minister of Justice)*, 1991 CanLII 78 (SCC), [1991] 2 S.C.R. 779, *per* La Forest J.; and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 32. As mentioned earlier, whether there is a substantial risk of torture if Suresh is deported is a threshold question. The threshold question here is in large part a fact-driven inquiry. It requires consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. It may also involve a reassessment of the refugee's initial claim and a determination of whether a third country is willing to accept the refugee. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. We are accordingly of the view that the threshold finding of whether Suresh faces a substantial risk of torture, as an aspect of the larger s. 53(1)(*b*) opinion, attracts deference by the reviewing court to the Minister's decision. The court may not reweigh the factors considered by the Minister, but may intervene if the decision is not supported by the evidence or fails to consider the appropriate factors. It must be recognized that the nature of the evidence required may be limited by the nature of the inquiry. This is consistent with the reasoning of this Court in *Kindler*, *supra*, at pp. 836-37, where considerable deference was shown to ministerial decisions involving similar considerations in the context of a constitutional revision, that is in the context of a decision where the s. 7 interest was engaged.

40 Before leaving the issue of standard of review, it is useful to underline the distinction between standard

of review and the evidence required to establish particular facts in issue. For example, some authors suggest a lower evidentiary standard may govern decisions at entry (under ss. 2 and 19 of the Act) than applies to decisions to deport a landed Convention refugee under s. 53(1)(*b*): see J. C. Hathaway and C. J. Harvey "Framing Refugee Protection in the New World Disorder" (2001), 34 *Cornell Int'l L.J.* 257, at p. 288. This does not imply different standards of review. Different administrative decisions involve different factors, stemming from the statutory scheme and the particular issues raised. Yet the same standard of review may apply.

41 We conclude that in reviewing ministerial decisions to deport under the Act, courts must accord deference to those decisions. If the Minister has considered the correct factors, the courts should not reweigh them. Provided the s. 53(1)(*b*) decision is not patently unreasonable — unreasonable on its face, unsupported by evidence, or vitiated by failure to consider the proper factors or apply the appropriate procedures — it should be upheld. At the same time, the courts have an important role to play in ensuring that the Minister has considered the relevant factors and complied with the requirements of the Act and the Constitution.

2. Are the Conditions for Deportation in the *Immigration Act* Constitutional?

(a) *Does the Act Permit Deportation to Torture Contrary to the Charter?*

42 Suresh opposes his deportation to Sri Lanka on the ground, among others, that on return he faces a substantial risk of torture. McKeown J. found that Suresh had not shown that he personally would risk torture according to the "substantial grounds" test. His finding seems to conflict with that of the immigration officer who acknowledged "that there is a risk to Mr. Suresh on his return to Sri Lanka", but concluded that "this is counterbalanced by the serious terrorist activities to which he is a party". Acting on these findings, the Minister ordered Suresh deported.

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43 Section 53 of the *Immigration Act* permits deportation "to a country where the person's life or freedom would be threatened". The question is whether such deportation violates s. 7 of the *Charter*. Torture is defined in Article 1 of the CAT as including the unlawful use of psychological or physical techniques to intentionally inflict severe pain and suffering on another, when such pain or suffering is inflicted by or with the consent of public officials. A similar definition of torture may be found in s. 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

44 Section 7 of the *Charter* guarantees "[e]veryone . . . 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". It is conceded that "everyone" includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life. The only question is whether this deprivation is in accordance with the principles of fundamental justice. If it is not, s. 7 is violated and, barring justification of the violation under s. 1 of the *Charter*, deportation to torture is unconstitutional.

45 The principles of fundamental justice are to be found in "the basic tenets of our legal system": *Burns*, *supra*, at para. 70. "They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system": *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 503. The relevant principles of fundamental justice are determined by a contextual approach that "takes into account the nature of the decision to be made": *Kindler*, *supra*, at p. 848, *per* McLachlin J. (as she then was). The approach is essentially one of balancing. As we said in *Burns*, "[i]t is inherent in the . . . balancing process that the outcome may well vary from case to case depending on the mix of contextual factors put into the balance" (para. 65). Deportation to torture, for example, requires us to consider a variety of factors, including the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada. In contexts in which the most significant considerations are general ones, it is likely that the balance will be struck the same way in most cases. It would be impossible to say in advance, however, that the balance will necessarily be struck the same way in every case.

46 The inquiry into the principles of fundamental justice is informed not only by Canadian experience and jurisprudence, but also by international law, including *jus cogens*. This takes into account Canada's international obligations and values as expressed in "[t]he various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, [and] customary norms": *Burns*, at paras. 79-81; *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 348, *per* Dickson C.J. (dissenting); see also *Re B.C. Motor Vehicle Act*, *supra*, at p. 512; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, at pp. 1056-57; *R. v. Keegstra*, 1990 CanLII 24 (SCC), [1990] 3 S.C.R. 697, at p. 750; and *Baker*, *supra.*

47 Determining whether deportation to torture violates the principles of fundamental justice requires us to balance Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response.

48 With these thoughts in mind, we turn to the question of whether the government may, consistent with the principles of fundamental justice, expel a suspected terrorist to face torture elsewhere: first from the Canadian perspective; then from the perspective of the international norms that inform s. 7.

(i) *The Canadian Perspective*

49 The inquiry at this stage is whether, viewed from a Canadian perspective, returning a refugee to the risk of torture because of security concerns violates the principles of fundamental justice where the deportation is effected for reasons of national security. A variety of phrases have been used to describe conduct that would violate fundamental justice. The most frequent is conduct that would "'shoc[k]' the Canadian conscience" (see *Kindler*, *supra*, at p. 852, and *Burns*, *supra*, at para. 60). Without resorting to opinion polls, which may vary with the mood of the moment, is the conduct fundamentally unacceptable to our notions of fair practice and justice?

50 It can be confidently stated that Canadians do not accept torture as fair or compatible with justice. Torture finds no condonation in our *Criminal Code*; indeed the *Code* prohibits it (see, for example, s. 269.1). The Canadian people, speaking through their elected representatives, have rejected all forms of state-sanctioned torture. Our courts ensure that confessions cannot be obtained by threats or force. The last vestiges of the death penalty were abolished in 1998 and Canada has not executed anyone since 1962: see *An Act to amend the National Defence Act and to make consequential amendments to other Acts*, S.C. 1998, c. 35. In *Burns*, the then Minister of Justice, in his decision on the order to extradite the respondents Burns and Rafay, emphasized that "in Canada, Parliament has decided that capital punishment is not an appropriate penalty for crimes committed here, and I am firmly committed to that position" (para. 76). While we would hesitate to draw a direct equation between government policy or public opinion at any particular moment and the principles of fundamental justice, the fact that successive governments and Parliaments have refused to inflict torture and the death penalty surely reflects a fundamental Canadian belief about the appropriate limits of a criminal justice system.

51 When Canada adopted the *Charter* in 1982, it affirmed the opposition of the Canadian people to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s. 12. A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at pp. 1072-73, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this

category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system: see, generally, E. Scarry, *The Body in Pain: The Making and Unmaking of the World* (1985), at pp. 27-59. Torture is an instrument of terror and not of justice. As Lamer J. stated in *Smith*, *supra*, at pp. 1073-74, "some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment". As such, torture is seen in Canada as fundamentally unjust.

52 We may thus conclude that Canadians reject government-sanctioned torture in the domestic context. However, this appeal focuses on the prospect of Canada expelling a person to face torture in another country. This raises the question whether s. 7 is implicated at all. On one theory, our inquiry need be concerned only with the Minister's act of deporting and not with the possible consequences that the expelled refugee may face upon arriving in the destination country. If our s. 7 analysis is confined to what occurs on Canadian soil as a necessary and immediate result of the Minister's decision, torture does not enter the picture. If, on the other hand, our analysis must take into account what may happen to the refugee in the destination country, we surely cannot ignore the possibility of grievous consequences such as torture and death, if a risk of those consequences is established.

53 We discussed this issue at some length in *Burns*, *supra*. In that case, the United States sought the extradition of two Canadian citizens to face aggravated first degree murder charges in the state of Washington. The respondents Burns and Rafay contested the extradition on the grounds that the Minister of Justice had not sought assurances that the death penalty would not be imposed. We rejected the respondents' argument that extradition in such circumstances would violate their s. 12 right not to be subjected to cruel and unusual treatment or punishment, finding that the nexus between the extradition order and the mere possibility of capital punishment was too remote to engage s. 12. We agreed, however, with the respondents' argument under s. 7, writing that "[s]ection 7 is concerned not only with the act of extraditing, but also the potential consequences of the act of extradition" (para. 60 (emphasis in original)). We cited, in particular, *Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500, at p. 522, in which La Forest J. recognized that "in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances". In that case, La Forest J. referred specifically to the possibility that a country seeking extradition might torture the accused on return.

54 While the instant case arises in the context of deportation and not extradition, we see no reason that the principle enunciated in *Burns* should not apply with equal force here. In *Burns*, nothing in our s. 7 analysis turned on the fact that the case arose in the context of extradition rather than *refoulement*. Rather, the governing principle was a general one — namely, that the guarantee of fundamental justice applies even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected. We reaffirm that principle here. At least where Canada's participation is a necessary precondition for the deprivation and where the deprivation is an entirely foreseeable consequence of Canada's participation, the government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.

55 We therefore disagree with the Federal Court of Appeal's suggestion that, in expelling a refugee to a risk of torture, Canada acts only as an "involuntary intermediary" (para. 120). Without Canada's action, there would be no risk of torture. Accordingly, we cannot pretend that Canada is merely a passive participant. That is not to say, of course, that any action by Canada that results in a person being tortured or put to death would violate s. 7. There is always the question, as there is in this case, of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.

56 While this Court has never directly addressed the issue of whether deportation to torture would be inconsistent with fundamental justice, we have indicated on several occasions that extraditing a person to face torture would be inconsistent with fundamental justice. As we mentioned above, in *Schmidt*, *supra*, La Forest J. noted that s. 7 is concerned not only with the immediate consequences of an extradition order but also with "the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country" (p. 522). La Forest J. went on to specifically identify the possibility that the requesting country might torture the accused and then to state that "[s]ituations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7" (p. 522).

57 A similar view was expressed by McLachlin J. in *Kindler*, *supra*. In that case, McLachlin J. wrote that in some instances the "social consensus" as to whether extradition would violate fundamental justice would be clear. "This would be the case if, for instance, the fugitive faced torture on return to his or her home country" (p. 851). Concurring, La Forest J. wrote, similarly, that "[t]here are, of course, situations where the punishment imposed following surrender — torture, for example — would be so outrageous to the values of the Canadian community that the surrender would be unacceptable" (p. 832).

58 Canadian jurisprudence does not suggest that Canada may never deport a person to face treatment elsewhere that would be unconstitutional if imposed by Canada directly, on Canadian soil. To repeat, the appropriate approach is essentially one of balancing. The outcome will depend not only on considerations inherent in the general context but also on considerations related to the circumstances and condition of the particular person whom the government seeks to expel. On the one hand stands the state's genuine interest in combatting terrorism, preventing Canada from becoming a safe haven for terrorists, and protecting public security. On the other hand stands Canada's constitutional commitment to liberty and fair process. This said, Canadian jurisprudence suggests that this balance will usually come down against expelling a person to face torture elsewhere.

(ii) *The International Perspective*

59 We have examined the argument that from the perspective of Canadian law to deport a Convention refugee to torture violates the principles of fundamental justice. However, that does not end the inquiry. The provisions of the *Immigration Act* dealing with deportation must be considered in their international context: *Pushpanathan*, *supra*. Similarly, the principles of fundamental justice expressed in s. 7 of the *Charter* and the limits on rights that may be justified under s. 1 of the *Charter* cannot be considered in isolation from the international norms which they reflect. A complete understanding of the Act and the *Charter* requires consideration of the international perspective.

60 International treaty norms are not, strictly speaking, binding in Canada unless they have been incorporated into Canadian law by enactment. However, in seeking the meaning of the Canadian Constitution, the courts may be informed by international law. Our concern is not with Canada's international obligations *qua* obligations; rather, our concern is with the principles of fundamental justice. We look to international law as evidence of these principles and not as controlling in itself.

61 It has been submitted by the intervener, Amnesty International, that the absolute prohibition on torture is a peremptory norm of customary international law, or *jus cogens.* Articles 53 and 64 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, provide that existing or new peremptory norms prevail over treaties. Article 53 defines a peremptory norm as

> a norm accepted and recognized by the international community of States as a whole as a norm from which no

> derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This raises the question of whether the prohibition on torture is a peremptory norm. Peremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community. As noted by L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at pp. 723-24:

> The clarification of the notion of jus cogens in international law is advancing, but is still far from being completed.
>
> On the other hand, the international community of States has been *inactive in stating expressly* which norms it recognizes as peremptory in the present-day international law. In the opinion of the present writer, this inactivity, and the consequent uncertainty as to which norms are peremptory, constitute at present *the main problem of the viability of jus cogens*. [Emphasis in original.]

62 In the case at bar, there are three compelling indicia that the prohibition of torture is a peremptory norm. First, there is the great number of multilateral instruments that explicitly prohibit torture: see *Geneva Convention Relative to the Treatment of Prisoners of War* (1949), Can. T.S. 1965 No. 20, p. 84, Article 3; *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (1949), Can. T.S. 1965 No. 20, p. 25, Article 3; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* (1949), Can. T.S. 1965 No. 20, p. 55, Article 3; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (1949), Can. T.S. 1965 No. 20, p. 163, Article 3; *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810, at 71 (1948), Article 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res. 3452 (XXX), UN Doc. A/10034 (1975); *International Covenant on Civil and Political Rights* (1966), Can. T.S. 1976 No. 47 ("ICCPR"), Article 7; *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950), 213 U.N.T.S. 221, Article 3; *American Convention on Human Rights* (1969), 1144 U.N.T.S. 123, Article 5; *African Charter on Human and Peoples' Rights* (1981), 21 I.L.M. 58, Article 5; *Universal Islamic Declaration of Human Rights* (1981), 9:2 *The Muslim World League Journal* 25, Article VII.

63 Second, Amnesty International submitted that no state has ever legalized torture or admitted to its deliberate practice and that governments accused of practising torture regularly deny their involvement, placing responsibility on individual state agents or groups outside the government's control. Therefore, it argues that the weight of these domestic practices is further evidence of a universal acceptance of the prohibition on torture. Counsel for the respondents, while not conceding this point, did not refer this Court to any evidence of state practice to contradict this submission. However, it is noted in most academic writings that most, if not all states have officially prohibited the use of torture as part of their administrative practices, see : Hannikainen, *supra*, at p. 503.

64 Last, a number of international authorities state that the prohibition on torture is an established peremptory norm: see Hannikainen, *supra*, at p. 509; M. N. Shaw, *International Law* (4th ed. 1997), at pp. 203-4; *Prosecutor v. Furundzija*, 38 I.L.M. 317 (1999) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, No. IT-95-17/1-T, December 10, 1998); *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 W.L.R. 827 (H.L.). Others do not explicitly set it out as a peremptory norm; however, they do generally accept that the protection of human rights or humanitarian rights is a peremptory norm: see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at p. 515, and C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (1998), at sections 251, 1394 and 1396.

65 Although this Court is not being asked to pronounce on the status of the prohibition on torture in international law, the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from. With this in mind, we now turn to the interpretation of the conflicting instruments at issue in this case.

66 Deportation to torture is prohibited by both the ICCPR, which Canada ratified in 1976, and the CAT, which Canada ratified in 1987. The relevant provisions of the ICCPR read:

ARTICLE 4

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law . . . .

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

ARTICLE 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. . . .

While the provisions of the ICCPR do not themselves specifically address the permissibility of a state's expelling a person to face torture elsewhere, *General Comment 20* to the ICCPR makes clear that Article 7 is intended to cover that scenario, explaining that ". . . States parties must not expose individuals to the danger of torture . . . upon return to another country by way of their extradition, expulsion or refoulement" (para. 9).

67 We do not share Robertson J.A.'s view that *General Comment 20* should be disregarded because it "contradicts" the clear language of Article 7. In our view, there is no contradiction between the two provisions. *General Comment 20* does not run counter to Article 7; rather, it explains it. Nothing would prevent a state from adhering both to Article 7 and to *General Comment 20*, and *General Comment 20* does not detract from rights preserved or provided by Article 7. The clear import of the ICCPR, read together with the *General Comment 20*, is to foreclose a state from expelling a person to face torture elsewhere.

68 The CAT takes the same stand. The relevant provisions of that document read:

ARTICLE 1

1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

2. This article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

ARTICLE 2

1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of

torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever . . . may be invoked as a justification of torture.

ARTICLE 3

1. No State Party shall expel, return ("*refouler*") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. [Emphasis added.]

ARTICLE 16

2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.

The CAT's import is clear: a state is not to expel a person to face torture, which includes both the physical and mental infliction of pain and suffering, elsewhere.

69 Robertson J.A., however, held that the CAT's clear proscription of deportation to torture must defer to Article 33(2) of the *Refugee Convention*, which permits a country to return (*refouler*) a refugee who is a danger to the country's security. The relevant provisions of the *Refugee Convention* state:

ARTICLE 33

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership or a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

70 Article 33 of the *Refugee Convention* appears on its face to stand in opposition to the categorical rejection of deportation to torture in the CAT. Robertson J.A., faced with this apparent contradiction, attempted to read the two conventions in a way that minimized the contradiction, holding that the anti-deportation provisions of the CAT were not binding, but derogable.

71 We are not convinced that the contradiction can be resolved in this way. It is not apparent to us that the clear prohibitions on torture in the CAT were intended to be derogable. First, the absence of an express prohibition against derogation in Article 3 of the CAT together with the "without prejudice" language of Article 16 do not seem to permit derogation. Nor does it follow from the assertion in Article 2(2) of CAT that "[n]o exceptional circumstances . . . may be invoked as a justification of torture", that the absence of such a clause in the Article 3 *refoulement* provision permits acts leading to torture in exceptional circumstances. Moreover, the history of Article 16 of the CAT suggests that it was intended to leave the door open to other legal instruments providing greater protection, not to serve as the means for reducing protection. During the deliberations of the Working Group that drafted the CAT, Article 16 was characterized as a "saving clause affirming the continued validity of other instruments prohibiting punishments or cruel, inhuman, or degrading treatment": Convention against Torture, travaux préparatoires, UN Doc. E/CN.4/1408, at p. 66. This undermines the suggestion that Article 16 can be used as a means of narrowing the scope of protection that the CAT was intended to provide.

72 In our view, the prohibition in the ICCPR and the CAT on returning a refugee to face a risk of torture

reflects the prevailing international norm. Article 33 of the *Refugee Convention* protects, in a limited way, refugees from threats to life and freedom from all sources. By contrast, the CAT protects everyone, without derogation, from state-sponsored torture. Moreover, the *Refugee Convention* itself expresses a "profound concern for refugees" and its principal purpose is to "assure refugees the widest possible exercise of . . . fundamental rights and freedoms" (Preamble). This negates the suggestion that the provisions of the *Refugee Convention* should be used to deny rights that other legal instruments make universally available to everyone.

73 Recognition of the dominant status of the CAT in international law is consistent with the position taken by the UN Committee against Torture, which has applied Article 3(1) even to individuals who have terrorist associations. (The CAT provides for the creation of a Committee against Torture to monitor compliance with the treaty: see CAT, Part II, Articles 17-24.) More particularly, the Committee against Torture has advised that Canada should "[c]omply fully with article 3(1) . . . whether or not the individual is a serious criminal or security risk": see Committee against Torture, *Conclusions and Recommendations of the Committee against Torture: Canada*, UN Doc. CAT/C/XXV/Concl.4, at para. 6(a).

74 Finally, we note that the Supreme Court of Israel sitting as the High Court of Justice and the House of Lords have rejected torture as a legitimate tool to use in combatting terrorism and protecting national security: H.C. 6536/95, *Hat'm Abu Zayda v. Israel General Security Service*, 38 I.L.M. 1471 (1999); *Rehman*, *supra*, at para. 54, *per* Lord Hoffmann.

75 We conclude that the better view is that international law rejects deportation to torture, even where national security interests are at stake. This is the norm which best informs the content of the principles of fundamental justice under s. 7 of the *Charter*.

(iii) *Application to Section 53(1)(b) of the Immigration Act*

76 The Canadian rejection of torture is reflected in the international conventions to which Canada is a party. The Canadian and international perspectives in turn inform our constitutional norms. The rejection of state action leading to torture generally, and deportation to torture specifically, is virtually categoric. Indeed, both domestic and international jurisprudence suggest that torture is so abhorrent that it will almost always be disproportionate to interests on the other side of the balance, even security interests. This suggests that, barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*. To paraphrase Lord Hoffmann in *Rehman*, *supra*, at para. 54, states must find some other way of ensuring national security.

77 The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman*, *supra*, at para. 56, *per* Lord Hoffmann:

> The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.

Similarly, Lord Slynn of Hadley stated, at para. 16:

> Whether there is . . . a real possibility [of an adverse effect on the U.K. even if it is not direct or immediate] is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to th[e] individual if a deportation order is made.

In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture.

78 We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1. (A violation of s. 7 will be saved by s. 1 "only in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like": see *Re B.C. Motor Vehicle Act*, *supra*, at p. 518; and *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 99.) Insofar as Canada is unable to deport a person where there are substantial grounds to believe he or she would be tortured on return, this is not because Article 3 of the CAT directly constrains the actions of the Canadian government, but because the fundamental justice balance under s. 7 of the *Charter* generally precludes deportation to torture when applied on a case-by-case basis. We may predict that it will rarely be struck in favour of expulsion where there is a serious risk of torture. However, as the matter is one of balance, precise prediction is elusive. The ambit of an exceptional discretion to deport to torture, if any, must await future cases.

79 In these circumstances, s. 53(1)(*b*) does not violate s. 7 of the *Charter*. What is at issue is not the legislation, but the Minister's obligation to exercise the discretion s. 53 confers in a constitutional manner.

(b) *Are the Terms "Danger to the Security of Canada" and "Terrorism" Unconstitutionally Vague?*

(i) *"Danger to the Security of Canada"*

80 In order to deny the benefit of s. 53(1) to a person seeking its protection, the Minister must certify that the person constitutes a "danger to the security of Canada". Suresh argues that this phrase is unconstitutionally vague.

81 A vague law may be unconstitutional for either of two reasons: (1) because it fails to give those who might come within the ambit of the provision fair notice of the consequences of their conduct; or (2) because it fails to adequately limit law enforcement discretion: see *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606. In the same case, this Court held that "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate" (p. 643).

82 Robertson J.A. found that the phrase "danger to the security of Canada", which is not defined in the *Immigration Act*, is not unconstitutionally vague (paras. 56-64). He conceded that the phrase was imprecise but reasoned that whether a person poses a danger to the security of Canada could be determined by "the individual's degree of association or complicity with a terrorist organization" (para. 63). The government similarly argues that the phrase is not unconstitutionally vague; it contends that the phrase "refer[s] to the possibility that someone's presence is harmful to national security in terms of the inadmissible classes" listed in s. 19 and referred to in s. 53. It suggests that the phrase can be "interpreted in the light of international law as a whole" and submits that the security of Canada is dependent on the security of other countries. On this interpretation, it need not be shown that the person's presence in Canada poses a risk here. All that need be shown is that deportation may have a result that, viewed generally, enhances the security of Canada.

83 We agree with the government and Robertson J.A. that the phrase "danger to the security of Canada" is not unconstitutionally vague. However, we do not interpret the phrase exactly as he or the government suggests. We would not conflate s. 19's reference to membership in a terrorist movement with "danger to the security of Canada". While the two may be related, "danger to the security of Canada", in our view, must mean

something more than just "person described in s. 19".

84 We would also, contrary to the government's submission, distinguish "danger to the security of Canada" from "danger to the public", although we recognize that the two phrases may overlap. The latter phrase clearly is intended to address threats to individuals in Canada, but its application is restricted by requiring that any individual who is declared to be a "danger to the public" have been convicted of a serious offence: *Immigration Act*, s. 53(1)(*a*), (*c*), and (*d*). The government's suggested reading of "danger to the security of Canada" effectively does an end-run around the requirement in Article 33(2) of the *Refugee Convention* that no one may be returned (*refoulé*) as a danger to the community of the country unless he has first been convicted by a final judgment of a particularly serious crime.

85 Subject to these qualifications, we accept that a fair, large and liberal interpretation in accordance with international norms must be accorded to "danger to the security of Canada" in deportation legislation. We recognize that "danger to the security of Canada" is difficult to define. We also accept that the determination of what constitutes a "danger to the security of Canada" is highly fact-based and political in a general sense. All this suggests a broad and flexible approach to national security and, as discussed above, a deferential standard of judicial review. Provided the Minister is able to show evidence that reasonably supports a finding of danger to the security of Canada, courts should not interfere with the Minister's decision.

86 The question arises whether the Minister must present direct evidence of a specific danger to the security of Canada. It has been argued that under international law the state must prove a connection between the terrorist activity and the security of the deporting country: Hathaway and Harvey, *supra*, at pp. 289-90. It has also been suggested that the *travaux préparatoires* to the *Refugee Convention* indicate that threats to the security of another state were not intended to qualify as a danger sufficient to permit *refoulement* to torture. Threats to the security of another state were arguably not intended to come within the term, nor were general concerns about terrorism intended to be sufficient: see *Refugee Convention*, *travaux préparatoires*, UN Doc. A/CONF.2/SR.16, at p. 8 ("Among the great mass of refugees it was inevitable that some persons should be tempted to engage in activities on behalf of a foreign Power against the country of their asylum, and it would be unreasonable to expect the latter not to safeguard itself against such a contingency"); see A. Grahl-Madsen, *Commentary on the Refugee Convention, 1951* (1997), at p. 236 ("'[T]he security of the country' is invoked against acts of a rather serious nature endangering directly or indirectly the constitution (Government), the territorial integrity, the independence or the external peace of the country concerned").

87 Whatever the historic validity of insisting on direct proof of specific danger to the deporting country, as matters have evolved, we believe courts may now conclude that the support of terrorism abroad raises a possibility of adverse repercussions on Canada's security: see *Rehman*, *supra*, *per* Lord Slynn of Hadley, at paras. 16-17. International conventions must be interpreted in the light of current conditions. It may once have made sense to suggest that terrorism in one country did not necessarily implicate other countries. But after the year 2001, that approach is no longer valid.

88 First, the global transport and money networks that feed terrorism abroad have the potential to touch all countries, including Canada, and to thus implicate them

in the terrorist activity. Second, terrorism itself is a worldwide phenomenon. The terrorist cause may focus on a distant locale, but the violent acts that support it may be close at hand. Third, preventive or precautionary state action may be justified; not only an immediate threat but also possible future risks must be considered. Fourth, Canada's national security may be promoted by reciprocal cooperation between Canada and other states in combating international terrorism. These considerations lead us to conclude that to insist on direct proof of a specific threat to Canada as the test for "danger to the security of Canada" is to set the bar too high. There must be a real and serious possibility of adverse effect to Canada. But the threat need not be direct; rather it may be grounded in distant events that indirectly have a real possibility of harming Canadian security.

89 While the phrase "danger to the security of Canada" must be interpreted flexibly, and while courts need not insist on direct proof that the danger targets Canada specifically, the fact remains that to return (*refouler*) a refugee under s. 53(1)(*b*) to torture requires evidence of a serious threat to national security. To suggest that something less than serious threats founded on evidence would suffice to deport a refugee to torture would be to condone unconstitutional application of the *Immigration Act*. Insofar as possible, statutes must be interpreted to conform to the Constitution. This supports the conclusion that while "danger to the security of Canada" must be given a fair, large and liberal interpretation, it nevertheless demands proof of a potentially serious threat.

90 These considerations lead us to conclude that a person constitutes a "danger to the security of Canada" if he or she poses a serious threat to the security of Canada, whether direct or indirect, and bearing in mind the fact that the security of one country is often dependent on the security of other nations. The threat must be "serious", in the sense that it must be grounded on objectively reasonable suspicion based on evidence and in the sense that the threatened harm must be substantial rather than negligible.

91 This definition of "danger to the security of Canada" does not mean that Canada is unable to deport those who pose a risk to individual Canadians, but not the country. A different provision, the "danger to the public" provision, allows the government to deport those who pose no danger to the security of the country *per se* — those who pose a danger to Canadians, as opposed to a danger to Canada — provided they have committed a serious crime. Moreover, if a refugee is wanted for crimes in a country that will not torture him or her on return, the government may be free to extradite him or her to face those charges, whether or not he or she has committed crimes in Canada.

92 We are satisfied that the term "danger to the security of Canada", defined as here suggested, gives those who might come within the ambit of the provision fair notice of the consequences of their conduct, while adequately limiting law enforcement discretion. We hold, therefore, that the term is not unconstitutionally vague.

(ii) *"Terrorism"*

93 The term "terrorism" is found in s. 19 of the *Immigration Act*, dealing with denial of refugee status upon arrival in Canada. The Minister interpreted s. 19 as applying to terrorist acts post-admission and relied on alleged terrorist associations in Canada in seeking Suresh's deportation under s. 53(1)(*b*), which refers to a class of persons falling under s. 19. We do not in these reasons seek to define terrorism exhaustively — a notoriously difficult endeavour — but content ourselves with finding that the term provides a sufficient basis for adjudication and hence is not unconstitutionally vague. We share the view of Robertson J.A. that the term is not inherently ambiguous "even if the full meaning . . . must be determined on an incremental basis" (para. 69).

94 One searches in vain for an authoritative definition of "terrorism". The *Immigration Act* does not define the term. Further, there is no single definition that is accepted internationally. The absence of an authoritative definition means that, at least at the margins, "the term is open to politicized manipulation, conjecture, and polemical interpretation": factum of the intervener Canadian Arab Federation ("CAF"), at para. 8; see also W. R. Farrell, *The U.S. Government Response to Terrorism: In Search of an Effective Strategy* (1982), at p. 6 ("The term [terrorism] is somewhat 'Humpty Dumpty' — anything we choose it to be"); O. Schachter, "The Extraterritorial Use of Force Against Terrorist Bases" (1989), 11 *Houston J. Int'l L.* 309, at p. 309 ("[n]o single inclusive definition of international terrorism has been accepted by the United Nations or in a generally accepted multilateral treaty"); G. Levitt, "Is 'Terrorism' Worth Defining?" (1986), 13 *Ohio N.U. L. Rev.* 97, at p. 97 ("The search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail"); C. C. Joyner, "Offshore Maritime Terrorism: International Implications and the Legal Response" (1983), 36 *Naval War C. Rev.* 16, at p. 20 (terrorism's "exact status under international law remains open to conjecture and polemical

interpretation"); and J. B. Bell, *A Time of Terror: How Democratic Societies Respond to Revolutionary Violence* (1978), at p. x ("The very word [terrorism] becomes a litmus test for dearly held beliefs, so that a brief conversation on terrorist matters with almost anyone reveals a special world view, an interpretation of the nature of man, and a glimpse into a desired future.")

95 Even amongst those who agree on the definition of the term, there is considerable disagreement as to whom the term should be attached: see, e.g., I. M. Porras, "On Terrorism: Reflections on Violence and the Outlaw" (1994), *Utah L. Rev.* 119, at p. 124 (noting the general view that "terrorism" is poorly defined but stating that "[w]ith 'terrorism' . . . everyone means the same thing. What changes is not the meaning of the word, but rather the groups and activities that each person would include or exclude from the list"); D. Kash, "Abductions of Terrorists in International Airspace and on the High Seas" (1993), 8 *Fla. J. Int'l L.* 65, at p. 72 ("[A]n act that one state considers terrorism, another may consider as a valid exercise of resistance"). Perhaps the most striking example of the politicized nature of the term is that Nelson Mandela's African National Congress was, during the apartheid era, routinely labelled a terrorist organization, not only by the South African government but by much of the international community.

96 We are not persuaded, however, that the term "terrorism" is so unsettled that it cannot set the proper boundaries of legal adjudication. The recently negotiated *International Convention for the Suppression of the Financing of Terrorism*, GA Res. 54/109, December 9, 1999, approaches the definitional problem in two ways. First, it employs a functional definition in Article 2(1)(*a*), defining "terrorism" as "[a]n act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex". The annex lists nine treaties that are commonly viewed as relating to terrorist acts, such as the *Convention for the Suppression of the Unlawful Seizure of Aircraft*, Can. T.S. 1972 No. 23, the *Convention on the Physical Protection of Nuclear Material*, 18 I.L.M. 1419, and the *International Convention for the Suppression of Terrorist Bombings*, 37 I.L.M. 249. Second, the Convention supplements this offence-based list with a stipulative definition of terrorism. Article 2(1)(*b*) defines "terrorism" as:

> Any . . . act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

97 In its submission to this Court, the CAF argued that this Court should adopt a functional definition of terrorism, rather than a stipulative one. The argument is that defining terrorism by reference to specific acts of violence (e.g. "hijacking, hostage taking and terrorist bombing") would minimize politicization of the term (CAF factum, at paras. 11-14). It is true that the functional approach has received strong support from international law scholars and state representatives — support that is evidenced by the numerous international legal instruments that eschew stipulative definitions in favour of prohibitions on specific acts of violence. While we are not unaware of the danger that the term "terrorism" may be manipulated, we are not persuaded that it is necessary or advisable to altogether eschew a stipulative definition of the term in favour of a list that may change over time and that may in the end necessitate distinguishing some (proscribed) acts from other (non-proscribed) acts by reliance on a term like "terrorism". (We note that the CAF, in listing acts, at para. 11, that might be prohibited under a functional definition, lists "terrorist bombing" — a category that clearly would not avoid the necessity of defining "terrorism".)

98 In our view, it may safely be concluded, following the *International Convention for the Suppression of the Financing of Terrorism*, that "terrorism" in s. 19 of the Act includes any "act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act". This definition catches the essence of what the world understands by "terrorism". Particular cases on the fringes of terrorist activity will inevitably provoke disagreement. Parliament is not prevented from adopting more detailed or different definitions

of terrorism. The issue here is whether the term as used in the *Immigration Act* is sufficiently certain to be workable, fair and constitutional. We believe that it is.

(iii) *Conclusion*

99 We conclude that the terms "danger to the security of Canada" and "terrorism" are not unconstitutionally vague. Applying them to the facts found in this case, they would *prima facie* permit the deportation of Suresh provided the Minister certifies him to be a substantial danger to Canada and provided he is found to be engaged in terrorism or a member of a terrorist organization as set out in s. 19(1)(*e*) and (*f*) of the *Immigration Act*.

(c) *Does Deportation for Membership in a Terrorist Organization Unjustifiably Violate the Charter Guarantees of Freedom of Expression and Freedom of Association?*

100 Suresh argues that the Minister's issuance of the certificate under s. 40.1 of the *Immigration Act* and the order declaring him a danger to the security of Canada under s. 53(1)(*b*) on the ground that he was a member of the LTTE violate his *Charter* rights of free expression and free association and cannot be justified. He points out that he has not been involved in actual terrorist activity in Canada, but merely in fund-raising and support activities that may, in some part, contribute to the civil war efforts of Tamils in Sri Lanka. He also points out that it is not a criminal offence to belong to such an organization and that the government seeks to deport him for something that Canadian citizens may lawfully do without sanction. He suggests that inclusion of mere membership in an organization that has been or will be involved in acts of terrorism unjustifiably limits the freedom of Convention refugees to express their views on dissident movements outside the country, as well as their freedom to associate with other people in Canada who come from similar backgrounds. He points out that the alleged terrorist organizations he was found to have been a member of are engaged in many positive endeavours to improve the lives of people in Canada and are not involved in violence here.

101 The government, for its part, argues that support of organizations that have engaged in or may assist terrorism is not constitutionally protected expression or association. It argues that constitutional rights cannot be extended to inflict harm on others. This is so, in the government's submission, even though many of the activities of the organization may be laudable. Accordingly, it says, ss. 2(*b*) and 2(*d*) of the *Charter* do not apply.

102 Section 19 of the *Immigration Act* applies to the entry of refugees into Canada. The *Refugee Convention*, and following it the *Immigration Act*, distinguish between the power of a state to refuse entry to a refugee, and its power to deport or "*refouler*" the refugee once the refugee is established in the country as a Convention refugee. The powers of a state to refuse entry are broader than to deport. The broader powers to refuse entry are based *inter alia* on the need to prevent criminals escaping justice in their own country from entering into Canada. No doubt the natural desire of states to reject unsuitable persons who by their conduct have put themselves "beyond the pale" also is a factor. See, generally, Hathaway and Harvey, *supra*.

103 The main purport of s. 19(1) is to permit Canada to refuse entry to persons who are or have been engaged in terrorism or who are or have been members of terrorist organizations. However, the *Immigration Act* uses s. 19(1) in a second and different way. It uses it in s. 53(1), the deportation section, to define the class of Convention refugees who may be deported because they constitute a danger to the security of Canada. Thus a Convention refugee like Suresh may be deported if he comes within a class of persons defined in s. 19(1) and constitutes a danger to the security of Canada.

104 At this point, an ambiguity in the combination of ss. 53 and 19 arises. Is the class of persons designated by the reference to s. 19 those persons who at entry were or had been associated with terrorist acts

or members of terrorist organizations? Or was Parliament's intention to include those who after entry committed terrorist acts or were members of terrorist organizations? The Minister interprets s. 19, as incorporated into s. 53, as including conduct of refugees after entry.

105 We do not find it necessary to resolve this ambiguity, as in our opinion on either interpretation, s. 19 as incorporated into s. 53 does not breach the rights of free expression and association guaranteed by ss. 2(*b*) and 2(*d*) of the *Charter*. If s. 19, as used in s. 53, is interpreted as referring only to conduct prior to the point of entry, no constitutional problem arises. On the other hand, if it is interpreted as referring to post-entry conduct, we are satisfied that the conduct caught by the section, interpreted properly by the Minister, fails to attract constitutional protection because it would be conduct associated with violent activity.

106 Section 53, as discussed earlier in connection with deportation to face torture, requires the Minister to balance a variety of factors relating on the one hand to concerns of national security, and to fair process to the Convention refugee on the other. In balancing these factors, the Minister must exercise her discretion in conformity with the values of the *Charter*.

107 It is established that s. 2 of the *Charter* does not protect expressive or associational activities that constitute violence: *Keegstra*, *supra*. This Court has, it is true, given a broad interpretation to freedom of expression, extending it, for example, to hate speech and perhaps even threats of violence: *Keegstra*; *R. v. Zundel*, 1992 CanLII 75 (SCC), [1992] 2 S.C.R. 731. At the same time, the Court has made plain that the restriction of such expression may be justified under s. 1 of the *Charter*: see *Keegstra*, at pp. 732-33. The effect of s. 2(*b*) and the justification analysis under s. 1 of the *Charter* suggest that expression taking the form of violence or terror, or directed towards violence or terror, is unlikely to find shelter in the guarantees of the *Charter*.

108 The Minister's discretion to deport under s. 53 of the *Immigration Act* is confined, on any interpretation of the section, to persons who have been engaged in terrorism or are members of terrorist organizations, and who also pose a threat to the security of Canada. Persons associated with terrorism or terrorist organizations — the focus of this argument — are, on the approach to terrorism suggested above, persons who are or have been associated with things directed at violence, if not violence itself. It follows that so long as the Minister exercises her discretion in accordance with the Act, there will be no ss. 2(*b*) or (*d*) *Charter* violation.

109 Suresh argues that s. 19 is so broadly drafted that it has the potential to catch persons who are members of or participate in the activities of a terrorist organization in ignorance of its terrorist activities. He points out that many organizations alleged to support terrorism also support humanitarian aid both in Canada and abroad. Indeed, he argues that this is so of the LTTE, the association to which he is alleged to belong. While it seems clear on the evidence that Suresh was not ignorant of the LTTE's terrorist activities, he argues that it may be otherwise for others who were members or contributed to its activities. Thus without knowingly advocating terrorism and violence, they may be found to be part of the organization and hence subject to deportation. This, he argues, would clearly violate ss. 2(*b*) and 2(*d*) of the *Charter*.

110 We believe that it was not the intention of Parliament to include in the s. 19 class of suspect persons those who innocently contribute to or become members of terrorist organizations. This is supported by the provision found at the end of s. 19, which exempts from the s. 19 classes "persons who have satisfied the Minister that their admission would not be detrimental to the national interest". Section 19 must therefore be read as permitting a refugee to establish that his or her continued residence in Canada will not be detrimental to Canada, notwithstanding proof that the person is associated with or is a member of a terrorist organization. This permits a refugee to establish that the alleged association with the terrorist group was innocent. In such case, the Minister, exercising her discretion constitutionally, would find that the refugee does not fall within the targeted s. 19 class

of persons eligible for deportation on national security grounds.

111 It follows that the appellant has not established that s. 53's reference to s. 19 unjustifiably violates his *Charter* rights of freedom of expression and freedom of association. Moreover, since there is no s. 2 violation, there is no basis to interfere with the s. 40.1 certificate that was issued in October 1995.

112 This brings us to Suresh's final argument, that the process by which the Minister assessed the risk of torture he faces should he be returned to Sri Lanka was flawed and violated his constitutional rights by unjustly exposing him to the risk of torture.

3. Are the Procedures for Deportation Set Out in the *Immigration Act* Constitutionally Valid?

113 This appeal requires us to determine the procedural protections to which an individual is entitled under s. 7 of the *Charter*. In doing so, we find it helpful to consider the common law approach to procedural fairness articulated by L'Heureux-Dubé J. in *Baker*, *supra*. In elaborating what is required by way of procedural protection under s. 7 of the *Charter* in cases of this kind, we wish to emphasize that our proposals should be applied in a manner sensitive to the context of specific factual situations. What is important are the basic principles underlying these procedural protections. The principles of fundamental justice of which s. 7 speaks, though not identical to the duty of fairness elucidated in *Baker*, are the same principles underlying that duty. As Professor Hogg has said, "The common law rules [of procedural fairness] are in fact basic tenets of the legal system, and they have evolved in response to the same values and objectives as s. 7": see P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.) vol. 2, at para. 44.20. In *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at pp. 212-13, Wilson J. recognized that the principles of fundamental justice demand, at a minimum, compliance with the common law requirements of procedural fairness. Section 7 protects substantive as well as procedural rights: *Re B.C. Motor Vehicle Act*, *supra*. Insofar as procedural rights are concerned, the common law doctrine summarized in *Baker*, *supra*, properly recognizes the ingredients of fundamental justice.

114 We therefore find it appropriate to look to the factors discussed in *Baker* in determining not only whether the common law duty of fairness has been met, but also in deciding whether the safeguards provided satisfy the demands of s. 7. In saying this, we emphasize that, as is the case for the substantive aspects of s. 7 in connection with deportation to torture, we look to the common law factors not as an end in themselves, but to inform the s. 7 procedural analysis. At the end of the day, the common law is not constitutionalized; it is used to inform the constitutional principles that apply to this case.

115 What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, 1990 CanLII 31 (SCC), [1990] 3 S.C.R. 1170, *per* Sopinka J. More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27. This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.

116 The nature of the decision to deport bears some resemblance to judicial proceedings. While the

decision is of a serious nature and made by an individual on the basis of evaluating and weighing risks, it is also a decision to which discretion must attach. The Minister must evaluate not only the past actions of and present dangers to an individual under her consideration pursuant to s. 53, but also the future behaviour of that individual. We conclude that the nature of the decision militates neither in favour of particularly strong, nor particularly weak, procedural safeguards.

117 The nature of the statutory scheme suggests the need for strong procedural safeguards. While the procedures set up under s. 40.1 of the *Immigration Act* are extensive and aim to ensure that certificates under that section are issued fairly and allow for meaningful participation by the person involved, there is a disturbing lack of parity between these protections and the lack of protections under s. 53(1)(*b*). In the latter case, there is no provision for a hearing, no requirement of written or oral reasons, no right of appeal — no procedures at all, in fact. As L'Heureux-Dubé J. stated in *Baker*, *supra*, "[g]reater procedural protections . . . will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted" (para. 24). This is particularly so where, as here, Parliament elsewhere in the Act has constructed fair and systematic procedures for similar measures.

118 The third factor requires us to consider the importance of the right affected. As discussed above, the appellant's interest in remaining in Canada is highly significant, not only because of his status as a Convention refugee, but also because of the risk of torture he may face on return to Sri Lanka as a member of the LTTE. The greater the effect on the life of the individual by the decision, the greater the need for procedural protections to meet the common law duty of fairness and the requirements of fundamental justice under s. 7 of the *Charter*. Deportation from Canada engages serious personal, financial and emotional consequences. It follows that this factor militates in favour of heightened procedural protections under s. 53(1)(*b*). Where, as here, a person subject to a s. 53(1)(*b*) opinion may be subjected to torture, this factor requires even more substantial protections.

119 As discussed above, Article 3 of the CAT, which explicitly prohibits the deportation of persons to states where there are "substantial grounds" for believing that the person would be "in danger of being subjected to torture", informs s. 7 of the *Charter*. It is only reasonable that the same executive that bound itself to the CAT intends to act in accordance with the CAT's plain meaning. Given Canada's commitment to the CAT, we find that the appellant had the right to procedural safeguards, at the s. 53(1)(*b*) stage of the proceedings. More particularly, the phrase "substantial grounds" raises a duty to afford an opportunity to demonstrate and defend those grounds.

120 The final factor we consider is the choice of procedures made by the agency. In this case, the Minister is free under the terms of the statute to choose whatever procedures she wishes in making a s. 53(1)(*b*) decision. As noted above, the Minister must be allowed considerable discretion in evaluating future risk and security concerns. This factor also suggests a degree of deference to the Minister's choice of procedures since Parliament has signaled the difficulty of the decision by leaving to the Minister the choice of how best to make it. At the same time, this need for deference must be reconciled with the elevated level of procedural protections mandated by the serious situation of refugees like Suresh, who if deported may face torture and violations of human rights in which Canada can neither constitutionally, nor under its international treaty obligations, be complicit.

121 Weighing these factors together with all the circumstances, we are of the opinion that the procedural protections required by s. 7 in this case do not extend to the level of requiring the Minister to conduct a full oral hearing or a complete judicial process. However, they require more than the procedure required by the Act under s. 53(1)(*b*) — that is, none — and they require more than Suresh received.

122 We find that a person facing deportation to torture under s. 53(1)(*b*) must be informed of the case to be met. Subject to privilege or similar valid reasons for reduced disclosure, such as safeguarding confidential public security documents, this means that the material on which the Minister is basing her decision must be provided to the individual, including memoranda such as Mr. Gautier's recommendation to the Minister. Furthermore, fundamental justice requires that an opportunity be provided to respond to the case presented to the Minister. While the Minister accepted written submissions from the appellant in this case, in the absence of access to the material she was receiving from her staff and on which she based much of her decision, Suresh and his counsel had no knowledge of which factors they specifically needed to address, nor any chance to correct any factual inaccuracies or mischaracterizations. Fundamental justice requires that written submissions be accepted from the subject of the order after the subject has been provided with an opportunity to examine the material being used against him or her. The Minister must then consider these submissions along with the submissions made by the Minister's staff.

123 Not only must the refugee be informed of the case to be met, the refugee must also be given an opportunity to challenge the information of the Minister where issues as to its validity arise. Thus the refugee should be permitted to present evidence pursuant to s. 19 of the Act showing that his or her continued presence in Canada will not be detrimental to Canada, notwithstanding evidence of association with a terrorist organization. The same applies to the risk of torture on return. Where the Minister is relying on written assurances from a foreign government that a person would not be tortured, the refugee must be given an opportunity to present evidence and make submissions as to the value of such assurances.

124 It may be useful to comment further on assurances. A distinction may be drawn between assurances given by a state that it will not apply the death penalty (through a legal process) and assurances by a state that it will not resort to torture (an illegal process). We would signal the difficulty in relying too heavily on assurances by a state that it will refrain from torture in the future when it has engaged in illegal torture or allowed others to do so on its territory in the past. This difficulty becomes acute in cases where torture is inflicted not only with the collusion but through the impotence of the state in controlling the behaviour of its officials. Hence the need to distinguish between assurances regarding the death penalty and assurances regarding torture. The former are easier to monitor and generally more reliable than the latter.

125 In evaluating assurances by a foreign government, the Minister may also wish to take into account the human rights record of the government giving the assurances, the government's record in complying with its assurances, and the capacity of the government to fulfill the assurances, particularly where there is doubt about the government's ability to control its security forces. In addition, it must be remembered that before becoming a Convention refugee, the individual involved must establish a well-founded fear of persecution (although not necessarily torture) if deported.

126 The Minister must provide written reasons for her decision. These reasons must articulate and rationally sustain a finding that there are no substantial grounds to believe that the individual who is the subject of a s. 53(1)(*b*) declaration will be subjected to torture, execution or other cruel or unusual treatment, so long as the person under consideration has raised those arguments. The reasons must also articulate why, subject to privilege or valid legal reasons for not disclosing detailed information, the Minister believes the individual to be a danger to the security of Canada as required by the Act. In addition, the reasons must also emanate from the person making the decision, in this case the Minister, rather than take the form of advice or suggestion, such as the memorandum of Mr. Gautier. Mr. Gautier's report, explaining to the Minister the position of Citizenship and Immigration Canada, is more like a prosecutor's brief than a statement of reasons for a decision.

127 These procedural protections need not be invoked in every case, as not every case of deportation of a Convention refugee under s. 53(1)(*b*) will involve risk to an individual's fundamental right to be protected from torture or similar abuses. It is for the refugee to establish a threshold showing that a risk of torture or similar abuse exists before the Minister is obliged to consider fully the possibility. This showing need not be proof of the

risk of torture to that person, but the individual must make out a *prima facie* case that there may be a risk of torture upon deportation. If the refugee establishes that torture is a real possibility, the Minister must provide the refugee with all the relevant information and advice she intends to rely on, provide the refugee an opportunity to address that evidence in writing, and after considering all the relevant information, issue responsive written reasons. This is the minimum required to meet the duty of fairness and fulfill the requirements of fundamental justice under s. 7 of the *Charter*.

128 The Minister argues that even if the procedures used violated Suresh's s. 7 rights, that violation is justified as a reasonable limit under s. 1 of the *Charter*. Despite the legitimate purpose of s. 53(1)(*b*) of the *Immigration Act* in striking a balance between the need to fulfil Canada's commitments with respect to refugees and the maintenance of the safety and good order of Canadian society, the lack of basic procedural protections provided to Suresh cannot be justified by s. 1 in our view. Valid objectives do not, without more, suffice to justify limitations on rights. The limitations must be connected to the objective and be proportional. Here the connection is lacking. A valid purpose for excepting some Convention refugees from the protection of s. 53(1) of the Act does not justify the failure of the Minister to provide fair procedures where this exception involves a risk of torture upon deportation. Nor do the alleged fundraising activities of Suresh rise to the level of exceptional conditions contemplated by Lamer J. in *Re B.C. Motor Vehicle Act*, *supra*. Consequently, the issuance of a s. 53(1)(*b*) opinion relating to him without the procedural protections mandated by s. 7 is not justified under s. 1.

4. Should the Minister's Order Be Set Aside and a New Hearing Ordered?

129 We conclude that generally to deport a refugee, where there are grounds to believe that this would subject the refugee to a substantial risk of torture, would unconstitutionally violate the *Charter*'s s. 7 guarantee of life, liberty and security of the person. This said, we leave open the possibility that in an exceptional case such deportation might be justified either in the balancing approach under ss. 7 or 1 of the *Charter*. We reject the argument that the terms "danger to the security of Canada" and "terrorism" are unconstitutionally vague. We also reject the argument that s. 53, by its reference to s. 19, unconstitutionally violates the *Charter* guarantees of freedom of expression and association. Finally, we conclude that the procedures for deportation under the *Immigration Act*, when applied in accordance with the safeguards outlined in these reasons, are constitutional.

130 Applying these conclusions in the instant case, we find that Suresh made a *prima facie* showing that he might be tortured on return if expelled to Sri Lanka. Accordingly, he should have been provided with the procedural safeguards necessary to protect his s. 7 right not to be expelled to torture. He was not provided the required safeguards. We therefore remand the case to the Minister for reconsideration in accordance with the procedures set out in these reasons.

V. Conclusion

131 The appeal is allowed with costs throughout on a party and party basis. The constitutional questions are answered as follows:

1. Does s. 53(1)(*b*) of the *Immigration Act*, R.S.C. 1985, c. I-2, offend s. 7 of the *Canadian Charter of Rights and Freedoms* to the extent that it does not prohibit the Minister of Citizenship and Immigration from removing a person from Canada to a country where the person may face a risk of torture?

   Answer: No.

2. If the answer to question 1 is in the affirmative, is s. 53(1)(*b*) of the *Immigration Act* a reasonable limit within the meaning of s. 1 of the *Charter* on the rights of a person who may face a risk of torture if removed to a particular country?

Answer: It is not necessary to answer this question.

3. Do ss. 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) of the *Immigration Act* infringe the freedoms guaranteed under ss. 2(*b*) and 2(*d*) of the *Charter*?

Answer: Section 19(1) of the *Immigration Act*, as incorporated by s. 53(1), does not infringe ss. 2(*b*) and 2(*d*) of the *Charter*.

4. If the answer to question 3 is in the affirmative, are ss. 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

5. Is the term "danger to the security of Canada" found in s. 53(1)(*b*) of the *Immigration Act* and/or the term "terrorism" found in s. 19(1)(*e*) and (*f*) of the *Immigration Act* void for vagueness and therefore contrary to the principles of fundamental justice under s. 7 of the *Charter*?

Answer: No.

6. If the answer to question 5 is in the affirmative, are ss. 53(1)(*b*) and/or s. 19(1)(*e*) and (*f*) of the *Immigration Act* a reasonable limit on the rights of a person within the meaning of s. 1 of the *Charter*?

Answer: It is not necessary to answer this question.

Appeal allowed with costs.

Solicitors for the appellant: Jackman, Waldman & Associates, Toronto.

Solicitor for the respondents: The Department of Justice, Toronto.

Solicitors for the intervener the United Nations High Commissioner for Refugees: Torys, Toronto.

Solicitors for the intervener Amnesty International: Wiseman, Battista, Toronto.

Solicitor for the intervener the Canadian Arab Federation: The Test Case Centre, Toronto.

Solicitor for the intervener the Canadian Council for Refugees: Refugee Law Office, Toronto.

Solicitor for the intervener the Federation of Associations of Canadian Tamils: Jamie Cameron, Toronto.

Solicitor for the intervener the Centre for Constitutional Rights: David Cole, Washington, D.C.

Solicitor for the intervener the Canadian Bar Association: David Matas, Winnipeg.

Solicitors for the intervener the Canadian Council of Churches: Ruby & Edwardh, Toronto.

17	*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62

Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62 (CanLII), [2014] 3 SCR 176

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File number:	35034
Other citations:	244 ACWS (3d) 695 — [2014] SCJ No 62 (QL) — JE 2014-1781 — 320 CRR (2d) 269 — 83 Admin LR (5th) 1 — [2014] EXP 3112 — 375 DLR (4th) 519 — 463 NR 1
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Most recent unfavourable mention:	Nevsun Resources Ltd. v. Araya, 2020 SCC 5 (CanLII) [...] **Distinguished:** Kazemi Estate v. Islamic Republic of Iran, 2014 SCC 62 , [2014] 3 S.C.R. 176; considered: Belhaj v. Straw, [2017] UKSC 3, [2017] A.C. 964 ; Blad v. Bamfield (1674), 3 Swans. 604, 36 E.R. 992 ; Duke of Brunswick v. King of Hanover (1848), 2 H.L.C. 1, 9 E.R. 993 ; Yukos Capital sarl v. OJSC Rosneft Oil Co. (No. [...]

SUPREME COURT OF CANADA

CITATION: Kazemi Estate *v.* Islamic Republic of Iran,
2014 SCC 62, [2014] 3 S.C.R. 176

DATE: 20141010
DOCKET: 35034

BETWEEN:

Estate of the Late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi
Appellants
and
Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi, Mohammad Bakhshi and Attorney General of Canada
Respondents
- and -
Canadian Lawyers for International Human Rights, Amnistie internationale, Section Canada francophone, Redress Trust Ltd., Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Centre for International Justice, David Asper Centre for Constitutional Rights, International Human Rights Program at the University of Toronto Faculty of Law and Iran Human Rights Documentation Center
Interveners

CORAM: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

REASONS FOR JUDGMENT: (paras. 1 to 171)	LeBel J. (McLachlin C.J. and Rothstein, Cromwell, Moldaver and Karakatsanis JJ. concurring)
DISSENTING REASONS (paras. 172 to 231)	Abella J.

Estate of the Late Zahra (Ziba) Kazemi and Stephan (Salman) Hashemi *Appellants*

v.

Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi, Mohammad Bakhshi and Attorney General of Canada *Respondents*

and

Canadian Lawyers for International Human Rights, Amnistie internationale, Section Canada francophone, Redress Trust Ltd., Canadian Association of Refugee Lawyers, British Columbia Civil Liberties Association, Canadian Bar Association, Canadian Civil Liberties Association, Canadian Centre for International Justice, David Asper Centre for Constitutional Rights, International Human Rights Program at the University of Toronto Faculty of Law and Iran Human Rights Documentation Center *Interveners*

Indexed as: Kazemi Estate *v.* Islamic Republic of Iran

2014 SCC 62

File No.: 35034.

2014: March 18; 2014: October 10.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Public international law — Sovereign immunity — Civil proceedings initiated in Quebec against Iran, Iranian head of state and two state officials in relation to alleged torture and death of Canadian citizen in Iran — Whether proceedings are barred, in whole or in part, by application of State Immunity Act — Whether international law requires State Immunity Act to be interpreted to include exception in cases of torture — Whether immunity extends to foreign public officials acting in their official capacity — Whether torture may constitute an official act of a state — State Immunity Act, R.S.C. 1985, c. S-18, s. 3(1).

Constitutional law — Charter of Rights — Bill of Rights — Right to security of person — Right to a fair hearing — Sovereign immunity — Civil proceedings initiated in Quebec against Iran, Iranian head of state and two state officials in relation to alleged torture and death of Canadian citizen in Iran — Proceedings barred by application of s. 3(1) of State Immunity Act — Whether s. 3(1) of State Immunity Act inconsistent with s. 2(e) of Bill of Rights or infringes s. 7 of Charter — State Immunity Act, R.S.C. 1985, c. S-18, s. 3(1) — Canadian Bill of Rights, R.S.C. 1985, App. III, s. 2(e) — Canadian Charter of Rights and Freedoms, s. 7.

K, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist. She was arrested, detained and interrogated by Iranian authorities. During her detention, she was beaten, sexually assaulted and tortured. She later died as the result of a brain injury sustained while in the custody of Iranian officials. Despite requests made by K's son, H, that her remains be sent to Canada for burial, she was buried in Iran. Although a report commissioned by the Iranian government linked members of the judiciary and the Office of the Prosecutor to K's torture, only one individual was tried. That person was acquitted following a trial marked by a lack of transparency. In short, it was impossible for K and her family to obtain justice in Iran.

In 2006, H instituted civil proceedings in Quebec seeking damages on behalf of himself and his mother's estate against the Islamic Republic of Iran, its head of state, the Chief Public Prosecutor of Tehran and the former Deputy Chief of Intelligence of the prison where K was detained and tortured. H sought damages on behalf of K's estate for her physical, psychological, and emotional pain and suffering as well as damages for the psychological and emotional prejudice that he sustained as the result of the loss of his mother. Both H and the estate also sought punitive damages. The Iranian defendants brought a motion in Quebec Superior Court to dismiss the action on the basis of state immunity. In response, H and K's estate raised certain exceptions provided in the *State Immunity Act* ("*SIA*"), and challenged the constitutionality of certain provisions of that Act.

The Quebec Superior Court dismissed the constitutional challenge to the *SIA*, allowed the defendants' motion to dismiss the action with respect to the claim brought by K's estate but dismissed the motion with respect to the recourse sought by H personally. The court held that the *SIA* exhaustively captures the law of state immunity and that there are no unwritten exceptions to state immunity at common law, in international law, or in international treaties that would allow the claims to proceed. However, it found that H's personal action could potentially fall within a statutory exception to state immunity applicable to proceedings relating to personal injury that occurs in Canada. The Quebec Court of Appeal dismissed the estate's appeal and allowed the Iranian defendants' appeal with respect to H's claim.

At issue in this appeal is whether the Islamic Republic of Iran, its head of state and the individuals who allegedly detained, tortured and killed K in Iran are entitled to immunity by operation of the *SIA*. The resolution of that issue rests on the scope of the *SIA*, the impact that the evolution of international law since the *SIA*'s adoption might have on its interpretation, and whether the Act is constitutional. An overarching question, which permeates almost all aspects of this appeal, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture, which would require Canada to open its courts to the claims of victims of acts of torture that were committed abroad. Moreover, this Court is asked to determine whether torture may constitute an official act of a state and whether public officials having committed acts of torture can benefit from immunity.

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

Per McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.: Neither H nor K's estate may avail themselves of a Canadian court in order to sue Iran or its functionaries for the torture that K endured. Furthermore, the challenges brought by the appellants based on s. 2(*e*) of the *Canadian Bill of Rights* and s. 7 of the *Charter* should be dismissed.

State immunity is not solely a rule of international law, it also reflects domestic choices made for policy reasons, particularly in matters of international relations. Canada's commitment to the universal prohibition of torture is strong. However, Parliament has made a choice to give priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. That policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote.

In Canada, state immunity from civil suits is codified in the *SIA*. That Act is a complete codification of Canadian law as it relates to state immunity from civil proceedings. It provides an exhaustive list of exceptions to state immunity and it does not contain an exception to immunity from civil suits alleging acts of torture committed

abroad. For that reason, reliance need not, and indeed cannot, be placed on the common law, *jus cogens* norms or customary international law to carve out additional exceptions to the immunity granted to foreign states pursuant to the *SIA*. Although there is no doubt that the prohibition of torture has reached the level of a peremptory norm, the current state of customary international law regarding redress for victims of torture does not alter the *SIA*, nor does it render it ambiguous.

H seeks to avail himself of the "personal or bodily injury" exception to state immunity set out at s. 6(*a*) of the *SIA*. If H's psychological suffering is captured by the personal injury exception to state immunity set out at s. 6(*a*), his claim would be allowed to proceed. However, when the words of s. 6(*a*) are examined in conjunction with the purpose of the Act, it becomes apparent that the exception applies only where the tort causing the personal injury or death has occurred in Canada. It does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada. Accordingly, H's claim is barred by the *SIA* because the alleged tort did not "occur in Canada". His claim is also barred by the *SIA* on the further ground that the "personal or bodily injury" exception does not apply where the injury allegedly suffered by the plaintiff does not stem from a physical breach of personal integrity. Only when psychological distress manifests itself after a physical injury will the exception to state immunity be triggered. In the present case, H did not plead any kind of physical harm nor did he claim to have suffered an injury to his physical integrity.

A further issue to be determined is whether the respondents M and B are immune from legal action by operation of the *SIA*. Section 3(1) of the *SIA* provides that a "foreign state" is immune from the jurisdiction of any court in Canada. The definition of "foreign state" at s. 2 of the *SIA* includes a reference to the term "government". The absence of an explicit reference to "public officials" in the *SIA* requires that the term "government" be interpreted in context and against the backdrop of international law. Following such an exercise, it becomes clear that public officials must be included in the meaning of "government" as it is used in the *SIA*. States are abstract entities that can only act through individuals. Excluding public officials from the meaning of government would completely thwart the purposes of the *SIA*, as allowing civil claims against individual public officials would require Canadian courts to scrutinize other states' decision-making as carried out by their public officials. Accordingly, public officials, being necessary instruments of the state, are included in the term "government" as used in the *SIA*. However, those public officials will only benefit from state immunity when acting in their official capacity.

The acts of torture allegedly committed by M and B have all the bearings of official acts, and no suggestion was made that either of these public officials were acting in their personal capacity or in a way that was unconnected to their roles as state functionaries. The heinous nature of these acts of torture does not transform the actions of M and B into private acts, undertaken outside of their official capacity. By definition, torture is necessarily an official act of the state. It is the state-sanctioned or official nature of torture that makes it such a despicable crime. There continues to be very strong support for the conclusion that immunity from civil suits extends to public officials engaging in acts of torture, and it is not yet possible to conclude that either a consistent state practice or *opinio juris* to the contrary effect exists. As a result, given that M and B were public officials acting in their official capacity, they are captured by the term "government" found at s. 2 of the *SIA*. By virtue of that statute, they are immune from the jurisdiction of Canadian courts.

Parliament has given no indication whatsoever that Canadian courts are to deem torture an "unofficial act" and that a universal civil jurisdiction has been created allowing foreign officials to be sued in our courts. Creating this kind of jurisdiction would have potentially considerable impact on Canada's international relations. This decision is to be made by Parliament, not the courts.

The *SIA* withstands constitutional scrutiny despite the fact that it prevents H and his mother's estate from suing Iran or its functionaries in Canada for the torture that K endured. The challenge brought by the appellants based on s. 2(*e*) of the *Bill of Rights* should be dismissed as that provision is not engaged in the present case. Section 2(*e*) guarantees fairness in the context of proceedings before a Canadian court or a tribunal. It does not create a self-standing right to a fair hearing where the law does not allow for an adjudicative process. Accordingly, in order to engage s. 2(*e*), a court or tribunal must properly have jurisdiction over a matter. As previously discussed, the existence of state immunity means that no jurisdiction exists in Canada to adjudicate the appellants' claims.

Similarly, the appellants' challenge of the *SIA* pursuant to s. 7 of the *Charter* must fail. Insofar as it prevents victims of torture or their next of kin from finding closure by seeking civil redress, it is arguable that s. 3(1) of the *SIA* might cause such serious psychological prejudice that the security of the person is engaged and

violated. However, it is not necessary to decide whether s. 3(1) of the *SIA* engages the security of the person interest under s. 7 of the *Charter* because that provision of the *SIA* does not violate any principles of fundamental justice.

Not all commitments in international agreements amount to principles of fundamental justice. When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate. The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system. Although the appellants argue that art. 14 of the *Convention Against Torture* requires Canada to ensure that a civil remedy be available to victims of torture committed in foreign countries and allege that this obligation is a principle of fundamental justice within the meaning of s. 7, they have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation. There appears to be no consensus that art. 14 should be interpreted in the manner the appellants suggest. In fact, the language of art. 14 as well as the interpretation of that provision by some party states and by international and domestic judicial authorities support a conclusion that art. 14 ensures redress and compensation for torture committed within the forum state's own territorial jurisdiction.

While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate and is also very likely a principle of fundamental justice, the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad. At this point in time, state practice and *opinio juris* do not suggest that Canada is obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice.

In conclusion, the *SIA*, in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada. Consequently, a foreign state and its functionaries cannot be sued in Canadian courts for acts of torture committed abroad. This conclusion does not, however, freeze state immunity in time. Parliament has the power and the capacity to change the current state of the law on exceptions to state immunity, just as it has done in the past, and to allow those in situations like H and his mother's estate to seek redress in Canadian courts.

Per Abella J. (dissenting): The doctrine of sovereign immunity is not entirely codified under the *State Immunity Act*. The only individuals expressly included in the definition of a "foreign state" are "any sovereign or other head of the foreign state . . . while acting as such in a public capacity". There is no reference to public officials apart from heads of state. That silence creates an ambiguity as to whether the *State Immunity Act* applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law and the significant development of the principle of reparation under public international law.

The prohibition on torture is a peremptory norm — *jus cogens* — under international law. That means that the international community has agreed that the prohibition cannot be derogated from by any state. The question then is how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture? This poses challenges for the integrity of international law and leaves this Court with a choice about whether to extend immunity to foreign officials for such acts.

Under international law generally, the protection for and treatment of individuals as legal subjects has evolved dramatically. With that evolving protection has come the recognition of a victim's right to redress for a violation of fundamental human rights. The claims for civil damages brought by K's estate and her son H are founded on Canada's and Iran's obligations under international human rights law and the *jus cogens* prohibition against torture. These claims must be situated in the context of the significant development of the principle of reparation under public international law throughout the twentieth century. At its most fundamental, the principle of reparation means that when the legal rights of an individual are violated, the wrongdoer owes redress to the victim for harm suffered. The aim of the principle of reparation is restorative.

While early international criminal proceedings did little to recognize victims' rights, several international courts now recognize victims' rights to reparation against individual perpetrators of international crimes. This shift is, in part, the result of the recognition of the principle of reparation as a general principle of international law in the enabling treaties and statutes of these courts. The treatment of immunity for civil claims should not be different from that for criminal proceedings.

The development and international acceptance of the principle of reparation demonstrates that an individual's right to a remedy against a state for violations of his or her human rights is now a recognized principle of international law. There is also growing acceptance that *jus cogens* violations such as torture do not constitute "official acts" justifying immunity for individual state officials.

The purpose of the *Convention Against Torture* is consistent with a broad obligation to protect victims' rights to remedies for torture regardless of where it occurred. The *Convention* established a shared commitment to "make more effective the struggle against torture . . . throughout the world". On a plain reading, Article 14 imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain "redress and ha[ve] an enforceable right to fair and adequate compensation". The text provides no indication that the "act of torture" must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture.

In the face of the universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition, necessarily shrink. The very nature of the prohibition as a peremptory norm means that all states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of immunity *ratione materiae*.

Under customary international law, there is a distinction between the blanket immunity *ratione personae* of high-ranking individuals such as the head of state, and the immunity *ratione materiae* for former heads of state and lower-ranking officials which applies only in respect of official acts performed for or on behalf of the state. These doctrines recognize the unique role and responsibility of heads of state. At present, state practice reveals a palpable, albeit slow trend in the international jurisprudence to recognize that torture, as a violation of a peremptory norm, does not constitute officially sanctioned state conduct for the purposes of immunity *ratione materiae*.

In light of the equivocal state of the customary international law of immunity, the long-standing international acceptance of the principle of reparation manifested in Article 14 of the *Convention Against Torture*, and almost a century of increasing international recognition that human rights violations threaten global peace and stability, there is no reason to include torture in the category of official state conduct attracting individual immunity. Equivocal customary international law should not be interpreted so as to block access to a civil remedy for what is unequivocally prohibited.

The *State Immunity Act* therefore does not apply to M and B. They are not immune from the jurisdiction of Canadian courts and the claims against them should be allowed to proceed.

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By LeBel J.

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APPEAL from a judgment of the Quebec Court of Appeal (Morissette, Wagner and Gascon JJ.A.), 2012 QCCA 1449, [2012] R.J.Q. 1567, 265 C.R.R. (2d) 265, 354 D.L.R. (4th) 385, [2012] AZ-50886272, [2012] Q.J. No. 7754 (QL), 2012 CarswellQue 8098, reversing in part a decision of Mongeon J., 2011 QCCS 196, 330 D.L.R. (4th) 1, 227 C.R.R. (2d) 233, [2011] AZ-50714217, [2011] Q.J. No. 412 (QL), 2011 CarswellQue 488. Appeal dismissed, Abella J. dissenting.

Kurt A. Johnson, *Mathieu Bouchard*, *Audrey Boctor* and *David Grossman*, for the appellants.

No one appeared for the respondents the Islamic Republic of Iran, Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi.

Bernard Letarte and *René LeBlanc*, for the respondent the Attorney General of Canada.

Christopher D. Bredt and *Heather Pessione*, for the *amicus curiae*.

Jill Copeland and *Emma Phillips*, for the intervener the Canadian Lawyers for International Human Rights.

François Larocque and *Alyssa Tomkins*, for the intervener Amnistie internationale, Section Canada francophone.

Written submissions only by *Azim Hussain*, *Rahool P. Agarwal* and *Maureen R. A. Edwards*, for the intervener Redress Trust Ltd.

Written submissions only by *Daniel Sheppard* and *Tamara Morgenthau*, for the intervener the Canadian Association of Refugee Lawyers.

Michael Sobkin, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *David Matas*, *Monique Pongracic-Speier* and *Noemi Gal-Or*, for the intervener the Canadian Bar Association.

Christopher A. Wayland and *Simon Chamberland*, for the intervener the Canadian Civil Liberties Association.

John Terry and *Sarah Shody*, for the intervener the Canadian Centre for International Justice.

John Norris and *Carmen Cheung*, for the interveners the David Asper Centre for Constitutional Rights and the International Human Rights Program at the University of Toronto Faculty of Law.

Babak Barin and *Payam Akhavan*, for the intervener the Iran Human Rights Documentation Center.

The judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell, Moldaver and Karakatsanis JJ. was delivered by

LeBel J. —

I. Introduction

[1] The death of Ms. Zahra Kazemi in Iran was nothing short of a tragedy. In an attempt to seek relief and redress, Ms. Kazemi's son and only child, Stephan Hashemi, instituted an action for damages on behalf of himself and his mother's estate against the Islamic Republic of Iran, its head of state, and two of its government officials. Mr. Hashemi and his mother's estate have appealed to this Court for a ruling that those who allegedly detained, tortured and killed Ms. Kazemi not be entitled to immunity by operation of the *State Immunity Act*, R.S.C. 1985, c. S-18 ("*SIA*" or "Act"), in order that their underlying claims be allowed to proceed.

[2] Despite the tragic fate of Ms. Kazemi, the current state of the law does not allow the appellants to sue the respondents for damages in a Canadian court. Foreign states, as well as their heads of state and public officials, are immune from civil suit in Canada except as expressly provided in the *SIA*. The *SIA* does not withdraw immunity in cases alleging acts of torture committed abroad. Put differently, the Parliament of Canada has chosen to embrace principles of comity and state sovereignty over the interests of individuals wishing to sue a foreign state in Canadian courts for acts of torture committed abroad. I conclude that this choice is not contrary to international law, the *Canadian Bill of Rights*, R.S.C. 1985, App. III ("*Bill of Rights*"), or the *Canadian Charter of Rights and Freedoms*. Accordingly, I would dismiss the appeal.

II. Facts

[3] The facts, taken as true in the court of first instance, are horrific.

[4] Zahra Kazemi, a Canadian citizen, visited Iran in 2003 as a freelance photographer and journalist. On or about June 23, 2003, Ms. Kazemi went to take photographs of individuals protesting against the arrest and detention of their family members outside the Evin prison in Tehran. During that time, Ms. Kazemi was

ordered arrested and detained by Mr. Mortazavi, Tehran's Chief Public Prosecutor. She was detained in the very prison that she was photographing.

[5] During her time in custody, Ms. Kazemi was not permitted to contact counsel, the Canadian embassy, or her family. She was interrogated by Iranian authorities. She was beaten. She was sexually assaulted. She was tortured.

[6] Eventually, some time prior to July 6, 2003, Ms. Kazemi was taken from the prison and transferred to a hospital in Tehran. She was unconscious upon her arrival. She had suffered a brain injury. Other injuries included a fractured nose, a crushed eardrum, strip-like wounds on her back and the back of her legs, fractured bones and broken nails on her hands and toes, and extensive trauma on and around her genital area.

[7] While Ms. Kazemi was in hospital, no attempt was made by the Iranian authorities to notify Canadian consulate officials or Ms. Kazemi's family members of her condition. Even after Ms. Kazemi's mother, a resident of Iran, was unofficially informed that her daughter was in hospital, she was largely forbidden from having contact with her. However, with the knowledge that her daughter was hospitalized, Ms. Kazemi's mother and other members of her family in Iran began to contact Canadian consular officials and Ms. Kazemi's son.

[8] On or about July 10, 2003, Canadian officials visited the hospital in which Ms. Kazemi was receiving care. Doctors informed these officials that Ms. Kazemi was medically brain dead and had no expectation of recovery. During this time, Ms. Kazemi's son and mother attempted to obtain independent medical assistance for Ms. Kazemi and to arrange for her transport to Canada for further treatment. Despite their wishes, the medical staff at the hospital removed Ms. Kazemi from life support and pronounced her dead. On July 12, the Iranian government officially announced Ms. Kazemi's death through the Islamic Republic News Agency. A later report confirmed that Ms. Kazemi had died as a result of sustaining a blow to the head while in custody.

[9] After her death, the Iranian government ordered an autopsy. In doing so, the government did not consult with Ms. Kazemi's family. Further, officials did not release the results of the autopsy to Ms. Kazemi's family or Canadian officials. Following the autopsy, Ms. Kazemi was buried in Iran, despite her son's requests that her remains be sent to Canada for burial.

[10] In late July, the Iranian government commissioned an investigation into Ms. Kazemi's death. Despite a report linking members of the judiciary and the Office of the Prosecutor to Ms. Kazemi's torture and subsequent death, only one individual, Mr. Reza Ahmadi, was tried. The trial was marked by a lack of transparency. Mr. Ahmadi was acquitted. In short, it was impossible for Ms. Kazemi and her family to obtain justice in Iran.

[11] In June 2006, Mr. Hashemi moved to institute proceedings in the Superior Court of the Province of Quebec on his own behalf and in his capacity as liquidator for the estate of his mother. Mr. Hashemi brought proceedings against (1) the Islamic Republic of Iran, (2) Iran's head of state, the Ayatollah Sayyid Ali Khamenei, (3) Saeed Mortazavi, the Chief Public Prosecutor of Tehran, and (4) Mohammad Bakhshi, the former Deputy Chief of Intelligence of the Evin Prison. The action sought: (a) $5,000,000 for the estate of the late Zahra Kazemi as a result of her physical, psychological, and emotional pain and suffering, plus $5,000,000 in punitive damages, and (b) $5,000,000 for the psychological and emotional prejudice caused to Mr. Hashemi personally by the loss of his mother, plus $2,000,000 in punitive damages.

[12] The defendants, named as respondents in this appeal, brought a motion to dismiss the action on the basis of state immunity. The defendants appointed counsel and took part in the litigation in the Superior Court and in the Court of Appeal in order to argue the absence of jurisdiction of Canadian courts. They were not represented in the appeal to this Court.

[13] Mr. Hashemi and Ms. Kazemi's estate responded to the motion to dismiss both by raising exceptions provided in the *SIA* and by challenging the constitutionality of certain provisions of the *SIA*.

[14] The motion to institute proceedings, the motion to dismiss, and the matter of the constitutionality of the Act were decided by Mongeon J. of the Quebec Superior Court on January 25, 2011.

III. Relevant Statutory Provisions

[15] As was the case before the lower courts, the constitutionality of ss. 3 and 6 of the *SIA* is at issue in this appeal. The following provisions are relevant to this appeal:

State Immunity Act, R.S.C. 1985, c. S-18

2. In this Act,

. . .

"foreign state" includes

(*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,

(*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and

(*c*) any political subdivision of the foreign state;

. . .

3. (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

(2) In any proceedings before a court, the court shall give effect to the immunity conferred on a foreign state by subsection (1) notwithstanding that the state has failed to take any step in the proceedings.

. . .

5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.

6. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to

(*a*) any death or personal or bodily injury, or

(*b*) any damage to or loss of property

that occurs in Canada.

IV. Judicial History

A. *Quebec Superior Court, 2011 QCCS 196, 330 D.L.R. (4th) 1*

[16] In the Superior Court, Mongeon J. addressed four main issues:

(1) Are there any unwritten exceptions to state immunity which might allow the plaintiffs' action to proceed?

(2) Assuming that the *SIA* is constitutionally valid, can the plaintiffs invoke the exception to immunity under s. 6(*a*) of the *SIA*?

(3) Does the *SIA*, assuming that it is constitutionally valid, grant immunity to the defendants Mr. Mortazavi and Mr. Bakhshi?

(4) If the claim cannot proceed against all the defendants, are the barring provisions of the *SIA* constitutionally valid?

[17] In response to the first issue, Mongeon J. concluded that the *SIA* exhaustively captures the law of state immunity. In his view, all of the legal principles surrounding state immunity, and all of the exceptions to state immunity, are expressly contained in the Act (para. 48). In Mongeon J.'s opinion, based on current case law and the wording of the *SIA*, no unwritten exceptions to state immunity at common law, in international law, or in international treaties would allow the plaintiffs' claims to proceed.

[18] With regard to the exception to immunity found in s. 6(*a*) of the *SIA*, Mongeon J. drew a distinction between the claim of Ms. Kazemi's estate and her son's claim. While the bodily injuries of Ms. Kazemi were suffered in Iran, Mr. Hashemi suffered his injuries in Canada. As a result, Mongeon J. held that Ms. Kazemi's estate could not raise the exception to state immunity under s. 6(*a*). However, he concluded that Mr. Hashemi's personal action could potentially fall within that exception. Relying on *Schreiber v. Canada (Attorney General)*, 2002 SCC 62, [2002] 3 S.C.R. 269, Mongeon J. acknowledged that mental distress could be considered a "personal . . . injury" within the meaning of the Act if the alleged injury manifested itself physically. In Mongeon J.'s view, if Mr. Hashemi could prove that the psychological trauma he suffered affected his physical integrity, or was equivalent to "nervous shock", the exception set out at s. 6(*a*) would apply and the defendants would be deprived of immunity (para. 92). As a result, Mongeon J. was not prepared to summarily dismiss Mr. Hashemi's case against the defendants.

[19] Next, Mongeon J. considered whether the *SIA* grants immunity to the individual defendants Saeed Mortazavi and Mohammad Bakhshi. He addressed the issue of whether "employees of the state acting in their capacity as employees" were included in the statutory definition of "foreign state" (para. 105). In his view, granting immunity to a governmental department, yet withholding immunity from its functionaries, "would render the *State Immunity Act* ineffective and inoperative" (para. 112). Mongeon J. concluded that the immunity provisions of the *SIA* should apply to the individual defendants regardless of the nature of the acts they are alleged to have committed.

[20] Finally, Mongeon J. addressed the constitutionality of the *SIA*. In particular, he considered whether s. 3(1) of the *SIA* contravenes ss. 2(*e*) and 2(*a*) of the *Canadian Bill of Rights* and ss. 7 and 9 of the *Charter*.

[21] Mongeon J. concluded that s. 2(*e*) of the *Bill of Rights* does not create a right to recourse where the law does not otherwise provide for such recourse. Rather, in his view, s. 2(*e*) merely ensures that when a hearing procedure is foreseen, it will be conducted fairly before an administrative body or tribunal. Having found that the plaintiffs did not have the right to sue a foreign authority except as provided by the exceptions of the *SIA*, Mongeon J. held that s. 2(*e*) did not assist them.

[22] Mongeon J. also determined that the plaintiffs' claim under s. 2(*a*) of the *Bill of Rights* had no merit. In his view, the *SIA* did not "authorize" Ms. Kazemi's detention. The *SIA* only prevents the plaintiffs from claiming damages in Canada in the aftermath of such detention.

[23] Mongeon J. then went on to consider the *Charter*. In his view, the causal connection between the plaintiffs' suffering and the action of the Canadian government was insufficient. He found that the application of the *SIA* did not cause the breach of Mr. Hashemi's or Ms. Kazemi's s. 7 *Charter* rights.

[24] In the result, Mongeon J. allowed the defendants' motion to dismiss the action with respect to the estate of Ms. Kazemi but dismissed the motion with respect to the recourse sought by Mr. Hashemi personally.

B. *Quebec Court of Appeal, 2012 QCCA 1449, [2012] R.J.Q. 1567*

[25] The Quebec Court of Appeal dismissed the appeal of the estate of Ms. Kazemi and allowed the defendants' appeal with respect to Mr. Hashemi's claim. Morissette J.A., writing for a unanimous court, addressed the same issues as those determined by Mongeon J.

[26] Morissette J.A. rejected the argument made by Mr. Hashemi and the estate that the language of the *SIA* is ambiguous because current customary international law, which has evolved subsequent to the enactment of the statute, recognizes exceptions to state immunity that are not included in the Act (para. 40). In the view of Morissette J.A., the language of the statute was clear and unambiguous: the only exceptions to state immunity recognized in Canada are those that are explicitly set out in the *SIA* (para. 42). Further, relying on the recent case of *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, I.C.J. Reports 2012, p. 99 ("*Germany v. Italy*"), before the International Court of Justice ("I.C.J."), Morissette J.A. confirmed that there is no rule of customary international law which overrides state immunity for serious international crimes, even when there are no alternative means for securing redress (para. 55). Finally, on this issue, Morissette J.A. added that art. 14 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85 ("*CAT*") and the Committee against Torture's interpretation of that article offered no assistance to the appellants. In his view, art. 14 was largely ambiguous, and the Committee against Torture's interpretation of the article did not have the force of law (paras. 57-59).

[27] Morissette J.A. made two further conclusions pertaining to s. 6(*a*) of the *SIA*. First, he rejected the argument that, for the exception in s. 6 to apply, the tortious act causing the injury must necessarily have occurred in Canada. Rather, the s. 6 exception could apply where the acts causing the injury had taken place in a foreign state but where the injury manifests itself in Canada. However, Morissette J.A. ultimately found that s. 6(*a*) was of no assistance to Mr. Hashemi because that section requires the claimant to have suffered "a breach of physical integrity, not simply psychological or psychic integrity" (para. 82 (emphasis deleted)). Mr. Hashemi suffered no such injury.

[28] Next, Morissette J.A. considered whether the defendants Mr. Mortazavi and Mr. Bakhshi should benefit from state immunity. In his view, Mongeon J. was correct in concluding that "individual agents of a foreign state" are granted immunity by the Act (para. 93). He also rejected the argument that the treatment of Ms. Kazemi at the hands of the foreign officials was so egregious that those actions could not fall under the umbrella of "official activity" which attracts immunity (para. 97). In his view, the concept of torture itself necessarily involves the acquiescence or direction of those in an official capacity or position of authority.

[29] Morissette J.A. then went on to consider the constitutionality of the *SIA*. At the Court of Appeal, Mr. Hashemi and the estate challenged the constitutionality of s. 3(1) of the *SIA* only in relation to s. 2(*e*) of the *Bill of Rights* and s. 7 of the *Charter*. Morissette J.A. rejected their *Bill of Rights* argument, confirming as Mongeon J. had before him, that s. 2(*e*) does not "creat[e] a self-standing right to a fair hearing" (para. 109). Morissette J.A. similarly dismissed the s. 7 argument, determining that an alleged violation of the "liberty interest" claimed by Mr. Hashemi (the ability to bring a civil suit against Iran in the forum of his choice) did not render s. 3(1) of the *SIA* unconstitutional. In his view, there was no s. 7 violation (para. 120).

[30] Mr. Hashemi and Ms. Kazemi's estate appealed the decision of the Quebec Court of Appeal to this Court. Although named as respondents, the Islamic Republic of Iran, the Ayatollah Sayyid Ali Khamenei, Saeed Mortazavi and Mohammad Bakhshi did not present written or oral arguments. The Attorney General of Canada was represented at the appeal but presented argument only on some of the issues. *Amicus curiae* was appointed to address issues raised by the appellants on which the Attorney General of Canada took no position.

V. Issues

[31] The following constitutional questions were stated:

(1) Is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?

(2) If so, is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inoperable by reason of such inconsistency?

(3) Does s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

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

[32] The answers to those questions can be found in the interpretation of the *SIA*. Essentially, the Court is being asked to determine the scope of the *SIA*, the impact that the evolution of international law since the *SIA*'s adoption might have on its interpretation, and whether the Act is constitutional. An overarching question, which permeates almost all aspects of this case, is whether international law has created a mandatory universal civil jurisdiction in respect of claims of torture which would require states to open their national courts to the claims of victims of acts of torture that were committed outside their national boundaries.

[33] For clarity, I have broken the case down into five core issues:

(1) Is s. 3(1) of the *SIA* a complete codification of state immunity from civil suits in Canada? Does international law render s. 3(1) ambiguous or otherwise require it to be interpreted to implicitly include an exception to state immunity in cases of torture?

(2) Does the exception to state immunity set out at s. 6(*a*) of the *SIA* apply to Mr. Hashemi's claim?

(3) Are the respondents Mr. Mortazavi and Mr. Bakhshi entitled to immunity by virtue of the *SIA*?

(4) If there is no exception for torture in the *SIA*, is s. 3(1) of that Act inconsistent with s. 2(*e*) of the *Bill of Rights*? If so, is s. 3(1) inoperable by reason of such inconsistency?

(5) If there is no exception for torture in the *SIA*, does s. 3(1) of that Act infringe s. 7 of the *Charter*? If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Charter*?

VI. Analysis

A. *Background*

(1) State or Sovereign Immunity

[34] Functionally speaking, state immunity is a "procedural bar" which stops domestic courts from exercising jurisdiction over foreign states (J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 365; H. Fox and P. Webb, *The Law of State Immunity* (3rd ed. 2013), at pp. 38-39; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at para. 60; *Germany v. Italy*, at para. 58). In this sense, state immunity operates to prohibit national courts from weighing the merits of a claim against a foreign state or its agents (Fox and Webb, at p. 82; F. Larocque, *Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (2010), at pp. 236-37).

[35] Conceptually speaking, state immunity remains one of the organizing principles between independent states (*R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 43). It ensures that individual nations and the international order remain faithful to the principles of sovereignty and equality (Larocque, *Civil Actions for Uncivilized Acts*, at p. 236; C. Emanuelli, *Droit international public: Contribution à l'étude du droit international selon une perspective canadienne* (3rd ed. 2010), at p. 294). Sovereignty guarantees a state's ability to exercise authority over persons and events within its territory without undue external interference. Equality, in international law, is the recognition that no one state is above another in the international order (*Schreiber*, at para. 13). The law of state immunity is a manifestation of these principles (*Hape*, at paras. 40-44; Fox and Webb, at pp. 25 and 76; *Germany v. Italy*, at para. 57).

[36] Beyond sovereign equality, other justifications for state immunity are grounded in the political realities of international relations in an imperfect world. One justification is that because it is "practical[ly] impossib[le]" to enforce domestic judgments against foreign states, domestic courts are not truly in a position to adjudicate claims in the first place (Fox and Webb, at p. 31). In this sense, it is counterproductive for a court to

review the decisions of foreign states when doing so risks rupturing international relations without providing much hope of a remedy (*ibid.*; C. Forcese, "De-immunizing Torture: Reconciling Human Rights and State Immunity" (2007), 52 *McGill L.J.* 127, at pp. 133-34).

[37] Two other justifications for state immunity are comity and reciprocity (Forcese, at p. 135; *Al-Adsani v. United Kingdom* (2001), 34 E.H.R.R. 273, at para. 54). Just as foreign states do not want to have their executive, legislative or public actions called into judgment in Canadian courts, so too Canada would prefer to avoid having to defend its actions and policies before foreign courts.

[38] State immunity plays a large role in international relations and has emerged as a general rule of customary international law (*Jones v. United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014, at para. 89; Fox and Webb, at p. 2). To be considered customary international law, a rule must be supported by state practice as well as *opinio juris*, an understanding on the part of states that the rule is obligatory as a matter of international law: *Hape*, at para. 46; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 14, at para. 207. The I.C.J. has confirmed that the principle of state immunity meets both of these requirements (*Germany v. Italy*, at paras. 55-56). Given the presence of both state practice and *opinio juris*, it is now settled and unequivocal that immunity is more than a courtesy; it has a firm place in the international legal landscape (Fox and Webb, at p. 2).

[39] The content of state immunity has evolved over time. In its earliest incarnation, state immunity was understood to be a complete and absolute bar on the ability of one state to subject another to any scrutiny (Fox and Webb, at p. 26). This absolute prohibition is thought to have derived from the historical personal imperviousness of "monarchs and their representatives" (Larocque, *Civilized Actions for Uncivilized Acts*, at p. 238). Over time, this immunity was transferred to the nation state as the head of state came to embody the state itself (*ibid.*). Any subjection of a foreign state to domestic courts was seen as incompatible with sovereign equality (J. H. Currie, C. Forcese, J. Harrington and V. Oosterveld, *International Law: Doctrine, Practice and Theory* (2nd ed. 2014), at pp. 539-41; *Re Canada Labour Code*, 1992 CanLII 54 (SCC), [1992] 2 S.C.R. 50, at p. 71).

[40] In the wake of the Second World War, the idea that a state and its officials could be immune from criminal proceedings appeared particularly incongruous in view of the atrocities that had been committed. The Nuremberg International Military Tribunal, in particular through art. 8 of its Charter, 82 U.N.T.S. 279, laid the foundations for a new approach to restricting state immunity in criminal proceedings. That approach has been evolving ever since.

[41] In parallel, the complete bar on bringing civil proceedings against a foreign state in domestic courts has also gradually relaxed. State immunity, once referred to as absolute immunity, slowly came to be qualified as "restrictive" immunity (Currie, Forcese, Harrington and Oosterveld, at p. 541). This transition was in part due to the greater role that states began to play in commercial and financial matters, and is reflected in the well-known distinction between the *acta imperii* of a state (acts of a governmental nature) and its *acta gestionis* (acts of a commercial nature) (Currie, at pp. 371-73; P. Ranganathan "Survivors of Torture, Victims of Law: Reforming State Immunity in Canada by Developing Exceptions for Terrorism and Torture" (2008), 71 *Sask. L. Rev.* 343, at p. 350). As the international community began to accept that not all acts or decisions of states were quintessentially "sovereign" or "public" in nature, but that, at times, states behaved as "private" actors, the idea of an absolute bar on suing a foreign state became obsolete (Larocque, *Civil Actions for Uncivilized Acts*, at pp. 239-41; Currie, Forcese, Harrington and Oosterveld, at p. 541; Fox and Webb, at p. 32). Many states, including Canada, have legislated this version of restrictive immunity through a commercial activity exception to state immunity (*SIA*, s. 5; *Re Canada Labour Code*, at p. 73; *Schreiber*, at para. 33; *Kuwait Airways Corp. v. Iraq*, 2010 SCC 40, [2010] 2 S.C.R. 571, at paras. 13-17).

[42] In Canada, state immunity from civil suits is codified in the *SIA*. The purposes of the Act largely mirror the purpose of the doctrine in international law: the upholding of sovereign equality. The "cornerstone" of the Act is found in s. 3 which confirms that foreign states are immune from the jurisdiction of our domestic courts "[e]xcept as provided by th[e] Act" (*Bouzari v. Islamic Republic of Iran* (2004), 2004 CanLII 871 (ON CA), 71 O.R. (3d) 675 (C.A.), at para. 42; *SIA*, s. 3). Significantly, the *SIA* does not apply to criminal proceedings, suggesting that Parliament was satisfied that the common law with respect to state immunity should continue governing that area of the law (*SIA*, s. 18).

[43] When enacting the *SIA*, Parliament recognized a number of exceptions to the broad scope of state immunity. Besides the commercial activity exception, canvassed above, Canada has chosen to include exceptions to immunity in situations where a foreign state waives such right, as well as for cases involving: death, bodily injury, or damage to property occurring in Canada; maritime matters; and foreign state property in Canada (*SIA*, ss. 4, 6, 7 and 8; Currie, at pp. 395-400; Emanuelli, at pp. 346-49; J.-M. Arbour and G. Parent, *Droit international public* (6th ed. 2012), at pp. 500-8.3).

[44] In 2012, Parliament amended the *SIA* to include an additional exception to state immunity for certain foreign states that have supported terrorist activity (Arbour and Parent, at pp. 508.1-8.3). Under this new legislative regime, a foreign state may be sued in Canada if (1) the act that the state committed took place on or after January 1, 1985 and (2) the foreign state accused of supporting terrorism is included on a list created by the Governor in Council (*SIA*, s. 6.1; Library of Parliament, *Legislative Summary of Bill C-10* (2012), at s. 2.2.2.1). Although no argument concerning the nature or constitutionality of the terrorism exception was advanced before this Court, it is nonetheless relevant to the case at hand. If nothing else, it reveals that Parliament can and does take active steps to address, and in this case pre-empt, emergent international challenges (Ranganathan, at p. 386), thereby reinforcing the conclusion, discussed below, that the *SIA* is intended to be an exhaustive codification of Canadian law of state immunity in civil suits. I also note in passing, with all due caution, that when the terrorism exception bill was before Parliament, it was criticized on numerous occasions for failing to create an exception to state immunity for civil proceedings involving allegations of torture, genocide and other grave crimes (*Legislative Summary of Bill C-10*, s. 2.1.4). Indeed, Private Member Bill C-483 proposed to create such an exception but it never became law. More broadly, the amendment to the *SIA* brought by Parliament in 2012 demonstrates that forum states (i.e. states providing jurisdiction) have a large and continuing role to play in determining the scope and extent of state immunity.

[45] It follows that state immunity is not solely a rule of customary international law. It also reflects domestic choices made for policy reasons, particularly in matters of international relations. As Fox and Webb note, although immunity as a general rule is recognized by international law, the "precise extent and manner of [the] application" of state immunity is determined by forum states (p. 17). In Canada, therefore, it is first towards Parliament that one must turn when ascertaining the contours of state immunity.

(2) Torture

[46] As discussed below, in drafting the *SIA*, Canada has made a choice to uphold state immunity as the oil that allows for the smooth functioning of the machinery of international relations. Canada has given priority to a foreign state's immunity over civil redress for citizens who have been tortured abroad. This policy choice is not a comment about the evils of torture, but rather an indication of what principles Parliament has chosen to promote given Canada's role and that of its government in the international community. The *SIA* cannot be read as suggesting that Canada has abandoned its commitment to the universal prohibition of torture. This commitment is strong, and developments in recent years have confirmed it.

[47] In 2002, in the case of *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, although there were "compelling indicia" to confirm that the prohibition of torture had reached peremptory status, the Court did not make a binding statement to this effect (paras. 62-65). Twelve years later, our Court cannot entertain any doubt that the prohibition of torture has reached the level of a peremptory norm (a peremptory norm, or *jus cogens* norm is a fundamental tenet of international law that is non-derogable: Currie, at p. 583; Emanuelli, at pp. 168-69; *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, art. 53).

[48] There are a number of multilateral instruments which explicitly prohibit torture (see *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 5; *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, G.A. Res. 3452 (XXX), U.N. Doc. A/3452/XXX, December 9, 1975, art. 3; European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221, art. 3; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 7; and generally the United Nations *CAT*). International jurisprudence also recognizes the prohibition of torture as a non-derogable norm (see Ranganathan, at pp. 381-82). For instance, the House of Lords in the case of *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, concluded that "there is no doubt that the prohibition on torture" is a peremptory norm (para.

43; see also *Al-Adsani v. United Kingdom*, at para. 61; *Prosecutor v. Anto Furund'ija*, Case No. IT-95-17/1-T, December 10, 1998 (International Criminal Tribunal for the former Yugoslavia), aff'd Case No. IT-95-17/1-A, July 21, 2000).

[49] The prohibition of torture is a peremptory international norm. But, in Canada, torture is also clearly prohibited by conventions and legislation. Canada is a party to the *CAT*, which has been in force for over twenty years. The *CAT* serves many purposes. In part, it defines torture (art. 1), and requires that a state party take legislative and administrative measures to prevent acts of torture (arts. 2, 3 and 4), investigate potential acts of torture believed to have been committed on its territory (art. 12), and provide means by which victims of torture may obtain redress (art. 14).

[50] I note in passing that, unlike my colleague Justice Abella, I cannot interpret art. 14 of the *CAT* as requiring Canada to implement a universal civil jurisdiction for acts of torture. The *Travaux Préparatoires* leading to the signing of the *CAT* do not clearly suggest a purposeful abandonment by party states of the territoriality restriction which at one point was contained in the draft language of art. 14. Indeed, the change in the language which led to the removal of the territoriality restriction appears to have been prompted by a suggestion made by the United States which sought to harmonize art. 14 with the definition of torture contained at art. 1 by broadening its language (U.N. Commission on Human Rights, *Summary prepared by the Secretary-General in accordance with Commission resolution 18 (XXXIV)*, U.N. Doc. E/CN.4/1314, December 19, 1978, at para. 45). The European Court of Human Rights reached the same conclusion recently, albeit for different reasons (*Jones v. United Kingdom*, at para. 208).

[51] Torture is also a criminal offence in Canada. Section 269.1 of the *Criminal Code*, R.S.C. 1985, c. C-46, states that "[e]very official, or every person acting at the instigation of or with the consent or acquiescence of an official, who inflicts torture on any other person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years."

[52] If the Canadian government were to carry out acts of torture, such conduct would breach international law rules and principles that are binding on Canada, would be illegal under the *Criminal Code*, and would also undoubtedly be unconstitutional. As was held in *Suresh*, the adoption of the *Charter* confirmed Canada's strict opposition to government-sanctioned torture. In particular, torture is blatantly contrary to s. 12 of the *Charter*. The Court stated:

> A punishment is cruel and unusual if it "is so excessive as to outrage standards of decency": see *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at pp. 1072-73, *per* Lamer J. (as he then was). It must be so inherently repugnant that it could never be an appropriate punishment, however egregious the offence. Torture falls into this category. The prospect of torture induces fear and its consequences may be devastating, irreversible, indeed, fatal. Torture may be meted out indiscriminately or arbitrarily for no particular offence. Torture has as its end the denial of a person's humanity; this end is outside the legitimate domain of a criminal justice system . . . . As such, torture is seen in Canada as fundamentally unjust. [para. 51]

Torture is also likely contrary to s. 7 of the *Charter*.

[53] Canada does not condone torture, nor are Canadian officials permitted to carry out acts of torture. However, the issue in the present case is not whether torture is abhorrent or illegal. That is incontestably true. The question before the Court is whether one can sue a foreign state in Canadian courts for torture committed abroad. The answer to that question lies in the interpretation of the *SIA*, and its interaction with international law, the *Charter* and the *Bill of Rights*.

B. *Section 3(1) of the State Immunity Act*

(1) Is Section 3(1) of the *State Immunity Act* a Complete Codification of State Immunity From Civil Proceedings in Canada?

[54] In my view, the *SIA* is a complete codification of Canadian law as it relates to state immunity from civil proceedings. In particular, s. 3(1) of the Act exhaustively establishes the parameters for state immunity and its exceptions.

[55] There is academic support for the view that the *SIA* is not truly exhaustive, and that despite the express language found in s. 3(1), the common law and international law necessarily inform its interpretation (F. Larocque, "La *Loi sur l'immunité des États* canadienne et la torture" (2010), 55 *McGill L.J.* 81, at pp. 92-93). In Professor Larocque's opinion, nothing in the Act expressly excludes the application of the common law (p. 94). In his view, to understand the *SIA* as a comprehensive code without consideration of the common law is to freeze state immunity in time, and to foreclose its development in line with international norms (pp. 100-2).

[56] With all due respect, I am of the view that the *SIA* provides an exhaustive list of exceptions to state immunity. For that reason, reliance need not, and indeed cannot, be placed on the common law, *jus cogens* norms or international law to carve out additional exceptions to the immunity granted to foreign states pursuant to s. 3(1) of the *SIA*. The *SIA*, in its present form, does not provide for an exception to foreign state immunity from civil suits alleging acts of torture occurring outside Canada. This conclusion does not freeze state immunity in time. Any ambiguous provisions of the Act remain subject to interpretation, and Parliament is at liberty to develop the law in line with international norms as it did with the terrorism exception.

[57] Certain of the interveners rely on a statement made in *Kuwait Airways* as evidence that the evolution of common law may have led to new exceptions to the principles of immunity from jurisdiction (see *Kuwait Airways*, at para. 24). This reliance is misplaced. In *Kuwait Airways*, the only conclusion was that, in that particular case, it was unnecessary to determine whether the *SIA* is exhaustive "or whether the evolution of international law and of the common law has led to the development of new exceptions to the principles of immunity from jurisdiction and immunity from execution" (*ibid.*). The time has now come to answer that question.

[58] In my opinion, the words of s. 3(1) of the *SIA* completely oust the common law and international law as a source of potential exceptions to the immunity which it provides. The plain and ordinary meaning of the words "[e]xcept as provided by this Act" is that it is the Act, and the Act alone, that may provide exceptions to the immunity granted pursuant to s. 3(1) of the *SIA* (*Bouzari*, at para. 57). Words as explicit as "[e]xcept as provided by this Act" demonstrate that Parliament intended for the legislation to displace the common law (*Gendron v. Supply and Services Union of the Public Service Alliance of Canada, Local 50057*, 1990 CanLII 110 (SCC), [1990] 1 S.C.R. 1298, at p. 1319). I cannot think of words that could be more "irresistibl[y] clea[r]" (*Goodyear Tire and Rubber Co. of Canada v. T. Eaton Co.*, 1956 CanLII 2 (SCC), [1956] S.C.R. 610, at p. 614).

(2) Does International Law Render Section 3(1) Ambiguous or Otherwise Require it To Be Interpreted to Include an Exception to State Immunity in Cases of Torture?

[59] A number of interveners argue that s. 3(1) of the Act is ambiguous and should therefore be interpreted in accordance with the common law, the *Charter* and international law. The intervener the Canadian Civil Liberties Association submits that the *SIA* is ambiguous because it does not clearly extend to cases involving alleged breaches of *jus cogens* norms (factum, at paras. 8-10). The British Columbia Civil Liberties Association ("BCCLA") similarly asserts that s. 3 of the Act is ambiguous (factum, at para. 8). The intervener Amnistie internationale, Section Canada francophone argues that s. 3 of the Act only shields foreign states with respect to their [TRANSLATION] "public acts", acts which do not include torture (factum, at para. 1).

[60] The current state of international law regarding redress for victims of torture does not alter the *SIA*, or make it ambiguous. International law cannot be used to support an interpretation that is not permitted by the words of the statute. Likewise, the presumption of conformity does not overthrow clear legislative intent (see S. Beaulac, "*'Texture ouverte', droit international et interprétation de la Charte canadienne*", in E. Mendes and S. Beaulac, eds., *Canadian Charter of Rights and Freedoms* (5th ed. 2013), at pp. 231-35). Indeed, the presumption that legislation will conform to international law remains just that — merely a presumption. This Court has cautioned that the presumption can be rebutted by the clear words of the statute under consideration (*Hape*, at paras. 53-54). In the present case, the *SIA* lists the exceptions to state immunity exhaustively. Canada's domestic legal order, as Parliament has framed it, prevails.

[61] Even if an exception to state immunity in civil proceedings for acts of torture had reached the status of a customary rule of international law, which, as I conclude below, it has not, such an exception could not be adopted as a common law exception to s. 3(1) of the *SIA* as it would be in clear conflict with the *SIA* (*Hape*, at para. 36). Moreover, the mere existence of a customary rule in international law does not automatically incorporate that rule into the domestic legal order (L. LeBel and G. Chao, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law" (2002), 16 *S.C.L.R.* (2d) 23, at p. 35). Should an exception to state immunity for acts of torture have become customary international law, such a rule could likely be *permissive* — and not *mandatory* — thereby, requiring legislative action to become Canadian law (*Hape*, at para. 36; dissenting reasons of La Forest J. in *R. v. Finta*, 1994 CanLII 129 (SCC), [1994] 1 S.C.R. 701, at pp. 734-35; LeBel and Chao, at p. 36; G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), at pp. 218-23).

[62] Further, the reading of "except as provided by", which indicates an exhaustive list, is in line with the purpose and scheme of the legislation. A complete codification of state immunity that ousts the common law and international law, and provides specific exceptions, in no way frustrates the goals of sovereign equality, reciprocity and comity.

[63] The above is not to suggest that international law and the common law may never be used to *interpret* the *SIA*. On the contrary, to borrow Lord Diplock's words, the provisions of the *State Immunity Act* fall to be construed against the background of those principles of public international law that are generally recognized by the family of nations (*Alcom Ltd. v. Republic of Columbia*, [1984] 1 A.C. 580, at p. 597). Thus, if certain provisions of the *SIA* were genuinely ambiguous or required clarification, it would be appropriate for courts to look to the common law and international law for guidance (*Schreiber*, at para. 50; *Daniels v. White*, 1968 CanLII 67 (SCC), [1968] S.C.R. 517, at p. 541). However, the plain language of s. 3(1) read alongside the purpose of the Act eliminates the possibility of relying on the common law or international law to find new exceptions to state immunity. I therefore find that the Court of Appeal was correct in its conclusion that the *SIA* contains a complete code of exceptions to immunity (paras. 38-42). I now turn to the interpretation and application of the *SIA* to the case at hand.

C. *Section 6(a) of the State Immunity Act*

[64] Although the appellants have not directly appealed Morissette J.A.'s interpretation of s. 6(*a*) of the *SIA*, it is necessary to determine the true scope of the legislation before analysing its constitutionality. If Mr. Hashemi's psychological suffering is captured by the personal injury exception to state immunity set out at s. 6(*a*), he will have no reason to argue that the statute is unconstitutional, although the estate's constitutional challenge may proceed. The Court therefore intends to discuss the meaning of s. 6(*a*) and whether Mr. Hashemi is entitled to rely on the exception that it sets out.

[65] The *amicus*, in his supplementary submissions, argues that the s. 6(*a*) "personal or bodily injury" exception to state immunity cannot be engaged in this case. According to the *amicus*, the exception at s. 6(*a*) does not apply where the alleged events that caused the personal injury or death did not take place in Canada. In the alternative, the *amicus* submits that the "personal or bodily injury" exception at s. 6(*a*) does not apply where the alleged injury is not a physical injury. Thus, Mr. Hashemi's allegations of psychological harm would not fall within the scope of s. 6(*a*).

[66] A number of interveners made submissions regarding the proper interpretation of "personal or bodily injury" under s. 6(*a*) of the Act. The BCCLA argues that s. 6(*a*) should be interpreted broadly to include psychological injury. In its view, psychological integrity is an integral part of one's physical integrity (factum, at para. 22). In the same vein, Canadian Lawyers for International Human Rights ("CLAIHR") submits that the Quebec Court of Appeal erred in holding that serious psychological trauma suffered in Canada cannot come within the exception to state immunity found at s. 6(*a*) of the *SIA*. In CLAIHR's view, the Court of Appeal's attempt to distinguish physical injuries from psychological injuries is inconsistent with s. 15 of the *Charter*. Further, CLAIHR points to recent medical research suggesting that there is no distinction between psychological and physical injuries. Finally, CLAIHR argues that *Schreiber* is not a full answer to the issues in this case.

[67] Given the above arguments, the Court is being presented with two questions. First, is it necessary for the tort or civil delict which caused the death or personal injury to have occurred in Canada in order

for the exception to immunity to apply? If not, is it possible for Mr. Hashemi's allegations of psychological harm to fit within the definition of "personal or bodily injury" under s. 6(*a*) of the Act?

[68] For ease of reference, the wording of s. 6(*a*) reads as follows:

> A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to . . . any death or personal or bodily injury . . . that occurs in Canada.

[69] Upon first reading, the wording of s. 6(*a*) could be interpreted in one of two ways. For the exception to be engaged, the Act requires either (1) that the injury manifest itself in Canada, even where the acts causing the death or injury occurred outside Canada, or (2) that the acts causing injury or death occur within Canada. The wording of s. 6(*a*) is not nearly as clear as the language of s. 3(1) discussed earlier with respect to the exceptions.

[70] However, when the words of s. 6(*a*) are examined in conjunction with the purpose of the Act, it becomes apparent that the second interpretation of s. 6(*a*) is far more tenable. As stated above, the purpose of the Act is to ensure that the underlying rationales for the doctrine of state immunity are upheld in Canada. If the statute were read in the manner proposed by certain of the interveners, an individual could be involved in an incident in a foreign country or be engaged in an altercation with agents of a foreign government while in that state's territory, have his or her injuries manifest themselves only upon returning to Canada, and then, once in Canada, institute proceedings against the foreign state for the extraterritorial incident. Even if the claim were not a meritorious one, a foreign state might nonetheless need to defend itself in Canada against this kind of claim. Such a situation would put the foreign state's decisions and actions in its own territory directly under the scrutiny of Canada's judiciary — the exact situation sovereign equality seeks to avoid.

[71] Further, interpreting s. 6(*a*) as requiring solely the injury or death to have occurred in Canada would lead to absurd results. It would mean that two individuals could suffer the exact same treatment in a foreign country, but the ability to bring a civil suit would be determined solely on the jurisdiction where each individual's injuries manifest themselves. Bork J. of the United States Court of Appeals for the District of Columbia considered a provision analogous to s. 6 in the case of *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (1984), and addressed this absurdity. Section 1605(a)(5) of the *Foreign Sovereign Immunities Act of 1976*, Pub. L. 94-583, 90 Stat. 2891, 28 U.S.C. ("*FSIA*"), § 1605(a)(5), reads:

> A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in [cases where money] . . . damages are sought against a foreign state for personal injury or death, . . . occurring in the United States and caused by the tortious act or omission of that foreign state . . . .

In determining that parents of a hostage held in Tehran could not sue Iran in American courts for emotional and mental distress suffered by them in the United States, Bork J. wrote:

> Indeed, [the proposed interpretation] would have the result that had one hostage died in Tehran and another been released and died in the United States, both deaths being due to injuries inflicted while they were held hostage, the district court would have jurisdiction over the second suit but not over the first. Such results would deprive the statute of any policy coherence. [p. 843]

Indeed, this kind of distinction would be arbitrary and irrational, and cannot have been the intention of Parliament (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 310-12).

[72] By contrast, an interpretation of s. 6(*a*) that requires the tort causing the personal injury or death to have occurred in Canada upholds the purposes of sovereign equality without leading to absurd results. It accords with the theory of sovereign equality to allow foreign states to be sued in Canada for torts allegedly committed by them within Canadian boundaries. As explored above, sovereignty is intimately tied to independence. State independence relates to the "exclusive competence of the State in regard to its own territory" (*Island of Palmas Case (Or Miangas), United States of America v. Netherlands*, Award (1928), II R.I.A.A. 829, at p. 838; Fox and Webb, at p. 74). If a foreign state is committing torts within Canadian controlled boundaries, Canada has the

competence (derived from its independence) to bring the foreign state within Canada's adjudicative jurisdiction. There would thus be a sufficient connection with the forum state to justify bringing the foreign state's actions under Canadian scrutiny. In this way, the territorial tort exception to state immunity maintains an appropriate balance between "the principles of territorial jurisdiction and state independence" (Larocque, *Civil Actions for Uncivilized Acts*, at p. 258). It enables a forum state to exercise jurisdiction over foreign states within its borders without allowing the forum state to "sit in judgment of extraterritorial state conduct" (*ibid.*). It should be noted, though, that, according to a recent I.C.J. decision, the territorial tort exception does not apply to torts allegedly committed by armed forces acting in times of conflict (*Germany v. Italy*, at para. 78; Fox and Webb, at p. 462).

[73] I am therefore in agreement with the *amicus* with regard to s. 6(*a*) of the *SIA*. The "personal or bodily injury" exception to state immunity does not apply where the impugned events, or the tort causing the personal injury or death, did not take place in Canada. In coming to this conclusion, I endorse the statements from the Ontario Court of Appeal in both *Bouzari* (at para. 47) and *Castle v. United States Department of Justice (Attorney General)* (2006), 2006 CanLII 41279 (ON CA), 218 O.A.C. 53, at para. 7, in which that court decided that s. 6 was meant to provide an exception for torts taking place on Canadian soil. Indeed, this seems to be the general international consensus surrounding legislated tort exceptions (see H. Fox, "State Immunity and the International Crime of Torture", [2006] *E.H.R.L.R.* 142, at p. 155).

[74] However, even if the alternative interpretation of s. 6(*a*) were accepted, Mr. Hashemi's circumstance would still not fall within the exception to state immunity. The "personal or bodily injury" exception to state immunity does not apply where the alleged injury does not stem from a physical breach of personal integrity.

[75] In *Schreiber*, our Court confirmed that "the scope of the exception in s. 6(*a*) is limited to instances where mental distress and emotional upset were linked to a physical injury" (para. 42). Only when psychological distress manifests itself after a physical injury will the exception to state immunity be triggered. In other words, "some form of a breach of physical integrity must be made out" (para. 62).

[76] Contrary to the submissions made by the intervener CLAIHR, *Schreiber* was neither incorrectly decided nor is the principle derived from *Schreiber* inapplicable to the case at hand. I come to these conclusions for a number of reasons.

[77] First, in order to maintain coherence with the civil law, it is necessary to interpret "*dommages corporels*" in the French version of s. 6(*a*) of the *SIA* as requiring physical harm (*Cinar Corporation v. Robinson*, 2013 SCC 73, [2013] 3 S.C.R. 1168, at paras. 100-1). Second, considering the lack of ambiguity in the French wording of the provision, there is no need to resort to *Charter* values to interpret s. 6(*a*) (see *R. v. Clarke*, 2014 SCC 28, [2014] 1 S.C.R. 611, at para. 15). Finally, although the facts in *Schreiber* were indeed different, the Court in that case did turn its mind to situations analogous to the present case. The Court noted that when torture involves "physical interference" with the person, *that* individual will have experienced a "*préjudice corporel*" regardless of signs of physical injury to the body (*Schreiber*, at para. 63). The "*préjudice corporel*" will not, however, extend to those who, although close to the victim, experienced a "*préjudice moral*" (mental injury) with no physical breach.

[78] It is my view, then, that *Schreiber* is good law and perfectly applicable to the case at hand. Even if current medical research maintains that it is often difficult to distinguish between physical and psychological injuries, I agree with the *amicus* that "[t]he fact that psychological trauma may cause physiological reactions does not alter the fact that no [physical] injuries have been pleaded as having been suffered by Mr. Hashemi" (supplemental factum, at para. 30). Mr. Hashemi did not plead any kind of physical harm or any injury to his physical integrity. Therefore, his claim is barred by the statute on two grounds. First, the alleged tort did not "occu[r] in Canada" within the meaning of the *SIA*. Second, Mr. Hashemi has not claimed any "*dommag[e] corpore[l]*" which could potentially have brought him within the exception stated at s. 6(*a*), had the tort occurred in Canada.

D. *Applicability of the State Immunity Act to Public Officials Mr. Bakhshi and Mr. Mortazavi*

[79] The final issue relating to statutory interpretation is whether Saeed Mortazavi and Mohammad Bakhshi are immune from legal action by operation of the *SIA*. The resolution of this issue hinges on answering three questions, namely: (1) Are public officials acting in their official capacity included in the term "government"

as it is used in the *SIA*? (2) Were Mr. Mortazavi and Mr. Bakhshi acting in their official capacity in their interactions with Ms. Kazemi? and (3) Can acts of torture be "official acts" for the purposes of the *SIA*? In my view, the above questions must be answered in the affirmative, with the result that Mr. Mortazavi and Mr. Bakhshi are immune from civil suit in the underlying claim pursuant to s. 3(1) of the *SIA*.

(1) Are Public Officials Acting in Their Official Capacity Included in the Term "Government" As It Is Used in the *State Immunity Act*?

[80] Section 3(1) of the *SIA* provides that a "foreign state" is immune from the jurisdiction of any court in Canada. "Foreign state" is defined in s. 2 as follows:

> "foreign state" includes
>
> (*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
>
> (*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
>
> (*c*) any political subdivision of the foreign state;

[81] The appellants submit that the courts below erred in holding that the *SIA* extends to all state officials acting within the scope of their duties. They argue that the only beneficiaries of immunity under the Act are the legal entity of the foreign state and the sovereign or other head of state when acting in a public capacity. In their view, unless foreign officials claim diplomatic or consular immunity, they will be subject to common law immunities and the private international law rules of every province.

[82] The *amicus* takes the position that all foreign public officials acting in their official capacity (i.e., civil servants, government employees, functionaries, etc.) fall within the purview of the term "government" under s. 2 of the *SIA*. The *amicus* notes that although "government" is not defined in the *SIA*, the use of the term elsewhere in the Act supports an interpretation of "government" that includes individual public officials. Further, the term "government" under the *Charter* and in other contexts includes public officials.

[83] According to the intervener Redress Trust Ltd. ("Redress"), immunity for torture should not extend to foreign public officials. In its opinion, under international law, individual perpetrators of torture cannot avoid accountability for their wrongful conduct by hiding behind their official status. In its view, permitting the appellants' claim does not undermine the principle of state immunity any more than what is already allowed by the principle of individual criminal responsibility of state officials under international criminal law.

[84] On the plain wording of the Act, it is unclear which actors Parliament intended to capture when it included the term "government" in the definition of "foreign state". The term "government" is capable of referring to many different entities and individuals, including but not limited to: legislatures, the executive, entities receiving government funding and which are subject to government control, and public officials. The absence of an explicit reference to "public officials" in the Act requires that the term "government" be interpreted in context, and, as previously mentioned, against the backdrop of international law.

[85] At the outset, I note that the definition of the term "foreign state" at s. 2 of the *SIA* is open-ended, as indicated by the use of the word "includes". When this statutory language is placed in context, in conjunction with the purpose of the Act, it becomes clear that public officials must be included in the meaning of "government" in s. 2 of the *SIA*. The reality is that governmental decisions are carried out by a state's servants and agents. States are abstract entities that can only act through individuals. Significantly, s. 14(1)(*c*) of the Act provides that a certificate issued by the Minister of Foreign Affairs as to whether a person or *persons* are to be regarded as the head or government of a foreign state is conclusive evidence of any matter that is stated in it. It is difficult to conceive of a reason for which "persons" might be regarded as "government" under the Act if not to be provided immunity pursuant to s. 3(1).

[86] This contextual interpretation, dictated by common sense, is further supported by the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) (not yet in force), which defines "State" as including "representatives of the State acting in that capacity" (art. 2(1)(b)(iv)). It is also supported by international jurisprudence, reflecting a growing consensus on this issue in a number of jurisdictions: see *Jones v. United Kingdom*, at paras. 96 and 202; *Prosecutor v. Blaškić* (1997), 110 I.L.R. 607, at p. 707; *Jones v. Ministry of the Interior of Saudi Arabia*, at paras. 30 and 65-69.

[87] Excluding public officials from the meaning of government would completely thwart the purposes of the *SIA*. I agree with the following statement of the European Court of Human Rights:

> Since an act cannot be carried out by a State itself but only by individuals acting on the State's behalf, where immunity can be invoked by the State then the starting point must be that immunity . . . applies to the acts of State officials. If it were otherwise, State immunity could always be circumvented by suing named officials.

(*Jones v. United Kingdom*, at para. 202)

[88] Within Canada itself, the Ontario Court of Appeal noted in *Jaffe v. Miller* (1993), 1993 CanLII 8468 (ON CA), 13 O.R. (3d) 745, that public officials were not included under the Act:

> To avoid having its action dismissed on the ground of state immunity, a plaintiff would have only to sue the functionaries who performed the acts. In the event that the plaintiff recovered judgment, the foreign state would have to respond to it by indemnifying its functionaries, thus, through this indirect route, losing the immunity conferred on it by the Act. [p. 759]

[89] The appellants argue that a civil suit against the two individual respondents — even if it were successful — would not necessarily lead to an award of damages against the state, and therefore Iran would not necessarily suffer any financial loss. In their view, the proceedings against Mr. Mortazavi and Mr. Bakhshi would have the effect of jeopardizing only the personal patrimony of those two individuals (A.F., at para. 167).

[90] Even if the appellants were correct in their contention, a matter of which I am not convinced, their argument is premised on a misunderstanding of the purposes of state immunity. Avoiding both the enforcement of an award of damages against a state and the state's indemnification of its agents are but two of the many purposes served by state immunity. In practice, suing a government official in his or her personal capacity for acts done while in government has many of the same effects as suing the state, effects that the *SIA* seeks to avoid. Allowing civil claims against individual public officials would in effect require our courts to scrutinize other states' decision making as carried out by their public officials. The foreign state would suffer very similar reputational consequences, could be forced to defend itself in Canada, and could still potentially suffer the same costs than if it were found liable itself (if, for example, the individual defendants attempted to obtain indemnification from the state domestically). In *Jones v. Ministry of the Interior of Saudi Arabia*, Lord Bingham reached the same conclusion while considering a slightly different argument:

> It is, however, clear that a civil action against individual torturers based on acts of official torture does indirectly implead the state since their acts are attributable to it. Were these claims against the individual defendants to proceed and be upheld, the interests of the Kingdom [of Saudi Arabia] would be obviously affected, even though it is not a named party. [para. 31]

[91] The appellants also rely on the U.S. Supreme Court decision in *Samantar v. Yousuf*, 560 U.S. 305 (2010) ("*Samantar*"), to argue that the *SIA* does not apply to public officials. In *Samantar*, victims of torture in Somalia sought damages from Mohamed Ali Samantar, the former Prime Minister of Somalia. The question before the U.S. Supreme Court was whether the *FSIA* provided immunity to an individual sued for actions taken in his official capacity. The court interpreted the *FSIA*, and concluded that the definition of "foreign state" does not include an official acting on behalf of the foreign state. Thus, the court held that foreign official immunity is governed by the common law.

[92] *Samantar* is distinguishable from the present case. The decision in *Samantar* hinged on the specific language found at § 1603 of the *FSIA*. A number of differences between Canadian and U.S. legislation render *Samantar* inapplicable to the case at hand. First, as the *amicus* points out, the *FSIA* does not contain a definition of "foreign state" which includes "government", the precise word our Court is tasked with interpreting in the instant case. Second, in the *FSIA*, when Congress intended to refer to officials, it did so expressly. The express mention of officials in some parts of the *FSIA* but not in the definition of "foreign state" indicates that Congress did not intend to include officials in the broader definition of "foreign state" under § 1603. Unlike the *FSIA*, express reference to officials can be found nowhere in the *SIA*. Therefore, the statutory interpretation argument of "implied exclusion", which was helpful to the U.S. Supreme Court in *Samantar*, cannot be made in our case (see generally Sullivan, at p. 244).

[93] Given the above, I conclude that public officials, being necessary instruments of the state, are included in the term "government" as used in the *SIA*. That being said, public officials will only benefit from state immunity when acting in their official capacity. This conclusion leads me to the question of whether the individual respondents were acting in their official capacity when they allegedly tortured Ms. Kazemi so as to render them immune from civil proceedings in Canada.

(2) Were Mr. Mortazavi and Mr. Bakhshi Acting in Their Official Capacity When Carrying out the Torture of Ms. Kazemi?

[94] The appellants' pleadings state that Mr. Mortazavi, the Chief Public Prosecutor for Tehran, ordered, oversaw, and actively participated in Ms. Kazemi's torture. The pleadings further state that Mr. Bakhshi, in his former role as the Deputy Chief of Intelligence for Evin prison, interrogated, assaulted and tortured Ms. Kazemi. Moreover, the facts as pleaded state that Ms. Kazemi's ordeal occurred on government premises, namely in the prison and in the military hospital, and that Ms. Kazemi was at all times under government control, even, sadly, after her death. The news of Ms. Kazemi's death was reported by a government agency. In short, based on the allegations alone, the acts committed by Mr. Mortazavi and Mr. Bakhshi have all the bearings of official acts, and no suggestion was made that either of these public officials were acting in their personal capacity or in a way that was unconnected to their roles as state functionaries.

[95] Though the acts allegedly committed by Mr. Mortazavi and Mr. Bakhshi shock the conscience, I am not prepared to accept that the acts were unofficial merely because they were atrocious. The question to be answered is not whether the acts were horrific, but rather, whether the acts were carried out by the named respondents in their role as "government". The heinous nature of torture does not transform the actions of Mr. Mortazavi and Mr. Bakhshi into private acts, undertaken outside of their official capacity. On the contrary, it is the state-sanctioned or official nature of torture that makes it such a despicable crime.

[96] Unsurprisingly, the very definition of torture contained in the *CAT* requires that it be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity" (art. 1). For clarity, and to address my colleague Justice Abella's concern, it is the official nature of the conduct which gives rise to torture, and not the opposite. In this sense, I am of the view that torture is an official act in the circumstances of the present case. Support for this conclusion can be found in the reasoning of Lord Bingham and Lord Hoffmann in the case of *Jones v. Ministry of the Interior of Saudi Arabia*, upheld as sound by the European Court of Human Rights. I agree with Lord Bingham that, by definition, torture is necessarily an official act of the state. He wrote:

> It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the Torture Convention torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity. [para. 19]

Lord Hoffmann noted that if certain governmental acts are "official enough" to come under the *CAT*, they are also "official enough" to attract immunity (para. 83).

[97] I generally agree. It is logically difficult for the appellants to simultaneously claim that the acts done to Ms. Kazemi fall within the definition of torture and thereby engage the protection of art. 14 of the *CAT*, but that the acts are not official enough to trigger immunity. I would, however, note that wilful blindness by a state to

the activities of private individuals or groups carried out for the benefit of that state may be a rare case where torture may meet the official definition in art. 14, but where state immunity would not necessarily be conferred on the individuals committing the acts. But, that is not the case before us.

[98] As a result, the *SIA* applies to Mr. Mortazavi and Mr. Bakhshi. Given that they were public officials acting in their official capacity, Mr. Mortazavi and Mr. Bakhshi are captured by the term "government" found at s. 2 of the *SIA*. By virtue of that statute, they are immune from the jurisdiction of Canadian courts.

(3) Can Acts of Torture Be "Official Acts" for the Purposes of the *State Immunity Act*?

[99] The intervener the Canadian Centre for International Justice ("CCIJ") submits that *jus cogens* violations, such as acts of torture, can never constitute "official conduct" under international and common law. The CCIJ therefore implicitly invites this Court to construe the term "government" as excluding public officials engaging in acts of torture. Unlike certain interveners who call for a blanket exception to state immunity in cases of torture, the exception proposed by the CCIJ would apply only to public officials.

[100] My colleague Justice Abella's dissent appears to echo in part the CCIJ's submissions. As I understand it, my colleague suggests that the meaning of "government" in s. 2 of the *SIA* must be construed in accordance with customary international law. According to my colleague, the right to reparation for violations of human rights and the non-official nature of acts done in violation of *jus cogens* are two rules of customary international law which together call for a construction of "government" that excludes government officials conducting acts of torture. With respect, this conclusion is based on a number of arguments that are inconsistent with the current state of relevant law, including customary international law.

[101] As far as the right to reparation is concerned, I find no evidence in the cases reviewed by my colleague demonstrating the existence of a rule of customary international law to the effect that courts have universal civil jurisdiction to hear civil cases alleging acts in violation of *jus cogens*. On the contrary, most of these cases have affirmed state immunity in civil proceedings alleging acts of torture. However, even if such a rule of customary international law existed, it would have to be weighed against other rules of customary international law and, namely the rule of state immunity. As the I.C.J. found in a similar context, I see no contradiction in the co-existence of a right to reparation and state immunity (*Germany v. Italy*, at paras. 92-96).

[102] Further, my colleague Justice Abella concludes that states are moving towards the proposition that government officials are not immune from civil suits for torture. Her reasons point to the equivocal state of the customary international law of immunity for violations of *jus cogens* norms as an indication that public officials may be sued in our domestic courts for torture committed aboard (para. 174). But customary international law is, by its very nature, unequivocal. It is not binding law if it is equivocal. In the absence of consistent state practice one way or another, and of *opinio juris* as to the binding effect of a state practice, no rule of customary international law is established. The "state of flux" of international law pertaining to official immunities for *jus cogens* violations is such that it may not be used to interpret domestic legislation or the common law in the same manner that courts might employ customary international law (see, for example, *Hape*, at para. 39). As a result, the presumption of conformity cannot be considered in construing the terms of the *SIA* (discussed in *Hape*, at paras. 53-54). With respect, international jurisprudence is at best "equivocal" concerning this area of the law. There is still very strong support for the conclusion that immunity from civil suits extends to public officials engaging in acts of torture, and it is therefore not possible to conclude that either a consistent state practice or *opinio juris* to the contrary effect exists (*Jones v. Ministry of the Interior of Saudi Arabia*; *Jones v. United Kingdom*; *Germany v. Italy*; *Democratic Republic of Congo v. Belgium*; *Al-Adsani v. United Kingdom*).

[103] While an exception to immunity for *jus cogens* violations exists in the criminal context, no such exception has developed in the civil context. My colleague Justice Abella as well as Breyer J. of the United States Supreme Court take issue with this distinction, essentially arguing that the existence of universal criminal jurisdiction contemplates the existence of universal civil jurisdiction as well (*Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), at pp. 762-63). In my view, principled grounds justify the distinction between the exception to immunity in the civil versus the criminal context. These include the "long pedigree" of exceptions to immunity in criminal proceedings, and the "screening mechanisms" that are available to governments in criminal suits as

compared to civil suits (see generally C. A. Bradley and L. R. Helfer, "International Law and the U.S. Common Law of Foreign Official Immunity" (2010), *Sup. Ct. Rev.* 213, at pp. 247-48).

[104] Whether or not these distinctions are convincing as a matter of policy is of secondary importance. The fact of the matter is that Canada has expressly created an exception to immunity for criminal proceedings, and has stopped short of doing so for civil suits involving *jus cogens* violations (*SIA*, s. 18; a similar exception also exists in the United Kingdom's *State Immunity Act 1978*, 1978, c. 33, s. 16(4)). Much like the I.C.J., I am convinced that the fact that universal criminal jurisdiction exists has no bearing in the present case (*Germany v. Italy*, at para. 87). The two types of proceeding are seen as fundamentally different by a majority of actors in the international community (*Jones v. Ministry of the Interior of Saudi Arabia*, at paras. 20 and 32).

[105] Further, there is a significant practical difficulty in allowing an exception to state immunity in civil suits alleging acts of torture committed abroad. Unlike the exceptions that are expressly set out in the *SIA* and which rely on preliminary or ancillary facts, an exception based on violations of *jus cogens* would require a judge seized of a matter raising allegations of torture to inquire into the merits of the claim at a preliminary stage regardless of whether those allegations are grounded in fact. In effect, a foreign defendant would be forced to mount a defence against the substance of a claim alleging acts of torture merely to obtain a determination of whether he or she is immune from suit. This clearly defeats the purpose of state immunity, namely to bar a court from hearing a case on its merits *in limine*. In theory, the same practical difficulty applies to criminal proceedings involving violations of *jus cogens*. However, the decision to bring criminal charges against a foreign state official is made based on the strength of investigations and legal opinions. In practice, this filters out vexatious charges.

[106] While the Fourth Circuit United States Court of Appeals has recently decided that torture cannot be qualified as an official act for the purposes of immunity (*Yousuf v. Samantar*, 699 F.3d 763 (2012) ("*Samantar II*") (appeal pending)), that case is of little weight in light of conflicting jurisprudence from other Circuits and the pending appeal of that decision to the Supreme Court of the United States (*Matar v. Dichter*, 563 F.3d 9 (2nd Cir. 2009); *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008); *Ye v. Zemin*, 383 F.3d 620 (7th Cir. 2004)). Moreover, *Samantar II* was decided in the context of a very different legislative and governmental backdrop. The court in that case expressly stated that Congress's enactment of the *Torture Victim Protection Act of 1991*, Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. § 1350, was "instructive" in reaching its determination (p. 774). The court also gave "substantial weight" to the Statement of Interest issued by the State Department suggesting that the court should deny the foreign defendant immunity (p. 773). Essentially, the court relied heavily on governmental intentions when deciding to deny immunity.

[107] In the case at hand, Canada has no equivalent to the *Torture Victim Protection Act of 1991* that would create a cause of action for torture committed abroad, nor have we been presented with a statement of any sort from the government suggesting that Mr. Mortazavi and Mr. Bakhshi should be denied immunity. Parliament has given no indication whatsoever that the courts are to deem torture an "unofficial act" and that a universal civil jurisdiction has been created allowing foreign officials to be sued in our courts. Creating this kind of jurisdiction would have a potentially considerable impact on Canada's international relations. This decision is to be made by Parliament, not the courts.

[108] I further note that the development of the common law should be gradual and that it should develop in line with norms accepted throughout the international community. As was determined in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, "[c]ertainty in the law requires that courts follow and apply authoritative precedents. Indeed, this is the foundational principle upon which the common law relies" (para. 38). The common law should not be used by the courts to determine complex policy issues in the absence of a strong legal foundation or obvious and applicable precedents that demonstrate that a new consensus is emerging. To do otherwise would be to abandon all certainty that the common law might hold. Particularly in cases of international law, it is appropriate for Canadian courts only to follow the "bulk of the authority" and not change the law drastically based on an emerging idea that is in its conceptual infancy (*Jones v. United Kingdom*, at para. 213). The "bulk of the authority" in this situation confirms that a "State's right to immunity may not be circumvented by suing its servants or agents instead" (ibid.).

[109] Given the definition of torture outlined above and the lack of evidence of an exception to state immunity for a *jus cogens* violation, I hold that it is possible for torture to be an official act. I agree with Lord Hoffmann in *Jones v. Ministry of the Interior of Saudi Arabia* that "[i]t is not for a national court to 'develop'

international law by unilaterally adopting a version of that law which, however desirable, forward-looking and reflective of values it may be, is simply not accepted by other states" or by the forum state (para. 63).

[110] This therefore confirms that neither Mr. Hashemi nor Ms. Kazemi's estate may avail themselves of a Canadian court in order to sue Iran or its functionaries for Ms. Kazemi's torture and death. The next question becomes whether the *SIA*, as interpreted, withstands constitutional scrutiny.

E. *The State Immunity Act and the Canadian Bill of Rights*

[111] Section 2(*e*) of the *Bill of Rights* provides that "no law of Canada shall be construed or applied so as to . . . deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations".

[112] The appellants argue that, as a quasi-constitutional statute, the *Bill of Rights* should be given a liberal and purposive interpretation. The appellants submit that the *SIA* does not extinguish substantive rights, but rather creates a procedural bar, and that this procedural bar is incompatible with the fairness guarantees contained in s. 2(*e*) of the *Bill of Rights*.

[113] The Attorney General of Canada argues that the *Bill of Rights* only protects rights that existed when it was enacted in 1960. At that time, foreign states enjoyed absolute immunity. Since, in 1960, there was no right to sue a foreign state for tortious acts committed abroad, the appellants' argument that s. 2(*e*) of the *Bill of Rights* guarantees an ability to sue cannot succeed.

[114] The Attorney General of Canada further submits that, in any event, s. 2(*e*) of the *Bill of Rights* does not provide a right of access to courts or a right to sue, but is merely a procedural right to natural justice within an existing adjudicative process. Where no existing process is in place or where, as here, Canadian courts are statutorily barred from exercising adjudicative jurisdiction, s. 2(*e*) does not apply.

[115] The intervener the Iran Human Rights Documentation Center ("IHRDC") submits that the appellants cannot obtain a fair hearing in Iran, and as such, the *SIA* contravenes s. 2(*e*) of the *Bill of Rights*. In its view, this Court's jurisprudence and international law maintain that a fair hearing requires an independent judiciary not subject to political influence or outside pressure. The IHRDC submits that Iran lacks this impartial and independent judicial system.

[116] I agree with the Attorney General of Canada that the challenge based on s. 2(*e*) of the *Bill of Rights* should be dismissed on the basis that s. 2(*e*) does not create a self-standing right to a fair hearing where the law does not otherwise allow for an adjudicative process. Instead, s. 2(*e*) guarantees fairness in the context of a hearing before a Canadian court or a tribunal.

[117] In *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, the Court held that s. 2(*e*) of the *Bill of Rights* did not impose a duty upon Parliament to provide a hearing to veterans prior to the adoption of legislation that would affect their financial interests. The Court concluded that "[the *Bill of Rights*] protections are operative only in the application of law to individual circumstances in a proceeding before a court, tribunal or similar body" (para. 61). Thus, s. 2(*e*) was found to only apply in the context of a proceeding before a court or tribunal; it does not create a right to a hearing where none otherwise exists by operation of law.

[118] To engage the right to a fair hearing guaranteed by s. 2(*e*), a court or tribunal must properly have jurisdiction over a matter. State immunity is a procedural bar that blocks the exercise of jurisdiction before a hearing can even take place. Therefore, it is irrelevant that a person's substantive claim has not been extinguished. The existence of state immunity means that regardless of an underlying substantive claim and of its merits, no jurisdiction exists in Canada to adjudicate that claim. Similarly, the applicability of state immunity does not depend on the impartiality of the judicial system of the foreign state. The jurisdictional bar exists notwithstanding the lack of fair proceedings or of an impartial judicial structure in the foreign state. Section 2(*e*) of the *Bill of Rights* does not operate to remove this type of jurisdictional prohibition. Rather, s. 2(*e*) guarantees a fair procedure only when a process is already in place in Canada to determine individuals' rights.

[119] For that reason, *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, does not assist the appellants in this case. In *Singh*, the Court was tasked with determining whether the procedures for adjudicating refugee status contained in the *Immigration Act, 1976*, S.C. 1976-77, c. 52, were in accordance with s. 7 of the *Charter* and s. 2(*e*) of the *Bill of Rights*. Although three of the six judges who took part in that judgment concluded that the adjudicative procedures were in conflict with s. 2(*e*), it should be stated that access to an adjudicator was already foreseen within the framework of the *Immigration Act, 1976*. By contrast, in the case at hand, no access to a method of resolution exists. State immunity prohibits that access. Much more analogous to the present situation is the case of *Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66, [2013] 3 S.C.R. 866.

[120] In *Amaratunga*, the Court upheld the principles set out in *Authorson* in the context of jurisdictional immunity of international organizations. In that case, a former employee sued an international organization for wrongful dismissal in the Nova Scotia Supreme Court. The organization successfully claimed immunity from the action under the *Northwest Atlantic Fisheries Organization Privileges and Immunities Order, SOR/80-64*. *The Court concluded that the organization was entitled to immunity from the wrongful dismissal claim and that s. 2(e) of the Bill of Rights was not infringed. The Court relied on Authorson and the Quebec Court of Appeal decision in the present appeal:*

> As for the *Canadian Bill of Rights*, the "right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" recognized in s. 2(*e*) does not create a substantive right to make a claim. Rather, it provides for a fair hearing if and when a hearing is held. (See also *Islamic Republic of Iran v. Hashemi*, 2012 QCCA 1449, [2012] R.J.Q. 1567, at para. 109; *Authorson v. Canada (Attorney General)*, 2003 SCC 39, [2003] 2 S.C.R. 40, at paras. 59-61.) . . .
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> . . .
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> The fact that the appellant has no forum in which to air his grievances and seek a remedy is unfortunate. However, it is the nature of an immunity to shield certain matters from the jurisdiction of the host state's courts. [Emphasis added; paras. 61 and 63.]

The same holds true in the instant case. Section 2(*e*) of the *Bill of Rights* does not apply to this situation. It offers protection only if and when a hearing is held.

F. *The Charter and the Constitutionality of the State Immunity Act*

[121] The final question to be determined on this appeal is whether s. 3(1) of the *SIA* infringes s. 7 of the *Charter*. In the following part of my reasons, I first consider whether the appellants have established that the impugned law imposes limits on security of the person, thus engaging s. 7. I then consider whether any such limits on security of the person are in violation of the principles of fundamental justice.

(1) Security of the Person

[122] The appellants argue that s. 3(1) exacerbates trauma because it bars individuals from seeking redress after they or a family member have been tortured. This aggravation of the trauma exceeds the threshold required to trigger a security of the person interest. In oral argument, the appellants posited that, when torture is being carried out "with impunity", there can be no doubt that a victim or a family member of a victim, a person of reasonable sensibility, would feel psychological distress beyond the ordinary anxiety caused by the vicissitudes of life (transcript, at pp. 13-14).

[123] The Attorney General of Canada responds that s. 7 of the *Charter* is not engaged because Mr. Hashemi alleges only that he has suffered psychological harm flowing from the torture suffered by his mother and the inability to seek redress in Iran, and not harm resulting from his inability to sue Iran whilst in Canada. In addition, the Attorney General of Canada points out that there is no evidence to show that a prohibition on civil proceedings hampers the rehabilitation of victims of torture (factum, at para. 98). Finally, the Attorney General posits that the harm suffered by Mr. Hashemi was neither "profound [nor] serious" as is required by s. 7 (para. 101).

[124] The intervener Redress takes the position that international law supports Mr. Hashemi's claim that s. 3(1) of the *SIA* has operated to cause him psychological trauma. Redress submits that a substantial body of international jurisprudence supports the position that denying an effective remedy for torture causes psychological harm. In its view, this denial of redress is so psychologically harmful to victims and their next of kin that s. 7 of the *Charter* is engaged.

[125] State action may engage security of the person when that action has an impact on an individual's psychological integrity (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307). In *G. (J.)*, Chief Justice Lamer wrote that in order to engage the security of the person,

> the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects . . . must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. [Emphasis added; para. 60.]

[126] As Bastarache J. noted in *Blencoe*, when psychological integrity is at issue, two requirements must be met in order to trigger the right to security of the person. First, the psychological prejudice that an individual experiences must be serious. Second, there must be a sufficient causal connection between the psychological prejudice and the actions of the state so that the harm may be said to result from state action (*Blencoe*, at para. 57).

(a) *Does the Inability to Seek Civil Redress Impose Serious Psychological Prejudice on Victims of Torture and Their Immediate Families?*

[127] It is suggested that laws that prohibit victims of torture and their immediate family members from seeking redress through civil proceedings may be seen as having harmful psychological effects. In this case, Mr. Hashemi's mother was beaten, was sexually assaulted, and died in Iran. Due to the *SIA*, Mr. Hashemi cannot seek civil redress in Canada for these atrocities. The question is: does the effect of s. 3(1) of the *SIA* cause a victim of torture or their next of kin such serious harm so as to engage the s. 7 security of the person interest?

[128] Although it would be preferable to have this evidence admitted through properly qualified experts at the trial level, I am prepared to accept as a general proposition for the sake of argument alone that impunity for torture can cause significant psychological harm to victims of torture and their family members. This position finds support in international jurisprudence.

[129] The Inter-American Court of Human Rights has made a number of statements regarding the effect of impunity on victims of torture or their next of kin. One of the strongest of such statements is found in *Tibi v. Ecuador* (2004), Inter-Am. Ct. H.R. (Ser. C) No. 114, in which Cançado Trindade J. noted in his separate opinion:

> Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or indifference regarding the criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered. [para. 33]

(See also *Bámaca Velásquez v. Guatemala* (2002), Inter-Am. Ct. H.R. (Ser. C) No. 91, at paras. 64-65.)

[130] While it is not clear that a lack of civil redress due to state immunity is tantamount to impunity, it is not an exaggeration to say that the interest in finding closure after suffering torture touches upon the core of human dignity. If an inability to seek civil redress prohibits victims of torture or their next of kin from finding closure, I accept that it causes them serious psychological harm.

(b) *Is there a Sufficient Causal Connection Between the Alleged Harm and the State Action?*

[131] While the most severe and immediate source of the psychological harm suffered by Mr. Hashemi in the instant situation is undeniably the torture suffered by Ms. Kazemi in Iran, this would not necessarily eliminate any contributory role of Canada to Mr. Hashemi's suffering. As we stated in *Bedford*, "[a] sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant" (para. 76; see also *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44, at para. 21).

[132] In terms of causation, this case presents many similarities to *Bedford.* In *Bedford*, the Attorneys General of Canada and Ontario argued that "the source of the harm [was] third parties — the johns who use and abuse prostitutes and the pimps who exploit them" (para. 84). The Court dismissed that argument and stated:

> It makes no difference that the conduct of pimps and johns is the immediate source of the harms suffered by prostitutes. The impugned laws deprive people engaged in a risky, but legal, activity of the means to protect themselves against those risks. The violence of a john does not diminish the role of the state in making a prostitute more vulnerable to that violence. [para. 89]

[133] In this case, the Attorney General of Canada argues that Iran, not Canada, caused the immediate harm suffered by Ms. Kazemi and Mr. Hashemi due to both the torture Iranian officials inflicted and Iran's ineffective justice system. However, it is irrelevant whether the torture in Iran is the immediate source of the harm suffered by Mr. Hashemi. If evidence properly introduced at trial demonstrated that the *SIA* deprives people whose family members have been tortured of the ability to heal from the trauma that they have experienced, the Canadian state might, nonetheless, have sufficiently contributed to causing serious psychological harm. Therefore, for the purpose of engaging s. 7, the fact that the foreign state caused the original violence would not necessarily diminish the role of the Canadian state in impeding the healing of Canadian victims of torture or their family members.

[134] Based on the above analysis, it is arguable that s. 3(1) of the *SIA* might cause such serious psychological prejudice that the security of the person is engaged and violated. But, in any event, I do not find it necessary to decide whether s. 3(1) of the *SIA* engages the security of the person interest under s. 7 of the *Charter*, given my conclusion (discussed below) that the operation of s. 3(1) does not violate any principles of fundamental justice.

(2) Principles of Fundamental Justice

[135] In order to conclude to a breach of s. 7 of the *Charter*, it must be demonstrated that a principle of fundamental justice has been violated due to the application of s. 3(1) of the *SIA* to the claims at issue.

[136] The appellants argue that given (a) Canada's domestic laws on torture, (b) Iran's failure to deliver justice to the appellants, and (c) Canada's international law obligations by virtue of art. 14(1) of the *CAT*, the blanket immunity provided by the *SIA* in this particular case is incompatible with principles of fundamental justice. The appellants submitted in oral argument that art. 14 requires Canada to ensure that a civil remedy be available to victims of torture committed in foreign countries and that this obligation is a principle of fundamental justice within the meaning of s. 7 (transcript, at p. 15).

[137] The respondent the Attorney General of Canada argues that the appellants adopt an erroneous approach to s. 7 of the *Charter* by failing to identify a specific principle of fundamental justice that has been violated by Canadian state action in this case. The respondent submits that international law does not support the appellants' reading of art. 14 of the *CAT* and that, in interpreting art. 14 in this matter, the appellants are effectively asking our Court to recognize a new, substantive principle: the right to a civil remedy in Canada for victims of torture. He further submits that the claimed right to a civil remedy in Canada for victims of torture does not meet the criteria for a new principle of fundamental justice.

[138] For ease of reference, art. 14(1) of the *CAT* reads:

> Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

[139] In order for a rule or principle to be a principle of fundamental justice, "it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person" (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113).

[140] There is no consensus that art. 14 should be interpreted in the manner the appellants suggest. In fact, although conflicting views have been vigorously advanced, the interpretation of art. 14 by some party states and by international and domestic judicial authorities support the respondent's contention that art. 14 ensures redress and compensation for torture committed within the forum state's own territorial jurisdiction.

[141] First, both the United States and Canada have taken the position that art. 14 does not require ratifying states to provide civil remedies for torture committed in foreign countries. When the U.S. provided notice of its ratification of the *CAT* in 1994, it expressed its understanding "that article 14 requires a state party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that state party" (*Jones v. Ministry of the Interior of Saudi Arabia*, at para. 20). As the Attorney General and the *amicus* point out, Canada has also confirmed that art. 14 establishes an obligation to ensure redress where an act of torture took place within the state's own jurisdiction — not where the torture occurred outside the forum state (United Nations, *Review of Canada's Sixth Report on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (2012) (online), at para. 339). Although the interpretation of an article by a limited number of party states is non-determinative of that article's meaning, there is no evidence that the majority of signatories interpret art. 14 in the manner that the appellants contend (M. Nowak and E. McArthur, with the contribution of K. Buchinger et al., *The United Nations Convention Against Torture: A Commentary* (2008), at pp. 492 and 502).

[142] Further, national and international jurisprudence heavily favours the Attorney General's interpretation of the *CAT*. In fact, neither the appellants nor the interveners have identified a single court or international tribunal that has interpreted art. 14 in the way they suggest.

[143] In *Jones v. Ministry of the Interior of Saudi Arabia*, one of the issues before the House of Lords was whether the U.K. was required to provide legal redress under art. 14 of the *CAT*. The House of Lords concluded:

> Secondly, article 14 of the Torture Convention does not provide for universal civil jurisdiction. It appears that at one stage of the negotiating process the draft contained words, which mysteriously disappeared from the text, making this clear. But the natural reading of the article as it stands in my view conforms with the US understanding noted above, that it requires a private right of action for damages only for acts of torture committed in territory under the jurisdiction of the forum state. This is an interpretation shared by Canada, as its exchanges with the Torture Committee make clear. The correctness of this reading is confirmed when comparison is made between the spare terms of article 14 and the much more detailed provisions governing the assumption and exercise of criminal jurisdiction. [para. 25]

[144] As stated above, the European Court of Human Rights recently confirmed this decision: *Jones v. United Kingdom*. That court noted that no decision of the I.C.J. or of any international arbitral tribunal had interpreted art. 14 as requiring ratifying states to provide civil remedies for torture committed abroad (para. 208).

[145] Furthermore, the appellants' interpretation of art. 14 is not necessarily supported by the language of that provision. It is true that art. 14 does not expressly state that there is a territorial limit on a state's obligation to provide civil recourse for torture. As the appellants point out, this can be contrasted with other provisions of the *CAT* which create obligations limited to the "territory under [the state's] jurisdiction" (see, for example, art. 12). However, the wording of art. 14 can also be contrasted with art. 5(1)(c), which expressly grants a state universal

criminal jurisdiction when the victim of torture is a national of that particular state and the state deems the establishment of jurisdiction appropriate (see Larocque, *Civil Actions for Uncivilized Acts*, at p. 261). I am therefore not convinced that the absence of an express territorial limit can be determinative of the meaning of art. 14.

[146] Finally, the appellants rely on comments made by the United Nations Committee against Torture, a committee established to monitor and report on states' compliance with the *CAT*. The intervener the Canadian Bar Association urges the Court to place heavy reliance on the Committee's comments. The Committee has clearly expressed the view that art. 14 requires states to provide a means of redress to all victims of torture, regardless of where the torture was committed. For example, in its *General comment No. 3 (2012): Implementation of article 14 by State parties*, U.N. Doc. CAT/C/GC/3, released in December 2012, the Committee stated:

> The Committee considers that the application of article 14 is not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has commended the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise the rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States parties to ensure that all victims of torture and ill-treatment are able to access remedy and obtain redress.
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> Similarly, granting immunity, in violation of international law, to any State or its agents or to non-State actors for torture or ill-treatment, is in direct conflict with the obligation of providing redress to victims. When impunity is allowed by law or exists de facto, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims full assurance of their rights under article 14. The Committee affirms that under no circumstances may arguments of national security be used to deny redress for victims. [paras. 22 and 42]

[147] In my view, despite their importance, the Committee's comments should not be given greater weight than the pronouncements of state parties and judicial authorities. If anything, the Committee's comments only indicate that there is an absence of consensus around the interpretation of art. 14. When a party points to a provision in an international treaty as evidence of a principle of fundamental justice, a court must determine (a) whether there is significant international consensus regarding the interpretation of the treaty, and (b) whether there is consensus that the particular interpretation is fundamental to the way in which the international legal system ought to fairly operate (*Malmo-Levine*, at para. 113; *Suresh*, at para. 46). The absence of such consensus weighs against finding that the principle is fundamental to the operation of the legal system. As indicated above, when it comes to art. 14, no such consensus exists.

[148] Further, while the Committee's comments may be helpful for purposes of interpretation (see *Suresh*, at para. 73), they do not overrule adjudicative interpretations of the articles in the *CAT* (*Jones v. Ministry of the Interior of Saudi Arabia*, at para. 23). At best, they form part of a dialogue within the international community where no consensus has yet developed on an interpretation of art. 14 that would recognize the existence of a mandatory universal civil jurisdiction for acts of torture committed outside the boundaries of contracting states.

[149] Even if we were to adopt the appellants' interpretation of art. 14 and there was international consensus on this issue, it must be noted that the existence of an article in a treaty ratified by Canada does not automatically transform that article into a principle of fundamental justice. Canada remains a dualist system in respect of treaty and conventional law (Currie, at p. 235). This means that, unless a treaty provision expresses a rule of customary international law or a peremptory norm, that provision will only be binding in Canadian law if it is given effect through Canada's domestic law-making process (*Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 69; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, 1977 CanLII 12 (SCC), [1978] 2 S.C.R. 141, at pp. 172-73; Currie, at p. 235). The appellants have not argued, let alone established, that their interpretation of art. 14 reflects customary international law, or that it has been incorporated into Canadian law through legislation.

[150] It is true that the *Charter* will often be understood to provide protection at least as great as that afforded by similar provisions in international human rights documents to which Canada is a party (*Reference re*

Public Service Employee Relations Act (Alta.), 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at pp. 348-49, *per* Dickson C.J. dissenting). In my view, however, this presumption operates principally as an interpretive tool in assisting the courts in delineating the breadth and scope of *Charter* rights (see *Health Services and Support*, at paras. 71-79; see also Beaulac, at pp. 231-39). International Conventions may also assist in establishing the elements of the *Malmo-Levine* test for recognition of new principles of fundamental justice (see *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 10). But not all commitments in international agreements amount to principles of fundamental justice. Their nature is very diverse. International law is ever changing. The interaction between domestic and international law must be managed carefully in light of the principles governing what remains a dualist system of application of international law and a constitutional and parliamentary democracy. The mere existence of an international obligation is not sufficient to establish a principle of fundamental justice. Were we to equate all the protections or commitments in international human rights documents with principles of fundamental justice, we might in effect be destroying Canada's dualist system of reception of international law and casting aside the principles of parliamentary sovereignty and democracy.

[151] That being said, I am prepared to accept that *jus cogens* norms can generally be equated with principles of fundamental justice and that they are particularly helpful to look to in the context of issues pertaining to international law. Just as principles of fundamental justice are the "basic tenets of our legal system" (*Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 503), *jus cogens* norms are a higher form of customary international law. In the same manner that principles of fundamental justice are principles "upon which there is some consensus that they are vital or fundamental to our societal notion of justice" (*Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 590), *jus cogens* norms are customs accepted and recognized by the international community of states from which no derogation is permitted (*Bouzari*, at paras. 85-86; van Ert, at p. 29).

[152] This recognition, however, does not bolster the appellants' argument. While the prohibition of torture is certainly a *jus cogens* norm from which Canada cannot derogate (and is also very likely a principle of fundamental justice), the question in this case is whether this norm extends in such a way as to require each state to provide a civil remedy for torture committed abroad by a foreign state.

[153] Several national courts and international tribunals have considered this question, and they have consistently confirmed that the answer is no: customary international law does not extend the prohibition of torture so far as to require a civil remedy for torture committed in a foreign state. I agree with these courts and tribunals that the peremptory norm prohibiting torture has not yet created an exception to state immunity from civil liability in cases of torture committed abroad.

[154] In *Germany v. Italy*, the I.C.J. considered whether Germany could benefit from state immunity in respect of its violations of international humanitarian law in Italy during the Second World War. The court observed that there was a substantial body of state practice which demonstrated that customary international law did not consider a state's entitlement to immunity as being dependent upon the gravity of the act of which it was accused or the peremptory nature of the rule which it was alleged to have violated (paras. 89-91).

[155] In *Jones v. United Kingdom*, the European Court of Human Rights reviewed judicial decisions from around the world, and concluded:

> In recent years, both prior to and following the House of Lords judgment in the present case, a number of national jurisdictions have considered whether there is now a *jus cogens* exception to State immunity in civil claims against the State . . . .
>
> However, it is not necessary for the Court to examine all of these developments in detail since the recent judgment of the International Court of Justice in *Germany v. Italy* . . . — which must be considered by this Court as authoritative as regards the content of customary international law — clearly establishes that, by February 2012, no *jus cogens* exception to State immunity had yet crystallised. [paras. 197-98]

[156] Similarly, in *Fang v. Jiang*, [2007] N.Z.A.R. 420, the High Court of New Zealand agreed with the House of Lords in *Jones v. Ministry of the Interior of Saudi Arabia* and held that there was no exception to state immunity claims in situations of torture.

[157] Taking the above as indicative of lack of state practice and *opinio juris*, I must conclude that Canada is not obligated by the *jus cogens* prohibition on torture to open its courts so that its citizens may seek civil redress for torture committed abroad. This is not the meaning and scope of the peremptory norm. Consequently, failing to grant such access would not be a breach of the principles of fundamental justice. However, I agree with the I.C.J. in *Germany v. Italy* that "recognizing the immunity of a foreign State in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule, or rendering aid and assistance in maintaining that situation" (para. 93).

[158] The David Asper Centre for Constitutional Rights ("DAC") and the International Human Rights Program ("IHRP") submit that s. 3(1) of the *SIA* is unconstitutional to the extent that it prevents access to an effective remedy for gross human rights violations. They argue that it is a principle of fundamental justice that "where there is a right there must be a remedy for its violation" (factum, at para. 6).

[159] While I agree that "where there is a right, there must be a remedy for its violation" is a legal maxim, I cannot accept that it necessarily constitutes a principle of fundamental justice. While rights would be illusory if there was never a way to remedy their violation, the reality is that certain rights do exist even though remedies for their violation may be limited by procedural bars. Remedies are by no means automatic or unlimited; there is no societal consensus that an effective remedy is always guaranteed to compensate for every rights violation.

[160] Substantive rights are frequently implemented within a framework of procedural limitations. There are numerous examples of substantive rights with procedural limitations in Canada. For instance, Canadians have a right to be free from defamation or libel, but in order to sue in Canada, the plaintiff must prove that there is a real and substantial connection between the alleged tortious action and the forum (*Breeden v. Black*, 2012 SCC 19, [2012] 1 S.C.R. 666). Further, Canadians have a right to be free from assault, but in order to sue for consequential relief, they must bring their claim within a specified period of time (see, for example, the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, ss. 4 and 10).

[161] Similarly, individuals have a right to be free from torture, but state immunity is a procedural bar which prevents an individual from bringing a civil claim against a foreign state. State immunity regulates a state's exercise of jurisdiction over another foreign state, which is a procedural matter. This regulation is distinct from the substantive law which would determine whether the alleged acts of torture were lawful (*Germany v. Italy*, at para. 93; Fox and Webb, at p. 21).

[162] The interveners the DAC and the IHRP have failed to establish that there is consensus that people must always have a right to an effective remedy and that this is necessary to the functioning of the legal system (factum, at paras. 17 and 20). As indicated above, there are many examples in Canadian law where remedies are subordinated to other concerns in appropriate contexts. Society does not always deem it essential that the right to a remedy "trump all other concerns in the administration of justice" (*Canadian Foundation for Children, Youth and the Law*, at para. 10).

[163] Similarly, there is no evidence of a consensus that the particular remedy requested in this instance (a civil action in domestic courts for human rights violations committed abroad) is necessary to the proper functioning of the international legal system. Although my colleague Justice Abella and many interveners point to international instruments touting the importance of effective remedies, these instruments are not consistently interpreted as ensuring access to domestic courts to pursue civil actions for torture committed abroad to the detriment of all other interests. Indeed, it is clear that, in the international community, the right to a civil remedy will give way to procedural bars that are crucial to the functioning of sovereign equality such as state immunity (see, for example, *Germany v. Italy*, at paras. 82 and 84).

[164] Further, I have difficulty accepting that the maxim "where there is a right, there must be a remedy for its violation" discloses a manageable standard as required by *Malmo-Levine.* The DAC and the IHRP rely on this Court's decisions in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, and *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, in attempting to define the term "remedy", or more precisely "an appropriate and just remedy". Our Court found that "an appropriate and just remedy" will (1) meaningfully vindicate the rights and freedoms of the claimants, (2) employ means that are legitimate within the framework of our constitutional democracy, (3) be a judicial remedy which vindicates the

right while invoking the function and powers of the court, and (4) be fair to the party against whom the order is made (*Doucet-Boudreau*, at paras. 55-58).

[165] While these are helpful guiding principles, they are not concrete enough to guarantee a predictable result. Determining whether a remedy will truly compensate for a violation of one's rights is an intensely personal and subjective matter. What will vindicate the violation of one person's rights will not come close to satisfying another individual.

[166] Much like the notion of "the best interests of the child" discussed in *Canadian Foundation for Children, Youth and the Law*, the idea of "an appropriate and just remedy" and "meaningful vindication" to properly compensate for a rights violation

> is inevitably highly contextual and subject to dispute; reasonable people may well disagree about the result that its application will yield . . . . It does not function as a principle of fundamental justice setting out our minimum requirements for the dispensation of justice.

(*Canadian Foundation for Children, Youth and the Law*, at para. 11)

[167] For these reasons, I conclude that while the application of s. 3(1) of the *SIA* in cases of torture may engage security of the person, no identifiable principle of fundamental justice has been violated. As a result, s. 3(1) of the *SIA* does not violate s. 7 of the *Charter*.

VII. Conclusion

[168] With regard to exceptions to state immunity, Professor H. H. Koh famously asked, "if contracts, why not torture?" ("Transnational Public Law Litigation" (1991), 100 *Yale L.J.* 2347, at p. 2365). The answer is simple. Parliament has decided as much.

[169] State immunity is a complex doctrine that is shaped by constantly evolving international relations. Determining the exceptions to immunity requires a thorough knowledge of diplomacy and international politics and a careful weighing of national interests. Since the introduction of the *SIA*, such a task belongs to Parliament or the government, though decisions and laws pertaining to international affairs may be subject to constitutional scrutiny under the *Charter*. In this sense, there is no *Charter* free zone and the courts may have to play a part, as they have done in the past (*Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441; *Khadr*). It is not, however, this Court's task to intervene in delicate international policy making.

[170] Parliament has the power and the capacity to decide whether Canadian courts should exercise civil jurisdiction. Parliament has the ability to change the current state of the law on exceptions to state immunity, just as it did in the case of terrorism, and allow those in situations like Mr. Hashemi and his mother's estate to seek redress in Canadian courts. Parliament has simply chosen not to do it yet.

[171] Given the above reasoning, I would dismiss the appeal without costs and answer the constitutional questions as follows:

(1) Is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inconsistent with s. 2(*e*) of the *Canadian Bill of Rights*, S.C. 1960, c. 44?

No.

(2) If so, is s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, inoperable by reason of such inconsistency?

It is not necessary to answer this question.

(3) Does s. 3(1) of the *State Immunity Act*, R.S.C. 1985, c. S-18, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

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

It is not necessary to answer this question.

The following are the reasons delivered by

[172] ABELLA J. (dissenting) — The prohibition on torture is a peremptory norm — *jus cogens* — under international law. That means that the international community has agreed that the prohibition cannot be derogated from by any state.[1] The *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1465 U.N.T.S. 85, was adopted by the United Nations General Assembly in 1984 and came into force in 1987. It is an international human rights instrument aimed at the prevention of torture and other cruel, inhuman, and degrading treatment or punishment around the world. The *Convention Against Torture* did not create the prohibition against torture, but was premised on its uncontroversial and universal acceptance.

[173] State practice is evolving over whether torture can qualify as official state conduct. The evolution emerges from the following conundrum: how can torture be an official function for the purpose of immunity under international law when international law itself universally prohibits torture (see *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [2000] 1 A.C. 147 (H.L.) ("*Pinochet No. 3*")). It seems to me that the legal fluidity created by this question and the challenges it imposes for the integrity of international law leave this Court with a choice about whether to extend immunity to foreign officials for such acts.

[174] In light of the equivocal state of the customary international law of immunity, the long-standing international acceptance of the principle of reparation manifested in Article 14 of the *Convention Against Torture*, and almost a century of increasing international recognition that human rights violations threaten global peace and stability, I see no reason to include torture in the category of official state conduct attracting individual immunity. Equivocal customary international law should not be interpreted so as to block access to a civil remedy for torture, which, at a *jus cogens* level, is unequivocally prohibited. As a result, and with great respect, I do not agree with the majority that the defendants Saeed Mortazavi and Mohammad Bakhshi are immune from the jurisdiction of Canadian courts.

Analysis

[175] The doctrine of sovereign immunity limits a state's power to submit a foreign state to the jurisdiction of its courts. This limit is "the natural legal consequence of the obligation to respect the sovereignty of other States": Antonio Cassese, *International Law* (2nd ed. 2005), at p. 98 (emphasis deleted). Like the theory of sovereignty itself, the international law of state immunity has evolved significantly over the last century. What was once considered absolute is now recognized to be nuanced and contextual.

[176] In Canada, the doctrine of state immunity historically developed and was applied by Canadian courts under the common law and in accordance with customary practice. The formerly complete procedural bar once imposed by the doctrine has become increasingly restricted. As LeBel J. recognized in *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 (CanLII), [2002] 3 S.C.R. 269,

> [o]ver the years, the general principle of sovereign immunity has been attenuated somewhat, and certain exceptions to the general rule have emerged. Some authors have interpreted the emergence of exceptions to sovereign immunity as evidence of a new, restrictive immunity. [para. 15]

[177] Before 1982, Canadian courts had generally adhered to a theory of absolute state immunity, but in some cases adopted an increasingly restricted form of immunity determined by the subject matter of the state conduct in question. In light of the diverging practices in domestic courts at the time, Parliament enacted the *State Immunity Act*, R.S.C. 1985, c. S-18, whose purpose was to bring clarity by codifying the common law on the immunity of foreign states.

[178] The *State Immunity Act* sets out the following general rule for the immunity of a foreign state in Canadian courts:

> **3.** (1) Except as provided by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

[179] By its own terms, then, the theory of state immunity codified by the *State Immunity Act* through s. 3(1) is restricted through several internal statutory limitations. The immunity of a foreign state may be limited, for instance, by waiver (s. 4); in proceedings relating to the commercial activity of the foreign state (s. 5); in proceedings relating to death, personal injury or property damage that occurs in Canada (s. 6); in certain maritime proceedings (s. 7); and in respect of certain property located in Canada (s. 8).

[180] In 2012, Parliament amended the *State Immunity Act* to limit the immunity of a foreign state in proceedings against it in connection with its support for terrorism (s. 6.1).

[181] The doctrine of sovereign immunity is not entirely codified under the *State Immunity Act*. Section 18 specifies that the Act "does not apply to criminal proceedings or proceedings in the nature of criminal proceedings". Accordingly, the *State Immunity Act* only addresses the circumstances in which Canadian courts are procedurally barred from taking jurisdiction over a foreign state in proceedings outside the criminal context.

[182] While s. 3(1) of the *State Immunity Act* outlines the immunity of a "foreign state", s. 2 defines it as follows:

> "foreign state" includes
>
> (*a*) any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity,
>
> (*b*) any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state, and
>
> (*c*) any political subdivision of the foreign state;

[183] "Agency of a foreign state" and "political subdivision" are defined as follows:

> "agency of a foreign state" means any legal entity that is an organ of the foreign state but that is separate from the foreign state;
>
> "political subdivision" means a province, state or other like political subdivision of a foreign state that is a federal state.

[184] The only individuals expressly included in the definition of a "foreign state" are "any sovereign or other head of the foreign state . . . while acting as such in a public capacity". There is no reference to public officials apart from heads of state. As the General Counsel for the Constitutional and International Law Section of the Department of Justice said in speaking to the Standing Committee on Justice and Legal Affairs: ". . . this proposed act deals with states, not with individuals" (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, No. 60, 1st Sess., 32nd Parl., February 4, 1982, at p. 32).

[185] The Ontario Court of Appeal was of the view in *Jaffe v. Miller* (1993), 1993 CanLII 8468 (ON CA), 13 O.R. (3d) 745, that the silence in the *State Immunity Act* on the immunity of lower-level individual officials who work for and on behalf of the state means that the common law determines when immunity applies to lower level officials:

> The fact that the Act is silent on its application to employees of the foreign state can only mean that Parliament is content to have the determination of which employees are entitled to immunity determined at common law. It will be a matter of fact for the court to decide in each case whether any given person performing a particular function is a functionary of the foreign state.
>
> . . . *There is nothing in the State Immunity Act which derogates from the common law principle that, when acting in pursuit of their duties, officials or employees of foreign states enjoy the benefits of sovereign immunity*. [Emphasis added; pp. 759-60.]

[186] At the very least, the silence creates an ambiguity as to whether the *State Immunity Act* applies to lower-level officials. Resolving that ambiguity is assisted by reference to customary international law (Jutta Brunnée and Stephen J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Int'l L.* 3, at pp. 50-51). Under customary international law, there is a distinction between the blanket immunity *ratione personae* of high-ranking individuals such as the head of state, and the immunity *ratione materiae* for former heads of state and lower-ranking officials which applies only in respect of official acts performed for or on behalf of the state. These doctrines recognize the unique role and responsibility of heads of state. Immunity *ratione personae* shields individuals in the state's highest positions of authority and, in so doing, preserves their ability to carry out the governance of the state. Immunity *ratione materiae*, on the other hand, confers immunity on foreign officials for acts performed while in office only if they are official acts performed on behalf of the state (John H. Currie, Craig Forcese, Joanna Harrington and Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* (2nd ed. 2014), at pp. 554-55).

[187] For a practice to become custom, its observance must be seen by states to be obligatory (Currie, Forcese, Harrington and Oosterveld, at p. 116, citing James L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed. 1963), at pp. 59-60). In my view, in determining whether the claims in this case are barred by immunity, we should consider what the international community has said about individual redress for gross violations of peremptory norms.

[188] Under international law generally, the protection for and treatment of individuals as legal subjects has evolved dramatically. And with that evolving protection has come the recognition of a victim's right to redress for a violation of fundamental human rights. The claims for civil damages brought by Zahra Kazemi's estate and her son Stephan Hashemi are founded on Canada's and Iran's obligations under international human rights law and the *jus cogens* prohibition against torture. These claims must be situated in the context of the significant development of the principle of reparation under public international law throughout the twentieth century. At its most fundamental, the principle of reparation means that when the legal rights of an individual are violated, the wrongdoer owes redress to the victim for harm suffered. The aim of the principle of reparation is restorative.

[189] This principle is foundational in domestic legal systems. One of the justifications advanced for tort law, for example, is the "obligation of reparation", which Professor Stephen R. Perry describes as the theory of corrective justice ("The Moral Foundations of Tort Law" (1992), 77 *Iowa L. Rev.* 449, at pp. 450-51, citing Neil MacCormick, *Legal Right and Social Democracy: Essays in Legal and Political Philosophy*, chapter 11, "The Obligation of Reparation" (1982)). Professor Ernest Weinrib writes that "corrective justice is the justificatory structure that renders tort law intelligible from within" ("The Special Morality of Tort Law" (1989), 34 *McGill L.J.* 403, at p. 413). The principle of reparation is of course not unique to tort law and underlies many legal processes.

[190] The principle of reparation is also well established in public international law and has been extensively reviewed in the academic literature: see Andrea Gattini, "Reparations to Victims", in Antonio Cassese, ed., *The Oxford Companion to International Criminal Justice* (2009), at p. 487; Eva Dwertmann, *The Reparation System of the International Criminal Court: Its Implementation, Possibilities and Limitations* (2010); Riccardo Pisillo Mazzeschi, "Reparation Claims by Individuals for State Breaches of Humanitarian Law and Human Rights:

An Overview" (2003), 1 *J.I.C.J.* 339; Liesbeth Zegveld, "Victims' Reparations Claims and International Criminal Courts: Incompatible Values?" (2010), 8 *J.I.C.J.* 79.

[191] As the Permanent Court of International Justice stated in the 1928 *Case Concerning the Factory at Chorzów* (1928), P.C.I.J. (Ser. A) No. 17:

> The essential principle contained in the actual notion of an illegal act — a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals — is that *reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed.* [Emphasis added; p. 47.]

[192] The Inter-American Court of Human Rights explained it as follows in 1989:

> It is a principle of international law, which jurisprudence has considered "even a general concept of law," that every violation of an international obligation which results in harm creates a duty to make adequate reparation. Compensation, on the other hand, is the most usual way of doing so (*Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and *Factory at Chorzów*, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 184).
>
> Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm.
>
> . . .
>
> Indemnification for human rights violations is supported by international instruments of a universal and regional character. The Human Rights Committee, created by the International Covenant of Civil and Political Rights of the United Nations, has repeatedly called for, based on the Optional Protocol, indemnification for the violation of human rights recognized in the Covenant (see, for example, communications 4/1977; 6/1977; 11/1977; 132/1982; 138/1983; 147/1983; 161/1983; 188/1984; 194/1985; etc., Reports of the Human Rights Committee, United Nations). The European Court of Human Rights has reached the same conclusion based upon Article 50 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

(*Godínez-Cruz v. Honduras*, July 21, 1989 (Reparations and Costs), at paras. 23, 24 and 26)

[193] Historically, reparations under public international law were limited to interstate reparations for violations of the laws of nations. It has increasingly been recognized, however, that individuals too are entitled to reparation for violations of individually held rights under international law (see Dwertmann, at p. 22; Gattini; Mazzeschi).

[194] While early international criminal proceedings did little to recognize victims' rights, several international courts now recognize victims' rights to reparations against individual perpetrators of international crimes. This shift is, in part, the result of the recognition of the principle of reparation as a general principle of international law in the enabling treaties and statutes of these courts and the advocacy of victims' rights organizations and scholars since the 1960s. The movement became all the more pronounced in the aftermath of widespread atrocities in the 1990s and influenced the drafters of the *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9, July 17, 1998, to "ensure victims a greater role in proceedings before the ICC than before any other international tribunal" (Charles P. Trumbull IV, "The Victims of Victim Participation in International Criminal Proceedings" (2008), 29 *Mich. J. Int'l L.* 777, at p. 780). Incorporating victims' rights into international criminal proceedings is now viewed by many as a significant mechanism of transitional justice and a means of advancing reconciliation.

[195] The right of individuals to reparation is most evidently established under international human rights law. Reparations are a "secondary" right, deriving from the violation of a recognized legal right (Zegveld, at pp. 82-83). It is, as a result, not surprising that the expansion of international human rights law protecting the rights of individuals has generated corresponding rights to "remedy, both substantive and procedural, for individuals suffering injury from unlawful conduct by state authorities" (Zegveld, at p. 83).

[196] Individuals are also granted a remedial right in numerous international human rights conventions: *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), Article 8; *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171 (entered into force March 23, 1976), Articles 2 and 9 to 14; *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195 (entered into force January 4, 1969), Article 6; *Convention Against Torture* (entered into force June 26, 1987), Article 14; *Convention on the Rights of the Child*, 1577 U.N.T.S. 3 (entered into force September 2, 1990), Article 39; and *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, G.A. Res. 45/158, U.N. Doc. A/Res/45/158, December 18, 1990 (in force July 1, 2003), Articles 15, 16(9), 18(6) and 83. Regional human rights treaties have also established an individual right to a remedy for violations of the rights protected under the treaties (Articles 5(5) and 13 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 221; and Articles 10 and 25(1) of the *American Convention on Human Rights*, 1144 U.N.T.S. 123).

[197] The United Nations General Assembly has provided significant guidance on victims' rights to reparations under international law. The General Assembly first recognized victims' rights to access to justice and redress in 1985 (*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. Doc. A/Res/40/34, November 29, 1985). And, in the 1990s, Theo van Boven and M. Cherif Bassiouni each produced U.N. reports recommending comprehensive guidelines on victims' rights.[2]

[198] Building on these recommendations and on the developments in the international human rights Conventions listed in the previous paragraph, in 2005, the General Assembly adopted the *Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law*, G.A. Res. 60/147, U.N. Doc. A/Res/60/147, December 16, 2005. This resolution recognizes a state's obligation to provide access to justice and effective remedies, including reparations, to victims of serious or gross human rights and humanitarian law violations. It defines reparations as including "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition"[3] and provides that reparations be proportional to the gravity of the violation and harm suffered. The Preamble emphasizes that the resolution does not *create* a right to reparation, but merely identifies methods for the "implementation of *existing legal obligations* under international human rights law".

[199] As all this shows, an individual's right to a remedy against a state for violations of his or her human rights is now a recognized principle of international law.[4]

[200] The as yet unsettled question remains, however, whether state immunity denies victims of torture access to a civil remedy. Jurisprudentially, like Polaroid photographs, the picture is becoming clearer, but it still lacks focus.

[201] In the context of civil proceedings, American courts have concluded that acts in violation of *jus cogens* cannot constitute official sovereign acts. In *Yousuf v. Samantar*, 699 F.3d 763 (2012) (appeal pending) ("*Samantar II*"), the Court of Appeal for the Fourth Circuit considered whether Mohamed Ali Samantar, a former high-level government official from Somalia who was a resident in the United States, could benefit from immunity for alleged acts of torture, arbitrary detention and extrajudicial killing committed in Somalia. Traxler C.J. concluded that under international law, "officials from other countries are not entitled to foreign official immunity for *jus cogens* violations, even if the acts were performed in the defendant's official capacity" (p. 777). Because *jus cogens* violations are not legitimate state acts, the performance of such an act does not qualify as an "official act" justifying immunity *ratione materiae*.

[202] This conclusion was further supported by Congress's enactment of the *Torture Victim Protection Act of 1991*, Pub. L. 102-256, 106 Stat. 73, 28 U.S.C. § 1350 ("*TVPA*") which created an express private right of action for individuals victimized by torture. Although no similar legislation exists in Canada, Congress's enactment of the *TVPA* serves as further evidence of state practice confirming that *jus cogens* violations are not official acts which are entitled to immunity *ratione materiae*. The Senate Report about the *TVPA* explained that "because no

state officially condones torture or extrajudicial killings, few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties" (No. 249, 102nd Cong., 1st Sess. (1991), at p. 6).

[203] At the International Court of Justice ("I.C.J."), in *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p.3, Judges Higgins, Kooijmans and Buergenthal referred to the growing acceptance in the academic literature, state practice and international jurisprudence that *jus cogens* violations do not constitute "official acts" for the purpose of immunity *ratione materiae*:

> It is now increasingly claimed in the literature (see for example, Andrea Bianchi, "Denying State Immunity to Violators of Human Rights", 46 *Austrian Journal of Public and International Law* (1994), pp. 227-228) that serious international crimes cannot be regarded as official acts because they are neither normal State functions nor functions that a State alone (in contrast to an individual) can perform (Goff, J. (as he then was) and Lord Wilberforce articulated this test in the case of *1º Congreso del Partido* (1978) QB 500 at 528 and (1983) AC 244 at 268, respectively). This view is underscored by the increasing realization that State-related motives are not the proper test for determining what constitutes public State acts. The same view is gradually also finding expression in State practice, as evidenced in judicial decisions and opinions. (For an early example, see the judgment of the Israel Supreme Court in the *Eichmann* case; Supreme Court, 29 May 1962, 36 *International Law Reports*, p. 312.) See also the speeches of Lords Hutton and Phillips of Worth Matravers in *R.* v. *Bartle and the Commissioner of Police for the Metropolis and Others*, ex parte *Pinochet* ("*Pinochet III*"); and of Lords Steyn and Nicholls of Birkenhead in "*Pinochet I*", as well as the judgment of the Court of Appeal of Amsterdam in the *Bouterse* case (Gerechtshof Amsterdam, 20 November 2000, para. 4.2.) [para. 85]

[204] More recently, however, the I.C.J. in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*,[5] in addressing the scope of state immunity under customary international law with respect to *jus cogens* violations, concluded that its availability was not dependent on the gravity of the unlawful act which the state is alleged to have committed. Significantly, however, it made clear that it was only considering immunity for acts committed by the state, specifically emphasizing that it was not considering the availability of immunity for individual state officials:

> [T]he Court must emphasize that it is addressing only the immunity of the State itself from the jurisdiction of the courts of other States; the question of whether, and if so to what extent, immunity might apply in criminal proceedings against an official of the State is not in issue in the present case. [para. 91]

[205] The availability of state immunity for *jus cogens* violations rests on the underlying rationale that such immunity is necessary to allow the government to continue functioning in its own territory. By declining to extend the reach of its conclusion to individual foreign officials, the I.C.J. implicitly acknowledged that immunity *ratione materiae* in civil proceedings can be developed on a different trajectory than state immunity (Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd ed. 2013), at p. 569).

[206] The evolutionary nature of the law of immunity for torture was recognized most recently in *Jones v. United Kingdom*, Nos. 34356/06 and 40528/06, ECHR 2014. Four individuals had started civil proceedings in the United Kingdom against the Ministry of Interior of the Kingdom of Saudi Arabia and against individual state officials, acting as agents of Saudi Arabia, for alleged incidents of torture.

[207] The European Court of Human Rights extensively reviewed the international jurisprudence, noting that state practice on the question of immunity *ratione materiae* for incidents of torture was "in a state of flux" (para. 30). It recognized the existence of "some emerging support in favour of a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials" because torture was not lawfully within the scope of official authority (para. 213; see, e.g., *Samantar II* as well as *Xuncax v. Gramajo*, 886 F.Supp. 162 (D. Mass. 1995), and *Cabiri v. Assasie-Gyimah*, 921 F.Supp. 1189 (S.D.N.Y. 1996)). Nevertheless, it was of the view that there was not yet sufficient international support for denying immunity to individual defendants against a *civil* claim based on torture.

[208] This decision, however, does not foreclose the possibility that torture is beyond the protection of immunity *ratione materiae*. What it manifestly *does* support is the recognition that, at present, state practice is evolving. The evolution, in my view, reveals a palpable, albeit slow trend in the international jurisprudence to

recognize that torture, as a violation of a peremptory norm, does not constitute officially sanctioned state conduct for the purposes of immunity *ratione materiae*.

[209] I have some difficulty, therefore, understanding why the treatment of immunity for civil claims should be different from that for criminal proceedings. As Judge Kalaydjieva said in her dissenting opinion in *Jones v. United Kingdom*:

> Like Lord Justice Mance [at the Court of Appeal] I find it difficult to "accept that general differences between criminal and civil law justif[y] a distinction in the application of immunity in the two contexts", especially in view of developments in this field, not least following the findings of the House of Lords in the case of *Pinochet (No. 3)* that there would be "no immunity from criminal prosecution in respect of an individual officer who had committed torture abroad in an official context." I also find it "not easy to see why civil proceedings against an alleged torturer could be said to involve a greater interference in the internal affairs of a foreign State than criminal proceedings against the same person" and also "incongruous that if an alleged torturer was within the jurisdiction of the forum State, he would be prosecuted pursuant to Article 5(2) of the Convention against Torture and no immunity could be claimed, but the victim of the alleged torture would be unable to pursue any civil claim". [pp. 62-63]

[210] This is only reinforced by the fact that many jurisdictions permit civil recovery against perpetrators in the context of criminal proceedings. As Ben Batros and Philippa Webb write, "the criminal courts of many states, including Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg and The Netherlands, combine civil and criminal proceedings, allowing victims to be represented, and to recover damages, in the criminal proceeding itself": "Accountability for Torture Abroad and the Limits of the Act of State Doctrine: Comments on *Habib v. Commonwealth of Australia*" (2010), 8 *J.I.C.J.* 1153, at p. 1169.

[211] Accordingly, while it can be said that customary international law permits states to recognize immunity for foreign officials, as evidenced in *Jones v. United Kingdom*, it also does not *preclude* a state from denying immunity for acts of torture, as exemplified in *Pinochet No. 3* and *Samantar II*.

[212] In my view, this conclusion is reinforced by the steps the international community has taken towards ensuring individual accountability for the commission of torture under the *Convention Against Torture*.

[213] The purpose of the *Convention Against Torture* is consistent with a broad obligation to protect victims' rights to remedies for torture regardless of where it occurred. The *Convention* established a shared commitment to "make more effective the struggle against torture . . . throughout the world", as the Preamble states. In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, the I.C.J. described the purpose of the *Convention*'s obligations as *erga omnes partes*, that is, all state parties have an interest in complying with them:

> As stated in its Preamble, the object and purpose of the Convention is "to make more effective the struggle against torture . . . throughout the world". The States parties to the Convention have a common interest to ensure, in view of their shared values, that acts of torture are prevented and that, if they occur, their authors do not enjoy impunity. . . . All the States parties "have a legal interest" in the protection of the rights involved (*Barcelona Traction, Light and Power Company, Limited (Belgium* v. *Spain), Second Phase, Judgment, I.C.J. Reports 1970*, p. 32, para. 33). These obligations may be defined as "obligations *erga omnes partes*" in the sense that each State party has an interest in compliance with them in any given case. [para. 68]

[214] Of particular relevance, Article 14 of the *Convention Against Torture* states:

> 1. Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

> 2. Nothing in this article shall affect any right of the victim or other persons to compensation which may exist under national law.

[215] On a plain reading, Article 14 imposes an obligation on state parties to ensure that all victims of torture from their countries can obtain "redress and ha[ve] an enforceable right to fair and adequate compensation". The text provides no indication that the "act of torture" must occur within the territory of the state party for the obligation to be engaged. If a state undertakes to ensure access to a remedy for torture committed abroad, this necessarily implicates the question of the immunity of the perpetrators of that torture.

[216] The absence of any territorial dimension to the provision is significant. When the parties to the *Convention Against Torture* wished to limit their obligations to their respective territorial jurisdictions, they did so expressly. The obligations imposed by Articles 2(1), 5(1)(*a*), 5(2), 11, 12, 13 and 16 of the *Convention*, for example, are limited or modified by the words "*in any territory under its jurisdiction*" (Harold Hongju Koh, "Memorandum Opinion on the Geographic Scope of the Convention Against Torture and Its Application in Situations of Armed Conflict", U.S. Department of State, January 21, 2013, at pp. 16-20).

[217] The drafting history of Article 14 further suggests that the absence of territorial limits in it are revealing. While the Netherlands had proposed to include the words "committed in any territory under its jurisdiction", this phrase was deleted from the text without any indication from either the *Travaux Préparatoires* or the commentary as to why: Manfred Nowak and Elizabeth McArthur, with the contribution of Kerstin Buchinger et al., *The United Nations Convention Against Torture: A Commentary* (2008), at para. 15.

[218] This has led some to suggest that the omission of the territorial limits was a mistake or an oversight: see Andrew Byrnes, "Civil Remedies for Torture Committed Abroad: An Obligation under the Convention against Torture?", in Craig M. Scott, ed., *Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation* (2001), 537, at pp. 546 and 548. But even accepting that the omission of any territorial limit to Article 14 was an error, there are international procedures which set out how such a mistake could have been rectified. Article 40 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, governs the circumstances in which an amendment to a multilateral treaty can be made, and Article 79 sets out the appropriate procedures to be followed for the correction of an error in the text of a treaty. To date, no amendment or correction has been made to Article 14.

[219] Further confusion has arisen because of the declaration by the United States upon the ratification of the *Convention Against Torture* in October 1994, stating that its consent was conditional on the following "understanding":

> (3) That it is the understanding of the United States that article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(United Nations Treaty Collection, Status of *Convention Against Torture* (online), at p. 7)

[220] The House of Lords said in *Jones v. Ministry of the Interior of Saudi Arabia*, [2006] UKHL 26, [2007] 1 A.C. 270, that "[n]o one has ever objected to that statement of understanding by the United States" (para. 57). But Germany had indicated in 1996 that the United States' "understanding" was a non-binding declaration:

> On 26 February 1996, the Government of Germany notified the Secretary-General that with respect to the . . . understandings under II (2) and (3) made by the United States of America upon ratification "*it is the understanding of the Government of the Federal Republic of Germany that [these understandings] do not touch upon the obligations of the United States of America as State Party to the Convention*."

(Emphasis added; United Nations Treaty Collection, Status of *Convention Against Torture* (online), at fn 26.)

[221] State parties to a treaty are not *presumed* to agree with a declared interpretation merely because they have not expressed an objection (International Law Commission's *Guide to Practice on Reservations to Treaties*, submitted to the U.N. General Assembly in 2011, U.N. Doc. A/66/10/Add.1, at paras. 2.9.8.-2.9.9). At best, therefore, the impact of the United States' "understanding" is inconclusive.

[222] Subsequent state practice and the views of the Committee against Torture further confirm that Article 14 does not embody a "mistake", or that it is merely understood to be territorially limited. In any event, the United States' position has shifted since the ratification of the *Convention Against Torture*, as evidenced by the enactment in 1991 of the *TVPA*, which provides a cause of action in s. 2(a) for the recovery of damages from "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects an individual to torture or extrajudicial killing. This led François Larocque to write that

> whatever weight the US executive "understanding" of Article 14 might have had upon ratification of the CAT in 1990, it was almost certainly superseded by the statements of both houses of Congress when they enacted the *TVPA*. *In their 1991 reports accompanying the TVPA bill, both the House of Representatives and the Senate explicitly noted that the TVPA was primarily intended to implement the Article 14 obligation to provide civil jurisdiction over torture.* . . . [I]n its report, the Senate Committee on the Judiciary stated that "this legislation will carry out the intent of the CAT . . . . This legislation will do precisely that — by making sure that torturers and death squads will no longer have a safe haven in the United States." [Emphasis added.]

(*Civil Actions for Uncivilized Acts: The Adjudicative Jurisdiction of Common Law Courts in Transnational Human Rights Proceedings* (2010), at pp. 262-63)

[223] The views of state parties to the *Convention Against Torture* confirm Larocque's observation. The governments of Australia, the Swiss Confederation and the United Kingdom of Great Britain and Northern Ireland submitted their views on Article 14 in an *amicus* brief to the Supreme Court of the United States in the case *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), by expressing that the *TVPA* "was passed by Congress to implement, in part, the Convention Against Torture and Other Cruel, [Inhuman] or Degrading Treatment or Punishment, which had been ratified by the United States" (p. 21).

[224] The opinion of the *Convention Against Torture*'s Committee against Torture is also instructive. The Committee consists of "ten experts of high moral standing and recognized competence in the field of human rights, who shall serve in their personal capacity" (Article 17). All state parties to the *Convention* are required under Article 19(1) to report to the Committee "on the measures they have taken to give effect to their undertakings under this Convention", and the Committee is mandated under Article 19(3) to "make such general comments on the report as it may consider appropriate and shall forward these to the State Party concerned". I agree with the intervener the Canadian Bar Association that the Committee's expertise lends support to the weight of its interpretation (see Michael O'Flaherty, "The Concluding Observations of United Nations Human Rights Treaty Bodies" (2006), 6 *Hum. Rts. L. Rev*. 27; International Law Association, Committee on International Human Rights Law and Practice, *Interim report on the impact of the work of the United Nations human rights treaty bodies on national courts and tribunals* (2002) (online).

[225] Notably, the *Report of the Committee against Torture* commended the United States in 2000 for the "broad legal recourse to compensation for victims of torture, whether or not such torture occurred in the United States of America" (U.N. Doc. G.A. A/55/44 (2000), at para. 178).

[226] In 2005, on the other hand, the Committee expressed concern about the absence of effective measures in Canada to provide civil compensation to victims of torture "in all cases" (United Nations, Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention*, U.N. Doc. CAT/C/CR/34/CAN, July 7, 2005, at para. 4(g)). These concerns were expressed shortly after the Ontario Court of Appeal, in *Bouzari v. Islamic Republic of Iran* (2004), 2004 CanLII 871 (ON CA), 71 O.R. (3d) 675 , concluded that the *State Immunity Act* precludes access to a civil remedy for acts committed by foreign states, notwithstanding Article 14 of the *Convention Against Torture* (see Jennifer Besner and Amir Attaran, "Civil liability in Canada's courts for torture committed abroad: The unsatisfactory interpretation of the State Immunity Act 1985 (Can)" (2008), 16 *Tort L. Rev.* 150, at p. 160). In 2012, the Committee reiterated its concern about Canada's failure to fully implement Article 14:

> The Committee remains concerned at the lack of effective measures to provide redress, including compensation, through civil jurisdiction to all victims of torture, *mainly due to the restrictions under provisions of the State Immunity Act* (art. 14).
>
> The State party should ensure that all victims of torture are able to access remedy and obtain redress, wherever acts of torture occurred and regardless of the nationality of the perpetrator . . . . [Emphasis added.]

(*Consideration of reports submitted by States parties under article 19 of the Convention*, U.N. Doc. CAT/C/CAN/CO/6, June 25, 2012, at para. 15)

[227] It is important to note that the plaintiff's claim in *Bouzari* was against the Islamic Republic of Iran, not against individual officials. *Bouzari* addressed only the extent to which Article 14 requires state parties to deny a "foreign state" immunity in civil proceedings in Canada arising out of torture committed abroad.

[228] All this demonstrates that customary international law no longer *requires* that foreign state officials who are alleged to have committed acts of torture be granted immunity *ratione materiae* from the jurisdiction of Canadian courts. This interpretation is not only consistent with the text and purposes of Article 14 of the *Convention Against Torture*, it also finds growing expression in the practice of state parties to that treaty.

[229] The denial of immunity to individual state officials for acts of torture does not undermine the rationale for the doctrine of immunity *ratione materiae*. In the face of universal acceptance of the prohibition against torture, concerns about any interference with sovereignty which may be created by acting in judgment of an individual state official who violates this prohibition necessarily shrink. The very nature of the prohibition as a peremptory norm means that all states agree that torture cannot be condoned. Torture cannot, therefore, be an official state act for the purposes of immunity *ratione materiae*. That the *Convention Against Torture* defines its scope by reference to the fact that torture itself is necessarily carried out by the state and its officials does not detract from this universal understanding, or predetermine whether immunity must be extended to such conduct.

[230] I am therefore in agreement with Breyer J.'s concurring opinion in *Sosa v. Alvarez-Machain* that assuming civil jurisdiction over torture committed abroad will not impair the objectives sought to be protected by comity:

> Today international law will sometimes similarly reflect not only substantive agreement as to certain universally condemned behavior but also procedural agreement that universal jurisdiction exists to prosecute a subset of that behavior. . . . That subset includes torture, genocide, crimes against humanity, and war crimes. . . .
>
> The fact that this procedural consensus exists suggests that recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. [Citations omitted; pp. 762-63.]

[231] As a result, in my view, the *State Immunity Act* does not apply to Mortazavi and Bakhshi, and the proceedings against them are not barred by immunity *ratione materiae*.

Appeal dismissed without costs, ABELLA J. *dissenting.*

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Solicitors appointed by the Court as amicus curiae: *Borden Ladner Gervais, Toronto.*

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Solicitors for the intervener the Iran Human Rights Documentation Center: Barin Avocats, Montréal; McGill University, Montréal.

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[1] *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3.

[2] Commission on Human Rights, *Report of the independent expert on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights resolution 1998/43*, U.N. Doc. E/CN.4/1999/65, February 8, 1999; Commission on Human Rights, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, U.N. Doc E/CN.4/Sub.2/1996/17, May 24, 1996.

[3] *Basic principles and guidelines*, at para. 18.

[4] For a detailed review of the evolution of victims' rights under international law, see M. Cherif Bassiouni, "International Recognition of Victims' Rights" (2006), 6 *Hum. Rts. L. Rev.* 203.

[5] Judgment, I.C.J. Reports 2012, p. 99.

18.	*Canada v Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49

Canada v. Alta Energy Luxembourg S.A.R.L., 2021 SCC 49 (CanLII)

SUPREME COURT OF CANADA

CITATION: Canada *v.* Alta Energy Luxembourg S.A.R.L., 2021 SCC 49

APPEAL HEARD: March 19, 2021
JUDGMENT RENDERED: November 26, 2021
DOCKET: 39113

BETWEEN:

Her Majesty The Queen
Appellant

and

Alta Energy Luxembourg S.A.R.L.
Respondent

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

REASONS FOR JUDGMENT:
(paras. 1 to 97)
Côté J. (Abella, Moldaver, Karakatsanis, Brown and Kasirer JJ. concurring)

JOINT DISSENTING REASONS:
(paras. 98 to 189)
Rowe and Martin JJ. (Wagner C.J. concurring)

Her Majesty The Queen *Appellant*

v.

Alta Energy Luxembourg S.A.R.L. *Respondent*

Indexed as: Canada *v.* Alta Energy Luxembourg S.A.R.L.

2021 SCC 49

File No.: 39113.

2021: March 19; 2021: November 26.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin and Kasirer JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Taxation — Income tax — Tax avoidance — Application of general anti-avoidance rule — Large capital gain realized by corporate resident of Luxembourg on sale of shares whose value derived principally from immovable property situated in Canada — Corporation claiming exemption from Canadian tax on basis that shares were protected property under tax treaty between Canada and Luxembourg — Whether general anti-avoidance rule applicable to deny requested exemption — Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 245 — Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Can. T.S. 2000 No. 22, art. 13.

In 2011, two American firms founded an American company for the purpose of acquiring and developing unconventional oil and natural gas properties. Alta Energy Partners Canada Ltd. ("Alta Canada"), a wholly owned Canadian subsidiary of that company, was incorporated in order to carry on that business. A restructuring of Alta Canada was undertaken in 2012. As part of the restructuring, Alta Energy Luxembourg S.A.R.L. ("Alta Luxembourg") was incorporated under the laws of Luxembourg and its shares were issued to a new Canadian partnership. On the same day, Alta Luxembourg purchased all of the shares of Alta Canada. In 2013, it sold those shares, realizing a capital gain in excess of $380 million. Payment for the shares was organized so that Alta Luxembourg did not receive any of the sale proceeds. Following the sale, Alta Luxembourg did not conduct any other business or hold any other investments.

The capital gain was reported to the Luxembourg tax authorities and was subject to full taxation under Luxembourg's domestic laws. In its Canadian tax return for 2013, Alta Luxembourg claimed an exemption from Canadian tax on the basis that the gain was not included in its "taxable income earned in Canada" under s. 115(1)(b) of the *Income Tax Act* ("*Act*") because the shares were "treaty-protected property" under art. 13(4) and (5) of the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* ("*Treaty*"). Article 13(4) of the *Treaty* creates an exemption for residents of Luxembourg from Canadian tax arising from a capital gain on the alienation of shares the value of which is derived principally from immovable property situated in Canada and in which the business of the company was carried on.

The Minister denied the treaty exemption. Alta Luxembourg appealed to the Tax Court of Canada. The Minister argued that the business property exemption in art. 13(4) of the *Treaty* did not apply and, in the alternative, if the shares did qualify as treaty-protected property, that the general anti-avoidance rule ("GAAR") in s. 245 of the *Act* should apply. The Tax Court found that the shares were treaty-protected property. With respect to the GAAR,

the parties agreed that the restructuring was an "avoidance transaction" as defined in s. 245(3) of the *Act* that resulted in a tax benefit. The Tax Court held that the avoidance transaction did not result in a misuse or abuse of the provisions of the Act or the *Treaty*. The Federal Court of Appeal dismissed the Minister's appeal, which raised only the issue of whether the GAAR applied.

Held (Wagner C.J. and Rowe and Martin JJ. dissenting): The appeal should be dismissed.

Per Abella, Moldaver, Karakatsanis, **Côté**, Brown and Kasirer JJ.: The Minister has not discharged her burden of proving abusive tax avoidance. In agreeing to include a specific exemption for immovable property in the *Treaty*, Canada sought to encourage investments by Luxembourg residents in business assets embodied in immovable property located in Canada and to reap the ensuing benefits. Alta Luxembourg made exactly such an investment. It is a resident of Luxembourg and, as such, is exempt from Canadian taxes on the capital gain realized on the disposition of shares of its wholly owned Canadian subsidiary.

The GAAR acts as a legislative limit on both tax certainty and the well-accepted principle that taxpayers are entitled to arrange their affairs to minimize the amount of tax payable. It bars abusive tax avoidance transactions, including those in which taxpayers seek to obtain treaty benefits that were never intended by the contracting states, but it cannot be used to fundamentally alter the criteria under which a person is entitled to the benefits of a treaty. Applying the GAAR involves a three-part process meant to determine: (1) whether there is a tax benefit arising from a transaction; (2) whether the transaction is an avoidance transaction; and (3) whether the avoidance transaction is abusive. To determine whether a transaction is abusive, the Court has set out a two-step inquiry. Under the first step, the provisions relied on for the tax benefit are interpreted to determine their object, spirit, and purpose. In cases of treaty interpretation, this must be done with a view to implementing the true intention of the parties. Under the second step, a factual analysis determines whether the avoidance transaction at issue frustrates the object, spirit, and purpose of the provisions.

The object, spirit, and purpose of the business property exemption provided for in art. 13(4) and (5) of the *Treaty* are to foster international investment. The object, spirit, and purpose of arts. 1 and 4, which make residence central to the application of the *Treaty*, are to allow all persons who are residents under the laws of one or both of the contracting states to claim benefits under the *Treaty*, so long as their resident status could expose them to full tax liability. According to art. 4, "residence" under the *Treaty* is based on liability to tax in one or both of the contracting states by reason of domicile, residence, place of management or another similar criterion. In the context of corporations, the "liable to tax" requirement is met where the domestic law of a contracting state exposes a corporation to full tax liability because it has its residence in that state. Residence is to be defined by the laws of the contracting state in which residence is claimed. Consistent with international practice, Luxembourg law grants resident status to corporations having either their legal seat or their central management in Luxembourg. This does not depart from accepted usage such that the bargain struck in the *Treaty* could be upheld only if Luxembourg residents claiming benefits have sufficient substantive economic connections to their country of residence. If the drafters had truly intended to include only corporations with sufficient substantive economic connections to their country of residence within the scope of the *Treaty*, they would have clearly signalled their intention to depart from a well-established criterion like the "place of incorporation" or "legal seat".

Another contextual element further reinforces the conclusion that the purpose of arts. 1 and 4 of the *Treaty* is not to reserve benefits to corporations with sufficient substantive economic connections to their country of residence: the inclusion of art. 28(3) in the *Treaty*, which denies benefits to certain Luxembourg holding companies. The parties' choice of this approach should be understood as a rejection of the relevance of economic ties for delineating which corporations should be entitled to benefits and which should not. This choice suggests that the drafters intended to exclude a corporation with minimal economic connections to one of the contracting states only where the corporation is a holding company benefiting from Luxembourg's well known international tax haven regime. In light of this clear intention, the spirit of arts. 1 and 4 was not to limit access to the benefits of the *Treaty* to corporations with sufficient substantive economic connections to their country of residence.

Although the absence of specific anti-avoidance rules is not necessarily determinative of the application of the GAAR, their absence sheds light on the contracting states' intention. This is not a case where Parliament did not or could not have foreseen the tax strategy employed by the taxpayer. The use of conduit corporations — legal entities created in a state essentially to obtain treaty benefits that would not be available directly — was not an unforeseen tax strategy at the time of the *Treaty*. Options to remediate the situation were available and known by the parties, but they made deliberate choices to guard some benefits against conduit

corporations and to leave others unguarded. Had the parties truly intended to prevent such corporations from taking advantage of the business property exemption, they could have done so. Combined with Canada's preference at the time of the *Treaty* for taking advantage of the economic benefits yielded by foreign investments rather than higher tax revenues, this makes the rationale of the business property exemption even clearer. The fact that the capital gains may not be taxed in Luxembourg, leading to double non-taxation, and the fact that conduit corporations can take advantage of the business property exemption are tax planning outcomes consistent with the bargain struck between Canada and Luxembourg.

In raising the GAAR, Canada is now seeking to revisit its bargain in order to secure both foreign investments and tax revenues. Tax treaties are replete with choices. One key choice made by Canada and Luxembourg in negotiating the *Treaty* was to deviate from the OECD *Model Tax Convention on Income and on Capital* by allocating to a person's residence state the right to tax capital gains realized on the disposition of shares or other similar interests deriving their value principally from immovable property used in a corporation's business. The business property exemption is a clear departure from the theory of economic allegiance, under which the parties to a treaty avoid double taxation by allocating the right to collect taxes to the contracting state to which the income and the taxpayer are more closely connected. Canada effectively agreed to give up its right to tax certain entities incorporated in Luxembourg in exchange for the jobs and economic opportunities that the business property exemption would promote.

The provisions of the *Treaty* operated as they were intended to operate —the avoidance transaction neither defeated nor frustrated the object, spirit, or purpose of the provisions in issue. Therefore, there was no abuse, so the GAAR cannot be applied to deny the tax benefit claimed. The *Treaty* makes it clear that Canada and Luxembourg agreed that the power to tax would be allocated to Luxembourg where the conditions of the business property exemption were met. There is nothing in the *Treaty* suggesting that a single-purpose conduit corporation resident in Luxembourg cannot avail itself of the benefits of the *Treaty* due to some other consideration. The provisions of the *Treaty* operated as they were intended to operate; there was no abuse, and, therefore, the GAAR cannot be applied to deny the tax benefit claimed.

Per Wagner C.J. and **Rowe** and **Martin** JJ. (dissenting): The appeal should be allowed. Alta Luxembourg's claim for a tax benefit under the *Treaty* is the result of abusive avoidance transactions. The courts below did not properly identify the rationale underlying the relevant provisions of the *Treaty*. They gave weight only to the text and failed to consider why the provisions were put in place. This is not the exercise mandated under the GAAR. Technical compliance with a tax treaty in a way that frustrates the underlying rationale of the provisions relied upon by the taxpayer is precisely what triggers the GAAR. Although it is a long standing principle in Canadian law that taxpayers may arrange their affairs to minimize their amount of tax payable, an unbridled application of that principle can mislead taxpayers into believing that tax plans that merely comply with the technical provisions of the *Act* are acceptable. Similarly, treaty shopping is not inherently abusive, but where taxing rights in a tax treaty are allocated on the basis of economic allegiance and conduit entities claim tax benefits despite the absence of any genuine economic connection with the state of residence, treaty shopping is abusive.

Canada has acted to curb abusive international tax avoidance by enacting the GAAR, which denies tax benefits when taxpayers engage in transactions that conform with the text of the tax rules relied upon, but do not accord with their rationale. As such, the GAAR vests upon courts the unusual duty to look beyond the words of the applicable provisions to determine whether the transactions in question frustrate their underlying rationale. An interpretation confined to the black letter of these legislative provisions would defeat Parliament's will and fail to fulfil the courts' role. As the question under the GAAR is not whether the taxpayer can claim a tax benefit, but rather why the benefit was conferred, a GAAR analysis is not constrained by the text in the same way as a traditional statutory interpretation. While this gives rise to a degree of uncertainty for taxpayers, allowing the GAAR to create this uncertainty was a deliberate choice that Parliament made when it enacted a provision that can defeat tax avoidance schemes that exploit Canada's legislation and treaties. Where those schemes cross the line into abusive tax avoidance, a finding that the GAAR applies does not run counter to the principles of certainty, predictability and fairness.

The allocation of taxing powers in the *Treaty* follows the theory of "economic allegiance", so the object, spirit or purpose of the relevant provisions of the *Treaty* is to assign taxing rights to the state with the closest economic connection to the taxpayer's income. Under art. 13(5), the state of residence retains its jurisdiction to tax capital gains unless the exceptions in art. 13(1) to (4) apply. Article 13(1) preserves the right of the source state to tax gains derived from immovable property situated in that state, and art. 13(4) preserves the source state's right to

tax capital gains arising from the disposition of shares the value of which is derived principally from immovable property situated in that state, unless the company carries on business in the property. The business property exemption assigns the right to tax capital gains arising from the disposition of immovable property in which business is carried on to the resident state. The rationale behind the business property exemption is to encourage investment; it reflects the fact that the business activity, rather than the immovable property itself, drives the value of the property. Article 13(4) therefore allocates to Luxembourg the right to tax its residents' indirect gains from immovable property situated in Canada used in a business.

In the instant case, the abuse is clear. Alta Luxembourg had no genuine economic connections with Luxembourg as it was a mere conduit interposed in Luxembourg for residents of third-party states to avail themselves of a tax exemption under the *Treaty*. This lack of any genuine economic connection to Luxembourg frustrates the rationale of the relevant provisions of the *Treaty*. The federal government did not deliberately set out to create the conditions for unlimited tax avoidance by means of schemes such as that in which Alta Luxembourg was used. The Court should not legitimize such blatantly abusive tax avoidance based on the view that Canada should have negotiated different treaty terms. *Ex ante* speculation about how the treaty parties ought to have proceeded based on alternatives said to have been available to them gives primacy to what is not there. Parliament was entitled to rely on the GAAR to address abusive uses of the *Treaty* rather than negotiate the inclusion of a specific rule. The focus should be on what was actually agreed upon and whether the underlying rationale of the relevant provisions was frustrated by the avoidance transactions undertaken. In the give and take of treaty negotiation, Canada certainly did not give up the GAAR.

The facts of this case are a patent example of a sophisticated taxpayer effecting a restructuring on the basis of professional tax advice to avoid Canadian tax. In such cases, the principle of fairness ought not to be ignored. As for the degree of uncertainty introduced by the GAAR, it is counterbalanced by the Crown's burden to show that the avoidance transactions frustrates the object, spirit or purpose of the provisions relied on by the taxpayer and by the fact that any doubt under the GAAR analysis is to be resolved in favour of the taxpayer.

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By Côté J.

Applied: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601; *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721; **approved:** *Prévost Car Inc. v. Canada*, 2009 FCA 57, [2010] 2 F.C.R. 65; **referred to:** *R. v. MIL (Investments) S.A.*, 2007 FCA 236, [2007] 4 C.T.C. 235; *MIL (Investments) S.A. v. R.*, 2006 TCC 460, [2006] 5 C.T.C. 2552; *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1; *Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3; *R. v. Melford Developments Inc.*, 1982 CanLII 201 (SCC), [1982] 2 S.C.R. 504; *Crown Forest Industries Ltd. v. Canada*, 1995 CanLII 103 (SCC), [1995] 2 S.C.R. 802; *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536; *J. N. Gladden Estate v. The Queen*, [1985] 1 C.T.C. 163; *Cudd Pressure Control Inc. v. R.*, 1998 CanLII 8590 (FCA), [1999] 1 C.T.C. 1; *SA Andritz*, No. 233894, Conseil d'État (Section du Contentieux), December 30, 2003; *R. v. Hauser*, 1979 CanLII 13 (SCC), [1979] 1 S.C.R. 984; *R. v. McLeod* (1950), 1950 CanLII 409 (BC CA), 97 C.C.C. 366; *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99; *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

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APPEAL from a judgment of the Federal Court of Appeal (Webb, Near and Locke JJ.A.), 2020 FCA 43, [2020] 5 C.T.C. 193, 2020 D.T.C. 5021, [2020] F.C.J. No. 204 (QL), 2020 CarswellNat 314 (WL Can.), affirming a decision of Hogan J., 2018 TCC 152, [2019] 5 C.T.C. 2183, 2018 D.T.C. 1120, [2018] T.C.J. No. 124 (QL), 2018 CarswellNat 4615 (WL Can.). Appeal dismissed, Wagner C.J. and Rowe and Martin JJ. dissenting.

Michael Taylor and *Natalie Goulard*, for the appellant.

Matthew G. Williams and *E. Rebecca Potter*, for the respondent.

The judgment of Abella, Moldaver, Karakatsanis, Côté, Brown and Kasirer JJ. was delivered by

CÔTÉ J. —

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I. Overview

[1] The principles of predictability, certainty, and fairness and respect for the right of taxpayers to legitimate tax minimization are the bedrock of tax law. In the context of international tax treaties, respect for

negotiated bargains between contracting states is fundamental to ensure tax certainty and predictability and to uphold the principle of *pacta sunt servanda*, pursuant to which parties to a treaty must keep their sides of the bargain.

[2] Section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("*Act*"), known as the general anti-avoidance rule ("GAAR"), acts as a legislative limit on tax certainty by barring abusive tax avoidance transactions, including those in which taxpayers seek to obtain treaty benefits that were never intended by the contracting states. This intention is found by going behind the text of the provisions under which a tax benefit is claimed in order to determine their object, spirit, and purpose. In the bilateral treaty context, there are two sovereign states whose intentions are relevant; a robust analysis must take both into consideration in order to give proper effect to the tax treaty as a carefully negotiated instrument.

[3] In this case, the appellant, Her Majesty The Queen, as represented by the Minister of National Revenue ("Minister"), submits that the transaction at issue abused the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 2000 No. 22 ("*Treaty*"). According to the Minister, the drafters did not intend the *Treaty* to benefit residents without "sufficient substantive economic connections" to their state of residence (A.F., at para. 100). In the view of the respondent, Alta Energy Luxembourg S.A.R.L. ("Alta Luxembourg"), the Minister has failed to discharge her burden of establishing that the object, spirit, or purpose of the provisions was frustrated or defeated.

[4] In my view, the Minister is asking this Court to use the GAAR to change the result, not by interpreting the provisions of the *Treaty* through a unified textual, contextual, and purposive analysis, but by fundamentally altering the criteria under which a person is entitled to the benefits of the *Treaty*, thus frustrating the certainty and predictability sought by the drafters.

[5] Tax treaties are replete with choices. One key choice made by Canada and Luxembourg was to deviate from the Organisation for Economic Co-operation and Development ("OECD") *Model Tax Convention on Income and on Capital* ("OECD *Model Treaty*")[1] by including a specific carve-out provision for immovable property, also called the business property exemption. This carve-out allocates to a person's residence state the right to tax capital gains realized on the disposition of shares or other similar interests deriving their value principally from immovable property used in a corporation's business. The rationale of the carve-out is not connected to the theory of economic allegiance. In fact, this provision is a clear departure from this theory, for the source state normally has the greater economic claim to tax income derived from immovable property or a business situated within its territory.

[6] Canada's decision to forego its right to tax such capital gains realized in Canada was based on economic considerations broader than generating tax revenues. Tax law is designed not only to bring revenues into a state's coffers but also to incentivize or disincentivize certain behaviours (*Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 53). Indeed, in agreeing to include the carve-out in the *Treaty*, Canada sought to encourage investments by Luxembourg residents in business assets embodied in immovable property located in Canada (e.g. mines, hotels, or oil shales) and to reap the ensuing economic benefits. This incentive was never intended to be limited to Luxembourg residents with "sufficient substantive economic connections" to Luxembourg. Internationally, residency typically does not depend on the existence of such connections; formal criteria for residency are just as well accepted as factual criteria.

[7] In this case, Alta Luxembourg made exactly such an investment. It is a resident of Luxembourg and, as such, is exempt from Canadian taxes on the capital gain realized on the disposition of shares of its wholly owned Canadian subsidiary.

[8] In my respectful view, my colleagues Rowe and Martin JJ. undertake their analysis as though the *Treaty* were a simple statute rather than a freely negotiated bargain whose interpretation must reflect the intentions of the parties that drafted it. Canada understood that it was dealing with a low-tax jurisdiction, and, in recognition of this reality, it agreed to specific terms in the *Treaty*, such as the business property exemption. In this way, Canada effectively agreed to give up its right to tax certain entities incorporated in Luxembourg in exchange for the jobs and economic opportunities that the business property exemption would promote. This decision can hardly be questioned.

[9] In raising the GAAR, Canada is now seeking to revisit its bargain in order to secure both foreign investments and tax revenues. But if the GAAR is to remain a robust tool, it cannot be used to judicially amend or renegotiate a treaty.

[10] For the reasons that follow, I agree with the courts below that the Minister has not discharged her burden of proving abusive tax avoidance. Therefore, I would dismiss the appeal.

II. Background

[11] In April 2011, Alta Resources LLC, a Texas-based oil and gas firm, and Blackstone Group LP ("Blackstone"), a New York-based private equity firm, founded Alta Energy Partners, LLC, a Delaware limited liability company, for the purpose of acquiring and developing unconventional oil and natural gas properties in North America. One such property was the Duvernay shale formation in northwestern Alberta. Alta Energy Partners Canada Ltd. ("Alta Canada"), a wholly owned Canadian subsidiary of the Delaware limited liability company, was incorporated in order to carry on that business. Alta Canada invested almost $300 million in its Canadian business through its acquisition of the oil and natural gas drill and recovery rights in certain lands in Alberta.

[12] A restructuring of Alta Canada was undertaken in 2012. As part of the restructuring, Alta Luxembourg was incorporated under the laws of Luxembourg to hold interests in Luxembourg and foreign companies. Prior to the restructuring, Blackstone's counsel obtained a ruling from the Luxembourg tax authorities that the restructuring was in compliance with tax legislation and administrative policies in Luxembourg. The shares of Alta Luxembourg were issued to a new Canadian partnership formed in Alberta, Alta Energy Canada Partnership ("Partnership"). On the same day, the Delaware limited liability company sold all of its shares of Alta Canada to Alta Luxembourg. This was a taxable transaction in Canada under the *Act*, as more than 50 percent of the value of the shares was derived from Canadian resource properties.

[13] In August 2013, Alta Luxembourg agreed to sell its shares of Alta Canada to Chevron Canada Ltd. When the sale closed on September 10, 2013, for $679,712,251.45, Alta Luxembourg realized a capital gain in excess of $380 million on the disposition. Pursuant to a direction to pay, Alta Luxembourg directed its proceeds from the sale (less an amount paid to the Minister) to the Partnership. In exchange, the Partnership issued promissory notes to Alta Luxembourg, which were set off, in part, by an existing interest-free loan and profit-participating loan. In other words, Alta Luxembourg did not receive any of the sale proceeds. Following the disposition of its shares of Alta Canada, Alta Luxembourg did not conduct any other business or hold any other investments.

[14] All tax was reported. Alta Luxembourg's capital gain was reported to the Luxembourg tax authorities and was subject to full taxation by them under their domestic laws.

[15] In its Canadian tax return filed for the 2013 taxation year, Alta Luxembourg claimed an exemption from Canadian tax on the basis that the gain was not included in its "taxable income earned in Canada" under s. 115(1)(b) of the *Act* because the shares were "treaty-protected property" under art. 13(4) and (5) of the *Treaty*. These provisions create a carve-out for residents of Luxembourg from Canadian tax arising from a capital gain on the alienation of "shares . . . the value of which . . . is derived principally from immovable property situated in [Canada]" and "in which the business of the company . . . was carried on" (art. 13(4) of the *Treaty*).

[16] The Minister denied the treaty exemption, and Alta Luxembourg appealed to the Tax Court of Canada.

[17] In their lengthy Statement of Agreed Facts, the parties make important concessions. First and foremost, the Minister agrees that Alta Luxembourg is a resident of Luxembourg for the purposes of the *Treaty*. The Minister and Alta Luxembourg also agree that Alta Canada was a "principal business corporation" pursuant to s. 66(15) of the *Act*, that its shares were taxable Canadian property within the meaning of s. 248(1) of the *Act* and that the series of restructuring transactions and the sale of the shares of Alta Canada to Chevron were an "avoidance transaction" as defined in s. 245(3) of the *Act*.

III. Judicial History

A. *Tax Court of Canada, 2018 TCC 152, [2019] 5 C.T.C. 2183 (Hogan J.)*

[18] Before the Tax Court, the Minister raised two arguments. First, the Minister argued that Alta Canada did not carry on business in the immovable property in question, such that the business property exemption in art. 13(4) of the *Treaty* did not apply. In the alternative, if the shares did qualify as treaty-protected property, the Minister argued that the GAAR should apply.

[19] Hogan J. found that Alta Canada carried on business in the immovable property; therefore, the carve-out in art. 13(4) applied, and Alta Canada's shares were treaty-protected property for the purposes of the *Act*. With respect to the GAAR, the parties agreed that the restructuring was an avoidance transaction that resulted in a tax benefit. Thus, the Tax Court had to determine if the GAAR applied, that is, whether the avoidance transaction resulted in a misuse or abuse of the provisions of the *Act* or the *Treaty*.

[20] With respect to the abuse analysis under the GAAR, Hogan J. held that the avoidance transaction did not result in an abuse of ss. 2(3), 38, 39, 115(1)(b) and 248(1) of the *Act*, or of the *Act* as a whole. In his view, the provisions of the *Act* had operated in the manner intended by Parliament. Without citing this Court's decision in *Canada Trustco*, Hogan J. followed the two-step approach it established, acknowledging that a tax treaty, as an international convention, should be given a liberal interpretation with a view to implementing the true intention of the parties.

[21] Hogan J. conducted a textual, contextual, and purposive analysis of arts. 1, 4 and 13 of the *Treaty* and held that their rationale is "to exempt residents of Luxembourg from Canadian taxation where there is an investment in immovable property used in a business" (para. 100). He relied in part on the 2017 OECD *Model Treaty*, on which the *Treaty* is modeled, and its Commentaries as interpretive aids. He observed that the business property exemption in art. 13(4) of the *Treaty* does not exist in the OECD *Model Treaty*, which demonstrates an intention to depart from the *Model Treaty* in order to attract foreign investment in business property situated in Canada. Despite the Minister's objections, Hogan J. found nothing improper about Alta Luxembourg, a single-purpose holding corporation resident in Luxembourg, availing itself of the benefits of the *Treaty*. In his view, the Minister was seeking to achieve through the courts the same result with the GAAR as was intended by the Minister of Finance's proposed rule against tax treaty shopping, but the GAAR could not be used in this way.

[22] Hogan J. held that the overall result of the transaction was not contrary to the rationale of arts. 1, 4 and 13 because the "significant investments of [Alta Luxembourg] to de-risk the Duvernay shale constitute an investment in immovable property used in a business" (para. 100). Therefore, the GAAR did not preclude Alta Luxembourg from claiming the exemption provided for in art. 13(5) of the *Treaty*, and the matter was referred back to the Minister for reconsideration and reassessment.

B. *Federal Court of Appeal, 2020 FCA 43, [2020] 5 C.T.C. 193 (Webb, Near and Locke JJ.A.)*

[23] The Minister did not appeal the Tax Court's finding that Alta Luxembourg satisfied the requirements for the business property exemption. Thus, the sole issue before the Federal Court of Appeal was whether the GAAR applied because of an abuse of the *Act* or the *Treaty*.

[24] Webb J.A., writing for a unanimous court, dismissed the appeal. In his analysis of the object, spirit, and purpose of the relevant provisions, Webb J.A. noted that most of the Minister's submissions were in reference to general principles and failed to identify any clear rationale for the provisions at issue: arts. 1, 4 and 13(4) of the *Treaty*. Relying on *R. v. MIL (Investments) S.A.*, 2007 FCA 236, [2007] 4 C.T.C. 235, Webb J.A. concluded "that the object, spirit and purpose of the relevant provisions of the [*Treaty*] is reflected in the words as chosen by Canada and Luxembourg. Since the provisions operated as they were intended to operate, there was no abuse" (para. 80). He also determined that Commentaries on the OECD *Model Treaty* published subsequently to the signature and ratification of the *Treaty* were "of little assistance in determining the rationale for the exemption" (para. 36).

[25] In addition to finding that the Minister had failed to identify any clear rationale for arts. 1, 4 and 13(4) of the *Treaty*, Webb J.A. found that the Minister's five further submissions did not withstand scrutiny, as they all added qualifications to or modified the words of the *Treaty*. The Minister's submissions changed the identity of who would qualify for the exemption from "residents" to "investors" and added the qualification that an "entity" had to have the potential to earn income in Luxembourg in order to be considered a resident of Luxembourg. In Webb J.A.'s view, the fact that the net effect of the profit-participating loan was that Alta Luxembourg never realized taxable income in Luxembourg "is a matter for the Luxembourg tax authorities" (para. 57). Additionally, there was no underlying requirement that the exemption benefit only persons with commercial or economic ties to Luxembourg, nor was the residence of the partners of Alta Luxembourg's sole shareholder relevant to the analysis. He found that these qualifications were not included in the exemption in the *Treaty*, even though they could easily have been added.

[26] Webb J.A. declined to find that treaty shopping is abusive, agreeing with the Tax Court judge in *MIL (Investments) S.A. v. R.*, 2006 TCC 460, [2006] 5 C.T.C. 2552 ("*MIL* (TCC)"), at para. 69, that "[t]here is nothing inherently proper or improper with selecting one foreign regime over another" and that, though "the selection of a low tax jurisdiction may speak persuasively as evidence of a tax purpose for an alleged avoidance transaction, . . . the shopping or selection of a treaty to minimize tax on its own cannot be viewed as being abusive".

[27] In short, Webb J.A. found that "the object, spirit and purpose of the relevant provisions of the [*Treaty*] is reflected in the words as chosen by Canada and Luxembourg. Since the provisions [had] operated as they were intended to operate, there was no abuse" (para. 80). The appeal was therefore dismissed.

IV. Issues

[28] The Minister has accepted that Alta Luxembourg is a resident of Luxembourg for the purposes of the *Treaty* and that a business was being carried on in the immovable property in question. Furthermore, Alta Luxembourg has admitted the existence of a tax benefit and an avoidance transaction. Therefore, the only element in dispute is the abusive nature of the transaction, which raises the following issues:

a) What are the object, spirit, and purpose of the relevant provisions of the *Treaty*?

b) Did the courts below err in concluding that the avoidance transaction in this case did not result in an abuse of those provisions?

V. Analysis

A. *General Anti-Avoidance Rule ("GAAR")*

[29] Like all statutes, tax legislation must be interpreted by conducting a "textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole" (*Canada Trustco*, at para. 10). However, where tax provisions are drafted with "particularity and detail", a largely textual interpretation is appropriate in light of the well-accepted *Duke of Westminster* principle that "taxpayers are entitled to arrange their affairs to minimize the amount of tax payable" (*Canada Trustco*, at para. 11, citing *Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.)). This principle, derived from the rule of law, has been deemed the "foundation stone of Canadian law on tax avoidance" (B. J. Arnold, "Reflections on the Relationship Between Statutory Interpretation and Tax Avoidance" (2001), 49 *Can. Tax J.* 1, at p. 3).

[30] This established principle was affected by the enactment of s. 245 of the *Act*, also known as the GAAR, which "superimposed a prohibition on abusive tax avoidance, with the effect that the literal application of provisions of the Act may be seen as abusive in light of their context and purpose" (*Canada Trustco*, at para. 1). Thus, if the Minister can establish abusive tax avoidance under the GAAR, s. 245 of the *Act* will apply to deny the tax benefit even where the tax arrangements are consistent with a literal interpretation of the relevant provisions

(*Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, at para. 66). The GAAR applies both to the abuse of provisions found in the *Act* and to the abuse of provisions found in a tax treaty (s. 245(4)(a)(i) and (iv) of the *Act*; s. 4.1 of the *Income Tax Conventions Interpretation Act*, R.S.C. 1985, c. I-4).

[31] Applying the GAAR involves a three-part process meant to determine: (1) whether there is a tax benefit arising from a transaction; (2) whether the transaction is an avoidance transaction; and (3) whether the avoidance transaction is abusive (*Canada Trustco*, at para. 17). As mentioned above, the third part is the only one in issue before this Court. To determine whether a transaction is abusive, this Court has set out a two-step inquiry (*Canada Trustco*, at paras. 44 and 55). Under the first step, the provisions relied on for the tax benefit are interpreted to determine their object, spirit, and purpose. The second step is to undertake a factual analysis to determine whether the avoidance transaction at issue is consistent with or frustrates the object, spirit, and purpose of the provisions.

[32] The onus rests on the Minister to demonstrate the object, spirit, and purpose of the relevant provisions and to establish that allowing Alta Luxembourg the benefit of the exemption would be a misuse or an abuse of the provisions (*Canada Trustco*, at para. 65). Abusive tax avoidance occurs "when a taxpayer relies on specific provisions of the *Income Tax Act* in order to achieve an outcome that those provisions seek to prevent" or when a transaction "defeats the underlying rationale of the provisions that are relied upon" (*Canada Trustco*, at paras. 45; see also para. 57; *Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3, at para. 40). Abusive tax avoidance can also occur when an arrangement "circumvents the application of certain provisions, such as specific anti-avoidance rules, in a manner that frustrates or defeats the object, spirit or purpose of those provisions" (para. 45).

[33] *Canada Trustco* recognized that the line between legitimate tax minimization and abusive tax avoidance is "far from bright" (para. 16). As a result, "[i]f the existence of abusive tax avoidance is unclear, the benefit of the doubt goes to the taxpayer" (*Canada Trustco*, at para. 66; see also *Copthorne*, at para. 72).

B. *International Tax Treaties*

(1) General Principles

[34] In *R. v. Melford Developments Inc.*, 1982 CanLII 201 (SCC), [1982] 2 S.C.R. 504, at p. 513, this Court applied the principle that tax treaties do not themselves levy new taxes, they simply authorize the contracting parties to do so. Reciprocity is a fundamental principle underlying tax treaties, as they confer rights and impose obligations on each of the contracting states. Hogan J. observed that "[p]arties to a tax treaty are presumed to know the other country's tax system when they negotiate a tax treaty; they are presumed to know the tax consequences of a tax treaty when they negotiate amendments to that treaty" (para. 84). This only makes sense.

[35] The objective of tax treaties, broadly stated, is to govern the interactions between national tax laws in order to facilitate cross-border trade and investment. One of the most important operational goals is the elimination of double taxation, where the same source of income is taxed by two or more states without any relief. If left unchecked, double taxation risks creating barriers to international trade and investment, which are vital in a globalized economy. Thus, many substantive provisions of the OECD *Model Treaty*, a model for numerous bilateral tax treaties, are directed to achieving this goal and resolving conflicting claims between residence-based taxation and source-based taxation.

[36] Another important consideration is the dual nature — contractual and statutory — of tax treaties. Consideration of the contractual element is crucial to the application of the GAAR because it focuses the analysis on whether the particular tax planning strategy is consistent with the compromises reached by the contracting states. As noted by international tax law scholars Jinyan Li and Arthur Cockfield:

Whether the particular outcome of tax planning is defensible may depend on the understanding of the "bargain" struck by the two treaty partner countries. Every dispute involving the application of a tax treaty needs to ask the question of whether and how one treaty partner can dispute or should be allowed to upset the "bargain" struck in its own national interest that inheres in the treaty "contract". Despite the offence that one treaty partner may take, in retrospect, to how a treaty provision is applied, the question remains: Might the particular outcome be one that the

other treaty partner foresaw or reflect the "contractual intention" of the other treaty partner? After all, the "bargain" was entered into by the parties out of mutual self-interest. This is particularly relevant in applying general anti-avoidance rules. [Emphasis added.]

(J. Li and A. Cockfield, with J. S. Wilkie, *International Taxation in Canada: Principles and Practices* (4th ed. 2018), at p. 376)

[37] As tax treaties are treaties, their interpretation is governed by the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37 ("*Vienna Convention*"), but the methodology prescribed is not radically different from the modern principle applicable to domestic statutes in Canada — that is, one must consider the ordinary meaning of the text in its context and in light of its purpose (art. 31(1) of the *Vienna Convention*; *Crown Forest Industries Ltd. v. Canada*, 1995 CanLII 103 (SCC), [1995] 2 S.C.R. 802, at para. 43; *Stubart Investments Ltd. v. The Queen*, 1984 CanLII 20 (SCC), [1984] 1 S.C.R. 536, at p. 578). However, unlike statutes, treaties must be interpreted "with a view to implementing the true intentions of the parties" (*J. N. Gladden Estate v. The Queen*, [1985] 1 C.T.C. 163 (F.C.T.D.), at p. 166, quoted approvingly in *Crown Forest*, at para. 43). The national self-interest of *each* contracting state must be reconciled in the interpretive process in order to give full effect to the bargain codified by the treaty. This principle applies with equal force where a court is engaged in the process of ascertaining a treaty's "object, spirit, and purpose" as part of the GAAR framework.

(2) OECD Commentaries as Interpretative Aids

[38] Article 31 of the *Vienna Convention* permits courts to consider contextual factors such as other agreements and instruments made by parties in connection with a treaty. In my view, the OECD *Model Treaty* and its Commentaries are relevant to the interpretation of treaties based on that model. The introduction to the OECD *Model Treaty* indicates that the Commentaries "can . . . be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes", and this Court has affirmed the "high persuasive value" of the OECD *Model Treaty* and its Commentaries ("Introduction" to the OECD *Model Treaty* (1998, 2003 and 2017), at para. 29; *Crown Forest*, at para. 55; see also D. A. Ward, "Principles To Be Applied in Interpreting Tax Treaties" (1977), 25 *Can. Tax J.* 263, at p. 268). However, the relevance of Commentaries released subsequent to the signing of a treaty is disputed (see, e.g., "Introduction" to the OECD *Model Treaty* (1998, 2003 and 2017), at para. 35; *MIL* (TCC), at para. 83; *Cudd Pressure Control Inc. v. R.*, 1998 CanLII 8590 (FCA), [1999] 1 C.T.C. 1 (F.C.A.), at para. 28, per McDonald J.A.; *SA Andritz*, No. 233894, Conseil d'État (Section du Contentieux), December 30, 2003 (France); Li and Cockfield, at p. 57).

[39] In the instant case, the Minister relies on revisions to the Commentaries on the OECD *Model Treaty* that were published in 2003 and 2017, several years after Canada and Luxembourg negotiated the *Treaty*. In the 2003 Commentaries, treaty shopping is characterized as an abuse of the concept of residence, whereas previous Commentaries published at the time the *Treaty* was signed were silent on this question. A revision to the 2017 Commentaries, made in connection with the addition of a new art. 29 to the OECD *Model Treaty*, provides that legal residency alone is not an automatic entitlement to all benefits under a tax treaty.

[40] While revisions to the Commentaries are relevant to tax treaty interpretation, the key issue is the weight that they should receive. Although some scholars submit that the OECD has a tendency of revising the Commentaries too often and too dramatically, thereby sometimes diverging from the original intentions of the parties, I am not prepared to reject all subsequent Commentaries as interpretative aids (see Li and Cockfield, at p. 57; P. Malherbe, *Elements of International Income Taxation* (2015), at pp. 49-50). I instead prefer the nuanced approach adopted by the Federal Court of Appeal in *Prévost Car Inc. v. Canada*, 2009 FCA 57, [2010] 2 F.C.R. 65.

[41] Indeed, in *Prévost Car*, the Federal Court of Appeal held that subsequent Commentaries expanding or clarifying notions already captured by the OECD *Model Treaty* are relevant, but not those that extend the scope of provisions in a manner that could not have been considered by the drafters (paras. 10-12; see also Li and Cockfield, at p. 57). Thus, while later amendments to the Commentaries are not part of the context as defined in art. 31(2) of the *Vienna Convention*, given that such amendments were not made "in connexion with the conclusion of the treaty", they may play a role under art. 31(3), which refers to "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "[a]ny subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

[42] In this case, I am of the view that the 2003 and 2017 Commentaries do not reflect the intentions of the drafters of the *Treaty*. The extensive revisions made to the Commentaries in 2003 purported to clarify the relationship between tax treaties and domestic anti-avoidance rules, and, in particular, one of the revisions was made to include the prevention of tax avoidance as a purpose of such treaties. The changes were not mere clarifications and have been described as being "created out of thin air by the OECD in 2003" and as "a significant change in the stated attitude of the OECD to the relationship between tax treaties and tax avoidance" (B. J. Arnold, "Tax Treaties and Tax Avoidance: The 2003 Revisions to the Commentary to the OECD Model" (2004), 58 *I.B.F.D. Bulletin* 244, at pp. 249 and 260).

[43] Using the Federal Court of Appeal's language in *Prévost Car* (at para. 12), the 2003 Commentaries do not elicit, but rather contradict, the views previously expressed. When Canada and Luxembourg signed the *Treaty* in 1999, the applicable Commentaries indicated that anti-abuse measures, to be effective, had to be included in a treaty ("Commentary on Article 1" of the 1998 OECD *Model Treaty*, at para. 21). Further, they referred to the principle of *pacta sunt servanda*, which supports the position that where nothing in a treaty speaks directly to fiscal avoidance, there is a strong argument that the treaty partners negotiated the treaty not intending such rules to apply ("Commentary on Article 1" of the 1998 OECD *Model Treaty*, at paras. 11-26; D. A. Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (2005), at pp. 91-92).

[44] Moreover, interpreting art. 1 of the *Treaty* with reference to the 2003 Commentaries would overlook Luxembourg's registered observation on the "Commentary on Article 1" of the 2003 OECD *Model Treaty*. That observation reads as follows:

> *Luxembourg* does not share the interpretation in paragraphs 9.2, 22.1 and 23 which provide that there is generally no conflict between anti-abuse provisions of the domestic law of a Contracting State and the provisions of its tax conventions. Absent an express provision in the Convention, Luxembourg therefore believes that a State can only apply its domestic anti-abuse provisions in specific cases after recourse to the mutual agreement procedure. [para. 27.6]

In effect, even if the Minister were able to rely on the Commentaries postdating the *Treaty*, they would be of no assistance because Luxembourg's observation expresses disagreement with the "Commentary on Article 1" of the OECD *Model Treaty*, which includes the anti-abuse commentary (Ward et al., at p. 64; "Commentary on Article 1" of the 2003 OECD *Model Treaty*, at p. 7).

[45] It follows, then, that in the interpretation of art. 1 of the *Treaty*, Commentaries on art. 1 of the OECD *Model Treaty* that postdate the *Treaty* cannot be relied on to introduce terms that modify the *Treaty*. Not only would this effectively amend the *Treaty* in a manner not agreed upon by the parties, but it would also usurp the role of the Governor in Council by allowing for judicial amendment of bilateral treaties against the expressed wishes of the contracting states.

C. *Cautionary Preface to the GAAR Analysis*

[46] Before I proceed, it is important to sound some notes of caution.

[47] First and foremost, tax avoidance is *not* tax evasion, and there is no suggestion by either party that the transaction in this case was evasive. In addition, tax avoidance should not be conflated with abuse. Even if a transaction was designed for a tax avoidance purpose and not for a *bona fide* non-tax purpose, such as an economic or commercial purpose, it does not mean that it is necessarily abusive within the meaning of the GAAR (*Canada Trustco*, at paras. 36 and 57; see also *Lipson*, at para. 38). The purpose of a transaction is relevant mainly to characterize it as either an avoidance transaction or a *bona fide* transaction and, specifically, to assess the abusive nature of the transaction. In their factual analysis, courts may consider whether an avoidance transaction was "motivated by any economic, commercial, family or other non-tax purpose" (*Canada Trustco*, at para. 58). However, a finding that a *bona fide* non-tax purpose is lacking, taken alone, should not be considered conclusive evidence of abusive tax avoidance. Justices Rowe and Martin are taking exactly that approach, and it colours their entire analysis. Moreover, such a finding should not be allowed to impair the proper interpretation of the relevant provisions in a manner that makes substantive economic connections or the presence of a *bona fide* non-tax purpose

a condition precedent to every tax benefit; the goal is to ensure the relevant provisions are properly interpreted in light of their context and purpose (*Canada Trustco*, at para. 62).

[48] Second, it is also important to distinguish what is immoral from what is abusive. It is true, as reiterated in *Copthorne*, that the GAAR is a legislative measure by which "Parliament has conferred on the court the unusual duty of going behind the words of the legislation to determine the object, spirit or purpose of the provision or provisions relied upon by the taxpayer" (para. 66). But, in *Copthorne*, Rothstein J. was quick to note the limits to that legislative mandate. In contrast to what my colleagues are proposing, Rothstein J. observed that courts should not infuse the abuse analysis with "a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do" (para. 70). Taxpayers are allowed to minimize their tax liability to the full extent of the law and to engage in "creative" tax avoidance planning, insofar as it is not abusive within the meaning of the GAAR (para. 65). Therefore, even though one may consider treaty shopping in tax havens to be immoral, this is not determinative of a finding of abuse.

[49] Finally, the abuse analysis is not meant to be a "search for an overriding policy of the Act that is not based on a unified, textual, contextual and purposive interpretation of the specific provisions in issue" (*Canada Trustco*, at para. 41). The focus of the interpretation is on the object, spirit, and purpose of the *specific provisions* and not on the broader policy objective of the *Act* or of a particular tax treaty. Therefore, policy objectives such as "avoiding double taxation" and "encouraging trade and investment" that are found in bilateral tax treaties cannot be invoked to override the wording of the provisions in issue.

D. *First Step: Object, Spirit, and Purpose of the Relevant Provisions*

[50] As mentioned above, the first step of the abuse analysis is to ascertain the object, spirit, and purpose of the relevant provisions. Because this is a question of treaty interpretation, however, this must be done with a view to implementing the true intentions of the parties. This is a question of law and the analysis of this first step is therefore subject to the correctness standard (*Canada Trustco*, at para. 44).

[51] The Minister's submissions centre on an alleged abuse by Alta Luxembourg of arts. 1, 4(1) and 13(4) and (5) of the *Treaty*. I analyze these provisions in two separate groups for the purposes of the first step: first, arts. 1 and 4(1), which pertain to resident status; and second, art. 13(4) and (5), under which the right to tax the capital gain at issue is allocated to the residence state.

(1) Residence (Arts. 1 and 4(1))

[52] Residence is at the core of bilateral tax treaties, given that access to treaty benefits is normally reserved to persons residing in one or both of the contracting states. The text of arts. 1 and 4(1) of the *Treaty* also makes residence central to the application of the *Treaty*. Indeed, the residency requirement established in art. 1 of the *Treaty* is modeled on the OECD *Model Treaty*:

This Convention shall apply to persons who are residents of one or both of the Contracting States.

[53] Article 4(1) elaborates on the definition of "residence" under the *Treaty*:

For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature. This term also includes a Contracting State or a political subdivision or local authority thereof or any agency or instrumentality of any such State, subdivision or authority. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

According to this provision, a resident under the *Treaty* is a person who is *liable to tax* in one or both of the contracting states (Canada and Luxembourg) by reason of one of the *connecting factors* listed (i.e. domicile, residence, place of management or another similar criterion) (see *Crown Forest*, at paras. 23-25). I also note that the use of the word "means" in this provision indicates that the definition should be "construed as comprehending that

which is specifically described or defined" and thus as setting out all requirements that must be met to be considered a resident under the *Treaty* (*R. v. Hauser*, 1979 CanLII 13 (SCC), [1979] 1 S.C.R. 984, at p. 1009, per Dickson J.; see also *R. v. McLeod* (1950), 1950 CanLII 409 (BC CA), 97 C.C.C. 366 (B.C.C.A.), at pp. 371-72, quoting *Dilworth v. Commissioner of Stamps*, [1899] A.C. 99 (P.C.), at pp. 105-6).

[54] In the context of corporations, the "liable to tax" requirement is met under the *Treaty* where the domestic law of a contracting state exposes the corporation to full tax liability on its worldwide income because it has its residence in that state (see *Crown Forest*, at paras. 40 and 45). Liability to full taxation is established by the nexus between that State and the corporation's resident status. The "liable to tax" requirement is often described in terms that may perhaps appear misleading, such as "comprehensive taxation" or "full liability to tax". These terms convey the idea that residents enjoying tax holidays may be more suspicious than others. In reality, this requirement is not concerned with whether the person claiming benefits is in fact subject to taxation. Being liable to tax is better understood as being "liable to be liable to tax", meaning that taxes are a possibility, regardless of whether the person actually pays any (R. Couzin, *Corporate Residence and International Taxation* (2002), at p. 107; see also pp. 106 and 111). Therefore, corporate residents enjoying certain tax holidays, for example on capital gains, do not automatically lose their resident status under the *Treaty* because they are not subject to every possible form of taxation (Couzin, at pp. 110-11 and 150). This can be contrasted with fiscally transparent vehicles like partnerships that are not exempted from taxation but, rather, are not exposed to tax at all, as their income is taxed in the partners' hands instead.

[55] Aside from the "liable to tax" requirement, the purpose of art. 4(1) is not to establish specific standards for defining residence. This provision expressly states that residence is to be defined by the *laws of the contracting state* of which the person claims to be a resident. This provision of the *Treaty* is modeled almost word for word on art. 4(1) of the 1998 OECD *Model Treaty*, whose Commentary also made it clear that the intention was to leave the core definition of residence to domestic law, not to bilateral tax treaties:

Conventions for the avoidance of double taxation do not normally concern themselves with the domestic laws of the Contracting States laying down the conditions under which a person is to be treated fiscally as "resident" and, consequently, is fully liable to tax in that State. They do not lay down standards which the provisions of the domestic laws on "residence" have to fulfil in order that claims for full tax liability can be accepted between the Contracting States. In this respect the States take their stand entirely on the domestic laws. [Emphasis added.]

("Commentary on Article 4" of the 1998 OECD *Model Treaty*, at para. 4)

[56] Consideration of the context of the *Treaty* confirms this intention expressed in the Commentary. Indeed, this preference for leaving the meaning of residence to domestic law is totally consistent with the scheme of the *Treaty*. Most terms found in the *Treaty* are defined under domestic law and not by the *Treaty* itself. As emphasized by Professor Arnold, "[b]ecause the language of tax treaties is broad and general, it seems inevitable that recourse must be had to the domestic laws of the contracting states in order to provide flesh for the bare bones of the treaty" (B. J. Arnold, *Reforming Canada's International Tax System: Toward Coherence and Simplicity* (2009), at p. 325). Although the *Treaty* does define residence in art. 4 and some other terms in arts. 3(1), 5, and 6(2), these definitions are far from exhaustive. In fact, the list of defined terms is rather scant, and important concepts, such as "business" and "profits", take their meaning directly from domestic law. The importance of domestic law as a source of substantive content for the application of the *Treaty* is expressly spelled out in art. 3(2):

As regards the application of the Convention at any time by a Contracting State, any term not defined therein shall, unless the context otherwise requires, have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State.

[57] Despite the clear pronouncement made in the Commentary above and the well-established preference for leaving important definitions to domestic law, and despite her admission that Alta Luxembourg is a resident of Luxembourg, the Minister argues that meeting the definition of resident under domestic law is not sufficient to qualify as a resident under the *Treaty*. According to the Minister, the benefits of the *Treaty* "are intended to be available only to persons who have sufficient substantive economic connections" to their state of residence (A.F., at para. 100 (emphasis added)). Mere formalistic or legal attachment to their state of residence would thus be insufficient.

[58] It is worth noting that the words "sufficient substantive economic connections" are conspicuous by their absence in the text of both arts. 1 and 4. Although the GAAR invites courts to go beyond the text to understand the object, spirit, and purpose of the provisions, there are limits to this exercise, especially when attempting to discern the intent of bilateral treaty partners. In the face of a complete absence of express words, the inclusion of an unexpressed condition must be approached with circumspection. It must be remembered that the text also plays an important role in ascertaining the purpose of a provision. The proper approach is one that *unifies* the text, context, and purpose, not a purposive one in search of a vague policy objective disconnected from the text (*Canada Trustco*, at para. 41).

[59] Nonetheless, I acknowledge that treaty partners do not have the unfettered liberty to alter or redefine residence as they wish for the purposes of a tax treaty. The broader context of international tax law and the law of treaties helps to understand what was within the contemplation of Canada and Luxembourg when they drafted arts. 1 and 4(1) of the *Treaty*. Pursuant to the principle of *pacta sunt servanda*, parties to a treaty must keep their sides of the bargain and perform their obligations in good faith (art. 26 of the *Vienna Convention*). Domestic law definitions of residence should therefore broadly correspond to international norms and not have the effect of redefining residence in a way "that takes the words unmistakably past their accepted usage" (Couzin, at p. 136), including the definitions of residence that were in effect in the two states at the time the *Treaty* was drafted.

[60] I pause here to observe that the definition of residence in Luxembourg law is consistent with international practice. Broadly speaking, there are two internationally recognized methods used to determine corporate residency: (1) the "place of incorporation" or "legal seat" rule, pursuant to which residence is determined by a purely formal criterion, that is, where the corporation was incorporated or has its legal seat; and (2) the "real seat" rule, pursuant to which residence depends on a combination of factual factors aimed at identifying the corporation's place of effective management (R. S. Avi-Yonah, N. Sartori and O. Marian, *Global Perspectives on Income Taxation Law* (2011), at p. 130, quoting M. A. Kane and E. B. Rock, "Corporate Taxation and International Charter Competition" (2008), 106 *Mich. L. Rev.* 1229, at p. 1235). Luxembourg law grants resident status to corporations having either their legal seat or their central management in Luxembourg — two criteria consistent with these methods (Statement of Agreed Facts, A.R., vol. II, at p. 28, para. 122; Opinion on the Luxembourg tax residence of the company, A.R., vol. VII, at pp. 5 and 7, paras. 7.2 and 8.2.1). In the instant case, the parties agree that Alta Luxembourg is a resident of Luxembourg as its legal seat is located there (Statement of Agreed Facts, A.R., vol. II, at p. 28, para. 122).

[61] Interestingly, the "sufficient substantive economic connections" rationale put forward by the Minister bears similarities to the "real seat" rule emphasizing substance over form and seemingly rejects a formal, legalistic rule like the "place of incorporation" or "legal seat" rule. Thus, I understand the Minister's submissions as suggesting that establishing residence merely on the basis of a formal criterion is insufficient to conform to the spirit of the rules of residence under the *Treaty*. Something more would be needed: some *real* connections to the country of residence. What the Minister's submissions overlook, however, is that many of the world's most developed economies — including Canada itself — accept and apply the "place of incorporation" or "legal seat" rule (Avi-Yonah, Sartori and Marian, pp. 130 and 133-34; see s. 250(4)(a) of the *Act*). Although a formal criterion may sometimes be unable to capture the *real* location of a corporation's economic activities, it nevertheless became widespread internationally because of its certainty and simplicity, considerations that are vital to a well-functioning tax system based on the rule of law and the *Duke of Westminster* principle (Li and Cockfield, at p. 77). Hence, the definition in Luxembourg law does not depart from accepted usage such that the bargain struck in the *Treaty* could be upheld only if Luxembourg residents claiming benefits have "sufficient substantive economic connections" to their country of residence.

[62] Given this broad international acceptance of formal residency, if the drafters had truly intended to include only corporations with "sufficient substantive economic connections" to their country of residence within the scope of the *Treaty*, they would have clearly signalled their intention to depart from a well-established criterion like the "place of incorporation" or "legal seat" rule. They would not have simply incorporated arts. 1 and 4(1) of the OECD *Model Treaty*, which reflect an international consensus, with no alteration. This indicates, in my view, that the object of arts. 1 and 4(1) is not to exclude all corporations with minimal economic connections to their country of residence, such as those whose residence is established solely on the basis of a formal, legal attachment. Access to the benefits of the *Treaty* by virtue of a domestic law definition of residence like the "legal seat" rule is therefore entirely consistent with the spirit of these provisions.

[63] Another contextual element further reinforces my opinion that the purpose of arts. 1 and 4 is not to reserve benefits to corporations with "sufficient substantive economic connections" to their country of residence: the inclusion of art. 28(3) in the *Treaty*, which denies benefits to certain Luxembourg holding companies. The "Commentary on Article 1" of the 1998 OECD *Model Treaty* specifically warned against the use of conduit companies, that is, "legal entit[ies] created in a State essentially to obtain treaty benefits that would not be available directly" (para. 9). Several solutions were proposed in the Commentary, but "no definitive texts [were] drafted" and "no strict recommendations [were] made" (para. 12). OECD members were left to choose which solution suited them.

[64] Chief among these solutions were the "look-through" approach and the exclusion approach. A "look-through" provision disallows treaty benefits to corporations that are resident in a contracting state but owned by residents of a third country (para. 13). When combined with a provision safeguarding *bona fide* business activities, a provision of this type has the effect of allowing treaty benefits to corporations owned by residents of a third country that conduct *bona fide* business activities in the contracting state of which they claim to be residents, while excluding those conducting "little substantive business activities" there (para. 14). The exclusion approach denies treaty benefits to certain types of companies enjoying special tax privileges that constitute harmful tax competition (para. 15). The main advantage of the exclusion approach over the "look-through" one is its clarity and simplicity (para. 16). It does not require an assessment of the substantive nature of business activities to determine whether they are *bona fide* or not, unlike the "look-through" approach or the approach focusing on the existence of "sufficient substantive economic connections" invoked by the Minister.

[65] At the time of the *Treaty*, Luxembourg was well known as an international tax haven exempting certain holding companies from most taxes, provided they had no direct presence in the local economy (see *Grundy's Tax Havens: A World Survey* (4th ed. 1983), at pp. 2 and 157-64; W. H. Diamond et al., *Tax Havens of the World* (loose-leaf), vol. 2, ch. Luxembourg, at pp. 5-6). To deny the benefits of the *Treaty* to such holding companies with minimal economic connections to Luxembourg, Canada and Luxembourg preferred the exclusion approach over the "look-through" approach. Indeed, the two contracting states did not insert a "look-through" provision combined with a safeguarding provision, as Canada did in the treaties it entered into during the same period with Kazakhstan (1996) and Peru (2001) (art. 28(3) of the *Convention between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can T.S. 1998 No. 13; art. 28(3) of the *Convention between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 2002 No. 23). Canada and Luxembourg included instead a provision denying the benefits of the *Treaty* to certain holding companies established in Luxembourg, that is, art. 28(3):

The Convention shall not apply to holding companies within the meaning of the special Luxembourg laws (currently the Act of July 31, 1929 and the Grand Duchy Order of December 17, 1938) or any other similar law enacted in Luxembourg after the signature of the Convention, nor to companies subjected to similar fiscal laws in Luxembourg.

[66] Pursuant to the principle of implied exclusion, this choice made by the parties in favour of the exclusion approach — one that favours form over substance — should be understood as a rejection of the relevance of economic ties for delineating which corporations should be entitled to benefits and which should not. This leads me to conclude that the drafters intended to exclude a corporation with minimal economic connections to one of the contracting states *only* where the corporation is a holding company benefiting from Luxembourg's international tax haven regime. In light of this clear intention to reject only Luxembourg holding companies and not every company with limited economic ties to its country of residence, I am even more persuaded that the spirit of arts. 1 and 4(1) was *not* to limit access to the benefits of the *Treaty* to corporations with "sufficient substantive economic connections" to their country of residence.

[67] In sum, the object, spirit, and purpose of arts. 1 and 4(1) are to allow all persons who are residents under the laws of one or both of the contracting states to claim benefits under the *Treaty* so long as their resident status could expose them to full tax liability (regardless of whether there is actual taxation). They are broadly consistent with international norms. This is normally the case for corporations that are residents by virtue of the "place of incorporation" or "legal seat" rule, unless they fall within the exclusion provided for in art. 28(3). As a result, I conclude that the spirit of these provisions is *not* to reserve the benefits of the *Treaty* to residents that have "sufficient substantive economic connections" to their country of residence.

(2) Carve-Out from Source-Based Capital Gains Tax ("Business Property Exemption") (Art. 13(4) and (5))

[68] The carve-out from source-based capital gains tax, also called the business property exemption, is provided for in art. 13(4) and (5). These provisions create an exception to source-based taxation for capital gains derived from the alienation of shares deriving their value principally from immovable property used in a corporation's business and allocate to the residence state the exclusive right to tax such capital gains:

ARTICLE 13

Capital Gains

. . .

4. Gains derived by a resident of a Contracting State from the alienation of:

(a) shares (other than shares listed on an approved stock exchange in the other Contracting State) forming part of a substantial interest in the capital stock of a company the value of which shares is derived principally from immovable property situated in that other State; or

(b) an interest in a partnership, trust or estate, the value of which is derived principally from immovable property situated in that other State,

may be taxed in that other State. For the purposes of this paragraph, the term "immovable property" does not include property (other than rental property) in which the business of the company, partnership, trust or estate was carried on; and a substantial interest exists when the resident and persons related thereto own 10 per cent or more of the shares of any class or the capital stock of a company.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1 to 4 shall be taxable only in the Contracting State of which the alienator is a resident.

[69] With respect to the object, spirit, and purpose of art. 13(4) and (5), the crux of the Minister's argument turns on the theory of economic allegiance. In accordance with this theory, the Minister submits that the provisions of the *Treaty* distributing taxing rights seek to avoid double taxation by allocating these rights to the contracting state to which the income and the taxpayer are more closely connected.

[70] According to the Minister, the carve-out provided for in art. 13(4) exempts the capital gains at issue from source-based taxation because the taxpayer's economic connection to the state of residence outweighs the connection between the source state and the immovable property. The connection with the residence state is considered greater, for that state is said to provide the benefits that allow its residents to earn such capital gains (e.g. economy, infrastructure, education, social services). The social and economic environment of the residence state therefore provides the taxpayer with the tools necessary to grow the business carried on in the immovable property located in the source state. In return for these benefits, the taxpayer is expected to pay taxes to the state of residence, not to the source state.

[71] In the Minister's view, this logic holds only where the taxpayer owes economic allegiance to the state of residence, which can be tested by the presence of "sufficient substantive economic connections" to that state. In the absence of such connections, the residence state's greater claim to tax would retreat so that the connection between the source state and the immovable property would prevail. As a consequence, the source state would possess the greater claim, and the carve-out from source-based taxation should be unavailable.

[72] The theory of economic allegiance is indeed the principle underlying the allocation of taxing rights, and giving effect to this principle thus constitutes the broad purpose of provisions of the *Treaty*, such as art. 13, that distribute the right to tax between the residence and source states (J. Li and F. Avella, "Article 13: Capital Gains", in *Global Tax Treaty Commentaries*, last reviewed May 30, 2020 (online), at s. 1.1.2.1). However, I disagree with the Minister's articulation of the theory in this case.

[73] Broadly speaking, the apportionment of taxing rights between the residence and source states under the OECD *Model Treaty*, which serves as a model for the *Treaty*, is centred on the distinction between active and passive income (Li and Cockfield, at p. 12; Avi-Yonah, Sartori and Marian, at p. 155). The source state has the primary right to tax active income (e.g. business profits and employment income), and the residence state has only residual rights. Pursuant to the theory of economic allegiance, the source state has a greater claim to tax active income because its economic environment has the closest connection with the origin of wealth (Malherbe, at p. 56; Li and Cockfield, at pp. 66 and 151). Non-residents owe allegiance to the source state as a result, and they are expected to pay tax for the public services from which they benefit in carrying on their active economic activities in the source state.

[74] Conversely, the residence state has the primary right to tax passive income (e.g. interest, dividends, and capital gains), and the source state has only residual rights. The source state's claim to tax passive income is considered weaker in comparison to that of the residence state because generating such income is assumed to require few public services from the source state. Moreover, the economic environment of the source state is considered less material to the earning prospect of passive investments, as such passive activities may be conducted in various jurisdictions without either improving or negatively affecting their earning prospect. Therefore, non-residents earning passive income owe little allegiance to the source state.

[75] The allocation of the right to tax capital gains in the *Treaty* relies on this articulation of economic allegiance distinguishing between active and passive income. This allocation serves as the broad purpose of art. 13. Under art. 13(5) of the *Treaty*, the residence state has the primary right to tax capital gains, as they are passive income. Under art. 13(1) to (4), there are exceptions allowing the source state to tax capital gains realized by non-residents. For example, gains derived from the alienation of immovable property, movable property forming part of the business property of a permanent establishment located in the source state, and shares whose value is derived principally from immovable property may be taxed by the source state. The rationale of these exceptions is that the origin of the wealth acquired from sales of immovable property and the like is the source state, which therefore has a greater claim to tax (Malherbe, at pp. 58-59). For instance, the sale of immovable property situated in Canada is, in essence, a sale of a "piece of Canada" — "the 'Canadianness' of the property . . . is the source of the gains" (Li and Cockfield, at pp. 198 and 151).

[76] The business property exemption applies where a capital gain is realized on the sale of shares whose value is derived principally from immovable property *in which a business was carried on*. As a consequence, the default rule is reinstated, so that the residence state has the primary right to tax the gain. In my opinion, this constitutes a departure from the theory of economic allegiance as articulated in the *Treaty* and the OECD *Model Treaty* and shows that the business property exemption has a different purpose. According to the logic of economic allegiance, the source state normally has a greater claim to tax income derived from a business carried on within its territory or from the disposition of immovable property located within its territory, because the source state's economic environment has the closest connection to the origin of wealth. Under art. 13(4) and (5), however, the taxing right is allocated to the residence state instead of the source state. This departure can be explained by the fact that economic allegiance is not the sole principle or policy consideration underlying the rules applicable to source-based taxation; the principle of capital import neutrality, the concern to prevent tax base erosion, and the desire to attract foreign investment also underlie these rules (Li and Cockfield, at pp. 151-54). Since all these principles and policy considerations cannot be accommodated in every single rule, a balancing exercise is inevitable (see *Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622, at para. 43; *Canada Trustco*, at para. 53; *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271, at para. 174). Article 13(4) is also the result of a balancing exercise. The theory of economic allegiance is not the dominating rationale underlying the carve-out provided for in art. 13(4). Rather, the main objective is to attract foreign investment, as I explain below.

[77] Canada was and still is a large importer of foreign capital and thus a source country (Arnold (2009), at pp. 10-11). As a source country, Canada would have had an interest in negotiating broad source-based taxation rights in bilateral treaties in order to collect larger tax revenues. According to learned authors, Canada must have been alive, however, to the fact that its position on source-based taxation could also be used as an instrument to attract foreign investment crucial to its economy (Li and Cockfield, at p. 153). Harsh source taxes chase away foreign investors, whereas tax breaks attract them. Importers of capital thus have an interest in maintaining a balance between these disincentives and incentives if they want to remain competitive in the global economy. Li and Avella say that Canada has routinely included the carve-out in many of its tax treaties, including this *Treaty*, for this specific reason (s. 3.1.4.6.3). This tax break encourages foreigners to invest in immovable property situated in Canada in which businesses are carried on (e.g. mines, hotels, or oil shales), rather than simply to invest in assets to be held for speculative purposes.

[78] Importantly, I note that only a very small number of the world's tax treaties include the carve-out, thereby signalling that its inclusion in the *Treaty* was no accident on Canada's part. To begin with, less than 35 percent of the world's pre-2014 double-tax treaties include a provision allocating to the source state the right to tax capital gains from the disposition of shares of a company or interests in a partnership, trust, or estate whose value is derived principally from immovable property, as provided for in the first part of art. 13(4) (Li and Avella, at ss. 2.1.5 and 3.1.4.1.2). And out of that 35 percent, an even smaller number of treaties contain the carve-out provided for at the end of art. 13(4) (Li and Avella, at s. 3.1.4.6.3).

[79] The remaining question is whether the contracting states intended that persons without "sufficient substantive economic connections" to their state of residence be able to take advantage of the carve-out to avoid paying any taxes. Put simply, the question is whether the use of conduit corporations in this context perverts the bargain struck between Canada and Luxembourg. In my view, it does not.

[80] The GAAR was enacted to catch unforeseen tax strategies. However, the use of conduit corporations, "legal entit[ies] created in a State essentially to obtain treaty benefits that would not be available directly", was not an unforeseen tax strategy at the time of the *Treaty* ("Commentary on Article 1" of the 1998 OECD *Model Treaty*, at para. 9). Indeed, it was far from being a novel phenomenon that emerged subsequently to the signing of the *Treaty*. Back in the 1970s, the "Commentary on Article 1" of the 1977 OECD *Model Treaty* criticized tax planning strategies involving conduit corporations (paras. 8-9). This was also an issue discussed by learned authors (see, e.g., A. A. Knechtle, *Basic Problems in International Fiscal Law* (1979), at p. 115; D. R. Davies, *Principles of International Double Taxation Relief* (1985), at paras. 1.13 and 3.22). And more contemporaneously to the *Treaty*, the "Commentary on Article 1" of the 1998 OECD *Model Treaty* discussed the use of conduit corporations as well.

[81] Luxembourg is a country well known for its broad tax treaty network and international tax haven regime, making it an attractive jurisdiction to set up a conduit corporation and take advantage of treaty benefits. As mentioned above, one can presume that Canada had knowledge of these features of Luxembourg's tax system when it entered into the *Treaty*. Canada nevertheless entered into a bilateral tax treaty with Luxembourg with only minimal safeguards and thereby ignored many of the OECD's suggestions. At that time, as discussed above, the "Commentary on Article 1" of the 1998 OECD *Model Treaty* set out a whole menu of potential anti-avoidance provisions that might have short-circuited the creation of conduit corporations in Luxembourg.

[82] I acknowledge that the absence of specific anti-avoidance rules that would have prevented the situation is not necessarily determinative of the application of the GAAR (see *Copthorne*, at paras. 108-11). Of course, one could always imagine a potential anti-avoidance rule that would have pre-empted the tax strategy at issue. If that were the standard, I agree that it would provide a full response in every case and gut the GAAR. In this case, the absence of specific anti-avoidance provisions represents, however, an enlightening contextual and purposive element as it sheds light on the contracting states' intention. This is not a case where Parliament did not or could not have foreseen the tax strategy employed by the taxpayer. Options to remediate the situation were available and known by the parties, but they made deliberate choices to guard some benefits against conduit corporations and to leave others unguarded. Had the parties truly intended to prevent such corporations from taking advantage of the carve-out, they could have done so. Combined with Canada's preference at the time of the *Treaty* for taking advantage of economic benefits yielded by foreign investments rather than higher tax revenues (as will be discussed below), this makes the rationale of the carve-out even clearer. In my opinion, Canada and Luxembourg made a deliberate choice to leave the business property exemption unguarded.

[83] The parties agreed to exclude Luxembourg holding companies from their *Treaty* (art. 28(3)). However, as explained above, the parties did not follow the OECD's suggestion to include a "look-through" provision combined with a provision safeguarding *bona fide* business activities. Doing so would have excluded conduit corporations that were owned by residents of a third country and that conducted few "substantive business activities" in Luxembourg.

[84] Moreover, Luxembourg and Canada added provisions reserving the benefits of the *Treaty* to the beneficial owners of certain income, but only in respect of dividends, interest, and royalties, not capital gains (arts. 10 to 12). If the parties had applied the concept of beneficial ownership to the carve-out, it would have prevented conduit corporations from taking advantage of this benefit where their beneficial owners were residents of a third country (see, e.g., *Prévost Car*). Although the OECD *Model Treaty* may not have specifically recommended extending the concept of beneficial ownership to capital gains, nothing barred the parties from doing

so. After all, the OECD *Model Treaty* remains a model, not a binding legal instrument. I fail to see, as Rowe and Martin JJ. do, a fundamental difference between capital gains, on the one hand, and dividends, interest, and royalties, on the other, that would have made beneficial ownership unsuitable in respect of capital gains. It is true that, in a paper prepared in 2008 for the United Nations, Professor Philip Baker questioned the possible extension of the beneficial ownership concept to capital gains because it is harder to identify the beneficial owner of a capital gain than to identify the beneficial owner of a traceable flow of income like dividends, interest, and royalties (*The United Nations Model Double Taxation Convention Between Developed and Developing Countries: Possible Extension of the Beneficial Ownership Concept*, U.N. Doc. E/C.18/2008/CRP.2/Add.1, Ann., October 17, 2008, at para. 55). But Professor Baker explained that this difference is "not insurmountable" (para. 58). In the end, he even suggested the potential wording of a beneficial ownership provision applicable to capital gains:

> 6. Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3, 4 and 5 shall be taxable only in the Contracting State of which the beneficial owner is a resident. [para. 59]

[85] As suggested in the "Commentary on Article 13" of the 1998 OECD *Model Treaty*, Canada could also have insisted on a subject-to-tax provision if it had truly been concerned about the erosion of its tax base (para. 21). Pursuant to such a provision, a contracting state foregoes its right to tax capital gains only if the other state actually taxes these gains. The inclusion of a provision of this sort would have meant that capital gains exempt from or subject to very little tax in Luxembourg would be taxable in Canada, instead of having almost double non-taxation. Canada's decision is, however, not surprising. Situations of double non-taxation are intentional and part of the bargain in most cases (Couzin, at p. 109). The absence of a subject-to-tax provision, combined with Canada's knowledge of Luxembourg's tax system, confirms my view that Canada's primary objective in including art. 13(4) was to cede its right to tax capital gains of a certain nature realized in Canada in order to attract foreign investment. It was not part of the bargain that Luxembourg actually tax the gains to the same extent that Canada would have taxed them.

[86] Further, consideration of tax treaties *in pari materia* forming part of the broader context of the *Treaty* corroborates the parties' deliberate choice to leave the business property exemption unguarded against conduit corporations established in Luxembourg. As noted by Professor Arnold, Canada began including discrete purpose tests designed to prevent treaty shopping in some of the treaties it entered into around the same time it entered into the *Treaty*, which was signed in 1999 ((2009), at p. 358). See, e.g., the treaties with Nigeria[2], Ukraine[3], Kazakhstan[4], Uzbekistan[5], and Peru[6]. These provisions were designed to take back certain treaty benefits where the purpose of a transaction was to gain access to these benefits. Most likely, the creation of a conduit corporation in Luxembourg to access the exemption would have been caught by such a purpose test. Had the parties truly intended to deprive such corporations of the benefits of the carve-out, they would have made the carve-out subject to a purpose test.

[87] The absence of any such anti-avoidance measure that would have limited access to the carve-out in a treaty with a country known for not taxing capital gains leads me to believe that Canada weighed the pros and cons and concluded that its national interest in attracting foreign investors, using Luxembourg as a conduit to take advantage of the carve-out, outweighed its interest in collecting more tax revenues on such capital gains. This answers the question of "why the benefit was conferred" posed under the GAAR (*Canada Trustco*, at para. 66). This choice must also have been motivated by the fact that Canada was not keen on going its own way at a time when the international community was not yet as serious about curtailing treaty shopping as it was during the years leading to the signature and ratification of the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting*, Can. T.S. 2019 No. 26, in 2017 and as it has remained to this day (see *Multilateral Instrument in Respect of Tax Conventions Act*, S.C. 2019, c. 12; Arnold (2009), at p. 18). As a relatively small country, "Canada does not have the luxury of setting its own policy without considering what other countries do", and it must have rightly seen multilateralism as the way forward (Li and Cockfield, at p. 25).

[88] This is not an absurd proposition, as my colleagues assert. There is no better way to describe Canada's attitude at the time of the *Treaty* when faced with the dilemma between higher tax revenues and competitiveness than to quote the words of the Department of Finance's response to the *Report of the Auditor General of Canada to the House of Commons, 1992*, at p. 52:

To a large degree, international norms limit the range of options available to the Canadian government and, in this context, the government's policy has generally been to favour competitiveness concerns over those of revenue generation. [Emphasis added.]

[89] In conclusion, the object, spirit, and purpose of the carve-out provided for in art. 13(4) and (5) of the *Treaty* are to foster international investment by exempting residents of a contracting state from taxes in the source state on capital gains realized on the disposition of immovable property in which a business was carried on, or on the disposition of shares whose value is derived principally from such immovable property. The fact that the capital gains may not be taxed in Luxembourg, leading to double non-taxation, and the fact that conduit corporations can take advantage of the carve-out are tax planning outcomes consistent with the bargain struck between Canada and Luxembourg. Although Canada had a greater claim to tax such income based on the theory of economic allegiance and would have most likely received more tax revenues without the carve-out given its traditional status as a source state, Canada agreed to forego its right to tax such capital gains, regardless of whether they would be taxed in Luxembourg, in order to attract foreign investment in business assets embodied in immovable property located in Canada (e.g. hotels, mines, or oil shales) and to reap the economic benefits generated by that investment. This is what was actually agreed upon. It appears that Canada was aware of tax planning strategies using conduit corporations in Luxembourg but that it made a deliberate choice not to include anti-avoidance provisions that would have addressed this situation in the *Treaty*.

E. *Second Step: Abusiveness of the Transaction*

[90] The second step of the methodology for the abuse analysis is "to examine the factual context of a case to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue" (*Canada Trustco*, at para. 55).

[91] Alta Luxembourg was created as part of a restructuring of activities to take advantage of the carve-out provided for in art. 13(4) of the *Treaty*. It concedes that this tax benefit was derived from a transaction not arranged primarily for a *bona fide* purpose other than to obtain this benefit. However, I fail to see how this avoidance transaction was abusive.

[92] In this Court, as in the Federal Court of Appeal, the Minister rightly concedes that Alta Luxembourg is a resident of Luxembourg for the purposes of the *Treaty*, as it has its legal seat there. Moreover, nothing indicates that Alta Luxembourg was not liable to tax in Luxembourg. The gain it realized on the disposition of its shares of Alta Canada was reported to the Luxembourg authorities and was subject to full taxation under their domestic laws. The fact that Alta Luxembourg paid less tax in Luxembourg on this gain than it would have paid if it were a Canadian resident paying tax in Canada changes nothing in this determination. As noted by this Court in *Copthorne*, "determining the rationale of the relevant provisions of the Act should not be conflated with a value judgment of what is right or wrong nor with theories about what tax law ought to be or ought to do" (para. 70). Therefore, from the moment that Alta Luxembourg realized a gain on the disposition of its shares of Alta Canada, the laws of Luxembourg applied and Canada's interest in the gain ceased. As a result, Alta Luxembourg's resident status falls squarely within the object, spirit, and purpose of arts. 1 and 4(1) of the *Treaty*.

[93] The Minister has failed to discharge her burden of establishing that the avoidance transaction defeats the underlying rationale, the "object, spirit, or purpose", beyond the words of the provisions. Alta Luxembourg met the clear requirements of arts. 1, 4, and 13(4).

[94] The *Treaty* makes it clear that Canada and Luxembourg agreed that the power to tax would be allocated to Luxembourg where the conditions of the carve-out were met. There is nothing in the *Treaty* suggesting that a single-purpose conduit corporation resident in Luxembourg cannot avail itself of the benefits of the *Treaty* or should be denied these benefits due to some other consideration such as its shareholders not being themselves residents of Luxembourg. In this case, the provisions operated as they were intended to operate; there was no abuse, and, therefore, the GAAR cannot be applied to deny the tax benefit claimed.

[95] This result accords with the true intention of the partners to the *Treaty* and must be respected. As Pelletier J.A. held in *MIL (Investments)*, "[t]o the extent that the appellant argues that the Tax Treaty should not

be interpreted so as to permit double non-taxation, the issue raised by GAAR is the incidence of Canadian taxation, not the foregoing of revenues by the Luxembourg fiscal authorities" (para. 8).

[96] A final note on the Minister's implication that treaty shopping arrangements are inherently abusive. A broad assertion of "treaty shopping" does not conform to a proper GAAR analysis. In accordance with the separation of powers, developing tax policy is the task of the executive and legislative branches. Courts do not have the constitutional legitimacy and resources to be tax policy makers (*Canada Trustco*, at para. 41). It is for the executive and legislative branches to decide what is right and what is wrong, and then to translate these decisions into legislation that courts can apply. It bears repeating that the application of the GAAR must not be premised on "a value judgment of what is right or wrong [or] theories about what tax law ought to be or ought to do" (*Copthorne*, at para. 70). Taxpayers are "entitled to select courses of action or enter into transactions that will minimize their tax liability" (*Copthorne*, at para. 65). The courts' role is limited to determining whether a transaction abuses the object, spirit, and purpose of the specific provisions relied on by the taxpayer. It is not to rewrite tax statutes and tax treaties to prevent treaty shopping when these instruments do not clearly do so.

VI. Conclusion

[97] For these reasons, I would dismiss the appeal. The respondent is entitled to its costs in this appeal.

The reasons of Wagner C.J. and Rowe and Martin JJ. were delivered by

ROWE AND MARTIN JJ. —

I. Overview

[98] Multinational companies exploiting gaps and mismatches in international tax rules erode domestic tax bases and cost countries an estimated US$100 to US$240 billion in lost revenue annually (Organisation for Economic Co-operation and Development ("OECD"), *Background Brief: Inclusive Framework on BEPS*, January 2017 (online), at p. 9). As a result, aggressive international tax avoidance has received increasing political and media scrutiny (see, e.g., *The Economist*'s "The big carve-up" (May 15, 2021), at pp. 65-66, and *Le Monde*'s series *OpenLux: Enquête sur le Luxembourg, coffre-fort de l'Europe* by J. Baruch et al., February 8, 2021 (online)).

[99] Although it is a long standing principle in Canadian law that taxpayers may arrange their affairs to minimize their amount of tax payable (*Commissioners of Inland Revenue v. Duke of Westminster*, [1936] A.C. 1 (H.L.); *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 11), the freedom to do so is not without limits. Canada has acted to curb abusive international tax avoidance by enacting the general anti-avoidance rule ("GAAR"), which denies tax benefits when taxpayers engage in transactions that conform with the text of the tax rules relied upon, but do not accord with their rationale. In introducing the GAAR in our tax legislation some 30 years ago, and in making it clear that it was applicable to abuses of tax treaties, Parliament made a policy choice by which it intended to fight harmful tax avoidance schemes that cross the line of legitimate tax planning and venture into the realm of abusive tax avoidance.

[100] Courts now have the responsibility to give proper effect to the intention of Parliament and ensure the GAAR plays a meaningful role in controlling avoidance transactions that technically comply with the provisions of a tax treaty but frustrate their underlying rationale. The interpretation exercise that is mandated in a GAAR analysis thus vests upon courts the unusual duty to look *beyond* the words of the applicable provisions to determine whether the transactions in question frustrate the underlying rationale of those provisions. Giving an interpretation confined to the black letter of these legislative provisions instead defeats Parliament's will and fails to fulfil the courts' role "to interpret and apply the Act as it was adopted by Parliament" (*Shell Canada Ltd. v. Canada*, 1999 CanLII 647 (SCC), [1999] 3 S.C.R. 622, at para. 45; see also *Canada Trustco*, at para. 13).

[101] Given that the GAAR can only find application where a taxpayer has complied with the strict requirements of a provision, absolute certainty cannot be achieved, nor was it intended. This is a legislative choice that Parliament made in order to strike a necessary balance between the uncertainty inherent in the GAAR and the fairness of the Canadian tax system as a whole achieved by defeating abusive tax avoidance schemes.

[102] Alta Energy Luxembourg S.A.R.L. ("Alta Luxembourg") is a Luxembourg corporation created so that shareholders of Alta Energy Partners, LLC ("Alta US"), who are residents neither of Canada nor of Luxembourg, could benefit from an exemption from Canadian income tax under the *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 2000 No. 22 ("Treaty"), with respect to liquidation of an investment in oil and gas properties. Despite being a mere conduit interposed in Luxembourg, Alta Luxembourg claimed a tax exemption for a capital gain of more than $380 million. The issue in this case is whether this transaction constitutes abuse under the GAAR. In effect, does Alta Luxembourg get to claim this exemption and, thereby, pay no tax at all in Canada on a multimillion dollar profit made from property in Canada, even though it had no genuine connection to Luxembourg?

[103] We conclude that Alta Luxembourg's claim for a tax benefit under the Treaty is the result of abusive avoidance transactions. In our respectful view, the courts below did not properly identify the rationale underlying the relevant provisions of the Treaty. They gave weight only to the text and failed to consider why the provisions were put in place. This is not the exercise mandated under the GAAR.

[104] The object, spirit or purpose of the relevant provisions of the Treaty is to assign taxing rights to the state with the closest economic connection to the taxpayer's income. Article 13(4) allocates to Luxembourg the right to tax its residents' indirect gains from immovable property situated in Canada used in a business. In such cases, Luxembourg is deemed to have the closer economic connection with the taxpayer's income because the business activity, rather than the immovable property itself, drives the value of the property.

[105] Here, a review of the factual matrix reveals that Alta Luxembourg utterly lacks a genuine economic connection with Luxembourg. Allowing it to benefit from art. 13(4) and (5) would frustrate the rationale of this provision and is thereby abusive. The common intention of Canada and Luxembourg in entering into a tax treaty could not have been to provide avenues for residents of third-party states to indirectly obtain benefits from Luxembourg's tax regime they could not obtain directly, despite the absence of genuine ties to that state. Accordingly, we would allow the appeal.

II. Background

[106] In June 2011, Alta Energy Partners Canada Ltd. ("Alta Canada") was incorporated under the laws of Alberta. It was a wholly owned subsidiary of Alta US, whose shareholders were foreign investors from the United States or other countries. Alta Canada carried on an unconventional shale oil business in Northern Alberta. The indirect owners of the shares of Alta Canada were advised by tax professionals that their current corporate structure was undesirable from a tax perspective — the capital gain resulting from the future disposition of the shares would be subject to Canadian taxes because the shares of Alta Canada were taxable Canadian property and Canada reserves the right to tax such capital gains under the *Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital* (enacted in law in Canada by the *Canada-United States Tax Convention Act, 1984*, S.C. 1984, c. 20, Sch. I; see ss. 2(3)(c) and 115(1)(b) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("Act"). The advice highlighted the existence of a favourable exemption under other tax treaties that would lead to the non-taxation of the capital gain to be realized on the sale of the shares.

[107] In April 2012, Alta Luxembourg was formed under the laws of Luxembourg for the purpose of taking advantage of the Treaty. The shares of Alta Luxembourg were still indirectly controlled by shareholders of Alta US. Alta Luxembourg had no genuine connection to Luxembourg: it had no business activity in Luxembourg and it did not hold any other investment. The sole purpose for the incorporation was to avoid paying taxes in Canada on the sale of the shares of Alta Canada.

[108] On the same day, Alta US sold all its shares of Alta Canada to Alta Luxembourg. The investors had received a confirmation from the Luxembourg tax authorities that capital gains realized on the participation in

Alta Canada would be exempt from Luxembourg tax. The result was to replace Alta US with Alta Luxembourg as shareholder of Alta Canada, but to keep the same persons effectively in control.

[109] In 2013, Alta Luxembourg sold the shares of Alta Canada for an amount of approximately $680 million. The resulting capital gain was in excess of $380 million. Alta Luxembourg then claimed an exemption from Canadian income tax under art. 13(5) of the Treaty.

[110] The Minister of National Revenue denied the exemption, partially on the basis that the GAAR operated to deny the benefit. Alta Luxembourg appealed the assessment. The Tax Court of Canada allowed Alta Luxembourg's appeal. It found that Alta Luxembourg could claim the exemption from Canadian income tax and that the GAAR did not prevent this entitlement (2018 TCC 152, [2019] 5 C.T.C. 2183). The Federal Court of Appeal agreed with the Tax Court (2020 FCA 43, [2020] 5 C.T.C. 193).

III. Analysis

A. *The Legal Framework Under the General Anti-Avoidance Rule*

[111] The GAAR, set out at s. 245 of the Act, is a tool to preserve the integrity of our tax system which seeks to respond to "the need to prevent further erosion of tax revenues through purely tax-motivated strategies" (J. Sasseville, "Implementation of the General Anti-Avoidance Rule", in Corporate Management Tax Conference, *Income Tax Enforcement, Compliance, and Administration* (1988), 4:1, at p. 4:2). Indeed, an unbridled application of the *Duke of Westminster* principle providing that a taxpayer may arrange their affairs to minimize their tax burden "can mislead taxpayers into believing that tax plans that merely comply with the technical provisions of the Act are acceptable" (V. Krishna, *Income Tax Law* (2nd ed. 2012), at p. 473).

[112] Establishing the line between legitimate tax planning and abusive tax avoidance is a complex balancing exercise. Parliament drew that line by enacting the GAAR — "the apex of all anti-avoidance measures" (Krishna (2012), at p. 470). Section 245, which sets out the GAAR reads, in part:

(2) Where a transaction is an avoidance transaction, the tax consequences to a person shall be determined as is reasonable in the circumstances in order to deny a tax benefit that, but for this section, would result, directly or indirectly, from that transaction or from a series of transactions that includes that transaction.

. . .

(4) Subsection (2) applies to a transaction only if it may reasonably be considered that the transaction

(a) would, if this Act were read without reference to this section, result directly or indirectly in a misuse of the provisions of any one or more of

. . .

(iv) a tax treaty . . . or

. . .

(b) would result directly or indirectly in an abuse having regard to those provisions, other than this section, read as a whole.

[113] There are three requirements for the GAAR to apply and to deny tax benefits: (1) there must be a *tax benefit*; (2) the transaction giving rise to the tax benefit must be an *avoidance transaction* under s. 245(3), "in the sense that it cannot be said to have been reasonably undertaken or arranged primarily for a *bona fide* purpose other than to obtain a tax benefit"; and (3) the avoidance transaction must result in a *misuse or abuse* of the Act or a tax treaty, "in the sense that it cannot be reasonably concluded that a tax benefit would be consistent with the object, spirit or purpose of the provisions relied upon by the taxpayer" (*Canada Trustco*, at para. 66(1.); s. 245(3) of the Act). Thus, where there is a tax benefit and an avoidance transaction, the application of the GAAR to deny the tax

benefit will only be avoided "if it may be reasonable to consider that it did not result from abusive tax avoidance under s. 245(4)" (para. 35, see also Department of Finance, *Explanatory Notes to Legislation Relating to Income Tax* (1988), at p. 464). The terms "misuse" and "abuse" are not defined in the Act. As such, courts had to ascertain the appropriate test for determining whether abusive tax avoidance had taken place.

(1) Determining Whether There Has Been Abuse Under the GAAR

[114] The third requirement of the GAAR is subdivided into two steps. The first is to determine the object, spirit or purpose of the provisions giving rise to the tax benefit; the second is to determine whether the transaction frustrates that purpose (*Canada Trustco*, at para. 44).

[115] First, the court must identify the "object, spirit or purpose of the provisions of the *Income Tax Act* that are relied on for the tax benefit, having regard to the scheme of the Act, the relevant provisions and permissible extrinsic aids" (*Canada Trustco*, at para. 55). As Justice Rothstein emphasized in *Copthorne Holdings Ltd. v. Canada*, 2011 SCC 63, [2011] 3 S.C.R. 721, Parliament, in enacting the GAAR, has conferred an "unusual duty" on the courts to look *beyond* the words of the statute to ascertain the object, spirit or purpose of the provisions at issue (para. 66). Even if the taxpayer complies with the text of the provisions of the Act or tax treaty, courts must determine whether the taxpayer's transactions are in accord with the rationale of the provisions relied upon (*Copthorne*, at para. 66; Krishna (2012), at p. 486).

[116] Although the GAAR analysis involves a textual, contextual, and purposive analysis, the inquiry differs from traditional statutory interpretation. Whereas the object of traditional statutory interpretation is to "determine what the words of the statute mean", the GAAR analysis is a "search . . . for the rationale that underlies the words that may not be captured by the bare meaning of the words themselves" (*Copthorne*, at para. 70). The question under the GAAR is not whether the taxpayer can claim a tax benefit, but rather "why the benefit was conferred" (*Canada Trustco*, at para. 66(4.)). Thus, a traditional statutory interpretation "is constrained by the text of the relevant provisions in a way that a GAAR analysis is not" (D. G. Duff, "The Interpretive Exercise Under the General Anti-Avoidance Rule", in B. J. Arnold, ed., *The General Anti-Avoidance Rule — Past, Present, and Future* (2021), 383, at p. 406). This follows by necessary implication. To determine whether a taxpayer can claim a tax benefit in the first place, the provisions of the Act must be interpreted applying the traditional textual, contextual and purposive approach. And, in any GAAR case, "the text of the provisions at issue will not literally preclude a tax benefit the taxpayer seeks by entering into the transaction or series" (*Copthorne*, at para. 88). If the GAAR simply replicated the statutory interpretation exercise, it would be meaningless. This difference in the methodology of interpretation is pivotal to giving proper effect to the GAAR.

[117] Similarly, in determining the meaning of tax treaties, art. 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, requires the terms of a treaty to be interpreted in light of their context and in light of the treaty's object and purpose. The GAAR directs courts to go behind this meaning and to identify the rationale underlying the relevant provision of the treaty.

[118] Once the court has identified the rationale underlying the relevant provisions, the second step of the abuse analysis is "to determine whether the avoidance transaction defeated or frustrated the object, spirit or purpose of the provisions in issue" (*Canada Trustco*, at para. 55). There will be a finding of abuse: ". . . (1) where the transaction achieves an outcome the statutory provision was intended to prevent; (2) where the transaction defeats the underlying rationale of the provision; or (3) where the transaction circumvents the provision in a manner that frustrates or defeats its object, spirit or purpose . . ." (*Copthorne*, at para. 72). These considerations "are not independent of one another and may overlap" (*ibid.*). The abusive nature of the transaction "must be clear" (*Canada Trustco*, at para. 62).

[119] In summary, the GAAR will not apply "to deny the tax benefi[t] that results from these transactions as long as they are carried out within the object and spirit of the provisions of the Act read as a whole" (Krishna (2012), at p. 486, quoting Department of Finance (1988), at p. 464). The same rule would undoubtedly apply to tax benefits arising under the Treaty. However, the GAAR applies when the taxpayer carries out transactions to obtain a tax benefit not intended by specific provisions of the Act or treaty read as a whole. In such cases, the GAAR "will override other provisions of the Act [or tax treaties] since, otherwise, its object and purpose would be defeated" (p. 489, quoting Department of Finance (1988), at p. 465).

(2) Certainty, Predictability and Fairness

[120] To the extent that the GAAR is only invoked where there will be compliance with the requirements on a literal reading of a provision, the GAAR, by nature, gives rise to an "unavoidable degree of uncertainty for taxpayers" (*Copthorne*, at para. 123). Allowing the GAAR to create this uncertainty was a deliberate choice that Parliament made when it enacted a provision that can defeat tax avoidance schemes that exploit Canada's legislation and treaties. The Act contains numerous anti-avoidance provisions that target specific factual scenarios. Inventive tax planners may successfully avoid these provisions by using structured transactions, but those transactions may still constitute abusive tax avoidance. The GAAR was designed to act as the final, catch-all provision which can be applied where no specific anti-avoidance provision applies, exists or was circumvented. It is a "provision of last resort" (*Canada Trustco*, at para. 21).

[121] Absolute certainty under the GAAR does not exist. Parliament has made a tax policy choice in order to balance the principles of certainty and predictability with another principle that is as fundamental to our tax system — the principle of fairness (*Lipson v. Canada*, 2009 SCC 1, [2009] 1 S.C.R. 3, at para. 52). The GAAR "is designed, in the complex context of the [Act], to restrain abusive tax avoidance and to make sure that the fairness of the tax system is preserved" (*ibid.*). Sophisticated taxpayers who can afford tax professionals have access to planning strategies that lower or eliminate their tax burden through what may cross the line into abusive tax avoidance territory. Not applying the GAAR to those abusive schemes is deeply unfair not solely because only this select group of taxpayers may have access to such professionals, but also because the tax burden avoided by the select group falls back on the taxpayers who do not, for instance through higher tax rates (D. A. Dodge, "A New and More Coherent Approach to Tax Avoidance" (1988), 36 *Can. Tax J.* 1, at pp. 4, 8 and 9).

[122] Professor J. Li underscores this essential balancing role the GAAR plays in our tax system, as recognized in our jurisprudence:

As the Supreme Court noted in *Canada Trustco*, the preservation of "certainty, predictability and fairness" for individual taxpayers is considered a "basic tenet of tax law" [at para. 61]. On the other hand, the GAAR requires the balancing of this set of policy concerns against the concern for protection of the tax base and the fairness of the tax system as a whole.

. . . the GAAR cases generally involve situations that do not concern the majority of taxpayers, and the transactions are well planned and executed on the basis of professional tax advice. Therefore, the requirement of certainty does not ring true in GAAR cases. [Emphasis added; footnotes omitted.]

("'Economic Substance': Drawing the Line Between Legitimate Tax Minimization and Abusive Tax Avoidance" (2006), 54 *Can. Tax J.* 23, at p. 40)

[123] Consequently, a finding that the GAAR applies to deny the tax benefits conferred by clear provisions where avoidance transactions defeat their underlying rationale does not run counter to the principles of certainty, predictability and fairness. The application of the GAAR in these circumstances upholds the balance Parliament sought to strike between those principles and gives effect to its intent to curb abusive tax avoidance (Department of Finance (1988), at p. 461, cited in *Canada Trustco*, at para. 15).

[124] This is the view that the majority upheld in *Lipson*. In that case, the dissenting judges were of the view that the *Duke of Westminster* principle should prevail over the GAAR on the basis that, if not contained, the GAAR was a "weapon" that "could have a widespread, serious and unpredictable effect on legitimate tax planning" (para. 55). Justice LeBel, for the majority, found that this approach "essentially gut[ted] the GAAR and rea[d] it out of the [Act] under the guise of an exercise in legal interpretation" (para. 52). Overemphasizing the principles of certainty and predictability to the detriment of that of fairness is contrary to Parliament's will. In the words of LeBel J., the "desire to avoid uncertainty cannot justify ignoring a provision of the [Act] that is clearly intended to apply to transactions that would otherwise be valid on their face" (*ibid.*). Courts have the obligation to animate all parts of Parliament's legislation, including s. 245 of the Act.

(3) The Application of the GAAR to Bilateral Tax Conventions

[125] Following the introduction of s. 245 of the Act, the question of whether this provision applied to tax treaties gave rise to much debate among commentators and scholars (W. I. Innes, P. J. Boyle and J. A. Nitikman, *The Essential GAAR Manual: Policies, Principles and Procedures* (2006), at p. 198-204). This debate is now settled.

[126] As Bowman J. (as he then was) had opined in *RMM Canadian Enterprises Inc. v. R.*, [1998] 1 C.T.C. 2300, at paras. 52-54 and 56, quoting *McNichol v. The Queen* (1997), 97 D.T.C. 111, at pp. 120-21, the Minister could use the GAAR to deny tax benefits arising from the exploitation of Canada's tax treaties. Parliament later confirmed that s. 245 applied to tax treaty benefits when it enacted s. 245(4)(a)(iv) of the Act in the *Budget Implementation Act, 2004, No. 2*, S.C. 2005, c. 19, s. 52(2). It also enacted s. 4.1 of the *Income Tax Conventions Interpretation Act*, R.S.C. 1985, c. I-4 ("*ITCIA*"), which provides that "[n]otwithstanding the provisions of a convention . . . it is hereby declared . . . that section 245 of the [Act] applies to any benefit provided under the convention." And, in the event of inconsistency between the Treaty and the *ITCIA*, the provisions of that act prevail (*Income Tax Conventions Implementation Act, 1999*, S.C. 2000, c. 11, s. 51(2)). The courts are bound to give effect to Parliament's legislative efforts to clearly communicate its intent to curb tax avoidance arising from an improper use of some of Canada's tax treaties through the application of the GAAR. The result is that "tax treaties must be interpreted in the same manner as domestic legislation when analyzing potentially abusive avoidance transactions" (*MIL (Investments) S.A. v. R.*, 2006 TCC 460, [2006] 5 C.T.C. 2552 ("*MIL* (TCC)"), at para. 28). Contrary to our colleague Côté J.'s suggestion, this is not an impermissible extension of the GAAR. If there were any doubts about the application of the GAAR to tax treaties, they were unequivocally resolved when Parliament amended the Act in 2005 (see Standing Senate Committee on National Finance, *Proceedings of the Standing Senate Committee on National Finance*, Nos. 19 and 20, 1st Sess., 38th Parl., April 20 and May 2, 2005, at pp. 19:16-17, 19:22, and 19:26-27).

[127] Therefore, although this Court's pronouncements on the GAAR were made in the context of alleged abuses of the Act, there is no dispute that the GAAR also applies to avoidance transactions that abuse or misuse tax treaties.

[128] The backdrop against which this amendment was brought provides insight. It followed a report by the Auditor General of Canada on what was then the Canada Customs and Revenue Agency ("CCRA"), in which it identified a number of tax avoidance schemes that exploited some of Canada's tax treaties. In discussing the tax treaty Canada concluded with Barbados, the Auditor General observed the following:

During our review of non-resident files, we noted that the Agency has discovered a number of schemes developed to exploit the Canada-Barbados Income Tax Agreement. Canada usually signs tax treaties to avoid double taxation. Barbados does not tax capital gains. However, the Agreement allows a resident of Barbados to claim a Canadian tax exemption on a capital gain that would otherwise be subject to Canadian tax. The Agency is currently reviewing transactions that move capital gains from Canada to Barbados. [Emphasis added.]

(Office of the Auditor General, *Report of the Auditor General of Canada to the House of Commons — Chapter 7 — Canada Customs and Revenue Agency, International Tax Administration: Non-Residents Subject to Canadian Income Tax* (2001), at para. 7.85)

[129] One of the schemes given as an example of an exploitation of Canada's tax treaties is strikingly similar to the facts of the present case: a non-resident company held shares of a Canadian company, the proceeds of the sale of which shares would be taxable in Canada. The non-resident company shifted its residence to Barbados and claimed a Canadian tax exemption on the capital gain provided under the treaty between Canada and Barbados (para 7.89).

[130] The Auditor General recommended that the CCRA "continue to be vigilant in ensuring that tax treaties are not used inappropriately to reduce Canadian tax and, if necessary, should seek legislative or treaty changes to protect Canada's tax base" (para. 7.91 (emphasis added)). Parliament opted to make clear that the GAAR would be its preferred tool to curb tax avoidance arising from an improper use of Canada's tax treaties.

B. *Application*

[131] We now turn to applying the principles laid out above to the facts of this case. Since the first two steps of the GAAR framework are not at issue, we will focus solely on the abuse analysis.

(1) Object, Spirit or Purpose of Articles 1, 4 and 13 of the Treaty

[132] The Crown submits that, with respect to "shares which derive their value principally from immovable property used in a company's business", the rationale underlying the relevant provisions of the Treaty is to allocate taxing rights to the state of residence, as the economic connection to the company's state of residence would usually outweigh the connection to the source state as the *situs* of the immovable property (A.F., at para. 65). Alta Luxembourg adopts the view of the courts below, according to which the rationale is no broader than the text of the relevant provisions of the Treaty (A.F., at para. 97). The rationale is simply to "exempt residents of Luxembourg from Canadian taxation where there is an investment in immovable property used in a business" (T.C.C. reasons, at para. 100; see also C.A. reasons, at para. 67).

[133] We agree with the Crown. Contrary to the result reached in the courts below, this is not a case where the text of a provision fully expresses its underlying rationale; failing to have regard to this rationale renders the GAAR "meaningless" (*Copthorne*, at paras. 110-11). We conclude that the rationale underlying arts. 1, 4 and 13 of the Treaty is to assign taxing rights to the state with the stronger economic claim to the income. Canada is presumed to have the stronger connection to capital gains related to passive investment in immovable property situated in Canada realized by residents of Luxembourg. However, when the value of the immovable is driven by a company's business — that is, when residents of Luxembourg realize a gain from immovable property used in a business — Luxembourg is deemed to have the closer economic connection. The rationale underlying the carve-out in art. 13(4) is to reflect the state of residence's stronger economic claim to tax the income. In this case, the state of residence is Luxembourg but the state with the stronger economic claim to tax the income is Canada.

(a) *The Text of the Relevant Provisions*

[134] The relevant provisions of the Treaty are the following:

ARTICLE 1

I. Scope of the Convention

Persons Covered

This Convention shall apply to persons who are residents of one or both of the Contracting States.

ARTICLE 4

Resident

1. For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature. This term also includes a Contracting State or a political subdivision or local authority thereof or any agency or instrumentality of any such State, subdivision or authority. This term, however, does not include any person who is liable to tax in that State in respect only of income from sources in that State.

ARTICLE 13

Capital Gains

1. Gains derived by a resident of a Contracting State from the alienation of immovable property situated in the other Contracting State may be taxed in that other State.

4. Gains derived by a resident of a Contracting State from the alienation of:
a. shares (other than shares listed on an approved stock exchange in the other Contracting State) forming part of a substantial interest in the capital stock of a company the value of which shares is derived principally from

immovable property situated in that other State; or
b. an interest in a partnership, trust or estate, the value of which is derived principally from immovable property situated in that other State,

may be taxed in that other State. For the purposes of this paragraph, the term "immovable property" does not include property (other than rental property) in which the business of the company, partnership, trust or estate was carried on; and a substantial interest exists when the resident and persons related thereto own 10 per cent or more of the shares of any class or the capital stock of a company.

5. Gains from the alienation of any property, other than that referred to in paragraphs 1 to 4 shall be taxable only in the Contracting State of which the alienator is a resident.

[135] Article 1 provides that the Treaty applies to "residents" of Canada or Luxembourg. Article 4 defines "resident" as persons who are liable to pay tax under the laws of the state. Article 13 of the Treaty provides for the allocation of the right to tax capital gains between Canada and Luxembourg. Under art. 13(5), the state of residence (here, Luxembourg) retains its jurisdiction to tax capital gains unless the exceptions in art. 13(1) to (4) of the Treaty apply.

[136] Article 13(1) preserves the right of the source state (here, Canada) to tax gains derived from immovable property situated in that state. This exception is reinforced by art. 13(4), which provides that the source state also preserves its right to tax capital gains arising from the disposition of shares the value of which is derived principally from immovable property situated in the source state. Article 13(4) is effectively an anti-avoidance rule: it prevents companies from avoiding source state taxation and thereby contradicting art. 13(1) simply by using a corporate vehicle to hold and sell the immovable property (J. Li and F. Avella, "Article 13: Capital Gains", in *Global Tax Treaty Commentaries*, May 30, 2020 (online), at s. 1.1.2.5; see also T.C.C. reasons, at para. 41).

[137] Finally, there is a carve-out to the exception set out by art. 13(4), for property in which the company carries on business. Capital gains arising from the disposition of such property will be taxable in the state of residence as such gains fall under the rule provided by art. 13(5). In this case, the Tax Court judge found that the carve-out applies to the disposition of the shares in Alta Canada, which can be taxed by the state of residence (Luxembourg) and not by Canada.

[138] Although the text of art. 13 of the Treaty sets out a clear distributive scheme to allocate taxing rights, it sheds little light on the rationale underlying this allocation. Canada and Luxembourg did not allocate taxing rights at random; there is a logic underlying the distributive scheme set out in art. 13 of the Treaty. It is this rationale that we must identify in order to give effect to the GAAR.

(b) *Context: Specific Anti-Avoidance Provisions*

[139] Alta Luxembourg argues that the Crown's submitted rationale, specifically what it calls a "substantial economic connection test", has the effect of changing the bargain struck between Canada and Luxembourg. It contends that the Crown is seeking to add the unstated condition that a taxpayer must have substantial economic ties to the contracting state of residence in order to qualify as a "resident" under the Treaty. Canada could have negotiated the inclusion of a provision that could have achieved a similar effect but elected not to. Specifically, Alta Luxembourg submits that, in negotiating with Luxembourg, Canada chose not to include one — or many — of the specific anti-avoidance rules discussed in the 1998 OECD "Commentary on Article 1", in *Model Tax Convention on Income and Capital: Condensed Version*. Therefore, Alta Luxembourg says, the Minister should not be allowed to rely on the GAAR to deny treaty benefits to an entity meeting the residency requirements outlined in the Treaty.

[140] This argument must fail as it ignores the very justifications behind the legislative choice to introduce a general anti-avoidance provision in a tax system. While there are specific rules that may have permitted the denial of the tax benefits conferred here had they been included in the Treaty, it does not follow that the GAAR cannot apply to deny the tax benefit.

[141] Since not every tax avoidance strategy can be foreseen, the effectiveness of specific provisions is limited to Parliament's ability to anticipate such schemes. For this reason, those provisions cannot completely

thwart inappropriate tax avoidance (Canada, *Report of the Royal Commission on Taxation* (1966), vol. 3, at p. 554). Before the inception of the GAAR, the increased use of complex tax avoidance schemes and matching responses to curb them left taxpayers with the expectation that purely tax-motivated transactions that were inconsistent with the rationale of the provisions relied upon were acceptable as long as they are not targeted by specific legislation (Dodge, at p. 4). Additionally, because legislation is generally prospective, specific anti-avoidance rules permit the early participants in avoidance schemes — those who can afford "the most astute tax advisers" — to enjoy the benefits of those schemes (p. 9). This may result in the loss of significant tax revenues.

[142] The GAAR was enacted as a much needed modernization of Canada's tools against tax avoidance. It was meant to respond appropriately to the proliferation of such complex arrangements and to reduce the burden of having to perpetually address abusive schemes with specific legislation matching each newly marketed "purely tax-motivated scheme" (Dodge, at pp. 4 and 8). The *Explanatory Notes* issued with the GAAR stated that it was to apply "as a provision of last resort after the application of the other provisions of the Act, including specific anti-avoidance measures" (Department of Finance (1988), at p. 461 (emphasis added)).

[143] Here, Alta Luxembourg's position essentially amounts to an argument based on the "implied exclusion" rule: if the contracting parties had meant to include an anti-avoidance provision within the Treaty, they would have done so expressly. This very reasoning was unanimously rejected by this Court in *Copthorne*.

[144] In that case, a parent and a subsidiary corporations strategically became sister corporations to conduct a horizontal, rather than vertical, amalgamation. This had the effect of increasing the paid-up capital of the shares of the amalgamated corporations compared to the paid-up capital that would have been otherwise available. The taxpayer argued that because its transactions were not caught by the detailed provisions seeking to prevent taxpayers from inappropriately preserving paid-up capital, no abusive tax avoidance could have resulted. Parliament, the argument went, would have expressly referred to such transactions if it had meant for them to be included under the provisions. This Court rejected this argument.

[145] Rothstein J. stated that the implied exclusion argument, while relevant in an exercise of statutory interpretation, does not align with "the nature of a GAAR analysis" and "is misplaced where it relies exclusively on the text of the [paid-up capital] provisions without regard to their underlying rationale" (paras. 109 and 111). He also warned that "[i]f such an approach were accepted, it would be a full response in all GAAR cases, because the actions of a taxpayer will always be permitted by the text of the Act" (para. 111).

[146] As a result, although the provisions at issue did not impose express limits on the preservation of paid-up capital on a horizontal amalgamation, the GAAR applied to deny the tax benefit. This conclusion was justified because the series of transactions allowed for the preservation of the paid-up capital upon a "horizontal" amalgamation that allowed the taxpayer to obtain tax benefits that would not have been available in a vertical amalgamation, a result contrary to the underlying rationale of the relevant provision (*Copthorne*, at para. 126).

[147] Moreover, relying on *Prévost Car Inc. v. Canada*, 2009 FCA 57, [2010] 2 F.C.R. 65, to suggest that Canada could have relied on the notion of beneficial ownership to prevent the tax avoidance that took place here is misplaced. Not only was Canada entitled to rely on the GAAR rather than negotiate a specific anti-avoidance rule in the Treaty, it is important to note that the provision at issue in that case was art. 10, not art. 13, dealing not with capital gains but with dividends.

[148] Indeed, beneficial ownership is utterly foreign to art. 13. This notion is relevant to, as noted, art. 10, as well as arts. 11 and 12 of the 2003 OECD "Model Convention with Respect to Taxes on Income and on Capital", in *Model Tax Convention on Income and on Capital: Condensed Version*, dealing respectively with the payment of dividends, interest and royalties. In a paper on whether the concept of beneficial ownership should be extended to arts. 13 and 21 of the 2001 United Nations *Model Double Taxation Convention between Developed and Developing Countries*, U.N. Doc. ST/ESA/PAD/SER.E/213 (identical in structure to the OECD "Model Convention"), Professor P. Baker explained, in 2008, that "the inclusion of a beneficial ownership limitation in the capital gains article of specific, bi-lateral conventions is not part of the current treaty practice of any state" and that "[t]here is also something of a conceptual gulf between applying the beneficial ownership concept to items of income — such as dividends, interest and royalties — and applying it to a capital gain" (*The United Nations Model Double Taxation Convention Between Developed and Developing Countries: Possible Extension of the Beneficial Ownership Concept*, U.N. Doc. E/C.18/2008/CRP.2/Add.1, Ann., October 17, 2008, at paras. 54-55 (emphasis added)). While Professor Baker did state that the "theoretical differences between a flow of income — as in the

case of dividends, interest and royalties — and the effective beneficiary of a capital gain, are not insurmountable", he then went on to state that "[i]t [was] also worth bearing in mind that there is something of a conflict in legal concepts in recognising that the owner of an asset who disposes of that asset may not be the beneficial owner of the capital gain arising from the asset" (para. 58 (emphasis added)). Further, in a subsequent report, the United Nations' committee of experts overseeing the subcommittee who had commissioned Professor Baker's paper concluded that "[t]here was ultimately only limited support for inserting beneficial ownership in article 13" (Committee of Experts on International Cooperation in Tax Matters, *Report on the fourth session (20-24 October 2008)*, U.N. Doc. E/2008/45 (Supp.), 2008, at para. 46).

[149] But, of more relevance to the present debate, the examples of tax treaty abuse through the use of art. 13 reviewed by Professor Baker involved, as here, transfers of residence before the disposal of an asset. He explained that the introduction of "[a] beneficial ownership limitation would not necessarily counter [these] transactions" (para. 53). For all these reasons, beneficial ownership would not be an appropriate anti-avoidance tool to curb tax treaty exploitation involving art. 13 dealing with the realization of capital gains.

[150] In sum, by Alta Luxembourg's logic, if the lack of a specific tax-avoidance provision in the Treaty is fatal to the Crown's position, not only would the GAAR be prevented from applying to tax treaties, it would also be prevented from applying in cases of abuse of the Act that are not specifically addressed. In our view, no inference can be drawn from the absence of an anti-avoidance rule designed to counter the particular scheme employed in this case. To do so would be inconsistent with of the role of the GAAR relative to other anti-avoidance tools. It would also be patently contrary to this Court's repeated holding that the GAAR is a provision of last resort, and can only find application where no other provisions of the Act do (*Canada Trustco*, at para. 21; *Copthorne*, at para. 66). Thus, the absence of specific anti-avoidance rule in the relevant provisions of the Treaty sheds little light on their underlying rationale.

(c) *The Purpose of the Relevant Provisions: Economic Allegiance Underlies the Distributive Scheme*

[151] The Treaty, like other bilateral tax treaties, allocates the right to tax between contracting states so as to avoid double taxation (E. C. C. M. Kemmeren, "Legal and Economic Principles Support an Origin and Import Neutrality-Based over a Residence and Export Neutrality-Based Tax Treaty Policy", in M. Lang et al., eds., *Tax Treaties: Building Bridges between Law and Economics* (2010), 237, at pp. 239 and 243; K. Vogel, "Double Tax Treaties and Their Interpretation" (1986), 4 *Int'l Tax & Bus. Law.* 1, at pp. 8 and 22; *Crown Forest Industries Ltd. v. Canada*, 1995 CanLII 103 (SCC), [1995] 2 S.C.R. 802, at para. 46). The allocation of taxing powers follows the theory of "economic allegiance", under which an economic connection between the state and the taxpayer serves as the basis of taxation (Li and Avella, at s. 1.1.2.1, referring to League of Nations, Economic and Financial Commission, *Report on Double Taxation Submitted to the Financial Committee* (1923)). This means that taxes should be paid on income where it has the strongest "economic interests" or ties, either in the state of residence or the source state.

[152] The theory of economic allegiance explains why arts. 1 and 4 provide that beneficiaries of the Treaty are the residents of either state. Contracting states extend the benefits of the tax treaties only to their residents (that is, persons liable to pay tax in their state) because residence is an appropriate criterion to ensure that the treaty will "cover only persons who had an economic allegiance to one or both of the contracting states" (P. J. Hattingh, "Article 1 of the OECD Model: Historical Background and the Issues Surrounding It" (2003), 57 *Bull. Int'l Fisc. Doc.* 215, at p. 221).

[153] Following the theory of economic allegiance, active income is generally taxable in the source country (where the income is earned) while passive income is taxed primarily in the residence country (J. Li and A. Cockfield, with J. S. Wilkie, *International Taxation in Canada: Principles and Practices* (4th ed. 2018), at pp. 46-47).

[154] While capital gains "do not fit nicely in either 'active income' or 'passive income'" (J. Li, A. Cockfield and J. S. Wilkie, *International Taxation in Canada: Principles and Practices* (2nd ed. 2011), at p. 44), nonetheless the distributive scheme of art. 13 reflects, as well, the theory of economic allegiance (Li and Avella, at s. 1.1.2.1). Depending on where the economic connection is stronger, the right to tax the capital gain will be allocated to either the source state or the residence state. As a general rule, residence is taken to indicate the state to which economic ties are closest. The state of residence is typically where "capital is accumulated and consumed"

(*ibid.*), so it has the greater claim to tax. As Professor Krishna explains, "[t]he obligation to pay tax based on residence derives from the principle that persons who benefit from their economic and social affiliation with a country have an obligation to contribute to its public finances" (*Fundamentals of Canadian Income Tax* (2nd ed. 2019), vol. 1, at p. 103).

[155] Article 13(5) of the Treaty reflects this principle: with certain exceptions, capital gains are taxable only in the state in which the taxpayer is a resident, because residence connotes this close connection.

[156] Gains deriving from immovable property form part of such an exception (see, generally, art. 13(1) and (4)). In relation to immovable property, the capital gain is generally connected predominantly to the *situs* of the property, which justifies allocating taxing rights to the source state. The rationale behind source taxation is that "a person who receives income from a person or property situated in a state has such a close relation with the state where the person or property is *physically* located that an obligation to support that state is justified on grounds of the relationship" (Kemmeren, at p. 262 (emphasis in original); see also A. Christians and N. Benoît-Guay, "Status and Structure of Tax Treaties", in J.-P. Vidal, ed., *Introduction to International Tax in Canada* (9th ed. 2021), at p. 4/14 to 4/15). This principle explains why art. 13(1) and (4) allocates to the source state the right to tax gains derived directly or indirectly from immovable property situated in that state (Li and Avella, at ss. 1.1.2.1 and 1.1.2.5; OECD, "Commentary on Article 13", in *Model Tax Convention on Income and on Capital: Condensed Version* (2017) ("2017 Commentary"), at para. 4; S. Simontacchi, *Taxation of Capital Gains under the OECD Model Convention: With special regard to Immovable Property* (2007), vol. 29, at p. 201).

[157] Finally, the carve-out of art. 13(4) allocates the taxing right to the state of residence for its residents' capital gains from immovable property when it is driven by business activity, to reflect what Canada and Luxembourg considered to be closer economic ties with the residence state. "The rationale underlying this carve-out is that where a non-resident actively invests in immovable property situated in the source country, tax should be levied in the residence country" (Christians and Benoît-Guay, at p. 4/15 (emphasis added)). When business is carried on in an immovable property, the business activity — rather than the immovable property itself — drives value. Accordingly, the economic justification for source state taxation is weaker.

[158] It is worth recalling that art. 13(4) is intended to prevent taxpayers from circumventing source state taxation (art. 13(1)) by interposing a company to alienate immovable property. This justification for source state taxation is weaker when the company carries on a business in the immovable property because "the assumption that a corporate veil has been interposed between the shareholder and the immovable property is questionable, and equating the alienation of shares in the company to the alienation of the underlying immovable property does not seem tenable" (S. Simontacchi, "Immovable Property Companies as Defined in Article 13(4) of the OECD Model" (2006), 60 *Bull. Int'l Tax'n* 29, at p. 31).

[159] The carve-out is not in the 2017 OECD "Model Convention", but it is contemplated by the OECD's commentaries as an option for contracting parties who want to allocate taxing rights to the residence state for immovable properties such as mines and hotels (2017 Commentary, at paras. 28.5-28.7). As a result, we agree with the Tax Court that one of the purposes of the carve-out is "to encourage investments by Luxembourg residents in Immovable Property acquired to be used in a company's business" (para. 43).

[160] Relying on *Fundy Settlement v. Canada*, 2010 FCA 309, [2012] 2 F.C.R. 374, the Federal Court of Appeal rejected the theory of "economic allegiance" as the rationale underlying art. 13(4) of the Treaty because "[t]here is no distinction in the Luxembourg Convention between residents with strong economic or commercial ties and those with weak or no commercial or economic ties" (*R. v. MIL (Investments) S.A.*, 2007 FCA 236, [2007] 4 C.T.C. 235 ("*MIL* (FCA)"), at para. 6).

[161] In our view, the reasoning adopted in *Fundy Settlement*, *MIL* (TCC) and *MIL* (FCA) departs from the proper approach under the GAAR, which focuses on the "why" — the rationale — behind the text of the relevant provisions; these cases should not be followed. If relying on the text of a treaty provision is sufficient to avoid abusing a treaty, then the GAAR is effectively rendered powerless to address abusive transactions structured around tax treaties, notwithstanding the retroactive 2005 amendments to s. 245 of the Act to ensure that the GAAR applied to tax treaties. As Professor G. T. Loomer explains, this analysis "seems to ensure that any avoidance strategy involving a Canadian tax treaty, no matter how blatant, will be immune to the GAAR provided the intermediate entity is formally established in the particular state and meets the technical requirements of the particular treaty provisions relied upon" ("Tax Treaty Abuse: Is Canada Responding Effectively?", in Oxford

University Centre for Business Taxation, Working Paper No. 09/05 (revised March 2009), at s. 4.3.3). We would also note that, when this Court disposed of the appeal in *Fundy Settlement* on other grounds, it specified that it "should not be understood as endorsing the reasons of the Federal Court of Appeal" on the GAAR (*Fundy Settlement v. Canada*, 2012 SCC 14, [2012] 1 S.C.R. 520, at para. 19).

[162] Alta Luxembourg similarly argues that this Court held, in *Crown Forest*, that residence under bilateral tax conventions is established where a taxpayer is subject to full tax liability in the contracting state. In its view, the Crown is seeking to add the unstated condition that a taxpayer must have substantial economic ties to the contracting state of residence in order to qualify as a "resident" under the Treaty.

[163] We disagree. This argument ignores the fact that *Crown Forest* did not deal with the application of the GAAR. The Court in that case had to interpret the term "resident" under the *Canada-United States Tax Convention Act, 1984*. By contrast, where, as here, the GAAR is invoked to deny a tax benefit that would otherwise be available based on the text of the provisions, one must look beyond the text in order to determine whether conferring such benefit frustrates or exploits the underlying rationale of the provisions. This does not mean that Alta Luxembourg must meet an "unstated condition" in addition to qualifying as a "resident" under arts. 1 and 4 of the Treaty. Rather, the Crown raises the need for economic ties to Luxembourg in relation to the object, spirit or purpose underpinning the relevant provisions. For the Crown, granting the tax benefit to Alta Luxembourg in the circumstances where it fails to have any real, substantial economic connection to the state of residence would frustrate the underlying rationale of the relevant provisions. This accords with the proper methodology under the GAAR.

[164] In sum, the distributive scheme allocates taxing rights based on the strength of the economic connection between the income and the contracting states. The carve-out of art. 13(4) follows the same logic: when a taxpayer carries on a business in an immovable property, it derives benefits more from the residence state and that state's commercial legal framework than from the source state's infrastructure. This connection between the income and the residence state forms the economic basis for residence state taxation.

(d) *Conclusion on the Rationale for the Relevant Provisions*

[165] We conclude that the rationale for the relevant provisions of the Treaty is to allocate taxation rights to the contracting state which has the strongest economic claim to the relevant income. The carve-out assigns the right to tax capital gains arising from the disposition of immovable property in which business is carried on to the resident state. The rationale behind the carve-out is to encourage investment; it reflects the fact that the business activity, rather than the immovable property itself, drives the value of the property. Accordingly, the economic justification for source state taxation — an exception to the general principle of taxation in the state of residence — is weaker. The state of residence has the stronger economic claim to tax the income.

(2) Was There an Abuse of the Provisions of the Treaty?

[166] The courts below erred in law by failing to identify the object, spirit or purpose of the Treaty's relevant provisions and, instead, merely restated art. 13(5). The courts failed to focus on the reason for the article. Consequently, we are called on to conduct the abuse analysis afresh and to determine whether the transaction falls within or frustrates the rationale of the relevant provisions of the Treaty (*Canada v. 594710 British Columbia Ltd.*, 2018 FCA 166, [2019] 5 C.T.C. 1, at para. 64).

[167] In our view, Alta Luxembourg's presence in Luxembourg is not genuine — it is mere gossamer. As such allowing it to enjoy tax benefits conferred on the basis of the stronger economic connection between the taxpayer's income and Luxembourg frustrates the object, spirit or purpose of the provisions of the Treaty.

[168] Alta Luxembourg's lack of substantial economic connection is plain from a review of the record. Alta Luxembourg was created and controlled by Alta US and its American and other foreign shareholders whose jurisdiction did not have a tax treaty with a similar exemption as the Treaty. The transaction was structured to ensure no gain would be realized in Luxembourg and that all proceeds of the sale would flow to the shareholders. As a senior managing director of the private equity firm behind the restructuring said, the objective was not to establish a genuine presence in Luxembourg, but rather to ensure that "everything will . . . flow through vehicles

and no Canadian taxes will be paid" (A.R., vol. IV, at p. 106). After the transaction, Alta Luxembourg did not carry business in Luxembourg.

[169] Alta Luxembourg's presence in Luxembourg was manufactured out of whole cloth. The shareholders and investors of Alta US retained "domiciliation services" to provide a corporate presence in Luxembourg and benefit from the Treaty. Email exchanges preceding the transaction make it clear that the service provider's role was solely to ensure that Alta Luxembourg had the minimum "substance requirements" so the shareholders and investors of Alta US could "avail [themselves of] the benefits under the Canada/Luxembourg tax treaty (i.e., to alleviate Canadian tax leakage)" (A.R., vol. IV, at pp. 138-39). Calls for Alta Luxembourg would be routed to a switchboard and answered by an employee from the service provider. In addition to providing a corporate presence to Alta Luxembourg, the service provider also held board meetings for Alta Luxembourg. The members of the board of Alta Luxembourg were composed of two classes of managers: Class A managers, and Class B managers. All Class B managers were provided by the service provider and never met with Class A managers. In essence, Alta Luxembourg only existed through the service provider. It was an empty shell.

[170] Canada and Luxembourg agreed to the carve-out for the purpose of reflecting the closer economic connection between Luxembourg and its residents who carry on business in an immovable property situated in Canada. Yet the avoidance transactions were structured around a shell company with no real ties to Luxembourg, which was created solely to obtain a tax benefit under the Treaty. Therefore, the transactions led to an outcome that defeats the rationale underlying the allocation of taxing rights to Luxembourg over a class of capital gains. Indeed, this is precisely the type of transaction that the authors Li and Avella qualify as abusive uses of tax treaties: ". . . using interposed companies in an intermediary jurisdiction to take advantage of that jurisdiction's treaty network . . ." in relation to capital gains (s. 2.1.1.3).

[171] Canada has deliberately decided not to extend the benefit of the treaty exemption found in the Treaty to the residents of the jurisdictions of the shareholders of Alta US. With regards to the provisions at issue, the common intention of Canada and Luxembourg could not have been to provide an avenue for residents of third-party states to indirectly obtain tax benefits they could not obtain directly absent any real economic connection with Luxembourg. This is "patently contrary to the basis on which" states cede their "jurisdiction to tax as the source country" (*Crown Forest*, at para. 52). Our colleague's reasons assume that the federal government deliberately set out, in the exercise of its treaty making authority, to create the conditions for unlimited tax avoidance by means of schemes such as that in which Alta Luxembourg was used. To state such a proposition is to expose its absurdity, yet our colleague seeks to legitimize such blatantly abusive tax avoidance based on her view that Canada should have negotiated different treaty terms. The focus on what else could hypothetically have been agreed to is misplaced. It involves *ex ante* speculation about how the treaty parties ought to have proceeded based on alternatives said to have been available to them. However, such an argument gives primacy to what is not there. We are of the view that Parliament was entitled to rely on the GAAR to address abusive uses of the Treaty rather than negotiate the inclusion of a specific rule. The focus should be on what was actually agreed upon and whether the underlying rationale of the relevant provisions was frustrated by the avoidance transactions undertaken. In the give and take of treaty negotiation, Canada certainly did not give up the GAAR.

[172] The Auditor General raised concerns with precisely these types of schemes 20 years ago and recommended that Parliament take legislative action to protect Canada's tax base. Parliament addressed this "mischief" with the enactment of s. 4.1 *ITCIA* to ensure the Minister could rely on the GAAR to deny tax benefits obtained through the use of schemes found to be abusive under the GAAR analysis. To borrow the words of Li and Cockfield, to "ascertain whether Parliament . . . intended to prohibit a particular tax-avoidance transaction", it is wise to determine what is the "mischief" it sought to remove (p. 380).

[173] In addition, the avoidance transactions run contrary to the objective of encouraging trade and investment which underlies the carve-out. They were not an acquisition or an investment, but rather a liquidation of an existing investment in Canada without paying tax on the capital gain. Thus, the transactions are disconnected from the economic objectives underlying the bargain.

[174] Further, although "insufficient by itself to establish abusive tax avoidance", our jurisprudence is clear that the absence of a *bona fide* non-tax purpose "may form part of the factual context that the courts may consider in the analysis of abusive tax avoidance allegations under s. 245(4)" (*Canada Trustco*, at para. 58; see also *Lipson*, at para. 38). The absence of *bona fide* non-tax purpose is relevant when the rationale of the provisions at

issue means "that a particular tax benefit may apply only to transactions with a certain economic, commercial, family or other non-tax purpose" (*Canada Trustco*, at para. 58).

[175] Here, the Minister is seeking to apply the GAAR in the context of a purely tax-motivated corporate restructuring resulting in a shift of residence to Luxembourg, a reorganization for which there was no *bona fide* non-tax purpose. Given that the rationale of the relevant provisions is to reflect the economic ties with Luxembourg, the state of residence, this utter lack of any non-tax purpose is a relevant underlying factor that can be considered in the analysis under s. 245(4) of the Act.

[176] While the Crown has conceded that Alta Luxembourg was a resident of Luxembourg under art. 4 of the Treaty, contrary to the Federal Court of Appeal, we do not consider the residency requirement to be determinative in the context of a GAAR analysis. Again, the GAAR framework requires courts to give effect to the rationale underlying the text of the relevant provisions. The reasoning of the Federal Court of Appeal would effectively amount to holding that the GAAR does not apply to tax treaties when the benefit is to be exempt from taxation in Canada, i.e. when Canada has ceded its right to its treaty partner. Since being exempt from taxation in Canada is the main tax benefit provided by tax treaties, the GAAR, a general rule of last resort, would be rendered nugatory as a rule in relation to abuses of tax treaties. Technical compliance with a tax treaty in a way that frustrates the underlying rationale of the provisions relied upon by the taxpayer is precisely what triggers the GAAR. Alta Luxembourg complied with the words of the relevant provisions of the Treaty, but not their rationale. It is that to which the GAAR requires courts to give effect.

[177] We acknowledge that finding that a transaction structured to claim tax benefits from a treaty can be abusive when a resident lacks economic connections to the state of residence may produce more uncertainty than mechanically applying the words of the Treaty. However, Parliament struck the balance it considered proper between certainty and fairness to the tax system as a whole. The facts of this case are a patent example of a sophisticated taxpayer effecting a restructuring on the basis of professional tax advice to avoid Canadian tax. In such cases, the principle of fairness ought not to be ignored. As for the degree of uncertainty introduced by the GAAR, it is counterbalanced by the Crown's burden to show that the avoidance transactions frustrate the object, spirit or purpose of the provisions relied on by the taxpayer and by the fact that any doubt under the GAAR analysis is to be resolved in favour of the taxpayer (*Canada Trustco*, at para. 69). In this case, the abuse is clear. The evidence demonstrates that Alta Luxembourg had no genuine economic connections with Luxembourg as it was a mere conduit interposed in Luxembourg for residents of third-party states to avail themselves of a tax exemption under the Treaty. We agree with our colleague that the lack of any non-tax purpose, although relevant, does not on its own lead to the determination of abuse in this case. Rather, it is this lack of any genuine economic connection to Luxembourg that frustrates the rationale of the relevant provisions of the Treaty. The Crown has discharged its burden.

[178] Finally, we wish to comment on an observation made at paras. 84-85 of the Tax Court decision. The Tax Court explained that a party negotiating a tax treaty is presumed to be aware of the other state's tax system, such that Canada, as a state which taxes capital gains, should have seen to the prevention of a double exemption of this type of income. To be clear, the Crown's position, as we understand it, is not that the GAAR is invoked because the capital gain did not go on to be taxed in Luxembourg. Rather, the Crown is seeking the application of the GAAR because in its view, Alta Luxembourg had no economic connection to Luxembourg and therefore the underlying rationale of arts. 1, 4 and 13(4) that it identified is frustrated.

[179] In sum, we are of the view that Alta Luxembourg's patent lack of economic connection to Luxembourg frustrates the underlying rationale of the relevant provisions of the Treaty to allocate the taxation rights to the contracting state with the strongest economic claim. The transactions are the product of a contrivance which was not reasonably contemplated within the object, spirit or purpose of art. 13(4). As a result, the avoidance transactions frustrate the rationale of art. 13(4) and constitute abuse under the GAAR. Accordingly, the tax benefit conferred by the relevant provisions is denied.

(3) A Word on Treaty Shopping

[180] We pause to say a word on whether treaty shopping constitutes an improper use of tax treaties, as this was extensively discussed by the parties and in the courts below. The OECD *Glossary of Tax Terms* (online) defines "treaty shopping" as follows:

An analysis of tax treaty provisions to structure an international transaction or operation so as to take advantage of a particular tax treaty. The term is normally applied to a situation where a person not resident of either the treaty countries establishes an entity in one of the treaty countries in order to obtain treaty benefits.

(See also *Crown Forest*, at para. 52.)

[181] On this issue, we agree with the Crown that the Treaty is not intended to provide avenues for residents of third-party states to benefit from their treaty partner's tax regime in the absence of genuine ties to that state. As this Court held in *Crown Forest*, there is no reason to assume that Canada would enter into tax treaties to "ced[e] its taxing authority to a jurisdiction that is a stranger to the Convention" (para. 49).

[182] Treaty shopping connotes "a premeditated effort to take advantage of the international tax treaty network, and careful selection of the most favorable treaty for a specific purpose" (H. D. Rosenbloom, "Tax Treaty Abuse: Policies and Issues" (1983), 15 *Law & Pol'y Int'l Bus.* 763, at p. 766, cited in D. G. Duff, "Tax Treaty Abuse and the Principal Purpose Test — Part 1" (2018), 66 *Can. Tax J.* 619, at pp. 623-24). Treaty shopping typically involves the practice of non-residents establishing a minimal presence or economic activity in a country in order to benefit from the jurisdiction's treaty network with other countries (V. Krishna, "Using Beneficial Ownership to Prevent Treaty Shopping" (2009), 56 *Tax Notes Int'l* 537, at p. 540).

[183] Treaty shopping has notably been criticized on the grounds that it produces outcomes contrary to the intention of the contracting states, such as reduced taxation and non-taxation, which can lead to an unintended erosion of national tax bases (Duff (2018), at pp. 624-25; see also B. J. Arnold and J. R. Wilson, "Aggressive International Tax Planning by Multinational Corporations: The Canadian Context and Possible Responses", University of Calgary School of Public Policy, vol. 7, Research Paper No. 29 (2014), at p. 56). Indeed, treaty shopping can indirectly and unwittingly provide tax benefits for residents of third-party states, contrary to Canada's intention to extend such benefits solely to the residents of the treaty partner (Department of Finance, *Consultation Paper on Treaty Shopping — The Problem and Possible Solutions*, August 12, 2013 (online)). As a result, treaty shopping can upset the "balance of sacrifices" that underlies a tax treaty and reduce the incentive to conclude a tax treaty. Why would a state negotiate a tax treaty with Canada and make the concessions such a process entails if its residents can access Canada's tax treaty network through treaty shopping arrangements (Duff (2018), at p. 624; OECD, *Action 6 Prevention of tax treaty abuse* (online); see also J. Li, "Beneficial Ownership in Tax Treaties: Judicial Interpretation and the Case for Clarity", in P. Baker and C. Bobbett, eds., *Tax Polymath: A life in international taxation* (2011), 187, at p. 191)?

[184] In *Crown Forest*, this Court unanimously stated that treaty shopping is "highly undesirable" and "patently contrary to the basis on which Canada ceded its jurisdiction to tax as the source country" (para. 52). It added that such behaviour "is not to be encouraged or promoted by judicial interpretation of existing agreements" (para. 49).

[185] Nevertheless, we agree with Alta Luxembourg that treaty shopping is not inherently abusive. There is nothing necessarily improper about minimizing tax liability by selecting a beneficial tax regime in making an investment in a foreign jurisdiction (*Crown Forest*, at para. 49). Certain jurisdictions may provide tax incentives to attract businesses and investment; as such, taxpayers are entitled to avail themselves of such benefits to minimize tax. Thus, merely selecting a treaty to minimize tax, on its own, is not abusive. In fact, it may be consonant with one of the main purposes of tax treaties: encouraging trade and investment.

[186] However, where taxing rights in a tax treaty are allocated on the basis of economic allegiance and conduit entities claim tax benefits despite the absence of any genuine economic connection with the state of residence, treaty shopping is, in our view, abusive. As Professors N. Bammens and L. De Broe explain, the use of "conduit companies" is disconnected from the objectives of bilateral tax treaties:

. . . tax treaties are concluded for reasons of an economic nature: the contracting states want to stimulate reciprocal commercial relations by preventing double taxation. <u>The use of conduit companies and treaty shopping structures has very little to do with this economic objective. Treaty shopping thus upsets the balance and reciprocity of the tax treaty: in order to preserve a tax treaty's inherent reciprocity, its benefits must not be extended to persons not entitled to them.</u> [Emphasis added; footnotes omitted.]

("Treaty Shopping and Avoidance of Abuse", in Lang et al., *Tax Treaties*, 51, at p. 52; see also Li and Avella, at s. 2.1.1.3.)

[187] In such cases, as here, the avoidance transaction would be contrary to the objectives of bilateral tax treaties and frustrate the object, spirit or purpose of the specific provisions related to the allocation of taxing rights. Preventing such abuse is the purpose of the GAAR: ". . . most double tax treaties do not contain specific limitations on the ability of third-country residents to treaty shop [and instead] rely on the concept of beneficial ownership or on domestic anti-abuse legislation to safeguard against hollow conduits" (Krishna (2009), at p. 540). Similarly, C. A. Brown and J. Bogle are of the view that the GAAR is "[t]he primary tool to fight treaty shopping in Canada currently" ("Treaty Shopping and the New Multilateral Tax Agreement — Is it Business as Usual in Canada?" (2020), 43 *Dal. L.J.* 1, at p. 4).

[188] In conclusion, not all types of treaty shopping lead to abuse of a tax treaty. Only when an avoidance transaction frustrates the rationale of the relevant treaty provision will treaty shopping be abusive and the tax benefit denied. For instance, where contracting parties allocate taxing rights to the state of residence on the basis of economic allegiance, as in this case, treaty shopping will be abusive if the resident of a third-party state uses a conduit company to claim treaty benefits conferred by provisions requiring a genuine economic connection with the residence state. Therein lies the undermining of these provisions' rationale clothed in a formalistic adherence to their text. Ignoring this is to render the GAAR empty of meaningful effect.

IV. Disposition

[189] We would allow the Crown's appeal and set aside the judgments of the Federal Court of Appeal and the Tax Court of Canada, with costs. Alta Luxembourg's appeal under the Act from the Minister of National Revenue's assessment for the 2013 taxation year should be dismissed.

Appeal dismissed with costs, WAGNER C.J. *and* ROWE *and* MARTIN JJ. *dissenting.*

Solicitor for the appellant: Attorney General of Canada, Vancouver.

Solicitors for the respondent: Thorsteinssons, Toronto.

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[1] Several versions of the OECD *Model Treaty* and its Introductions and Commentaries are cited in these reasons: the 1977 "Commentary on Article 1", in *Model Double Taxation Convention on Income and on Capital*; the 1998 "Model Convention with Respect to Taxes on Income and on Capital", "Commentary on Article 1", "Commentary on Article 4" and "Commentary on Article 13", in *Model Convention with Respect to Taxes on Income and on Capital: Condensed Version*; the 2003 "Model Convention with Respect to Taxes on Income and on Capital", "Introduction" and "Commentary on Article 1", in *Model Tax Convention on Income and on Capital: Condensed Version*; and the 2017 "Model Convention with Respect to Taxes on Income and on Capital" and "Introduction", in *Model Tax Convention on Income and on Capital: Condensed Version*.

[2] *Agreement between the Government of Canada and the Government of the Federal Republic of Nigeria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains*, Can. T.S. 1999 No. 48, arts. 10(7), 11(8) and 12(7).

[3] *Convention between the Government of Canada and the Government of Ukraine for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 1997 No. 39, arts. 11(8) and 12(8).

[4] *Convention between the Government of Canada and the Government of the Republic of Kazakhstan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 1998 No. 13, arts. 11(8) and 12(7).

[5] *Convention between the Government of Canada and the Government of the Republic of Uzbekistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on*

Capital, Can. T.S. 2000 No. 18, arts. 11(8) and 12(7).

[6] *Convention Between the Government of Canada and the Government of the Republic of Peru for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*, Can. T.S. 2002 No. 23, arts. 10(7), 11(7), and 12(7).

19	*Gabčíkovo-Nagymaros Project (Hungary–Slovakia) (Merits)* [1997] ICJ Rep 7

ICJ (INTERNATIONAL COURT OF JUSTICE)

GABČÍKOVO-NAGYMAROS PROJECT (HUNGARY/SLOVAKIA)

JUDGMENT

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25 September 1997

Tribunal:
Stephen M. Schwebel (President); C.G. Weeramantry (Vice-President); Shigeru Oda (Judge); Mohammed Bedjaoui (Judge); Gilbert Guillaume (Judge); Raymond Ranjeva (Judge); Géza Herczegh (Judge); Jiuyong Shi (Judge); Carl-August Fleischhauer (Judge); Abdul G. Koroma (Judge); Vladlen Stepanovich Vereshchetin (Judge); Gonzalo Parra-Aranguren (Judge); Pieter H. Kooijmans (Judge); Francisco Rezek (Judge); Krzysztof J. Skubiszewski (Judge Ad-hoc)

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Judgment

1. By a letter dated 2 July 1993, filed in the Registry of the Court on the same day, the Ambassador of the Republic of Hungary (hereinafter called "Hungary") to the Netherlands and the Chargé d'affaires *ad interim* of the Slovak Republic (hereinafter called "Slovakia") to the Netherlands jointly notified to the Court a Special Agreement in English that had been signed at Brussels on 7 April 1993 and had entered into force on 28 June 1993, on the date of the exchange of instruments of ratification.

2. The text of the Special Agreement reads as follows:
"The Republic of Hungary and the Slovak Republic,

Considering that differences have arisen between the Czech and Slovak Federal Republic and the Republic of Hungary regarding the implementation and the termination of the Treaty on the Construction and Operation of the Gabčikovo-Nagymaros Barrage System signed in Budapest on 16 September 1977 and related instruments (hereinafter referred to as 'the Treaty'), and on the construction and operation of the 'provisional solution';

Bearing in mind that the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčikovo-Nagymaros Project;

Recognizing that the Parties concerned have been unable to settle these differences by negotiations;

Having in mind that both the Czechoslovak and Hungarian delegations expressed their commitment to submit the differences connected with the Gabčikovo-Nagymaros Project in all its aspects to binding international arbitration or to the International Court of Justice;

Desiring that these differences should be settled by the International Court of Justice;

Recalling their commitment to apply, pending the Judgment of the International Court of Justice, such a temporary water management régime of the Danube as shall be agreed between the Parties;

Desiring further to define the issues to be submitted to the International Court of Justice,

Have agreed as follows:

Article I

The Parties submit the questions contained in Article 2 to the International Court of Justice pursuant to Article 40, paragraph 1, of the Statute of the Court.

Article 2

(1) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable,

(a) whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

(c) what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

(2) The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions in paragraph 1 of this Article.

Article 3

(1) All questions of procedure and evidence shall be regulated in accordance with the provisions of the Statute and the Rules of Court.

(2) However, the Parties request the Court to order that the written proceedings should consist of :

(a) a Memorial presented by each of the Parties not later than ten months after the date of notification of this Special Agreement to the Registrar of the International Court of Justice;

(b) a Counter-Memorial presented by each of the Parties not later than seven months after the date on which each has received the certified copy of the Memorial of the other Party;

(c) a Reply presented by each of the Parties within such time-limits as the Court may order.

(d) The Court may request additional written pleadings by the Parties if it so determines.

(3) The above-mentioned parts of the written proceedings and their annexes presented to the Registrar will not be transmitted to the other Party until the Registrar has received the corresponding part of the proceedings from the said Party.

Article 4

(1) The Parties agree that, pending the final Judgment of the Court, they will establish and implement a temporary water management régime for the Danube.

(2) They further agree that, in the period before such a régime is established or implemented, if either Party believes its rights are endangered by the conduct of the other, it may request immediate consultation and reference, if necessary, to experts, including the Commission of the European Communities, with a view to protecting those rights; and that protection shall not be sought through a request to the Court under Article 41 of the Statute.

(3) This commitment is accepted by both Parties as fundamental to the conclusion and continuing validity of the Special Agreement.

Article 5

(1) The Parties shall accept the Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(2) Immediately after the transmission of the Judgment the Parties shall enter into negotiations on the modalities for its execution.

(3) If they are unable to reach agreement within six months, either Party may request the Court to render an additional Judgment to determine the modalities for executing its Judgment.

Article 6

(1) The present Special Agreement shall be subject to ratification.

(2) The instruments of ratification shall be exchanged as soon as possible in Brussels.

(3) The present Special Agreement shall enter into force on the date of exchange of instruments of ratification. Thereafter it will be notified jointly to the Registrar of the Court.

In witness whereof the undersigned being duly authorized thereto, have signed the present Special Agreement and have affixed thereto their seals."

3. Pursuant to Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court, copies of the notification and of the Special Agreement were transmitted by the Registrar to the Secretary-General of the United Nations, Members of the United Nations and other States entitled to appear before the Court.

4. Since the Court included upon the Bench no judge of Slovak nationality, Slovakia exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Krzysztof Jan Skubiszewski.

5. By an Order dated 14 July 1993, the Court fixed 2 May 1994 as the timelimit for the filing by each of the Parties of a Memorial and 5 December 1994 for the filing by each of the Parties of a Counter-Memorial, having regard to the provisions of Article 3, paragraph 2 *(a)* and *(b),* of the Special Agreement. Those pleadings were duly filed within the prescribed time-limits.

6. By an Order dated 20 December 1994, the President of the Court, having heard the Agents of the Parties, fixed 20 June 1995 as the time-limit for the filing of the Replies, having regard to the provisions of Article 3, paragraph 2 *(c),* of the Special Agreement. The Replies were duly filed within the time-limit thus prescribed and, as the Court had not asked for the submission of additional pleadings, the case was then ready for hearing.

7. By letters dated 27 January 1997, the Agent of Slovakia, referring to the provisions of Article 56, paragraph 1, of the Rules of Court, expressed his Government's wish to produce two new documents; by a letter dated 10 February 1997, the Agent of Hungary declared that his Government objected to their production. On 26 February 1997, after having duly ascertained the views of the

two Parties, the Court decided, in accordance with Article 56, paragraph 2, of the Rules of Court, to authorize the production of those documents under certain conditions of which the Parties were advised. Within the time-limit fixed by the Court to that end, Hungary submitted comments on one of those documents under paragraph 3 of that same Article. The Court authorized Slovakia to comment in turn upon those observations, as it had expressed a wish to do so; its comments were received within the time-limit prescribed for that purpose.

8. Moreover, each of the Parties asked to be allowed to show a video cassette in the course of the oral proceedings. The Court agreed to those requests, provided that the cassettes in question were exchanged in advance between the Parties, through the intermediary of the Registry. That exchange was effected accordingly.

9. In accordance with Article 53, paragraph 2, of the Rules of Court, the Court decided, after having ascertained the views of the Parties, that copies of the pleadings and documents annexed would be made available to the public as from the opening of the oral proceedings.

10. By a letter dated 16 June 1995, the Agent of Slovakia invited the Court to visit the locality to which the case relates and there to exercise its functions with regard to the obtaining of evidence, in accordance with Article 66 of the Rules of Court. For his part, the Agent of Hungary indicated, by a letter dated 28 June 1995, that, if the Court should decide that a visit of that kind would be useful, his Government would be pleased to co-operate in organizing it. By a letter dated 14 November 1995, the Agents of the Parties jointly notified to the Court the text of a Protocol of Agreement, concluded in Budapest and New York the same day, with a view to proposing to the Court the arrangements that might be made for such a visit *in situ;* and, by a letter dated 3 February 1997, they jointly notified to it the text of Agreed Minutes drawn up in Budapest and New York the same day, which supplemented the Protocol of Agreement of 14 November 1995. By an Order dated 5 February 1997, the Court decided to accept the invitation to exercise its functions with regard to the obtaining of evidence at a place to which the case relates and, to that end, to adopt the arrangements proposed by the Parties. The Court visited the area from 1 to 4 April 1997; it visited a number of locations along the Danube and took note of the technical explanations given by the representatives who had been designated for the purpose by the Parties.

11. The Court held a first round of ten public hearings from 3 to 7 March and from 24 to 27 March 1997, and a second round of four public hearings on 10, 11, 14 and 15 April 1997, after having made the visit *in situ* referred to in the previous paragraph. During those hearings, the Court heard the oral arguments and replies of :

For Hungary:

H.E. Mr. Szénási,

Professor Valki,

Professor Kiss,

Professor Vida,

Professor Carbiener,

Professor Crawford,

Professor Nagy,

Dr. Kern,

Professor Wheater,

Ms Gorove,

Professor Dupuy,

Professor Sands.

For Slovakia:

H.E. Dr. Tomka,

Dr. Mikulka,

Mr. Wordsworth,

Professor McCaffrey,

Professor Mucha,

Professor Pellet,

Mr. Refsgaard,

Sir Arthur Watts.

12. The Parties replied orally and in writing to various questions put by Members of the Court. Referring to the provisions of Article 72 of the Rules of Court, each of the Parties submitted to the Court its comments upon the replies given by the other Party to some of those questions.

13. In the course of the written proceedings, the following submissions were presented by the Parties : *On behalf of Hungary,*

in the Memorial, the Counter-Memorial and the Reply *(mutatis mutandis* identical texts):

"On the basis of the evidence and legal argument presented in the Memorial, Counter-Memorial and this Reply, the Republic of Hungary

Requests the Court to adjudge and declare

First, that the Republic of Hungary was entitled to suspend and subsequently abandon the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the Treaty attributed responsibility to the Republic of Hungary;

Second, that the Czech and Slovak Federal Republic was not entitled to proceed to the 'provisional solution' (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course);

Third, that by its Declaration of 19 May 1992, Hungary validly terminated the Treaty on the Construction and Operation of the Gabčikovo-Nagymaros Barrage System of 16 September 1977:

Requests the Court to adjudge and declare further

that the legal consequences of these findings and of the evidence and the arguments presented to the Court are as follows:

(1) that the Treaty of 16 September 1977 has never been in force between the Republic of Hungary and the Slovak Republic;

(2) that the Slovak Republic bears responsibility to the Republic of Hungary for maintaining in operation the 'provisional solution' referred to above ;

(3) that the Slovak Republic is internationally responsible for the damage and loss suffered by the Republic of Hungary and by its nationals as a result of the 'provisional solution';

(4) that the Slovak Republic is under an obligation to make reparation in respect of such damage and loss, the amount of such reparation, if it cannot be agreed by the Parties within six months of the date of the Judgment of the Court, to be determined by the Court;

(5) that the Slovak Republic is under the following obligations:

(a) to return the waters of the Danube to their course along the international frontier between the Republic of Hungary and the Slovak Republic, that is to say the main navigable channel as defined by applicable treaties;

(b) to restore the Danube to the situation it was in prior to the putting into effect of the provisional solution; and

(c) to provide appropriate guarantees against the repetition of the damage and loss suffered by the Republic of Hungary and by its nationals."

On behalf of Slovakia,

in the Memorial, the Counter-Memorial and the Reply *(mutatis mutandis* identical texts):

"On the basis of the evidence and legal arguments presented in the Slovak Memorial, Counter-Memorial and in this Reply, and reserving the right to supplement or amend its claims in the light of further written pleadings, the Slovak Republic

Requests the Court to adjudge and declare:

1. That the Treaty between Czechoslovakia and Hungary of 16 September 1977 concerning the construction and operation of the Gabčikovo/ Nagymaros System of Locks, and related instruments, and to which the Slovak Republic is the acknowledged successor, is a treaty in force and has been so from the date of its conclusion ; and that the notification of termination by the Republic of Hungary

on 19 May 1992 was without legal effect.

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčikovo Project for which the 1977 Treaty attributed responsibility to the Republic of Hungary.

3. That the act of proceeding with and putting into operation Variant C, the 'provisional solution', was lawful.

4. That the Republic of Hungary must therefore cease forthwith all conduct which impedes the full and bona fide implementation of the 1977 Treaty and must take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty.

5. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary is liable to pay, and the Slovak Republic is entitled to receive, full compensation for the loss and damage caused to the Slovak Republic by those breaches, plus interest and loss of profits, in the amounts to be determined by the Court in a subsequent phase of the proceedings in this case."

14. In the oral proceedings, the following submissions were presented by the Parties
On behalf of Hungary,

at the hearing of 11 April 1997 :

The submissions read at the hearing were *mutatis mutandis* identical to those presented by Hungary during the written proceedings.

On behalf of Slovakia,

at the hearing of 15 April 1997:

"On the basis of the evidence and legal arguments presented in its written and oral pleadings, the Slovak Republic,

Requests the Court to adjudge and declare :

1. That the Treaty, as defined in the first paragraph of the Preamble to the Compromis between the Parties, dated 7 April 1993, concerning the construction and operation of the Gabčikovo/Nagymaros System of Locks and related instruments, concluded between Hungary and Czechoslovakia and with regard to which the Slovak Republic is the successor State, has never ceased to be in force and so remains, and that the notification of 19 May 1992 of purported termination of the Treaty by the Republic of Hungary was without legal effect;

2. That the Republic of Hungary was not entitled to suspend and subsequently abandon the works on the Nagymaros Project and on that part of the Gabčikovo Project for which the 1977 Treaty attributes responsibility to the Republic of Hungary;

3. That the Czech and Slovak Federal Republic was entitled, in November 1991, to proceed with the 'provisional solution' and to put this system into operation from October 1992; and that the Slovak

Republic was, and remains, entitled to continue the operation of this system ;

4. That the Republic of Hungary shall therefore cease forthwith all conduct which impedes the bona fide implementation of the 1977 Treaty and shall take all necessary steps to fulfil its own obligations under the Treaty without further delay in order to restore compliance with the Treaty, subject to any amendments which may be agreed between the Parties ;

5. That the Republic of Hungary shall give appropriate guarantees that it will not impede the performance of the Treaty, and the continued operation of the system;

6. That, in consequence of its breaches of the 1977 Treaty, the Republic of Hungary shall, in addition to immediately resuming performance of its Treaty obligations, pay to the Slovak Republic full compensation for the loss and damage, including loss of profits, caused by those breaches together with interest thereon;

7. That the Parties shall immediately begin negotiations with a view, in particular, to adopting a new timetable and appropriate measures for the implementation of the Treaty by both Parties, and to fixing the amount of compensation due by the Republic of Hungary to the Slovak Republic; and that, if the Parties are unable to reach an agreement within six months, either one of them may request the Court to render an additional Judgment to determine the modalities for executing its Judgment."

15. The present case arose out of the signature, on 16 September 1977, by the Hungarian People's Republic and the Czechoslovak People's Republic, of a treaty "concerning the construction and operation of the Gabčikovo-Nagymaros System of Locks" (hereinafter called the "1977 Treaty"). The names of the two contracting States have varied over the years; hereinafter they will be referred to as Hungary and Czechoslovakia. The 1977 Treaty entered into force on 30 June 1978.
It provides for the construction and operation of a System of Locks by the parties as a "joint investment". According to its Preamble, the barrage system was designed to attain

"the broad utilization of the natural resources of the Bratislava-Budapest section of the Danube river for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties".

The joint investment was thus essentially aimed at the production of hydroelectricity, the improvement of navigation on the relevant section of the Danube and the protection of the areas along the banks against flooding. At the same time, by the terms of the Treaty, the contracting parties undertook to ensure that the quality of water in the Danube was not impaired as a result of the Project, and that compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks would be observed.

16. The Danube is the second longest river in Europe, flowing along or across the borders of nine countries in its 2,860-kilometre course from the Black Forest eastwards to the Black Sea. For 142 kilometres, it forms the boundary between Slovakia and Hungary. The sector with which this case is concerned is a stretch of approximately 200 kilometres, between Bratislava in Slovakia and Budapest in Hungary. Below Bratislava, the river gradient decreases markedly, creating an alluvial plain of gravel and sand sediment. This plain is delimited to the north-east, in Slovak territory, by

the Maly Danube and to the south-west, in Hungarian territory, by the Mosoni Danube. The boundary between the two States is constituted, in the major part of that region, by the main channel of the river. The area lying between the Maly Danube and that channel, in Slovak territory, constitutes the Zitny Ostrov; the area between the main channel and the Mosoni Danube, in Hungarian territory, constitutes the Szigetkoz. Cunovo and, further downstream, Gabčikovo, are situated in this sector of the river on Slovak territory, Cunovo on the right bank and Gabčikovo on the left. Further downstream, after the confluence of the various branches, the river enters Hungarian territory and the topography becomes hillier. Nagymaros lies in a narrow valley at a bend in the Danube just before it turns south, enclosing the large river island of Szentendre before reaching Budapest (see sketch-map No. 1, p. 19 below).

17. The Danube has always played a vital part in the commercial and economic development of its riparian States, and has underlined and reinforced their interdependence, making international co-operation essential. Improvements to the navigation channel have enabled the Danube, now linked by canal to the Main and thence to the Rhine, to become an important navigational artery connecting the North Sea to the Black Sea. In the stretch of river to which the case relates, flood protection measures have been constructed over the centuries, farming and forestry practised, and, more recently, there has been an increase in population and industrial activity in the area. The cumulative effects on the river and on the environment of various human activities over the years have not all been favourable, particularly for the water régime.
Only by international co-operation could action be taken to alleviate these problems. Water management projects along the Danube have frequently sought to combine navigational improvements and flood protection with the production of electricity through hydroelectric power plants. The potential of the Danube for the production of hydroelectric power has been extensively exploited by some riparian States. The history of attempts to harness the potential of the particular stretch of the river at issue in these proceedings extends over a 25-year period culminating in the signature of the 1977 Treaty.

18. Article 1, paragraph 1, of the 1977 Treaty describes the principal works to be constructed in pursuance of the Project. It provided for the building of two series of locks, one at Gabčikovo (in Czechoslovak territory) and the other at Nagymaros (in Hungarian territory), to constitute "a single and indivisible operational system of works" (see sketch-map No. 2, p. 21 below). The Court will subsequently have occasion to revert in more detail to those works, which were to comprise, *inter alia,* a reservoir upstream of Dunakiliti, in Hungarian and Czechoslovak territory; a dam at Dunakiliti, in Hungarian territory; a bypass canal, in Czechoslovak territory, on which was to be constructed the Gabčikovo System of Locks (together with a hydroelectric power plant with an installed capacity of 720 megawatts (MW)); the deepening of the bed of the Danube downstream of the place at which the bypass canal was to rejoin the old bed of the river; a reinforcement of flood-control works along the Danube upstream of Nagymaros; the Nagymaros System of Locks, in Hungarian territory (with a hydroelectric power plant of a capacity of 158 MW) ; and the deepening of the bed of the Danube downstream.

Article 1, paragraph 4, of the Treaty further provided that the technical specifications concerning the system would be included in the "Joint Contractual Plan" which was to be drawn up in accordance with the Agreement signed by the two Governments for this purpose on 6 May 1976; Article 4, paragraph 1, for its part, specified that "the joint investment [would] be carried out in

conformity with the joint contractual plan".

According to Article 3, paragraph 1 :

"Operations connected with the realization of the joint investment and with the performance of tasks relating to the operation of the System of Locks shall be directed and supervised by the Governments of the Contracting Parties through...(... 'government delegates')."

Those delegates had, *inter alia,* "to ensure that construction of the System of Locks is... carried out in accordance with the approved joint contractual plan and the project work schedule". When the works were brought into operation, they were moreover "To establish the operating and operational procedures of the System of Locks and ensure compliance therewith."

Article 4, paragraph 4, stipulated that :

"Operations relating to the joint investment [should] be organized by the Contracting Parties in such a way that the power generation plants [would] be put into service during the period 1986-1990."

Article 5 provided that the cost of the joint investment would be borne by the contracting parties in equal measure. It specified the work to be carried out by each one of them. Article 8 further stipulated that the Dunakiliti dam, the bypass canal and the two series of locks at Gabčikovo and Nagymaros would be "jointly owned" by the contracting parties "in equal measure". Ownership of the other works was to be vested in the State on whose territory they were constructed.

The parties were likewise to participate in equal measure in the use of the system put in place, and more particularly in the use of the base-load and peak-load power generated at,the hydroelectric power plants (Art. 9).

According to Article 10, the works were to be managed by the State on whose territory they were located, "in accordance with the jointly-agreed operating and operational procedures", while Article 12 stipulated that the operation, maintenance (repair) and reconstruction costs of jointly owned works of the System of Locks were also to be borne jointly by the contracting parties in equal measure.

According to Article 14,

"The discharge specified in the water balance of the approved joint contractual plan shall be ensured in the bed of the Danube [between Dunakiliti and Sap] unless natural conditions or other circumstances temporarily require a greater or smaller discharge."

Paragraph 3 of that Article was worded as follows :

"In the event that the withdrawal of water in the Hungarian-Czechoslovak section of the Danube exceeds the quantities of water specified in the water balance of the approved joint contractual plan and the excess withdrawal results in a decrease in the output of electric power, the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced."

Article 15 specified that the contracting parties

"shall ensure, by the means specified in the joint contractual plan, that the quality of the water in the Danube is not impaired as a result of the construction and operation of the System of Locks".

Article 16 set forth the obligations of the contracting parties concerning the maintenance of the bed of the Danube.

Article 18, paragraph 1, provided as follows:

"The Contracting Parties, in conformity with the obligations previously assumed by them, and in particular with article 3 of the Convention concerning the regime of navigation on the Danube, signed at Belgrade on 18 August 1948, shall ensure uninterrupted and safe navigation on the international fairway both during the construction and during the operation of the System of Locks."

It was stipulated in Article 19 that:

"The Contracting Parties shall, through the means specified in the joint contractual plan, ensure compliance with the obligations for the protection of nature arising in connection with the construction and operation of the System of Locks."

Article 20 provided for the contracting parties to take appropriate measures, within the framework of their national investments, for the protection of fishing interests in conformity with the Convention concerning Fishing in the Waters of the Danube, signed at Bucharest on 29 January 1958.

According to Article 22, paragraph 1, of the Treaty, the contracting parties had, in connection with the construction and operation of the System of Locks, agreed on minor revision to the course of the State frontier between them as follows:

"(d) In the Dunakiliti-Hrusov head-water area, the State frontier shall run from boundary point 161.V.O.á. to boundary stone No. 1.5. in a straight line in such a way that the territories affected, to the extent of about 10-10 hectares shall be offset between the two States."

It was further provided, in paragraph 2, that the revision of the State frontier and the exchange of territories so provided for should be effected "by the Contracting Parties on the basis of a separate treaty". No such treaty was concluded.

Finally a dispute settlement provision was contained in Article 27, worded as follows:

"1. The settlement of disputes in matters relating to the realization and operation of the System of Locks shall be a function of the government delegates.

2. If the government delegates are unable to reach agreement on the matters in dispute, they shall refer them to the Governments of the Contracting Parties for decision."

19. The Joint Contractual Plan, referred to in the previous paragraph, set forth, on a large number of points, both the objectives of the system and the characteristics of the works. In its latest version it specified in paragraph 6.2 that the Gabčikovo bypass canal would have a discharge capacity of 4,000

cubic metres per second (m3/s). The power plant would include "Eight... turbines with 9.20 m diameter running wheels" and would "mainly operate in peak-load time and continuously during high water". This type of operation would give an energy production of 2,650 gigawatt/hours (GWh) per annum. The Plan further stipulated in paragraph 4.4.2:
"The low waters are stored every day, which ensures the peakload time operation of the Gabčikovo hydropower plant... a minimum of 50 m3/s additional water is provided for the old bed [of the Danube] besides the water supply of the branch system."

The Plan further specified that, in the event that the discharge into the bypass canal exceeded 4,000-4,500 m3/s, the excess amounts of water would be channelled into the old bed. Lastly, according to paragraph 7.7 of the Plan:

"The common operational regulation stipulates that concerning the operation of the Dunakiliti barrage in the event of need during the growing season 200 m3/s discharge must be released into the old Danube bed, in addition to the occasional possibilities for rinsing the bed."

The Joint Contractual Plan also contained "Preliminary Operating and Maintenance Rules", Article 23 of which specified that "The final operating rules [should] be approved within a year of the setting into operation of the system." (Joint Contractual Plan, Summary Documentation, Vol. O-l-A.)

Nagymaros, with six turbines, was, according to paragraph 6.3 of the Plan, to be a "hydropower station... type of a basic power-station capable of operating in peak-load time for five hours at the discharge interval between 1,000-2,500 m3/s" per day. The intended annual produc. tion was to be 1,025 GWh (i.e., 38 per cent of the production of Gabčikovo, for an installed power only equal to 21 per cent of that of Gabčikovo).

20. Thus, the Project was to have taken the form of an integrated joint project with the two contracting parties on an equal footing in respect of the financing, construction and operation of the works. Its single and indivisible nature was to have been realized through the Joint Contractual Plan which complemented the Treaty. In particular, Hungary would have had control of the sluices at Dunakiliti and the works at Nagymaros, whereas Czechoslovakia would have had control of the works at Gabčikovo.

21. The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977, at the same time as the Treaty itself. The Agreement moreover made some adjustments to the allocation of the works between the parties as laid down by the Treaty.
Work on the Project started in 1978. On Hungary's initiative, the two parties first agreed, by two Protocols signed on 10 October 1983 (one amending Article 4, paragraph 4, of the 1977 Treaty and the other the Agreement on mutual assistance), to slow the work down and to postpone putting into operation the power plants, and then, by a Protocol signed on 6 February 1989 (which amended the Agreement on mutual assistance), to accelerate the Project.

22. As a result of intense criticism which the Project had generated in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros pending the completion of various studies which the competent authorities were to finish before 31 July 1989. On 21 July

1989, the Hungarian Government extended the suspension of the works at Nagymaros until 31 October 1989, and, in addition, suspended the works at Dunakiliti until the same date. Lastly, on 27 October 1989, Hungary decided to abandon the works at Nagymaros and to maintain the status quo at Dunakiliti.

23. During this period, negotiations were being held between the parties. Czechoslovakia also started investigating alternative solutions. One of them, subsequently known as "Variant C ", entailed a unilateral diversion of the Danube by Czechoslovakia on its territory some 10 kilometres upstream of Dunakiliti (see sketch-map No. 3, p. 26 below). In its final stage, Variant C included the construction at Cunovo of an overflow dam and a levee linking that dam to the south bank of the bypass canal. The corresponding reservoir was to have a smaller surface area and provide approximately 30 per cent less storage than the reservoir initially contemplated. Provision was made for ancillary works, namely: an intake structure to supply the Mosoni Danube; a weir to enable, *inter alia,* floodwater to be directed along the old bed of the Danube; an auxiliary shiplock; and two hydroelectric power plants (one capable of an annual production of 4 GWh on the Mosoni Danube, and the other with a production of 174 GWh on the old bed of the Danube). The supply of water to the side-arms of the Danube on the Czechoslovak bank was to be secured by means of two intake structures in the bypass canal at Dobrohost' and Gabčikovo. A solution was to be found for the Hungarian bank. Moreover, the question of the deepening of the bed of the Danube at the confluence of the bypass canal and the old bed of the river remained outstanding.

On 23 July 1991, the Slovak Government decided "to begin, in September 1991, construction to put the Gabčikovo Project into operation by the provisional solution". That decision was endorsed by the Federal Czechoslovak Government on 25 July. Work on Variant C began in November 1991. Discussions continued between the two parties but to no avail, and, on 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Note Verbale terminating the 1977 Treaty with effect from 25 May 1992. On 15 October 1992, Czechoslovakia began work to enable the Danube to be closed and, starting on 23 October, proceeded to the damming of the river.

24. On 23 October 1992, the Court was seised of an "Application of the Republic of Hungary v. The Czech and Slovak Federal Republic on the Diversion of the Danube River"; however, Hungary acknowledged that there was no basis on which the Court could have founded its jurisdiction to entertain that application, on which Czechoslovakia took no action. In the meanwhile, the Commission of the European Communities had offered to mediate and, during a meeting of the two parties with the Commission held in London on 28 October 1992, the parties entered into a series of interim undertakings. They principally agreed that the dispute would be submitted to the International Court of Justice, that a tripartite fact-finding mission should report on Variant C not later than 31 October, and that a tripartite group of independent experts would submit suggestions as to emergency measures to be taken.

25. On 1 January 1993 Slovakia became an independent State. On 7 April 1993, the "Special Agreement for Submission to the International Court of Justice of the Differences between the Republic of Hungary and the Slovak Republic concerning the Gabčikovo-Nagymaros Project" was signed in Brussels, the text of which is reproduced in paragraph 2 above. After the Special Agreement was notified to the Court, Hungary informed the Court, by a letter dated 9 August 1993, that it considered its "initial Application [to be] now without object, and... lapsed".

According to Article 4 of the Special Agreement, "The Parties [agreed] that, pending the final Judgment of the Court, they [would] establish and implement a temporary water management régime for the Danube." However, this régime could not easily be settled. The filling of the Cunovo dam had rapidly led to a major reduction in the flow and in the level of the downstream waters in the old bed of the Danube as well as in the side-arms of the river. On 26 August 1993, Hungary and Slovakia reached agreement on the setting up of a tripartite group of experts (one expert designated by each party and three independent experts designated by the Commission of the European Communities)

"In order to provide reliable and undisputed data on the most important effects of the current water discharge and the remedial measures already undertaken as well as to make recommendations for appropriate measures."

On 1 December 1993, the experts designated by the Commission of the European Communities recommended the adoption of various measures to remedy the situation on a temporary basis. The Parties were unable to agree on these recommendations. After lengthy negotiations, they finally concluded an Agreement "concerning Certain Temporary Technical Measures and Discharges in the Danube and Mosoni branch of the Danube", on 19 April 1995. That Agreement raised the discharge of water into the Mosoni Danube to 43 m3/s. It provided for an annual average of 400 m3/s in the old bed (not including flood waters). Lastly, it provided for the construction by Hungary of a partially underwater weir near to Dunakiliti with a view to improving the water supply to the side-arms of the Danube on the Hungarian side. It was specified that this temporary agreement would come to an end 14 days after the Judgment of the Court.

26. The first subparagraph of the Preamble to the Special Agreement covers the disputes arising between Czechoslovakia and Hungary concerning the application and termination, not only of the 1977 Treaty, but also of "related instruments"; the subparagraph specifies that, for the purposes of the Special Agreement, the 1977 Treaty and the said instruments shall be referred to as "the Treaty". "The Treaty" is expressly referred to in the wording of the questions submitted to the Court in Article 2, paragraph 1, subparagraphs *(a)* and *(c),* of the Special Agreement.

The Special Agreement however does not define the concept of "related instruments", nor does it list them. As for the Parties, they gave some consideration to that question — essentially in the written proceedings — without reaching agreement as to the exact meaning of the expression or as to the actual instruments referred to. The Court notes however that the Parties seemed to agree to consider that that expression covers at least the instruments linked to the 1977 Treaty which implement it, such as the Agreement on mutual assistance of 16 September 1977 and its amending Protocols dated, respectively, 10 October 1983 and 6 February 1989 (see paragraph 21 above), and the Agreement as to the common operational regulations of Plenipotentiaries fulfilling duties related to the construction and operation of the Gabčikovo-Nagymaros Barrage System signed in Bratislava on 11 October 1979. The Court notes that Hungary, unlike Slovakia, declined to apply the description of related instruments to the 1977 Treaty to the Joint Contractual Plan (see paragraph 19 above), which it refused to see as "an agreement at the same level as the other... related Treaties and inter-State agreements".

Lastly the Court notes that the Parties, in setting out the replies which should in their view be given to the questions put in the Special Agreement, concentrated their reasoning on the 1977 Treaty; and

that they would appear to have extended their arguments to "related instruments" in considering them as accessories to a whole treaty system, whose fate was in principle linked to that of the main part, the 1977 Treaty. The Court takes note of the positions of the Parties and considers that it does not need to go into this matter further at this juncture.

27. The Court will now turn to a consideration of the questions submitted by the Parties. In terms of Article 2, paragraph 1 (a), of the Special Agreement, the Court is requested to decide first "whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the Treaty attributed responsibility to the Republic of Hungary".

28. The Court would recall that the Gabčikovo-Nagymaros System of Locks is characterized in Article 1, paragraph 1, of the 1977 Treaty as a "single and indivisible operational system of works". The principal works which were to constitute this system have been described in general terms above (see paragraph 18). Details of them are given in paragraphs 2 and 3 of Article 1 of the Treaty.

For Gabčikovo, paragraph 2 lists the following works:

"(a) the Dunakiliti-Hrusov head-water installations in the Danube sector at r.km. (river kilometre(s)) 1860-1842, designed for a maximum flood stage of 131.10 m.B. (metres above sea-level, Baltic system), in Hungarian and Czechoslovak territory;

(b) the Dunakiliti dam and auxiliary navigation lock at r.km. 1842, in Hungarian territory;

(c) the by-pass canal (head-water canal and tail-water canal) at r.km. 1842-1811, in Czechoslovak territory;

(d) series of locks on the by-pass canal, in Czechoslovak territory, consisting of a hydroelectric power plant with installed capacity of 720 MW, double navigation locks and appurtenances thereto ;

(e) improved old bed of the Danube at r.km. 1842-1811, in the joint Hungarian-Czechoslovak section;

(f) deepened and regulated bed of the Danube at r.km. 18111791, in the joint Hungarian-Czechoslovak section."

For Nagymaros, paragraph 3 specifies the following works:

"(a) head-water installations and flood-control works in the Danube sector at r.km. 1791-1696.25 and in the sectors of tributaries affected by flood waters, designed for a maximum flood stage of 107.83 m.B., in Hungarian and Czechoslovak territory;

(b) series of locks at r.km. 1696.25, in Hungarian territory, consisting of a dam, a hydroelectric power plant with installed capacity of 158 MW, double navigation locks and appurtenances thereto;

(c) deepened and regulated bed of the Danube, in both its branches, at r.km. 1696.25-1657, in the Hungarian section."

29. Moreover, the precise breakdown of the works incumbent on each party was set out in Article 5, paragraph 5, of the 1977 Treaty, as follows:
"5. The labour and supplies required for the realization of the joint investment shall be apportioned between the Contracting Parties in the following manner:

(a) The Czechoslovak Party shall be responsible for:

(1) the Dunakiliti-Hrusov head-water installations on the left bank, in Czechoslovak territory;

(2) the head-water canal of the by-pass canal, in Czechoslovak territory;

(3) the Gabčikovo series of locks, in Czechoslovak territory ;

(4) the flood-control works of the Nagymaros head-water installations, in Czechoslovak territory, with the exception of the lower Ipel district ;

(5) restoration of vegetation in Czechoslovak territory;

(b) The Hungarian Party shall be responsible for:

(1) the Dunakiliti-Hrusov head-water installations on the right bank, in Czechoslovak territory, including the connecting weir and the diversionary weir;

(2) the Dunakiliti-Hrusov head-water installations on the right bank, in Hungarian territory;

(3) the Dunakiliti dam, in Hungarian territory;

(4) the tail-water canal of the by-pass canal, in Czechoslovak territory;

(5) deepening of the bed of the Danube below Palkovicovo, in Hungarian and Czechoslovak territory;

(6) improvement of the old bed of the Danube, in Hungarian and Czechoslovak territory;

(7) operational equipment of the Gabčikovo system of locks (transport equipment, maintenance machinery), in Czechoslovak territory;

(8) the flood-control works of the Nagymaros head-water installations in the lower Ipel district, in Czechoslovak territory;

(9) the flood-control works of the Nagymaros head-water installations, in Hungarian territory;

(10) the Nagymaros series of locks, in Hungarian territory;

(11) deepening of the tail-water bed below the Nagymaros system of locks, in Hungarian territory;

(12) operational equipment of the Nagymaros system of locks (transport equipment, maintenance machinery), in Hungarian territory;

(13) restoration of vegetation in Hungarian territory."

30. As the Court has already indicated (see paragraph 18 above), Article 1, paragraph 4, of the 1977 Treaty stipulated in general terms that the "technical specifications" concerning the System of Locks would be included in the "joint contractual plan". The schedule of work had for its part been fixed in an Agreement on mutual assistance signed by the two parties on 16 September 1977 (see paragraph 21 above). In accordance with the provisions of Article 1, paragraph 1, of that Agreement, the whole of the works of the barrage system were to have been completed in 1991. As indicated in paragraph 2 of that same article, a summary construction schedule was appended to the Agreement, and provision was made for a more detailed schedule to be worked out in the Joint Contractual Plan. The Agreement of 16 September 1977 was twice amended further. By a Protocol signed on 10 October 1983, the parties agreed first to postpone the works and the putting into operation of the power plants for four more years; then, by a Protocol signed on 6 February 1989, the parties decided, conversely, to bring them forward by 15 months, the whole system having to be operational in 1994. A new summary construction schedule was appended to each of those Protocols; those schedules were in turn to be implemented by means of new detailed schedules, included in the Joint Contractual Plan.

31. In spring 1989, the work on the Gabčikovo sector was well advanced : the Dunakiliti dam was 90 per cent complete, the Gabčikovo dam was 85 per cent complete, and the bypass canal was between 60 per cent complete (downstream of Gabčikovo) and 95 per cent complete (upstream of Gabčikovo) and the dykes of the Dunakiliti-Hrusov reservoir were between 70 and 98 per cent complete, depending on the location. This was not the case in the Nagymaros sector where, although dykes had been built, the only structure relating to the dam itself was the coffer-dam which was to facilitate its construction.

32. In the wake of the profound political and economic changes which occurred at this time in central Europe, the Gabčikovo-Nagymaros Project was the object, in Czechoslovakia and more particularly in Hungary, of increasing apprehension, both within a section of public opinion and in some scientific circles. The uncertainties not only about the economic viability of the Project, but also, and more so, as to the guarantees it offered for preservation of the environment, engendered a climate of growing concern and opposition with regard to the Project.

33. It was against this background that, on 13 May 1989, the Government of Hungary adopted a resolution to suspend works at Nagymaros, and ordered
"the Ministers concerned to commission further studies in order to place the Council of Ministers in a position where it can make well-founded suggestions to the Parliament in connection with the amendment of the international treaty on the investment. In the interests of the above, we must examine the international and legal consequences, the technical considerations, the obligations related to continuous navigation on the Danube and the environmental/ecological and seismic impacts of the eventual stopping of the Nagymaros investment. To be further examined are the opportunities for the replacement of the lost electric energy and the procedures for minimising claims for compensation."

The suspension of the works at Nagymaros was intended to last for the duration of these studies, which were to be completed by 31 July 1989. Czechoslovakia immediately protested and a document defining the position of Czechoslovakia was transmitted to the Ambassador of Hungary in Prague on 15 May 1989. The Prime Ministers of the two countries met on 24 May 1989, but their talks did not lead to any tangible result. On 2 June, the Hungarian Parliament authorized the Government to

begin negotiations with Czechoslovakia for the purpose of modifying the 1977 Treaty.

34. At a meeting held by the Plenipotentiaries on 8 and 9 June 1989, Hungary gave Czechoslovakia a number of assurances concerning the continuation of works in the Gabčikovo sector, and the signed Protocol which records that meeting contains the following passage :
"The Hungarian Government Commissioner and the Hungarian Plenipotentiary stated, that the Hungarian side will complete construction of the Gabčikovo Project in the agreed time and in accordance with the project plans. Directives have already been given to continue works suspended in the area due to misunderstanding."

These assurances were reiterated in a letter that the Commissioner of the Government of Hungary addressed to the Czechoslovak Plenipotentiary on 9 June 1989.

35. With regard to the suspension of work at Nagymaros, the Hungarian Deputy Prime Minister, in a letter dated 24 June 1989 addressed to his Czechoslovak counterpart, expressed himself in the following terms :
"The Hungarian Academy of Sciences (HAS) has studied the environmental, ecological and water quality as well as the seismological impacts of abandoning or implementing the Nagymaros Barrage of the Gabčikovo-Nagymaros Barrage System (GNBS).

...

Having studied the expected impacts of the construction in accordance with the original plan, the Committee *[ad hoc]* of the Academy [set up for this purpose] came to the conclusion that we do not have adequate knowledge of the consequences of environmental risks.

In its opinion, the risk of constructing the Barrage System in accordance with the original plan cannot be considered acceptable. Of course, it cannot be stated either that the adverse impacts will ensue for certain, therefore, according to their recommendation, further thorough and time consuming studies are necessary."

36. The Hungarian and Czechoslovak Prime Ministers met again on 20 July 1989 to no avail. Immediately after that meeting, the Hungarian Government adopted a second resolution, under which the suspension of work at Nagymaros was extended to 31 October 1989. However, this resolution went further, as it also prescribed the suspension, until the same date, of the "Preparatory works on the closure of the riverbed at... Dunakiliti" ; the purpose of this measure was to invite "international scientific institutions [and] foreign scientific institutes and experts" to cooperate with "the Hungarian and Czechoslovak institutes and experts" with a view to an assessment of the ecological impact of the Project and the "development of a technical and operational water quality guarantee system and... its implementation".

37. In the ensuing period, negotiations were conducted at various levels between the two States, but proved fruitless. Finally, by a letter dated 4 October 1989, the Hungarian Prime Minister formally proposed to Czechoslovakia that the Nagymaros sector of the Project be abandoned and that an agreement be concluded with a view to reducing the ecological risks associated with the Gabčikovo

sector of the Project. He proposed that that agreement should be concluded before 30 July 1990.
The two Heads of Government met on 26 October 1989, and were unable to reach agreement. By a Note Verbale dated 30 October 1989, Czechoslovakia, confirming the views it had expressed during those talks, proposed to Hungary that they should negotiate an agreement on a system of technical, operational and ecological guarantees relating to the Gabčikovo-Nagymaros Project, "on the assumption that the Hungarian party will immediately commence preparatory work on the refilling of the Danube's bed in the region of Dunakiliti". It added that the technical principles of the agreement could be initialled within two weeks and that the agreement itself ought to be signed before the end of March 1990. After the principles had been initialled, Hungary "[was to] start the actual closure of the Danube bed". Czechoslovakia further stated its willingness to "conclu[de]... a separate agreement in which both parties would oblige themselves to limitations or exclusion of peak hour operation mode of the... System". It also proposed "to return to deadlines indicated in the Protocol of October 1983", the Nagymaros construction deadlines being thus extended by 15 months, so as to enable Hungary to take advantage of the time thus gained to study the ecological issues and formulate its own proposals in due time. Czechoslovakia concluded by announcing that, should Hungary continue unilaterally to breach the Treaty, Czechoslovakia would proceed with a provisional solution.

In the meantime, the Hungarian Government had on 27 October adopted a further resolution, deciding to abandon the construction of the Nagymaros dam and to leave in place the measures previously adopted for suspending the works at Dunakiliti. Then, by Notes Verbales dated 3 and 30 November 1989, Hungary proposed to Czechoslovakia a draft treaty incorporating its earlier proposals, relinquishing peak power operation of the Gabčikovo power plant and abandoning the construction of the Nagymaros dam. The draft provided for the conclusion of an agreement on the completion of Gabčikovo in exchange for guarantees on protection of the environment. It finally envisaged the possibility of one or other party seising an arbitral tribunal or the International Court of Justice in the event that differences of view arose and persisted between the two Governments about the construction and operation of the Gabčikovo dam, as well as measures to be taken to protect the environment. Hungary stated that it was ready to proceed immediately "with the preparatory operations for the Dunakiliti bed-decanting", but specified that the river would not be dammed at Dunakiliti until the agreement on guarantees had been concluded.

38. During winter 1989-1990, the political situation in Czechoslovakia and Hungary alike was transformed, and the new Governments were confronted with many new problems.
In spring 1990, the new Hungarian Government, in presenting its National Renewal Programme, announced that the whole of the Gabčikovo -Nagymaros Project was a "mistake" and that it would initiate negotiations as soon as possible with the Czechoslovak Government "on remedying and sharing the damages". On 20 December 1990, the Hungarian Government adopted a resolution for the opening of negotiations with Czechoslovakia on the termination of the Treaty by mutual consent and the conclusion of an agreement addressing the consequences of the termination. On 15 February 1991, the Hungarian Plenipotentiary transmitted a draft agreement along those lines to his Czechoslovak counterpart.

On the same day, the Czechoslovak President declared that the Gabčikovo -Nagymaros Project constituted a "totalitarian, gigomaniac monument which is against nature", while emphasizing that "the problem [was] that [the Gabčikovo power plant] [had] already been built". For his part, the

Czechoslovak Minister of the Environment stated, in a speech given to Hungarian parliamentary committees on 11 September 1991, that "the G/N Project [was] an old, obsolete one", but that, if there were "many reasons to change, modify the treaty... it [was] not acceptable to cancel the treaty... and negotiate later on".

During the ensuing period, Hungary refrained from completing the work for which it was still responsible at Dunakiliti. Yet it continued to maintain the structures it had already built and, at the end of 1991, completed the works relating to the tailrace canal of the bypass canal assigned to it under Article 5, paragraph 5 *(b),* of the 1977 Treaty.

39. The two Parties to this case concur in recognizing that the 1977 Treaty, the above-mentioned Agreement on mutual assistance of 1977 and the Protocol of 1989 were validly concluded and were duly in force when the facts recounted above took place.
Further, they do not dispute the fact that, however flexible they may have been, these texts did not envisage the possibility of the signatories unilaterally suspending or abandoning the work provided for therein, or even carrying it out according to a new schedule not approved by the two partners.

40. Throughout the proceedings, Hungary contended that, although it did suspend or abandon certain works, on the contrary, it never suspended the application of the 1977 Treaty itself. To justify its conduct, it relied essentially on a "state of ecological necessity".
Hungary contended that the various installations in the Gabčikovo-Nagymaros System of Locks had been designed to enable the Gabčikovo power plant to operate in peak mode. Water would only have come through the plant twice each day, at times of peak power demand. Operation in peak mode required the vast expanse (60 km²) of the planned reservoir at Dunakiliti, as well as the Nagymaros dam, which was to alleviate the tidal effects and reduce the variation in the water level downstream of Gabčikovo. Such a system, considered to be more economically profitable than using run-of-the-river plants, carried ecological risks which it found unacceptable.

According to Hungary, the principal ecological dangers which would have been caused by this system were as follows. At Gabčikovo/ Dunakiliti, under the original Project, as specified in the Joint Contractual Plan, the residual discharge into the old bed of the Danube was limited to 50 m3/s, in addition to the water provided to the system of side-arms. That volume could be increased to 200 m3/s during the growing season. Additional discharges, and in particular a number of artificial floods, could also be effected, at an unspecified rate. In these circumstances, the groundwater level would have fallen in most of the Szigetkoz. Furthermore, the groundwater would then no longer have been supplied by the Danube — which, on the contrary, would have acted as a drain — but by the reservoir of stagnant water at Dunakiliti and the side-arms which would have become silted up. In the long term, the quality of water would have been seriously impaired. As for the surface water, risks of eutrophication would have arisen, particularly in the reservoir; instead of the old Danube there would have been a river choked with sand, where only a relative trickle of water would have flowed. The network of arms would have been for the most part cut off from the principal bed. The fluvial fauna and flora, like those in the alluvial plains, would have been condemned to extinction.

As for Nagymaros, Hungary argued that, if that dam had been built, the bed of the Danube upstream would have silted up and, consequently, the quality of the water collected in the bank-filtered wells

would have deteriorated in this sector. What is more, the operation of the Gabčikovo power plant in peak mode would have occasioned significant daily variations in the water level in the reservoir upstream, which would have constituted a threat to aquatic habitats in particular. Furthermore, the construction and operation of the Nagymaros dam would have caused the erosion of the riverbed downstream, along Szentendre Island. The water level of the river would therefore have fallen in this section and the yield of the bank-filtered wells providing two-thirds of the water supply of the city of Budapest would have appreciably diminished. The filter layer would also have shrunk or perhaps even disappeared, and fine sediments would have been deposited in certain pockets in the river. For this twofold reason, the quality of the infiltrating water would have been severely jeopardized.

From all these predictions, in support of which it quoted a variety of scientific studies, Hungary concluded that a "state of ecological necessity" did indeed exist in 1989.

41. In its written pleadings, Hungary also accused Czechoslovakia of having violated various provisions of the 1977 Treaty from before 1989 — in particular Articles 15 and 19 relating, respectively, to water quality and nature protection — in refusing to take account of the now evident ecological dangers and insisting that the works be continued, notably at Nagymaros. In this context Hungary contended that, in accordance with the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 concerning the Joint Contractual Plan, Czechoslovakia bore responsibility for research into the Project's impact on the environment; Hungary stressed that the research carried out by Czechoslovakia had not been conducted adequately, the potential effects of the Project on the environment of the construction having been assessed by Czechoslovakia only from September 1990. However, in the final stage of its argument, Hungary does not appear to have sought to formulate this complaint as an independent ground formally justifying the suspension and abandonment of the works for which it was responsible under the 1977 Treaty. Rather, it presented the violations of the Treaty prior to 1989, which it imputes to Czechoslovakia, as one of the elements contributing to the emergence of a state of necessity.

42. Hungary moreover contended from the outset that its conduct in the present case should not be evaluated only in relation to the law of treaties. It also observed that, in accordance with the provisions of Article 4, the Vienna Convention of 23 May 1969 on the Law of Treaties could not be applied to the 1977 Treaty, which was concluded before that Convention entered into force as between the parties. Hungary has indeed acknowledged, with reference to the jurisprudence of the Court, that in many respects the Convention reflects the existing customary law. Hungary nonetheless stressed the need to adopt a cautious attitude, while suggesting that the Court should consider, in each case, the conformity of the prescriptions of the Convention with customary international law.

43. Slovakia, for its part, denied that the basis for suspending or abandoning the performance of a treaty obligation can be found outside the law of treaties. It acknowledged that the 1969 Vienna Convention could not be applied as such to the 1977 Treaty, but at the same time stressed that a number of its provisions are a reflection of pre-existing rules of customary international law and specified that this is, in particular, the case with the provisions of Part V relating to invalidity, termination and suspension of the operation of treaties. Slovakia has moreover observed that, after the Vienna Convention had entered into force for both parties, Hungary affirmed its accession to

the substantive obligations laid down by the 1977 Treaty when it signed the Protocol of 6 February 1989 that cut short the schedule of work ; and this led it to conclude that the Vienna Convention was applicable to the "contractual legal régime" constituted by the network of interrelated agreements of which the Protocol of 1989 was a part.

44. In the course of the proceedings, Slovakia argued at length that the state of necessity upon which Hungary relied did not constitute a reason for the suspension of a treaty obligation recognized by the law of treaties. At the same time, it cast doubt upon whether "ecological necessity" or "ecological risk" could, in relation to the law of State responsibility, constitute a circumstance precluding the wrongfulness of an act.
In any event, Slovakia denied that there had been any kind of "ecological state of necessity" in this case either in 1989 or subsequently. It invoked the authority of various scientific studies when it claimed that Hungary had given an exaggeratedly pessimistic description of the situation. Slovakia did not, of course, deny that ecological problems could have arisen. However, it asserted that they could to a large extent have been remedied. It accordingly stressed that no agreement had been reached with respect to the modalities of operation of the Gabčikovo power plant in peak mode, and claimed that the apprehensions of Hungary related only to operating conditions of an extreme kind. In the same way, it contended that the original Project had undergone various modifications since 1977 and that it would have been possible to modify it even further, for example with respect to the discharge of water reserved for the old bed of the Danube, or the supply of water to the side-arms by means of underwater weirs.

45. Slovakia moreover denied that it in any way breached the 1977 Treaty — particularly its Articles 15 and 19 — and maintained, *inter alia,* that according to the terms of Article 3, paragraph 2, of the Agreement of 6 May 1976 relating to the Joint Contractual Plan, research into the impact of the Project on the environment was not the exclusive responsibility of Czechoslovakia but of either one of the parties, depending on the location of the works.

Lastly, in its turn, it reproached Hungary with having adopted its unilateral measures of suspension and abandonment of the works in violation of the provisions of Article 27 of the 1977 Treaty (see paragraph 18 above), which it submits required prior recourse to the machinery for dispute settlement provided for in that Article.

46. The Court has no need to dwell upon the question of the applicability in the present case of the Vienna Convention of 1969 on the Law of Treaties. It needs only to be mindful of the fact that it has several times had occasion to hold that some of the rules laid down in that Convention might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the Vienna Convention concerning the termination and the suspension of the operation of treaties, set forth in Articles 60 to 62 (see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports, 1971,* p. 47, and *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Jurisdiction of the Court, Judgment, I.C.J. Reports 1973,* p. 18; see also *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980,* pp. 95-96).

Neither has the Court lost sight of the fact that the Vienna Convention is in any event applicable to the Protocol of 6 February 1989 whereby Hungary and Czechoslovakia agreed to accelerate completion of the works relating to the Gabčikovo-Nagymaros Project.

47. Nor does the Court need to dwell upon the question of the relationship between the law of treaties and the law of State responsibility, to which the Parties devoted lengthy arguments, as those two branches of international law obviously have a scope that is distinct. A determination of whether a convention is or is not in force, and whether it has or has not been properly suspended or denounced, is to be made pursuant to the law of treaties. On the other hand, an evaluation of the extent to which the suspension or denunciation of a convention, seen as incompatible with the law of treaties, involves the responsibility of the State which proceeded to it, is to be made under the law of State responsibility.
Thus the Vienna Convention of 1969 on the Law of Treaties confines itself to defining — in a limitative manner — the conditions in which a treaty may lawfully be denounced or suspended; while the effects of a denunciation or suspension seen as not meeting those conditions are, on the contrary, expressly excluded from the scope of the Convention by operation of Article 73. It is moreover well established that, when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect (cf. *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Second Phase, Advisory Opinion, I.C.J. Reports 1950,* p. 228; and see Article 17 of the Draft Articles on State Responsibility provisionally adopted by the International Law Commission on first reading, *Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 32).

48. The Court cannot accept Hungary's argument to the effect that, in 1989, in suspending and subsequently abandoning the works for which it was still responsible at Nagymaros and at Dunakiliti, it did not, for all that, suspend the application of the 1977 Treaty itself or then reject that Treaty. The conduct of Hungary at that time can only be interpreted as an expression of its unwillingness to comply with at least some of the provisions of the Treaty and the Protocol of 6 February 1989, as specified in the Joint Contractual Plan. The effect of Hungary's conduct was to render impossible the accomplishment of the system of works that the Treaty expressly described as "single and indivisible".
The Court moreover observes that, when it invoked the state of necessity in an effort to justify that conduct, Hungary chose to place itself from the outset within the ambit of the law of State responsibility, thereby implying that, in the absence of such a circumstance, its conduct would have been unlawful. The state of necessity claimed by Hungary — supposing it to have been established — thus could not permit of the conclusion that, in 1989, it had acted in accordance with its obligations under the 1977 Treaty or that those obligations had ceased to be binding upon it. It would only permit the affirmation that, under the circumstances, Hungary would not incur international responsibility by acting as it did. Lastly, the Court points out that Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate its partner.

49. The Court will now consider the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and

abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments.

50. In the present case, the Parties are in agreement in considering that the existence of a state of necessity must be evaluated in the light of the criteria laid down by the International Law Commission in Article 33 of the Draft Articles on the International Responsibility of States that it adopted on first reading. That provision is worded as follows:
"Article 33. State of Necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the State in question has contributed to the occurrence of the state of necessity." (*Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 34.)

In its Commentary, the Commission defined the "state of necessity" as being

"the situation of a State whose sole means of safeguarding an essential interest threatened by a grave and imminent peril is to adopt conduct not in conformity with what is required of it by an international obligation to another State" *(ibid.,* para. 1).

It concluded that "the notion of state of necessity is... deeply rooted in general legal thinking" *(ibid.,* p. 49, para. 31).

51. The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft
"in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception — and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness..." *(ibid.,* p. 51,

para. 40).

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

52. In the present case, the following basic conditions set forth in Draft Article 33 are relevant : it must have been occasioned by an "essential interest" of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a "grave and imminent peril"; the act being challenged must have been the "only means" of safeguarding that interest; that act must not have "seriously impair[ed] an essential interest" of the State towards which the obligation existed ; and the State which is the author of that act must not have "contributed to the occurrence of the state of necessity". Those conditions reflect customary international law.
The Court will now endeavour to ascertain whether those conditions had been met at the time of the suspension and abandonment, by Hungary, of the works that it was to carry out in accordance with the 1977 Treaty.

53. The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčikovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.
The Commission, in its Commentary, indicated that one should not, in that context, reduce an "essential interest" to a matter only of the "existence" of the State, and that the whole question was, ultimately, to be judged in the light of the particular case (see *Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 49, para. 32); at the same time, it included among the situations that could occasion a state of necessity, "a grave danger to... the ecological preservation of all or some of [the] territory [of a State]" *(ibid.,* p. 35, para. 3); and specified, with reference to State practice, that "It is primarily in the last two decades that safeguarding the ecological balance has come to be considered an ‘essential interest’ of all States." *(Ibid.,* p. 39, para. 14.)

The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

"the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment." *(Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* pp. 241-242, para. 29.)

54. The verification of the existence, in 1989, of the "peril" invoked by Hungary, of its "grave and imminent" nature, as well as of the absence of any "means" to respond to it, other than the measures taken by Hungary to suspend and abandon the works, are all complex processes.

As the Court has already indicated (see paragraphs 33 *et seq.),* Hungary on several occasions expressed, in 1989, its "uncertainties" as to the ecological impact of putting in place the Gabčikovo-Nagymaros barrage system, which is why it asked insistently for new scientific studies to be carried out.

The Court considers, however, that, serious though these uncertainties might have been they could not, alone, establish the objective existence of a "peril" in the sense of a component element of a state of necessity. The word "peril" certainly evokes the idea of "risk" ; that is precisely what distinguishes "peril" from material damage. But a state of necessity could not exist without a "peril" duly established at the relevant point in time; the mere apprehension of a possible "peril" could not suffice in that respect. It could moreover hardly be otherwise, when the "peril" constituting the state of necessity has at the same time to be "grave" and "imminent". "Imminence" is synonymous with "immediacy" or "proximity" and goes far beyond the concept of "possibility". As the International Law Commission emphasized in its commentary, the "extremely grave and imminent" peril must "have been a threat to the interest at the actual time" *(Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 49, para. 33). That does not exclude, in the view of the Court, that a "peril" appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable.

The Hungarian argument on the state of necessity could not convince the Court unless it was at least proven that a real, "grave" and "imminent" "peril" existed in 1989 and that the measures taken by Hungary were the only possible response to it.

Both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments. The Court has given most careful attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that, as will be shown below, it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded.

55. The Court will begin by considering the situation at Nagymaros. As has already been mentioned (see paragraph 40), Hungary maintained that, if the works at Nagymaros had been carried out as planned, the environment — and in particular the drinking water resources — in the area would have been exposed to serious dangers on account of problems linked to the upstream reservoir on the one hand and, on the other, the risks of erosion of the riverbed downstream.
The Court notes that the dangers ascribed to the upstream reservoir were mostly of a long-term nature and, above all, that they remained uncertain. Even though the Joint Contractual Plan envisaged that the Gab-cikovo power plant would "mainly operate in peak-load time and continuously during high water", the final rules of operation had not yet been determined (see paragraph 19 above); however, any dangers associated with the putting into service of the Nagymaros portion of the Project would have been closely linked to the extent to which it was operated in peak mode and to the modalities of such operation. It follows that, even if it could have been established — which, in the Court's appreciation of the evidence before it, was not the case — that the reservoir would ultimately have constituted a "grave peril" for the environment in the area, one would be bound to conclude that the peril was not "imminent" at the time at which Hungary

suspended and then abandoned the works relating to the dam.

With regard to the lowering of the riverbed downstream of the Nagymaros dam, the danger could have appeared at once more serious and more pressing, in so far as it was the supply of drinking water to the city of Budapest which would have been affected. The Court would however point out that the bed of the Danube in the vicinity of Szentendre had already been deepened prior to 1980 in order to extract building materials, and that the river had from that time attained, in that sector, the depth required by the 1977 Treaty. The peril invoked by Hungary had thus already materialized to a large extent for a number of years, so that it could not, in 1989, represent a peril arising entirely out of the project. The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even though — and this is not determinative of the state of necessity — the purification of the river water, like the other measures envisaged, clearly would have been a more costly technique.

56. The Court now comes to the Gabčikovo sector. It will recall that Hungary's concerns in this sector related on the one hand to the quality of the surface water in the Dunakiliti reservoir, with its effects on the quality of the groundwater in the region, and on the other hand, more generally, to the level, movement and quality of both the surface water and the groundwater in the whole of the Szigetkôz, with their effects on the fauna and flora in the alluvial plain of the Danube (see paragraph 40 above). Whether in relation to the Dunakiliti site or to the whole of the Szigetkôz, the Court finds here again, that the peril claimed by Hungary was to be considered in the long term, and, more importantly, remained uncertain. As Hungary itself acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.

Even if the works were more advanced in this sector than at Nagymaros, they had not been completed in July 1989 and, as the Court explained in paragraph 34 above, Hungary expressly undertook to carry on with them, early in June 1989. The report dated 23 June 1989 by the *ad hoc* Committee of the Hungarian Academy of Sciences, which was also referred to in paragraph 35 of the present Judgment, does not express any awareness of an authenticated peril — even in the form of a definite peril, whose realization would have been inevitable in the long term — when it states that :

"The measuring results of an at least five-year monitoring period following the completion of the Gabčikovo construction are indispensable to the trustworthy prognosis of the ecological impacts of the barrage system. There is undoubtedly a need for the establishment and regular operation of a comprehensive monitoring system, which must be more developed than at present. The examination of biological indicator objects that can sensitively indicate the changes happening in the environment, neglected till today, have to be included."

The report concludes as follows:

"It can be stated, that the environmental, ecological and water quality impacts were not taken into account properly during the design and construction period until today. Because of the complexity of the ecological processes and lack of the measured data and the relevant calculations the environmental impacts cannot be evaluated.

The data of the monitoring system newly operating on a very limited area are not enough to forecast the impacts probably occurring over a longer term. In order to widen and to make the data more frequent a further multi-year examination is necessary to decrease the further degradation of the water quality playing a dominant role in this question. The expected water quality influences equally the aquatic ecosystems, the soils and the recreational and tourist land-use."

The Court also notes that, in these proceedings, Hungary acknowledged that, as a general rule, the quality of the Danube waters had improved over the past 20 years, even if those waters remained subject to hypertrophic conditions.

However "grave" it might have been, it would accordingly have been difficult, in the light of what is said above, to see the alleged peril as sufficiently certain and therefore "imminent" in 1989.

The Court moreover considers that Hungary could, in this context also, have resorted to other means in order to respond to the dangers that it apprehended. In particular, within the framework of the original Project, Hungary seemed to be in a position to control at least partially the distribution of the water between the bypass canal, the old bed of the Danube and the side-arms. It should not be overlooked that the Dunakiliti dam was located in Hungarian territory and that Hungary could construct the works needed to regulate flows along the old bed of the Danube and the side-arms. Moreover, it should be borne in mind that Article 14 of the 1977 Treaty provided for the possibility that each of the parties might withdraw quantities of water exceeding those specified in the Joint Contractual Plan, while making it clear that, in such an event, "the share of electric power of the Contracting Party benefiting from the excess withdrawal shall be correspondingly reduced".

57. The Court concludes from the foregoing that, with respect to both Nagymaros and Gabčikovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they "imminent"; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation "characterized so aptly by the maxim *summum jus summa injuria" (Yearbook of the International Law Commission,* 1980, Vol. II, Part 2, p. 49, para. 31).

Moreover, the Court notes that Hungary decided to conclude the 1977 Treaty, a Treaty which — whatever the political circumstances prevailing at the time of its conclusion — was treated by Hungary as valid and in force until the date declared for its termination in May 1992. As can be seen from the material before the Court, a great many studies of a scientific and technical nature had been conducted at an earlier time, both by Hungary and by Czechoslovakia. Hungary was, then, presumably aware of the situation as then known, when it assumed its obligations under

the Treaty. Hungary contended before the Court that those studies had been inadequate and that the state of knowledge at that time was not such as to make possible a complete evaluation of the ecological implications of the Gabčikovo-Nagymaros Project. It is nonetheless the case that although the principal object of the 1977 Treaty was the construction of a System of Locks for the production of electricity, improvement of navigation on the Danube and protection against flooding, the need to ensure the protection of the environment had not escaped the parties, as can be seen from Articles 15, 19 and 20 of the Treaty.

What is more, the Court cannot fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the works under the Treaty should go forward more slowly, for reasons that were essentially economic but also, subsidiarily, related to ecological concerns. In 1989, when, according to Hungary itself, the state of scientific knowledge had undergone a significant development, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court is not however unaware that profound changes were taking place in Hungary in 1989, and that, during that transitory phase, it might have been more than usually difficult to co-ordinate the different points of view prevailing from time to time.

The Court infers from all these elements that, in the present case, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about.

58. It follows that the Court has no need to consider whether Hungary, by proceeding as it did in 1989, "seriously impair[ed] an essential interest" of Czechoslovakia, within the meaning of the aforementioned Article 33 of the Draft of the International Law Commission — a finding which does not in any way prejudge the damage Czechoslovakia claims to have suffered on account of the position taken by Hungary.
Nor does the Court need to examine the argument put forward by Hungary, according to which certain breaches of Articles 15 and 19 of the 1977 Treaty, committed by Czechoslovakia even before 1989, contributed to the purported state of necessity; and neither does it have to reach a decision on the argument advanced by Slovakia, according to which Hungary breached the provisions of Article 27 of the Treaty, in 1989, by taking unilateral measures without having previously had recourse to the machinery of dispute settlement for which that Article provides.

59. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(a),* of the Special Agreement (see paragraph 27 above), finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

60. By the terms of Article 2, paragraph 1 *(b),* of the Special Agreement, the Court is asked in the second place to decide

"(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991,

to the ‘provisional solution’ and to put into operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Communities, the Republic of Hungary and the Czech and Slovak Federal Republic dated 23 November 1992 (damming up of the Danube at river kilometre 1851.7 on Czechoslovak territory and resulting consequences on water and navigation course)".

61. The Court will recall that, as soon as Hungary suspended the works at Nagymaros on 13 May 1989 and extended that suspension to certain works to be carried out at Dunakiliti, Czechoslovakia informed Hungary that it would feel compelled to take unilateral measures if Hungary were to persist in its refusal to resume the works. This was *inter alia* expressed as follows in Czechoslovakia’s Note Verbale of 30 October 1989 to which reference is made in paragraph 37 above:

"Should the Republic of Hungary fail to meet its liabilities and continue unilaterally to breach the Treaty and related legal documents then the Czechoslovak party will be forced to commence a provisional, substitute project on the territory of the Czechoslovak Socialist Republic in order to prevent further losses. Such a provisional project would entail directing as much water into the Gabčikovo dam as agreed in the Joint Construction Plan."

As the Court has already indicated (see paragraph 23), various alternative solutions were contemplated by Czechoslovakia. In September 1990, the Hungarian authorities were advised of seven hypothetical alternatives defined by the firm of Hydroconsult of Bratislava. All of those solutions implied an agreement between the parties, with the exception of one variant, subsequently known as "Variant C", which was presented as a provisional solution which could be brought about without Hungarian co-operation. Other contacts between the parties took place, without leading to a settlement of the dispute. In March 1991, Hungary acquired information according to which perceptible progress had been made in finalizing the planning of Variant C; it immediately gave expression to the concern this caused.

62. Inter-governmental negotiation meetings were held on 22 April and 15 July 1991.
On 22 April 1991, Hungary proposed the suspension, until September 1993, of all the works begun on the basis of the 1977 Treaty, on the understanding that the parties undertook to abstain from any unilateral action, and that joint studies would be carried out in the interval. Czechoslovakia maintained its previous position according to which the studies contemplated should take place within the framework of the 1977 Treaty and without any suspension of the works.

On 15 July 1991, Czechoslovakia confirmed its intention of putting the Gabčikovo power plant into service and indicated that the available data enabled the effects of four possible scenarios to be assessed, each of them requiring the co-operation of the two Governments. At the same time, it proposed the setting up of a tripartite committee of experts (Hungary, Czechoslovakia, European Communities) which would help in the search for technical solutions to the problems arising from the entry into operation of the Gabčikovo sector. Hungary, for its part, took the view that :

"In the case of a total lack of understanding the so-called C variation or ‘theoretical opportunity’ suggested by the Czecho-Slovak party as a unilateral solution would be such a grave transgression

of Hungarian territorial integrity and International Law for which there is no precedent even in the practices of the formerly socialist countries for the past 30 years";

it further proposed the setting up of a bilateral committee for the assessment of environmental consequences, subject to work on Czechoslovak territory being suspended.

63. By a letter dated 24 July 1991, the Government of Hungary communicated the following message to the Prime Minister of Slovakia:
"Hungarian public opinion and the Hungarian Government anxiously and attentively follows the [Czechoslovakian] press reports of the unilateral steps of the Government of the Slovak Republic in connection with the barrage system.

The preparatory works for diverting the water of the Danube near the Dunakiliti dam through unilaterally are also alarming. These steps are contrary to the 1977 Treaty and to the good relationship between our nations."

On 30 July 1991 the Slovak Prime Minister informed the Hungarian Prime Minister of

"the decision of the Slovak Government and of the Czech and Slovak Federal Government to continue work on the Gabčikovo power plant, as a provisional solution, which is aimed at the commencement of operations on the territory of the Czech and Slovak Federal Republic".

On the same day, the Government of Hungary protested, by a Note Verbale, against the filling of the headrace canal by the Czechoslovak construction company, by pumping water from the Danube.

By a letter dated 9 August 1991 and addressed to the Prime Minister of Slovakia, the Hungarian authorities strenuously protested against "any unilateral step that would be in contradiction with the interests of our [two] nations and international law" and indicated that they considered it "very important [to] receive information as early as possible on the details of the provisional solution". For its part, Czechoslovakia, in a Note Verbale dated 27 August 1991, rejected the argument of Hungary that the continuation of the works under those circumstances constituted a violation of international law, and made the following proposal:

"Provided the Hungarian side submits a concrete technical solution aimed at putting into operation the Gabčikovo system of locks and a solution of the system of locks based on the 1977 Treaty in force and the treaty documents related to it, the Czechoslovak side is prepared to implement the mutually agreed solution."

64. The construction permit for Variant C was issued on 30 October 1991. In November 1991 construction of a dam started at Cunovo, where both banks of the Danube are on Czechoslovak (now Slovak) territory.
In the course of a new inter-governmental negotiation meeting, on 2 December 1991, the parties agreed to entrust the task of studying the whole of the question of the Gabčikovo-Nagymaros Project to a Joint Expert Committee which Hungary agreed should be complemented with an expert from the European Communities. However whereas, for Hungary, the work of that Committee would have been meaningless if Czechoslovakia continued construction of Variant C, for Czechoslovakia,

the suspension of the construction, even on a temporary basis, was unacceptable.

That meeting was followed by a large number of exchanges of letters between the parties and various meetings between their representatives at the end of 1991 and early in 1992. On 23 January 1992, Czechoslovakia expressed its readiness "to stop work on the provisional solution and continue the construction upon mutual agreement" if the tripartite committee of experts whose constitution it proposed, and the results of the test operation of the Gabčikovo part, were to "confirm that negative ecological effects exceed its benefits". However, the positions of the parties were by then comprehensively defined, and would scarcely develop any further. Hungary considered, as it indicated in a Note Verbale of 14 February 1992, that Variant C was in contravention

"of [the Treaty of 1977]... and the convention ratified in 1976 regarding the water management of boundary waters.

...

with the principles of sovereignty, territorial integrity, with the inviolability of State borders, as well as with the general customary norms on international rivers and the spirit of the 1948 Belgrade Danube Convention";

and the suspension of the implementation of Variant C was, in its view, a prerequisite. As for Czechoslovakia, it took the view that recourse to Variant C had been rendered inevitable, both for economic and ecologi-cal as well as navigational reasons, because of the unlawful suspension and abandonment by Hungary of the works for which provision was made in the 1977 Treaty. Any negotiation had, in its view, to be conducted within the framework of the Treaty and without the implementation of Variant C — described as "provisional" — being called into question.

65. On 5 August 1992, the Czechoslovak representative to the Danube Commission informed it that "work on the severance cutting through of the Danube's flow will begin on 15 October 1992 at the 1,851,759-kilometre line" and indicated the measures that would be taken at the time of the "severance". The Hungarian representative on the Commission protested on 17 August 1992, and called for additional explanations.
During the autumn of 1992, the implementation of Variant C was stepped up. The operations involved in damming the Danube at Cunovo had been scheduled by Czechoslovakia to take place during the second half of October 1992, at a time when the waters of the river are generally at their lowest level. On the initiative of the Commission of the European Communities, trilateral negotiations took place in Brussels on 21 and 22 October 1992, with a view to setting up a committee of experts and defining its terms of reference. On that date, the first phase of the operations leading to the damming of the Danube (the reinforcement of the riverbed and the narrowing of the principal channel) had been completed. The closure of the bed was begun on 23 October 1992 and the construction of the actual dam continued from 24 to 27 October 1992: a pontoon bridge was built over the Danube on Czechoslovak territory using river barges, large stones were thrown into the riverbed and reinforced with concrete, while 80 to 90 per cent of the waters of the Danube were directed into the canal designed to supply the Gabčikovo power plant. The implementation of Variant C did not, however, come to an end with the diversion of the waters, as there still remained outstanding both reinforcement work on the dam and the building of certain auxiliary structures.

The Court has already referred in paragraph 24 to the meeting held in London on 28 October 1992 under the auspices of the European Communities, in the course of which the parties to the negotiations agreed, *inter alia,* to entrust a tripartite Working Group composed of independent experts (i.e., four experts designated by the European Commission, one designated by Hungary and another by Czechoslovakia) with the task of reviewing the situation created by the implementation of Variant C and making proposals as to urgent measures to adopt. After having worked for one week in Bratislava and one week in Budapest, the Working Group filed its report on 23 November 1992.

66. A summary description of the constituent elements of Variant C appears at paragraph 23 of the present Judgment. For the purposes of the question put to the Court, the official description that should be adopted is, according to Article 2, paragraph 1 *(b),* of the Special Agreement, the one given in the aforementioned report of the Working Group of independent experts, and it should be emphasized that, according to the Special Agreement, "Variant C" must be taken to include the consequences "on water and navigation course" of the dam closing off the bed of the Danube.

In the section headed "Variant C Structures and Status of Ongoing Work", one finds, in the report of the Working Group, the following passage :

"In both countries the original structures for the Gabčikovo scheme are completed except for the closure of the Danube river at Dunakiliti and the

(1) Completion of the hydropower station (installation and testing of turbines) at Gabčikovo.

Variant C consists of a complex of structures, located in Czechoslovakia... The construction of these are planned for two phases. The structures include... :

(2) By-pass weir controlling the flow into the river Danube.

(3) Dam closing the Danubian river bed.

(4) Floodplain weir (weir in the inundation).

(5) Intake structure for the Mosoni Danube.

(6) Intake structure in the power canal.

(7) Earth barrages/dykes connecting structures.

(8) Ship lock for smaller ships (15 m x 80 m).

(9) Spillway weir.

(10) Hydropower station.

The construction of the structures 1-7 are included in Phase 1, while the remaining 8-10 are a part of Phase 2 scheduled for construction 1993-1995."

67. Czechoslovakia had maintained that proceeding to Variant C and putting it into operation did not constitute internationally wrongful acts; Slovakia adopted this argument. During the proceedings before the Court Slovakia contended that Hungary's decision to suspend and subsequently abandon the construction of works at Dunakiliti had made it impossible for Czechoslovakia to carry out the works as initially contemplated by the 1977 Treaty and that the latter was therefore entitled to proceed with a solution which was as close to the original Project as possible. Slovakia invoked what it described as a "principle of approximate application" to justify the construction and operation of Variant C. It explained that this was the only possibility remaining to it "of fulfilling not only the purposes of the 1977 Treaty, but the continuing obligation to implement it in good faith".

68. Slovakia also maintained that Czechoslovakia was under a duty to mitigate the damage resulting from Hungary's unlawful actions. It claimed that a State which is confronted with a wrongful act of another State is under an obligation to minimize its losses and, thereby, the damages claimable against the wrongdoing State. It argued furthermore that "Mitigation of damages is also an aspect of the performance of obligations in good faith." For Slovakia, these damages would have been immense in the present case, given the investments made and the additional economic and environmental prejudice which would have resulted from the failure to complete the works at Dunakiliti/Gabčikovo and to put the system into operation. For this reason, Czechoslovakia was not only entitled, but even obliged, to implement Variant C.

69. Although Slovakia maintained that Czechoslovakia's conduct was lawful, it argued in the alternative that, even were the Court to find otherwise, the putting into operation of Variant C could still be justified as a countermeasure.

70. Hungary for its part contended that Variant C was a material breach of the 1977 Treaty. It considered that Variant C also violated Czechoslovakia's obligations under other treaties, in particular the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters concluded at Budapest, and its obligations under general international law.

71. Hungary contended that Slovakia's arguments rested on an erroneous presentation of the facts and the law. Hungary denied, *inter alia,* having committed the slightest violation of its treaty obligations which could have justified the putting into operation of Variant C. It considered that "no such rule" of "approximate application" of a treaty exists in international law; as to the argument derived from "mitigation of damage[s]", it claimed that this has to do with the quantification of loss, and could not serve to excuse conduct which is substantively unlawful. Hungary furthermore stated that Variant C did not satisfy the conditions required by international law for countermeasures, in particular the condition of proportionality.

72. Before dealing with the arguments advanced by the Parties, the Court wishes to make clear that it is aware of the serious problems with which Czechoslovakia was confronted as a result of Hungary's decision to relinquish most of the construction of the System of Locks for which it was responsible by virtue of the 1977 Treaty. Vast investments had been made, the construction at Gabčikovo was all but finished, the bypass canal was completed, and Hungary itself, in 1991, had duly fulfilled its obligations under the Treaty in this respect in completing work on the tailrace canal. It emerges from the report, dated 31 October 1992, of the tripartite fact-finding mission the Court has referred to in paragraph 24 of the present Judgment, that not using the system would have led to considerable financial losses, and that it could have given rise to serious problems for the

environment.

73. Czechoslovakia repeatedly denounced Hungary's suspension and abandonment of works as a fundamental breach of the 1977 Treaty and consequently could have invoked this breach as a ground for terminating the Treaty; but this would not have brought the Project any nearer to completion. It therefore chose to insist on the implementation of the Treaty by Hungary, and on many occasions called upon the latter to resume performance of its obligations under the Treaty. When Hungary steadfastly refused to do so — although it had expressed its willingness to pay compensation for damage incurred by Czechoslovakia — and when negotiations stalled owing to the diametrically opposed positions of the parties, Czechoslovakia decided to put the Gabčikovo system into operation unilaterally, exclusively under its own control and for its own benefit.

74. That decision went through various stages and, in the Special Agreement, the Parties asked the Court to decide whether Czechoslovakia "was entitled to proceed, in November 1991" to Variant C, and "to put [it] into operation from October 1992".

75. With a view to justifying those actions, Slovakia invoked what it described as "the principle of approximate application", expressed by Judge Sir Hersch Lauterpacht in the following terms:
"It is a sound principle of law that whenever a legal instrument of continuing validity cannot be applied literally owing to the conduct of one of the parties, it must, without allowing that party to take advantage of its own conduct, be applied in a way approximating most closely to its primary object. To do that is to interpret and to give effect to the instrument — not to change it." (*Admissibility of Hearings of Petitioners by the Committee on South West Africa, I.C.J. Reports 1956*, separate opinion of Sir Hersch Lauterpacht, p. 46.)

It claimed that this is a principle of international law and a general principle of law.

76. It is not necessary for the Court to determine whether there is a principle of international law or a general principle of law of "approximate application" because, even if such a principle existed, it could by definition only be employed within the limits of the treaty in question. In the view of the Court, Variant C does not meet that cardinal condition with regard to the 1977 Treaty.

77. As the Court has already observed, the basic characteristic of the 1977 Treaty is, according to Article 1, to provide for the construction of the Gabčikovo-Nagymaros System of Locks as a joint investment constituting a single and indivisible operational system of works. This element is equally reflected in Articles 8 and 10 of the Treaty providing for joint ownership of the most important works of the Gabčikovo-Nagymaros Project and for the operation of this joint property as a co-ordinated single unit. By definition all this could not be carried out by unilateral action. In spite of having a certain external physical similarity with the original Project, Variant C thus differed sharply from it in its legal characteristics.

78. Moreover, in practice, the operation of Variant C led Czechoslovakia to appropriate, essentially for its use and benefit, between 80 and 90 per cent of the waters of the Danube before returning them to the main bed of the river, despite the fact that the Danube is not only a shared international watercourse but also an international boundary river.

Czechoslovakia submitted that Variant C was essentially no more than what Hungary had already agreed to and that the only modifications made were those which had become necessary by virtue of Hungary's decision not to implement its treaty obligations. It is true that Hungary, in concluding the 1977 Treaty, had agreed to the damming of the Danube and the diversion of its waters into the bypass canal. But it was only in the context of a joint operation and a sharing of its benefits that Hungary had given its consent. The suspension and withdrawal of that consent constituted a violation of Hungary's legal obligations, demonstrating, as it did, the refusal by Hungary of joint operation; but that cannot mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse.

The Court accordingly concludes that Czechoslovakia, in putting Variant C into operation, was not applying the 1977 Treaty but, on the contrary, violated certain of its express provisions, and, in so doing, committed an internationally wrongful act.

79. The Court notes that between November 1991 and October 1992, Czechoslovakia confined itself to the execution, on its own territory, of the works which were necessary for the implementation of Variant C, but which could have been abandoned if an agreement had been reached between the parties and did not therefore predetermine the final decision to be taken. For as long as the Danube had not been unilaterally dammed, Variant C had not in fact been applied.
Such a situation is not unusual in international law or, for that matter, in domestic law. A wrongful act or offence is frequently preceded by preparatory actions which are not to be confused with the act or offence itself. It is as well to distinguish between the actual commission of a wrongful act (whether instantaneous or continuous) and the conduct prior to that act which is of a preparatory character and which "does not qualify as a wrongful act" (see for example the Commentary on Article 41 of the Draft Articles on State Responsibility, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), p. 141, and *Yearbook of the International Law Commission,* 1993, Vol. II, Part 2, p. 57, para. 14).

80. Slovakia also maintained that it was acting under a duty to mitigate damages when it carried out Variant C. It stated that "It is a general principle of international law that a party injured by the non-performance of another contract party must seek to mitigate the damage he has sustained."
It would follow from such a principle that an injured State which has failed to take the necessary measures to limit the damage sustained would not be entitled to claim compensation for that damage which could have been avoided. While this principle might thus provide a basis for the calculation of damages, it could not, on the other hand, justify an otherwise wrongful act.

81. Since the Court has found that the putting into operation of Variant C constituted an internationally wrongful act, the duty to mitigate damage invoked by Slovakia does not need to be examined further.

82. Although it did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful, Slovakia stated that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts".

The Court has concluded, in paragraph 78 above, that Czechoslovakia committed an internationally wrongful act in putting Variant C into operation. Thus, it now has to determine whether such wrongfulness may be precluded on the ground that the measure so adopted was in response to Hungary's prior failure to comply with its obligations under international law.

83. In order to be justifiable, a countermeasure must meet certain conditions (see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986,* p. 127, para. 249. See also *Arbitral Award of 9 December 1978 in the case concerning the Air Service Agreement of 27 March 1946 between the United States of America and France,* United Nations, *Reports of International Arbitral Awards (RIAA),* Vol. XVIII, pp. 443 *et seq.* ; also Articles 47 to 50 of the Draft Articles on State Responsibility adopted by the International Law Commission on first reading, "Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996", *Official Records of the General Assembly, Fifty-first Session, Supplement No. 10* (A/51/10), pp. 144-145.)

In the first place it must be taken in response to a previous international wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandonment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful.

84. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case, as recalled above by the Court (see paragraphs 61 *et seq.),* that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions.

85. In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.
In 1929, the Permanent Court of International Justice, with regard to navigation on the River Oder, stated as follows:

"[the] community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others" (*Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23,* p. 27).

Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.

The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube — with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetkoz — failed to respect the proportionality which is required by

international law.

86. Moreover, as the Court has already pointed out (see paragraph 78), the fact that Hungary had agreed in the context of the original Project to the diversion of the Danube (and, in the Joint Contractual Plan, to a provisional measure of withdrawal of water from the Danube) cannot be understood as having authorized Czechoslovakia to proceed with a unilateral diversion of this magnitude without Hungary's consent.

87. The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible.

88. In the light of the conclusions reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(b),* of the Special Agreement (see paragraph 60), finds that Czechoslovakia was entitled to proceed, in November 1991, to Variant C in so far as it then confined itself to undertaking works which did not predetermine the final decision to be taken by it. On the other hand, Czechoslovakia was not entitled to put that Variant into operation from October 1992.

89. By the terms of Article 2, paragraph 1 *(c),* of the Special Agreement, the Court is asked, thirdly, to determine "what are the legal effects of the notification, on 19 May 1992, of the termination of the Treaty by the Republic of Hungary".

The Court notes that it has been asked to determine what are the legal effects of the notification given on 19 May 1992 of the termination of the Treaty. It will consequently confine itself to replying to this question.

90. The Court will recall that, by early 1992, the respective parties to the 1977 Treaty had made clear their positions with regard to the recourse by Czechoslovakia to Variant C. Hungary in a Note Verbale of 14 February 1992 had made clear its view that Variant C was a contravention of the 1977 Treaty (see paragraph 64 above); Czechoslovakia insisted on the implementation of Variant C as a condition for further negotiation. On 26 February 1992, in a letter to his Czechoslovak counterpart, the Prime Minister of Hungary described the impending diversion of the Danube as "a serious breach of international law" and stated that, unless work was suspended while further enquiries took place, "the Hungarian Government [would] have no choice but to respond to this situation of necessity by terminating the 1977 inter-State Treaty". In a Note Verbale dated 18 March 1992, Czechoslovakia reaffirmed that, while it was prepared to continue negotiations "on every level", it could not agree "to stop all work on the provisional solution".
On 24 March 1992, the Hungarian Parliament passed a resolution authorizing the Government to terminate the 1977 Treaty if Czechoslovakia did not stop the works by 30 April 1992. On 13 April 1992, the Vice-President of the Commission of the European Communities wrote to both parties confirming the willingness of the Commission to chair a committee of independent experts including representatives of the two countries, in order to assist the two Governments in identifying

a mutually acceptable solution. Commission involvement would depend on each Government not taking "any steps... which would prejudice possible actions to be undertaken on the basis of the report's findings". The Czechoslovak Prime Minister stated in a letter to the Hungarian Prime Minister dated 23 April 1992, that his Government continued to be interested in the establishment of the proposed committee "without any preliminary conditions" ; criticizing Hungary's approach, he refused to suspend work on the provisional solution, but added, "in my opinion, there is still time, until the damming of the Danube (i.e., until October 31, 1992), for resolving disputed questions on the basis of agreement of both States".

On 7 May 1992, Hungary, in the very resolution in which it decided on the termination of the Treaty, made a proposal, this time to the Slovak Prime Minister, for a six-month suspension of work on Variant C. The Slovak Prime Minister replied that the Slovak Government remained ready to negotiate, but considered preconditions "inappropriate".

91. On 19 May 1992, the Hungarian Government transmitted to the Czechoslovak Government a Declaration notifying it of the termination by Hungary of the 1977 Treaty as of 25 May 1992. In a letter of the same date from the Hungarian Prime Minister to the Czechoslovak Prime Minister, the immediate cause for termination was specified to be Czechoslovakia's refusal, expressed in its letter of 23 April 1992, to suspend the work on Variant C during mediation efforts of the Commission of the European Communities. In its Declaration, Hungary stated that it could not accept the deleterious effects for the environment and the conservation of nature of the implementation of Variant C which would be practically equivalent to the dangers caused by the realization of the original Project. It added that Variant C infringed numerous international agreements and violated the territorial integrity of the Hungarian State by diverting the natural course of the Danube.

92. During the proceedings, Hungary presented five arguments in support of the lawfulness, and thus the effectiveness, of its notification of termination. These were the existence of a state of necessity; the impossibility of performance of the Treaty; the occurrence of a fundamental change of circumstances; the material breach of the Treaty by Czechoslovakia; and, finally, the development of new norms of international environmental law. Slovakia contested each of these grounds.

93. On the first point, Hungary stated that, as Czechoslovakia had "remained inflexible" and continued with its implementation of Variant C, "a temporary state of necessity eventually became permanent, justifying termination of the 1977 Treaty".
Slovakia, for its part, denied that a state of necessity existed on the basis of what it saw as the scientific facts; and argued that even if such a state of necessity had existed, this would not give rise to a right to terminate the Treaty under the Vienna Convention of 1969 on the Law of Treaties.

94. Hungary's second argument relied on the terms of Article 61 of the Vienna Convention, which is worded as follows:
"Article 61

Supervening Impossibility of Performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating or

withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

2. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty."

Hungary declared that it could not be "obliged to fulfil a practically impossible task, namely to construct a barrage system on its own territory that would cause irreparable environmental damage". It concluded that

"By May 1992 the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two parties jointly — had permanently disappeared, and the Treaty had thus become impossible to perform."

In Hungary's view, the "object indispensable for the execution of the treaty", whose disappearance or destruction was required by Article 61 of the Vienna Convention, did not have to be a physical object, but could also include, in the words of the International Law Commission, "a legal situation which was the raison d'être of the rights and obligations".

Slovakia claimed that Article 61 was the only basis for invoking impossibility of performance as a ground for termination, that paragraph 1 of that Article clearly contemplated physical "disappearance or destruction" of the object in question, and that, in any event, paragraph 2 precluded the invocation of impossibility "if the impossibility is the result of a breach by that party... of an obligation under the treaty".

95. As to "fundamental change of circumstances", Hungary relied on Article 62 of the Vienna Convention on the Law of Treaties which states as follows:

"Article 62

Fundamental Change of Circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

(b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

Hungary identified a number of "substantive elements" present at the conclusion of the 1977 Treaty which it said had changed fundamentally by the date of notification of termination. These included the notion of "socialist integration", for which the Treaty had originally been a "vehicle", but which subsequently disappeared; the "single and indivisible operational system", which was to be replaced by a unilateral scheme; the fact that the basis of the planned joint investment had been overturned by the sudden emergence of both States into a market economy; the attitude of Czechoslovakia which had turned the "framework treaty" into an "immutable norm"; and, finally, the transformation of a treaty consistent with environmental protection into "a prescription for environmental disaster".

Slovakia, for its part, contended that the changes identified by Hungary had not altered the nature of the obligations under the Treaty from those originally undertaken, so that no entitlement to terminate it arose from them.

96. Hungary further argued that termination of the Treaty was justified by Czechoslovakia's material breaches of the Treaty, and in this regard it invoked Article 60 of the Vienna Convention on the Law of Treaties, which provides:

"Article 60

Termination or Suspension of the Operation of a Treaty as a Consequence of Its Breach

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:

(i) in the relations between themselves and the defaulting State, or

(ii) as between all the parties;

(b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character

that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

(a) a repudiation of the treaty not sanctioned by the present Convention; or

(b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

4. The foregoing paragraphs are without prejudice to any provision in the treaty applicable in the event of a breach.

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties."

Hungary claimed in particular that Czechoslovakia violated the 1977 Treaty by proceeding to the construction and putting into operation of Variant C, as well as failing to comply with its obligations under Articles 15 and 19 of the Treaty. Hungary further maintained that Czechoslovakia had breached other international conventions (among them the Convention of 31 May 1976 on the Regulation of Water Management Issues of Boundary Waters) and general international law.

Slovakia denied that there had been, on the part of Czechoslovakia or on its part, any material breach of the obligations to protect water quality and nature, and claimed that Variant C, far from being a breach, was devised as "the best possible approximate application" of the Treaty. It furthermore denied that Czechoslovakia had acted in breach of other international conventions or general international law.

97. Finally, Hungary argued that subsequently imposed requirements of international law in relation to the protection of the environment precluded performance of the Treaty. The previously existing obligation not to cause substantive damage to the territory of another State had, Hungary claimed, evolved into an *erga omnes* obligation of prevention of damage pursuant to the "precautionary principle". On this basis, Hungary argued, its termination was "forced by the other party's refusal to suspend work on Variant C".

Slovakia argued, in reply, that none of the intervening developments in environmental law gave rise to norms of *jus cogens* that would override the Treaty. Further, it contended that the claim by Hungary to be entitled to take action could not in any event serve as legal justification for termination of the Treaty under the law of treaties, but belonged rather "to the language of self-help or reprisals".

98. The question, as formulated in Article 2, paragraph 1 *(c),* of the Special Agreement, deals with treaty law since the Court is asked to determine what the legal effects are of the notification of termination of the Treaty. The question is whether Hungary's notification of 19 May 1992 brought the 1977 Treaty to an end, or whether it did not meet the requirements of international law, with the consequence that it did not terminate the Treaty.

99. The Court has referred earlier to the question of the applicability to the present case of the Vienna Convention of 1969 on the Law of Treaties. The Vienna Convention is not directly applicable to the 1977 Treaty inasmuch as both States ratified that Convention only after the Treaty's conclusion. Consequently only those rules which are declaratory of customary law are applicable to the 1977 Treaty. As the Court has already stated above (see paragraph 46), this is the case, in many respects, with Articles 60 to 62 of the Vienna Convention, relating to termination or suspension of the operation of a treaty. On this, the Parties, too, were broadly in agreement.

100. The 1977 Treaty does not contain any provision regarding its termination. Nor is there any indication that the parties intended to admit the possibility of denunciation or withdrawal. On the contrary, the Treaty establishes a long-standing and durable régime of joint investment and joint operation. Consequently, the parties not having agreed otherwise, the Treaty could be terminated only on the limited grounds enumerated in the Vienna Convention.

101. The Court will now turn to the first ground advanced by Hungary, that of the state of necessity. In this respect, the Court will merely observe that, even if a state of necessity is found to exist, it is not a ground for the termination of a treaty. It may only be invoked to exonerate from its responsibility a State which has failed to implement a treaty. Even if found justified, it does not terminate a Treaty; the Treaty may be ineffective as long as the condition of necessity continues to exist; it may in fact be dormant, but — unless the parties by mutual agreement terminate the Treaty — it continues to exist. As soon as the state of necessity ceases to exist, the duty to comply with treaty obligations revives.

102. Hungary also relied on the principle of the impossibility of performance as reflected in Article 61 of the Vienna Convention on the Law of Treaties. Hungary's interpretation of the wording of Article 61 is, however, not in conformity with the terms of that Article, nor with the intentions of the Diplomatic Conference which adopted the Convention. Article 61, paragraph 1, requires the "permanent disappearance or destruction of an object indispensable for the execution" of the treaty to justify the termination of a treaty on grounds of impossibility of performance. During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties *(Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March-24 May 1968,* doc. A/CONF.39/11, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, 62nd Meeting of the Committee of the Whole, pp. 361-365). Although it was recognized that such situations could lead to a preclusion of the wrongfulness of non-performance by a party of its treaty obligations, the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept.

103. Hungary contended that the essential object of the Treaty — an economic joint investment which was consistent with environmental protection and which was operated by the two contracting parties jointly — had permanently disappeared and that the Treaty had thus become impossible to perform. It is not necessary for the Court to determine whether the term "object" in Article 61 can also be understood to embrace a legal régime as in any event, even if that were the case, it would have to conclude that in this instance that régime had not definitively ceased to exist. The 1977 Treaty — and in particular its Articles 15, 19 and 20 — actually made available to the parties the necessary means to proceed at any time, by negotiation, to the required readjustments between

economic imperatives and ecological imperatives. The Court would add that, if the joint exploitation of the investment was no longer possible, this was originally because Hungary did not carry out most of the works for which it was responsible under the 1977 Treaty; Article 61, paragraph 2, of the Vienna Convention expressly provides that impossibility of performance may not be invoked for the termination of a treaty by a party to that treaty when it results from that party's own breach of an obligation flowing from that treaty.

104. Hungary further argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances. In this respect it specified profound changes of a political nature, the Project's diminishing economic viability, the progress of environmental knowledge and the development of new norms and prescriptions of international environmental law (see paragraph 95 above).
The Court recalls that, in the *Fisheries Jurisdiction* case, it stated that

"Article 62 of the Vienna Convention on the Law of Treaties,... may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances" *(I.C.J. Reports 1973,* p. 63, para. 36).

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the Treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court's view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically altered the extent of the obligations still to be performed. The same holds good for the economic system in force at the time of the conclusion of the 1977 Treaty. Besides, even though the estimated profitability of the Project might have appeared less in 1992 than in 1977, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result.

The Court does not consider that new developments in the state of environmental knowledge and of environmental law can be said to have been completely unforeseen. What is more, the formulation of Articles 15, 19 and 20, designed to accommodate change, made it possible for the parties to take account of such developments and to apply them when implementing those treaty provisions.

The changed circumstances advanced by Hungary are, in the Court's view, not of such a nature, either individually or collectively, that their effect would radically transform the extent of the obligations still to be performed in order to accomplish the Project. A fundamental change of circumstances must have been unforeseen; the existence of the circumstances at the time of the Treaty's conclusion must have constituted an essential basis of the consent of the parties to be bound by the Treaty. The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication moreover that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.

105. The Court will now examine Hungary's argument that it was entitled to terminate the 1977 Treaty on the ground that Czechoslovakia had violated its Articles 15, 19 and 20 (as well as a number of other conventions and rules of general international law); and that the planning, construction and putting into operation of Variant C also amounted to a material breach of the 1977 Treaty.

106. As to that part of Hungary's argument which was based on other treaties and general rules of international law, the Court is of the view that it is only a material breach of the treaty itself, by a State party to that treaty, which entitles the other party to rely on it as a ground for terminating the treaty. The violation of other treaty rules or of rules of general international law may justify the taking of certain measures, including countermeasures, by the injured State, but it does not constitute a ground for termination under the law of treaties.

107. Hungary contended that Czechoslovakia had violated Articles 15, 19 and 20 of the Treaty by refusing to enter into negotiations with Hungary in order to adapt the Joint Contractual Plan to new scientific and legal developments regarding the environment. Articles 15, 19 and 20 oblige the parties jointly to take, on a continuous basis, appropriate measures necessary for the protection of water quality, of nature and of fishing interests.
Articles 15 and 19 expressly provide that the obligations they contain shall be implemented by the means specified in the Joint Contractual Plan. The failure of the parties to agree on those means cannot, on the basis of the record before the Court, be attributed solely to one party. The Court has not found sufficient evidence to conclude that Czechoslovakia had consistently refused to consult with Hungary about the desirability or necessity of measures for the preservation of the environment. The record rather shows that, while both parties indicated, in principle, a willingness to undertake further studies, in practice Czechoslovakia refused to countenance a suspension of the works at Dunakiliti and, later, on Variant C, while Hungary required suspension as a prior condition of environmental investigation because it claimed continuation of the work would prejudice the outcome of negotiations. In this regard it cannot be left out of consideration that Hungary itself, by suspending the works at Nagymaros and Dunakiliti, contributed to the creation of a situation which was not conducive to the conduct of fruitful negotiations.

108. Hungary's main argument for invoking a material breach of the Treaty was the construction and putting into operation of Variant C. As the Court has found in paragraph 79 above, Czechoslovakia violated the Treaty only when it diverted the waters of the Danube into the bypass canal in October 1992. In constructing the works which would lead to the putting into operation of Variant C, Czechoslovakia did not act unlawfully.
In the Court's view, therefore, the notification of termination by Hungary on 19 May 1992 was premature. No breach of the Treaty by Czechoslovakia had yet taken place and consequently Hungary was not entitled to invoke any such breach of the Treaty as a ground for terminating it when it did.

109. In this regard, it should be noted that, according to Hungary's Declaration of 19 May 1992, the termination of the 1977 Treaty was to take effect as from 25 May 1992, that is only six days later. Both Parties agree that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary law, at least generally reflect customary international law and contain certain procedural principles which are based on an obligation to act in good faith. As the Court stated in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (in which case the Vienna Convention did not apply):

"Precisely what periods of time may be involved in the observance of the duties to consult and negotiate, and what period of notice of termination should be given, are matters which necessarily

vary according to the requirements of the particular case. In principle, therefore, it is for the parties in each case to determine the length of those periods by consultation and negotiation in good faith." *(I.C.J. Reports 1980,* p. 96, para. 49.)

The termination of the Treaty by Hungary was to take effect six days after its notification. On neither of these dates had Hungary suffered injury resulting from acts of Czechoslovakia. The Court must therefore confirm its conclusion that Hungary's termination of the Treaty was premature.

110. Nor can the Court overlook that Czechoslovakia committed the internationally wrongful act of putting into operation Variant C as a result of Hungary's own prior wrongful conduct. As was stated by the Permanent Court of International Justice:
"It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him." *(Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No.* 9, p. 31.)

Hungary, by its own conduct, had prejudiced its right to terminate the Treaty; this would still have been the case even if Czechoslovakia, by the time of the purported termination, had violated a provision essential to the accomplishment of the object or purpose of the Treaty.

111. Finally, the Court will address Hungary's claim that it was entitled to terminate the 1977 Treaty because new requirements of international law for the protection of the environment precluded performance of the Treaty.

112. Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus

requires a mutual willingness to discuss in good faith actual and potential environmental risks.

It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" *(I.C.J. Reports 1996,* p. 241, para. 29; see also paragraph 53 above).

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20.

113. The Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project. In such a case, third-party involvement may be helpful and instrumental in finding a solution, provided each of the Parties is flexible in its position.

114. Finally, Hungary maintained that by their conduct both parties had repudiated the Treaty and that a bilateral treaty repudiated by both parties cannot survive. The Court is of the view, however, that although it has found that both Hungary and Czechoslovakia failed to comply with their obligations under the 1977 Treaty, this reciprocal wrongful conduct did not bring the Treaty to an end nor justify its termination. The Court would set a precedent with disturbing implications for treaty relations and the integrity of the rule *pacta sunt servanda* if it were to conclude that a treaty in force between States, which the parties have implemented in considerable measure and at great cost over a period of years, might be unilaterally set aside on grounds of reciprocal noncompliance. It would be otherwise, of course, if the parties decided to terminate the Treaty by mutual consent. But in this case, while Hungary purported to terminate the Treaty, Czechoslovakia consistently resisted this act and declared it to be without legal effect.

115. In the light of the conclusions it has reached above, the Court, in reply to the question put to it in Article 2, paragraph 1 *(c),of* the Special Agreement (see paragraph 89), finds that the notification of termination by Hungary of 19 May 1992 did not have the legal effect of terminating the 1977 Treaty and related instruments.

116. In Article 2, paragraph 2, of the Special Agreement, the Court is requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgment on the questions formulated in paragraph 1. In Article 5 of the Special Agreement the Parties agreed to enter into negotiations on the modalities for the execution of the Judgment immediately after the Court has rendered it.

117. The Court must first turn to the question whether Slovakia became a party to the 1977 Treaty as successor to Czechoslovakia. As an alternative argument, Hungary contended that, even if the Treaty survived the notification of termination, in any event it ceased to be in force as a treaty on 31 December 1992, as a result of the "disappearance of one of the parties". On that date Czechoslovakia ceased to exist as a legal entity, and on 1 January 1993 the Czech Republic and the Slovak Republic came into existence.

118. According to Hungary, "There is no rule of international law which provides for automatic succession to bilateral treaties on the disappearance of a party" and such a treaty will not survive unless another State succeeds to it by express agreement between that State and the remaining party. While the second paragraph of the Preamble to the Special Agreement recites that
"the Slovak Republic is one of the two successor States of the Czech and Slovak Federal Republic and the sole successor State in respect of rights and obligations relating to the Gabčikovo-Nagymaros Project",

Hungary sought to distinguish between, on the one hand, rights and obligations such as "continuing property rights" under the 1977 Treaty, and, on the other hand, the treaty itself. It argued that, during the negotiations leading to signature of the Special Agreement, Slovakia had proposed a text in which it would have been expressly recognized "as the successor to the Government of the CSFR" with regard to the 1977 Treaty, but that Hungary had rejected that formulation. It contended that it had never agreed to accept Slovakia as successor to the 1977 Treaty. Hungary referred to diplomatic exchanges in which the two Parties had each submitted to the other lists of those bilateral treaties which they respectively wished should continue in force between them, for negotiation on a case-by-case basis; and Hungary emphasized that no agreement was ever reached with regard to the 1977 Treaty.

119. Hungary claimed that there was no rule of succession which could operate in the present case to override the absence of consent.
Referring to Article 34 of the Vienna Convention of 23 August 1978 on Succession of States in respect of Treaties, in which "a rule of automatic succession to all treaties is provided for", based on the principle of continuity, Hungary argued not only that it never signed or ratified the Convention, but that the "concept of automatic succession" contained in that Article was not and is not, and has never been accepted as, a statement of general international law.

Hungary further submitted that the 1977 Treaty did not create "obligations and rights... relating to the régime of a boundary" within the meaning of Article 11 of that Convention, and noted that the existing course of the boundary was unaffected by the Treaty. It also denied that the Treaty was a "localized" treaty, or that it created rights "considered as attaching to [the] territory" within the meaning of Article 12 of the 1978 Convention, which would, as such, be unaffected by a succession of States. The 1977 Treaty was, Hungary insisted, simply a joint investment. Hungary's conclusion was that there is no basis on which the Treaty could have survived the disappearance of Czechoslovakia so as to be binding as between itself and Slovakia.

120. According to Slovakia, the 1977 Treaty, which was not lawfully terminated by Hungary's notification in May 1992, remains in force between itself, as successor State, and Hungary.
Slovakia acknowledged that there was no agreement on succession to the Treaty between itself and Hungary. It relied instead, in the first place, on the "general rule of continuity which applies in the case of dissolution"; it argued, secondly, that the Treaty is one "attaching to [the] territory" within the meaning of Article 12 of the 1978 Vienna Convention, and that it contains provisions relating to a boundary.

121. In support of its first argument Slovakia cited Article 34 of the 1978 Vienna Convention, which it

claimed is a statement of customary international law, and which imposes the principle of automatic succession as the rule applicable in the case of dissolution of a State where the predecessor State has ceased to exist. Slovakia maintained that State practice in cases of dissolution tends to support continuity as the rule to be followed with regard to bilateral treaties. Slovakia having succeeded to part of the territory of the former Czechoslovakia, this would be the rule applicable in the present case.

122. Slovakia's second argument rests on "the principle of *ipso jure* continuity of treaties of a territorial or localized character". This rule, Slovakia said, is embodied in Article 12 of the 1978 Convention, which in part provides as follows:

"Article 12

Other Territorial Regimes

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;

(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory."

According to Slovakia, "[this] article [too] can be considered to be one of those provisions of the Vienna Convention that represent the codification of customary international law". The 1977 Treaty is said to fall within its scope because of its "specific characteristics... which place it in the category of treaties of a localized or territorial character". Slovakia also described the Treaty as one "which contains boundary provisions and lays down a specific territorial régime" which operates in the interest of all Danube riparian States, and as "a dispositive treaty, creating rights *in rem,* independently of the legal personality of its original signatories". Here, Slovakia relied on the recognition by the International Law Commission of the existence of a "special rule" whereby treaties "intended to establish an objective régime" must be considered as binding on a successor State *(Official Records of the United Nations Conference on the Succession of States in respect of Treaties,* Vol. III, doc. A/CONF.80/16/ Add.2, p. 34). Thus, in Slovakia's view, the 1977 Treaty was not one which could have been terminated through the disappearance of one of the original parties.

123. The Court does not find it necessary for the purposes of the present case to enter into a discussion of whether or not Article 34 of the 1978 Convention reflects the state of customary international law. More relevant to its present analysis is the particular nature and character of the 1977 Treaty. An examination of this Treaty confirms that, aside from its undoubted nature as a joint investment, its major elements were the proposed construction and joint operation of a large, integrated and indivisible complex of structures and installations on specific parts of the respective territories of Hungary and Czechoslovakia along the Danube. The Treaty also established the navigational régime for an important sector of an international waterway, in particular the relocation of the main international shipping lane to the bypass canal. In so doing, it inescapably created a situation in which the interests of other users of the Danube were affected. Furthermore, the interests of third States were expressly acknowledged in Article 18, whereby the parties undertook to ensure "uninterrupted and safe navigation on the international fairway" in accordance with their

obligations under the Convention of 18 August 1948 concerning the Régime of Navigation on the Danube.

In its Commentary on the Draft Articles on Succession of States in respect of Treaties, adopted at its twenty-sixth session, the International Law Commission identified "treaties of a territorial character" as having been regarded both in traditional doctrine and in modern opinion as unaffected by a succession of States *(Official Records of the United Nations Conference on the Succession of States in respect of Treaties,* Vol. III, doc. A/CONF.80/16/Add.2, p. 27, para. 2). The draft text of Article 12, which reflects this principle, was subsequently adopted unchanged in the 1978 Vienna Convention. The Court considers that Article 12 reflects a rule of customary international law; it notes that neither of the Parties disputed this. Moreover, the Commission indicated that "treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties" *(ibid.,* p. 33, para. 26). The Court observes that Article 12, in providing only, without reference to the treaty itself, that rights and obligations of a territorial character established by a treaty are unaffected by a succession of States, appears to lend support to the position of Hungary rather than of Slovakia. However the Court concludes that this formulation was devised rather to take account of the fact that, in many cases, treaties which had established boundaries or territorial régimes were no longer in force *(ibid.,* pp. 26-37). Those that remained in force would nonetheless bind a successor State.

Taking all these factors into account, the Court finds that the content of the 1977 Treaty indicates that it must be regarded as establishing a territorial régime within the meaning of Article 12 of the 1978 Vienna Convention. It created rights and obligations "attaching to" the parts of the Danube to which it relates; thus the Treaty itself cannot be affected by a succession of States. The Court therefore concludes that the 1977 Treaty became binding upon Slovakia on 1 January 1993.

124. It might be added that Slovakia also contended that, while still a constituent part of Czechoslovakia, it played a role in the development of the Project, as it did later, in the most critical phase of negotiations with Hungary about the fate of the Project. The evidence shows that the Slovak Government passed resolutions prior to the signing of the 1977 Treaty in preparation for its implementation; and again, after signature, expressing its support for the Treaty. It was the Slovak Prime Minister who attended the meeting held in Budapest on 22 April 1991 as the Plenipotentiary of the Federal Government to discuss questions arising out of the Project. It was his successor as Prime Minister who notified his Hungarian counterpart by letter on 30 July 1991 of the decision of the Government of the Slovak Republic, as well as of the Government of the Czech and Slovak Federal Republic, to proceed with the "provisional solution" (see paragraph 63 above); and who wrote again on 18 December 1991 to the Hungarian Minister without Portfolio, renewing an earlier suggestion that a joint commission be set up under the auspices of the European Communities to consider possible solutions. The Slovak Prime Minister also wrote to the Hungarian Prime Minister in May 1992 on the subject of the decision taken by the Hungarian Government to terminate the Treaty, informing him of resolutions passed by the Slovak Government in response.

It is not necessary, in the light of the conclusions reached in paragraph 123 above, for the Court to determine whether there are legal consequences to be drawn from the prominent part thus played by the Slovak Republic. Its role does, however, deserve mention.

125. The Court now turns to the other legal consequences arising from its Judgment.

As to this, Hungary argued that future relations between the Parties, as far as Variant C is concerned, are not governed by the 1977 Treaty. It claims that it is entitled, pursuant to the Convention of 1976 on the Regulation of Water Management Issues of Boundary Waters, to "50% of the natural flow of the Danube at the point at which it crosses the boundary below Cunovo" and considers that the Parties

"are obliged to enter into negotiations in order to produce the result that the water conditions along the area from below Cunovo to below the confluence at Sap become jointly defined water conditions as required by Article 3 *(a)* of the 1976 Convention".

Hungary moreover indicated that any mutually accepted long-term discharge régime must be "capable of avoiding damage, including especially damage to biodiversity prohibited by the [1992 Rio Convention on Biological Diversity]". It added that "a joint environmental impact assessment of the region and of the future of Variant C structures in the context of the sustainable development of the region" should be carried out.

126. Hungary also raised the question of financial accountability for the failure of the original project and stated that both Parties accept the fact that the other has "proprietary and financial interests in the residues of the original Project and that an accounting has to be carried out". Furthermore, it noted that:
"Other elements of damage associated with Variant C on Hungarian territory also have to be brought into the accounting..., as well as electricity production since the diversion",

and that: "The overall situation is a complex one, and it may be most easily resolved by some form of lump sum settlement."

127. Hungary stated that Slovakia had incurred international responsibility and should make reparation for the damage caused to Hungary by the operation of Variant C. In that connection, it referred, in the context of reparation of the damage to the environment, to the rule of *restitutio in integrum,* and called for the re-establishment of "joint control by the two States over the installations maintained as they are now", and the "re-establishment of the flow of [the] waters to the level at which it stood prior to the unlawful diversion of the river". It also referred to reparation of the damage to the fauna, the flora, the soil, the sub-soil, the groundwater and the aquifer, the damages suffered by the Hungarian population on account of the increase in the uncertainties weighing on its future *(pretium doloris),* and the damage arising from the unlawful use, in order to divert the Danube, of installations over which the two Parties exercised joint ownership.

Lastly, Hungary called for the "cessation of the continuous unlawful acts" and a "guarantee that the same actions will not be repeated", and asked the Court to order "the permanent suspension of the operation of Variant C".

128. Slovakia argued for its part that Hungary should put an end to its unlawful conduct and cease to impede the application of the 1977 Treaty, taking account of its "flexibility and of the important possibilities of development for which it provides, or even of such amendments as might be made to it by agreement between the Parties, further to future negotiations". It stated that joint operations could resume on a basis jointly agreed upon and emphasized the following:

"whether Nagymaros is built as originally planned, or built elsewhere in a different form, or, indeed, not built at all, is a question to be decided by the Parties some time in the future.

...

Provided the bypass canal and the Gabčikovo Power-station and Locks — both part of the original Treaty, and not part of Variant C — remain operational and economically viable and efficient, Slovakia is prepared to negotiate over the future roles of Dunakiliti and Cunovo, bearing Nagymaros in mind."

It indicated that the Gabčikovo power plant would not operate in peak mode "if the evidence of environmental damage [was] clear and accepted by both Parties". Slovakia noted that the Parties appeared to agree that an accounting should be undertaken "so that, guided by the Court's findings on responsibility, the Parties can try to reach a global settlement". It added that the Parties would have to agree on how the sums due are to be paid.

129. Slovakia stated that Hungary must make reparation for the deleterious consequences of its failures to comply with its obligations, "whether they relate to its unlawful suspensions and abandonments of works or to its formal repudiation of the Treaty as from May 1992", and that compensation should take the form of a *restitutio in integrum.* It indicated that "Unless the Parties come to some other arrangement by concluding an agreement, *restitutio in integrum* ought to take the form of a *return* by Hungary, *at a future time,* to its obligations under the Treaty" and that "For compensation to be 'full'..., to 'wipe out all the consequences of the illegal act'..., a payment of compensation must... *be added* to the *restitutio....*" Slovakia claims compensation which must include both interest and loss of profits and should cover the following heads of damage, which it offers by way of guidance:

(1) Losses caused to Slovakia in the Gabčikovo sector: costs incurred from 1990 to 1992 by Czechoslovakia in protecting the structures of the G/N project and adjacent areas; the cost of maintaining the old bed of the River Danube pending the availability of the new navigation canal, from 1990 to 1992; losses to the Czechoslovak navigation authorities due to the unavailability of the bypass canal from 1990 to 1992; construction costs of Variant C (1990-1992).

(2) Losses caused to Slovakia in the Nagymaros sector: losses in the field of navigation and flood protection incurred since 1992 by Slovakia due to the failure of Hungary to proceed with the works.

(3) Loss of electricity production.

Slovakia also calls for Hungary to "give the appropriate guarantees that it will abstain from preventing the application of the Treaty and the continuous operation of the system". It argued from that standpoint that it is entitled "to be given a formal assurance that the internationally wrongful acts of Hungary will not recur", and it added that "the maintenance of the closure of the Danube at Cunovo constitutes a guarantee of that kind", unless Hungary gives an equivalent guarantee "within the framework of the negotiations that are to take place between the Parties".

130. The Court observes that the part of its Judgment which answers the questions in Article 2, paragraph 1, of the Special Agreement has a declaratory character. It deals with the *past* conduct of the Parties and determines the lawfulness or unlawfulness of that conduct between 1989 and 1992

as well as its effects on the existence of the Treaty.

131. Now the Court has, on the basis of the foregoing findings, to determine what the *future* conduct of the Parties should be. This part of the Judgment is prescriptive rather than declaratory because it determines what the rights and obligations of the Parties are. The Parties will have to seek agreement on the modalities of the execution of the Judgment in the light of this determination, as they agreed to do in Article 5 of the Special Agreement.

132. In this regard it is of cardinal importance that the Court has found that the 1977 Treaty is still in force and consequently governs the relationship between the Parties. That relationship is also determined by the rules of other relevant conventions to which the two States are party, by the rules of general international law and, in this particular case, by the rules of State responsibility; but it is governed, above all, by the applicable rules of the 1977 Treaty as a *lex specialis.*

133. The Court, however, cannot disregard the fact that the Treaty has not been fully implemented by either party for years, and indeed that their acts of commission and omission have contributed to creating the factual situation that now exists. Nor can it overlook that factual situation — or the practical possibilities and impossibilities to which it gives rise — when deciding on the legal requirements for the future conduct of the Parties.
This does not mean that facts — in this case facts which flow from wrongful conduct — determine the law. The principle *ex injuria jus non oritur* is sustained by the Court's finding that the legal relationship created by the 1977 Treaty is preserved and cannot in this case be treated as voided by unlawful conduct.

What is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as that is feasible. For it is only then that the irregular state of affairs which exists as the result of the failure of both Parties to comply with their treaty obligations can be remedied.

134. What might have been a correct application of the law in 1989 or 1992, if the case had been before the Court then, could be a miscarriage of justice if prescribed in 1997. The Court cannot ignore the fact that the Gabčikovo power plant has been in operation for nearly five years, that the bypass canal which feeds the plant receives its water from a significantly smaller reservoir formed by a dam which is built not at Dunakiliti but at Cunovo, and that the plant is operated in a run-of-the-river mode and not in a peak hour mode as originally foreseen. Equally, the Court cannot ignore the fact that, not only has Nagymaros not been built, but that, with the effective discarding by both Parties of peak power operation, there is no longer any point in building it.

135. As the Court has already had occasion to point out, the 1977 Treaty was not only a joint investment project for the production of energy, but it was designed to serve other objectives as well : the improvement of the navigability of the Danube, flood control and regulation of ice-discharge, and the protection of the natural environment. None of these objectives has been given absolute priority over the other, in spite of the emphasis which is given in the Treaty to the construction of a System of Locks for the production of energy. None of them has lost its importance. In order to achieve these objectives the parties accepted obligations of conduct, obligations of performance, and

obligations of result.

136. It could be said that that part of the obligations of performance which related to the construction of the System of Locks — in so far as they were not yet implemented before 1992 — have been overtaken by events. It would be an administration of the law altogether out of touch with reality if the Court were to order those obligations to be fully reinstated and the works at Cunovo to be demolished when the objectives of the Treaty can be adequately served by the existing structures.

137. Whether this is indeed the case is, first and foremost, for the Parties to decide. Under the 1977 Treaty its several objectives must be attained in an integrated and consolidated programme, to be developed in the Joint Contractual Plan. The Joint Contractual Plan was, until 1989, adapted and amended frequently to better fit the wishes of the parties. This Plan was also expressly described as the means to achieve the objectives of maintenance of water quality and protection of the environment.

138. The 1977 Treaty never laid down a rigid system, albeit that the construction of a system of locks at Gabčikovo and Nagymaros was prescribed by the Treaty itself. In this respect, however, the subsequent positions adopted by the parties should be taken into consideration. Not only did Hungary insist on terminating construction at Nagymaros, but Czechoslovakia stated, on various occasions in the course of negotiations, that it was willing to consider a limitation or even exclusion of operation in peak hour mode. In the latter case the construction of the Nagymaros dam would have become pointless. The explicit terms of the Treaty itself were therefore in practice acknowledged by the parties to be negotiable.

139. The Court is of the opinion that the Parties are under a legal obligation, during the negotiations to be held by virtue of Article 5 of the Special Agreement, to consider, within the context of the 1977 Treaty, in what way the multiple objectives of the Treaty can best be served, keeping in mind that all of them should be fulfilled.

140. It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the Court by the Parties — even if their conclusions are often contradictory — provide abundant evidence that this impact and these implications are considerable.
In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing — and thus necessarily evolving — obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind — for present and future generations — of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during

the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčikovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.

141. It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties. It is for the Parties themselves to find an agreed solution that takes account of the objectives of the Treaty, which must be pursued in a joint and integrated way, as well as the norms of international environmental law and the principles of the law of international watercourses. The Court will recall in this context that, as it said in the *North Sea Continental Shelf* cases:

"[the Parties] are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it" *(I.C.J. Reports 1969,* p. 47, para. 85).

142. What is required in the present case by the rule *pacta sunt servanda,* as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty.

Article 26 combines two elements, which are of equal importance. It provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.

143. During this dispute both Parties have called upon the assistance of the Commission of the European Communities. Because of the diametrically opposed positions the Parties took with regard to the required outcome of the trilateral talks which were envisaged, those talks did not succeed. When, after the present Judgment is given, bilateral negotiations without pre-conditions are held, both Parties can profit from the assistance and expertise of a third party. The readiness of the Parties to accept such assistance would be evidence of the good faith with which they conduct bilateral negotiations in order to give effect to the Judgment of the Court.

144. The 1977 Treaty not only contains a joint investment programme, it also establishes a régime. According to the Treaty, the main structures of the System of Locks are the joint property of the Parties; their operation will take the form of a co-ordinated single unit; and the benefits of the project shall be equally shared.
Since the Court has found that the Treaty is still in force and that, under its terms, the joint régime

is a basic element, it considers that, unless the Parties agree otherwise, such a régime should be restored.

145. Article 10, paragraph 1, of the Treaty states that works of the System of Locks constituting the joint property of the contracting parties shall be operated, as a co-ordinated single unit and in accordance with jointly agreed operating and operational procedures, by the authorized operating agency of the contracting party in whose territory the works are built. Paragraph 2 of that Article states that works on the System of Locks owned by one of the contracting parties shall be independently operated or maintained by the agencies of that contracting party in the jointly prescribed manner. The Court is of the opinion that the works at Cunovo should become a jointly operated unit within the meaning of Article 10, paragraph 1, in view of their pivotal role in the operation of what remains of the Project and for the water-management régime. The dam at Cunovo has taken over the role which was originally destined for the works at Dunakiliti, and therefore should have a similar status.

146. The Court also concludes that Variant C, which it considers operates in a manner incompatible with the Treaty, should be made to conform to it. By associating Hungary, on an equal footing, in its operation, management and benefits, Variant C will be transformed from a *de facto* status into a treaty-based régime.

It appears from various parts of the record that, given the current state of information before the Court, Variant C could be made to function in such a way as to accommodate both the economic operation of the system of electricity generation and the satisfaction of essential environmental concerns.

Regularization of Variant C by making it part of a single and indivisible operational system of works also appears necessary to ensure that Article 9 of the Treaty, which provides that the contracting parties shall participate in the use and in the benefits of the System of Locks in equal measure, will again become effective.

147. Re-establishment of the joint régime will also reflect in an optimal way the concept of common utilization of shared water resources for the achievement of the several objectives mentioned in the Treaty, in concordance with Article 5, paragraph 2, of the Convention on the Law of the Non-Navigational Uses of International Watercourses, according to which :
"Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention." (General Assembly doc. A/51/869 of 11 April 1997.)

148. Thus far the Court has indicated what in its view should be the effects of its finding that the 1977 Treaty is still in force. Now the Court will turn to the legal consequences of the internationally wrongful acts committed by the Parties.

149. The Permanent Court of International Justice stated in its Judgment of 13 September 1928 in the case

concerning the *Factory at Chorzów:*

"reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" *(P.C.I.J., Series A, No. 17,* p. 47).

150. Reparation must, "as far as possible", wipe out all the consequences of the illegal act. In this case, the consequences of the wrongful acts of both Parties will be wiped out "as far as possible" if they resume their co-operation in the utilization of the shared water resources of the Danube, and if the multi-purpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner. What it is possible for the Parties to do is to re-establish co-operative administration of what remains of the Project. To that end, it is open to them to agree to maintain the works at Cunovo, with changes in the mode of operation in respect of the allocation of water and electricity, and not to build works at Nagymaros.

151. The Court has been asked by both Parties to determine the consequences of the Judgment as they bear upon payment of damages. According to the Preamble to the Special Agreement, the Parties agreed that Slovakia is the sole successor State of Czechoslovakia in respect of rights and obligations relating to the Gabčikovo-Nagymaros Project. Slovakia thus may be liable to pay compensation not only for its own wrongful conduct but also for that of Czechoslovakia, and it is entitled to be compensated for the damage sustained by Czechoslovakia as well as by itself as a result of the wrongful conduct of Hungary.

152. The Court has not been asked at this stage to determine the quantum of damages due, but to indicate on what basis they should be paid. Both Parties claimed to have suffered considerable financial losses and both claim pecuniary compensation for them.
It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it. In the present Judgment, the Court has concluded that both Parties committed internationally wrongful acts, and it has noted that those acts gave rise to the damage sustained by the Parties; consequently, Hungary and Slovakia are both under an obligation to pay compensation and are both entitled to obtain compensation.

Slovakia is accordingly entitled to compensation for the damage suffered by Czechoslovakia as well as by itself as a result of Hungary's decision to suspend and subsequently abandon the works at Nagymaros and Dunakiliti, as those actions caused the postponement of the putting into operation of the Gabčikovo power plant, and changes in its mode of operation once in service.

Hungary is entitled to compensation for the damage sustained as a result of the diversion of the Danube, since Czechoslovakia, by putting into operation Variant C, and Slovakia, in maintaining it in service, deprived Hungary of its rightful part in the shared water resources, and exploited those resources essentially for their own benefit.

153. Given the fact, however, that there have been intersecting wrongs by both Parties, the Court wishes to observe that the issue of compensation could satisfactorily be resolved in the framework of an

overall settlement if each of the Parties were to renounce or cancel all financial claims and counter-claims.

154. At the same time, the Court wishes to point out that the settlement of accounts for the construction of the works is different from the issue of compensation, and must be resolved in accordance with the 1977 Treaty and related instruments. If Hungary is to share in the operation and benefits of the Cunovo complex, it must pay a proportionate share of the building and running costs.

155. For these reasons,
The Court,

(1) Having regard to Article 2, paragraph 1, of the Special Agreement,

A. By fourteen votes to one,

Finds that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčikovo Project for which the Treaty of 16 September 1977 and related instruments attributed responsibility to it;

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski ;

against: *Judge* Herczegh;

B. By nine votes to six,

Finds that Czechoslovakia was entitled to proceed, in November 1991, to the "provisional solution" as described in the terms of the Special Agreement;

in favour: *Vice-President* Weeramantry; *Judges* Oda, Guillaume, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski ;

against: *President* Schwebel; *Judges* Bedjaoui, Ranjeva, Herczegh, Fleischhauer, Rezek;

C. By ten votes to five,

Finds that Czechoslovakia was not entitled to put into operation, from October 1992, this "provisional solution";

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Kooijmans, Rezek;

against: *Judges* Oda, Koroma, Vereshchetin, Parra-Aranguren; *Judge* ad hoc Skubiszewski;

D. By eleven votes to four,

Finds that the notification, on 19 May 1992, of the termination of the Treaty of 16 September 1977 and related instruments by Hungary did not have the legal effect of terminating them;

in favour: *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans; *Judge* ad hoc Skubiszewski;

against: *President* Schwebel; *Judges* Herczegh, Fleischhauer, Rezek;

(2) Having regard to Article 2, paragraph 2, and Article 5 of the Special Agreement,

A. By twelve votes to three,

Finds that Slovakia, as successor to Czechoslovakia, became a party to the Treaty of 16 September 1977 as from 1 January 1993;

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans: *Judge* ad hoc Skubiszewski;

against: *Judges* Herczegh, Fleischhauer, Rezek;

B. By thirteen votes to two,

Finds that Hungary and Slovakia must negotiate in good faith in the light of the prevailing situation, and must take all necessary measures to ensure the achievement of the objectives of the Treaty of 16 September 1977, in accordance with such modalities as they may agree upon;

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

against: *Judges* Herczegh, Fleischhauer;

C. By thirteen votes to two,

Finds that, unless the Parties otherwise agree, a joint operational régime must be established in accordance with the Treaty of 16 September 1977;

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

against: *Judges* Herczegh, Fleischhauer;

D. By twelve votes to three,

Finds that, unless the Parties otherwise agree, Hungary shall compensate Slovakia for the damage sustained by Czechoslovakia and by Slovakia on account of the suspension and abandonment by Hungary of works for which it was responsible; and Slovakia shall compensate Hungary for the damage it has sustained on account of the putting into operation of the "provisional solution" by Czechoslovakia and its maintenance in service by Slovakia;

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

against: *Judges* Oda, Koroma, Vereshchetin;

E. By thirteen votes to two,

Finds that the settlement of accounts for the construction and operation of the works must be effected in accordance with the relevant provisions of the Treaty of 16 September 1977 and related instruments, taking due account of such measures as will have been taken by the Parties in application of points 2 B and 2 C of the present operative paragraph.

in favour: *President* Schwebel; *Vice-President* Weeramantry; *Judges* Oda, Bedjaoui, Guillaume, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc Skubiszewski;

against: *Judges* Herczegh, Fleischhauer.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of September, one thousand nine hundred and ninety-seven, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Republic of Hungary and the Government of the Slovak Republic, respectively.

President Schwebel and Judge Rezek append declarations to the Judgment of the Court.
Vice-President Weeramantry and Judges Bedjaoui and Koroma append separate opinions to the Judgment of the Court.

Judges Oda, Ranjeva, Herczegh, Fleischhauer, Vereshchetin and Parra-Aranguren and Judge *ad hoc* Skubiszewski append dissenting opinions to the Judgment of the Court.

20	*Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395

Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395

Date:	2012-03-22
File number:	33594
Other citations:	[2012] ACS no 12 — 211 ACWS (3d) 852 — [2012] SCJ No 12 (QL) — EYB 2012-203967 — JE 2012-672 — 255 CRR (2d) 289 — 34 Admin LR (5th) 1 — [2012] EXP 1231 — AZ-50841558 — 343 DLR (4th) 193 — 428 NR 146
Citation:	Doré v. Barreau du Québec, 2012 SCC 12 (CanLII), [2012] 1 SCR 395, <https://canlii.ca/t/fqn88>, retrieved on 2022-02-27
Most recent unfavourable mention:	Groia v. Law Society of Upper Canada, 2018 SCC 27 (CanLII), [2018] 1 SCR 772 […] Applied: Dunsmuir v. New Brunswick , 2008 SCC 9 , [2008] 1 S.C.R. 190; distinguished: Law Society of New Brunswick v. Ryan , 2003 SCC 20 , [2003] 1 S.C.R. 247 ; Doré v. Barreau du Québec , **2012 SCC 12 , [2012] 1 S.C.R. 395** ; referred to: McLean v. British Columbia (Securities Commission) , 2013 SCC 67 , [2013] 3 S.C.R. 895 […]

SUPREME COURT OF CANADA

CITATION: Doré *v.* Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

DATE: 20120322
DOCKET: 33594

BETWEEN:

Gilles Doré
Appellant
and
Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec
Respondents
- and -
Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 72) Abella J. (McLachlin C.J. and Binnie, LeBel, Fish, Rothstein and Cromwell JJ. concurring)

Doré *v.* Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

Gilles Doré *Appellant*

v.

Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec, Tribunal des professions and Attorney General of Quebec *Respondents*

and

Federation of Law Societies of Canada, Canadian Civil Liberties Association and Young Bar Association of Montreal *Interveners*

Indexed as: Doré *v.* Barreau du Québec

2012 SCC 12

File No.: 33594.

2011: January 26; 2012: March 22.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Administrative law — Judicial review — Standard of review — Disciplinary council — Lawyer challenging constitutionality of council's decision — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether framework developed in R. v. Oakes appropriate to determine if discretionary administrative decisions comply with Canadian Charter of Rights and Freedoms.

Law of professions — Discipline — Barristers and solicitors — Lawyer writing private letter to judge and criticizing him — Disciplinary council finding lawyer in breach of duty to behave with objectivity, moderation and dignity and reprimanding him — Whether council properly balanced relevant Charter values with statutory objectives — Whether decision reasonable — Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, art. 2.03.

D appeared before a judge of the Superior Court of Quebec on behalf of a client. In the course of D's argument, the judge criticized D. In his written reasons rejecting D's application, the judge levied further criticism, accusing D of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. D then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.

The Assistant Syndic of the Barreau du Québec filed a complaint against D based on that letter alleging that D had violated art. 2.03 of the *Code of ethics of advocates*, which states that the conduct of advocates "must bear the stamp of objectivity, moderation and dignity". The Disciplinary Council of the Barreau du Québec found

that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge's conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it. The Council rejected D's argument that art. 2.03 violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, finding that the limitation on freedom of expression was reasonable. Based on the seriousness of D's conduct, the Council reprimanded D and suspended his ability to practice law for 21 days. On appeal to the Tribunal des professions, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression. The Tribunal found that D had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

Before the Quebec Court of Appeal, D no longer appealed the actual sanction of 21 days, challenging only the decision to reprimand him as a violation of the *Charter*. The Court of Appeal applied a full *Oakes* analysis under s. 1 of the *Charter* and upheld the reprimand. It found that D's letter had limited importance compared to the values underlying freedom of expression, that the Council's decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

Held: The appeal from the result should be dismissed.

To determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*'s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.

When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Here, the decision to suspend D for 21 days was not before the Court. The only issue was whether the Council's decision to reprimand D reflected a proportionate balancing of the lawyer's expressive rights with its statutory mandate to ensure that lawyers behave with "objectivity, moderation and dignity" in accordance with art. 2.03 of the *Code of ethics*. In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. The fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not, however, argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. Such criticism, even when it is expressed vigorously, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, D's letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not.

In light of the excessive degree of vituperation in the letter's context and tone, the Council's decision that D's letter warranted a reprimand represented a proportional balancing of D's expressive rights with the statutory objective of ensuring that lawyers behave with "objectivity, moderation and dignity". The decision is, as a result, a reasonable one.

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Discussed: *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; **referred to:** *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *R. v. Lanthier*, 2001 CanLII 9351; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *R. v. Daviault*, 1994 CanLII 61

(SCC), [1994] 3 S.C.R. 63; *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933; *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570; *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75; *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199; *R. v. Felderhof* (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481; *R. v. Kopyto* (1987), 1987 CanLII 176 (ON CA), 62 O.R. (2d) 449; *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74.

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APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Dufresne and Léger JJ.A.), 2010 QCCA 24, [2010] R.J.Q. 77, 326 D.L.R. (4th) 749, [2010] Q.J. No. 88 (QL), 2010 CarswellQue 13368, affirming a decision of Déziel J., 2008 QCCS 2450 (CanLII), [2008] J.Q. n^{o} 5222 (QL), 2008 CarswellQue 5285, dismissing an application for judicial review of a decision of the Tribunal des professions, 2007 QCTP 152 (CanLII), [2007] D.T.P.Q. n^{o} 152 (QL). Appeal dismissed.

Sophie Dormeau and *Sophie Préfontaine*, for the appellant.

Claude G. Leduc and *Luce Bastien*, for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec.

Dominique A. Jobin and *Noémi Potvin*, for the respondents Tribunal des professions and the Attorney General of Quebec.

Babak Barin and *Frédéric Côté*, for the intervener the Federation of Law Societies of Canada.

David Grossman, Sylvain Lussier, *Julien Morissette* and *Annie Gallant*, for the intervener the Canadian Civil Liberties Association.

Mathieu Bouchard and *Audrey Boctor*, for the intervener the Young Bar Association of Montreal.

The judgment of the Court was delivered by

[1] ABELLA J. — The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.

[2] The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian Charter of Rights and Freedoms*.

[3] This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law's violation of the *Charter* as a "reasonable limit" under s. 1.

[4] It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?

[5] We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.

[6] In assessing whether a law violates the *Charter*, we are balancing the government's pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are

looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

[7] As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.

[8] In this case, the discipline committee's decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with "objectivity, moderation and dignity" with the lawyer's expressive rights. It is, as a result, a reasonable one.

Background

[9] Gilles Doré was counsel for Daniel Lanthier in criminal proceedings. On June 18 and 19, 2001, Mr. Doré appeared before Boilard J. in the Superior Court of Quebec seeking a stay of proceedings or, in the alternative, the release of his client on bail. In the course of Mr. Doré's argument, Justice Boilard said about him that [TRANSLATION] "an insolent lawyer is rarely of use to his client". In his written reasons rejecting Mr. Doré's application on June 21, 2001, Boilard J. levied further criticism (*R. v. Lanthier*, 2001 CanLII 9351). He accused Mr. Doré of [TRANSLATION] "bombastic rhetoric and hyperbole" and said that the court must "put aside" Mr. Doré's "impudence". Justice Boilard characterized Mr. Doré's request for a stay as "totally ridiculous" and one of his arguments as "idle quibbling". Finally, he said that "fixated on or obsessed with his narrow vision of reality, which is not consistent with the facts, Mr. Doré has done nothing to help his client discharge his burden".

[10] On June 21, 2001, Mr. Doré wrote a private letter to Justice Boilard, stating:

> [TRANSLATION]
>
> WITHOUT PREJUDICE OR ADMISSION
>
> Sir,
>
> I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.
>
> Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.
>
> If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well.
>
> Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.
>
> Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.
>
> I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

> Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.
>
> Sincerely,
>
> Gilles Doré
>
> P.S. As this letter is purely personal, I see no need to distribute it.
>
> (C.A. judgment, 2010 QCCA 24, 326 D.L.R. (4th) 749, at para. 5)

[11] The next day, June 22, 2001, Mr. Doré wrote to Chief Justice Lyse Lemieux, with a copy to Justice Boilard. He made it clear that he was not filing a complaint with her against Justice Boilard. Instead, Mr. Doré respectfully requested that he not be required to appear before Justice Boilard in the future since he was concerned that he could not properly represent his clients before him.

[12] On July 10, 2001, Mr. Doré complained to the Canadian Judicial Council about Justice Boilard's conduct. On July 13, 2001, Chief Justice Lemieux sent a copy of the letter Mr. Doré had sent to Justice Boilard to the Syndic du Barreau, the body that disciplines lawyers in Quebec.

[13] In March 2002, the Assistant Syndic filed a complaint against Mr. Doré based on his letter to Justice Boilard. The complaint alleged that Mr. Doré had violated both art. 2.03 of the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, and Mr. Doré's oath of office. Article 2.03 stated: "The conduct of an advocate must bear the stamp of objectivity, moderation and dignity."

[14] In the interval between the filing of the Assistant Syndic's complaint against Mr. Doré and the actual proceedings against him, a committee of judges appointed by the Judicial Council to look into Mr. Doré's complaint communicated its conclusions to Mr. Doré and Justice Boilard in letters sent on July 15, 2002. The committee found that Justice Boilard had made [TRANSLATION] "unjustified derogatory remarks to Mr. Doré" stating, in part:

> [TRANSLATION] . . . to use the words "bombastic rhetoric and hyperbole" and "impudence" in referring to counsel arguing a case before you, quite clearly in good faith, is unnecessarily insulting. To reply to counsel who submits that you have not allowed him to argue his case "that an insolent lawyer is rarely of use to his client" not only is unjustified in the circumstances, but could tarnish counsel's professional reputation in the eyes of his client, his peers and the public. To say to counsel arguing a case before you that "I have the impression this is going to be tiresome" is to gratuitously degrade him. To describe a procedure before the court as "totally ridiculous" is unnecessarily humiliating. It is the panel's opinion that such comments would seem to show contempt for counsel not only as an individual but also as a professional.
>
> The evidence reveals a flagrant lack of respect for an officer of the court, namely Mr. Doré, who was nevertheless at all times respectful to the court. The evidence also shows signs of impatience on your part that are surprising in light of every judge's duty to listen calmly to the parties and to counsel. It is the panel's opinion that in so abusing your power as a judge, you not only tarnished your image as a dispenser of justice, but also undermined the judiciary, the image of which has unfortunately been diminished. The panel reminds you that your independence and your authority as a judge do not exempt you from respecting the dignity of every individual who argues a case before you. Dispensing justice while gratuitously insulting counsel is befitting neither for the judge nor for the judiciary.
>
> Having also read the judgments of the Quebec Court of Appeal in *R. v. Proulx*, *R. v. Bisson* and *R. v. Callochia*, the panel observed that you tend to use your platform to unjustly denigrate counsel appearing before you. The transcript of the hearing of April 9, 2002 in *Sa Majesté la Reine v. Sébastien Beauchamp*, which contains evidence of personal attacks on another lawyer, also confirmed that the case raised in Mr. Doré's complaint is neither unique nor isolated, but shows that extreme conduct and comments seem to form part of a more generalized attitude. In the panel's view, the fact that such an attitude could persist despite warnings from the Court of Appeal is troubling.
>
> The panel finds that the impatience you showed and the immoderate comments you made to an officer of the court, Mr. Doré, are unacceptable and merit an expression of the panel's disapproval under

subsection 55(2) of the Canadian Judicial Council By-Laws.

> The panel notes that you have deferred to its decision and assumes that the fact that Mr. Doré has made a complaint will lead you to reflect on this and will remind you of your duty as a judge to show respect and courtesy to all counsel who appear before you.

[15] On July 22, 2002, after receiving this reprimand, Justice Boilard recused himself from a complex criminal trial involving the Hell's Angels, a trial related to the trial of Daniel Lanthier in which Mr. Doré had acted. As a result of this recusal, the Attorney General of Quebec requested the Canadian Judicial Council to conduct an inquiry. The Judicial Council concluded that Justice Boilard's recusal had not constituted misconduct.

[16] As for Mr. Doré, the proceedings before the Disciplinary Council of the Barreau du Québec took place between April 2003 and January 2006. In its January 18, 2006 decision, the Disciplinary Council found that Mr. Doré's letter was [TRANSLATION] "likely to offend and is rude and insulting" (2006 CanLII 53416, at para. 58). It concluded that his statements had little expressive value, as they were "merely opinions, perceptions and insults" (para. 62). The Disciplinary Council rejected Mr. Doré's submission that his letter was private, since it was written by him as a lawyer. It also concluded that Justice Boilard's conduct could not be relied on as justification for the letter.

[17] The Disciplinary Council rejected Mr. Doré's argument that art. 2.03 violated s. 2(*b*) of the *Charter*. While acknowledging that the provision infringed on freedom of expression, the Disciplinary Council found that

> [TRANSLATION] [t]his is a limitation on freedom of expression that is entirely reasonable, even necessary, in the Canadian legal system, where lawyers and judges must work together in the interest of justice. [para. 88]

Moreover, it concluded that Mr. Doré had willingly joined a profession that was subject to rules of discipline that he knew would limit his freedom of expression. While the rules may [TRANSLATION] "be seen as restrictions imposed on the members of the Barreau in comparison to the freedom that may be enjoyed by other Canadian citizens", they are made in exchange for "the privileges conferred on lawyers as members of an 'exclusive profession'" (paras. 109-10). On July 24, 2006, based on what it found to be the seriousness of Mr. Doré's conduct and on his failure to show remorse, the same panel suspended Mr. Doré's ability to practise law for 21 days (2006 CanLII 53436).

[18] Mr. Doré appealed the Disciplinary Council's decisions to the Tribunal des professions on several grounds (2007 QCTP 152 (CanLII)). This time, he did not challenge the constitutionality of art. 2.03. Instead, he argued that the manner in which the relevant legislation was applied by the Disciplinary Council was unconstitutional because his comments were protected by s. 2(*b*) of the *Charter*.

[19] The Tribunal reviewed the constitutionality of the Disciplinary Council's decision on a standard of correctness, but said that a full *Oakes* analysis under s. 1 of the *Charter* was inappropriate where a decision only applied to one person. Instead, it held that "[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right" (para. 69, citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 155). In the circumstances, the Disciplinary Council's decision to sanction Mr. Doré was found to be a [TRANSLATION] "minimal restriction on freedom of expression" (para. 76). It rejected Mr. Doré's argument that Justice Boilard's disparaging remarks justified his letter. It also rejected his argument that the letter was private, since Mr. Doré remained "an officer of the court and a lawyer" (para. 77) and had exceeded the objectivity, moderation and dignity expected of him. Though it noted that the sanction imposed by the Disciplinary Council "seems harsh" (para. 135), the Tribunal held that it was not unreasonable, given the gravity of Mr. Doré's conduct and his lack of remorse.

[20] On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal, including its view that the letter did not constitute a private act, and found the Tribunal's reasoning to be [TRANSLATION] "unassailable" (2008 QCCS 2450 (CanLII), at paras. 105, 109, 139 and 147). It concluded that by finding the decision to be a minimal restriction on Mr. Doré's freedom of expression, the Tribunal had "implicitly" held that the restriction was "justified in a free and democratic society" (para. 104).

[21] The Quebec Court of Appeal held that given the status and role of the parties, Mr. Doré could not reasonably have expected his letter to remain confidential or private. It acknowledged that the Disciplinary Council's decision was a breach of s. 2(*b*), but, applying a full s. 1 analysis, it found that Mr. Doré's letter had [TRANSLATION] "limited importance . . . compared to the values underlying freedom of expression, which are the pursuit of truth, participation in the community, individual self-fulfillment, and human flourishing" (para. 36). The court held that protecting the public was an important objective, and that the Disciplinary Council's decision had a rational connection with that objective, especially given the importance of a judge's position in the judicial system. On minimal impairment, assessing both the decision and the sanction, the Court of Appeal held that while the sanction was significant, it was targeted at the manner in which Mr. Doré criticized Justice Boilard, and did not prohibit the expression itself:

> [TRANSLATION] The impugned decision appears to be measured and, in the present case, is a correct application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence. [para. 47]

It concluded by finding that the effects of the decision were proportionate to its objectives.

Analysis

[22] Mr. Doré's argument rests on his assertion that the finding of a breach of the *Code of ethics* violates the expressive rights protected by s. 2(*b*) of the *Charter*. Because the 21-day suspension had already been served when he was before the Court of Appeal, he did not appeal the penalty. The reasonableness of its length, therefore, is not before us.

[23] It is clear from the decisions of the Tribunal and the reviewing courts in this case that there is some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values. Some courts have used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*; others have used a classic judicial review approach.

[24] It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?

[25] In *Slaight Communications Inc. v. Davidson*, 1989 CanLII 92 (SCC), [1989] 1 S.C.R. 1038, Lamer J., in his concurring reasons, said that the *Charter* applied to a labour adjudicator's decision and used the s. 1 framework developed in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, to determine if the decision complied with the *Charter*. Writing for the majority, Dickson C.J. agreed with Lamer J. that the *Charter* applied to administrative decision-making. But while he applied the *Oakes* framework, he notably and presciently observed that "[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases" (p. 1049 (emphasis added)).

[26] Yet the approach taken in *Slaight* can only be properly understood in its context. Importantly, when Lamer J. held that discretionary administrative decisions implicating *Charter* values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion. This concern permeates the reasons in *Slaight*. As Prof. Geneviève Cartier has noted:

> . . . while Lamer J thought the administrative law standard was ill-suited to *Charter* challenges because of its inability to inquire into the substance of discretionary decisions, Dickson CJ thought it was ill-suited because of its inability to properly unravel the value inquiries involved in any *Charter* litigation.

("The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion", in David Dyzenhaus, ed., *The Unity of Public Law* (2004), 61, at p. 68)

[27] The approach taken in *Slaight* attracted academic concern from administrative law scholars. Prof. John Evans argued that if courts were too quick to bypass administrative law in favour of the *Charter*, "a rich source of thought and experience about law and government will be overlooked or lost altogether" ("The Principles of Fundamental Justice: The Constitution and the Common Law" (1991), 29 *Osgoode Hall L.J.* 51, at p. 73). Similarly, Prof. Cartier suggested that the *Slaight* approach reduced the role of administrative law to the "formal determination of jurisdiction on the basis of statutory interpretation", which prevented the control of discretion with reference to "values" and presented "an impoverished picture of administrative law" (pp. 68-69).

[28] The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by this Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 65. In that case, L'Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56).

[29] Building on the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227 ("*C.U.P.E.*"), *Baker* represented a further shift away from Diceyan principles. By recognizing that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers (David Dyzenhaus and Evan Fox-Decent, "Rethinking the Process/Substance Distinction: *Baker* v. *Canada*" (2001), 51 *U.T.L.J.* 193, at p. 240). This allows the *Charter* to "nurture" administrative law, by emphasizing that *Charter* values infuse the inquiry (Cartier, at pp. 75 and 86; see also Mary Liston, "Governments in Miniature: The Rule of Law in the Administrative State", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77, at p. 100; Susan L. Gratton and Lorne Sossin, "In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court", in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 145, at pp. 157-58).

[30] When this is weighed together with this Court's subsequent decisions, we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.

[31] But, as predicted by Chief Justice Dickson, this Court has explored different ways to review the constitutionality of administrative decisions, vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*. The s. 1 *Oakes* approach suggested by Lamer J., was followed in *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.

[32] Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in *Baker*; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Chamberlain*; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Pinet*; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Criminal Lawyers' Association*; and *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.

[33] The last decision of this Court to use the full s. 1 *Oakes* approach to determine whether the exercise of statutory discretion complied with the *Charter* was *Multani*. The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion (see Gratton and Sossin, at p. 157; David Mullan, "Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*" (2006), 21 *N.J.C.L.* 127; Stéphane Bernatchez, "Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?" (2010), 55 *McGill L.J.* 641).

[34] Since then, and largely as a result of the revised administrative law template found in *Dunsmuir*, this Court appears to have moved away from *Multani*, leading to the suggestion that it may have "decided to start from ground zero in building coherence in public law" (Gratton and Sossin, at p. 161). Today, the Court has two options for reviewing discretionary administrative decisions that implicate *Charter* values. The first is to adopt the *Oakes* framework, developed for reviewing laws for compliance with the Constitution. This undoubtedly protects *Charter* rights, but it does so at the risk of undermining a more robust conception of administrative law. In the words of Prof. Evans, if administrative law is bypassed for the *Charter*, "a rich source of thought and experience about law and government will be overlooked" (p. 73).

[35] The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised "in light of constitutional guarantees and the values they reflect" (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as "a reminder that some values are clearly fundamental and . . . cannot be violated lightly" (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens "an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship" (Liston, at p. 100).

[36] As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular "law" is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.

[37] The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be "prescribed by law" has been held by this Court to apply to norms where "their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply" (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).

[38] Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the "pressing and substantial" objective of a decision is, or who would have the burden of defining and defending it.

[39] This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, "where there is no specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect" (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, 1994 CanLII 61 (SCC), [1994] 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values:

> If a new common law rule could be enunciated which would not interfere with an accused person's right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court's simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. [pp. 93-94, citing *R. v. Swain*, 1991 CanLII 104 (SCC), [1991] 1 S.C.R. 933, at p. 978.]

[40] In *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, this Court explicitly rejected the use of the s. 1 *Oakes* framework in developing the common law of defamation for two reasons. First, when interpreting a common law rule, there is no violation of a *Charter* right, but a conflict between principles, so "the balancing must be more flexible than the traditional s. 1 analysis", with *Charter* values providing the guidelines for any modification to the common law (para. 97). Second, the Court noted that "the division of onus which normally operates in a *Charter* challenge" was not appropriate for private litigation under the common law, as the party seeking to change the common law should not be allowed to benefit from a reverse onus (para. 98). As a result, the Court went on to "consider the common law of defamation in light of the values underlying the *Charter*" (para. 99). And in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Court relied on *Charter* values in introducing the new defence of responsible communication on matters of public interest to the law of defamation, without engaging in an *Oakes* analysis.

[41] A further example is found in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, where the Court dealt with the common law of secondary picketing. After concluding that freedom of expression was engaged, the Court did not embark on an *Oakes* analysis. Instead, it found that the appropriate question was "which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?" (para. 65).

[42] Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.

[43] What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.

[44] This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

> Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the "correct" answer but may intervene only if the decision is shown to be unreasonable. [Emphasis added; para. 42.]

[45] It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when

what is assessed is the disciplinary body's application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.

[46] The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

> those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime . . . .
>
> (para. 49, citing "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the "reasons for judicial restraint in reviewing agencies' decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension" (p. 81).

[47] An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, adopting the observations of Prof. Danielle Pinard:

> [TRANSLATION] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.
>
> (p. 605, citing "Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu'ils jugent inconstitutionnels" (1987-88), *McGill L.J.* 170, at pp. 173-74.)

[48] This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, 1996 CanLII 254 (SCC), [1996] 1 S.C.R. 75, tailoring the *Charter* to a specific situation "is more suited to a tribunal's special role in determining rights on a case by case basis in the tribunal's area of expertise" (para. 64; see also *C.U.P.E.*, at pp. 235-36).

[49] These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the "values of accommodation, tolerance and respect for diversity" which were incorporated into its enabling legislation and "reflected in our Constitution's commitment to equality and minority rights" (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*, a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected "the expertise of the members appointed to Review Boards" (para. 22). The purpose of the exercise was to determine whether the decision was "the least onerous and least restrictive" of the liberty interests of the appellant while considering "public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society" (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.

[50] In *Lake*, where the Court was reviewing the Minister's decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister's decision, as the Minister is closer to the relevant facts required to balance competing considerations and benefits from expertise:

> This Court has repeatedly affirmed that deference is owed to the Minister's decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns

> the standard to be applied in reviewing the Minister's assessment of a fugitive's *Charter* rights. Reasonableness is the appropriate standard of review for the Minister's decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court's jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister's decision will be limited to exceptional cases of "real substance" reflects the breadth of the Minister's discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, 1987 CanLII 48 (SCC), [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34.]

[51] The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts "retrying" a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

> If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

[52] So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.

[53] The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for "objectivity, moderation and dignity", necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.

[54] Nevertheless, as McLachlin C.J. noted in *Catalyst*, "reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry" (para. 18). Deference is still justified on the basis of the decision-maker's expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

[55] How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada's international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie* infringement of mobility rights under s. 6(1) (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual's liberty interest was justified (para. 19).

[56] Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160, "courts must accord some leeway to the legislator" in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure "falls within a range of reasonable alternatives". The same is

true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, "falls within a range of possible, acceptable outcomes" (para. 47).

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.

[58] If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

Application

[59] The *Charter* value at issue in this appeal is expression, and, specifically, how it should be applied in the context of a lawyer's professional duties.

[60] At the relevant time, art. 2.03 of the *Code of ethics* (now modified as art. 2.00.01, O.C. 351-2004, (2004) 136 G.O. II, 1272) stated that "[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity". This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council's discretion.

[61] No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely "potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy" (Michael Code, "Counsel's Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System" (2007), 11 *Can. Crim. L.R.* 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1). The duty to encourage civility, "both inside and outside the courtroom", rests with the courts and with lawyers (*R. v. Felderhof* (2003), 2003 CanLII 37346 (ON CA), 68 O.R. (3d) 481 (C.A.), at para. 83).

[62] As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association's *Code of Professional Conduct* (2009), for example, states that a "lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding" (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).

[63] But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular (MacKenzie, at p. 26-1; *R. v. Kopyto* (1987), 1987 CanLII 176 (ON CA), 62 O.R. (2d) 449 (C.A.); and *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.)).

[64] In *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, where Steel J.A. upheld a disciplinary decision resulting from a lawyer's criticism of a judge, the critical role played by lawyers in assuring the accountability of the judiciary was acknowledged:

> Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act

> and speak without inhibition and with courage when the circumstances demand it. [Emphasis added; para. 71.]

[65] Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer's expressive rights under the *Charter*. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.

[66] We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer's right to expression and the public's interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

[67] In this case, the 21-day suspension imposed on Mr. Doré is not before this Court, since Mr. Doré did not appeal it either to the Court of Appeal or to this Court. All we have been asked to determine is whether the Disciplinary Council's conclusion that a reprimand was warranted under art. 2.03 of the *Code of ethics* was a reasonable one. To make that assessment, we must consider whether this result reflects a proportionate application of the statutory mandate with Mr. Doré's expressive rights.

[68] Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer's equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

[69] A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public's reasonable expectations of a lawyer's professionalism. As the Disciplinary Council found, Mr. Doré's letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.

[70] The Disciplinary Council recognized that a lawyer must have [TRANSLATION] "total liberty and independence in the defence of a client's rights", and "has the right to respond to criticism or remarks addressed to him by a judge", a right which the Council recognized "can suffer no restrictions when it is a question of defending clients' rights before the courts" (paras. 68-70). It was also "conscious" of the fact that art. 2.03 may constitute a restriction on a lawyer's expressive rights (para. 79). But where, as here, the judge was called [TRANSLATION] "loathsome", arrogant and "fundamentally unjust" and was accused by Mr. Doré of "hid[ing] behind [his] status like a coward"; having a "chronic inability to master any social skills"; being "pedantic, aggressive and petty in [his] daily life"; having "obliterate[d] any humanity from [his] judicial position"; having "non-existent listening skills"; having a "propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal attacks", which "not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge"; and being "[un]able to face [his] detractors without hiding behind [his] judicial position", the Council concluded that the [TRANSLATION] "generally accepted norms of moderation and dignity" were "overstepped" (para. 86).

[71] In the circumstances, the Disciplinary Council found that Mr. Doré's letter warranted a reprimand. In light of the excessive degree of vituperation in the letter's context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré's expressive rights with the statutory objectives.

[72] I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Sophie Dormeau, Outremont.

Solicitors for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec: Mercier Leduc, Montréal.

Solicitor for the respondents Tribunal des professions and the Attorney General of Quebec: Attorney General of Quebec, Sainte-Foy.

Solicitors for the intervener the Federation of Law Societies of Canada: BCF, Montréal.

Solicitors for the intervener the Canadian Civil Liberties Association: Osler, Hoskin & Harcourt, Montréal.

Solicitors for the intervener the Young Bar Association of Montreal: Irving Mitchell Kalichman, Westmount.

21	*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

SUPREME COURT OF CANADA

CITATION: Canada (Minister of Citizenship and Immigration) *v.* Vavilov, 2019 SCC 65

APPEAL HEARD: December 4, 5, 6, 2018
JUDGMENT RENDERED: December 19, 2019
DOCKET: 37748

BETWEEN:

Minister of Citizenship and Immigration
Appellant

and

Alexander Vavilov
Respondent

- and -

Attorney General of Ontario, Attorney General of Quebec, Attorney General of British Columbia, Attorney General of Saskatchewan, Canadian Council for Refugees, Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program, Ontario Securities Commission, British Columbia Securities Commission, Alberta Securities Commission, Ecojustice Canada Society, Workplace Safety and Insurance Appeals Tribunal (Ontario), Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia), Appeals Commission for Alberta Workers' Compensation, Workers' Compensation Appeals Tribunal (New Brunswick), British Columbia International Commercial Arbitration Centre Foundation, Council of Canadian Administrative Tribunals, National Academy of Arbitrators, Ontario Labour-Management Arbitrators' Association, Conférence des arbitres du Québec, Canadian Labour Congress, National Association of Pharmacy Regulatory Authorities, Queen's Prison Law Clinic, Advocates for the Rule of Law, Parkdale Community Legal Services, Cambridge Comparative Administrative Law Forum, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Bar Association, Canadian Association of Refugee Lawyers, Community & Legal Aid Services Programme, Association québécoise des avocats et avocates en droit de l'immigration and First Nations Child & Family Caring Society of Canada
Interveners

CORAM: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

JOINT REASONS FOR JUDGMENT: (paras. 1 to 197)	Wagner C.J. and Moldaver, Gascon, Côté, Brown, Rowe and Martin JJ.
JOINT CONCURRING REASONS: (paras. 198 to 343)	Abella and Karakatsanis JJ.

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

CANADA (CITIZENSHIP AND IMMIGRATION) *v.* VAVILOV

Minister of Citizenship and Immigration *Appellant*

v.

Alexander Vavilov *Respondent*

and

Attorney General of Ontario,
Attorney General of Quebec,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Canadian Council for Refugees,
Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program,
Ontario Securities Commission,
British Columbia Securities Commission,
Alberta Securities Commission,
Ecojustice Canada Society,
Workplace Safety and Insurance Appeals Tribunal (Ontario),
Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), Workers' Compensation Appeals Tribunal (Nova Scotia),
Appeals Commission for Alberta Workers' Compensation,
Workers' Compensation Appeals Tribunal (New Brunswick),
British Columbia International Commercial Arbitration Centre Foundation,
Council of Canadian Administrative Tribunals,
National Academy of Arbitrators,
Ontario Labour-Management Arbitrators' Association,
Conférence des arbitres du Québec,
Canadian Labour Congress,
National Association of Pharmacy Regulatory Authorities,
Queen's Prison Law Clinic,
Advocates for the Rule of Law,
Parkdale Community Legal Services,
Cambridge Comparative Administrative Law Forum,
Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic,
Canadian Bar Association,
Canadian Association of Refugee Lawyers,
Community & Legal Aid Services Programme,
Association québécoise des avocats et avocates en droit de l'immigration and
First Nations Child & Family Caring Society of Canada *Interveners*

Indexed as: Canada (Minister of Citizenship and Immigration) *v.* Vavilov

2019 SCC 65

File No.: 37748.

2018: December 4, 5, 6; 2019: December 19.

Present: Wagner C.J. and Abella, Moldaver, Karakatsanis, Gascon, Côté, Brown, Rowe and Martin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law — Judicial review — Standard of review — Proper approach to judicial review of administrative decisions — Proper approach to reasonableness review.

Citizenship — Canadian citizens — Registrar of Citizenship cancelling certificate of Canadian citizenship issued to Canadian-born son of parents later revealed to be Russian spies — Decision of Registrar based on interpretation of statutory exception to general rule that person born in Canada is Canadian citizen —Exception stating that Canadian-born child is not citizen if either parent was representative or employee in Canada of foreign government at time of child's birth — Whether Registrar's decision to cancel certificate of citizenship was reasonable — Citizenship Act, R.S.C. 1985, c. 29, s. 3(2)(a).

V was born in Toronto in 1994. At the time of his birth, his parents were posing as Canadians under assumed names. In reality, they were foreign nationals working on assignment for the Russian foreign intelligence service. V did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, he lived and identified as a Canadian, and he held a Canadian passport. In 2010, V's parents were arrested in the United States and charged with espionage. They pled guilty and were returned to Russia. Following their arrest, V's attempts to renew his Canadian passport proved unsuccessful. However, in 2013, he was issued a certificate of Canadian citizenship.

Then, in 2014, the Canadian Registrar of Citizenship cancelled V's certificate on the basis of her interpretation of s. 3(2)(a) of the *Citizenship Act*. This provision exempts children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" from the general rule that individuals born in Canada acquire Canadian citizenship by birth. The Registrar concluded that because V's parents were employees or representatives of Russia at the time of V's birth, the exception to the rule of citizenship by birth in s. 3(2)(a), as she interpreted it, applied to V, who therefore was not, and had never been, entitled to citizenship. V's application for judicial review of the Registrar's decision was dismissed by the Federal Court. The Court of Appeal allowed V's appeal and quashed the Registrar's decision because it was unreasonable. The Minister of Citizenship and Immigration appeals.

Held: The appeal should be dismissed.

Per **Wagner** C.J. and **Moldaver**, **Gascon**, **Côté**, **Brown**, **Rowe** and **Martin** JJ.: The Registrar's decision to cancel V's certificate of citizenship was unreasonable, and the Court of Appeal's decision to quash it should be upheld. It was not

reasonable for the Registrar to interpret s. 3(2)(a) of the *Citizenship Act* as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

More generally, this appeal and its companion cases (*Bell Canada v. Canada (Attorney General)*, 2019 SCC 66) provide an opportunity to consider and clarify the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and subsequent cases. The submissions presented to the Court have highlighted two aspects of the current framework which need clarification. The first aspect is the analysis for determining the standard of review. The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard.

It has become clear that *Dunsmuir*'s promise of simplicity and predictability has not been fully realized. Certain aspects of the current standard of review framework are unclear and unduly complex. The former contextual analysis has proven to be unwieldly and offers limited practical guidance for courts attempting to determine the standard of review. The practical effect is that courts struggle in conducting the analysis, and debates surrounding the appropriate standard and its application continue to overshadow the review on the merits, thereby undermining access to justice. A reconsideration of the Court's approach is therefore necessary in order to bring greater coherence and predictability to this area of law. A revised framework to determine the standard of review where a court reviews the merits of an administrative decision is needed.

In setting out a revised framework, this decision departs from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration of past precedents can be justified only by compelling circumstances and requires carefully weighing the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty. In such circumstances, following a prior decision would be contrary to the underlying values of clarity and certainty in the law.

The revised standard of review analysis begins with a presumption that reasonableness is the applicable standard in all cases. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to fulfill its mandate and interpret the law applicable to all issues that come before it. Where a legislature has not explicitly provided that a court is to have a more involved role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended a minimum of judicial interference. Respect for these institutional design choices requires a reviewing court to adopt a posture of restraint. Thus, whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. As a result, it is no longer necessary for courts to engage in a contextual inquiry in order to identify the appropriate standard. Conclusively closing the door on the application of a contextual analysis to determine the applicable standard streamlines and simplifies the standard of review framework. As well, with the presumptive application of the reasonableness standard, the relative expertise of administrative decision makers is no longer relevant to a determination of the standard of review. It is simply folded into the new starting point. Relative expertise remains, however, a relevant consideration in conducting reasonableness review.

The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard to apply. This will be the case where it has explicitly prescribed the applicable standard of review. Any framework rooted in legislative intent must respect clear statutory language. The legislature may also direct that derogation from the presumption is appropriate by providing for a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. Where a legislature has provided a statutory appeal mechanism, it has subjected the administrative regime to appellate oversight and it expects the court to scrutinize such administrative decisions on an appellate basis. The applicable standard is therefore to be determined with reference to the nature of the question and to the jurisprudence on appellate standards of review. Where, for example, a court hears an appeal from an administrative decision, it would apply the standard of correctness to questions of law, including on statutory interpretation and the scope of a decision maker's authority. Where the scope of the statutory appeal includes questions of fact or questions of mixed fact and law, the standard is palpable and overriding error for such questions.

Giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. This shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by weighing the values of certainty and correctness. First, there has been significant and valid judicial and academic criticism of the Court's recent approach to statutory appeal rights and of the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. Second, there is no satisfactory justification for the recent trend in the Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis, absent exceptional wording. More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute. Accepting that the legislature intends an appellate standard of review to be applied also helps to explain why many statutes provide for both appeal and judicial review mechanisms, thereby indicating two roles for reviewing courts. Finally, because the presumption of reasonableness review is no longer premised upon notions of relative expertise and is now based on respect for the legislature's institutional design choice, departing from the presumption of reasonableness review in the context of a statutory appeal respects this legislative choice.

The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of legal questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. First, questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Second, the rule of law requires courts to have the final word with regard to general questions of law that are of central importance to the legal system as a whole because they require uniform and consistent answers. Third, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another since the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies. The application of the correctness standard for such questions therefore respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary.

The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. The possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case is not definitively foreclosed. However, any new basis for correctness review would be exceptional and would need to be consistent with this framework and the overarching principles set out in this decision. Any new correctness category based on legislative intent would require a signal of legislative intent as strong and compelling as a legislated standard of review or a statutory appeal mechanism. Similarly, a new correctness category based on the rule of law would be justified only where failure to apply correctness review would

undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in this decision.

For example, the Court is not persuaded that it should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. A lack of unanimity within an administrative tribunal is the price to pay for decision-making freedom and independence. While discord can lead to legal incoherence, a more robust form of reasonableness review is capable of guarding against such threats to the rule of law. As well, jurisdictional questions should no longer be recognized as a distinct category subject to correctness review; there are no clear markers to distinguish such questions from other questions related to interpreting an administrative decision maker's enabling statute. A proper application of the reasonableness standard will enable courts to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment on jurisdictional issues and without having to apply the correctness standard.

Going forward, a court seeking to determine what standard of review is appropriate should look to this decision first in order to determine how the general framework applies. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance and will continue to apply essentially without modification, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between administrative bodies. On other issues, such as the effect of statutory appeal mechanisms, true questions of jurisdiction or the former contextual analysis, certain cases will necessarily have less precedential force.

There is also a need for better guidance from the Court on the proper application of the reasonableness standard, what that standard entails and how it should be applied in practice. Reasonableness review is meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. Its starting point lies in the principle of judicial restraint and in demonstrating respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering decision makers from accountability. While courts must recognize the legitimacy and authority of administrative decision makers and adopt a posture of respect, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be justified. In conducting reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale, to ensure that the decision as a whole is transparent, intelligible and justified. Judicial review is concerned with both the outcome of the decision and the reasoning process that led to that outcome. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

Reasonableness review is methodologically distinct from correctness review. The court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it. A court applying the reasonableness standard does not ask what decision it would have made in place of the administrative decision maker, attempt to ascertain the range of possible conclusions, conduct a new analysis or seek to determine the correct solution to the problem. Instead, the reviewing court must consider only whether the decision made by the decision maker, including both the rationale for the decision and the outcome to which it led, was unreasonable.

In cases where reasons are required, they are the starting point for reasonableness review, as they are the primary mechanism by which decision makers show that their decisions are reasonable. Reasons are the means by which the decision maker communicates the rationale for its decision: they explain how and why a decision was made, help to show affected parties that their arguments have been considered and that the decision was made in a fair and lawful manner, and shield against arbitrariness. A principled approach to reasonableness review is therefore one which puts those reasons first. This enables a reviewing court to assess whether the decision as a whole is reasonable. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process.

In many cases, formal reasons for a decision will not be given or required. Even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason. There will nonetheless be situations in which neither the record nor the larger context sheds light on the basis for the decision. In such cases, the reviewing court must still examine the decision in light of the relevant factual and legal constraints on the decision maker in order to determine whether the decision is reasonable.

It is conceptually useful to consider two types of fundamental flaws that tend to render a decision unreasonable. The first is a failure of rationality internal to the reasoning process. To be reasonable, a decision must be based on an internally coherent reasoning that is both rational and logical. A failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a line-by-line treasure hunt for error. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. Because formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point. Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies.

The second type of fundamental flaw arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. Although reasonableness is a single standard that already accounts for context, and elements of a decision's context should not modulate the standard or the degree of scrutiny by the reviewing court, what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The governing statutory scheme, other relevant statutory or common law, the principles of statutory interpretation, the evidence before the decision maker and facts of which the decision maker may take notice, the submissions of the parties, the past practices and decisions of the administrative body, and the potential impact of the decision on the individual to whom it applies, are all elements that will generally be relevant in evaluating whether a given decision is reasonable. Such elements are not a checklist; they may vary in significance depending on the context and will necessarily interact with one another.

Accordingly, a reviewing court may find that a decision is unreasonable when examined against these contextual considerations. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. A proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority.

Both statutory and common law will also impose constraints on how and what an administrative decision maker can lawfully decide. Any precedents on the issue before the administrative decision maker or on a similar issue, as well as international law in some administrative decision making contexts, will act as a constraint on what the decision maker can reasonably decide. Whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Where this is the applicable standard, the reviewing court does not undertake a *de novo* analysis of the question or ask itself what the correct decision would have been. But an approach to reasonableness review that respects legislative intent must assume that those who interpret the law, whether courts or administrative decision makers, will do so in a manner consistent with the modern principle of statutory interpretation. Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.

Furthermore, the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. The reasons must also meaningfully account for the central issues and concerns raised by the parties, even though reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis.

While administrative decision makers are not bound by their previous decisions, they must be concerned with the general consistency of administrative decisions. Therefore, whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Finally, individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention.

The question of the appropriate remedy — specifically, whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons — is multi-faceted. The choice of remedy must be guided by the rationale for applying the reasonableness standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, concerns related to the proper administration of the justice system, the need to ensure access to justice and the goal of expedient and cost-efficient decision making. Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons. However, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended. An intention that the administrative decision maker decide the matter at first instance cannot give rise to endless judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose. Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and efficient use of public resources may also influence the exercise of a court's discretion to remit the matter.

In the case at bar, there is no basis for departing from the presumption of reasonableness review. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. Given that Parliament has not prescribed the standard to be applied, there is no indication that the legislature intended a standard of review other than reasonableness. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between administrative bodies. As a result, the standard to be applied in reviewing the Registrar's decision is reasonableness.

The Registrar's decision was unreasonable. She failed to justify her interpretation of s. 3(2)(a) in light of the constraints imposed by s. 3 considered as a whole, by international treaties that inform its purpose, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though V had raised many of these considerations, the Registrar failed to address those submissions in her reasons and did not do more than conduct a cursory review of the legislative history of s. 3(2)(a) and conclude that her interpretation was not explicitly precluded by its text.

First, the Registrar failed to address the immediate statutory context of s. 3(2)(a), which provides clear support for the conclusion that all of the persons contemplated by s. 3(2)(a) must have been granted diplomatic privileges and immunities in some form for the exception to apply. Second, the Registrar disregarded compelling submissions that s. 3(2) is a narrow exception consistent with established principles of international law and with the leading international treaties that extend diplomatic privileges and immunities to employees and representatives of foreign governments. Third, it was a significant omission to ignore the relevant cases that were before the Registrar which suggest that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities. Finally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include all individuals who have not been granted diplomatic privileges and immunities. Rules concerning citizenship require a high degree of interpretive consistency in order to shield against arbitrariness. The Registrar's interpretation cannot be limited to the children of spies — its logic would be equally applicable to other scenarios. As well, provisions such as s. 3(2)(a) must be given a narrow interpretation because they potentially take away rights which otherwise benefit from a liberal and broad interpretation. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation, or whether, in light of those potential consequences, Parliament would have intended s. 3(2)(a) to apply in this manner. Although the Registrar knew her interpretation was novel, she failed to provide a rationale for her expanded interpretation.

It was therefore unreasonable for the Registrar to find that s. 3(2)(a) can apply to individuals whose parents have not been granted diplomatic privileges and immunities in Canada. It is undisputed that V's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar. Given that V was born in Canada, his status is governed only by the general rule of citizenship by birth. He is a Canadian citizen.

Per **Abella** and **Karakatsanis** JJ.: There is agreement with the majority that the appeal should be dismissed. The Registrar's decision to cancel V's citizenship certificate was unreasonable and was properly quashed by the Court of Appeal.

There is also agreement with the majority that there should be a presumption of reasonableness in judicial review. The contextual factors analysis should be eliminated from the standard of review framework, and "true questions of jurisdiction" should be abolished as a separate category of issues subject to correctness review. However, the elimination of these elements does not support the foundational changes to judicial review outlined in the majority's framework that result in expanded correctness review. Rather than confirming a meaningful presumption of deference for administrative decision-makers, the majority strips away deference from hundreds of administrative actors, based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to administrative decision-makers. The majority's presumption of reasonableness review rests on a totally new understanding of legislative intent and the rule of law and prohibits any consideration of well-established foundations for deference. By dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis, the majority's framework fundamentally reorients the relationship between administrative actors and the judiciary, thus advocating a profoundly different philosophy of administrative law.

The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers and reads out the foundations of the modern understanding of legislative intent. Instead of understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely. In so doing, the majority disregards the historically accepted reason why the legislature intended to delegate authority to an administrative actor. In particular, such an approach ignores the possibility that specialization and expertise are embedded into this legislative choice. Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the interpretative upper hand on questions of law. Specialized expertise has become the core rationale for deference. Giving proper effect to the legislature's choice to delegate authority to an administrative decision-maker requires understanding the advantages that the decision-maker may enjoy in exercising its mandate. Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. In interpreting their enabling statutes, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations, of statutory context, of the purposes that a provision or legislative scheme are meant to serve, and of specialized terminology. The advantages stemming from specialization and expertise provide a robust foundation for deference. The majority's approach accords no weight to such institutional advantages and banishes expertise from the standard of review analysis entirely. The removal of the current conceptual basis for deference opens the gates to expanded correctness review.

In the majority's framework, deference gives way whenever the rule of law demands it. This approach, however, flows from a court-centric conception of the rule of law. The rule of law means that administrative decision-makers make legal determinations within their mandate; it does not mean that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review. The majority's approach not only erodes the presumption of deference; it erodes confidence in the fact that law-making and legal interpretation are shared enterprises between courts and administrative decision-makers. Moreover, access to justice is at the heart of the legislative choice to establish a robust system of administrative law. This goal is compromised when a narrow conception of the rule of law is invoked to impose judicial hegemony over administrative decision-makers, which adds unnecessary expense and complexity. Authorizing more incursions into the administrative system by judges and permitting *de novo* review of every legal decision adds to the delay and cost of obtaining a final decision.

The majority's reformulation of "legislative intent" invites courts to apply an irrebuttable presumption of correctness review whenever an administrative scheme includes a right of appeal. Elevating appeal clauses to indicators of correctness review creates a two-tier system that defers to the expertise of administrative decision-makers only where there is no appeal clause. Yet appeal rights do not represent a different institutional structure that requires a more searching form of review. The mere fact that a statute contemplates an appeal says nothing about the degree of deference required in the review process. The majority's position hinges almost entirely on a textualist argument — i.e., that the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence. This disregards long-accepted institutional distinctions between courts and administrative decision-makers. The continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority ascribes to it. The idea that appellate standards of review must be applied to every right of appeal is entirely unsupported by the jurisprudence. For at least 25 years, the Court has not treated statutory rights of appeal as a determinative reflection of legislative intent, and such clauses have played little or no role in the standard of review analysis. Moreover, pre-*Dunsmuir*, statutory rights of appeal were still seen as only one factor and not as unequivocal indicators of correctness review. Absent exceptional circumstances, a statutory right of appeal does not displace the presumption of reasonableness.

The majority's disregard for precedent and *stare decisis* has the potential to undermine both the integrity of the Court's decisions, and public confidence in the stability of the law. *Stare decisis* places significant limits on the Court's ability to overturn its precedents. The doctrine promotes the predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the integrity of the judicial process. Respect for precedent also safeguards the Court's institutional legitimacy. The precedential value of a judgment does not expire with the tenure of the panel of judges that decided it. When the Court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine of *stare decisis*. A nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law.

There is no principled justification for departing from the existing jurisprudence and abandoning the Court's long-standing view of how statutory appeal clauses impact the standard of review analysis. In doing so, the majority disregards the high threshold required to overturn the Court's decisions. The unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are numerous and include many decisions conducting deferential review even in the face of a statutory right of appeal and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis. Overruling these judgments flouts *stare decisis*, which prohibits courts from overturning past decisions that simply represent a choice with which the current bench does not agree. The majority's approach also has the potential to disturb settled interpretations of many statutes that contain a right of appeal; every existing interpretation of such statutes that has been affirmed under a reasonableness standard will be open to fresh challenge. Moreover, if the Court, in its past decisions, misconstrued the purpose of statutory appeal clauses, legislatures were free to clarify this interpretation through legislative amendment. In the absence of legislative correction, the case for overturning decisions is even less compelling.

The Court should offer additional direction on reasonableness review so that judges can provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers. However, rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the Court's prior jurisprudence. The majority's multi-factored, open-ended list of constraints on administrative decision making will encourage reviewing courts to dissect administrative reasons in a line-by-line hunt for error. These constraints may function in practice as a wide-ranging catalogue of hypothetical errors to

justify quashing an administrative decision. Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than on trial judges. Such an approach undercuts deference. Reasonableness review should instead focus on the concept of deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Curial deference is the hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under correctness.

Deference imposes three requirements on courts conducting reasonableness review. First, deference is the attitude a reviewing court must adopt towards an administrative decision-maker. Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, for the important role that administrative decision-makers play, and for their specialized expertise and the institutional setting in which they operate. Reviewing courts must pay respectful attention to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction. Second, deference affects how a court frames the question it must answer and the nature of its analysis. A reviewing court does not ask how it would have resolved an issue, but rather whether the answer provided by the decision-maker was unreasonable. Ultimately, whether an administrative decision is reasonable depends on the context, and a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised, among other factors. Third, deferential review impacts how a reviewing court evaluates challenges to a decision. The party seeking judicial review bears the onus of showing that the decision was unreasonable; the decision-maker does not have to persuade the court that its decision is reasonable.

The administrative decision itself is the focal point of the review exercise. In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable. Where reasons are neither required nor available, reasonableness may be justified by past decisions of the administrative body or in light of the procedural context. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably. By beginning with the reasons, read in light of the surrounding context and the grounds raised, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making. Reviewing courts should approach the reasons with respect for the specialized decision-makers, their significant role and the institutional context chosen by the legislator. Reviewing courts should not second-guess operational implications, practical challenges and on-the-ground knowledge and must remain alert to specialized concepts or language. Further, a reviewing court is not restricted to the four corners of the written reasons and should, if faced with a gap in the reasons, look to other materials to see if they shed light on the decision, including: the record of any formal proceedings and the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review. These materials may assist a court in understanding the outcome. In these ways, reviewing courts may legitimately supplement written reasons without supplanting the analysis. Reasons must be read together with the outcome to determine whether the result falls within a range of possible outcomes. This approach puts substance over form where the basis for a decision is evident on the record, but not clearly expressed in written reasons.

As well, a court conducting deferential review must view claims of error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised to ensure they go to the reasonableness of the decision rather than representing a mere difference of opinion. Courts must also consider the materiality of any alleged errors. An error that is peripheral to the reasoning process is not sufficient to justify quashing a decision. The same deferential approach must apply with equal force to statutory interpretation cases. In such cases, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach imperils deference. A *de novo* interpretation of a statute necessarily omits the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question. By placing that perspective at the heart of the judicial review inquiry, courts display respect for specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies. Conversely, by imposing their own interpretation of a statute, courts undermine legislative intent.

In the instant case, there is agreement with the majority that the standard of review is reasonableness. The Registrar's reasons failed to respond to V's submission that the objectives of s. 3(2)(a) of the *Citizenship Act* require its terms to be read narrowly. Instead, the Registrar interpreted s. 3(2)(a) broadly, based on a purely textual assessment. This reading was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Furthermore, the judicial treatment of this provision also points to the need for a narrow interpretation. In addition, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation of s. 3(2)(a), because the former denies citizenship to children born to individuals who enjoy diplomatic privileges and immunities equivalent to those granted to persons referred to in the latter. This suggests that s. 3(2)(a) covers only those employees in Canada of a foreign government who have such privileges and immunities, in contrast with V's parents. By ignoring the objectives of s. 3 as a whole, the Registrar's decision was unreasonable.

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APPEAL from a judgment of the Federal Court of Appeal (Stratas, Webb and Gleason JJ.A.), 2017 FCA 132, [2018] 3 F.C.R. 75, 52 Imm. L.R. (4th) 1, 30 Admin. L.R. (6th) 1, [2017] F.C.J. No. 638 (QL), 2017 CarswellNat 2791 (WL Can.), setting aside a decision of Bell J., 2015 FC 960, [2016] 2 F.C.R. 39, 38 Imm. L.R. (4th) 110, [2015] F.C.J. No. 981 (QL), 2015 CarswellNat 3740 (WL Can.). Appeal dismissed.

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Kyle McCreary and *Johnna Van Parys*, for the intervener the Attorney General of Saskatchewan.

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Karen Andrews, for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program.

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Laura Bowman and *Bronwyn Roe*, for the intervener Ecojustice Canada Society.

David Corbett and *Michelle Alton*, for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers’ Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers’ Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers’ Compensation and the Workers’ Compensation Appeals Tribunal (New Brunswick).

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Brendan Van Niejenhuis and *Andrea Gonsalves*, for the intervener Queen's Prison Law Clinic.

Adam Goldenberg, for the intervener Advocates for the Rule of Law.

Toni Schweitzer, for the intervener Parkdale Community Legal Services.

Paul Warchuk and *Francis Lévesque*, for the intervener the Cambridge Comparative Administrative Law Forum.

James Plotkin and *Alyssa Tomkins*, for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic.

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Daniel Jutras and *Audrey Boctor*, as *amici curiae*, and *Olga Redko* and *Edward Béchard Torres*.

The following is the judgment delivered by

THE CHIEF JUSTICE AND MOLDAVER, GASCON, CÔTÉ, BROWN, ROWE AND MARTIN JJ. —

[1] This appeal and its companion cases (see *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66), provide this Court with an opportunity to re-examine its approach to judicial review of administrative decisions.

[2] In these reasons, we will address two key aspects of the current administrative law jurisprudence which require reconsideration and clarification. First, we will chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision. Second, we will provide additional guidance for reviewing courts to follow when conducting reasonableness review. The revised framework will continue to be guided by the principles underlying judicial review that this Court articulated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190: that judicial review functions to maintain the rule of law while giving effect to legislative intent. We will also affirm the need to develop and strengthen a culture of justification in administrative decision making.

[3] We will then address the merits of the case at bar, which relates to an application for judicial review of a decision by the Canadian Registrar of Citizenship concerning Alexander Vavilov, who was born in Canada and whose parents were later revealed to be Russian spies. The Registrar found on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29, that Mr. Vavilov was not a Canadian citizen and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*, SOR/93-246. In our view, the standard of review to be applied to the Registrar's decision is reasonableness, and the Registrar's decision was unreasonable. We would therefore uphold the Federal Court of Appeal's decision to quash it, and would dismiss the Minister of Citizenship and Immigration's appeal.

I. Need for Clarification and Simplification of the Law of Judicial Review

[4] Over the past decades, the law relating to judicial review of administrative decisions in Canada has been characterized by continuously evolving jurisprudence and vigorous academic debate. This area of the law concerns matters which are fundamental to our legal and constitutional order, and seeks to navigate the proper relationship between administrative decision makers, the courts and individuals in our society. In parallel with the law, the role of administrative decision making in Canada has also evolved. Today, the administration of countless public bodies and regulatory regimes has been entrusted to statutory delegates with decision-making power. The number, diversity and importance of the matters that come before such delegates has made administrative decision making one of the principal manifestations of state power in the lives of Canadians.

[5] Given the ubiquity and practical importance of administrative decision making, it is essential that administrative decision makers, those subject to their decisions and courts tasked with reviewing those decisions have clear guidance on how judicial review is to be performed.

[6] In granting leave to appeal in the case at bar and in its companion cases, this Court's leave to appeal judgment made clear that it viewed these appeals as an opportunity to consider the law applicable to the judicial review of administrative decisions as addressed in *Dunsmuir* and subsequent cases. In light of the importance of this issue, the Court appointed two *amici curiae*, invited the parties to devote a substantial portion of their submissions to the standard of review

issue, and granted leave to 27 interveners, comprising 4 attorneys general and numerous organizations representing the breadth of the Canadian administrative law landscape. We have, as a result, received a wealth of helpful submissions on this issue. Despite this Court's review of the subject in *Dunsmuir*, some aspects of the law remain challenging. In particular, the submissions presented to the Court have highlighted two aspects of the current framework which need clarification.

[7] The first aspect is the analysis for determining the standard of review. It has become clear that *Dunsmuir*'s promise of simplicity and predictability in this respect has not been fully realized. In *Dunsmuir*, a majority of the Court merged the standards of "patent unreasonableness" and "reasonableness *simpliciter*" into a single "reasonableness" standard, thus reducing the number of standards of review from three to two: paras. 34-50. It also sought to simplify the analysis for determining the applicable standard of review: paras. 51-64. Since *Dunsmuir*, the jurisprudence has evolved to recognize that reasonableness will be the applicable standard for most categories of questions on judicial review, including, presumptively, when a decision maker interprets its enabling statute: see, e.g., *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3, at para. 46; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197, at para. 13; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 25; *Dunsmuir*, at para. 54. The Court has indicated that this presumption may be rebutted by showing the issue on review falls within a category of questions attracting correctness review: see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 22. It may also be rebutted by showing that the context indicates that the legislature intended the standard of review to be correctness: *McLean*, at para. 22; *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at para. 32; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230 ("*CHRC*"), at paras. 45-46. However, uncertainty about when the contextual analysis remains appropriate and debate surrounding the scope of the correctness categories have sometimes caused confusion and made the analysis unwieldy: see, e.g., P. Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527.

[8] In addition, this analysis has in some respects departed from the theoretical foundations underpinning judicial review. While the application of the reasonableness standard is grounded, in part, in the necessity of avoiding "undue interference" in the face of the legislature's intention to leave certain questions with administrative bodies rather than with the courts (see *Dunsmuir*, at para. 27), that standard has come to be routinely applied even where the legislature has provided for a different institutional structure through a statutory appeal mechanism.

[9] The uncertainty that has followed *Dunsmuir* has been highlighted by judicial and academic criticism, litigants who have come before this Court, and organizations that represent Canadians who interact with administrative decision makers. These are not light critiques or theoretical challenges. They go to the core of the coherence of our administrative law jurisprudence and to the practical implications of this lack of coherence. This Court, too, has taken note. In *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 19, Abella J. expressed the need to "simplify the standard of review labyrinth we currently find ourselves in" and offered suggestions with a view to beginning a necessary conversation on the way forward. It is in this context that the Court decided to grant leave to hear this case and the companion cases jointly.

[10] This process has led us to conclude that a reconsideration of this Court's approach is necessary in order to bring greater coherence and predictability to this area of law. We have therefore adopted a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. The analysis begins with a presumption that reasonableness is the applicable standard in all cases. Reviewing courts should derogate from this presumption only where required by a clear indication of legislative intent or by the rule of law.

[11] The second aspect is the need for better guidance from this Court on the proper application of the reasonableness standard. The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between "good enough" and "not quite wrong". These concerns have been echoed by some members of the legal profession, civil society organizations and legal clinics. The Court has an obligation to take these perspectives seriously and to ensure that the framework it adopts accommodates all types of administrative decision making, in areas that range from immigration, prison administration and social security entitlements to labour relations, securities regulation and energy policy.

[12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature's choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*'s promise to protect "the legality, the reasonableness and the fairness of the administrative process and its outcomes", reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.

[13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a "rubber-stamping" process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.

[14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be "justified to citizens in terms of rationality and fairness": the Rt. Hon. B. McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998), 12 *C.J.A.L.P.* 171, at p. 174 (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

II. Determining the Applicable Standard of Review

[16] In the following sections, we set out a revised framework for determining the standard of review a court should apply when the merits of an administrative decision are challenged. It starts with a presumption that reasonableness is the applicable standard whenever a court reviews administrative decisions.

[17] The presumption of reasonableness review can be rebutted in two types of situations. The first is where the legislature has indicated that it intends a different standard or set of standards to apply. This will be the case where the legislature explicitly prescribes the applicable standard of review. It will also be the case where the legislature has provided a statutory appeal mechanism from an administrative decision to a court, thereby signalling the legislature's intent that appellate standards apply when a court reviews the decision. The second situation in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied. This will be the case for certain categories of questions, namely constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies. The general rule of reasonableness review, when coupled with these limited exceptions, offers a comprehensive approach to determining the applicable standard of review. As a result, it is no longer necessary for courts to engage in a "contextual inquiry" (*CHRC*, at paras. 45-47, see also *Dunsmuir*, at paras. 62-64; *McLean*, at para. 22) in order to identify the appropriate standard.

[18] Before setting out the framework for determining the standard of review in greater detail, we wish to acknowledge that these reasons depart from the Court's existing jurisprudence on standard of review in certain respects. Any reconsideration such as this can be justified only by compelling circumstances, and we do not take this decision lightly. A decision to adjust course will always require the Court to carefully weigh the impact on legal certainty and predictability against the costs of continuing to follow a flawed approach: see *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 47; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489, at paras. 24-27; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3, at paras. 56-57 and 129-31, 139; *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609, at paras. 43-44; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at pp. 849-50.

[19] On this point, we recall the observation of Gibbs J. in *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), which this Court endorsed in *Craig*, at para. 26:

> No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court.

[20] Nonetheless, this Court has in the past revisited precedents that were determined to be unsound in principle, that had proven to be unworkable and unnecessarily complex to apply, or that had attracted significant and valid judicial, academic and other criticism: *Craig*, at paras. 28-30; *Henry*, at paras. 45-47; *Fraser*, at para. 135 (per Rothstein J., concurring in the result); *Bernard*, at pp. 858-59. Although adhering to the established jurisprudence will generally promote certainty and predictability, in some instances doing so will create or perpetuate uncertainty in the law: *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518, at p. 528; *Bernard*, at p. 858; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740, at p. 778. In such circumstances, "following the prior decision because of *stare decisis* would be contrary to the underlying value behind that doctrine, namely, clarity and certainty in the law": *Bernard*, at p. 858. These considerations apply here.

[21] Certain aspects of the current framework are unclear and unduly complex. The practical effect of this lack of clarity is that courts sometimes struggle in conducting the standard of review analysis, and costly debates surrounding the appropriate standard and its application continue to overshadow the review on the merits in many cases, thereby undermining access to justice. The words of Binnie J. in his concurring reasons in *Dunsmuir*, at para. 133, are still apt:

> [J]udicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied . . . . If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is [the choice of standard analysis] . . . . A victory before the reviewing court may be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome . . . .

Regrettably, we find ourselves in a similar position following *Dunsmuir*. As Karakatsanis J. observed in *Edmonton East*, at para. 35, "[t]he contextual approach can generate uncertainty and endless litigation concerning the standard of review." While counsel and courts attempt to work through the complexities of determining the standard of review and its proper application, litigants "still find the merits waiting in the wings for their chance to be seen and reviewed": *Wilson*, at para. 25, per Abella J.

[22] As noted in *CHRC*, this Court "has for years attempted to simplify the standard of review analysis in order to 'get the parties away from arguing about the tests and back to arguing about the substantive merits of their case'": para. 27, quoting *Alberta Teachers*, at para. 36, citing *Dunsmuir*, at para. 145, per Binnie J. The principled changes set out below seek to promote the values underlying *stare decisis* and to make the law on the standard of review more certain, coherent and workable going forward.

A. *Presumption That Reasonableness Is the Applicable Standard*

[23] Where a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions other than a review related to a breach of natural justice and/or the duty of procedural fairness), the standard of review it applies must reflect the legislature's intent with respect to the role of the reviewing court, except where giving effect to that intent is precluded by the rule of law. The starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness.

[24] Parliament and the provincial legislatures are constitutionally empowered to create administrative bodies and to endow them with broad statutory powers: *Dunsmuir*, at para. 27. Where a legislature has created an administrative decision maker for the specific purpose of administering a statutory scheme, it must be presumed that the legislature also intended that decision maker to be able to fulfill its mandate and interpret the law as applicable to all issues that come before it. Where a legislature has not explicitly prescribed that a court is to have a role in reviewing the decisions of that decision maker, it can safely be assumed that the legislature intended the administrative decision maker to function with a minimum of judicial interference. However, because judicial review is protected by s. 96 of the *Constitution Act, 1867*, legislatures cannot shield

administrative decision making from curial scrutiny entirely: *Dunsmuir*, at para. 31; *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, at pp. 236-37; *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, at p. 1090. Nevertheless, respect for these institutional design choices made by the legislature requires a reviewing court to adopt a posture of restraint on review.

[25] For years, this Court's jurisprudence has moved toward a recognition that the reasonableness standard should be the starting point for a court's review of an administrative decision. Indeed, a presumption of reasonableness review is already a well-established feature of the standard of review analysis in cases in which administrative decision makers interpret their home statutes: see *Alberta Teachers*, at para. 30; *Saguenay*, at para. 46; *Edmonton East*, at para. 22. In our view, it is now appropriate to hold that whenever a court reviews an administrative decision, it should start with the presumption that the applicable standard of review for all aspects of that decision will be reasonableness. While this presumption applies to the administrative decision maker's interpretation of its enabling statute, the presumption also applies more broadly to other aspects of its decision.

[26] Before turning to an explanation of how the presumption of reasonableness review may be rebutted, we believe it is desirable to clarify one aspect of the conceptual basis for this presumption. Since *C.U.P.E. v. N.B. Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, the central rationale for applying a deferential standard of review in administrative law has been a respect for the legislature's institutional design choice to delegate certain matters to non-judicial decision makers through statute: *C.U.P.E.*, at pp. 235-36. However, this Court has subsequently identified a number of other justifications for applying the reasonableness standard, some of which have taken on influential roles in the standard of review analysis at various times.

[27] In particular, the Court has described one rationale for applying the reasonableness standard as being the relative expertise of administrative decision makers with respect to the questions before them: see, e.g., *C.U.P.E.*, at p. 236; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, at paras. 32-35; *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, at pp. 591-92; *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at paras. 50-53; *Dunsmuir*, at para. 49, quoting D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93; see also *Dunsmuir*, at para. 68. However, this Court's jurisprudence has sometimes been deeply divided on the question of what expertise entails in the administrative context, how it should be assessed and how it should inform the standard of review analysis: see, e.g., *Khosa*, at paras. 23-25, per Binnie J. for the majority, compared to paras. 93-96, per Rothstein J., concurring in the result; *Edmonton East*, at para. 33, per Karakatsanis J. for the majority, compared to paras. 81-86, per Côté and Brown JJ., dissenting. In the era of what was known as the "pragmatic and functional" approach, which was first set out in *Bibeault*, a decision maker's expertise relative to that of the reviewing court was one of the key contextual factors said to indicate legislative intent with respect to the standard of review, but the decision maker was not presumed to have relative expertise. Instead, whether a decision maker had greater expertise than the reviewing court was assessed in relation to the specific question at issue and on the basis of a contextual analysis that could incorporate factors such as the qualification of an administrative body's members, their experience in a particular area and their involvement in policy making: see, e.g., *Pezim*, at pp. 591-92; *Southam*, at paras. 50-53; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226, at paras. 28-29; *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36, [2001] 2 S.C.R. 100, at paras. 28-32; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 50.

[28] Unfortunately, this contextual analysis proved to be unwieldly and offered limited practical guidance for courts attempting to assess an administrative decision maker's relative expertise. More recently, the dominant approach in this Court has been to accept that expertise simply inheres in an administrative body by virtue of the specialized function designated for it by the legislature: *Edmonton East*, at para. 33. However, if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not.

[29] Of course, the fact that the specialized role of administrative decision makers lends itself to the development of expertise and institutional experience is not the only reason that a legislature may choose to delegate decision-making authority. Over the years, the Court has pointed to a number of other compelling rationales for the legislature to delegate the administration of a statutory scheme to a particular administrative decision maker. These rationales have included the decision maker's proximity and responsiveness to stakeholders, ability to render decisions promptly, flexibly and efficiently, and ability to provide simplified and streamlined proceedings intended to promote access to justice.

[30] While specialized expertise and these other rationales may all be reasons for a legislature to delegate decision-making authority, a reviewing court need not evaluate which of these rationales apply in the case of a particular decision maker in order to determine the standard of review. Instead, in our view, it is the *very fact* that the legislature has chosen to delegate authority which justifies a default position of reasonableness review. The Court has in fact recognized this basis for applying the reasonableness standard to administrative decisions in the past. In *Khosa*, for example, the majority understood *Dunsmuir* to stand for the proposition that "with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts": para. 25. More recently, in *Edmonton East*, Karakatsanis J. explained that a presumption of reasonableness review "respects the principle of legislative supremacy and the choice made to delegate decision making to a tribunal, rather than the courts": para. 22. And in *CHRC*, Gascon J. explained that "the fact that the legislature has allocated authority to a decision maker other than the courts is itself an indication that the legislature intended deferential review": para. 50. In other words, respect for this institutional design choice and the democratic principle, as well as the need for courts to avoid "undue interference" with the administrative decision maker's discharge of its functions, is what justifies the presumptive application of the reasonableness standard: *Dunsmuir*, at para. 27.

[31] We wish to emphasize that because these reasons adopt a presumption of reasonableness as the starting point, expertise is no longer relevant to a determination of the standard of review as it was in the contextual analysis. However, we are not doing away with the role of expertise in administrative decision making. This consideration is simply folded into the new starting point and, as explained below, expertise remains a relevant consideration in conducting reasonableness review.

[32] That being said, our starting position that the applicable standard of review is reasonableness is not incompatible with the rule of law. However, because this approach is grounded in respect for legislative choice, it also requires courts to give effect to clear legislative direction that a different standard was intended. Similarly, a reviewing court must be prepared to derogate from the presumption of reasonableness review where respect for the rule of law requires a singular, determinate and final answer to the question before it. Each of these situations will be discussed in turn below.

B. *Derogation From the Presumption of Reasonableness Review on the Basis of Legislative Intent*

[33] This Court has described respect for legislative intent as the "polar star" of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

(1) Legislated Standards of Review

[34] Any framework rooted in legislative intent must, to the extent possible, respect clear statutory language that prescribes the applicable standard of review. This Court has consistently affirmed that legislated standards of review should be given effect: see, e.g., *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 31-32; *Khosa*, at paras. 18-19; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 20; *Moore v. British Columbia (Education)*, 2012 SCC 61, [2012] 3 S.C.R. 360, at para. 55; *McCormick v. Fasken Martineau DuMoulin LLP*, 2014 SCC 39, [2014] 2 S.C.R. 108, at para. 16; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25, [2016] 1 S.C.R. 587, at paras. 8 and 29; *British Columbia Human Rights Tribunal v. Schrenk*, 2017 SCC 62, [2017] 2 S.C.R. 795, at para. 28.

[35] It follows that where a legislature has indicated that courts are to apply the standard of correctness in reviewing certain questions, that standard must be applied. In British Columbia, the legislature has established the applicable standard of review for many tribunals by reference to the *Administrative Tribunals Act*, S.B.C. 2004, c. 45: see ss. 58 and 59. For example, it has provided that the standard of review applicable to decisions on questions of statutory interpretation by the B.C. Human Rights Tribunal is to be correctness: *ibid.*, s. 59(1); *Human Rights Code*, R.S.B.C. 1996, c. 210, s. 32. We continue to be of the view that where the legislature has indicated the applicable standard of review, courts are bound to respect that designation, within the limits imposed by the rule of law.

(2) Statutory Appeal Mechanisms

[36] We have reaffirmed that, to the extent possible, the standard of review analysis requires courts to give effect to the legislature's institutional design choices to delegate authority through statute. In our view, this principled position also requires courts to give effect to the legislature's intent, signalled by the presence of a statutory appeal mechanism from an administrative decision to a court, that the court is to perform an appellate function with respect to that decision. Just as a legislature may, within constitutional limits, insulate administrative decisions from judicial interference, it may also choose to establish a regime "which does not exclude the courts but rather makes them part of the enforcement machinery": *Seneca College of Applied Arts and Technology v. Bhadauria*, 1981 CanLII 29 (SCC), [1981] 2 S.C.R. 181, at p. 195. Where a legislature has provided that parties may appeal from an administrative decision to a court, either as of right or with leave, it has subjected the administrative regime to appellate oversight and indicated that it expects the court to scrutinize such administrative decisions on an appellate basis. This expressed intention necessarily rebuts the blanket presumption of reasonableness review, which is premised on giving effect to a legislature's decision to leave certain issues with a body other than a court. This intention should be given effect. As noted by the intervener Attorney General of Quebec in its factum, [TRANSLATION] "[t]he requirement of deference must not sterilize such an appeal mechanism to the point that it changes the nature of the decision-making process the legislature intended to put in place": para. 2.

[37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[38] We acknowledge that giving effect to statutory appeal mechanisms in this way departs from the Court's recent jurisprudence. However, after careful consideration, we are of the view that this shift is necessary in order to bring coherence and conceptual balance to the standard of review analysis and is justified by a weighing of the values of certainty and correctness: *Craig*, at para. 27. Our conclusion is based on the following considerations.

[39] First, there has been significant judicial and academic criticism of this Court's recent approach to statutory appeal rights: see, e.g., Y.-M. Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 244; the Hon. J.T. Robertson, *Administrative Deference: The Canadian Doctrine that Continues to Disappoint* (April 18, 2018) (online), at p. 8; the Hon. D. Stratas, "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency" (2016), 42 *Queen's L.J.* 27, at p. 33; Daly, at pp. 541-42; *Québec (Procureure générale) v. Montréal (Ville)*, 2016 QCCA 2108, 17 Admin. L.R. (6th) 328, at paras. 36-46; *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174, 428 D.L.R. (4th) 311, at paras. 190- 92, per Nadon J.A., concurring, and at 66 and 69-72, per Rennie J.A., dissenting; *Garneau Community League v. Edmonton (City)*, 2017 ABCA 374, 60 Alta. L.R. (6th) 1, at paras. 91 and 93-95, per Slatter J.A., concurring; *Nova Scotia (Attorney General) v. S&D Smith Central Supplies Limited*, 2019 NSCA 22, at paras. 250, 255-64 and 274-302 (CanLII), per Beveridge J.A., dissenting; *Atlantic Mining NS Corp. (D.D.V. Gold Limited) v. Oakley*, 2019 NSCA 14, at paras. 9-14 (CanLII). These critiques seize on the inconsistency inherent in a standard of review framework based on legislative intent that otherwise declines to give meaning to an express statutory right of appeal. This criticism observes that legislative choice is not one-dimensional; rather, it pulls in two directions. While a legislative choice to delegate to an administrative decision maker grounds a presumption of reasonableness on the one hand, a legislative choice to enact a statutory right of appeal signals an intention to ascribe an appellate role to reviewing courts on the other hand.

[40] This Court has in the past held that the existence of significant and valid judicial, academic and other criticism of its jurisprudence may justify reconsideration of a precedent: *Craig*, at para. 29; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683, at paras. 35-41. This consideration applies in the instant case. In particular, the suggestion that the recent treatment of statutory rights of appeal represents a departure from the conceptual basis underpinning the standard of review framework is itself a compelling reason to re-examine the current approach: *Khosa*, at para. 87, per Rothstein J., concurring in the result.

[41] Second, there is no satisfactory justification for the recent trend in this Court's jurisprudence to give no effect to statutory rights of appeal in the standard of review analysis absent exceptional wording: see *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161, at paras. 35-39. Indeed, this approach is itself a departure from earlier jurisprudence: the Hon. J. T. Robertson, "Judicial Deference to Administrative Tribunals: A Guide to 60 Years of Supreme Court Jurisprudence" (2014), 66 *S.C.L.R.* (2d) 1, at pp. 91-93. Under the former "pragmatic and functional" approach to determining the applicable standard of review, the existence of a privative clause or a statutory right of appeal was one of four contextual factors that a court would consider in order to determine the standard that the legislature intended to apply to a particular decision. Although a statutory appeal clause was not determinative, it was understood to be a key factor indicating that the legislature intended that a less deferential standard of review be applied: see, e.g., *Pezim*, at pp. 589-92; *British Columbia Telephone Co. v. Shaw Cable Systems (B.C.) Ltd.*, 1995 CanLII 101 (SCC), [1995] 2 S.C.R. 739, at paras. 28-31; *Southam*, at paras. 30-32, 46 and 54-55; *Pushpanathan*, at paras. 30-31; *Dr. Q*, at para. 27; *Mattel*, at paras. 26-27; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at paras. 21 and 27-29; *Barrie Public Utilities v. Canadian Cable Television Assn.*, 2003 SCC 28, [2003] 1 S.C.R. 476, at para. 11; *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)*, 2004 SCC 54, [2004] 3 S.C.R. 152, at para. 7.

[42] The Court did indeed sometimes find that, even in a statutory appeal, a deferential standard of review was warranted for the legal findings of a decision maker that lay at the heart of the decision maker's expertise: see, e.g., *Pezim*. In other instances, however, the Court concluded that the existence of a statutory appeal mechanism and the fact that the decision maker did not have greater expertise than a court on the issue being considered indicated that correctness was the appropriate standard, including on matters involving the interpretation of the administrative decision maker's home statute: see, e.g., *Mattel*, at paras. 26-33; *Barrie Public Utilities*, at paras. 9-19; *Monsanto*, at paras. 6-16.

[43] Yet as, in *Dunsmuir*, *Alberta Teachers*, *Edmonton East* and subsequent cases, the standard of review analysis was simplified and shifted from a contextual analysis to an approach more focused on categories, statutory appeal mechanisms ceased to play a role in the analysis. Although this simplification of the standard of review analysis may have been a laudable change, it did not justify ceasing to give *any* effect to statutory appeal mechanisms. *Dunsmuir* itself provides little guidance on the rationale for this change. The majority in *Dunsmuir* was silent on the role of a statutory right of appeal in determining the standard of review, and did not refer to the prior treatment of statutory rights of appeal under the pragmatic and functional approach.

[44] More generally, there is no convincing reason to presume that legislatures mean something entirely different when they use the word "appeal" in an administrative law statute than they do in, for example, a criminal or commercial law context. Accepting that the word "appeal" refers to the same type of procedure in all these contexts also accords with the presumption of consistent expression, according to which the legislature is presumed to use language such that the same words have the same meaning both within a statute and across statutes: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 217. Accepting that the legislature intends an appellate standard of review to be applied when it uses the word "appeal" also helps to explain why many statutes provide for *both* appeal and judicial review mechanisms in different contexts, thereby indicating two roles for reviewing courts: see, e.g., *Federal Courts Act*, R.S.C. 1985, c. F-7, ss. 27 and 28. This offers further support for giving effect to statutory rights of appeal. Our colleagues' suggestion that our position in this regard "hinges" on what they call a "textualist argument" (at para. 246) is inaccurate.

[45] That there is no principled rationale for ignoring statutory appeal mechanisms becomes obvious when the broader context of those mechanisms is considered. The existence of a limited right of appeal, such as a right of appeal on questions of law or a right of appeal with leave of a court, does not preclude a court from considering other aspects of a decision in a judicial review proceeding. However, if the same standards of review applied regardless of whether a question was covered by the appeal provision, and regardless of whether an individual subject to an administrative decision was granted leave to appeal or applied for judicial review, the appeal provision would be completely redundant — contrary to the well-established principle that the legislature does not speak in vain: *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, 1985 CanLII 35 (SCC), [1985] 1 S.C.R. 831, at p. 838.

[46] Finally, and most crucially, the appeals now before the Court have allowed for a comprehensive and considered examination of the standard of review analysis with the goal of remedying the conceptual and practical difficulties that have made this area of the law challenging for litigants and courts alike. To achieve this goal, the revised framework must, for at least two reasons, give effect to statutory appeal mechanisms. The first reason is conceptual. In the past, this Court has looked past an appeal clause primarily when the decision maker possessed greater relative expertise — what it called the "specialization of duties" principle in *Pezim*, at p. 591. But, as discussed above, the presumption of reasonableness review is no longer premised upon notions of relative expertise. Instead, it is now based on respect for the legislature's institutional design choice, according to which the authority to make a decision is vested in an administrative decision maker rather than in a court. It would be inconsistent with this conceptual basis for the presumption of reasonableness review to disregard clear indications that the legislature has intentionally chosen a more involved role for the courts. Just as recognizing a presumption of reasonableness review on all questions respects a legislature's choice to leave some matters first and foremost to an administrative decision maker, departing from that blanket presumption in the context of a statutory appeal respects the legislature's choice of a more involved role for the courts in supervising administrative decision making.

[47] The second reason is that, building on developments in the case law over the past several years, this decision conclusively closes the door on the application of a contextual analysis to determine the applicable standard, and in doing so streamlines and simplifies the standard of review framework. With the elimination of the contextual approach to selecting the standard of review, the need for statutory rights of appeal to play a role becomes clearer. Eliminating the contextual approach means that statutory rights of appeal must now either play no role in administrative law or be accepted as directing a departure from the default position of reasonableness review. The latter must prevail.

[48] Our colleagues agree that the time has come to put the contextual approach espoused in *Dunsmuir* to rest and adopt a presumption of reasonableness review. We part company on the extent to which the departure from the contextual approach requires corresponding modifications to other aspects of the standard of review jurisprudence. We consider that the elimination of the contextual approach represents an incremental yet important adjustment to Canada's judicial review roots. While it is true that this Court has, in the past several years of jurisprudential development, warned that the contextual approach should be applied "sparingly" (*CHRC*, at para. 46), it is incorrect to suggest that our jurisprudence was such that the elimination of the contextual analysis was "all but complete": reasons of Abella and Karakatsanis JJ., at para. 277; see, in this regard, *CHRC*, at paras. 44-54; *Saguenay*, at para. 46; *Tervita*, at para. 35; *McLean*, at para. 22; *Edmonton East*, at para. 32; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283, at para. 15. The contextual analysis was one part of the broader standard of review framework set out in *Dunsmuir*. A departure from this aspect of the *Dunsmuir* framework requires a principled rebalancing of the framework as a whole in order to maintain the equilibrium between the roles of administrative decision makers and reviewing courts that is fundamental to administrative law.

[49] In our view, with the starting position of this presumption of reasonableness review, and in the absence of a searching contextual analysis, legislative intent can only be given effect in this framework if statutory appeal mechanisms, as clear signals of legislative intent with respect to the applicable standard of review, are given effect through the application of

appellate standards by reviewing courts. Conversely, in such a framework that is based on a presumption of reasonableness review, contextual factors that courts once looked to as signalling deferential review, such as privative clauses, serve no independent or additional function in identifying the standard of review.

[50] We wish, at this juncture, to make three points regarding how the presence of a statutory appeal mechanism should inform the choice of standard analysis. First, we note that statutory regimes that provide for parties to appeal to a court from an administrative decision may allow them to do so in all cases (that is, as of right) or only with leave of the court. While the existence of a leave requirement will affect whether a court will hear an appeal from a particular decision, it does not affect the standard to be applied if leave is given and the appeal is heard.

[51] Second, we note that not all legislative provisions that contemplate a court reviewing an administrative decision actually provide a right of appeal. Some provisions simply recognize that all administrative decisions are subject to judicial review and address procedural or other similar aspects of judicial review in a particular context. Since these provisions do not give courts an appellate function, they do not authorize the application of appellate standards. Some examples of such provisions are ss. 18 to 18.2, 18.4 and 28 of the *Federal Courts Act*, which confer jurisdiction on the Federal Court and the Federal Court of Appeal to hear and determine applications for judicial review of decisions of federal bodies and grant remedies, and also address procedural aspects of such applications: see *Khosa*, at para. 34. Another example is the current version of s. 470 of Alberta's *Municipal Government Act*, R.S.A. 2000, c. M-26, which does not provide for an appeal to a court, but addresses procedural considerations and consequences that apply "[w]here a decision of an assessment review board is the subject of an application for judicial review": s. 470(1).

[52] Third, we would note that statutory appeal rights are often circumscribed, as their scope might be limited with reference to the types of questions on which a party may appeal (where, for example, appeals are limited to questions of law) or the types of decisions that may be appealed (where, for example, not every decision of an administrative decision maker may be appealed to a court), or to the party or parties that may bring an appeal. However, the existence of a circumscribed right of appeal in a statutory scheme does not on its own preclude applications for judicial review of decisions, or of aspects of decisions, to which the appeal mechanism does not apply, or by individuals who have no right of appeal. But any such application for judicial review is distinct from an appeal, and the presumption of reasonableness review that applies on judicial review cannot then be rebutted by reference to the statutory appeal mechanism.

C. *The Applicable Standard Is Correctness Where Required by the Rule of Law*

[53] In our view, respect for the rule of law requires courts to apply the standard of correctness for certain types of legal questions: constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies. The application of the correctness standard for such questions respects the unique role of the judiciary in interpreting the Constitution and ensures that courts are able to provide the last word on questions for which the rule of law requires consistency and for which a final and determinate answer is necessary: *Dunsmuir*, at para. 58.

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

(1) Constitutional Questions

[55] Questions regarding the division of powers between Parliament and the provinces, the relationship between the legislature and the other branches of the state, the scope of Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*, and other constitutional matters require a final and determinate answer from the courts. Therefore, the standard of correctness must continue to be applied in reviewing such questions: *Dunsmuir*, para. 58; *Westcoast Energy Inc. v. Canada (National Energy Board)*, 1998 CanLII 813 (SCC), [1998] 1 S.C.R. 322.

[56] The Constitution — both written and unwritten — dictates the limits of all state action. Legislatures and administrative decision makers are bound by the Constitution and must comply with it. A legislature cannot alter the scope of its own constitutional powers through statute. Nor can it alter the constitutional limits of executive power by delegating authority to an administrative body. In other words, although a legislature may choose what powers it delegates to an administrative body, it cannot delegate powers that it does not constitutionally have. The constitutional authority to act must have determinate, defined and consistent limits, which necessitates the application of the correctness standard.

[57] Although the *amici* questioned the approach to the standard of review set out in *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395, a reconsideration of that approach is not germane to the issues in this appeal. However, it is important to draw a distinction between cases in which it is alleged that the effect of the administrative decision being reviewed is to unjustifiably limit rights under the *Canadian Charter of Rights and Freedoms* (as was the case in *Doré*) and those in which the issue on review is whether a provision of the decision maker's enabling statute violates the *Charter* (see, e.g., *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504, at para. 65). Our jurisprudence holds that an administrative decision maker's interpretation of the latter issue should be reviewed for correctness, and that jurisprudence is not displaced by these reasons.

(2) General Questions of Law of Central Importance to the Legal System as a Whole

[58] In *Dunsmuir*, a majority of the Court held that, in addition to constitutional questions, general questions of law which are "both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" will require the application of the correctness standard: para. 60, citing *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 62, per LeBel J., concurring. We remain of the view that the rule of law requires courts to have the final word with regard to general questions of law that are "of central importance to the legal system as a whole". However, a return to first principles reveals that it is not necessary to evaluate the decision maker's specialized expertise in order to determine whether the correctness standard must be applied in cases involving such questions. As indicated above (at para. 31) of the reasons, the consideration of expertise is folded into the new starting point adopted in these reasons, namely the presumption of reasonableness review.

[59] As the majority of the Court recognized in *Dunsmuir*, the key underlying rationale for this category of questions is the reality that certain general questions of law "require uniform and consistent answers" as a result of "their impact on the administration of justice as a whole": *Dunsmuir*, para. 60. In these cases, correctness review is necessary to resolve general questions of law that are of "fundamental importance and broad applicability", with significant legal

consequences for the justice system as a whole or for other institutions of government: see *Toronto (City)*, at para. 70; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555, at para. 20; *Canadian National Railway*, at para. 60; *Chagnon v. Syndicat de la fonction publique et parapublique du Québec*, 2018 SCC 39, [2018] 2 S.C.R. 687, at para. 17; *Saguenay*, at para. 51; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 ("*Mowat*"), at para. 22; *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, [2016] 1 S.C.R. 29, at para. 38. For example, the question in *University of Calgary* could not be resolved by applying the reasonableness standard, because the decision would have had legal implications for a wide variety of other statutes and because the uniform protection of solicitor-client privilege — at issue in that case — is necessary for the proper functioning of the justice system: *University of Calgary*, at paras. 19-26. As this shows, the resolution of general questions of law "of central importance to the legal system as a whole" has implications beyond the decision at hand, hence the need for "uniform and consistent answers".

[60] This Court's jurisprudence continues to provide important guidance regarding what constitutes a general question of law of central importance to the legal system as a whole. For example, the following general questions of law have been held to be of central importance to the legal system as a whole: when an administrative proceeding will be barred by the doctrines of *res judicata* and abuse of process (*Toronto (City)*, at para. 15); the scope of the state's duty of religious neutrality (*Saguenay*, at para. 49); the appropriateness of limits on solicitor-client privilege (*University of Calgary*, at para. 20); and the scope of parliamentary privilege (*Chagnon*, at para. 17). We caution, however, that this jurisprudence must be read carefully, given that expertise is no longer a consideration in identifying such questions: see, e.g., *CHRC*, at para. 43.

[61] We would stress that the mere fact that a dispute is "of wider public concern" is not sufficient for a question to fall into this category — nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue: see, e.g., *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458, at para. 66; *McLean*, at para. 28; *Barreau du Québec v. Quebec (Attorney General)*, 2017 SCC 56, [2017] 2 S.C.R. 488, at para. 18. The case law reveals many examples of questions this Court has concluded are *not* general questions of law of central importance to the legal system as a whole. These include whether a certain tribunal can grant a particular type of compensation (*Mowat*, at para. 25); when estoppel may be applied as an arbitral remedy (*Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616, at paras. 37-38); the interpretation of a statutory provision prescribing timelines for an investigation (*Alberta Teachers*, at para. 32); the scope of a management rights clause in a collective agreement (*Irving Pulp & Paper*, at paras. 7, 15-16 and 66, per Rothstein and Moldaver JJ., dissenting but not on this point); whether a limitation period had been triggered under securities legislation (*McLean*, at paras. 28-31); whether a party to a confidential contract could bring a complaint under a particular regulatory regime (*Canadian National Railway*, at para. 60); and the scope of an exception allowing non-advocates to represent a minister in certain proceedings (*Barreau du Québec*, at paras. 17-18). As these comments and examples indicate, this does not mean that simply because expertise no longer plays a role in the selection of the standard of review, questions of central importance are now transformed into a broad catch-all category for correctness review.

[62] In short, general questions of law of central importance to the legal system as a whole require a single determinate answer. In cases involving such questions, the rule of law requires courts to provide a greater degree of legal certainty than reasonableness review allows.

(3) Questions Regarding the Jurisdictional Boundaries Between Two or More Administrative Bodies

[63] Finally, the rule of law requires that the correctness standard be applied in order to resolve questions regarding the jurisdictional boundaries between two or more administrative bodies: *Dunsmuir*, para. 61. One such question arose in *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360, in which the issue was the jurisdiction of a labour arbitrator to consider matters of police discipline and dismissal that were otherwise subject to a comprehensive legislative regime. Similarly, in *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Quebec (Attorney General)*, 2004 SCC 39, [2004] 2 S.C.R. 185, the Court considered a jurisdictional dispute between a labour arbitrator and the Quebec Human Rights Tribunal.

[64] Administrative decisions are rarely contested on this basis. Where they are, however, the rule of law requires courts to intervene where one administrative body has interpreted the scope of its authority in a manner that is incompatible with the jurisdiction of another. The rationale for this category of questions is simple: the rule of law cannot tolerate conflicting orders and proceedings where they result in a true operational conflict between two administrative bodies, pulling a party in two different and incompatible directions: see *British Columbia Telephone Co.*, at para. 80, per McLachlin J. (as she then was), concurring. Members of the public must know where to turn in order to resolve a dispute. As with general questions of law of central importance to the legal system as a whole, the application of the correctness standard in these cases safeguards predictability, finality and certainty in the law of administrative decision making.

D. *A Note Regarding Jurisdictional Questions*

[65] We would cease to recognize jurisdictional questions as a distinct category attracting correctness review. The majority in *Dunsmuir* held that it was "without question" (para. 50) that the correctness standard must be applied in reviewing jurisdictional questions (also referred to as true questions of jurisdiction or *vires*). True questions of jurisdiction were said to arise "where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter": see *Dunsmuir*, at para. 59; *Quebec (Attorney General) v. Guérin*, 2017 SCC 42, [2017] 2 S.C.R. 3, at para. 32. Since *Dunsmuir*, however, majorities of this Court have questioned the necessity of this category, struggled to articulate its scope and "expressed serious reservations about whether such questions can be distinguished as a separate category of questions of law": *McLean*, at para. 25, referring to *Alberta Teachers*, at para. 34; *Edmonton East*, at para. 26; *Guérin*, at paras. 32-36; *CHRC*, at paras. 31-41.

[66] As Gascon J. noted in *CHRC*, the concept of "jurisdiction" in the administrative law context is inherently "slippery": para. 38. This is because, in theory, any challenge to an administrative decision can be characterized as "jurisdictional" in the sense that it calls into question whether the decision maker had the authority to act as it did: see *CHRC*, at para. 38; *Alberta Teachers*, at para. 34; see similarly *City of Arlington, Texas v. Federal Communications Commission*, 569 U.S. 290 (2013), at p. 299. Although this Court's jurisprudence contemplates that only a much narrower class of "truly" jurisdictional questions requires correctness review, it has observed that there are no "clear markers" to distinguish such questions from other questions related to the interpretation of an administrative decision maker's enabling statute: see *CHRC*, at para. 38. Despite differing views on whether it is possible to demarcate a class of "truly" jurisdictional questions, there is general agreement that "it is often difficult to distinguish between exercises of delegated power that raise truly jurisdictional questions from those entailing an unremarkable application of an enabling statute": *CHRC*, at para. 111, per Brown J., concurring. This tension is perhaps clearest in cases where the legislature has delegated broad authority to an administrative decision maker that allows the latter to make regulations in pursuit of the objects of its enabling statute: see, e.g., *Green v. Law Society of Manitoba*, 2017 SCC 20, **[2017] 1 S.C.R. 360**; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22, [2018] 1 S.C.R. 635.

[67] In *CHRC*, the majority, while noting this inherent difficulty — and the negative impact on litigants of the resulting uncertainty in the law — nonetheless left the question of whether the category of true questions of jurisdiction remains necessary to be determined in a later case. After hearing submissions on this issue and having an adequate opportunity for reflection on this point, we are now in a position to conclude that it is not necessary to maintain this category of correctness review. The arguments that support maintaining this category — in particular the concern that a delegated decision maker should not be free to determine the scope of its own authority — can be addressed adequately by applying the framework for conducting reasonableness review that we describe below. Reasonableness review is both robust and responsive to context. A proper application of the reasonableness standard will enable courts to fulfill their constitutional duty to ensure that administrative bodies have acted within the scope of their lawful authority without having to conduct a preliminary assessment regarding whether a particular interpretation raises a "truly" or "narrowly" jurisdictional issue and without having to apply the correctness standard.

[68] Reasonableness review does not give administrative decision makers free rein in interpreting their enabling statutes, and therefore does not give them licence to enlarge their powers beyond what the legislature intended. Instead, it confirms that the governing statutory scheme will always operate as a constraint on administrative decision makers and as a limit on their authority. Even where the reasonableness standard is applied in reviewing a decision maker's interpretation of its authority, precise or narrow statutory language will necessarily limit the number of *reasonable* interpretations open to the decision maker — perhaps limiting it one. Conversely, where the legislature has afforded a decision maker broad powers in general terms — and has provided no right of appeal to a court — the legislature's intention that the decision maker have greater leeway in interpreting its enabling statute should be given effect. Without seeking to import the U.S. jurisprudence on this issue wholesale, we find that the following comments of the Supreme Court of the United States in *Arlington*, at p. 307, are apt:

> The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision-making that is accorded no deference, but by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where [the legislature] has established a clear line, the agency cannot go beyond it; and where [the legislature] has established an ambiguous line, the agency can go no further than the ambiguity will fairly allow. But in rigorously applying the latter rule, a court need not pause to puzzle over whether the interpretive question presented is "jurisdictional" . . . .

E. *Other Circumstances Requiring a Derogation from the Presumption of Reasonableness Review*

[69] In these reasons, we have identified five situations in which a derogation from the presumption of reasonableness review is warranted either on the basis of legislative intent (i.e., legislated standards of review and statutory appeal mechanisms) or because correctness review is required by the rule of law (i.e., constitutional questions, general questions of law of central importance to the legal system as a whole, and questions regarding jurisdictional boundaries between administrative bodies). This framework is the product of careful consideration undertaken following extensive submissions and based on a thorough review of the relevant jurisprudence. We are of the view, at this time, that these reasons address all of the situations in which a reviewing court should derogate from the presumption of reasonableness review. As previously indicated, courts should no longer engage in a contextual inquiry to determine the standard of review or to rebut the presumption of reasonableness review. Letting go of this contextual approach will, we hope, "get the parties away from arguing about the tests and back to arguing about the substantive merits of their case": *Alberta Teachers*, at para. 36, quoting *Dunsmuir*, at para. 145, per Binnie J., concurring.

[70] However, we would not definitively foreclose the possibility that another category could be recognized as requiring a derogation from the presumption of reasonableness review in a future case. But our reluctance to pronounce that the list of exceptions to the application of a reasonableness standard is closed should not be understood as inviting the routine establishment of new categories requiring correctness review. Rather, it is a recognition that it would be unrealistic to declare that we have contemplated every possible set of circumstances in which legislative intent or the rule of law will require a derogation from the presumption of reasonableness review. That being said, the recognition of any new basis for correctness review would be exceptional and would need to be consistent with the framework and the overarching principles set out in these reasons. In other words, any new category warranting a derogation from the presumption of reasonableness review on the basis of legislative intent would require a signal of legislative intent as strong and compelling as those identified in these reasons (i.e., a legislated standard of review or a statutory appeal mechanism). Similarly, the recognition of a new category of questions requiring correctness review that is based on the rule of law would be justified only where failure to apply correctness review would undermine the rule of law and jeopardize the proper functioning of the justice system in a manner analogous to the three situations described in these reasons.

[71] The *amici curiae* suggest that, in addition to the three categories of legal questions identified above, the Court should recognize an additional category of legal questions that would require correctness review on the basis of the rule of law: legal questions regarding which there is persistent discord or internal disagreement within an administrative body leading to legal incoherence. They argue that correctness review is necessary in such situations because the rule of law breaks down where legal inconsistency becomes the norm and the law's meaning comes to depend on the identity of the decision maker. The *amici curiae* submit that, where competing reasonable legal interpretations linger over time at the administrative level — such that a statute comes to mean, simultaneously, both "yes" and "no" — the courts must step in to provide a determinative answer to the question without according deference to the administrative decision maker: factum of the *amici curiae*, at para. 91.

[72] We are not persuaded that the Court should recognize a distinct correctness category for legal questions on which there is persistent discord within an administrative body. In *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, this Court held that "a lack of unanimity [within a tribunal] is the price to pay for the decision-making freedom and independence given to the members of these tribunals": p. 800; see also *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at para. 28. That said, we agree that the hypothetical scenario suggested by the *amici curiae* — in which the law's meaning depends on the identity of the individual decision maker, thereby leading to legal incoherence — is antithetical to the rule of law. In our view, however, the more robust form of reasonableness review set out below, which accounts for the value of consistency and the threat of arbitrariness, is capable, in tandem with internal administrative processes to promote consistency and with legislative oversight (see *Domtar*, at p. 801), of guarding against threats to the rule of law. Moreover, the precise point at which internal discord on a point of law would be so serious, persistent and unresolvable that the resulting situation would amount to "legal incoherence" and require a court to step in is not obvious. Given these practical difficulties, this Court's binding jurisprudence and the hypothetical nature of the problem, we decline to recognize such a category in this appeal.

III. Performing Reasonableness Review

[73] This Court's administrative law jurisprudence has historically focused on the analytical framework used to determine the applicable standard of review, while providing relatively little guidance on how to conduct reasonableness review in practice.

[74] In this section of our reasons, we endeavour to provide that guidance. The approach we set out is one that focuses on justification, offers methodological consistency and reinforces the principle "that reasoned decision-making is the lynchpin of institutional legitimacy": *amici curiae* factum, at para. 12.

[75] We pause to note that our colleagues' approach to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. Moreover, as explained below, reasonableness review considers all relevant circumstances in order to determine whether the applicant has met their onus.

A. *Procedural Fairness and Substantive Review*

[76] Before turning to a discussion of the proposed approach to reasonableness review, we pause to acknowledge that the requirements of the duty of procedural fairness in a given case — and in particular whether that duty requires a decision maker to give reasons for its decision — will impact how a court conducts reasonableness review.

[77] It is well established that, as a matter of procedural fairness, reasons are not required for all administrative decisions. The duty of procedural fairness in administrative law is "eminently variable", inherently flexible and context-specific: *Knight v. Indian Head School Division No. 19*, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682; *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at paras. 22-23; *Moreau-Bérubé*, at paras. 74-75; *Dunsmuir*, at para. 79. Where a particular administrative decision-making context gives rise to a duty of procedural fairness, the specific procedural requirements that the duty imposes are determined with reference to all of the circumstances: *Baker*, at para. 21. In *Baker*, this Court set out a non-exhaustive list of factors that inform the content of the duty of procedural fairness in a particular case, one aspect of which is whether written reasons are required. Those factors include: (1) the nature of the decision being made and the process followed in making it; (2) the nature of the statutory scheme; (3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision; and (5) the choices of procedure made by the administrative decision maker itself: *Baker*, at paras. 23-27; see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650, at para. 5. Cases in which written reasons tend to be required include those in which the decision-making process gives the parties participatory rights, an adverse decision would have a significant impact on an individual or there is a right of appeal: *Baker*, at para. 43; D. J. M. Brown and the Hon. J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), vol. 3, at p. 12-54.

[78] In the case at bar and in its companion cases, reasons for the administrative decisions at issue were both required and provided. Our discussion of the proper approach to reasonableness review will therefore focus on the circumstances in which reasons for an administrative decision are required and available to the reviewing court.

[79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the] decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

[80] The process of drafting reasons also necessarily encourages administrative decision makers to more carefully examine their own thinking and to better articulate their analysis in the process: *Baker*, at para. 39. This is what Justice Sharpe describes — albeit in the judicial context — as the "discipline of reasons": *Good Judgment*: *Making Judicial Decisions* (2018), at p. 134; see also *Sheppard*, at para. 23.

[81] Reasons facilitate meaningful judicial review by shedding light on the rationale for a decision: *Baker*, at para. 39. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the Court reaffirmed that "the purpose of reasons, when they are required, is to demonstrate 'justification, transparency and intelligibility'": para. 1, quoting *Dunsmuir*, at para. 47; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 126. The starting point for our analysis is therefore that where reasons are required, they are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts. It follows that the provision of reasons for an administrative decision may have implications for its legitimacy, including in terms both of whether it is procedurally fair and of whether it is substantively reasonable.

B. *Reasonableness Review Is Concerned With the Decision-making Process and Its Outcomes*

[82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 10; *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, 1997 CanLII 317 (SCC), [1997] 3 S.C.R. 3, at para. 10.

[83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada*

(Attorney General), 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.

[84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. A reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with "respectful attention" and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion: see *Dunsmuir*, at para. 48, quoting D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.

[87] This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with *both* outcome *and* process. To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker.

C. *Reasonableness Is a Single Standard That Accounts for Context*

[88] In any attempt to develop a coherent and unified approach to judicial review, the sheer variety of decisions and decision makers that such an approach must account for poses an inescapable challenge. The administrative decision makers whose decisions may be subject to judicial review include specialized tribunals exercising adjudicative functions, independent regulatory bodies, ministers, front-line decision makers, and more. Their decisions vary in complexity and importance, ranging from the routine to the life-altering. These include matters of "high policy" on the one hand and "pure law" on the other. Such decisions will sometimes involve complex technical considerations. At other times, common sense and ordinary logic will suffice.

[89] Despite this diversity, reasonableness remains a single standard, and elements of a decision's context do not modulate the standard or the degree of scrutiny by the reviewing court. Instead, the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case. This is what it means to say that "[r]easonableness is a single standard that takes its colour from the context": *Khosa*, at para. 59; *Catalyst*, at para. 18; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, **[2012] 1 S.C.R. 364,** at para. 44; *Wilson*, at para. 22, per Abella J.; *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, [2016] 2 S.C.R. 80, at para. 57, per Côté J., dissenting but not on this point; *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32, **[2018] 2 S.C.R. 293,** at para. 53.

[90] The approach to reasonableness review that we articulate in these reasons accounts for the diversity of administrative decision making by recognizing that what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review. These contextual constraints dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt. The fact that the contextual constraints operating on an administrative decision maker may vary from one decision to another does not pose a problem for the reasonableness standard, because each decision must be both justified by the administrative body and evaluated by reviewing courts in relation to its own particular context.

D. *Formal Reasons for a Decision Should Be Read in Light of the Record and With Due Sensitivity to the Administrative Setting in Which They Were Given*

[91] A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" is not on its own a basis to set the decision aside: *Newfoundland Nurses*, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

[92] Administrative decision makers cannot always be expected to deploy the same array of legal techniques that might be expected of a lawyer or judge — nor will it always be necessary or even useful for them to do so. Instead, the concepts and language employed by administrative decision makers will often be highly specific to their fields of experience and expertise, and this may impact both the form and content of their reasons. These differences are not necessarily a sign of an unreasonable decision — indeed, they may be indicative of a decision maker's strength within its particular and specialized domain. "Administrative justice" will not always look like "judicial justice", and reviewing courts must remain acutely aware of that fact.

[93] An administrative decision maker may demonstrate through its reasons that a given decision was made by bringing that institutional expertise and experience to bear: see *Dunsmuir*, at para. 49. In conducting reasonableness review, judges should be attentive to the application by decision makers of specialized knowledge, as demonstrated by their reasons.

Respectful attention to a decision maker's demonstrated expertise may reveal to a reviewing court that an outcome that might be puzzling or counterintuitive on its face nevertheless accords with the purposes and practical realities of the relevant administrative regime and represents a reasonable approach given the consequences and the operational impact of the decision. This demonstrated experience and expertise may also explain why a given issue is treated in less detail.

[94] The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

[95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party.

[96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record, they contain a fundamental gap or reveal that the decision is based on an unreasonable chain of analysis, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision. Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome: *Delta Air Lines*, at paras. 26-28. To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.

[97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn . . . .

[98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility.

E. *A Reasonable Decision Is One That Is Both Based on an Internally Coherent Reasoning and Justified in Light of the Legal and Factual Constraints That Bear on the Decision*

[99] A reviewing court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision: *Dunsmuir*, at paras. 47 and 74; *Catalyst*, at para. 13.

[100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[101] What makes a decision unreasonable? We find it conceptually useful here to consider two types of fundamental flaws. The first is a failure of rationality internal to the reasoning process. The second arises when a decision is in some respect untenable in light of the relevant factual and legal constraints that bear on it. There is however, no need for reviewing courts to categorize failures of reasonableness as belonging to one type or the other. Rather, we use these descriptions simply as a convenient way to discuss the types of issues that may show a decision to be unreasonable.

(1) A Reasonable Decision Is Based on an Internally Coherent Reasoning

[102] To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[103] While, as we indicated earlier (at paras. 89-96), formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis: see *Wright v. Nova Scotia (Human Rights Commission),* 2017 NSSC 11, 23 Admin. L.R. (6th) 110; *Southam*, at para. 56. A decision will also be unreasonable where the conclusion reached cannot follow from the analysis undertaken (see *Sangmo v. Canada (Citizenship and Immigration)*, 2016 FC 17, at para. 21 (CanLII)) or if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (see *Blas v. Canada (Citizenship and Immigration)*, 2014 FC 629, 26 Imm. L.R. (4th) 92, at paras. 54-66; *Reid v. Criminal Injuries Compensation Board*, 2015 ONSC 6578; *Lloyd v. Canada (Attorney General)*, 2016 FCA 115, 2016 D.T.C. 5051; *Taman v. Canada (Attorney General)*, 2017 FCA 1, [2017] 3 F.C.R. 520, at para. 47).

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

(2) A Reasonable Decision Is Justified in Light of the Legal and Factual Constraints That Bear on the Decision

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

[106] It is unnecessary to catalogue all of the legal or factual considerations that could constrain an administrative decision maker in a particular case. However, in the sections that follow, we discuss a number of elements that will generally be relevant in evaluating whether a given decision is reasonable, namely the governing statutory scheme; other relevant statutory or common law; the principles of statutory interpretation; the evidence before the decision maker and facts of which the decision maker may take notice; the submissions of the parties; the past practices and decisions of the administrative body; and the potential impact of the decision on the individual to whom it applies. These elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached.

[107] A reviewing court may find that a decision is unreasonable when examined against these contextual considerations. These elements necessarily interact with one another: for example, a reasonable penalty for professional misconduct in a given case must be justified *both* with respect to the types of penalties prescribed by the relevant legislation and with respect to the nature of the underlying misconduct.

(a) *Governing Statutory Scheme*

[108] Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely to be the most salient aspect of the legal context relevant to a particular decision. That administrative decision makers play a role, along with courts, in elaborating the precise content of the administrative schemes they administer should not be taken to mean that administrative decision makers are permitted to disregard or rewrite the law as enacted by Parliament and the provincial legislatures. Thus, for example, while an administrative body may have considerable discretion in making a particular decision, that decision must ultimately comply "with the rationale and purview of the statutory scheme under which it is adopted": *Catalyst*, at paras. 15 and 25-28; see also *Green*, at para. 44. As Rand J. noted in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SCC), [1959] S.C.R. 121, at p. 140, "there is no such thing as absolute and untrammelled 'discretion'", and any exercise of discretion must accord with the purposes for which it was given: see also *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 7; *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427, at paras. 32-33; *Nor-Man Regional Health Authority*, at para. 6. Likewise, a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion: see *Montréal (City)*, at paras. 33 and 40-41; *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C.R. 203, at paras. 38-40. The statutory scheme also informs the acceptable approaches to decision making: for example, where a decision maker is given wide discretion, it would be unreasonable for it to fetter that discretion: see *Delta Air Lines*, at para. 18.

[109] As stated above, a proper application of the reasonableness standard is capable of allaying the concern that an administrative decision maker might interpret the scope of its own authority beyond what the legislature intended. As a result, there is no need to maintain a category of "truly" jurisdictional questions that are subject to correctness review. Although a decision maker's interpretation of its statutory grant of authority is generally entitled to deference, the decision maker must nonetheless properly justify that interpretation. Reasonableness review does not allow administrative decision makers to arrogate powers to themselves that they were never intended to have, and an administrative body cannot exercise authority which was not delegated to it. Contrary to our colleagues' concern (at para. 285), this does not reintroduce the concept of "jurisdictional error" into judicial review, but merely identifies one of the obvious and necessary constraints imposed on administrative decision makers.

[110] Whether an interpretation is justified will depend on the context, including the language chosen by the legislature in describing the limits and contours of the decision maker's authority. If a legislature wishes to precisely circumscribe an administrative decision maker's power in some respect, it can do so by using precise and narrow language and delineating the power in detail, thereby tightly constraining the decision maker's ability to interpret the provision. Conversely, where the legislature chooses to use broad, open-ended or highly qualitative language — for example, "in the public interest"

— it clearly contemplates that the decision maker is to have greater flexibility in interpreting the meaning of such language. Other language will fall in the middle of this spectrum. All of this is to say that certain questions relating to the scope of a decision maker's authority may support more than one interpretation, while other questions may support only one, depending upon the text by which the statutory grant of authority is made. What matters is whether, in the eyes of the reviewing court, the decision maker has properly justified its interpretation of the statute in light of the surrounding context. It will, of course, be impossible for an administrative decision maker to justify a decision that strays beyond the limits set by the statutory language it is interpreting.

(b) *Other Statutory or Common Law*

[111] It is evident that both statutory and common law will impose constraints on how and what an administrative decision maker can lawfully decide: see *Dunsmuir*, at paras. 47 and 74. For example, an administrative decision maker interpreting the scope of its regulation-making authority in order to exercise that authority cannot adopt an interpretation that is inconsistent with applicable common law principles regarding the nature of statutory powers: see *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at paras. 45-48. Neither can a body instructed by legislation to determine what tax rate is applicable in accordance with an existing tax system ignore that system and base its determination on a "fictitious" system it has arbitrarily created: *Montréal (City)*, at para. 40. Where a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship: *Dunsmuir*, at para. 74. Similarly, where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard: see, e.g., the discussion of "reasonable grounds to suspect" in *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, [2015] 2 F.C.R. 1006, at paras. 93-98.

[112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent. The decision maker would have to be able to explain why a different interpretation is preferable by, for example, explaining why the court's interpretation does not work in the administrative context: M. Biddulph, "Rethinking the Ramification of Reasonableness Review: *Stare Decisis* and Reasonableness Review on Questions of Law" (2018), 56 *Alta. L.R.* 119, at p. 146. There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent. For instance, where an immigration tribunal is required to determine whether an applicant's act would constitute a criminal offence under Canadian law (see, e.g., *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, ss. 35-37), it would clearly not be reasonable for the tribunal to adopt an interpretation of a criminal law provision that is inconsistent with how Canadian criminal courts have interpreted it.

[113] That being said, administrative decision makers will not necessarily be required to apply equitable and common law principles in the same manner as courts in order for their decisions to be reasonable. For example, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to its administrative context: see *Nor-Man Regional Health Authority*, at paras. 5-6, 44-45, 52, 54 and 60. Conversely, a decision maker that rigidly applies a common law doctrine without adapting it to the relevant administrative context may be acting unreasonably: see *Delta Air Lines*, at paras. 16-17 and 30. In short, whether an administrative decision maker has acted reasonably in adapting a legal or equitable doctrine involves a highly context-specific determination.

[114] We would also note that in some administrative decision making contexts, international law will operate as an important constraint on an administrative decision maker. It is well established that legislation is presumed to operate in conformity with Canada's international obligations, and the legislature is "presumed to comply with . . . the values and principles of customary and conventional international law": *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 40. Since *Baker*, it has also been clear that international treaties and conventions, even where they have not been implemented domestically by statute, can help to inform whether a decision was a reasonable exercise of administrative power: *Baker*, at paras. 69-71.

(c) *Principles of Statutory Interpretation*

[115] Matters of statutory interpretation are not treated uniquely and, as with other questions of law, may be evaluated on a reasonableness standard. Although the general approach to reasonableness review described above applies in such cases, we recognize that it is necessary to provide additional guidance to reviewing courts on this point. This is because reviewing courts are accustomed to resolving questions of statutory interpretation in a context in which the issue is before them at first instance or on appeal, and where they are expected to perform their own independent analysis and come to their own conclusions.

[116] Reasonableness review functions differently. Where reasonableness is the applicable standard on a question of statutory interpretation, the reviewing court does not undertake a *de novo* analysis of the question or "ask itself what the correct decision would have been": *Ryan*, at para. 50. Instead, just as it does when applying the reasonableness standard in reviewing questions of fact, discretion or policy, the court must examine the administrative decision as a whole, including the reasons provided by the decision maker and the outcome that was reached.

[117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must 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": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[119] Administrative decision makers are not required to engage in a formalistic statutory interpretation exercise in every case. As discussed above, formal reasons for a decision will not always be necessary and may, where required, take

different forms. And even where the interpretive exercise conducted by the administrative decision maker is set out in written reasons, it may look quite different from that of a court. The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required "to explicitly address all possible shades of meaning" of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker.

[123] There may be other cases in which the administrative decision maker has not explicitly considered the meaning of a relevant provision in its reasons, but the reviewing court is able to discern the interpretation adopted by the decision maker from the record and determine whether that interpretation is reasonable.

[124] Finally, even though the task of a court conducting a reasonableness review is *not* to perform a *de novo* analysis or to determine the "correct" interpretation of a disputed provision, it may sometimes become clear in the course of reviewing a decision that the interplay of text, context and purpose leaves room for a single reasonable interpretation of the statutory provision, or aspect of the statutory provision, that is at issue: *Dunsmuir*, at paras. 72-76. One case in which this conclusion was reached was *Nova Tube Inc./Nova Steel Inc. v. Conares Metal Supply Ltd.*, 2019 FCA 52., in which Laskin J.A., after analyzing the reasoning of the administrative decision maker (at paras. 26-61 (CanLII)), held that the decision maker's interpretation had been unreasonable, and, furthermore, that the factors he had considered in his analysis weighed so overwhelmingly in favour of the opposite interpretation that that was the only reasonable interpretation of the provision: para. 61. As discussed below, it would serve no useful purpose in such a case to remit the interpretative question to the original decision maker. Even so, a court should generally pause before definitively pronouncing upon the interpretation of a provision entrusted to an administrative decision maker.

(d) *Evidence Before the Decision Maker*

[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.

[126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.

(e) *Submissions of the Parties*

[127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.

[128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

(f) *Past Practices and Past Decisions*

[129] Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by *stare decisis*. As this Court noted in *Domtar*, "a lack of unanimity is the price to pay for the decision-making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.

[130] Fortunately, administrative bodies generally have a range of resources at their disposal to address these types of concerns. Access to past reasons and summaries of past reasons enables multiple individual decision makers within a single organization (such as administrative tribunal members) to learn from each other's work, and contributes to a harmonized decision-making culture. Institutions also routinely rely on standards, policy directives and internal legal opinions to encourage greater uniformity and guide the work of frontline decision makers. This Court has also held that plenary meetings of a tribunal's members can be an effective tool to "foster coherence" and "avoid . . . conflicting results": *IWA v. Consolidated-Bathurst Packaging Ltd.*, 1990 CanLII 132 (SCC), [1990] 1 S.C.R. 282, at pp. 324-28. Where disagreement arises within an administrative body about how to appropriately resolve a given issue, that institution may also develop strategies to address that divergence internally and on its own initiative. Of course, consistency can also be encouraged through less formal methods, such as the development of training materials, checklists and templates for the purpose of streamlining and strengthening institutional best practices, provided that these methods do not operate to fetter decision making.

[131] Whether a particular decision is consistent with the administrative body's past decisions is also a constraint that the reviewing court should consider when determining whether an administrative decision is reasonable. Where a decision maker *does* depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons. If the decision maker does not satisfy this burden, the decision will be unreasonable. In this sense, the legitimate expectations of the parties help to determine both whether reasons are required and what those reasons must explain: *Baker*, at para. 26. We repeat that this does not mean administrative decision makers are bound by internal precedent in the same manner as courts. Rather, it means that a decision that departs from longstanding practices or established internal decisions will be reasonable if that departure is justified, thereby reducing the risk of arbitrariness, which would undermine public confidence in administrative decision makers and in the justice system as a whole.

[132] As discussed above, it has been argued that correctness review would be required where there is "persistent discord" on questions on law in an administrative body's decisions. While we are not of the view that such a correctness category is required, we would note that reviewing courts have a role to play in managing the risk of persistently discordant or contradictory legal interpretations within an administrative body's decisions. When evidence of internal disagreement on legal issues has been put before a reviewing court, the court may find it appropriate to telegraph the existence of an issue in its reasons and encourage the use of internal administrative structures to resolve the disagreement. And if internal disagreement continues, it may become increasingly difficult for the administrative body to justify decisions that serve only to preserve the discord.

(g) *Impact of the Decision on the Affected Individual*

[133] It is well established that individuals are entitled to greater procedural protection when the decision in question involves the potential for significant personal impact or harm: *Baker*, at para. 25. However, this principle also has implications for how a court conducts reasonableness review. Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes. The principle of responsive justification means that if a decision has particularly harsh consequences for the affected individual, the decision maker must explain why its decision best reflects the legislature's intention. This includes decisions with consequences that threaten an individual's life, liberty, dignity or livelihood.

[134] Moreover, concerns regarding arbitrariness will generally be more acute in cases where the consequences of the decision for the affected party are particularly severe or harsh, and a failure to grapple with such consequences may well be unreasonable. For example, this Court has held that the Immigration Appeal Division should, when exercising its equitable jurisdiction to stay a removal order under the *Immigration and Refugee Protection Act*, consider the potential foreign hardship a deported person would face: *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84.

[135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

F. *Review in the Absence of Reasons*

[136] Where the duty of procedural fairness or the legislative scheme mandates that reasons be given to the affected party but none have been given, this failure will generally require the decision to be set aside and the matter remitted to the decision maker: see, e.g., *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at para. 35. Also, where reasons are provided but they fail to provide a transparent and intelligible justification as explained above, the decision will be unreasonable. In many cases, however, neither the duty of procedural fairness nor the statutory scheme will require that formal reasons be given at all: *Baker*, at para. 43.

[137] Admittedly, applying an approach to judicial review that prioritizes the decision maker's justification for its decisions can be challenging in cases in which formal reasons have not been provided. This will often occur where the decision-making process does not easily lend itself to producing a single set of reasons, for example, where a municipality passes a bylaw or a law society renders a decision by holding a vote: see, e.g., *Catalyst*; *Green*; *Trinity Western University*. However, even in such circumstances, the reasoning process that underlies the decision will not usually be opaque. It is important to recall that a reviewing court must look to the record as a whole to understand the decision, and that in doing so, the court will often uncover a clear rationale for the decision: *Baker*, at para. 44. For example, as McLachlin C.J. noted in *Catalyst*, "[t]he reasons for a municipal bylaw are traditionally deduced from the debate, deliberations, and the statements of policy that give rise to the bylaw": para. 29. In that case, not only were "the reasons [in the sense of rationale] for the bylaw . . . clear to everyone", they had also been laid out in a five-year plan: para. 33. Conversely, even without reasons, it is possible for the record and the context to reveal that a decision was made on the basis of an improper motive or for another impermissible reason, as, for example, in *Roncarelli*.

[138] There will nonetheless be situations in which no reasons have been provided and neither the record nor the larger context sheds light on the basis for the decision. In such a case, the reviewing court must still examine the decision in

light of the relevant constraints on the decision maker in order to determine whether the decision is reasonable. But it is perhaps inevitable that without reasons, the analysis will then focus on the outcome rather than on the decision maker's reasoning process. This does not mean that reasonableness review is less robust in such circumstances, only that it takes a different shape.

G. *A Note on Remedial Discretion*

[139] Where a court reviews an administrative decision, the question of the appropriate remedy is multi-faceted. It engages considerations that include the reviewing court's common law or statutory jurisdiction and the great diversity of elements that may influence a court's decision to exercise its discretion in respect of available remedies. While we do not aim to comprehensively address here the issue of remedies on judicial review, we do wish to briefly address the question of whether a court that quashes an unreasonable decision should exercise its discretion to remit the matter to the decision maker for reconsideration with the benefit of the court's reasons.

[140] Where the reasonableness standard is applied in conducting a judicial review, the choice of remedy must be guided by the rationale for applying that standard to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court, to decide: see *Delta Air Lines*, at para. 31. However, the question of remedy must also be guided by concerns related to the proper administration of the justice system, the need to ensure access to justice and "the goal of expedient and cost-efficient decision making, which often motivates the creation of specialized administrative tribunals in the first place": *Alberta Teachers*, at para. 55.

[141] Giving effect to these principles in the remedial context means that where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons. In reconsidering its decision, the decision maker may arrive at the same, or a different, outcome: see *Delta Air Lines*, at paras. 30-31.

[142] However, while courts should, as a general rule, respect the legislature's intention to entrust the matter to the administrative decision maker, there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended: *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, at paras. 18-19 (CanLII). An intention that the administrative decision maker decide the matter at first instance cannot give rise to an endless merry-go-round of judicial reviews and subsequent reconsiderations. Declining to remit a matter to the decision maker may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose: see *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, 1994 CanLII 114 (SCC), [1994] 1 S.C.R. 202, at pp. 228-30; *Renaud v. Quebec (Commission des affaires sociales)*, 1999 CanLII 642 (SCC), [1999] 3 S.C.R. 855; *Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 161; *Sharif v. Canada (Attorney General)*, 2018 FCA 205, 50 C.R. (7th) 1, at paras. 53-54; *Maple Lodge Farms Ltd. v. Canadian Food Inspection Agency*, 2017 FCA 45, 411 D.L.R. (4th) 175, at paras. 51-56 and 84; *Gehl v. Canada (Attorney General)*, 2017 ONCA 319, at paras. 54 and 88 (CanLII). Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed: see *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, at paras. 45-51; *Alberta Teachers*, at para. 55.

IV. Role of Prior Jurisprudence

[143] Given that this appeal and its companion cases involve a recalibration of the governing approach to the choice of standard of review analysis and a clarification of the proper application of the reasonableness standard, it will be necessary to briefly address how the existing administrative law jurisprudence should be treated going forward. These reasons set out a holistic revision of the framework for determining the applicable standard of review. A court seeking to determine what standard is appropriate in a case before it should look to these reasons first in order to determine how this general framework applies to that case. Doing so may require the court to resolve subsidiary questions on which past precedents will often continue to provide helpful guidance. Indeed, much of the Court's jurisprudence, such as cases concerning general questions of law of central importance to the legal system as a whole or those relating to jurisdictional boundaries between two or more administrative bodies, will continue to apply essentially without modification. On other issues, certain cases — including those on the effect of statutory appeal mechanisms, "true" questions of jurisdiction or the former contextual analysis — will necessarily have less precedential force. As for cases that dictated how to conduct reasonableness review, they will often continue to provide insight, but should be used carefully to ensure that their application is aligned in principle with these reasons.

[144] This approach strives for future doctrinal stability under the new framework while clarifying the continued relevance of the existing jurisprudence. Where a reviewing court is not certain how these reasons relate to the case before it, it may find it prudent to request submissions from the parties on both the appropriate standard and the application of that standard.

[145] Before turning to Mr. Vavilov's case, we pause to note that our colleagues mischaracterize the framework developed in these reasons as being an "encomium" for correctness, and a turn away from the Court's deferential approach to the point of being a "eulogy" for deference (at paras. 199 and 201). With respect, this is a gross exaggeration. Assertions that these reasons adopt a formalistic, court-centric view of administrative law (at paras. 229 and 240), enable an unconstrained expansion of correctness review (at para. 253) or function as a sort of checklist for "line-by-line" reasonableness review (at para. 284), are counter to the clear wording we use and do not take into consideration the delicate balance that we have accounted for in setting out this framework.

V. Mr. Vavilov's Application for Judicial Review

[146] The case at bar involves an application for judicial review of a decision made by the Canadian Registrar of Citizenship on August 15, 2014. The Registrar's decision concerned Mr. Vavilov, who was born in Canada and whose parents were later revealed to be undercover Russian spies. The Registrar determined that Mr. Vavilov was not a Canadian citizen on the basis of an interpretation of s. 3(2)(a) of the *Citizenship Act* and cancelled his certificate of citizenship under s. 26(3) of the *Citizenship Regulations*. We conclude that the standard of review applicable to the Registrar's decision is reasonableness, and that the Registrar's decision was unreasonable. We would uphold the decision of the Federal Court of Appeal to quash the Registrar's decision and would not remit the matter to the Registrar for redetermination.

A. *Facts*

[147] Mr. Vavilov was born in Toronto as Alexander Foley on June 3, 1994. At the time of his birth, his parents were posing as Canadians under the assumed names of Tracey Lee Ann Foley and Donald Howard Heathfield. In reality, they were Elena Vavilova and Andrey Bezrukov, two foreign nationals working on a long-term assignment for the Russian foreign intelligence service, the SVR. Their false Canadian identities had been assumed prior to the birth of Mr. Vavilov and of his older brother, Timothy, for purposes of a "deep cover" espionage network under the direction of the SVR. The United States Department of Justice refers to it as the "illegals" program.

[148] Ms. Vavilova and Mr. Bezrukov were deployed to Canada to establish false personal histories as Western citizens. They worked, ran a business, pursued higher education and, as noted, had two children here. After their second son was born, the family moved to France, and later to the United States. In the United States, Mr. Bezrukov obtained a Masters of Public Administration at Harvard University and worked as a consultant, all while working to collect information on a variety of sensitive national security issues for the SVR. The nature of the undercover work of Ms. Vavilova and Mr. Bezrukov meant that there was no point at which either of them had any publicly acknowledged affiliation with the Russian state, held any official diplomatic or consular status, or had been granted any diplomatic privilege or immunity.

[149] Until he was about 16 years old, Mr. Vavilov did not know that his parents were not who they claimed to be. He believed that he was a Canadian citizen by birth, lived and identified as a Canadian, held a Canadian passport, learned both official languages and was proud of his heritage. His parents' true identities became known to him on June 27, 2010, when they were arrested in the United States and charged (along with several other individuals) with conspiracy to act as unregistered agents of a foreign government. On July 8, 2010, they pled guilty, admitted their status as Russian citizens acting on behalf of the Russian state, and were returned to Russia in a "spy swap" the following day. Mr. Vavilov has described the revelation as a traumatic event characterized by disbelief and a crisis of identity.

[150] Just prior to his parents' deportation, Mr. Vavilov left the United States with his brother on a trip that had been planned before their parents' arrest, going first to Paris, and then to Russia on a tourist visa. In October 2010, Mr. Vavilov unsuccessfully attempted to renew his Canadian passport through the Canadian Embassy in Moscow. Although he submitted to DNA testing and changed his surname from Foley to Vavilov at the behest of passport authorities, his second attempt to obtain a Canadian passport in December 2011 was also unsuccessful. He was then informed that despite his Canadian birth certificate, he would also need to obtain and provide a certificate of Canadian citizenship before he would be issued a passport. Mr. Vavilov applied for that certificate in October 2012, and it was issued to him on January 15, 2013. At that point, he made another passport application through the Canadian Embassy in Buenos Aires, Argentina, and, after a delay, applied for mandamus, a process that was settled out of court in June 2013. The Minister of Citizenship and Immigration undertook to issue a new travel document to Mr. Vavilov by July 19, 2013.

[151] However, Mr. Vavilov never received a passport. Instead, he received a "procedural fairness letter" from the Canadian Registrar of Citizenship dated July 18, 2013 in which the Registrar stated that Mr. Vavilov had not been entitled to a certificate of citizenship, that his certificate of citizenship had been issued in error and that, pursuant to s. 3(2)(a) of the *Citizenship Act*, he was not a citizen of Canada. Mr. Vavilov was invited to make submissions in response, and he did so. On August 15, 2014, the Registrar formally cancelled Mr. Vavilov's Canadian citizenship certificate pursuant to s. 26(3) of the *Citizenship Regulations*.

B. *Procedural History*

(1) Registrar's Decision

[152] In a brief letter sent to Mr. Vavilov on August 15, 2014, the Registrar informed him that she was cancelling his certificate of citizenship pursuant to s. 26(3) of the *Citizenship Regulations* on the basis that he was not entitled to it. The Registrar summarized her position as follows:

a) Although Mr. Vavilov was born in Toronto, neither of his parents was a citizen of Canada, and neither of them had been lawfully admitted to Canada for permanent residence at the time of his birth.

b) In 2010, Mr. Vavilov's parents were convicted of "conspiracy to act in the United States as a foreign agent of a foreign government", and recognized as unofficial agents working as "illegals" for the SVR.

c) As a result, the Registrar believed that, at the time of Mr. Vavilov's birth, his parents were "employees or representatives of a foreign government".

d) Accordingly, pursuant to s. 3(2)(a) of the *Citizenship Act*, Mr. Vavilov had never been a Canadian citizen and had not been entitled to receive the certificate of Canadian citizenship that had been issued to him in 2013. Section 3(2)(a) provides that s. 3(1)(a) of the *Citizenship Act* (which grants citizenship by birth to persons born in Canada after February 14, 1977) does not apply to an individual if, at the time of the individual's birth, neither of their parents was a citizen or lawfully admitted to Canada for permanent residence and either parent was "a diplomatic or consular officer or other representative or employee in Canada of a foreign government."

[153] For these reasons, the Registrar cancelled the certificate and indicated that Mr. Vavilov would no longer be recognized as a Canadian citizen. The Registrar's letter did not offer any analysis or interpretation of s. 3(2)(a) of the *Citizenship Act*. However, it appears that in coming to her decision, the Registrar relied on a 12-page report prepared by a junior analyst, which included an interpretation of this key statutory provision.

[154] In that report, the analyst provided a timeline of the procedural history of Mr. Vavilov's file, a summary of the investigation into and charges against his parents in the United States, and background information on the SVR's "illegals" program. The analyst also discussed several provisions of the *Citizenship Act*, including s. 3(2)(a), and it is this aspect of her report that is most relevant to Mr. Vavilov's application for judicial review. The analyst's ultimate conclusion was that the certificate of citizenship issued to Mr. Vavilov in January 2013 was issued in error, as his parents had been "working as employees or representatives of a foreign government (the Russian Federation) during the time they resided in Canada, including at the time of Mr. Vavilov's birth", and that "[a]s such, Mr. Vavilov was not entitled to receive a citizenship certificate pursuant to paragraph 3(2)(a) of the *Citizenship Act*": A.R., Vol. I, at p. 3. The report was dated June 24, 2014.

[155] In discussing the relevant legislation, the analyst cited s. 3(1)(a) of the *Citizenship Act*, which establishes the general rule that persons born in Canada after February 14, 1977 are Canadian citizens. The analyst also referred to an exception to that general rule set out in s. 3(2) of the *Citizenship Act*, which reads as follows:

(2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was

(a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;

(b) an employee in the service of a person referred to in paragraph (a); or

(c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[156] The analyst noted that s. 3(2)(a) refers both to diplomatic and consular officers and to *other* representatives or employees of a foreign government. She acknowledged that the term "diplomatic or consular officer" is defined in s. 35(1) of the *Interpretation Act* and that the definition lists a large number of posts within a foreign mission or consulate. However, the analyst observed that no statutory definition exists for the phrase "other representative or employee in Canada of a foreign government."

[157] The analyst compared the wording of s. 3(2)(a) with that of a similar provision in predecessor legislation. That provision, s. 5(3)(b) of the *Canadian Citizenship Act,* R.S.C. 1970, c. C-19, excluded from citizenship children whose "responsible parent" at the time of birth was:

(i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
(ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
(iii) an employee in the service of a person referred to in subparagraph (i).

[158] The analyst reasoned that because s. 3(2)(a) "makes reference to 'representatives or employees of a foreign government,' but does not link the representatives or employees to 'attached to or in the service of a foreign diplomatic mission or consulate in Canada' (as did the earlier version of the provision), it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff'": A.R., vol. I, at p. 7.

[159] Although the analyst acknowledged that "Ms. Vavilova and Mr. Bezrukov, were employed in Canada by a foreign government without the benefits or protections (i.e.: immunity) that accompany diplomatic, consular, or official status positions", she concluded that they were nonetheless "unofficial employees or representatives" of Russia at the time of Mr. Vavilov's birth: A.R., vol. I, at p. 13. The exception in s. 3(2)(a) of the *Citizenship Act*, as she interpreted it, therefore applied to Mr. Vavilov. As a result, the analyst recommended that the Canadian Registrar of Citizenship "recall" Mr. Vavilov's certificate on the basis that he was not, and had never been, entitled to citizenship.

(2) Federal Court (Bell J.), 2015 FC 960, [2016] 2 F.C.R. 39

[160] Mr. Vavilov sought and was granted leave to bring an application for judicial review of the Registrar's decision in the Federal Court pursuant to s. 22.1 of the *Citizenship Act*. His application was dismissed.

[161] The Federal Court rejected Mr. Vavilov's argument that the Registrar had breached her duty of procedural fairness by failing to disclose the documentation that had prompted the procedural fairness letter. In the Federal Court's view, the Registrar had provided Mr. Vavilov sufficient information to allow him to meaningfully respond, and had thereby satisfied the requirements of procedural fairness in the circumstances.

[162] The Federal Court also rejected Mr. Vavilov's challenge to the Registrar's interpretation of s. 3(2)(a) of the *Citizenship Act*. Applying the correctness standard, the Federal Court agreed with the Registrar that undercover foreign operatives living in Canada fall within the meaning of the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" in s. 3(2)(a). In the Federal Court's view, to interpret s. 3(2)(a) in any other way would render the phrase "other representative or employee in Canada of a foreign government" meaningless and would lead to the "absurd result" that "children of a foreign diplomat, registered at an embassy, who conducts spy operations, cannot claim Canadian citizenship by birth in Canada but children of those who enter unlawfully for the very same purpose, become Canadian citizens by birth": para. 25.

[163] Finally, the Federal Court was satisfied, given the evidence, that the Registrar's conclusion that Mr. Vavilov's parents had at the time of his birth been in Canada as part of an undercover operation for the Russian government was reasonable.

(3) Federal Court of Appeal (Stratas J.A. with Webb J.A. Concurring; Gleason J.A. Dissenting), 2017 FCA 132, [2018] 3 F.C.R. 75

[164] A majority of the Federal Court of Appeal allowed Mr. Vavilov's appeal from the Federal Court's judgment and quashed the Registrar's decision.

[165] The Court of Appeal unanimously rejected Mr. Vavilov's argument that he had been denied procedural fairness by the Registrar. In the Court of Appeal's view, the Registrar had provided Mr. Vavilov sufficient information in the procedural fairness letter to enable him to know the case to meet. Even if Mr. Vavilov had been entitled to more information at the time of that letter, the court indicated that his procedural fairness challenge would nevertheless have failed because he had subsequently obtained that additional information through his own efforts and was able to make meaningful submissions.

[166] The Court of Appeal was also unanimously of the view that the appropriate standard of review for the Registrar's interpretation and application of s. 3(2)(a) of the *Citizenship Act* was reasonableness. It split, however, on the application of that standard to the Registrar's decision.

[167] The majority of the Court of Appeal concluded that the analyst's interpretation of s. 3(2)(a), which the Registrar had adopted, was unreasonable and that the Registrar's decision should be quashed. The analysis relied on by the Registrar on the statutory interpretation issue was confined to a consideration of the text of s. 3(2)(a) and an abbreviated review of its legislative history, which totally disregarded its purpose or context. In the majority's view, such a "cursory and incomplete approach to statutory interpretation" in a case such as this was indefensible: para. 44. Moreover, when the provision's purpose and its context were taken into account, the only reasonable conclusion was that the phrase "employee in

Canada of a foreign government" in s. 3(2)(a) was meant to apply only to individuals who have been granted diplomatic privileges and immunities under international law. Because it was common ground that neither of Mr. Vavilov's parents had been granted such privileges or immunities, s. 3(2)(a) did not apply to him. The cancellation of his citizenship certificate on the basis of s. 3(2)(a) therefore could not stand, and Mr. Vavilov was entitled to Canadian citizenship under the *Citizenship Act*.

[168] The dissenting judge disagreed, finding that the Registrar's interpretation of s. 3(2)(a) was reasonable. According to the dissenting judge, the text of that provision admits of at least two rational interpretations: one that includes all employees of a foreign government and one that is restricted to those who have been granted diplomatic privileges and immunities. In the dissenting judge's view, the former interpretation is not foreclosed by the context or the purpose of the provision. It was thus open to the Registrar to conclude that Mr. Vavilov's parents fell within the scope of s. 3(2)(a). The dissenting judge would have upheld the Registrar's decision.

C. *Analysis*

(1) Standard of Review

[169] Applying the standard of review analysis set out above leads to the conclusion that the standard to be applied in reviewing the merits of the Registrar's decision is reasonableness.

[170] When a court reviews the merits of an administrative decision, reasonableness is presumed to be the applicable standard of review, and there is no basis for departing from that presumption in this case. The Registrar's decision has come before the courts by way of judicial review, not by way of a statutory appeal. On this point, we note that ss. 22.1 through 22.4 of the *Citizenship Act* lay down rules that govern applications for judicial review of decisions made under that Act, one of which, in s. 22.1(1), is that such an application may be made only with leave of the Federal Court. However, none of these provisions allow for a party to bring an appeal from a decision under the *Citizenship Act*. Given this fact, and given that Parliament has not prescribed the standard to be applied on judicial review of the decision at issue, there is no indication that the legislature intended a standard of review other than reasonableness to apply. The Registrar's decision does not give rise to any constitutional questions, general questions of law of central importance to the legal system as a whole or questions regarding the jurisdictional boundaries between two or more administrative bodies. As a result, the standard to be applied in reviewing the decision is reasonableness.

(2) Review for Reasonableness

[171] The principal issue before this Court is whether it was reasonable for the Registrar to find that Mr. Vavilov's parents had been "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*.

[172] In our view, it was not. The Registrar failed to justify her interpretation of s. 3(2)(a) of the *Citizenship Act* in light of the constraints imposed by the text of s. 3 of the *Citizenship Act* considered as a whole, by other legislation and international treaties that inform the purpose of s. 3, by the jurisprudence on the interpretation of s. 3(2)(a), and by the potential consequences of her interpretation. Each of these elements — viewed individually and cumulatively — strongly supports the conclusion that s. 3(2)(a) was not intended to apply to children of foreign government representatives or employees who have not been granted diplomatic privileges and immunities. Though Mr. Vavilov raised many of these considerations in his submissions in response to the procedural fairness letter (A.R., vol. IV, at pp. 448-52), the Registrar failed to address those submissions in her reasons and did not, to justify her interpretation of s. 3(2)(a), do more than conduct a cursory review of the legislative history and conclude that her interpretation was not explicitly precluded by the text of s. 3(2)(a).

[173] Our review of the Registrar's decision leads us to conclude that it was unreasonable for her to find that the phrase "diplomatic or consular officer or other representative or employee in Canada of a foreign government" applies to individuals who have not been granted diplomatic privileges and immunities in Canada. It is undisputed that Mr. Vavilov's parents had not been granted such privileges and immunities. No purpose would therefore be served by remitting this matter to the Registrar.

(a) *Section 3(2) of the Citizenship Act*

[174] The analyst justified her conclusion that Mr. Vavilov is not a citizen of Canada by reasoning that his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act.* Section 3(2)(a) provides that children of "a diplomatic or consular officer or other representative or employee in Canada of a foreign government" are exempt from the general rule in s. 3(1)(a) that individuals born in Canada after February 14, 1977 acquire Canadian citizenship by birth. The analyst observed that although the term "diplomatic or consular officer" is defined in the *Interpretation Act* and does not apply to individuals like Mr. Vavilov's parents, the phrase "other representative or employee in Canada of a foreign government" is not so defined, and may apply to them.

[175] The analyst's attempt to give the words "other representative or employee in Canada of a foreign government" a meaning distinct from that of "diplomatic or consular officer" is sensible. It is generally consistent with the principle of statutory interpretation that Parliament intends each word in a statute to have meaning: Sullivan, at p. 211. We accept that if the phrase "other representative or employee in Canada of a foreign government" were considered in isolation, it could apply to a spy working in the service of a foreign government in Canada. However, the analyst failed to address the immediate statutory context of s. 3(2)(a), including the closely related text in s. 3(2)(c):

> (2) Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> (a) a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> (b) an employee in the service of a person referred to in paragraph (a); or
>
> (c) an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament, diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

[176] As the majority of the Court of Appeal noted (at paras. 61-62), the wording of s. 3(2)(c) provides clear support for the conclusion that *all* of the persons contemplated by s. 3(2)(a) — including those who are "employee[s] in

Canada of a foreign government" — must have been granted diplomatic privileges and immunities in some form. If, as the Registrar concluded, s. 3(2)(a) includes persons who do not benefit from these privileges or immunities, it is difficult to understand how effect could be given to the explicit equivalency requirement articulated in s. 3(2)(c). However, the analyst did not account for this tension in the immediate statutory context of s. 3(2)(a).

(b) *The Foreign Missions and International Organizations Act and the Treaties It Implements*

[177] Before the Registrar, Mr. Vavilov argued that s. 3(2) of the *Citizenship Act* must be read in conjunction with both the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"), and the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29 ("*VCDR*"). The *VCDR* and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, are the two leading treaties that extend diplomatic and/or consular privileges and immunities to employees and representatives of foreign governments in diplomatic missions and consular posts. Parliament has implemented the relevant provisions of both conventions by means of s. 3(1) of the *FMIOA*.

[178] To begin, we note that Canada affords citizenship in accordance both with the principle of *jus soli*, the acquisition of citizenship through birth regardless of the parents' nationality, and with that of *jus sanguinis*, the acquisition of citizenship by descent, that is through a parent: *Citizenship Act*, s. 3(1)(a) and (b); see I. Brownlie, *Principles of Public International Law* (5th ed. 1998), at pp. 391-93. These two principles operate as a backdrop to s. 3 of the *Citizenship Act* as a whole. It is undisputed that s. 3(2)(a) operates as an exception to these general rules. However, Mr. Vavilov took a narrower view of that exception than did the Registrar. In his submissions to the Registrar, he argued that Parliament intended s. 3(2) of the *Citizenship Act* to simply mirror the *FMIOA* and the *VCDR*, as well as Article II of the *Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning Acquisition of Nationality*, 500 U.N.T.S. 223, which provides that "[m]embers of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State". Mr. Vavilov made the following submission to the Registrar:

> The purpose in excluding diplomats and their families, including newborn children, from acquiring citizenship in the receiving state relates to the immunities which extend to this group of people. Diplomats and their family members are immune from criminal prosecution and civil liability in the receiving state. As such, they cannot acquire citizenship in the receiving state and also benefit from these immunities. A citizen has duties and responsibilities to its country. Immunity is inconsistent with this principle and so does not apply to citizens. See Article 37 of the *Convention*.
>
> Section 3(2) legislates into Canadian domestic law the above principles and should be narrowly interpreted with these purposes in mind. The term "employee in Canada of a foreign government" must be interpreted to mean an employee of a diplomatic mission, or connected to it, who benefits from the immunities of the *Convention*. Any other interpretation would lead to absurd results. There is no purpose served in excluding any child born of a person not having a connection to a diplomatic mission in Canada while sojourning here from the principle of *Jus soli*.
>
> (A.R., vol. IV, at pp. 449-50)

[179] In *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)*, 2007 FC 559, 64 Imm. L. R. (3d) 67, a case which was referred to in the analyst's report and which we will discuss in greater detail below, the Federal Court, at para. 53, quoted a passage by Professor Brownlie on this point:

> Of particular interest are the special rules relating to the jus soli, appearing as exceptions to that principle, the effect of the exceptions being to remove the cases where its application is clearly unjustifiable. A rule which has very considerable authority stipulated that children born to persons having diplomatic immunity shall not be nationals by birth of the state to which the diplomatic agent concerned is accredited. Thirteen governments stated the exception in the preliminaries of the Hague Codification Conference. In a comment on the relevant article of the Harvard draft on diplomatic privileges and immunities it is stated: 'This article is believed to be declaratory of an established rule of international law'. The rule receives ample support from legislation of states and expert opinion. The Convention on Certain Questions relating to the Conflict of Nationality Laws of 1930 provides in Article 12: 'Rules of law which confer nationality by reasons of birth on the territory of a State shall not apply automatically to children born to persons enjoying diplomatic immunities in the country where the birth occurs.'
>
> In 1961 the United Nations Conference on Diplomatic Intercourse and Immunities adopted an Optional Protocol concerning Acquisition of Nationality, which provided in Article II: 'Members of the mission not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State'. Some states extend the rule to the children of consuls, and there is some support for this from expert opinion. [Emphasis deleted.]
>
> (Brownlie, at pp. 392-93).

[180] Mr. Vavilov included relevant excerpts from the parliamentary debate that had preceded the enactment of the *Citizenship Act* in support of his argument that the very purpose of s. 3(2) of the *Citizenship Act* was to align Canada's citizenship rules with these principles of international law. These excerpts describe s. 3(2) as "conform[ing] to international custom" and as having been drafted with the intention of "exclud[ing] children born in Canada to diplomats from becoming Canadian citizens": Hon. J. Hugh Faulkner, Secretary of State of Canada, House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Broadcasting, Films and Assistance to the Arts, respecting Bill C-20*, *An Act respecting citizenship*, No. 34, 1st Sess., 30th Parl., February 24, 1976, at 34:23. The record of that debate also reveals that Parliament took care to avoid the danger that because of how some provisions were written, "a number of other people would be affected such as those working for large foreign corporations": *ibid*. Although the analyst discussed the textual difference between s. 3(2) and a similar provision in the former *Canadian Citizenship Act*, she did not grapple with these other elements of the legislative history, despite the fact that they cast considerable doubt on her conclusions, indicating that s. 3(2) was not intended to affect the status of individuals whose parents have not been granted diplomatic privileges and immunities.

[181] In attempting to distinguish the meaning of the phrase "other representative or employee in Canada of a foreign government" from that of the term "diplomatic or consular officer", the analyst also appeared to overlook the possibility that some individuals who fall into the former category might be granted privileges or immunities despite not being considered "diplomatic or consular officer[s]" under the *Interpretation Act*. Yet, as the majority of the Federal Court of Appeal pointed out, such individuals do in fact exist: paras. 53-55, citing *FMIOA*, at ss. 3 and 4 and Sched. II, Articles 1, 41, 43, 49, and 53. In light of Mr. Vavilov's submissions regarding the purpose of s. 3(2), the failure to consider this possibility is a noticeable omission.

[182] It is well established that domestic legislation is presumed to comply with Canada's international obligations, and that it must be interpreted in a manner that reflects the principles of customary and conventional international law: *Appulonappa*, at para. 40; see also *Pushpanathan*, at para. 51; *Baker*, at para. 70; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *Hape*, at paras. 53- 54; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, at para. 48; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Office of the Children's Lawyer v. Balev*, 2018 SCC 16, [2018] 1 S.C.R. 398, at paras. 31-32. Yet the analyst did not refer to the relevant international law, did not inquire into Parliament's purpose in enacting s. 3(2) and did not respond to Mr. Vavilov's submissions on this issue. Nor did she advance any alternate explanation for why Parliament would craft such a provision in the first place. In the face of compelling submissions that the underlying rationale of s. 3(2) was to implement a narrow exception to a general rule in a manner that was consistent with established principles of international law, the analyst and the Registrar chose a different interpretation without offering any reasoned explanation for doing so.

(c) *Jurisprudence Interpreting Section 3(2) of the Citizenship Act*

[183] Although the analyst cited three Federal Court decisions on s. 3(2)(a) of the *Citizenship Act* in a footnote, she dismissed them as being irrelevant on the basis that they related only to "individuals whose parents maintained diplomatic status in Canada at the time of their birth". But this distinction, while true, does not explain why the *reasoning* employed in those decisions, which directly concerned the scope, the meaning and the legislative purpose of s. 3(2)(a), was inapplicable in Mr. Vavilov's case. Had the analyst considered just the three cases cited in her report — *Al-Ghamdi*; *Lee v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 614, [2009] 1 F.C.R. 204; and *Hitti v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 294, 310 F.T.R. 169 — it would have been evident to her that she needed to grapple with and justify her interpretation in light of the persuasive and comprehensive legal reasoning that supports the position that s. 3(2)(a) was intended to apply only to those individuals whose parents have been granted diplomatic privileges and immunities.

[184] In *Al-Ghamdi*, the Federal Court considered the constitutionality of paras. (a) and (c) of s. 3(2) of the *Citizenship Act* in reviewing a decision in which Passport Canada had refused to issue a passport to a child of a Saudi Arabian diplomat. In its reasons, the court came to a number of conclusions regarding the purpose and scope of s. 3(2), including, at para. 5, that:

> The only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status. These are individuals who enter Canada under special circumstances and without undergoing any of the normal procedures. Most importantly, while in Canada, they are granted all of the immunities and privileges of diplomats . . . .

[185] The court went on to extensively document the link between the exception to the rule of citizenship by birth set out in s. 3(2) of the *Citizenship Act* and the rules of international law, the *FMIOA* and the *VCDR*: *Al-Ghamdi*, at paras. 52 et. seq. It noted that there is an established rule of international law that children born to parents who enjoy diplomatic immunities are not entitled to automatic citizenship by birth, and that their status in this respect is an exception to the principle of *jus soli*: *Al-Ghamdi*, at para. 53, quoting Brownlie, at pp. 391-93. In finding that the exceptions under s. 3(2) to citizenship on the basis of *jus soli* do not infringe the rights of children of diplomats under s. 15 of the *Charter*, the court emphasized that *all* children to whom s. 3(2) applies are entitled to an "extraordinary array of privileges under the *Foreign Missions and International Organizations Act*": *Al-Ghamdi*, at para. 62. Citing the *VCDR*, it added that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship": para. 63. In its analysis under s. 1 of the *Charter*, the court found that the choice to deny citizenship to individuals provided for in s. 3(2) is "tightly connected" to a pressing government objective of ensuring "that no citizen is immune from the obligations of citizenship", such as the obligations to pay taxes and comply with the criminal law: *Al-Ghamdi*, at paras. 74-75. In the case at bar, the analyst failed entirely to engage with the arguments endorsed by the Federal Court in *Al-Ghamdi* despite the court's key finding that s. 3(2)(a) applies only to "children born of foreign diplomats or an equivalent", a conclusion upon which the very constitutionality of the provision turned: *Al-Ghamdi*, at paras. 3, 9, 27, 28, 56 and 59.

[186] In *Lee*, another case cited by the analyst, the Federal Court confirmed the finding in *Al-Ghamdi* that "[t]he only individuals covered in paragraphs 3(2)(a) and (c) of the *Citizenship Act* are children of individuals with diplomatic status": *Lee*, at para. 77. The court found in *Lee* that the "functional duties of the applicant's father" were not relevant to whether or not the applicant was excluded from citizenship pursuant to s. 3(2)(a) of the *Citizenship Act*: para. 58. Rather, what mattered was only that at the time of the applicant's birth, his father had been a registered consular official and had held a diplomatic passport and the title of Vice-Consul: paras. 44, 58, 61 and 63.

[187] *Hitti*, the third case cited in the analyst's report, concerned a decision to confiscate two citizenship certificates on the basis that, under s. 3(2) of the *Citizenship Act*, their holders had never been entitled to them. In that case, the applicants' father, a Lebanese citizen, had been employed as an information officer of the League of Arab States in Ottawa. Although the League did not have diplomatic standing at that time, Canada had agreed as a matter of courtesy to extend diplomatic status to officials of the League's information centre, treating them as "attachés" of their home countries' embassies: *Hitti*, at paras. 6 and 9; see also *Interpretation Act*, s. 35(1). Mr. Hitti argued he did not, in practice, fulfill diplomatic tasks or act as a representative of Lebanon, but there was nonetheless a record of his being an accredited diplomat, enjoying the benefits of that status and being covered by the *VCDR* when his children were born: paras. 5 and 8. The Federal Court rejected a submission that Mr. Hitti would have had to perform duties in the service of Lebanon in order for his children to fall within the meaning of s. 3(2)(a), and concluded that "what Mr. Hitti did when he was in the country is not relevant": para. 32.

[188] What can be seen from both *Lee* and *Hitti* is that what matters, for the purposes of s. 3(2)(a), is not whether an individual carries out activities in the service of a foreign state while in Canada, but whether, at the relevant time, the individual has been granted diplomatic privileges and immunities. Thus, in addition to the Federal Court's decision in *Al-Ghamdi*, the analyst was faced with two cases in which the application of s. 3(2) had turned on the existence of diplomatic status rather than on the "functional duties" or activities of the child's parents. In these circumstances, it was a significant omission for her to ignore the Federal Court's reasoning when determining whether the espionage activities of Ms. Vavilova and Mr. Bezrukov were sufficient to ground the application of s. 3(2)(a).

(d) *Possible Consequences of the Registrar's Interpretation*

[189] When asked why the children of individuals referred to in s. 3(2)(a) would be excluded from acquiring citizenship by birth, another analyst involved in Mr. Vavilov's file (who had also been involved in Mr. Vavilov's brother's file) responded as follows:

> Well, usually the way we use section 3(2)(a) is for – you're right, for diplomats and that they don't -- because they are not -- they are not obliged . . . to the law of Canada and everything, so that's why their children do not obtain

> citizenship if they were born in Canada while the person was in Canada under that status. But then there is also this other part of the Act that says other representatives or employees of a foreign government in Canada, that may open the door for other person than diplomats and that's how we interpreted in this specific case 3(2)(a) but there is no jurisprudence on that.
>
> (R.R. transcript, at pp. 87-88)

[190] In other words, the officials responsible for these files were aware that s. 3(2)(a) was informed by the principle that individuals subject to the exception are "not obliged . . . to the law of Canada". They were also aware that the interpretation they had adopted in the case of the Vavilov brothers was a novel one. Although the Registrar knew this, she failed to provide a rationale for this expanded interpretation.

[191] Additionally, there is no evidence that the Registrar considered the potential consequences of expanding her interpretation of s. 3(2)(a) to include individuals who have not been granted diplomatic privileges and immunities. Citizenship has been described as "the right to have rights": U.S. Supreme Court Chief Justice Earl Warren, as quoted in A. Brouwer, *Statelessness in Canadian Context: A Discussion Paper* (July 2003) (online), at p. 2. The importance of citizenship was recognized in *Benner v. Canada (Secretary of State)*, 1997 CanLII 376 (SCC), [1997] 1 S.C.R. 358, in which Iacobucci J., writing for this Court, stated: "I cannot imagine an interest more fundamental to full membership in Canadian society than Canadian citizenship": para. 68. This was reiterated in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, 1997 CanLII 322 (SCC), [1997] 3 S.C.R. 391, in which this Court unanimously held that "[f]or some, such as those who might become stateless if deprived of their citizenship, it may be valued as highly as liberty": para. 108.

[192] It perhaps goes without saying that rules concerning citizenship require a high degree of interpretive consistency in order to shield against a perception of arbitrariness and to ensure conformity with Canada's international obligations. We can therefore only assume that the Registrar intended that this new interpretation of s. 3(2)(a) would apply to any other individual whose parent is employed by or represents a foreign government at the time of the individual's birth in Canada but has not been granted diplomatic privileges and immunities. The Registrar's interpretation would not, after all, limit the application of s. 3(2)(a) to the children of spies — its logic would be equally applicable to a number of other scenarios, including that of a child of a non-citizen worker employed by an embassy as a gardener or cook, or of a child of a business traveller who represents a foreign government-owned corporation. Mr. Vavilov had raised the fact that provisions such as s. 3(2)(a) must be given a narrow interpretation because they deny or potentially take away rights — that of citizenship under s. 3(1) in this case — which otherwise benefit from a liberal and broad interpretation: *Brossard (Town) v. Québec (Commission des droits de la personne)*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279, at p. 307. Yet there is no indication that the Registrar considered the potential harsh consequences of her interpretation for such a large class of individuals, which included Mr. Vavilov, or the question whether, in light of those possible consequences, Parliament would have intended s. 3(2)(a) to apply in this manner.

[193] Moreover, we would note that despite following a different legal process, the Registrar's decision in this case had the same effect as a revocation of citizenship — a process which has been described by scholars as "a kind of 'political death'" — depriving Mr. Vavilov of his right to vote and the right to enter and remain in Canada: see A. Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014), 40 *Queen's L.J.* 1, at pp. 7-8. While we question whether the Registrar was empowered to unilaterally alter Canada's position with respect to Mr. Vavilov's citizenship and recognize that the relationship between the cancellation of a citizenship certificate under s. 26 of the *Citizenship Regulations* and the revocation of an individual's citizenship (as set out in s. 10 of the *Citizenship Act*) is not clear, we leave this issue for another day because it was neither raised nor argued by the parties.

D. *Conclusion*

[194] Multiple legal and factual constraints may bear on a given administrative decision, and these constraints may interact with one another. In some cases, a failure to justify the decision against any one relevant constraint may be sufficient to cause the reviewing court to lose confidence in the reasonableness of the decision. Section 3 of the *Citizenship Act* considered as a whole, other legislation and international treaties that inform the purpose of s. 3, the jurisprudence cited in the analyst's report, and the potential consequences of the Registrar's decision point overwhelmingly to the conclusion that Parliament did not intend s. 3(2)(a) to apply to children of individuals who have not been granted diplomatic privileges and immunities. The Registrar's failure to justify her decision with respect to these constraints renders her interpretation unreasonable, and we would therefore uphold the Federal Court of Appeal's decision to quash the Registrar's decision.

[195] As noted above, we would exercise our discretion not to remit the matter to the Registrar for redetermination. Crucial to our decision is the fact that Mr. Vavilov explicitly raised all of these issues before the Registrar and that the Registrar had an opportunity to consider them but failed to do so. She offered no justification for the interpretation she adopted except for a superficial reading of the provision in question and a comment on part of its legislative history. On the other hand, there is overwhelming support — including in the parliamentary debate, established principles of international law, an established line of jurisprudence and the text of the provision itself — for the conclusion that Parliament did not intend s. 3(2)(a) of the *Citizenship Act* to apply to children of individuals who have not been granted diplomatic privileges and immunities. That being said, we would stress that it is not our intention to offer a definitive interpretation of s. 3(2)(a) in all respects, nor to foreclose the possibility that multiple reasonable interpretations of other aspects might be available to administrative decision makers. In short, we do not suggest that there is necessarily "one reasonable interpretation" of the provision as a whole. But we agree with the majority of the Court of Appeal that it was *not* reasonable for the Registrar to interpret s. 3(2)(a) as applying to children of individuals who have not been granted diplomatic privileges and immunities at the time of the children's birth.

[196] Given that it is undisputed that Ms. Vavilova and Mr. Bezrukov, as undercover spies, were granted no such privileges, it would serve no purpose to remit the matter in this case to the Registrar. Given that Mr. Vavilov is a person who was born in Canada after February 14, 1977, his status is governed only by the general rule set out in s. 3(1)(a) of the *Citizenship Act*. He is a Canadian citizen.

E. *Disposition*

[197] The appeal is dismissed with costs throughout to Mr. Vavilov.

The following are the reasons delivered by

Abella and Karakatsanis JJ. —

[198] Forty years ago, in *C.U.P.E., Local 963 v. New Brunswick Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, this Court embarked on a course to recognize the unique and valuable role of administrative decision-makers within the Canadian legal order. Breaking away from the court-centric theories of years past, the Court encouraged judges to show deference when specialized administrative decision-makers provided reasonable answers to legal questions within their mandates. Building on this more mature understanding of administrative law, subsequent decisions of this Court sought to operationalize deference and explain its relationship to core democratic principles. These appeals offered a platform to clarify and refine our administrative law jurisprudence, while remaining faithful to the deferential path it has travelled for four decades.

[199] Regrettably, the majority shows our precedents no such fidelity. Presented with an opportunity to steady the ship, the majority instead dramatically reverses course — away from this generation's deferential approach and back towards a prior generation's more intrusive one. Rather than confirming a meaningful presumption of deference for administrative decision-makers, as our common law has increasingly done for decades, the majority's reasons strip away deference from hundreds of administrative actors subject to statutory rights of appeal; rather than following the consistent path of this Court's jurisprudence in understanding legislative intent as being the intention to leave legal questions within their mandate to specialized decision-makers with expertise, the majority removes expertise from the equation entirely and reformulates legislative intent as an overriding intention to provide — or not provide — appeal routes; and rather than clarifying the role of reasons and how to review them, the majority revives the kind of search for errors that dominated the pre-*C.U.P.E.* era. In other words, instead of *reforming* this generation's evolutionary approach to administrative law, the majority *reverses* it, taking it back to the formalistic judge-centred approach this Court has spent decades dismantling.

[200] We support the majority's decision to eliminate the vexing contextual factors analysis from the standard of review framework and to abolish the shibboleth category of "true questions of jurisdiction". These improvements, accompanied by a meaningful presumption of deference for administrative decision-makers, would have simplified our judicial review framework and addressed many of the criticisms levied against our jurisprudence since *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 S.C.R. 190.

[201] But the majority goes much further and fundamentally reorients the decades-old relationship between administrative actors and the judiciary, by dramatically expanding the circumstances in which generalist judges will be entitled to substitute their own views for those of specialized decision-makers who apply their mandates on a daily basis. In so doing, the majority advocates a profoundly different philosophy of administrative law than the one which has guided our Court's jurisprudence for the last four decades. The majority's reasons are an encomium for correctness and a eulogy for deference.

The Evolution of Canadian Administrative Law

[202] The modern Canadian state "could not function without the many and varied administrative tribunals that people the legal landscape" (The Rt. Hon. Beverley McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*, May 27, 2013 (online)). Parliament and the provincial legislatures have entrusted a broad array of complex social and economic challenges to administrative actors, including regulation of labour relations, welfare programs, food and drug safety, agriculture, property assessments, liquor service and production, infrastructure, the financial markets, foreign investment, professional discipline, insurance, broadcasting, transportation and environmental protection, among many others. Without these administrative decision-makers, "government would be paralyzed, and so would the courts" (Guy Régimbald, *Canadian Administrative Law* (2nd ed. 2015), at p. 3).

[203] In exercising their mandates, administrative decision-makers often resolve claims and disputes within their areas of specialization (Gus Van Harten et al., *Administrative Law: Cases, Text, and Materials* (7th ed. 2015), at p. 13). These claims and disputes vary greatly in scope and subject-matter. Corporate merger requests, professional discipline complaints by dissatisfied clients, requests for property reassessments and applications for welfare benefits, among many other matters, all fall within the purview of the administrative justice system.

[204] The administrative decision-makers tasked to resolve these issues come from many different walks of life (Van Harten et al., at p. 15). Some have legal backgrounds, some do not. The diverse pool of decision-makers in the administrative system responds to the diversity of issues that it must resolve. To address this broad range of issues, administrative dispute-resolution processes are generally "[d]esigned to be less cumbersome, less expensive, less formal and less delayed" than their judicial counterparts — but "no less effectiv[e] or credibl[e]" (*Rasanen v. Rosemount Instruments Ltd.* (1994), 1994 CanLII 608 (ON CA), 17 O.R. (3d) 267 (C.A.), at p. 279). In the field of labour relations, for example, Parliament explicitly rejected a court-based system to resolve workplace disputes in favour of a Labour Board, staffed with representatives from management and labour alongside an independent member (Bora Laskin, "Collective Bargaining in Ontario: A New Legislative Approach" (1943), 21 *Can. Bar Rev.* 684; John A. Willes, *The Ontario Labour Court: 1943-1944* (1979); Katherine Munro, "A 'Unique Experiment': The Ontario Labour Court, 1943-1944" (2014), 74 *Labour/Le Travail* 199). Other administrative processes — license renewals, zoning permit issuances and tax reassessments, for example — bear even less resemblance to the traditional judicial model.

[205] Courts, through judicial review, monitor the boundaries of administrative decision making. Questions about the standards of judicial review have been an enduring feature of Canadian administrative law. The debate, in recent times, has revolved around "reasonableness" and "correctness", and determining when each standard applies. On the one hand, "reasonableness" review expects courts to defer to decisions by specialized decision-makers that "are defensible in respect of the facts and law"; on the other, "correctness" review allows courts to substitute their own opinions for those of the initial decision-maker (*Dunsmuir*, at paras. 47-50). This standard of review debate has profound implications for the extent to which reviewing courts may substitute their views for those of administrative decision-makers. At its core, it is a debate over two distinct philosophies of administrative law.

[206] The story of modern Canadian administrative law is the story of a shift away from the court-centric philosophy which denied administrative bodies the authority to interpret or shape the law. This approach found forceful expression in the work of Albert Venn Dicey. For Dicey, the rule of law meant the rule of courts. Dicey developed his philosophy at the end of the 19th century to encourage the House of Lords to restrain the government from implementing ameliorative social and welfare reforms administered by new regulatory agencies. Famously, Dicey asserted that administrative law was anathema to the English legal system (Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed. 1959), at pp. 334-35). Because, in his view, only the judiciary had the authority to interpret law, there was no reason for a court to defer to legal interpretations proffered by administrative bodies, since their decisions did not constitute "law" (Kevin M. Stack, "Overcoming Dicey in Administrative Law" (2018), 68 *U.T.L.J.* 293, at p. 294).

[207] The canonical example of Dicey's approach at work is the House of Lords' decision in *Anisminic Ltd. v. Foreign Compensation Commission*, [1969] 2 A.C. 147, the judicial progenitor of "jurisdictional error". *Anisminic* entrenched non-deferential judicial review by endorsing a lengthy checklist of "jurisdictional errors" capable of undermining administrative decisions. Lord Reid noted that there were two scenarios in which an administrative decision-maker would lose

jurisdiction. The first was narrow and asked whether the legislature had empowered the administrative decision-maker to "enter on the inquiry in question" (p. 171). The second was wider:

> [T]here are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. *It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account.-Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.* [Emphasis added; p. 171.]

[208] The broad "jurisdictional error" approach in *Anisminic* initially found favour with this Court in cases like *Metropolitan Life Insurance Company v. International Union of Operating Engineers, Local 796*, 1970 CanLII 7 (SCC), [1970] S.C.R. 425, and *Bell v. Ontario Human Rights Commission*, 1971 CanLII 195 (SCC), [1971] S.C.R. 756. These cases "took the position that a definition of jurisdictional error should include any question pertaining to the interpretation of a statute made by an administrative tribunal", and in each case, "th[e] Court substituted what was, in its opinion, the correct interpretation of the enabling provision of the tribunal's statute for that of the tribunal" (*Canada (Attorney General) v. Public Service Alliance of Canada*, 1991 CanLII 88 (SCC), [1991] 1 S.C.R. 614, at p. 650, per Cory J., dissenting, but not on this point). In *Metropolitan Life*, for example, this Court quashed a labour board's decision to certify a union, concluding that the Board had "ask[ed] itself the wrong question" and "decided a question which was not remitted to it" (p. 435). In *Bell*, this Court held that a human rights commission had strayed beyond its jurisdiction by deciding to investigate a complaint of racial discrimination filed against a landlord. The Court held that the Commission had incorrectly interpreted the term "self-contained dwelling uni[t]" found in s. 3 of the *Ontario Human Rights Code*, *1961-62*, S.O. 1961-62, c. 93, and by so doing, had lost jurisdiction to inquire into the complaint of discrimination (pp. 767 and 775).

[209] As these cases illustrate, the *Anisminic* approach proved easy to manipulate, allowing courts to characterize any question as "jurisdictional" and thereby give themselves latitude to substitute their own view of the appropriate answer without regard for the original decision-maker's decision or reasoning. The *Anisminic* era and the "jurisdictional error" approach were and continue to be subject to significant judicial and academic criticism (*Public Service Alliance*, at p. 650; *National Corn Growers Assn. v. Canada (Import Tribunal)*, 1990 CanLII 49 (SCC), [1990] 2 S.C.R. 1324, at p. 1335, per Wilson J., concurring; Beverley McLachlin, P.C., "'Administrative Law is Not for Sissies': Finding a Path Through the Thicket" (2016), 29 *C.J.A.L.P.* 127, at pp. 129-30; Jocelyn Stacey and Alice Woolley, "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at pp. 215-16; R.A. MacDonald, "Absence of Jurisdiction: A Perspective" (1983), 43 *R. du B.* 307).

[210] In 1979, the Court signaled a turn to a more deferential approach to judicial review with its watershed decision in *C.U.P.E.* There, the Court challenged the "jurisdictional error" model and planted the seeds of a home-grown approach to administrative law in Canada. In a frequently-cited passage, Dickson J., writing for a unanimous Court, cautioned that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233; cited in nearly 20 decisions of this Court, including *Dunsmuir*, at para. 35; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (CanLII), [2009] 1 S.C.R. 339, at para. 45; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 S.C.R. 654, at para. 33; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (CanLII), [2018] 2 S.C.R. 230, at para. 31). The Court instead endorsed an approach that respected the legislature's decision to assign legal policy issues in some areas to specialized, non-judicial decision-makers. The Court recognized that legislative language could "bristl[e] with ambiguities" and that the interpretive choices made by administrative tribunals deserved respect from courts, particularly when, as in *C.U.P.E.*, the decision was protected by a privative clause (pp. 230 and 234-36).

[211] By championing "curial deference" to administrative bodies, *C.U.P.E.* embraced "a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state" (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, 1993 CanLII 106 (SCC), [1993] 2 S.C.R. 756, at p. 800). As one scholar has observed:

> . . . legislatures and courts in . . . Canada have come to settle on the idea that the functional capacities of administrative agencies – their expertise, investment in understanding the practical circumstances at issue, openness to participation, and level of responsiveness to political change – justify not only their law-making powers but also judicial deference to their interpretations and decisions. *Law-making and legal interpretation are shared enterprises in the administrative state*. [Emphasis added.]
>
> (Stack, at p. 310)

[212] In explaining why courts must sometimes defer to administrative actors, *C.U.P.E.* embraced two related foundational justifications for Canada's approach to administrative law — one based on the legislature's express choice to have an administrative body decide the issues arising from its mandate; and one animated by the recognition that an administrative justice system could offer institutional advantages in relation to proximity, efficiency, and specialized expertise (David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed., *The Province of Administrative Law* (1997), 279 at p. 304).

[213] A new institutional relationship between the courts and administrative actors was thus being forged, based on "an understanding of the role of expertise in the modern administrative state" which "acknowledge[d] that judges are not always in the best position to interpret the law" (The Hon. Frank Iacobucci, "Articulating a Rational Standard of Review Doctrine: A Tribute to John Willis" (2002), 27 *Queen's L.J.* 859, at p. 866).

[214] In subsequent decades, the Court attempted to reconcile the deference urged by *C.U.P.E.* with the lingering concept of "jurisdictional error". In *U.E.S., Local 298 v. Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 S.C.R. 1048, the Court introduced the "pragmatic and functional" approach for deciding when a matter was within the jurisdiction of an administrative body. Instead of describing jurisdiction as a preliminary or collateral matter, the *Bibeault* test directed reviewing courts to consider the wording of the enactment conferring jurisdiction on the administrative body, the purpose of the statute creating the tribunal, the reason for the tribunal's existence, the area of expertise of its members, and the nature of the question the tribunal had to decide — all to determine whether the legislator "intend[ed] the question to be within the jurisdiction conferred on the tribunal" (p. 1087; see also p. 1088). If so, the tribunal's decision could only be set aside if it was "patently unreasonable" (p. 1086).

[215] Although still rooted in a formalistic search for jurisdictional errors, the pragmatic and functional approach recognized that legislatures had assigned courts and administrative decision-makers distinct roles, and that the specialization and expertise of administrative decision-makers deserved deference. In her concurring reasons in *National Corn Growers*, Wilson J. noted that part of the process of moving away from Dicey's framework and towards a more sophisticated understanding of the role of administrative tribunals:

> . . . has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise. [p. 1336]

[216] By the mid-1990s, the Court had accepted that specialization and the legislative intent to leave issues to administrative decision-makers were inextricable and essential factors in the standard of review analysis. It stressed that "the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision . . . [e]ven where the tribunal's enabling statute provides explicitly for appellate review" (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, 1993 CanLII 88 (SCC), [1993] 2 S.C.R. 316, at p. 335). Of the factors relevant to setting the standard of review, expertise was held to be "the most important" (*Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748, at para. 50).

[217] Consistent with these judgments, this Court invoked the specialized expertise of a securities commission to explain why its decisions were entitled to deference on judicial review even when there was a statutory right of appeal. Writing for a unanimous Court, Iacobucci J. explained that "the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise" (*Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557, at p. 591; see also *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, 1989 CanLII 67 (SCC), [1989] 1 S.C.R. 1722, at pp. 1745-46). Critically, the Court's willingness to show deference demonstrated that specialization outweighed a statutory appeal as the most significant indicator of legislative intent.

[218] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 778 (SCC), [1998] 1 S.C.R. 982, the Court reformulated the pragmatic and functional approach, engaging four slightly different factors from those in *Bibeault*, namely: (1) whether there was a privative clause, or conversely, a right of appeal; (2) the expertise of the decision-maker on the matter in question relative to the reviewing court; (3) the purpose of the statute as a whole, and of the provision in particular; and (4) the nature of the problem, i.e., whether it was a question of law, fact, or mixed law and fact (paras. 29-37). Instead of using these factors to answer whether a question was jurisdictional, *Pushpanathan* deployed them to discern how much deference the legislature intended an administrative decision to receive on judicial review. *Pushpanathan* confirmed three standards of review: patent unreasonableness, reasonableness *simpliciter*, and correctness (para. 27; see also *Southam*, at paras. 55-56).

[219] Significantly, *Pushpanathan* did not disturb the finding reaffirmed in *Southam* that specialized expertise was the most important factor in determining whether a deferential standard applied. Specialized expertise thus remained integral to the calibration of legislative intent, even in the face of statutory rights of appeal (see *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 (CanLII), [2003] 1 S.C.R. 247, at paras. 21 and 29-34; *Cartaway Resources Corp. (Re)*, 2004 SCC 26 (CanLII), [2004] 1 S.C.R. 672, at para. 45; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 (CanLII), [2007] 1 S.C.R. 650, at paras. 88-92 and 100).

[220] Next came *Dunsmuir*, which sought to simplify the pragmatic and functional analysis while maintaining respect for the specialized expertise of administrative decision-makers. The Court merged the three standards of review into two: reasonableness and correctness. *Dunsmuir* also wove together the deferential threads running through the Court's administrative law jurisprudence, setting out a presumption of deferential review for certain categories of questions, including those where the decision-maker had expertise or was interpreting its "home" statute (paras. 53-54, per Bastarache and LeBel JJ., and para. 124, per Binnie J., concurring). Certain categories of issues remained subject to correctness review, including constitutional questions regarding the division of powers, true questions of jurisdiction, questions of law that were both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, and questions about jurisdictional lines between tribunals (paras. 58-61). Where the standard of review had not been satisfactorily determined in the jurisprudence, four contextual factors — the presence or absence of a privative clause, the purpose of the tribunal, the nature of the question at issue and the expertise of the tribunal — remained relevant to the standard of review analysis (para. 64).

[221] Notably, *Dunsmuir* did not mention statutory rights of appeal as one of the contextual factors, and left undisturbed their marginal role in the standard of review analysis. Instead, the Court explicitly affirmed the links between deference, the specialized expertise of administrative decision-makers and legislative intent. Justices LeBel and Bastarache held that "deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system" (para. 49). They noted that "in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (para. 49, citing David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93).

[222] Post-*Dunsmuir*, this Court continued to stress that specialized expertise is the basis for making administrative decision-makers, rather than the courts, the appropriate forum to decide issues falling within their mandates (see *Khosa*, at para. 25; *R. v. Conway*, 2010 SCC 22 (CanLII), [2010] 1 S.C.R. 765, at para. 53; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 (CanLII), [2013] 3 S.C.R. 895, at paras. 30-33). Drawing on the concept of specialized expertise, the Court's post-*Dunsmuir* cases expressly confirmed a presumption of reasonableness review for an administrative decision-maker's interpretation of its home or closely-related statutes (see *Alberta Teachers' Association*, at paras. 39-41). As Gascon J. explained in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 S.C.R. 3, at para. 46:

> Deference is in order where the Tribunal acts within its specialized area of expertise . . . (*Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467, at paras. 166-68; *Mowat*, at para. 24). In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paras. 30, 34 and 39, the Court noted that, on judicial review of a decision of a specialized administrative tribunal interpreting and applying its enabling statute, it should be presumed that the standard of review is reasonableness (*Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 55; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197 ("*NGC*"), at para. 13; *Khosa*, at para. 25; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 26 and 28; *Dunsmuir*, at para. 54).

[223] And in *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 (CanLII), [2016] 2 S.C.R. 293, the majority recognized:

> The presumption of reasonableness is grounded in the legislature's choice to give a specialized tribunal responsibility for administering the statutory provisions, and the expertise of the tribunal in so doing. Expertise arises from the specialization of functions of administrative tribunals like the Board which have a habitual familiarity with the legislative scheme they administer . . . . [E]xpertise is something that inheres in a tribunal itself as an institution: ". . . at an institutional level, adjudicators . . . can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions". [Citation omitted; para. 33.]

[224] The presumption of deference, therefore, operationalized the Court's longstanding jurisprudential acceptance of the "specialized expertise" principle in a workable manner, continuing the deferential path Dickson J. first laid out in *C.U.P.E.*

[225] As for statutory rights of appeal, they continued to be seen as either an irrelevant factor in the standard of review analysis or one that yielded to specialized expertise. So firmly entrenched was this principle that in cases like *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40 (CanLII), [2009] 2 S.C.R. 764, *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), [2011] 1 S.C.R. 160, *ATCO Gas and Pipelines Ltd. v. Alberta (Utilities Commission)*, 2015 SCC 45 (CanLII), [2015] 3 S.C.R. 219, and *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII), [2016] 2 S.C.R. 80, the Court applied the reasonableness standard without even *referring* to the presence of an appeal clause. When appeal clauses *were* discussed, the Court consistently confirmed that they did not oust the application of judicial review principles.

[226] In *Khosa*, Binnie J. explicitly endorsed *Pezim* and rejected "the idea that in the absence of express statutory language . . . a reviewing court is 'to apply a correctness standard as it does in the regular appellate context'" (para. 26). This reasoning was followed in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII), [2011] 3 S.C.R. 471 ("*Mowat*"), where the Court confirmed that "care should be taken not to conflate" judicial and appellate review (para. 30; see also para. 31). In *McLean*, decided two years after *Mowat*, the majority cited *Pezim* and other cases for the proposition that "general administrative law principles still apply" on a statutory appeal (see para. 21, fn. 2). Similarly, in *Mouvement laïque*, Gascon J. affirmed that

> [w]here a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal . . . . [para. 38]

[227] In *Edmonton East*, the Court considered — and again rejected — the argument that statutory appeals should form a new category of correctness review. As the majority noted, "recognizing issues arising on statutory appeals as a new category to which the correctness standard applies — as the Court of Appeal did in this case —would go against strong jurisprudence from this Court" (para. 28). Even the dissenting judges in *Edmonton East*, although of the view that the wording of the relevant statutory appeal clause and legislative scheme pointed to the correctness standard, nonetheless unequivocally stated that "a statutory right of appeal is not a new 'category' of correctness review" (para. 70).

[228] By the time these appeals were heard, contextual factors had practically disappeared from the standard of review analysis, replaced by a presumption of deference subject only to the correctness exceptions set out in *Dunsmuir* — which explicitly did *not* include statutory rights of appeal. In other words, the Court was well on its way to realizing *Dunsmuir*'s promise of a simplified analysis. Justice Gascon recognized as much last year in *Canadian Human Rights Commission*:

> *This contextual approach should be applied sparingly*. As held by the majority of this Court in *Alberta Teachers*, it is inappropriate to "retreat to the application of a full standard of review analysis where it can be determined summarily" . . . . After all, the "contextual approach can generate uncertainty and endless litigation concerning the standard of review" (*Capilano* [*Edmonton East*], at para. 35). The presumption of reasonableness review and the identified categories will generally be sufficient to determine the applicable standard. In the exceptional cases where such a contextual analysis may be justified to rebut the presumption, it need not be a long and detailed one (*Capilano* [*Edmonton East*], at para. 34). Where it has been done or referred to in the past, the analysis has been limited to determinative factors that showed a clear legislative intent justifying the rebuttal of the presumption (see, e.g., *Rogers*, at para. 15; *Tervita*, at paras. 35-36; see also, *Saguenay*, at paras. 50-51). [Emphasis added; para. 46.]

[229] In sum, for four decades, our standard of review jurisprudence has been clear and unwavering about the foundational role of specialized expertise and the limited role of statutory rights of appeal. Where confusion persists, it concerns the relevance of the contextual factors in *Dunsmuir*, the meaning of "true questions of jurisdiction" and how best to conduct reasonableness review. That was the backdrop against which these appeals were heard and argued. But rather than ushering in a simplified next act, these appeals have been used to rewrite the whole script, reassigning to the courts the starring role Dicey ordained a century ago.

The Majority's Reasons

[230] The majority's framework rests on a flawed and incomplete conceptual account of judicial review, one that unjustifiably ignores the specialized expertise of administrative decision-makers. Although the majority uses language endorsing a "presumption of reasonableness review", this presumption now rests on a totally new understanding of legislative intent and the rule of law. By prohibiting any consideration of well-established foundations for deference, such as "expertise . . . institutional experience . . . proximity and responsiveness to stakeholders . . . prompt[ness], flexib[ility], and efficien[cy]; and . . . access to justice", the majority reads out the foundations of the modern understanding of legislative intent in administrative law.

[231] In particular, such an approach ignores the possibility that specialization and other advantages are embedded into the legislative choice to delegate particular subject matters to administrative decision-makers. Giving proper effect to the legislature's choice to "delegate authority" to an administrative decision-maker requires understanding the *advantages* that the decision-maker may enjoy in exercising its mandate (*Dunsmuir*, at para. 49). As Iacobucci J. observed in *Southam*:

> Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, *it is because the tribunal enjoys some advantage that judges do not*. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. [Emphasis added; para. 55.]

[232] Chief among those advantages are the institutional expertise and specialization inherent to administering a particular mandate on a daily basis. Those appointed to administrative tribunals are often chosen precisely because their backgrounds and experience align with their mandate (Van Harten et al., at p. 15; Régimbald, at p. 463). Some administrative schemes explicitly require a degree of expertise from new members as a condition of appointment (*Edmonton East*, at para. 33; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 S.C.R. 226, at para. 29; Régimbald, at p. 462). As institutions, administrative bodies also benefit from specialization as they develop "habitual familiarity with the legislative scheme they administer" (*Edmonton East*, at para. 33) and "grappl[e] with issues on a repeated basis" (*Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (CanLII), [2003] 2 S.C.R. 157, at para. 53). Specialization and expertise are further enhanced by continuing education and through meetings of the membership of an administrative body to discuss policies and best practices (Finn Makela, "Acquired Expertise of Administrative Tribunals and the Standard of Judicial Review: The Case of Grievance Arbitrators and Human Rights Law" (2013), 17 *C.L.E.L.J.* 345, at p. 349). In addition, the blended membership of some tribunals fosters special institutional competence in resolving "polycentric" disputes (*Pushpanathan*, at para. 36; *Dr. Q* at paras. 29-30; *Pezim*, at pp. 591-92 and 596).

[233] All this equips administrative decision-makers to tackle questions of law arising from their mandates. In interpreting their enabling statutes, for example, administrative actors may have a particularly astute appreciation for the on-the-ground consequences of particular legal interpretations; of statutory context; of the purposes that a provision or legislative scheme are meant to serve; and of specialized terminology used in their administrative setting. Coupled with this Court's acknowledgment that legislative provisions often admit of multiple reasonable interpretations, the advantages stemming from specialization and expertise provide a robust foundation for deference to administrative decision-makers on legal questions within their mandate (*C.U.P.E.*, at p. 236; *McLean*, at para. 37). As Professor H.W. Arthurs said:

> There is no reason to believe that a judge who reads a particular regulatory statute once in his life, perhaps in worst-case circumstances, can read it with greater fidelity to legislative purpose than an administrator who is sworn to uphold that purpose, who strives to do so daily, and is well-aware of the effect upon the purpose of the various alternate interpretations. There is no reason to believe that a legally-trained judge is better qualified to determine the existence or sufficiency or appropriateness of evidence on a given point than a trained economist or engineer, an arbitrator selected by the parties, or simply an experienced tribunal member who decides such cases day in and day out. There is no reason to believe that a judge whose entire professional life has been spent dealing with disputes one by one should possess an aptitude for issues which arise often because an administrative system dealing with cases in volume has been designed to strike an appropriate balance between efficiency and effective rights of participation.
>
> ("Protection against Judicial Review" (1983), 43 *R. du B.* 277, at p. 289)

[234] Judges of this Court have endorsed both this passage and the broader proposition that specialization and expertise justify the deference owed to administrative decision-makers (*National Corn Growers*, at p. 1343, per Wilson J., concurring). As early as *C.U.P.E.*, Dickson J. fused expertise and legislative intent by explaining that an administrative body's specialized expertise can be essential to achieving the purposes of a statutory scheme:

> The Act calls for a delicate balance between the need to maintain public services, and the need to maintain collective bargaining. Considerable sensitivity and unique expertise on the part of Board members is all the more required if the twin purposes of the legislation are to be met. [p. 236]

[235] Over time, specialized expertise would become the core rationale for deferring to administrative decision-makers (*Bradco Construction*, at p. 335; *Southam*, at para. 50; Audrey Macklin, "Standard of Review: Back to the Future?", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 381 at pp. 397-98). Post-*Dunsmuir*, the Court has been steadfast in confirming the central role of specialization and expertise, affirming their connection to legislative intent, and recognizing that they give administrative decision-makers the "interpretative upper hand" on questions of law (*McLean*, at para. 40; see also *Conway*, at para. 53; *Mowat*, at para. 30; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 (CanLII), [2011] 3 S.C.R. 708, at para. 13; *Doré v. Barreau du Québec*, 2012 SCC 12 (CanLII), [2012] 1 S.C.R. 395, at para. 35; *Mouvement laïque*, at para. 46; *Khosa*, at para. 25; *Edmonton East*, at para. 33).

[236] Although the majority's approach extolls respect for the legislature's "institutional design choices", it accords no weight to the institutional advantages of specialization and expertise that administrative decision-makers possess in resolving questions of law. In so doing, the majority disregards the historically accepted reason *why* the legislature intended to delegate authority to an administrative actor.

[237] Nor are we persuaded by the majority's claim that "if administrative decision makers are understood to possess specialized expertise on all questions that come before them, the concept of expertise ceases to assist a reviewing court in attempting to distinguish questions for which applying the reasonableness standard is appropriate from those for which it is not". Here, the majority sets up a false choice: expertise must either be assessed on a case-by-case basis or play no role at all in a theory of judicial review.

[238] We disagree. While not every decision-maker necessarily has expertise on every issue raised in an administrative proceeding, reviewing courts do not engage in an individualized, case-by-case assessment of specialization and expertise. The theory of deference is based not only on the legislative choice to delegate decisions, but also on institutional expertise and on "the reality that . . . those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Khosa*, at para. 25; see also *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 (CanLII), [2011] 3 S.C.R. 616, at para. 53; *Edmonton East*, at para. 33).

[239] The exclusion of expertise, specialization and other institutional advantages from the majority's standard of review framework is not merely a theoretical concern. The removal of the current "conceptual basis" for deference opens the gates to expanded correctness review. The majority's "presumption" of deference will yield all too easily to justifications for a correctness-oriented framework.

[240] In the majority's framework, deference gives way whenever the "rule of law" demands it. The majority's approach to the rule of law, however, flows from a court-centric conception of the rule of law rooted in Dicey's 19th century philosophy.

[241] The rule of law is not the rule of courts. A pluralist conception of the rule of law recognizes that courts are not the exclusive guardians of law, and that others in the justice arena have shared responsibility for its development, including administrative decision-makers. *Dunsmuir* embraced this more inclusive view of the rule of law by acknowledging that the "court-centric conception of the rule of law" had to be "reined in by acknowledging that the courts do not have a monopoly on

deciding all questions of law" (para. 30). As discussed in *Dunsmuir*, the rule of law is understood as meaning that administrative decision-makers make legal determinations within their mandate, and not that only judges decide questions of law with an unrestricted license to substitute their opinions for those of administrative actors through correctness review (see McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*; The Hon. Thomas A. Cromwell, "What I Think I've Learned About Administrative Law" (2017), 30 *C.J.A.L.P.* 307, at p. 308; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29 (CanLII), [2016] 1 S.C.R. 770, at para. 31, per Abella J.).

[242] Moreover, central to any definition of the rule of law is access to a fair and efficient dispute resolution process, capable of dispensing timely justice (*Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, at para. 1). This is an important objective for all litigants, from the sophisticated consumers of administrative justice, to, most significantly, the particularly vulnerable ones (Angus Grant and Lorne Sossin, "Fairness in Context: Achieving Fairness Through Access to Administrative Justice", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (3rd ed. 2018), 341, at p. 342). For this reason, access to justice is at the heart of the legislative choice to establish a robust system of administrative law (Grant and Sossin, at pp. 342 and 369-70; Van Harten, et al., at p. 17; Régimbald, at pp. 2-3; McLachlin, *Administrative Tribunals and the Courts: An Evolutionary Relationship*). As Morissette J.A. has observed:

> . . . the aims of administrative law . . . generally gravitate towards promoting access to justice. The means contemplated are costless or inexpensive, simple and expeditious procedures, expertise of the decision-makers, coherence of reasons, consistency of results and finality of decisions.
>
> (Yves-Marie Morissette, "What is a 'reasonable decision'?" (2018), 31 *C.J.A.L.P.* 225, at p. 236)

[243] These goals are compromised when a narrow conception of the "rule of law" is invoked to impose judicial hegemony over administrative decision-makers. Doing so perverts the purpose of establishing a parallel system of administrative justice, and adds unnecessary expense and complexity for the public.

[244] The majority even calls for a reformulation of the "questions of central importance" category from *Dunsmuir* and permits courts to substitute their opinions for administrative decision-makers on "questions of central importance to the legal system as a whole", even if those questions fall squarely within the mandate and expertise of the administrative decision-maker. As noted in *Canadian Human Rights Commission*, correctness review was permitted only for questions "of central importance to the legal system *and* outside the specialized expertise of the adjudicator" (para. 28 (emphasis in original)). Broadening this category from its original characterization unduly expands the issues available for judicial substitution. Issues of discrimination, labour rights, and economic regulation of the securities markets (among many others) theoretically raise questions of vital importance for Canada and its legal system. But by ignoring administrative decision-makers' expertise on these matters, this category will inevitably provide more "room . . . for both mistakes and manipulation" (Andrew Green, "Can There Be Too Much Context in Administrative Law? Setting the Standard of Review in Canadian Administrative Law" (2014), 47 *U.B.C. L. Rev.* 443, at p. 483). We would leave *Dunsmuir*'s description of this category undisturbed.[1]

[245] We also disagree with the majority's reformulation of "legislative intent" to include, for the first time, an invitation for courts to apply correctness review to legal questions whenever an administrative scheme includes a right of appeal. We do not see how appeal rights represent a "different institutional structure" that requires a more searching form of review. The mere fact that a statute contemplates a reviewing role for a court says nothing about the *degree of deference* required in the review process. Rights of appeal reflect different choices by different legislatures to permit review for different reasons, on issues of fact, law, mixed fact and law, and discretion, among others. Providing parties with a right of appeal can serve several purposes entirely unrelated to the standard of review, including outlining: where the appeal will take place (sometimes, at a different reviewing court than in the routes provided for judicial review); who is eligible to take part; when materials must be filed; how materials must be presented; the reviewing court's powers on appeal; any leave requirements; and the grounds on which the parties may appeal (among other things). By providing this type of structure and guidance, statutory appeal provisions may allow legislatures to promote efficiency and access to justice, in a way that exclusive reliance on the judicial review procedure would not have.

[246] In reality, the majority's position on statutory appeal rights, although couched in language about "giv[ing] effect to the legislature's institutional design choices", hinges almost entirely on a textualist argument: the presence of the word "appeal" indicates a legislative intent that courts apply the same standards of review found in civil appellate jurisprudence.

[247] The majority's reliance on the "presumption of consistent expression" in relation to the single word "appeal" is misplaced and disregards long-accepted institutional distinctions between how courts and administrative decision-makers function. The language in each setting is different; the mandates are different; the policy bases are different. The idea that *Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235, must be inflexibly applied to every right of "appeal" within a statute — with no regard for the broader purposes of the statutory scheme or the practical implications of greater judicial involvement within it — is entirely unsupported by our jurisprudence.

[248] In addition, the majority's claim that legislatures "d[o] not speak in vain" is irreconcilable with its treatment of privative clauses, which play no role in its standard of review framework. If, as the majority claims, Parliament's decision to provide appeal routes must influence the standard of review analysis, there is no principled reason why Parliament's decision via privative clauses to *prohibit* appeals should not be given comparable effect.[2]

[249] In any event, legislatures in this country have known for at least 25 years since *Pezim* that this Court has not treated statutory rights of appeal as a determinative reflection of legislative intent regarding the standard of review (*Pezim*, at p. 590). Against this reality, the continued use by legislatures of the term "appeal" cannot be imbued with the intent that the majority retroactively ascribes to it; doing so is inconsistent with the principle that legislatures are presumed to enact legislation in compliance with existing common law rules (Ruth Sullivan, *Statutory Interpretation* (3rd ed. 2016), at p. 315).

[250] Those legislatures, moreover, understood from our jurisprudence that this Court was committed to respecting *standards* of review that were statutorily prescribed, as British Columbia alone has done.[3] We agree with the Attorney General of Canada's position in the companion appeals of *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, that, absent exceptional circumstances, the existence of a statutory right of appeal does not displace the presumption that the standard of reasonableness applies.[4] The majority, however, has inexplicably chosen the template proposed by the *amici*,[5] recommending a sweeping overhaul of our approach to legislative intent and to the determination of the standard of review.

[251] The result reached by the majority means that hundreds of administrative decision-makers subject to different kinds of statutory rights of appeal — some in highly specialized fields, such as broadcasting, securities regulation and international trade — will now be subject to an irrebuttable presumption of correctness review. This has the potential to cause a

stampede of litigation. Reviewing courts will have license to freely revisit legal questions on matters squarely within the expertise of administrative decision-makers, even if they are of no broader consequence outside of their administrative regimes. Even if specialized decision-makers provide reasonable interpretations of highly technical statutes with which they work daily, even if they provide internally consistent interpretations responsive to the parties' submissions and consistent with the text, context and purpose of the governing scheme, the administrative body's past practices and decisions, the common law, prior judicial rulings and international law, those interpretations can still be set aside by a reviewing court that simply takes a different view of the relevant statute. This risks undermining the integrity of administrative proceedings whenever there is a statutory right of appeal, rendering them little more than rehearsals for a judicial appeal — the inverse of the legislative intent to establish a specialized regime and entrust certain legal and policy questions to non-judicial actors.

[252] Ironically, the majority's approach will be a roadblock to its promise of simplicity. Elevating appeal clauses to indicators of correctness review creates a two-tier system of administrative law: one tier that defers to the expertise of administrative decision-makers where there is no appeal clause; and another tier where such clauses permit judges to substitute their own views of the legal issues at the core of those decision-makers' mandates. Within the second tier, the application of appellate law principles will inevitably create confusion by encouraging segmentation in judicial review (*Mouvement laïque*, at para. 173, per Abella J., concurring in part; see also Paul Daly, "Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness" (2016), 62 *McGill L.J.* 527, at pp. 542-43; The Hon. Joseph T. Robertson, "Identifying the Review Standard: Administrative Deference in a Nutshell" (2017), 68 *U.N.B.L.J.* 145, at p. 162). Courts will be left with the task of identifying palpable and overriding errors for factual questions, extricating legal issues from questions of mixed fact and law, reviewing questions of law *de novo*, and potentially having to apply judicial review and appellate standards interchangeably if an applicant challenges in one proceeding multiple aspects of an administrative decision, some falling within an appeal clause and others not. It is an invitation to complexity and a barrier to access to justice.

[253] The majority's reasons "roll back the *Dunsmuir* clock to an era where some courts asserted a level of skill and knowledge in administrative matters which further experience showed they did not possess" (*Khosa*, at para. 26). The reasons elevate statutory rights of appeal to a determinative factor based on a formalistic approach that ignores the legislature's intention to leave certain legal and policy questions to specialized administrative decision-makers. This unravelling of Canada's carefully developed, deferential approach to administrative law returns us to the "black letter law" approach found in *Anisminic* and cases like *Metropolitan Life* whereby specialized decision-makers were subject to the pre-eminent determinations of a judge. Rather than building on *Dunsmuir*, which recognized that specialization is fundamentally intertwined with the legislative choice to delegate particular subject matters to administrative decision-makers, the majority's reasons banish expertise from the standard of review analysis entirely, opening the door to a host of new correctness categories which remain open to further expansion. The majority's approach not only erodes the presumption of deference; it erodes confidence in the existence — and desirability — of the "shared enterprises in the administrative state" of "[l]aw-making and legal interpretation" between courts and administrative decision-makers (Stack, at p. 310).

[254] But the aspect of the majority's decision with the greatest potential to undermine both the integrity of this Court's decisions, and public confidence in the stability of the law, is its disregard for precedent and *stare decisis*.

[255] *Stare decisis* places significant limits on this Court's ability to overturn its precedents. Justice Rothstein described some of these limits in *Canada v. Craig*, 2012 SCC 43 (CanLII), [2012] 2 S.C.R. 489, the case about horizontal *stare decisis* on which the majority relies:

> The question of whether this Court should overrule one of its own prior decisions was addressed recently in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, [2011] 2 S.C.R. 3. At paragraph 56, Chief Justice McLachlin and LeBel J., in joint majority reasons, noted that overturning a precedent of this Court is a step not to be lightly undertaken. *This is especially so when the precedent represents the considered views of firm majorities* (para. 57).
>
> Nonetheless, this Court has overruled its own decisions on a number of occasions. (See *R. v. Chaulk*, 1990 CanLII 34 (SCC), [1990] 3 S.C.R. 1303, at p. 1353, *per* Lamer C.J., for the majority; *R. v. B. (K.G.)*, 1993 CanLII 116 (SCC), [1993] 1 S.C.R. 740; *R. v. Robinson*, 1996 CanLII 233 (SCC), [1996] 1 S.C.R. 683.) *However, the Court must be satisfied based on compelling reasons that the precedent was wrongly decided and should be overruled* . . . .
>
> Courts must proceed with caution when deciding to overrule a prior decision. In *Queensland v. Commonwealth* (1977), 139 C.L.R. 585 (H.C.A.), at p. 599, Justice Gibbs articulated the required approach succinctly:
>
> > No Justice is entitled to ignore the decisions and reasoning of his predecessors, and to arrive at his own judgment as though the pages of the law reports were blank, or as though the authority of a decision did not survive beyond the rising of the Court. A Justice, unlike a legislator, cannot introduce a programme of reform which sets at nought decisions formerly made and principles formerly established. It is only after the most careful and respectful consideration of the earlier decision, and after giving due weight to all the circumstances, that a Justice may give effect to his own opinions in preference to an earlier decision of the Court. [Emphasis added; paras. 24-26.]

[256] Apex courts in several jurisdictions outside Canada have similarly stressed the need for caution and compelling justification before departing from precedent. The United States Supreme Court refrains from overruling its past decisions absent a "special justification", which must be over and above the belief that a prior case was wrongly decided (*Kimble v. Marvel Entertainment, LLC.*, 135 S. Ct. 2401 (2015), at p. 2409; see also *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258 (2014), at p. 266; *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), at pp. 2418 and 2422; Bryan A. Garner et al., *The Law of Judicial Precedent* (2016), at pp. 35-36).

[257] Similarly, the House of Lords "require[d] much more than doubts as to the correctness of [a past decision] to justify departing from it" (*Fitzleet Estates Ltd. v. Cherry* (1977), 51 T.C. 708, at p. 718), an approach that the United Kingdom Supreme Court continues to endorse (*R. v. Taylor*, [2016] UKSC 5, [2016] 4 All E.R. 617, at para. 19; *Willers v. Joyce (No. 2)*, [2016] UKSC 44, [2017] 2 All E.R. 383, at para. 7; *Knauer v. Ministry of Justice*, [2016] UKSC 9, [2016] 4 All E.R. 897, at paras. 22-23).

[258] New Zealand's Supreme Court views "caution, often considerable caution" as the "touchstone" of its approach to horizontal *stare decisis*, and has emphasized that it will not depart from precedent "merely because, if the matter were being decided afresh, the Court might take a different view" (*Couch v. Attorney-General (No. 2)*, [2010] NZSC 27, [2010] 3 N.Z.L.R. 149, at paras. 105, per Tipping J., and 209, per McGrath J.).

[259] Restraint and respect for precedent also guide the High Court of Australia and South Africa's Constitutional Court when applying *stare decisis* (*Lee v. New South Wales Crime Commission*, [2013] HCA 39, 302 A.L.R. 363, at paras. 62-66 and 70; *Camps Bay Ratepayers' and Residents' Association v. Harrison*, [2010] ZACC 19, 2011 (4) S.A. 42, at pp. 55-56; *Buffalo City Metropolitan Municipality v. Asla Construction Ltd.*, [2019] ZACC 15, 2019 (4) S.A. 331, at para. 65).

[260] The virtues of horizontal *stare decisis* are widely recognized. The doctrine "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*Kimble*, at p. 2409, citing *Payne v. Tennessee*, 501 U.S. 808 (1991), at p. 827). This Court has stressed the importance of *stare decisis* for "[c]ertainty in the law" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, at para. 38; *R. v. Bernard*, 1988 CanLII 22 (SCC), [1988] 2 S.C.R. 833, at p. 849; *Minister of Indian Affairs and Northern Development v. Ranville*, 1982 CanLII 202 (SCC), [1982] 2 S.C.R. 518, at p. 527). Other courts have described *stare decisis* as a "foundation stone of the rule of law" (*Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), at p. 798; *Kimble*, at p. 2409; *Kisor*, at p. 2422; see also *Camps Bay*, at pp. 55-56; Jeremy Waldron, "Stare Decisis and the Rule of Law: A Layered Approach" (2012), 111 *Mich. L. Rev.* 1, at p. 28; Lewis F. Powell, Jr., "Stare Decisis and Judicial Restraint" (1990), 47 *Wash. & Lee L. Rev.* 281, at p. 288).

[261] Respect for precedent also safeguards this Court's institutional legitimacy. The precedential value of a judgment of this Court does not "expire with the tenure of the particular panel of judges that decided it" (*Plourde v. Wal-Mart Canada Corp.*, 2009 SCC 54 (CanLII), [2009] 3 S.C.R. 465, at para. 13). American cases have stressed similar themes:

> There is . . . a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.
>
> (*Planned Parenthood of Southeastern Pennsylvania v. Casey, Governor of Pennsylvania*, 505 U.S. 833 (1992), at p. 866; see also *Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association*, 450 U.S. 147 (1981), at p. 153, per Stevens J., concurring.)

[262] Several scholars have made this point as well (see e.g., Michael J. Gerhardt, *The Power of Precedent* (2008), at p. 18; Garner et al., at p. 391). Aharon Barak has warned that

> overruling precedent damages the public's conception of the judicial role, and undermines the respect in which the public holds the courts and its faith in them. Precedent should not resemble a ticket valid only for the day of purchase.
>
> ("Overruling Precedent" (1986), 21 *Is.L.R.* 269, at p. 275)

[263] The majority's reasons, in our view, disregard the high threshold required to overturn one of this Court's decisions. The justification for the majority abandoning this Court's long-standing view of how statutory appeal clauses impact the standard of review analysis is that this Court's approach was "unsound in principle" and criticized by judges and academics. The majority also suggests that the Court's decisions set up an "unworkable and unnecessarily complex" system of judicial review. Abandoning them, the majority argues, would promote the values underlying *stare decisis*, namely "clarity and certainty in the law". In doing so, the majority discards several of this Court's bedrock administrative law principles.

[264] The majority leaves unaddressed the most significant rejection of this Court's jurisprudence in its reasons — its decision to change the entire "conceptual basis" for judicial review by excluding specialization, expertise and other institutional advantages from the analysis. The lack of any justification for this foundational shift — repeatedly invoked by the majority to sanitize further overturning of precedent — undercuts the majority's stated respect for *stare decisis* principles.

[265] The majority explains its decision to overrule the Court's prior decisions about appeal clauses by asserting that these precedents had "no satisfactory justification". It does not point, however, to any arguments different from those heard and rejected by other panels of this Court over the decades whose decisions are being discarded. Instead, the majority substitutes its own preferred approach to interpreting statutory rights of appeal — an approach rejected by several prior panels of this Court in a line of decisions stretching back three decades. The rejection of such an approach was explicitly reaffirmed *no fewer than four times in the past ten years* (*Khosa*, at para. 26; *Mowat*, at paras. 30-31; *Mouvement laïque*, at para. 38; *Edmonton East*, at paras. 27-31; see also *McLean*, at para. 21).

[266] Overruling these judgments flouts *stare decisis* principles, which prohibit courts from overturning past decisions which "simply represen[t] a preferred choice with which the current Bench does not agree" (*Couch*, at para. 105; see also *Knauer*, at para. 22; *Casey*, at p. 864). "[T]he entire idea of *stare decisis* is that judges do not get to reverse a decision just because they never liked it in the first instance" (*Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), at p. 2190, per Kagan J., dissenting). As the United States Supreme Court noted in *Kimble*:

> . . . an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." [Citation omitted; p. 2409.]

[267] But it is the unprecedented wholesale rejection of an entire body of jurisprudence that is particularly unsettling. The affected cases are too numerous to list in full here. It includes many decisions conducting deferential review even in the face of a statutory right of appeal (*Pezim*; *Southam*; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (CanLII), [2001] 2 S.C.R. 132; *Dr. Q*; *Ryan*; *Cartaway*; *VIA Rail*; *Association des courtiers et agents immobiliers du Québec v. Proprio Direct inc.*, 2008 SCC 32 (CanLII), [2008] 2 S.C.R. 195; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39 (CanLII), [2009] 2 S.C.R. 678; *McLean*; *Bell Canada (2009)*; *ATCO Gas*; *Mouvement laïque*; *Igloo Vikski*; *Edmonton East*) and bedrock judgments affirming the relevance of administrative expertise to the standard of review analysis and to "home statute" deference (*C.U.P.E.*; *National Corn Growers*; *Domtar Inc.*; *Bradco Construction*; *Southam*; *Pushpanathan*; *Alberta Teachers' Association*; *Canadian Human Rights Commission*, among many others).

[268] Most of those decisions were decided unanimously or by strong majorities. At no point, however, does the majority acknowledge this Court's strong reluctance to overturn precedents that "represen[t] the considered views of firm majorities" (*Craig*, at para. 24; *Ontario (Attorney General) v. Fraser*, 2011 SCC 20 (CanLII), [2011] 2 S.C.R. 3, at para. 57; see also *Nishi v. Rascal Trucking Ltd.*, 2013 SCC 33 (CanLII), [2013] 2 S.C.R. 438, at paras. 23-24), or to overrule decisions of a "recent vintage" (*Fraser*, at para. 57; see also *Nishi*, at para. 23). The decisions the majority *does* rely on, by contrast, involved overturning usually only one precedent and almost always an older one: *Craig* overruled a 34-year-old precedent; *R. v. Henry*, 2005 SCC 76 (CanLII), [2005] 3 S.C.R. 609, overruled a 19-year-old precedent (and another 15-year-old precedent, in part); and the dissenting judges in *Bernard* would have overruled a 10-year-old precedent.

[269] The majority's decision to overturn precedent also has the potential to disturb settled interpretations of many statutes that contain a right of appeal. Under the majority's approach, every existing interpretation of such statutes by an administrative body that has been affirmed under a reasonableness standard of review will be open to fresh challenge. In *McLean*, for example, this Court acknowledged that a limitations period in British Columbia's *Securities Act*[6] had two reasonable interpretations, but deferred to the one the Commission preferred based on deferential review. We see no reason why an individual in the same situation as Ms. McLean could not now revisit our Court's decision through the statutory right of appeal in the *Securities Act*, and insist that a new reviewing court offer *its* definitive view of the relevant limitations period now that appeal clauses are interpreted to permit judicial substitution rather than deference.

[270] The majority does not address the chaos that such legal uncertainty will generate for those who rely on settled interpretations of administrative statutes to structure their affairs, despite the fact that protecting these reliance interests is a well-recognized and especially powerful reason for respecting precedent (Garner et al., at pp. 404-11; Neil Duxbury, *The Nature and Authority of Precedent* (2008), at pp. 118-19; *Kimble*, at pp. 2410-11). By changing the entire status quo, the majority's approach will undermine legal certainty — "the foundational principle upon which the common law relies" (*Bedford*, at para. 38; see also Cromwell, at p. 315).

[271] Moreover, if this Court had for over 30 years significantly misconstrued the purpose of statutory appeal routes by failing to recognize what *this* majority has ultimately discerned — that in enacting such routes, legislatures were unequivocally directing courts to review *de novo* every question of law that an administrative body addresses, regardless of that body's expertise — legislatures across Canada were free to clarify this interpretation and endorse the majority's favoured approach through legislative amendment. Given the possibility — and continued absence — of legislative correction, the case for overturning our past decisions is even less compelling (*Binus v. The Queen*, 1967 CanLII 15 (SCC), [1967] S.C.R. 594, at p. 601; see also *Kimble*, at p. 2409; *Kisor*, at pp. 2422-23; *Bilski v. Kappos*, *Under Secretary of Commerce for Intellectual Property and Director, Patent and Trademark Office*, 561 U.S. 593 (2010), at pp. 601-2).

[272] Each of these rationales for adhering to precedent — consistent affirmation, reliance interests and the possibility of legislative correction — was recently endorsed by the United States Supreme Court in *Kisor*. There, the Court invoked *stare decisis* to uphold two administrative law precedents which urged deference to administrative agencies when they interpreted ambiguous provisions in their regulations (*Bowles, Price Administrator v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Auer v. Robbins*, 519 U.S. 452 (1997)). Writing for the majority on the issue of *stare decisis*, Justice Kagan explained at length why the doctrine barred the Court from overturning *Auer* or *Seminole Rock*. To begin, Justice Kagan reiterated the importance of *stare decisis* and the need for special justification to overcome its demands. She then explained that *stare decisis* carried even greater force than usual when applied to two decisions that had been affirmed by a "long line of precedents" going back 75 years or more and cited by lower courts thousands of times (p. 2422). She noted that overturning the challenged precedents would cast doubt on many settled statutory interpretations and invite relitigation of cases (p. 2422). Finally, Justice Kagan reasoned that Congress remained free to overturn the cases if the Court had misconstrued legislative intent:

> . . . even if we are wrong about *Auer*, "Congress remains free to alter what we have done." In a constitutional case, only we can correct our error. But that is not so here. Our deference decisions are "balls tossed into Congress's court, for acceptance or not as that branch elects." And so far, at least, Congress has chosen acceptance. It could amend the APA or any specific statute to require the sort of *de novo* review of regulatory interpretations that Kisor favors. Instead, for approaching a century, it has let our deference regime work side-by-side with both the APA and the many statutes delegating rulemaking power to agencies. It has done so even after we made clear that our deference decisions reflect a presumption about congressional intent. And it has done so even after Members of this Court began to raise questions about the doctrine. Given that history — and Congress's continuing ability to take up Kisor's arguments — we would need a particularly "special justification" to now reverse *Auer*. [Citations omitted; pp. 2422-23]

[273] In the face of these compelling reasons for adhering to precedent, many of which have found resonance in this Court's jurisprudence, the majority's reliance on "judicial and academic criticism" falls far short of overcoming the demands of *stare decisis*. It is hard to see why the *obiter* views of the handful of Canadian judges referred to by the majority should be determinative or even persuasive. The majority omits the views of any academics or judges who *have* voiced support for a strong presumption of deference without identifying our approach to statutory rights of appeal as cause for concern (Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 109; Green, at pp. 489-90; Matthew Lewans, *Administrative Law and Judicial Deference* (2016); Jonathan M. Coady, "The Time Has Come: Standard of Review in Canadian Administrative Law" (2017), 68 *U.N.B.L.J.* 87; The Hon. John M. Evans, "Standards of Review in Administrative Law" (2013), 26 *C.J.A.L.P.* 67, at p. 79; The Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" (2014), 27 *C.J.A.L.P.* 101; Jerry V. DeMarco, "Seeking Simplicity in Canada's Complex World of Judicial Review" (2019), 32 *C.J.A.L.P.* 67).

[274] A selective assortment of criticism is not evidence of generalized criticism or unworkability. This Court frequently tackles contentious, high-profile cases that engender strong and persisting divisions of opinion. The public looks to us to definitively resolve those cases, regardless of the composition of the Court. As Hayne J. noted in *Lee*:

> To regard the judgments of this Court as open to reconsideration whenever a new argument is found more attractive than the principle expressed in a standing decision is to overlook the function which a final court of appeal must perform in defining the law. In difficult areas of the law, differences of legal opinion are inevitable; before a final court of appeal, the choice between competing legal solutions oftentimes turns on the emphasis or weight given by each of the judges to one factor against a countervailing factor ... *In such cases, the decision itself determines which solution is, for the purposes of the current law, correct*. It is not to the point to argue in the next case that, leaving the particular decision out of account, another solution is better supported by legal theory. *Such an approach would diminish the authority and finality of the judgments of this Court.* As the function of defining the law is vested in the Court rather than in the justices who compose it, a decision of the Court will be followed in subsequent cases by the Court, however composed, subject to the exceptional power which resides in the Court to permit reconsideration.
>
> Accordingly, as one commentator has put the point: "the previous decision is to be treated as the primary premise from which other arguments follow, and not just as one potential premise among an aggregate of competing premises". [Emphasis in original; footnote omitted.]
>
> (paras. 65-66, citing *Baker v. Campbell*, [1983] HCA 39, 153 C.L.R. 52, at pp. 102-3)

[275] This Court, in fact, has been clear that "criticism of a judgment is not sufficient to justify overruling it" (*Fraser*, at para. 86). Differences of legal and public opinion are a natural by-product of contentious cases like *R. v. Jordan*, 2016 SCC 27 (CanLII), [2016] 1 S.C.R. 631, or even *Housen*, which, as this Court acknowledged, was initially applied by appeal courts with "varying degrees of enthusiasm" (*H.L. v. Canada (Attorney General)*, 2005 SCC 25 (CanLII), [2005] 1 S.C.R. 401, at para. 76; see also Paul M. Perell, "The Standard of Appellate Review and The Ironies of Housen v. Nikolaisen" (2004), 28 *Adv. Q.* 40, at p. 53; Mike Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable

Overview of Current Standards of Appellate and Judicial Review" (2010), 36 *Adv. Q.* 269, at pp. 278-79 and 293; Paul J. Pape and John J. Adair, "Unreasonable review: The losing party and the palpable and overriding error standard" (2008), 27 *Adv. J.* 6, at p. 8; Geoff R. Hall, "Two Unsettled Questions in the Law of Contractual Interpretation: A Call to the Supreme Court of Canada" (2011), 50 *Can. Bus. L.J.* 434, at p. 436).

[276] To justify circumventing this Court's jurisprudence, the majority claims that the precedents being overturned *themselves* departed from the approach to statutory rights of appeal under the pragmatic and functional test. That, with respect, is wrong. Ever since *Bell Canada (1989)* and in several subsequent decisions outlined earlier in these reasons, statutory rights of appeal have played little or no role in the standard of review analysis. Moreover, in pre-*Dunsmuir* cases, statutory rights of appeal were still seen as only one factor among others — and *not* as unequivocal indicators of correctness review (see, for example, *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, 2001 SCC 36 (CanLII), [2001] 2 S.C.R. 100, at paras. 27-33; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (CanLII), [2002] 1 S.C.R. 84, at paras. 23-24; *Harvard College v. Canada (Commissioner of Patents)*, 2002 SCC 76 (CanLII), [2002] 4 S.C.R. 45, at paras. 149-51). Our pre- and post-*Dunsmuir* cases on statutory rights of appeal shared in common an unwavering commitment to determining the standard of review in administrative proceedings using administrative law principles, even when appeal rights were involved.

[277] For the majority, the elimination of the contextual factors appears to have justified the reconstruction of the whole judicial review framework. Yet the elimination of the contextual analysis was all but complete in our post-*Dunsmuir* jurisprudence, and does not support the foundational changes to judicial review in the majority's decision. Neither that development, nor the majority's assertion that our precedents have proven "unclear and unduly complex", justifies the conclusion that *all* of our administrative law precedents — even those unconnected to the practical difficulties in applying *Dunsmuir* — are suddenly fair game.

[278] This Court is overturning a long line of well-established and recently-affirmed precedents in a whole area of law, including several unanimous or strong majority judgments. There is no principled justification for such a dramatic departure from this Court's existing jurisprudence.

Going Forward

[279] In our view, a more modest approach to modifying our past decisions, one that goes no further than necessary to clarify the law and its application, is justified. "[W]hen a court does choose to overrule its own precedents, it should do so carefully, with moderation, and with due regard for all the important considerations that undergird the doctrine" (Garner et al., at pp. 41-42). Such an approach to changing precedent preserves the integrity of the judicial process and, at a more conceptual level, of the law itself as a social construct. Michael J. Gerhardt summarized this approach eloquently:

> Judicial modesty is . . . . a disposition to respect precedents (as embodying the opinions of others), to learn from their and others' experiences, and to decide cases incrementally to minimize conflicts with either earlier opinions of the Court or other constitutional actors. [p. 7]

[280] Judicial modesty promotes the responsible development of the common law. Lord Tom Bingham described that process in his seminal work, *The Rule of Law* (2010):

> . . . it is one thing to move the law a little further along a line on which it is already moving, or to adapt it to accord with modern views and practices; it is quite another to seek to recast the law in a radically innovative or adventurous way, because that is to make it uncertain and unpredictable, features which are the antithesis of the rule of law. [pp. 45-46]
>
> (See also Robert J. Sharpe, *Good Judgment: Making Judicial Decisions* (2018), at p. 93; Beverley McLachlin, "The Role of the Supreme Court of Canada in Shaping the Common Law", in Paul Daly, ed., *Apex Courts and the Common Law* (2019), 25, at p. 35; *R. v. Salituro*, 1991 CanLII 17 (SCC), [1991] 3 S.C.R. 654, at p. 670; *Friedmann Equity Developments Inc. v. Final Note Ltd.*, 2000 SCC 34 (CanLII), [2000] 1 S.C.R. 842, at para. 42; *R. v. Kang-Brown*, 2008 SCC 18 (CanLII), [2008] 1 S.C.R. 456, at paras. 14-16, per Lebel J., and 73-74, per Binnie J., concurring.)

[281] Lord Bingham's comments highlight that a nuanced balance must be struck between maintaining the stability of the common law and ensuring that the law is flexible and responsive enough to adapt to new circumstances and shifts in societal norms. *Stare decisis* plays a critical role in maintaining that balance and upholding the rule of law. When *stare decisis* is respected, precedent acts as a stabilizing force: providing certainty as to what the law is, consistency that allows those subject to the law to order their affairs accordingly, and continuity that protects reliance on those legal consequences. *Stare decisis* is at the heart of the iterative development of the common law, fostering progressive, incremental and responsible change.

[282] So what do we suggest? We support a standard of review framework with a meaningful rule of deference, based on *both* the legislative choice to delegate decision-making authority to an administrative actor *and* on the specialized expertise that these decision-makers possess and develop in applying their mandates. Outside of the three remaining correctness categories from *Dunsmuir* — and absent clear and explicit legislative direction on the *standard* of review — administrative decisions should be reviewed for reasonableness. Like the majority, we support eliminating the category of "true questions of jurisdiction" and foreclosing the use of the contextual factors identified in *Dunsmuir*. These developments introduce incremental changes to our judicial review framework, while respecting its underlying principles and placing the ball in the legislatures' court to modify the standards of review if they wish.

[283] To the extent that concerns were expressed about the quality of administrative decision making by some interveners who represented particularly vulnerable groups, we agree that they must be taken seriously. But the solution does not lie in authorizing more incursions into the administrative system by generalist judges who lack the expertise necessary to implement these sensitive mandates. Any perceived shortcomings in administrative decision making are not solved by permitting *de novo* review of every legal decision by a court and, as a result, adding to the delay and cost of obtaining a final decision. The solution lies instead in ensuring the proper qualifications and training of administrative decision-makers. Like courts, administrative actors are fully capable of, and responsible for, improving the quality of their own decision-making processes, thereby strengthening access to justice in the administrative justice system.

[284] We also acknowledge that this Court should offer additional direction on conducting reasonableness review. [7] We fear, however, that the majority's multi-factored, open-ended list of "constraints" on administrative decision making will encourage reviewing courts to dissect administrative reasons in a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (CanLII), [2013] 2 S.C.R. 458, at para. 54). These "constraints" may function in practice as a wide-ranging catalogue of hypothetical errors to justify

quashing an administrative decision — a checklist with unsettling similarities to the series of "jurisdictional errors" spelled out in *Anisminic* itself.

[285] Structuring reasonableness review in this fashion effectively imposes on administrative decision-makers a higher standard of justification than that applied to trial judges. Such an approach undercuts deference and revives a long-abandoned posture of suspicion towards administrative decision making. We are also concerned by the majority's warning that administrative decision-makers cannot "arrogate powers to themselves that they were never intended to have", an unhelpful truism that risks reintroducing the tortured concept of "jurisdictional error" by another name.

[286] We would advocate a continued approach to reasonableness review which focuses on the concept of *deference* and what it requires of reviewing courts. Curial deference, after all, is *the* hallmark of reasonableness review, setting it apart from the substitution of opinion permitted under the correctness standard. The choice of a particular standard of review — whether described as "correctness", "reasonableness" or in other terms — is fundamentally about "whether or not a reviewing court should defer"[8] to an administrative decision (see *Dunsmuir*, at para. 141, per Binnie J., concurring; Régimbald, at pp. 539-40). If courts, therefore, are to properly conduct "reasonableness" review, they must properly understand what deference means.

[287] In our view, deference imposes three requirements on courts conducting reasonableness review. It informs the attitude a reviewing court must adopt towards an administrative decision-maker; it affects how a court frames the question it must answer on judicial review; and it affects how a reviewing court evaluates challenges to an administrative decision.

[288] First and foremost, deference is an "attitude of the court" conducting reasonableness review (*Dunsmuir*, at para. 48). Deference mandates respect for the legislative choice to entrust a decision to administrative actors rather than to the courts, and for the important role that administrative decision-makers play in upholding and applying the rule of law (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, at para. 131, per LeBel J., concurring). Deference also requires respect for administrative decision-makers, their specialized expertise and the institutional setting in which they operate (*Dunsmuir*, at paras. 48-49). Reviewing courts must pay "respectful attention" to the reasons offered for an administrative decision, make a genuine effort to understand why the decision was made, and give the decision a fair and generous construction in light of the entire record (*Newfoundland Nurses*, at paras. 11-14 and 17).

[289] Second, deference affects how a court frames the question it must answer when conducting judicial review. A reviewing court does not ask how it would have resolved an issue, but rather, whether the answer provided by the administrative decision-maker has been shown to be unreasonable (*Khosa*, at paras. 59 and 61-62; *Dunsmuir*, at para. 47). Framing the inquiry in this way ensures that the administrative decision under review is the focus of the analysis.

[290] This Court has often endorsed this approach to conducting reasonableness review. In *Ryan*, for example, Iacobucci J. explained:

> . . . When deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been . . . . The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> . . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable. [paras. 50-51]
>
> (See also *Volvo Canada Ltd. v. U.A.W., Local 720*, 1979 CanLII 4 (SCC), [1980] 1 S.C.R. 178, at p. 214; *Toronto (City)*, at paras. 94-95, per LeBel J., concurring; *VIA Rail*, at para. 101; *Mason v. Minister of Citizenship and Immigration*, 2019 FC 1251, at para. 22 (CanLII), per Grammond J.; Régimbald, at p. 539; Sharpe, at pp. 204 and 208; Paul Daly, "The Signal and the Noise in Administrative Law" (2017), 68 *U.N.B.L.J.* 68, at p. 85; Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 107.)

[291] Third, deferential review impacts how a reviewing court evaluates challenges to an administrative decision. Deference requires the applicant seeking judicial review to bear the onus of showing that the decision was unreasonable (*Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4 (CanLII), [2018] 1 S.C.R. 83, at para. 108; *Mission Institution v. Khela*, 2014 SCC 24 (CanLII), [2014] 1 S.C.R. 502, at para. 64; *May v. Ferndale Institution*, 2005 SCC 82 (CanLII), [2005] 3 S.C.R. 809, at para. 71; *Ryan*, at para. 48; *Southam*, at para. 61; *Northern Telecom Ltd. v. Communications Workers of Canada*, 1979 CanLII 3 (SCC), [1980] 1 S.C.R. 115, at p. 130). Focusing on whether the applicant has demonstrated that the decision is unreasonable reinforces the central role that administrative decisions play in a properly deferential review process, and confirms that the decision-maker does not have to persuade the court that its decision is reasonable.

[292] Assessing whether a decision is reasonable also requires a qualitative assessment. Reasonableness is a concept that pervades the law but is difficult to define with precision (*Dunsmuir*, at para. 46). It requires, by its very nature, a fact-specific inquiry that involves a certain understanding of common experience. Reasonableness cannot be reduced to a formula or a checklist of factors, many of which will not be relevant to a particular decision. Ultimately, whether an administrative decision is reasonable will depend on the context (*Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 (CanLII), [2012] 1 S.C.R. 5, at para. 18). Administrative law covers an infinite variety of decisions and decision-making contexts, as LeBel J. colourfully explained in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307, at para. 158 (dissenting in part, but not on this point):

> . . . not all administrative bodies are the same. Indeed, this is an understatement. At first glance, labour boards, police commissions, and milk control boards may seem to have about as much in common as assembly lines, cops, and cows! Administrative bodies do, of course, have some common features, but the diversity of their powers, mandate and structure is such that to apply particular standards from one context to another might well be entirely inappropriate . . . .

[293] Deference, in our view, requires approaching each administrative decision on its own terms and in its own context. But we emphasize that the inherently contextual nature of reasonableness review does not mean that the degree of scrutiny applied by a reviewing court varies (*Alberta Teachers' Association*, at para. 47; *Wilson*, at para. 18). It merely means that when assessing a challenge to an administrative decision, a reviewing court must be attentive to all relevant circumstances, including the reasons offered to support the decision, the record, the statutory scheme and the particular issues raised by the applicant, among other factors (see, for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 S.C.R. 3, at para. 40; *Newfoundland Nurses*, at para. 18; Van Harten et al., at p. 794). Without this context, it is impossible to determine what constitutes a sufficiently compelling justification to quash a decision under reasonableness

review. Context may make a challenge to an administrative decision more or less persuasive — but it does not alter the deferential posture of the reviewing court (*Suresh*, at para. 40).

[294] Deference, however, does not require reviewing courts to shirk their obligation to review the decision. So long as they maintain a respectful attitude, frame the judicial review inquiry properly and demand compelling justification for quashing a decision, reviewing courts are entitled to meaningfully probe an administrative decision. A thorough evaluation by a reviewing court is not "disguised correctness review", as some have used the phrase. Deference, after all, stems from respect, not inattention to detail.

[295] Bearing this in mind, we offer the following suggestions for conducting reasonableness review. We begin with situations where reasons are required.[9]

[296] The administrative decision is the focal point of the review exercise. Where reasons are provided, they serve as the natural starting point to determine whether the decision-maker acted reasonably (*Williams Lake*, at para. 36). By beginning with the reasons offered for the decision, read in light of the surrounding context and the grounds raised to challenge the decision, reviewing courts provide meaningful oversight while respecting the legitimacy of specialized administrative decision making.

[297] Reviewing courts should approach the reasons with respect for the specialized decision-makers, the significant role they have been assigned and the institutional context chosen by the legislator. Reasons should be approached generously, on their own terms. Reviewing courts should be hesitant to second-guess operational implications, practical challenges and on-the-ground knowledge used to justify an administrative decision. Reviewing courts must also remain alert to specialized concepts or language used in an administrative decision that may be unfamiliar to a generalist judge (*Newfoundland Nurses*, at para. 13; *Igloo Vikski*, at paras. 17 and 30). When confronted with unfamiliar language or modes of reasoning, judges should acknowledge that such differences are an inevitable, intentional and invaluable by-product of the legislative choice to assign a matter to the administrative system. They may lend considerable force to an administrative decision and, by the same token, render an applicant's challenge to that decision less compelling. Reviewing courts scrutinizing an administrative body's decision under the reasonableness framework should therefore keep in mind that the administrative body holds the "interpretative upper hand" (*McLean*, at para. 40).

[298] Throughout the review process, a court conducting deferential review must view claims of administrative error in context and with caution, cognizant of the need to avoid substituting its opinion for that of those empowered and better equipped to answer the questions at issue. Because judicial substitution is incompatible with deference, reviewing courts must carefully evaluate the challenges raised by an applicant to ensure they go to the *reasonableness* of the administrative decision.

[299] Unsurprisingly, applicants rarely present challenges to an administrative decision as explicit invitations for courts to substitute their opinions for those of administrative actors. Courts, therefore, must carefully probe challenges to administrative decisions to assess whether they amount, in substance, to a mere difference of opinion with how the administrative decision-maker weighed or prioritized the various factors relevant to the decision-making process. Allegations of error may, on deeper examination, simply reflect a legitimate difference in approach by an administrative decision-maker. By rooting out and rejecting such challenges, courts respect the valuable and distinct perspective that administrative bodies bring to answering legal questions, flowing from the considerable expertise and field sensitivity they develop by administering their mandate and working within the intricacies of their statutory context on a daily basis. The understanding and insights of administrative actors enhance the decision-making process and may be more conducive to reaching a result "that promotes effective public policy and administration . . . than the limited knowledge, detachment, and modes of reasoning typically associated with courts of law" (*National Corn Growers*, at pp. 1336-37 (emphasis deleted), per Wilson J., concurring, citing J. M. Evans et al., *Administrative Law: Cases, Text, and Materials* (3rd ed. 1989), at p. 414).

[300] When resolving challenges to an administrative decision, courts must also consider the *materiality* of any alleged errors in the decision-maker's reasoning. Under reasonableness review, an error is not necessarily sufficient to justify quashing a decision. Inevitably, the weight of an error will depend on the extent to which it affects the decision. An error that is peripheral to the administrative decision-maker's reasoning process, or overcome by more compelling points advanced in support of the result, does not provide fertile ground for judicial review. Ultimately, the role of the reviewing court is to examine the decision as a whole to determine whether it is reasonable (*Dunsmuir*, at para. 47; *Khosa*, at para. 59). Considering the materiality of any impugned errors is a natural part of this exercise, and of reading administrative reasons "together with the outcome" (*Newfoundland Nurses*, at para. 14).

[301] Review of the decision as a whole is especially vital when an applicant alleges that an administrative decision contains material omissions. Significantly, and as this Court has frequently emphasized, administrative decision-makers are not required to consider and comment upon every issue raised by the parties in their reasons (*Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 (CanLII), [2012] 3 S.C.R. 405, at para. 3; *Newfoundland Nurses*, at para. 16, citing *Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association*, 1973 CanLII 191 (SCC), [1975] 1 S.C.R. 382, at p. 391). Further, a reviewing court is not restricted to the four corners of the written reasons delivered by the decision-maker and should, if faced with a gap in the reasons, look to the record to see if it sheds light on the decision (*Williams Lake*, at para. 37; *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 (CanLII), [2018] 1 S.C.R. 6, at para. 23; *Newfoundland Nurses*, at para. 15; *Alberta Teachers' Association*, at paras. 53 and 56).

[302] The use of the record and other context to supplement a decision-maker's reasons has been the subject of some academic discussion (see, for example, Mullan, at pp. 69-74). We support a flexible approach to supplementing reasons, which is consistent with the flexible approach used to determine whether administrative reasons must be provided to begin with and sensitive to the "day-to-day realities of administrative agencies" (*Baker*, at para. 44), which may not be conducive to the production of "archival" reasons associated with court judgments (para. 40, citing Roderick A. Macdonald and David Lametti, "Reasons for Decision in Administrative Law" (1990), 3 *C.J.A.L.P.* 123).

[303] Some materials that may help bridge gaps in a reviewing court's understanding of an administrative decision include: the record of any formal proceedings as well as the materials before the decision-maker, past decisions of the administrative body, and policies or guidelines developed to guide the type of decision under review (see Matthew Lewans, "Renovating Judicial Review" (2017), 68 *U.N.B.L.J.* 109, at pp. 137-38). Reviewing these materials may assist a court in understanding, "by inference", why an administrative decision-maker reached a particular outcome (*Baker*, at para. 44; see also *Williams Lake*, at para. 37; *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal (Ont.)*, 2008 ONCA 436, 237 O.A.C. 71, at paras. 38-39). It may reveal further confirmatory context for a line of reasoning employed by the decision-maker — by showing, for example, that the decision-maker's understanding of the purpose of its statutory mandate finds support in the provision's legislative history (*Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 (CanLII), [2011] 1 S.C.R. 3, at paras. 25-29). Reviewing the record can also yield responses to the specific challenges raised by an applicant on judicial review, responses that are "consistent with the process of reasoning" applied by the administrative decision-maker (*Igloo*

Vikski, at para. 45). In these ways, reviewing courts may legitimately supplement written reasons without "supplant[ing] the analysis of the administrative body" (*Lukács*, at para. 24).

[304] The "adequacy" of reasons, in other words, is not "a stand-alone basis for quashing a decision" (*Newfoundland Nurses*, at para. 14). As this Court has repeatedly confirmed, reasons must instead "be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" (*Newfoundland Nurses*, at para. 14; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 (CanLII), [2012] 2 S.C.R. 108, at para. 44; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 (CanLII), [2013] 2 S.C.R. 559, at para. 52; *Williams Lake*, at para. 141, per Rowe J., dissenting, but not on this point). This approach puts substance over form in situations where the basis for a decision by a specialized administrative actor is evident on the record, but not clearly expressed in written reasons. Quashing decisions in such circumstances defeats the purpose of deference and thwarts access to justice by wasting administrative and judicial resources.

[305] In our view, therefore, if an applicant claims that an administrative decision-maker failed to address a relevant factor in reaching a decision, the reviewing court must consider the submissions and record before the decision-maker, and the materiality of any such omission to the decision rendered. An administrative decision-maker's failure, for example, to refer to a particular statutory provision or the full factual record before it does not automatically entitle a reviewing court to conduct a *de novo* assessment of the decision under review. The inquiry must remain focussed on whether the applicant has satisfied the burden of showing that the omission renders the decision reached unreasonable.

[306] We acknowledge that respecting the line between reasonableness and correctness review has posed a particular challenge for judges when reviewing interpretation by administrative decision-makers of their statutory mandates. Judges routinely interpret statutes and have developed a template for how to scrutinize words in that context. But the same deferential approach we have outlined above must apply with equal force to statutory interpretation cases. When reviewing an administrative decision involving statutory interpretation, a court should not assess the decision by determining what, in its own view, would be a reasonable interpretation. Such an approach "imperils deference" (Paul Daly, "Unreasonable Interpretations of Law" (2014), 66 *S.C.L.R.* (2d) 233, at p. 250).

[307] We agree with Justice Evans that "once [a] court embarks on its own interpretation of the statute to determine the reasonableness of the tribunal's decision, there seems often to be little room for deference" (Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?", at p. 109; see also *Mason*, at para. 34; Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification", at p. 108; Daly, "Unreasonable Interpretations of Law", at pp. 254-55). We add that a *de novo* interpretation of a statute, conducted as a prelude to "deferential" review, necessarily omits a vital piece of the interpretive puzzle: the perspective of the front-line, specialized administrative body that routinely applies the statutory scheme in question (Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", at p. 304; Paul Daly, "Deference on Questions of Law" (2011), 74 *Mod. L. Rev.* 694). By placing that perspective at the heart of the judicial review inquiry, courts display respect for administrative specialization and expertise, and for the legislative choice to delegate certain questions to non-judicial bodies.

[308] Conversely, by imposing their own interpretation of a statutory provision, courts *undermine* legislative intent to confide a mandate to the decision-maker. Applying a statute will almost always require some interpretation, making the interpretive mandate of administrative decision-makers inherent to their legislative mandate. The decision-maker who applies the statute has primary responsibility for interpreting the provisions in order to carry out their mandate effectively.

[309] Administrative decision-makers performing statutory interpretation should therefore be permitted to be guided by their expertise and knowledge of the practical realities of their administrative regime. In many cases, the "ordinary meaning" of a word or term makes no sense in a specialized context. And in some settings, law and policy are so inextricably at play that they give the words of a statute a meaning unique to a particular specialized context (*National Corn Growers*, at p. 1336, per Wilson J., concurring; *Domtar Inc.*, at p. 800). Further, not only are statutory provisions sometimes capable of bearing more than one reasonable interpretation, they are sometimes drafted in general terms or with "purposeful ambiguity" in order to permit adaptation to future, unknown circumstances (see Felix Frankfurter, "Some Reflections on the Reading of Statutes" (1947), 47 *Colum. L. Rev.* 527, at p. 528). These considerations make it all the more compelling that reviewing courts avoid imposing judicial norms on administrative decision-makers or maintaining a dogmatic insistence on formalism. Where a decision-maker can explain its decision adequately, that decision should be upheld (Daly, "Unreasonable Interpretations of Law", at pp. 233-34, 250 and 254-55).

[310] Justice Brown's reasons in *Igloo Vikski* provide a useful illustration of a properly deferential approach to statutory interpretation. That case involved an interpretation of the *Customs Tariff*, S.C. 1997, c. 36, as it applies to hockey goaltender gloves. The Canada Border Services Agency had classified the gloves as "[g]loves, mittens [or] mitts". Igloo Vikski argued they should have been classified as sporting equipment. The Canadian International Trade Tribunal ("CITT") confirmed the initial classification. The Federal Court of Appeal reversed the decision.

[311] Acknowledging that the "specific expertise" of the CITT gave it the upper hand over a reviewing court with respect to certain questions of law, Justice Brown determined that the standard of review was reasonableness. Writing for seven other members of the Court, he carefully reviewed the reasons of the CITT and how it had engaged with Igloo Vikski's arguments before turning to the errors alleged by Igloo Vikski and the Federal Court of Appeal. Conceding that the CITT reasons lacked "perfect clarity", Justice Brown nevertheless concluded that the Tribunal's interpretation was reasonable. While he agreed with Igloo Vikski that an alternate interpretation to that given by the CITT was available, the inclusive language of the applicable statute was broad enough to accommodate the CITT's reasonable interpretation. By beginning with the reasons offered for the interpretation and turning to the challenges mounted against it in light of the surrounding context, *Igloo Vikski* provides an excellent example of respectful and properly deferential judicial review.

[312] We conclude our discussion of reasonableness review by addressing cases where reasons are neither required nor available for judicial review. In these circumstances, a reviewing court should remain focussed on whether the decision has been shown to be unreasonable. The reasonableness of the decision may be justified by past decisions of the administrative body (see *Edmonton East*, at paras. 38 and 44-46; *Alberta Teachers' Association*, at paras. 56-64). In other circumstances, reviewing courts may have to assess the reasonableness of the outcome in light of the procedural context surrounding the decision (see *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 S.C.R. 293, at paras. 51-56; *Edmonton East*, at paras. 48-60; *Catalyst Paper Corp.*, at paras. 32-36). In all cases, the question remains whether the challenging party has demonstrated that a decision is unreasonable.

[313] In sum, reasonableness review is based on deference to administrative decision-makers and to the legislative intention to confide in them a mandate. Deference must inform the attitude of a reviewing court and the nature of its analysis: the court does not ask how it would have resolved the issue before the administrative decision-maker but instead evaluates whether the decision-maker acted reasonably. The reviewing court starts with the reasons offered for the administrative decision, read in light of the surrounding context and based on the grounds advanced to challenge the reasonableness of the decision. The reviewing court must remain focussed on the reasonableness of the decision viewed as a whole, in light of the

record, and with attention to the materiality of any alleged errors to the decision-maker's reasoning process. By properly conducting reasonableness review, judges provide careful and meaningful oversight of the administrative justice system while respecting its legitimacy and the perspectives of its front-line, specialized decision-makers.

Application to Mr. Vavilov

[314] Alexander Vavilov challenges the Registrar of Citizenship's decision to cancel his citizenship certificate. The Registrar concluded that Mr. Vavilov was not a Canadian citizen, and therefore not entitled to a certificate of Canadian citizenship because, although he was born in Canada, his parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

[315] The first issue is the applicable standard of review. We agree with the majority that reasonableness applies.

[316] The second issue is whether the Registrar was reasonable in concluding that the exception to Canadian citizenship in s. 3(2)(a) applies not only to parents who enjoy diplomatic privileges and immunities, but also to intelligence agents of a foreign government. The onus is therefore on Mr. Vavilov to satisfy the reviewing court that the decision was unreasonable. In our view, he has met that onus.

[317] Mr. Vavilov was born in Canada in 1994. His Russian parents, Elena Vavilova and Andrey Bezrukov, entered Canada at some point prior to his birth, assumed the identities of two deceased Canadians and fraudulently obtained Canadian passports. After leaving Canada to live in France, Mr. Vavilov and his family moved to the United States. While in the United States, Mr. Vavilov's parents became American citizens under their assumed Canadian identities. Mr. Vavilov and his older brother also obtained American citizenship.

[318] In June 2010, agents of the United States Federal Bureau of Investigation arrested Mr. Vavilov's parents and charged them with conspiracy to act as unregistered agents of a foreign government and to commit money laundering. Mr. Vavilov's parents pleaded guilty to the conspiracy charges in July 2010 and were returned to Russia in a spy swap. Around the same time, Mr. Vavilov and his brother travelled to Russia. The American government subsequently revoked Mr. Vavilov's passport and citizenship. In December 2010, he was issued a Russian passport and birth certificate.

[319] From 2010 to 2013, Mr. Vavilov repeatedly sought a Canadian passport. In December 2011, he obtained an amended Ontario birth certificate, showing his parents' true names and places of birth. Using this birth certificate, Mr. Vavilov applied for and received a certificate of Canadian citizenship in January 2013. Relying on these certificates, Mr. Vavilov applied for an extension of his Canadian passport in early 2013. On July 18, 2013, the Registrar wrote to Mr. Vavilov, informing him that there was reason to believe the citizenship certificate had been erroneously issued and asking him for additional information.

[320] On April 22, 2014, Mr. Vavilov provided extensive written submissions to the Registrar. He argued that the narrow exception set out in s. 3(2) of the Act does not apply to him. Because he was born in Canada, he is entitled to Canadian citizenship. Mr. Vavilov also argued that the Registrar had failed to respect the requirements of procedural fairness.

[321] The Registrar wrote to Mr. Vavilov on August 15, 2014, cancelling his certificate of Canadian citizenship. In her view, because Mr. Vavilov met the two statutory restrictions in s. 3(2) of the Act, he was not a Canadian citizen. First, when Mr. Vavilov was born in Canada, neither of his parents were Canadian citizens or lawfully admitted to Canada for permanent residence. Second, as unofficial agents working for Russia's Foreign Intelligence Service, Mr. Vavilov's parents were "other representative[s] or employee[s] in Canada of a foreign government" within the meaning of s. 3(2)(a).

[322] The Federal Court (2015 FC 960 (CanLII), [2016] 2 F.C.R. 39) dismissed Mr. Vavilov's application for judicial review. It found that the Registrar had satisfied the requirements of procedural fairness and, applying a correctness standard, determined that the Registrar's interpretation of s. 3(2)(a) was correct. The Federal Court then reviewed the application of s. 3(2)(a) on a reasonableness standard and concluded that the Registrar had reasonably determined that Mr. Vavilov's parents were working in Canada as undercover agents of the Russian government at the time of his birth.

[323] The Federal Court of Appeal (2017 FCA 132 (CanLII), [2018] 3 F.C.R. 75) allowed the appeal and quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate. Writing for the majority, Stratas J.A. agreed that the requirements of procedural fairness were met but held that the Registrar's interpretation of s. 3(2)(a) was unreasonable. In his view, only those who enjoy diplomatic privileges and immunities fall within the exception to citizenship found in s. 3(2)(a). Justice Stratas reached this conclusion after considering the context and purpose of the provision, its legislative history and international law principles related to citizenship and diplomatic privileges and immunities.

[324] As a general rule, administrative decisions are to be judicially reviewed for reasonableness. None of the correctness exceptions apply to the Registrar's interpretation of the Act in this case. As such, the standard of review is reasonableness.

[325] The following provisions of the *Citizenship Act* are relevant to this appeal:

> **Persons who are citizens**
>
> **3 (1)** Subject to this Act, a person is a citizen if
>
> **(a)** the person was born in Canada after February 14, 1977;
>
> . . .
>
> **Not applicable to children of foreign diplomats, etc.**
>
> **(2)** Paragraph (1)(a) does not apply to a person if, at the time of his birth, neither of his parents was a citizen or lawfully admitted to Canada for permanent residence and either of his parents was
>
> **(a)** a diplomatic or consular officer or other representative or employee in Canada of a foreign government;
>
> **(b)** an employee in the service of a person referred to in paragraph (a); or
>
> **(c)** an officer or employee in Canada of a specialized agency of the United Nations or an officer or employee in Canada of any other international organization to whom there are granted, by or under any Act of Parliament,

> diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a).

The general rule embodied in s. 3(1)(a) of the Act is that persons born in Canada are Canadian citizens. Section 3(2) sets out an exception to this rule. As such, if s. 3(2) applies to Mr. Vavilov, he was never a Canadian citizen.

[326] The specific issue in this case is whether the Registrar's interpretation of the statutory exception to citizenship was reasonable. Reasonableness review entails deference to the decision-maker, and we begin our analysis by examining the reasons offered by the Registrar in light of the context and the grounds argued.

[327] In this case, the Registrar's letter to Mr. Vavilov summarized the key points underlying her decision. In concluding that Mr. Vavilov was not entitled to Canadian citizenship, the Registrar adopted the recommendations of an analyst employed by Citizenship and Immigration Canada. As such, the analyst's report properly forms part of the reasons supporting the Registrar's decision.

[328] The analyst's report sought to answer the question of whether Mr. Vavilov was erroneously issued a certificate of Canadian citizenship. The report identifies the key question in this case as being whether either of Mr. Vavilov's parents was a "representative" or "employee" of a foreign government within the meaning of s. 3(2)(a). Much of the report relates to matters not disputed in this appeal, including the legal status of Mr. Vavilov's parents in Canada and their employment as Russian intelligence agents.

[329] The analyst began her analysis with the text of s. 3(2)(a). In concluding that the provision operates to deny Mr. Vavilov Canadian citizenship, she set out two textual arguments. First, she compared the current version of s. 3(2)(a) to an earlier iteration of the exception found in s. 5(3) of the *Canadian Citizenship Act*, R.S.C. 1970, c. C-19:

> **Not applicable to children of foreign diplomats, etc.**
>
> (3) Subsection (1) does not apply to a person if, at the time of that person's birth, his responsible parent
>
> (*a*) is an alien who has not been lawfully admitted to Canada for permanent residence; and
>
> (*b*) is
>
> (i) a foreign diplomatic or consular officer or a representative of a foreign government accredited to Her Majesty,
>
> (ii) an employee of a foreign government attached to or in the service of a foreign diplomatic mission or consulate in Canada, or
>
> (iii) an employee in the service of a person referred to in subparagraph (i).

[330] The analyst stated that the removal of references to official accreditation or a diplomatic mission indicate that the previous exception was narrower than s. 3(2)(a). She then pointed out that the definition of "diplomatic or consular officer" in s. 35(1) of the *Interpretation Act*, R.S.C. 1985, c. I-21, clearly associates these individuals with diplomatic positions. Because the current version of s. 3(2)(a) does not link "other representative or employee in Canada of a foreign government" to a diplomatic mission, the analyst determined "it is reasonable to maintain that this provision intends to encompass individuals not included in the definition of 'diplomatic and consular staff.'" Finally, the analyst stated that the phrase "other representative or employee in Canada of a foreign government" has not been previously interpreted by a court.

[331] Beyond the analyst's report, there is little in the record to supplement the Registrar's reasons. There is no evidence about whether the Registrar has previously applied this provision to individuals like Mr. Vavilov, whose parents did not enjoy diplomatic privileges and immunities. Neither does there appear to be any internal policy, guideline or legal opinion to guide the Registrar in making these types of decisions.

[332] In challenging the Registrar's decision, Mr. Vavilov bears the onus of demonstrating why it is not reasonable. Before this Court, Mr. Vavilov submitted that the analyst focussed solely on the text of the exception to citizenship. In his view, had the broader objectives of s. 3(2)(a) been considered, the analyst would have concluded that "other representative" or "employee" only applies to individuals who benefit from diplomatic privileges and immunities.

[333] In his submissions before the Registrar, Mr. Vavilov offered three reasons why the text of s. 3(2) must be read against the backdrop of Canadian and international law relating to the roles and functions of diplomats.

[334] First, Mr. Vavilov explained that s. 3(2)(a) should be read in conjunction with the *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41 ("*FMIOA*"). This statute incorporates into Canadian law aspects of the *Vienna Convention on Diplomatic Relations*, Can. T.S. 1966 No. 29, Sched. I to the *FMIOA*, and the *Vienna Convention on Consular Relations*, Can. T.S. 1974 No. 25, Sched. II to the *FMIOA*, which deal with diplomatic privileges and immunities. He submitted that s. 3(2) denies citizenship to children of diplomats because diplomatic privileges and immunities, including immunity from criminal prosecution and civil liability, are inconsistent with the duties and responsibilities of a citizen. Because Mr. Vavilov's parents did not enjoy such privileges and immunities, there would be no purpose in excluding their children born in Canada from becoming Canadian citizens.

[335] Second, Mr. Vavilov provided the Registrar with Hansard committee meeting minutes such as the comments of the Honourable J. Hugh Faulkner, Secretary of State, when introducing the amendments to s. 3(2), who explained that the provision had been redrafted to narrow the exception to citizenship.

[336] Third, Mr. Vavilov cited case law, arguing that: (i) the exception to citizenship should be narrowly construed because it takes away substantive rights (*Brossard (Town) v. Quebec Commission des droits de la personne*, 1988 CanLII 7 (SCC), [1988] 2 S.C.R. 279, at p. 307); (ii) s. 3(2)(a) must be interpreted functionally and purposively (*Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (CanLII), [2005] 2 S.C.R. 539, at para. 8); and (iii) because Mr. Vavilov's parents were not immune from criminal or civil proceedings, they fall outside the scope of s. 3(2) (*Greco v. Holy See (State of the Vatican City)*, [1999] O.J. No. 2467 (QL) (S.C.J.); *R. v. Bonadie* (1996), 1996 CanLII 17924 (ON CJ), 109 C.C.C. (3d) 356 (Ont. C.J.); *Al-Ghamdi v. Canada (Minister of Foreign Affairs & International Trade)* (2007), 2007 FC 559 (CanLII), 64 Imm. L.R. (3d) 67 (F.C.)).

[337] The Federal Court's decision in *Al-Ghamdi*, a case which challenged the constitutionality of s. 3(2)(a), was particularly relevant. In that case, Shore J. wrote that s. 3(2)(a) only applies to the "children of individuals with diplomatic status" (paras. 5 and 65). Justice Shore also stated that "[i]t is precisely because of the vast array of privileges accorded to diplomats and their families, which are by their very nature inconsistent with the obligations of citizenship, that a person who enjoys diplomatic status cannot acquire citizenship" (para. 63).

[338] The Registrar's reasons failed to respond to Mr. Vavilov's extensive and compelling submissions about the objectives of s. 3(2)(a). It appears that the analyst misunderstood Mr. Vavilov's arguments on this point. In discussing the scope of s. 3(2), she wrote, "[c]ounsel argues that CIC [Citizenship and Immigration Canada] cannot invoke subsection 3(2) because CIC has not requested or obtained verification with the Foreign Affairs Protocol to prove that [Mr. Vavilov's parents] held diplomatic or consular status with the Russian Federation while they resided in Canada." It thus appears that the analyst did not recognize that Mr. Vavilov's argument was more fundamental in nature — namely, that the objectives of s. 3(2) require the terms "other representative" and "employee" to be read narrowly. During discovery, in fact, the analyst acknowledged that her research did not reveal a policy purpose behind s. 3(2)(a) or why the phrase "other representative or employee" was included in the Act. It also appears that the analyst did not understand the potential relevance of the *Al-Ghamdi* decision, since her report stated that "[t]he jurisprudence that does exist only relates to individuals whose parents maintained diplomatic status in Canada at the time of their birth."

[339] The Registrar, in the end, interpreted s. 3(2)(a) broadly, based on the analyst's purely textual assessment of the provision, including a comparison with the text of the previous version. This reading of "other representative or employee" was only reasonable if the text is read in isolation from its objective. Nothing in the history of this provision indicates that Parliament intended to widen its scope. Rather, as Mr. Vavilov points out, the modifications made to s. 3(2) in 1976 appear to mirror those embodied in the *Vienna Convention on Diplomatic Relations* and the *Vienna Convention on Consular Relations*, which were incorporated into Canadian law in 1977. The judicial treatment of this provision, in particular the statements in *Al-Ghamdi* about the narrow scope of s. 3(2)(a) and the inconsistency between diplomatic privileges and immunities and citizenship, also points to the need for a narrow interpretation of the exception to citizenship.

[340] In addition, as noted by the majority of the Federal Court of Appeal, the text of s. 3(2)(c) can be seen as undermining the Registrar's interpretation. That provision denies citizenship to children born to individuals who enjoy "diplomatic privileges and immunities certified by the Minister of Foreign Affairs to be equivalent to those granted to a person or persons referred to in paragraph (a)". As Stratas J.A. noted, this language suggests that s. 3(2)(a) covers *only* those "employee[s] in Canada of a foreign government" who have diplomatic privileges and immunities.

[341] By ignoring the objectives of the provision, the Registrar rendered an unreasonable decision. In particular, the arguments supporting a reading of s. 3(2) that is restricted to those who have diplomatic privileges and immunities, likely would have changed the outcome in this case.

[342] Mr. Vavilov has satisfied us that the Registrar's decision is unreasonable. As a result, the Court of Appeal properly quashed the Registrar's decision to cancel Mr. Vavilov's citizenship certificate, and he is thus entitled to a certificate of Canadian citizenship.

[343] We would therefore dismiss the appeal with costs to Mr. Vavilov throughout.

Appeal dismissed with costs throughout.

Solicitor for the appellant: Attorney General of Canada, Toronto.

Solicitors for the respondent: Jackman Nazami & Associates, Toronto; University of Windsor — Faculty of Law, Windsor.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Attorney General of Saskatchewan: Attorney General of Saskatchewan, Regina.

Solicitor for the intervener the Canadian Council for Refugees: The Law Office of Jamie Liew, Ottawa.

Solicitor for the intervener the Advocacy Centre for Tenants Ontario - Tenant Duty Counsel Program: Advocacy Centre for Tenants Ontario, Toronto.

Solicitor for the interveners the Ontario Securities Commission, the British Columbia Securities Commission and the Alberta Securities Commission: Ontario Securities Commission, Toronto.

Solicitor for the intervener Ecojustice Canada Society: Ecojustice Canada Society, Toronto.

Solicitor for the interveners the Workplace Safety and Insurance Appeals Tribunal (Ontario), the Workers' Compensation Appeals Tribunal (Northwest Territories and Nunavut), the Workers' Compensation Appeals Tribunal (Nova Scotia), the Appeals Commission for Alberta Workers' Compensation and the Workers' Compensation Appeals Tribunal (New Brunswick): Workplace Safety and Insurance Appeals Tribunal, Toronto.

Solicitors for the intervener the British Columbia International Commercial Arbitration Centre Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Council of Canadian Administrative Tribunals: Lax O'Sullivan Lisus Gottlieb, Toronto.

Solicitors for the interveners the National Academy of Arbitrators, the Ontario Labour-Management Arbitrators' Association and Conférence des arbitres du Québec: Susan L. Stewart, Toronto; Paliare Roland Rosenberg Rothstein, Toronto;

Rae Christen Jeffries, Toronto.

Solicitors for the intervener the Canadian Labour Congress: Goldblatt Partners, Toronto.

Solicitors for the intervener the National Association of Pharmacy Regulatory Authorities: Shores Jardine, Edmonton.

Solicitors for the intervener Queen's Prison Law Clinic: Stockwoods, Toronto.

Solicitors for the intervener Advocates for the Rule of Law: McCarthy Tétrault, Vancouver.

Solicitor for the intervener the Parkdale Community Legal Services: Parkdale Community Legal Services, Toronto.

Solicitors for the intervener the Cambridge Comparative Administrative Law Forum: Cambridge University — The Faculty of Law, Cambridge, U.K.; White & Case, Washington, D.C.

Solicitors for the intervener the Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic: Caza Saikaley, Ottawa.

Solicitors for the intervener the Canadian Bar Association: Gowling WLG (Canada), Ottawa.

Solicitors for the intervener the Canadian Association of Refugee Lawyers: Centre for Criminology & Sociolegal Studies — University of Toronto, Toronto; Legal Aid Ontario, Toronto.

Solicitor for the intervener the Community & Legal Aid Services Programme: Community & Legal Aid Services Programme, Toronto.

Solicitors for the intervener Association québécoise des avocats et avocates en droit de l'immigration: Nguyen, Tutunjian & Cliche-Rivard, Montréal; Hadekel Shams, Montréal.

Solicitors for the intervener the First Nations Child & Family Caring Society of Canada: Stikeman Elliott, Ottawa.

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[1] Other than one of the two *amici*, no one asked us to modify this category.

[2] The "constitutional concerns" cited by the majority are no answer to this dilemma — nothing in *Crevier v. Attorney General of Quebec*, 1981 CanLII 30 (SCC), [1981] 2 S.C.R. 220, prevents privative clauses from influencing the *standard* of review, as they did for years under the pragmatic and functional approach and in *C.U.P.E.* (David Dyzenhaus, "Dignity in Administrative Law: Judicial Deference in a Culture of Justification" (2012), 17 *Rev. Const. Stud.* 87, at p. 103; David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action – The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at p. 21).

[3] See *Administrative Tribunals Act*, S.B.C. 2004, c. 45. Quebec's recent attempt to introduce such legislation is another example of a legislature which understood that it was free to set standards of review, and that the mere articulation of a right of appeal did not dictate what those standards would be: see Bill 32, *An Act mainly to promote the efficiency of penal justice and to establish the terms governing the intervention of the Court of Québec with respect to applications for appeal*, 1st Sess., 42nd Leg., 2019.

[4] The notion that legislative intent finds determinative expression in statutory rights of appeal found no support in the submissions of four of the five attorneys general who appeared before us.

[5] Even the *amici* did not go so far as to say that *all* appeal clauses were indicative of a legislative intent for courts to substitute their views on questions of law.

[6] R.S.B.C. 1996, c. 418, s. 159

[7] Consistent with requests from some commentators and some of the interveners at these hearings, including the Canadian Bar Association and the Council of Canadian Administrative Tribunals (see also Mullan, at pp. 76-78).

[8] Factum of the intervener the Canadian Association of Refugee Lawyers, at para. 5; factum of the intervener the Council of Canadian Administrative Tribunals, at paras. 24-26.

[9] Under the duty of procedural fairness outlined in *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 43.

22	*Black v. Canada (Prime Minister)*, 2001 CanLII 8537 (ON CA)

Black v. Chrétien et al.
[Indexed as: Black v. Canada (Prime Minister)

54 O.R. (3d) 215
[2001] O.J. No. 1853
Docket No. C33887

Court of Appeal for Ontario,
Laskin, Goudge and Feldman JJ.A.
May 18, 2001

Courts--Jurisdiction--Provincial superior court having jurisdiction to grant declaratory relief against Prime Minister in respect of his exercise of honours prerogative of Crown --However, jurisdictional issue moot as exercise of honours prerogative is always beyond judicial review.

Crown--Crown prerogative--Granting of honours has not been displaced by statute in Canada and continues to be Crown prerogative--Advice by Prime Minister of Canada to Queen about conferral of honour on Canadian citizen constituting exercise of prerogative power of Crown which is not reviewable by courts.

The appellant, who was at the time a Canadian citizen, was nominated for appointment by the Queen as a peer. The nomination was accepted and recommended by the British Government. The Prime Minister of Canada intervened with the Queen to block the appellant's peerage, citing a contravention of Canadian law. He asserted that he had a right to block the appellant's nomination because of the Nickle Resolution, passed by the Canadian House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. The appellant's appointment as a peer was suspended or deferred. The appellant brought an action against the Prime Minister for abuse of power, misfeasance in public office and negligence. He also sued the Government of Canada for negligent misrepresentation. The Prime Minister and the Attorney General of Canada brought a motion to dismiss the claims (except for the claim of negligent misrepresentation against the Government) on two grounds: first, that the claims were not justiciable and therefore disclosed no reasonable cause of action; and, second, that the Superior Court had no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lay exclusively with the Federal Court. The motions judge held that the Superior Court had jurisdiction to entertain the appellant's claims. He dismissed the claims, holding that what was involved was an exercise of the Crown prerogative, non-reviewable in court. The appellant appealed on the issue of justiciability. The respondents cross-appealed on the jurisdiction of the Superior Court to grant declaratory relief.

Held, the appeal and the cross-appeal should be dismissed.

The Crown prerogative is the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown. It can be limited or displaced by statute. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in Canada.

Whether the Prime Minister exercised a prerogative power was a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. The motions judge was entitled to consider the legal character of the appellant's allegations even though the appellant did not expressly plead that the Prime Minister exercised the Crown prerogative.

Crown prerogative powers are not required to be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative.

Whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on the appellant's peerage or opposing the appellant's appointment, he was exercising the prerogative power of the Crown relating to honours. The honours prerogative is not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, and even advising against, a foreign country's conferral of an honour on a Canadian citizen.

The controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter. The exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. The exercise of the honours prerogative is always beyond the review of the courts. No important individual interests are at stake. The appellant's rights were not affected. No Canadian citizen has a right to an honour, and no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights. Even if the doctrine of legitimate expectations could give substantive rights, neither the appellant nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The disc retion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on the appellant rested not with the Canadian Prime Minister but with the Queen.

Once the Prime Minister's exercise of the honours prerogative was found to be beyond review by the courts, how the Prime Minister exercised the prerogative was also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they could not be challenged by judicial review.

Section 18(1) of the Federal Court Act, R.S.C. 1985, c. F-7 gives the Federal Court, Trial Division exclusive original jurisdiction to grant declaratory relief against any "federal board, commission or other tribunal". "Federal board, commission or other tribunal" is defined in s. 2(1) of the Act as meaning "any body or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown". The actions complained of by the appellant were not performed "by or under an Act of Parliament". The motions judge held that "an order" modifies both "by" and "under" in the definition. The Prime Minister did not exercise powers conferred by an order made pursuant to a prerogative of the Crown or exercise powers conferred under an order made pursuant to a prerogative of the Crown. The respondents submitted that "an order" modifies "under" but not "by". Under this interpretation, the Federal Court would have exclusive jurisdiction if the respondents exercised powers conferred by a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. However, a fair reading of s. 2(1) suggests that "an order made pursuant to" modifies both "by" and "under". Even if the respondents' interpretation was plausible, it collided with the principle that clear and explicit statutory language is required to oust the jurisdiction of provincial superior courts, which, unlike the Federal Court, are courts of inherent jurisdiction. Section 18(1) of the Act does not clearly and explicitly oust the jurisdiction of the Superior Court to grant declaratory relief in respect of the Prime Minister's exercise of the honours prerogative.

APPEAL from an order of LeSage C.J.S.C. (2000), 2000 CanLII 22629 (ON SC), 47 O.R. (3d) 532 (S.C.J.) striking out part of statement of claim as disclosing no reasonable cause of action; CROSS-APPEAL from an order that the Superior Court had jurisdiction to entertain the plaintiff's claims.

Council of Civil Service Unions v. Minister for the Civil Service, [1984] 3 All E.R. 935, [1984] 3 W.L.R. 1174, [1985] 1 A.C. 374, [1985] I.C.R. 14 (H.L.); Operation Dismantle Inc. v. R., 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481, 59 N.R. 1, 13 C.R.R. 287, 12 Admin. L.R. 16n, apld Other cases referred to Attorney-General v. De Keyser's Royal Hotel, [1920] A.C. 508, [1920] All E.R. Rep. 80, 89 L.J. Ch. 417, 122 L.T. 691, 36

T.L.R. 600, 64 Sol. Jo. 513 (H.L.); Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 243 N.R. 22; Barton v. Commonwealth of Australia (1974), A.L.J.R. 161; Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604, 97 N.R. 241; Canada (Human Rights Commission) v. Canadian Liberty Net, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385, 224 N.R. 241, 50 C.R.R. (2d) 189, 22 C.P.C. (4th) 1, 147 F.T.R. 305n; Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Ordon Estate v. Grail, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, 40 O.R. (3d) 639n, 166 D.L.R. (4th) 193, 232 N.R. 201 ; Proclamations Case (1611), 12 Co. Rep. 74, 2 State Tr. 723, 77 E.R. 1352 (K.B.); R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, [1989] 1 All E.R. 655, [1989] Q.B. 811, [1989] 2 W.L.R. 224 (C.A.); R. v. Secretary of State for the Home Department, Ex p. Bentley, [1993] 4 All E.R. 442 (Q.B.); Reference re Canada Assistance Plan (British Columbia), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, 58 B.C.L.R. (2d) 1, 83 D.L.R. (4th) 297, 127 N.R. 161, [1991] 6 W.W.R. 1 (sub nom. Constitutional Question Act (Re)); Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, 1933 CanLII 40 (SCC), [1933] S.C.R. 269, 59 C.C.C. 301, [1933] 2 D.L.R. 348; Schreiber v. Canada (Attorney General), 1999 CanLII 9372 (FC), [2000] 1 F.C. 427, 174 F.T.R. 221; Thorne's Hardware Ltd. v. R., 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577, 46 N.R. 91 (sub nom. Irving Oil Ltd. v. National Harbours Board) Statutes referred to Canadian Charter of Rights and Freedoms, ss. 6, 7, 32(1)(a) Citizenship Act, R.S.C. 1985, c. C-29 Criminal Code, R.S.C. 1985, c. C-46, s. 749 Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22 Federal Court Act, R.S.C. 1985, c. F-7, ss. 2 "federal board, commission or other tribunal", 2(1) "federal board, commission or other tribunal" (as am. S.C. 1990, c. 8, s. 1), 18(1) Letters Patent constituting the office of the Governor General of Canada (1947), Canada Gazette, Part I, Vol. 81, p. 3104 (reprinted at R.S.C. 1985, Appendix II, No. 31), para. II Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4 Rules and regulations referred to Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 21.01(1) (b), 21.01(3)(a) Authorities referred to Chitty, J., A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject (London: Butterworths and Son, 1820) Cox, N., "The Dichotomy of Legal Theory and Political Reality: With Particular Regard to the Honours Prerogative and Imperial Unity" (1998-99) 14 Australian Journal of Law and Society 15 DeSmith, S., H. Woolf and J. Jowell, DeSmith, Woolf & Jowell's Principles of Judicial Review (London: Sweet & Maxwell, 1999) Dicey, Introduction to the Study of the Law of the Constitution, 9th ed. (London: Macmillan, 1950) Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London: Macmillan, 1959) Hadfield, B., "Judicial Review and the Prerogative Power," in M. Sunkin and S. Payne, eds., The Nature of the Crown (Oxford: Oxford University Press, 1999) Hogg, P., Constitutional Law of Canada, looseleaf (Toronto: Carswell, 1995) Hogg, P. and P. Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) Lordon, P., Q.C., Crown Law (Toronto: Butterworths, 1991) Mann, F.A., Foreign Affairs in English Courts (Oxford: Clarendon Press, 1986) Wade, E.C.S., Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988)

Alan J. Lenczner, Q.C., for appellant.
David W. Scott, Peter K. Doody and Jan Brongers, for respondents.

The judgment of the court was delivered by

LASKIN J.A.:--

A. Introduction

[1] The appellant Conrad Black wants to be appointed a peer in the United Kingdom, which would allow him to sit in the House of Lords. He alleges that Prime Minister Jean Chrétien intervened with the Queen to oppose his appointment and that, but for the Prime Minister's intervention, he would have received the honour and title of peer. Mr. Black has sued the Prime Minister for abuse of power, misfeasance in public office and negligence. He has sued the Government of Canada, represented by the Attorney General of Canada, for negligent misrepresentation. He seeks declaratory relief and damages of $25,000.

[2] The respondents Prime Minister Chrétien and the Attorney General of Canada brought a motion to dismiss all of Mr. Black's claims (except the claim for negligent misrepresentation against the Government) on two grounds: first, that the claims are not justiciable and therefore disclose no reasonable cause of action; and second, that the Superior Court has no jurisdiction to grant declaratory relief against the respondents because that jurisdiction lies exclusively with the Federal Court.

[3] In a decision reported as Black v. Canada (Prime Minister) (2000), 2000 CanLII 22629 (ON SC), 47 O.R. (3d) 532 (S.C.J.), LeSage C.J.S.C. held that the Superior Court had jurisdiction to entertain Mr. Black's claims. However, the motions judge dismissed these claims, concluding at p. 544 that "[i]t is [the Prime Minister's] prerogative, non-reviewable in court, to give advice and express opinions on honours and foreign affairs . . . his actions and his reasons for giving that advice or expressing those opinions are not justiciable."

[4] Black appeals on the issue of justiciability and the respondents cross-appeal on the jurisdiction of the Superior Court to grant declaratory relief. Together, the appeal and the cross-appeal raise the following three issues:

(1) Is it plain and obvious that, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power of the Crown?

(2) If so, is it plain and obvious that this exercise of the prerogative is not reviewable by the courts?

(3) If the Prime Minister's exercise of the prerogative is reviewable, does the Superior Court have jurisdiction to grant declaratory relief?

[5] For the reasons that follow, I would answer yes to all three questions. Because of my answers to the first two questions, I would dismiss Mr. Black's appeal. In my view, in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising his honours prerogative, a prerogative power that is beyond the review of the courts.

B. The Claim

[6] For the purpose of both the motion before LeSage C.J.S.C. and this appeal, the facts pleaded in Mr. Black's amended statement of claim must be taken as true and assumed to be proven. I will briefly summarize Mr. Black's pleading.

(a) The factual allegations

[7] In February 1999, the leader of the British Conservative Party advised Mr. Black that he intended to nominate him for appointment by the Queen as a peer. At the time, Mr. Black was a Canadian citizen ordinarily residing in England. The nomination was accepted and recommended by the British Government. The appointment would permit Mr. Black to use a title and sit in the House of Lords.

[8] On May 10, 1999, the British Government asked the Government of Canada to confirm the absence of a legal impediment to conferring a peerage on Mr. Black. On May 24, the Canadian High Commissioner in London spoke to Mr. Black. The Commissioner told Mr. Black that he had been advised by the Honours Committee of the Canadian Government that Mr. Black was not prevented from accepting a peerage by any statutory bar in Canada, though consultation between the United Kingdom and Canada was customary. Mr. Black claims that hundreds of honours, including more that 25 titular honours, have been bestowed on Canadians without objection by the Canadian Government. Some of those honours have been bestowed during Prime Minister Chrétien's term in office.

[9] On May 28, 1999, the Prime Minister of England, Mr. Blair, told Mr. Black that as long as he became a British citizen and did not use the title in Canada, the Canadian Government did not object to the peerage. The Canadian Government confirmed Prime Minister Blair's advice in a letter to the British Government dated June 9, 1999. The British High Commission received the same advice from Canada.

[10] Relying on this advice, Mr. Black immediately applied for, and on June 11, 1999 obtained, British citizenship. On June 14, Prime Minister Blair wrote Mr. Black confirming that his nomination as a peer was being forwarded to the Queen. Mr. Black was told that his appointment would be made on June 18, 1999.

[11] However, on June 17, Prime Minister Blair told Mr. Black that Prime Minister Chrétien had intervened with the Queen to oppose Mr. Black's peerage, citing a contravention of Canadian law. Prime Minister Chrétien asserted that he had a right to block Mr. Black's nomination because of the Nickle Resolution passed by the House of Commons in 1919, which requested the King to refrain from conferring titles on any of his Canadian subjects. Later that day, Mr. Black telephoned Prime Minister Chrétien. The Prime Minister refused to change his position. He defended his actions by referring to the Nickle Resolution and the status of the monarchy in Canada. He added that he had not been kindly treated by the National Post, a newspaper published by Mr. Black. This was the third time in six months that the Prime Minister had expressed to Mr. Black his dissatisfaction with comments made about him in the National Post.

[12] Because of Prime Minister Chrétien's intervention with the Queen, Mr. Black's appointment as a peer was suspended or deferred "with considerable public embarrassment and inconvenience" to him. The Prime Minister later tried to justify his actions by referring to a Regulation passed in 1968 and a Policy issued in 1988.

(b) Canadian policy statements

[13] Mr. Black's amended statement of claim refers to three Canadian policy statements dealing with the granting of honours to Canadian citizens by foreign countries: the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy.

[14] The Nickle Resolution passed by the House of Commons in 1919 asked the King "to refrain hereafter from conferring any title or honour or titular distinction upon any of your subjects domiciled or ordinarily resident in Canada . . .". The amended statement of claim states that Prime Minister Chrétien relied on the Nickle Resolution in opposing Mr. Black's appointment. However, Mr. Black pleads that the Nickle Resolution "had no legal effect on the prerogative of Her Majesty the Queen in Right of the United Kingdom" and "without the status of a statute . . . could not affect in any way the prerogative of Her Majesty the Queen". Mr. Black also pleads that the Nickle Resolution must yield to the Citizenship Act, R.S.C. 1985, c. C-29, which permits and recognizes dual citizenship with the United Kingdom. And, finally, Mr. Black pleads that he was a British citizen resident in the United Kingdom before the Prime Minister intervened with the Queen.

[15] Mr. Black also alleges that Prime Minister Chrétien relied both on the 1968 Regulation and the 1988 Policy "after the fact" and that neither justified the Prime Minister's actions. The 1968 Regulation [See Note 1 at end of document] was issued by the Secretary of State Department, the 1988 Policy [See Note 2 at end of document] by the Clerk of the Privy Council. Both the Regulation and the Policy require foreign countries to obtain the Government of Canada's approval before awarding an order, a decoration or a medal to a Canadian citizen. And both the Regulation and the Policy state that the Government of Canada shall not grant approval for an award "that carries with it an honourary title or confers any precedence or privilege". However, s. 5 of the 1968 Regulation states that "approval is generally given to accept orders and decorations conferred on Canadian citizens who have dual nationality, provided acceptable evidence is offered that the recipient is ordinarily resident in or has a closer actual connection with the donor country."

(c) Relief sought

[16] In substance, Mr. Black seeks three declarations: first, a declaration that the Prime Minister and the Government of Canada had no right to advise the Queen not to confer an honour on a British citizen or a dual citizen; second, a declaration that the Prime Minister committed an abuse of power by intervening with the Queen to prevent him from receiving a peerage; and third, a declaration that the Government of Canada negligently misrepresented to Mr. Black that he would be entitled to receive a peerage if he became a dual citizen and refrained from using his title in Canada. Mr. Black also seeks damages of $25,000 against both respondents for abuse of power, negligence and negligent misrepresentation. The respondents acknowledge that the negligent misrepresentation claim against the Government of Canada can proceed to trial. However, they move to dismiss all other claims against the Government of Canada and all claims against the Prime Minister.

C. The Decision of the Motions Judge

[17] LeSage C.J.S.C. dealt first with the question whether the Superior Court had jurisdiction to grant declaratory relief against the Prime Minister and the Government of Canada. He held that it did. He concluded at p. 539 that Mr. Black's claim did not "come clearly or exclusively within the jurisdiction of the Federal Court (Trial Division)" under s. 18(1) of the Federal Court Act, R.S.C. 1985, c. F-7 because Prime Minister Chrétien did not act under an Act of Parliament or make any "order".

[18] The motions judge then considered whether Mr. Black's claims were justiciable. He concluded that they were not. He held that the justiciability of the Prime Minister's actions depended on how these actions were characterized. The motions judge characterized them as an exercise of the Crown prerogative in relation to the granting of honours or the giving of advice in foreign affairs. In his view, these actions came "within the political area of the prerogative that is not subject to review in the courts" (supra, at p. 541).

[19] The motions judge then looked separately at the claims in negligence and for abuse of power. He concluded that these claims could not succeed. Having found that Prime Minister Chrétien acted within his prerogative, the motions judge held that neither the improper exercise of that prerogative nor the wisdom of the Prime Minister's

actions was justiciable. The motions judge therefore struck out all claims as non- justiciable, except the claim for negligent misrepresentation against the Government of Canada, which was permitted to proceed.

D. Discussion

[20] The respondents brought their motion under rule 21.01(1) (b) and rule 21.01(3)(a) of the Rules of Civil Procedure [R.R.O. 1990, Reg. 194]. Under rule 21.01(1)(b), the respondents contend that Mr. Black's claim, other than the negligent misrepresentation claim against the Government, discloses no reasonable cause of action. Under rule 21.01(3) (a), they contend that the Superior Court has no jurisdiction to grant the declaratory relief Mr. Black requests.

[21] I will deal first with whether Mr. Black's claim discloses a reasonable cause of action. The test under rule 21.01(1)(b) is well established. The threshold is low. The court must assume that the facts pleaded are true. The court should strike out the statement of claim only if it is "plain and obvious" that the claim discloses no reasonable cause of action: "Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. Only if the action is certain to fail . . . should the relevant portions of a plaintiff's statement of claim be struck out": Hunt v. Carey Canada Inc., 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959 at p. 980, 49 B.C.L.R. (2d) 273. In applying this test, counsel for Mr. Black appropriately cautioned us not to give this statement of claim extra scrutiny because of who the parties are.

[22] The broad question raised by Mr. Black's pleading is whether it discloses a justiciable cause of action against the Prime Minister. As I stated earlier, this broad question divides into two issues: Is it plain and obvious that in advising the Queen about the conferral of an honour on a Canadian citizen, the Prime Minister was exercising a prerogative power? If so, is the exercise of this prerogative power reviewable by the courts?

First issue: Was the Prime Minister exercising a prerogative power?

[23] The motions judge concluded that the Prime Minister's communication with the Queen was an exercise of the prerogative power to grant honours and conduct foreign affairs. I agree with the motions judge that Prime Minister Chrétien was exercising a prerogative power, although I rest my own conclusion on the honours prerogative alone.

[24] Mr. Black submits that the motions judge erred in his conclusion for four reasons. First, because Mr. Black did not plead that the Prime Minister exercised a Crown prerogative, the motions judge should not have concluded that he did. Second, in Canada the Prime Minister does not have the power to exercise the Crown prerogative, only the Governor General does. Third, the actions of Prime Minister Chrétien pleaded in the statement of claim were not an exercise of the Crown prerogative, in relation to either the granting of honours or the conduct of foreign affairs, but an unsolicited personal intervention in which the Prime Minister gave wrong legal advice. Fourth, in Canada the prerogative power to conduct foreign affairs has been displaced by the Department of Foreign Affairs and International Trade Act, R.S.C. 1985, c. E-22.

[25] To put these submissions in context, I will briefly review the nature of the Crown's prerogative power. According to Professor Dicey, the Crown prerogative is "the residue of discretionary or arbitrary authority, which at any given time is left in the hands of the Crown": Dicey, Introduction to the Study of the Law of the Constitution, 10th ed. (London:
Macmillan, 1959) at p. 424. Dicey's broad definition has been explicitly adopted by the Supreme Court of Canada and the House of Lords. See Reference re Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings, 1933 CanLII 40 (SCC), [1933] S.C.R. 269 at pp. 272-73, 59 C.C.C. 301, and Attorney General v. De Keyser's Royal Hotel, [1920] A.C. 508 at p. 526, [1920] All E.R. Rep. 80 (H.L.). See also Peter Hogg and Patrick Monahan, Liability of the Crown, 3rd ed. (Toronto: Carswell, 2000) at p. 15.

[26] The prerogative is a branch of the common law because decisions of courts determine both its existence and its extent. In short, the prerogative consists of "the powers and privileges accorded by the common law to the Crown": Peter Hogg, Constitutional Law in Canada, loose-leaf ed. (Toronto:
Carswell, 1995) at 1.9. See also Proclamations Case (1611), 12 Co. Rep. 74, 77 E.R. 1352 (K.B.). The Crown prerogative has descended from England to the Commonwealth. As Professor Cox has recently observed, "it is clear that the major prerogatives apply throughout the Commonwealth, and are applied as a pure question of law": N. Cox, The Dichotomy of Legal Theory and Political Reality: The Honours Prerogative and Imperial Unity, 14 Australian Journal of Law and Society (1998-99) 15 at 19.

[27] Despite its broad reach, the Crown prerogative can be limited or displaced by statute. See Parliament of Canada Act, R.S.C. 1985, c. P-1, s. 4. Once a statute occupies ground formerly occupied by the prerogative, the prerogative goes into abeyance. The Crown may no longer act under the prerogative, but must act under and subject to the conditions imposed by the statute: Attorney General v. De Keyser's Royal Hotel, supra. In England and Canada, legislation has severely curtailed the scope of the Crown prerogative. Dean Hogg comments that statutory displacement of the prerogative has had the effect of "shrinking the prerogative powers of the Crown down to a very narrow compass" (supra). Professor Wade agrees:

> [I]n the course of constitutional history the Crown's prerogative powers have been stripped away, and for administrative purposes the prerogative is now a much- attenuated remnant. Numerous statutes have expressly restricted it, and even where a statute merely overlaps it the doctrine is that the prerogative goes into abeyance.

E.C.S. Wade, Administrative Law, 6th ed. (Oxford: Clarendon Press, 1988) at pp. 240-41.)

Nonetheless, as I will discuss, the granting of honours has never been displaced by statute in Canada and therefore continues to be a Crown prerogative in this country.

[28] I turn now to Mr. Black's submissions. Mr. Black did not plead that Prime Minister Chrétien exercised a prerogative power. Therefore, he first submits that on a rule 21.01(1)(b) motion, LeSage C.J.S.C. should not have characterized his allegations about the Prime Minister's actions as amounting to an exercise of the prerogative, and then used that characterization to strike out the amended statement of claim. If the Prime Minister is relying on the prerogative, he must plead it in his statement of defence.

[29] I disagree with this submission. As is evident from my earlier discussion, whether the Prime Minister exercised a prerogative power is a question of law. The court has the responsibility to determine whether a prerogative power exists and, if so, its scope and whether it has been superseded by statute. Although Mr. Black did not expressly plead that the Prime Minister was exercising the Crown prerogative, the motions judge was entitled to consider the "legal character" of Mr. Black's allegations.

[30] That the motions judge was entitled to do so on a motion under rule 21.01(1)(b) is supported by the Supreme Court of Canada's decision in Operation Dismantle Inc. v. R., 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, 13 C.R.R. 287. In that case, the plaintiffs pleaded that the decision of the federal Cabinet to allow the United States to test cruise missiles in Canada violated s. 7 of the Canadian Charter of Rights and Freedoms. The court struck out the claim, holding that it did not disclose a reasonable cause of action. The plaintiffs did not plead that in deciding to permit cruise missile testing the Cabinet was exercising the Crown prerogative. Nonetheless, both the Federal Court of Appeal and Wilson J., in her concurring judgment in the Supreme Court of Canada, held that [the] Cabinet's decision was an exercise of the Crown prerogative relating to national defence and foreign affairs. That finding alone did not insulate the Cabinet's decision from review under the Charter. But Wilson J.'s judgment shows that in determining whether a statement of claim discloses a reasonable cause of action, the court may consider whether, on the allegations pleaded, the defendant exercised a prerogative power.

[31] Mr. Black's second submission is that the Prime Minister cannot exercise the Crown prerogative. He submits that in Canada, only the Governor General can exercise the prerogative. I find no support for this proposition in theory or in practice. Admittedly, the Governor General is the Queen's permanent representative in Canada. The 1947 Letters Patent constituting the office of the Governor General of Canada [Canada Gazette, Part I, Vol. 81, p. 3104] is the instrument by which the Monarch delegates her prerogative powers for application in Canada. The Letters Patent empower[s] the Governor General "to exercise all powers and authorities lawfully belonging to Us in respect of Canada" (at para. II). By convention, the Governor General exercises her powers on the advice of the Prime Minister or Cabinet. Although the Governor General retains discretion to refuse to follow this advice, in Canada that discretion has been exercised only in the most exceptional circumstances. See Pa ul Lordon, Q.C., Crown Law (Toronto: Butterworths, 1991) at p. 70.

[32] Still, nothing in the Letters Patent or the case law requires that all prerogative powers be exercised exclusively by the Governor General. As members of the Privy Council, the Prime Minister and other Ministers of the Crown may also exercise the Crown prerogative: see Lordon, supra, at p. 71. The reasons of Wilson J. in Operation Dismantle affirm that prerogative power may be exercised by cabinet ministers and therefore does not lie exclusively with the Governor General. Similarly, in England the prerogative "[was] gradually relocated from the Monarch in person to the Monarch's advisors or ministers. Hence it made increasing sense to refer to those powers as belonging to the Crown . . .": Bridgid Hadfield, "Judicial Review and the Prerogative Power" in M. Sunkin and S. Payne, The Nature of the Crown (Oxford: Oxford University Press, 1999) at p. 199. This gradual relocation of the prerogative is consistent with Professor Wade's general view of the Crown prerogative as an "instrument of

government":
Commentary on Dicey's Introduction to the Study of the Law of the Constitution, 9th ed. (London: Macmillan, 1950). The conduct of foreign affairs, for example, "is an executive act of government in which neither the Queen nor Parliament has any part": F.A. Mann, Foreign Affairs in English Courts (Oxford:
Clarendon Press, 1986) at p. 2. See also Barton v. Commonwealth of Australia (1974), A.L.J.R. 161 at 172.

[33] Counsel for the respondents points out that if Mr. Black were correct, the Prime Minister -- whose powers are not enumerated in any statute -- would have no legal authority to speak for Canada on foreign affairs. This proposition is, on its face, absurd. I therefore reject Mr. Black's submission that only the Governor General can exercise prerogative powers in Canada. I conclude that the Prime Minister and the Government of Canada can exercise the Crown prerogative as well.

[34] Mr. Black's third submission is that even if the Prime Minister can exercise prerogative power relating to the granting of honours or the conduct of foreign affairs, on the facts pleaded in the amended statement of claim, Prime Minister Chrétien was doing neither. He was not deciding whether to grant Mr. Black an honour -- that decision rests with the Queen -- and he was not conducting foreign affairs. Instead, according to Mr. Black, Prime Minister Chrétien intervened personally with the Queen and gave unsolicited and wrong legal advice.

[35] In my view, however, whether one characterizes the Prime Minister's actions as communicating Canada's policy on honours to the Queen, giving her advice on Mr. Black's peerage, or opposing Mr. Black's appointment, he was exercising the prerogative power of the Crown relating to honours.

[36] Unquestionably, the granting of honours is the prerogative of the Crown. The Monarch is "the fountain, parent and distributor of honours, dignities, privileges and franchises": Joseph Chitty, A Treatise on the Law of the Prerogatives of the Crown: And the Relative Duties and Rights of the Subject (London: Butterworths and Son, 1820), at p. 6. Because no statute in Canada governs the conferral of honours, this prerogative has not been displaced by federal law. Nor has it been limited by the common law. As Hogg and Monahan, supra, observe at pp. 18-19, appointments and honours is one area in which the prerogative power "remains meaningful". Their view is consistent with the opinion of Lord Roskill in the important House of Lords decision, Council of Civil Service Unions v. Minister for the Civil Service, [1985] 1 A.C. 374, [1984] 3 All E.R. 935. In his speech in that case Lord Roskill said at p. 418 that the modern exercise of the prerogative includes "the making of treaties , the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others . . .". (Emphasis added.)

[37] It is one thing to state that the honours prerogative still exists in Canada. However, one critical question on this appeal is the scope of that power. Common sense dictates that, at a minimum, the honours prerogative includes the power to grant or refuse to grant an honour to a Canadian citizen. However, in my view the honours prerogative is much broader than that, and is not limited to conferrals the Government of Canada or the Prime Minister might make. The honours prerogative also includes giving advice on, even advising against, a foreign country's conferral of an honour on a Canadian citizen. If that were not so, the three Canadian policy statements on the granting of honours by foreign countries -- the 1919 Nickle Resolution, the 1968 Regulation and the 1988 Policy -- would be meaningless. Because these policy statements guide the exercise of Canada's honours prerogative, the exercise of the prerogative necessarily embraces the communication of these policies to a foreign country considering bestowing a title on a Canadian citizen. Furthermore, the authority to communicate that policy rests with the nation's leader, the Prime Minister.

[38] The policy statements show that Canada has chosen to exercise the honours prerogative differently from England. As we have seen, Canada calls for foreign countries to obtain the Government of Canada's approval before granting honours to Canadian citizens. The underlying rationale of these policies is egalitarianism. Canada disapproves of ranking its citizens according to status and lineage. In communicating Canada's policy to the Queen, in giving her advice on it, right or wrong, in advising against granting a title to one of Canada's citizens, the Prime Minister was exercising the Crown prerogative relating to honours.

[39] Mr. Black's argument appears to rest on the notion that Prime Minister Chrétien's communication with the Queen was grounded not in the prerogative but was a "personal intervention" motivated by a "personal vendetta". He argues that the exercise of a prerogative power is confined to powers and privileges unique to the Crown; powers and privileges enjoyed equally with private persons are not part of the prerogative. There are two answers to Mr. Black's argument. One answer is that the Prime Minister's authority is always derived from either a federal statute or the prerogative; it is never personal in nature. See Dicey, supra, at p. 424 and Schreiber v. Canada (Attorney General), 1999 CanLII 9372 (FC), [2000] 1 F.C. 427 at p. 444, 174 F.T.R. 221. Here, Prime Minister Chrétien did not act under a statute; he therefore acted under the authority of the Crown prerogative.

[40] The other answer is that even if the Prime Minister does at times act as a private citizen of Canada, he could hardly be said to have been acting as one in this case. Private citizens cannot ordinarily communicate private advice to the Queen. Thus, even accepting Mr. Black's pleading, Prime Minister Chrétien's intervention with the Queen was not personal. Whatever his motivation, he was acting as the leader of this country, giving advice or communicating Canada's policy on honours to a foreign head of state.

[41] For these reasons, I conclude that it is plain and obvious the Prime Minister was exercising the Crown prerogative relating to the granting of honours. Because I am satisfied that the Prime Minister was exercising prerogative power relating to the granting of honours, it is unnecessary to consider the alternative basis for the motions judge's decision, the foreign affairs prerogative, or Mr. Black's submissions on it.

Second issue: Is the prerogative power exercised by the Prime Minister reviewable in the courts?

[42] This is the main question on this appeal. The motions judge concluded at p. 541 that Mr. Black's complaint about the Prime Minister was not justiciable. He wrote: "It is not within the power of the court to decide whether or not the advice of the PM about the prerogative honour to be conferred or denied upon Black was right or wrong. It is not for the court to give its opinion on the advice tendered by the PM to another country. These are non-justiciable decisions for which the PM is politically accountable to Parliament and the electorate, not to the courts."

[43] Mr. Black submits that the motions judge erred in concluding that Prime Minister Chrétien's exercise of the honours prerogative was not reviewable by the court. The amended statement of claim pleads that the Prime Minister gave the Queen wrong legal advice, which detrimentally affected Mr. Black. Mr. Black argues that had the advice been given under a statutory power, it would have been subject to judicial review; it should similarly be subject to judicial review if given under a prerogative power.

[44] I agree with Mr. Black that the source of the power -- statute or prerogative -- should not determine whether the action complained of is reviewable. However, in my view, the action complained of in this case -- giving advice to the Queen or communicating to her Canada's policy on the conferral of an honour on a Canadian citizen -- is not justiciable. Even if the advice was wrong or given carelessly or negligently, it is not reviewable in the courts. I therefore agree with the motions judge's conclusion.

[45] Under the law that existed at least into the 1960s, the court's power to judicially review the prerogative was very limited. The court could determine whether a prerogative power existed and, if so, what its scope was, and whether it had been superseded by statute. However, once a court established the existence and scope of a prerogative power, it could not review how that power was exercised. See S. DeSmith, H. Woolf and J. Jowell, DeSmith, Woolf & Jowell's Principles of Judicial Review (London: Sweet & Maxwell, 1999) at p. 175 and De Keyser's Royal Hotel, supra. The appropriateness or adequacy of the grounds for its exercise, even whether the procedures used were fair, were not reviewable. The courts insisted that the source of the power -- the prerogative -- precluded judicial scrutiny of its exercise. The underlying rationale for this narrow review of the prerogative was that exercises of prerogative power ordinarily raised questions courts were not qualified or competent to answer.

[46] Even this narrow view of the court's role in reviewing the prerogative power now has to be modified in Canada because of the Canadian Charter of Rights and Freedoms. By s. 32(1)(a), the Charter applies to Parliament and the Government of Canada in respect of all matters within the authority of Parliament. The Crown prerogative lies within the authority of Parliament. Therefore, if an individual claims that the exercise of a prerogative power violates that individual's Charter rights, the court has a duty to decide the claim. See Operation Dismantle, supra. However, Mr. Black does not assert any Charter claim.

[47] Apart from the Charter, the expanding scope of judicial review and of Crown liability make it no longer tenable to hold that the exercise of a prerogative power is insulated from judicial review merely because it is a prerogative and not a statutory power. The preferable approach is that adopted by the House of Lords in the Civil Service Unions case, supra. There, the House of Lords emphasized that the controlling consideration in determining whether the exercise of a prerogative power is judicially reviewable is its subject matter, not its source. If, in the words of Lord Roskill, the subject matter of the prerogative power is "amenable to the judicial process", it is reviewable; if not, it is not reviewable. Lord Roskill provided content to this subject matter test of reviewability by explaining that the exercise of the prerogative will be amenable to the judicial process if it affects the rights of individuals. Again, in his words at p. 417 A.C.:

> If the executive in pursuance of the statutory power does an act affecting the rights of the citizen, it is beyond question that in principle the manner of the exercise of that power may today be challenged on one or more of the three grounds which I have mentioned earlier in this speech. If the executive instead of acting under a

> statutory power acts under a prerogative power and in particular a prerogative power delegated to the respondent under article 4 of the Order in Council of 1982, so as to affect the rights of the citizen, I am unable to see, subject to what I shall say later, that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory. In either case the act in question is the act of the executive.

[48] In his speech in that case, Lord Diplock discussed two ways in which the exercise of a prerogative power may affect the rights of an individual: by altering the individual's legal rights and obligations or by affecting the individual's legitimate expectations. He stated at p. 408 A.C.:

> To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either:
>
> > (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or
> >
> > (b) by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision- maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker [that the benefit or advantage] will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[49] I agree with the House of Lords that the proper test for the review of the exercise of the prerogative is the subject matter test. It is that test that I will endeavour to apply in this case.

[50] At the core of the subject matter test is the notion of justiciability. The notion of justiciability is concerned with the appropriateness of courts deciding a particular issue, or instead deferring to other decision-making institutions like Parliament. See Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources), 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, 61 D.L.R. (4th) 604; Thorne's Hardware Ltd. v. R., 1983 CanLII 20 (SCC), [1983] 1 S.C.R. 106, 143 D.L.R. (3d) 577. Only those exercises of the prerogative that are justiciable are reviewable. The court must decide "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": Reference re Canada Assistance Plan (British Columbia), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525 at p. 545, 58 B.C.L.R. (2d) 1.

[51] Under the test set out by the House of Lords, the exercise of the prerogative will be justiciable, or amenable to the judicial process, if its subject matter affects the rights or legitimate expectations of an individual. Where the rights or legitimate expectations of an individual are affected, the court is both competent and qualified to judicially review the exercise of the prerogative.

[52] Thus, the basic question in this case is whether the Prime Minister's exercise of the honours prerogative affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. To put this question in context, I will briefly discuss prerogative powers that lie at the opposite ends of the spectrum of judicial reviewability. At one end of the spectrum lie executive decisions to sign a treaty or to declare war. These are matters of "high policy":
R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, [1989] 1 All E.R. 655 at p. 660, [1989] Q.B. 811, per Taylor L.J. Where matters of high policy are concerned, public policy and public interest considerations far outweigh the rights of individuals or their legitimate expectations. In my view, apart from Charter claims, these decisions are not judicially reviewable.

[53] At the other end of the spectrum lie decisions like the refusal of a passport or the exercise of mercy. The power to grant or withhold a passport continues to be a prerogative power. A passport is the property of the Government of Canada, and no person, strictly speaking, has a legal right to one. However, common sense dictates that a refusal to issue a passport for improper reasons or without affording the applicant procedural fairness should be judicially reviewable. This was the position taken by the English Court of Appeal in R. v. Secretary of State for Foreign & Commonwealth Affairs, Ex p. Everett, supra. Two passages from that case are worth highlighting. O'Connor L.J. wrote at p. 658 All E.R.:

> The judge held that the issue of a passport fell into an entirely different category. That seems common sense. It is a familiar document to all citizens who travel in the world and it would seem obvious to me that the exercise of the prerogative, because there is no doubt that passports are issued under the royal prerogative in the discretion of the Secretary of State, is an area where common sense tells one that, if for some reason a passport is wrongly refused for a bad reason, the court should be able to inquire into it. I would reject the submission made on behalf of the Secretary of State that the judge was wrong to review the case.

And Taylor L.J. wrote at p. 660 All E.R.:

> At the top of the scale of executive functions under the prerogative are matters of high policy, of which examples were given by their Lordships: making treaties, making law, dissolving Parliament, mobilising the armed forces. Clearly those matters, and no doubt a number of others, are not justiciable. But the grant or refusal of a passport is in a quite different category. It is a matter of administrative decision, affecting the rights of individuals and their freedom of travel. It raises issues which are just as justiciable as, for example, the issues arising in immigration cases.

[54] In today's world, the granting of a passport is not a favour bestowed on a citizen by the state. It is not a privilege or a luxury but a necessity. Possession of a passport offers citizens the freedom to travel and to earn a livelihood in the global economy. In Canada, the refusal to issue a passport brings into play Charter considerations; the guarantee of mobility under s. 6 and perhaps even the right to liberty under s. 7. In my view, the improper refusal of a passport should, as the English courts have held, be judicially reviewable.

[55] A similar view might also be taken of the exercise of the prerogative of mercy, still preserved in Canada by s. 749 of the Criminal Code, R.S.C. 1985, c. C-46. Though on one view mercy begins where legal rights end, I think the prerogative of mercy should be looked at as more than a royal favour. The existence of this prerogative is the ultimate safeguard against mistakes in the criminal justice system and thus in some cases the Government's refusal to exercise it may be judicially reviewable. That was the view taken by the English Queen's Bench Division in Re Secretary of State for the Home Department, Ex p. Bentley, [1993] 4 All E.R. 442. There, the court held that the Home Secretary's decision not to grant a posthumous conditional pardon was judicially reviewable.

[56] Against the context of these cases I return to the issue raised in this appeal -- whether the action of the Prime Minister affected a right or legitimate expectation enjoyed by Mr. Black and is therefore judicially reviewable. This issue turns on how the subject matter of Prime Minister Chrétien's exercise of the honours prerogative is characterized. Mr. Black characterizes the subject matter of the Prime Minister's actions in one of two ways: first, as giving unsolicited and wrong legal advice to the Queen, which detrimentally affected Mr. Black; or second, as an administrative decision involving the improper interpretation and application of Canadian policy, the Nickle Resolution, to the granting of an honour. See also Hogg and Monahan, supra, at p. 20.

[57] In my opinion, these are not accurate characterizations of Prime Minister Chrétien's actions as pleaded in the amended statement of claim. Prime Minister Chrétien was not giving legal advice or making an administrative decision. Focusing on wrong legal advice or the improper interpretation of a policy misses what this case is about. As I see it, the action of Prime Minister Chrétien complained of by Mr. Black is his giving advice to the Queen about the conferral of an honour on a Canadian citizen. The Prime Minister communicated Canada's policy on honours to the Queen and advised her against conferring an honour on Mr. Black.

[58] So characterized, it is plain and obvious that the Prime Minister's exercise of the honours prerogative is not judicially reviewable. Indeed, in the Civil Service Unions case, Lord Roskill listed a number of exercises of the prerogative power whose subject matters were by their very nature not justiciable. Included in the list was the grant of honours. He wrote, in a passage I have already referred to, at p. 418 A.C.:

> But I do not think that that right of challenge can be unqualified. It must, I think, depend upon the subject matter of the prerogative power which is exercised. Many examples were given during the argument of prerogative powers which as at present advised I do not think could properly be made the subject of judicial review. Prerogative powers such as those relating to the making of treaties, the defence of the realm, the prerogative of mercy, the grant of honours, the dissolution of Parliament and the appointment of ministers as well as others are not, I think, susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. The courts are not the place wherein to determine whether a treaty should be concluded or the armed forces disposed in a particular manner or Parliament dissolved on one date rather than another.

(Emphasis added)

[59] Lord Roskill's opinion on the grant of honours was obiter in that case, and regardless of course, is not binding on this court. Moreover, including the grant of honours in a list of non-reviewable exercises of the prerogative has been criticized by some as overly broad. See Hogg and Monahan, supra, at p. 15 and Hadfield, supra, at p. 217. However, I agree with Lord Roskill. Holding that the exercise of the honours prerogative is always beyond the review of courts is not a departure from the subject matter test espoused by the House of Lords in the Civil Service Unions case. Rather, it is faithful to that test. See also Cox, supra, at p. 19.

[60] The refusal to grant an honour is far removed from the refusal to grant a passport or a pardon, where important individual interests are at stake. Unlike the refusal of a peerage, the refusal of a passport or a pardon has real adverse consequences for the person affected. Here, no important individual interests are at stake. Mr. Black's rights were not affected, however broadly "rights" are construed. No Canadian citizen has a right to an honour.

[61] And no Canadian citizen can have a legitimate expectation of receiving an honour. In Canada, the doctrine of legitimate expectations informs the duty of procedural fairness; it gives no substantive rights: Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at pp. 838-42 S.C.R., pp. 212-14 D.L.R.. See also Civil Service Unions, per Lord Diplock at pp. 408-09 A.C. Here Mr. Black does not assert that he was denied procedural fairness. Indeed, he had no procedural rights.

[62] But even if the doctrine of legitimate expectations could give substantive rights, neither Mr. Black nor any other Canadian citizen can claim a legitimate expectation of receiving an honour. The receipt of an honour lies entirely within the discretion of the conferring body. The conferral of the honour at issue in this case, a British peerage, is a discretionary favour bestowed by the Queen. It engages no liberty, no property, no economic interests. It enjoys no procedural protection. It does not have a sufficient legal component to warrant the court's intervention. Instead, it involves "moral and political considerations which it is not within the province of the courts to assess". See Operation Dismantle, supra, per Wilson J. at p. 465 S.C.R.

[63] In other words, the discretion to confer or refuse to confer an honour is the kind of discretion that is not reviewable by the court. In this case, the court has even less reason to intervene because the decision whether to confer a British peerage on Mr. Black rests not with Prime Minister Chrétien, but with the Queen. At its highest, all the Prime Minister could do was give the Queen advice not to confer a peerage on Mr. Black.

[64] For these reasons, I agree with the motions judge that Prime Minister Chrétien's exercise of the honours prerogative by giving advice to the Queen about granting Mr. Black's peerage is not justiciable and therefore not judicially reviewable.

[65] Once Prime Minister Chrétien's exercise of the honours prerogative is found to be beyond review by the courts, how the Prime Minister exercised the prerogative is also beyond review. Even if the advice was wrong or careless or negligent, even if his motives were questionable, they cannot be challenged by judicial review. To paraphrase Dickson J. in Thorne's Hardware, supra, at p. 112 S.C.R.: "It is neither our duty nor our right" to investigate the Prime Minister's motives or his reasons for his advice. Therefore, the declaratory relief and the tort claims asserted by Mr. Black cannot succeed. For these reasons, I would dismiss his appeal.

Third issue: Does the Superior Court have jurisdiction to grant declaratory relief against the Prime Minister and the Government of Canada?

[66] Although raised only on the cross-appeal, the Superior Court's jurisdiction over Mr. Black's claim is a threshold issue. For that reason, and because it was fully argued, I will consider it in these reasons.

[67] Under the recent amendments to the Federal Court Act and the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, the general rule is that the Federal Court and the courts of the provinces have concurrent jurisdiction to entertain claims for relief against the Crown. In their cross-appeal, however, the Prime Minister and the Government of Canada submit that even if Mr. Black's claims are justiciable, the Superior Court does not have jurisdiction to grant the declaratory relief he seeks because that jurisdiction rests exclusively with the Federal Court (Trial Division). The respondents ask us to dismiss Mr. Black's claims for declaratory relief under rule 21.01(3)(a) of the Rules of Civil Procedure. This rule permits a court to dismiss an action on the ground that "the court has no jurisdiction over the subject matter of the action." The motions judge concluded that the Superior Court had jurisdiction to entertain the claim against the Prime Minister. He also held that the Superior Court could deal with the claim against the Government of Canada because for the purpose of jurisdiction it was in the same position as the Prime Minister.

[68] The respondents rely on s. 18(1) of the Federal Court Act, which gives the Trial Division of the Federal Court exclusive original jurisdiction to grant declaratory relief against any "federal board, commission or other tribunal":

> 18(1) Subject to section 28, the Trial Division has exclusive original jurisdiction
>
> > (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
> >
> > (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
>
> . . . . .
>
> (3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

Thus, the narrow question on this cross-appeal is whether the Prime Minister or the Government of Canada was acting as a federal board, commission or other tribunal.

[69] When the Federal Court Act was first enacted, the phrase "federal board, commission or other tribunal" was defined in s. 2 to mean a body exercising jurisdiction or powers conferred by or under an Act of Parliament:

> . . . any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

However, in 1990, this definition was amended to include the exercise of power conferred by or under an order made pursuant to a prerogative of the Crown. Section 2 was replaced by a new definition in s. 2(1), which reads:

> "federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the Constitution Act, 1867.

(Emphasis added)

[70] The respondents acknowledge that the actions complained of by Mr. Black were not performed "by or under an Act of Parliament". Even if Prime Minister Chrétien acted under the 1919 Nickle Resolution or the 1968 Regulation or the 1988 Policy, none of these policy statements gives powers conferred by or under a federal statute. Therefore, the Federal Court has exclusive jurisdiction only if Prime Minister Chrétien exercised powers conferred "by or under an order made pursuant to a prerogative of the Crown". LeSage C.J.S.C. concluded, and the respondents accept, that Prime Minister Chrétien did not make any order. What he did, according to the amended statement of claim, was intervene with the Queen to block Mr. Black's peerage or advise the Queen not to appoint Mr. Black. There was no "order".

[71] However, the phrase "by or under an order made pursuant to a prerogative of the Crown" admits of two possible interpretations. Under the first interpretation, advanced by Mr. Black and accepted by the motions judge, "an order" modifies both "by" and "under". Under this interpretation, the Federal Court (Trial Division) would have exclusive jurisdiction if the Prime Minister exercised powers conferred by an order made pursuant to a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. As Prime Minister Chrétien did neither, under this interpretation, the Superior Court has jurisdiction to entertain Mr. Black's claim for declaratory relief.

[72] Under the second interpretation, advanced by the respondents, "an order" modifies "under" but not "by". Under this interpretation, the Federal Court would have exclusive jurisdiction if the respondents exercised powers conferred by a prerogative of the Crown or exercised powers conferred under an order made pursuant to a prerogative of the Crown. As the Prime Minister exercised a prerogative power, under this interpretation only the Federal Court (Trial Division) would have jurisdiction to grant declaratory relief, at least against him.

[73] The respondents submit that their interpretation is more plausible. They argue that the motions judge's interpretation of the Act is contrary to Parliament's intention to make the Federal Court the only forum for review of federal administrative action. They point out that under the motions judge's interpretation, if the prerogative were exercised pursuant to an order, it could only be reviewed by the Federal Court; but if the prerogative were exercised directly, that is, without an order, it could be reviewed by the Superior Court. The respondents contend that such a result is anomalous. And they point out that judicial review of administrative action does not depend on the existence of an order.

[74] One possible answer to the respondents' argument is that by defining "federal board, commission or other tribunal" in the way it did, Parliament intended that the exercise of the prerogative be immune from judicial review. However, accepting -- as I have -- that some prerogative powers are reviewable, the respondents' argument must yield to the wording and structure of s. 2(1) of the statute. A fair reading of s. 2(1) suggests that "an order made pursuant to" modifies both "by" and "under". This interpretation is supported by the parallel structure of s. 2(1) -- "by or under an Act of Parliament" and "by or under an order made pursuant to a prerogative of the Crown". The former phrase must mean by an Act of Parliament or under an Act of Parliament; similarly, the latter phrase must mean by an order made pursuant to a prerogative of the Crown or under an order made pursuant to a prerogative of the Crown.

[75] Even if the respondents' interpretation is plausible, it collides with the principle that clear and explicit statutory language is required to oust the jurisdiction of provincial superior courts, which, unlike the Federal Court, are courts of inherent general jurisdiction. The Supreme Court of Canada articulated this principle in Ordon Estate v. Grail, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, 166 D.L.R. (4th) 193, where Iacobucci and Major JJ. wrote at p. 474 S.C.R.:

> As a statutory court, the Federal Court of Canada has no jurisdiction except that assigned to it by statute. In light of the inherent general jurisdiction of the provincial superior courts, Parliament must use express statutory language where it intends to assign jurisdiction to the Federal Court. In particular, it is well established that the complete ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court (rather than simply concurrent jurisdiction with the superior courts) requires clear and explicit statutory wording to this effect. This latter principle finds early expression in the judgment in Peacock v. Bell (1677), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88:
>
> > And the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged.
>
> This basic principle continues to be applied up to the present day . . .

Section 18(1) of the Federal Court Act does not clearly and explicitly oust the jurisdiction of the Superior Court to grant declaratory relief in respect of the Prime Minister's exercise of the honours prerogative.

[76] Put differently, if Parliament has left a "gap" in its grant of statutory jurisdiction to the Federal Court, the institutional and constitutional position of provincial superior courts warrants granting them this residual jurisdiction over federal matters. See Canada (Human Rights Commission) v. Canadian Liberty Net, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, 50 C.R.R. (2d) 189. I therefore conclude that absent an order, the exercise of a prerogative power may be reviewable in the Superior Court. Thus, I agree with the motions judge and would dismiss the cross-appeal.

E. Conclusion

[77] I would dismiss the appeal with costs. I would also dismiss the cross-appeal with costs. I conclude by thanking counsel for their submissions. This case was exceptionally well-argued by both sides.

Appeal and cross-appeal dismissed.

Notes

Note 1: The 1968 Regulation of the Secretary of State (Respecting the Acceptance and Wearing by Canadian of Commonwealth and Foreign Orders, Decorations and Medals).

Note 2: The 1988 Policy of the Clerk of the Privy Council (Respecting the Awarding of an Order, Decoration and Medal by a Commonwealth or a Foreign Government).

23	*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62

Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62 (CanLII), [2010] 3 SCR 585

Date:	2010-12-23
File number:	33041
Other citations:	196 ACWS (3d) 98 — [2010] ACS no 62 — 96 CLR (3d) 1 — [2010] SCJ No 62 (QL) — JE 2011-18 — 56 CELR (3d) 1 — [2011] EXP 42 — 273 OAC 1 — AZ-50703926 — 327 DLR (4th) 527 — 410 NR 1
Citation:	Canada (Attorney General) v. TeleZone Inc., 2010 SCC 62 (CanLII), [2010] 3 SCR 585, <https://canlii.ca/t/2f3vt>, retrieved on 2022-02-28
Most recent unfavourable mention:	Sagkeeng First Nation v. Canada (Attorney General), 2015 FC 1113 (CanLII) [...] [27] However, even if the affidavit is admitted, Manuge, Huronne-Wendat FC and **TeleZone are distinguishable** as they all address situations where the issue to be decided was whether an action should be stayed on the basis that the relief sought should have been obtained by means of an application for judicial review. [...]

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

DATE: 20101223
DOCKET: 33041

BETWEEN:

Attorney General of Canada
Appellant
and
TeleZone Inc.
Respondent

CORAM: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 81)	Binnie J. (LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ. concurring)

Canada (Attorney General) *v.* TeleZone Inc., 2010 SCC 62, [2010] 3 S.C.R. 585

Attorney General of Canada *Appellant*

v.

TeleZone Inc. *Respondent*

Indexed as: Canada (Attorney General) *v.* TeleZone Inc.

2010 SCC 62

File No.: 33041.

2010: January 20, 21; 2010: December 23.

Present: Binnie, LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Courts — Jurisdiction — Provincial superior courts — Action brought against federal Crown in Ontario Superior Court of Justice seeking damages for breach of contract, negligence and unjust enrichment arising from decision rejecting application for telecommunications licence — Whether plaintiff entitled to proceed by way of action in Ontario Superior Court of Justice without first proceeding by way of judicial review in Federal Court — Federal Courts Act, R.S.C. 1985, c. F-7, ss. 17, 18; Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 21.

In 1995, Industry Canada issued a call for personal communication services licence applications, and released the policy statement within which potential service providers could shape their applications. The statement provided that Industry Canada would grant up to six licences on the basis of criteria it set out. T submitted an application, but when Industry Canada announced its decision, there were only four successful applicants and T was not among them. T filed an action against the Federal Crown in the Ontario Superior Court of Justice for breach of contract, negligence and unjust enrichment, and sought compensation for claimed losses of $250 million. It claimed that it was an express or implied term of the policy statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria. Since its application satisfied all the criteria, it says, Industry Canada must have considered other undisclosed factors when it rejected T's application. The Attorney General of Canada, relying on *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, challenged the jurisdiction of the Superior Court on the ground that the claim constituted a collateral attack on the decision, which is barred by the grant to the Federal Court, by s. 18 of the *Federal Courts Act*, of exclusive judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals. The Superior Court dismissed the objection on the ground that it was not plain and obvious that the claim would fail. The Court of Appeal upheld the decision, holding that *Grenier* was wrongly decided. In that court's view s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown, and s. 18 of the *Federal Courts Act* did not remove relief by way of an award of damages from the jurisdiction of superior courts.

Held: The appeal should be dismissed.

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary costs and complexity. The Court's approach should be practical and pragmatic with that objective in mind. Acceptance of *Grenier* would tend to undermine the effectiveness of the *Federal Courts Act* reforms of the early 1990s by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite Parliament's promise to give plaintiffs a choice of forum and to make provincial superior courts available to litigants "in all cases in which relief is claimed against the [federal] Crown" except as otherwise provided.

Apart from constitutional limitations, none of which are relevant here, Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. However, any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language. Nothing in the *Federal Courts Act* satisfies this test. The explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as

well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes the Attorney General's argument. The grant of exclusive jurisdiction to judicially review federal decision makers in s. 18 is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". This reservation or subtraction is expressed in s. 18 of the *Federal Courts Act* in terms of particular remedies. All the remedies listed are traditional administrative law remedies and do not include awards of damages. If a claimant seeks compensation, he or she cannot get it on judicial review, but must file an action.

The *Federal Courts Act* contains other internal evidence that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*. Section 18.1(2) imposes a 30-day limitation for judicial review applications. A 30-day cut off for a damages claimant would be unrealistic, as the facts necessary to ground a civil cause of action may not emerge until after 30 days have passed, and the claimant may not be in a position to apply for judicial review within the limitation period. While the 30-day limit can be extended, the extension is discretionary and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. Moreover, the grant of judicial review is itself discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention. This does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. Further, s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the lawfulness of administrative decisions could be assessed by the provincial superior court in the course of adjudicating a claim for damages.

The *Grenier* approach cannot be justified by the rule against collateral attacks. T's claim is not an attempt to invalidate or render inoperative the Minister's decision; rather, the decision and the financial losses allegedly consequent to it constitute the very foundation of the damages claim. In any event, given the statutory grant of concurrent jurisdiction in s. 17 of the *Federal Courts Act*, Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of a claim and this includes any attack on the validity of the Minister's decision where this issue is essential to the cause of action and where adjudicating the matter is a necessary step in disposing of the claim. While the doctrine of collateral attack may be raised by the Crown in the provincial superior court as a defence, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Similarly, while it may be open to the Crown, by way of defence, to argue that the government decision maker was acting under statutory authority which precludes compensation for consequent losses, this is not a matter of jurisdiction and can be dealt with as well by the provincial superior court as by the Federal Court.

It is true that the provincial superior courts and the Federal Court have a residual discretion to stay a damages claim if, in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. However, where a plaintiff's pleading alleges the elements of a private cause of action, the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that could be pursued on judicial review. If the plaintiff has pleaded a valid cause of action for damages, he or she should generally be allowed to pursue it.

Here, T's claim as pleaded is dominated by private law considerations. It is not attempting to nullify or set aside the decision to issue licences. Nor does it seek to deprive the decision of any legal effect. T's causes of action in contract, tort and equity are predicated on the finality of that decision excluding it from participation in the telecommunications market. The Ontario Superior Court of Justice has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating T's claim.

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Consolidated Maybrun Mines Ltd., 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706; *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476; *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568, rev'd 2010 SCC 64, [2010] 3 S.C.R. 639; *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244; *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123; *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182; *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, 1995 CanLII 3600 (FCA), [1995] 2 F.C. 694; *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, leave to appeal refused, [2009] 3 S.C.R. vii; *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860; *R. v. Al Klippert Ltd.*, 1998 CanLII 821 (SCC), [1998] 1 S.C.R. 737; *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437; *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] S.C.R. 821; *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626; *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84; *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863; *R. v. Morgentaler* (1984), 1984 CanLII 55 (ON CA), 41 C.R. (3d) 262; *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *Canada Labour Relations Board v. Paul L'Anglais Inc.*, 1983 CanLII 121 (SCC), [1983] 1 S.C.R. 147; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326; *Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181; *City of Manchester v. Farnworth*, [1930] A.C. 171; *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130; *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212; *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624.

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APPEAL from a judgment of the Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19, 303 D.L.R. (4th) 626, 245 O.A.C. 91, 86 Admin L.R. (4th) 163, 40 C.E.L.R. (3d) 183, [2008] O.J. No. 5291 (QL), 2008 CarswellOnt 7826, affirming a decision of Morawetz J. (2007), 2007 CanLII 52788 (ON SC), 88 O.R. (3d) 173, [2007] O.J. No. 4766 (QL), 2007 CarswellOnt 7847. Appeal dismissed.

Christopher M. Rupar, *Alain Préfontaine* and *Bernard Letarte*, for the appellant.

Peter F. C. Howard, *Patrick J. Monahan, Eliot N. Kolers* and *Nicholas McHaffie*, for the respondent.

The judgment of the Court was delivered by

[1] BINNIE J. — TeleZone Inc. claims it was wronged by the decision of the Minister of Industry Canada that rejected its application for a licence to provide telecommunications services. It seeks compensation in the Ontario Superior Court of Justice against the Federal Crown for its claimed losses of $250 million. It pleads breach of contract, negligence, and, in the alternative, unjust enrichment arising out of monies it had thrown away on the application.

[2] The Attorney General challenges the jurisdiction of the Superior Court to proceed with the claim for compensation unless and until TeleZone obtains from the Federal Court of Canada an order quashing the Minister's decision. TeleZone's claim, he says, constitutes an impermissible collateral attack on the Minister's order. Such a collateral attack is barred, he argues, by the grant to the Federal Court of *exclusive* judicial review jurisdiction in relation to decisions of all federal boards, commissions or other tribunals — *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 18. The Attorney General relies on a line of cases in the Federal Court of Appeal to this effect, giving particular prominence to *Canada v. Grenier*, 2005 FCA 348, [2006] 2 F.C.R. 287, hence the "*Grenier* principle".

[3] The definition of "federal board, commission or other tribunal" in the Act is sweeping. It means "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown" (s. 2), with certain exceptions, not relevant here, e.g., decisions of Tax Court judges. The federal decision makers that are included run the gamut from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between. The *Grenier* principle would shield the Crown from private law damages involving any of these people or entities in respect of losses caused by unlawful government decision making without first passing through the Federal Court. Such a bottleneck was manifestly not the intention of Parliament when it enacted the judicial review provisions of the *Federal Courts Act*.

[4] The *Grenier* principle would undermine s. 17 of the same Act granting concurrent jurisdiction to the provincial superior courts "in all cases in which relief is claimed against the Crown" as well as the grant of concurrent jurisdiction to the superior courts in s. 21 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, to deal with tort claims. A central issue in some (but not all) damages claims against the federal Crown will be the "lawfulness" of the government decision said to have caused the loss. *Grenier* would deny the provincial superior courts the jurisdiction to deal with that central issue in a damages claim pending before them. Adoption of the *Grenier* principle would relegate the provincial superior courts in such matters to a subordinate and contingent jurisdiction — not concurrent, i.e., subordinate to the Federal Court's decision on

judicial review and contingent on the Federal Court being willing to grant a discretionary order on judicial review in favour of the plaintiff.

[5] The Ontario Court of Appeal rejected the Attorney General's position, and in my respectful opinion, it was correct to do so. *Grenier* is based on what, in my respectful view, is an exaggerated view of the legal effect of the grant of judicial review jurisdiction to the Federal Court in s. 18 of the *Federal Courts Act*, which is best understood as a reservation or subtraction from the more comprehensive grant of concurrent jurisdiction in s. 17 "in all cases in which relief is claimed against the [federal] Crown". The arguments of the Attorney General, lacking any support in the express statutory language of s. 18, are necessarily based on suggested inferences and implications, but it is well established that inferences and implications are not enough to oust the jurisdiction of the provincial superior courts.

[6] In the present case, the Ontario Superior Court has jurisdiction over the parties, the subject matter and the remedies sought by TeleZone. That jurisdiction includes the authority to determine every legal and factual element necessary for the granting or withholding of the remedies sought unless such authority is taken away by statute. The *Federal Courts Act* does not, by clear and direct statutory language, oust the jurisdiction of the provincial superior courts to deal with these common law and equitable claims, including the potential "unlawfulness" of government orders. That being the case, the Superior Court has jurisdiction to proceed. The Ontario Superior Court ((2007), 2007 CanLII 52788 (ON SC), 88 O.R. (3d) 173) and the Ontario Court of Appeal (2008 ONCA 892, 94 O.R. (3d) 19) so held. I agree. I would dismiss the appeal.

I. Facts

[7] The alleged faults of the Minister of Industry Canada in dealing with the application under the *Radiocommunication Act*, R.S.C. 1985, c. R-2, are detailed in the amended Statement of Claim. For present purposes, we must take TeleZone's allegations as capable of proof.

[8] TeleZone was created in 1992 with the ultimate goal of obtaining a licence to provide personal communication services ("PCS") — essentially a cell phone network. In December 1992, as a preliminary step toward this goal, TeleZone obtained a licence to provide personal cordless telephone service. Between 1993 and 1995, TeleZone alleges that it kept Industry Canada appraised of its efforts to raise capital and acquire the necessary expertise to provide PCS services. TeleZone says that Industry Canada encouraged it to continue these efforts.

[9] In June 1995, Industry Canada issued a call for PCS licence applications (the "Call"), and released a document setting out the policy and procedural framework within which potential service providers could shape their applications (the "Policy Statement"). The Policy Statement provided that Industry Canada would grant up to six PCS licences on the basis of criteria it set out. TeleZone alleges that Industry Canada promoted a general policy in favour of awarding more rather than fewer licences to encourage competition and consumer choice. TeleZone governed itself accordingly.

[10] Article 9.1 of the Call created a three-step application process: (1) expressions of interest by potential service providers; (2) detailed applications by potential service providers; and (3) the announcement and awarding of PCS licences by Industry Canada. Articles 9.4 to 9.5.6 set out the criteria that would be used to evaluate the applications. The Call did not explicitly reserve to Industry Canada the right to consider additional factors. TeleZone alleges that Industry Canada was prohibited from considering any criteria beyond the factors set out in the Call.

[11] In September 1995, TeleZone submitted its detailed application for a PCS licence to Industry Canada, which was prepared, it says, at a cost of approximately $20 million. In December 1995, Industry Canada announced its decision regarding the PCS licence applications. There were only four successful applicants. TeleZone was not among them.

[12] The amended statement of claim pleads that it was either an express or implied term of the Policy Statement that Industry Canada would only issue fewer than six licences if fewer than six applications met the criteria (para. 12). TeleZone says that its application satisfied all the criteria in the Call. Accordingly, it says,

the Minister must have considered factors other than those in the Call when it rejected TeleZone's application (para. 17). These other factors were not disclosed to TeleZone.

[13] On the contractual branch of its case, TeleZone argues that the tendering process gave rise to a tendering contract (Contract A) which imposed an obligation on Industry Canada to act in accordance with the Call and the Policy Statement and to treat all applicants fairly and in good faith in awarding the PCS licences (R.F., at para. 133). TeleZone submits that the Crown breached "Contract A" by (1) granting fewer licences than it represented would be awarded; (2) not adhering to the requirements of the Call including the listed criteria (para. 134); and (3) failing to conform to a duty of care and a duty to act in good faith (para. 135).

[14] In its amended statement of claim, TeleZone does not seek to impugn the Minister's decision to award the licences. TeleZone does not seek a licence for itself or to remove licences from the successful applicants; it simply seeks damages. Accordingly, TeleZone submits that whether or not the licences were validly issued to the other applicants is irrelevant because under the Call and Policy Statement, there was still room for two more PCS licences and TeleZone only takes issue with the conduct of the Crown *vis-à-vis* TeleZone itself (para. 136).

II. Judicial History

A. *Ontario Superior Court of Justice (Morawetz J.) (2007), 2007 CanLII 52788 (ON SC), 88 O.R. (3d) 173*

[15] On a preliminary motion to dismiss TeleZone's action for want of jurisdiction, the Attorney General argued that TeleZone must first have the Minister's order quashed on judicial review in the Federal Court as a condition precedent to a civil suit against the Crown. TeleZone countered that its claim is based on causes of action that are distinct from an application for judicial review. It does not seek to set aside the licences. It seeks damages for negligence, breach of contract, or unjust enrichment. Morawetz J. dismissed the objection because, in his view, it was not plain and obvious that TeleZone's claim in the Superior Court would fail.

B. *Ontario Court of Appeal (Laskin, Borins and Feldman JJ.A.), 2008 ONCA 892, 94 O.R. (3d) 19*

[16] Borins J.A., writing for a unanimous court, held that s. 17 of the *Federal Courts Act* and s. 21 of the *Crown Liability and Proceedings Act* conferred concurrent jurisdiction on the superior courts and the Federal Court for claims against the Crown. The Ontario Superior Court, as a court of general and inherent jurisdiction, may entertain any cause of action in the absence of legislation or an arbitration agreement to the contrary. Section 18 of the *Federal Courts Act* removed from the superior courts' jurisdiction the prerogative writs and extraordinary remedies listed (para. 94). Since the relief sought by TeleZone (damages) is not listed in s. 18, he concluded that the Superior Court continues to have jurisdiction. The appeal was dismissed.

III. Relevant Enactments

[17] *Constitution Act, 1867*

> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Federal Courts Act, R.S.C. 1985, c. F-7

> **2.** (1) . . .
>
> "federal board, commission or other tribunal" means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such

person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;

17. (1) [Relief against the Crown] Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

(2) [Cases] Without restricting the generality of subsection (1), the Federal Court has concurrent original jurisdiction, except as otherwise provided, in all cases in which

. . .

(*b*) the claim arises out of a contract entered into by or on behalf of the Crown;

. . .

(*d*) the claim is for damages under the *Crown Liability and Proceedings Act*.

(5) [Relief in favour of Crown or against officer] The Federal Court has concurrent original jurisdiction

. . .

(*b*) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

18. (1) [Extraordinary remedies, federal tribunals] Subject to section 28, the Federal Court has exclusive original jurisdiction

(*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) [Remedies to be obtained on application] The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

18.1 (1) [Application for judicial review] An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

(2) [Time limitation] An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

(3) [Powers of Federal Court] On an application for judicial review, the Federal Court may

(*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal.

18.4 (1) [Hearings in summary way] Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

(2) [Exception] The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50

3. [Liability] The Crown is liable for the damages for which, if it were a person, it would be liable

(*a*) in the Province of Quebec, in respect of

(i) the damage caused by the fault of a servant of the Crown, or

(ii) the damage resulting from the act of a thing in the custody of or owned by the Crown or by the fault of the Crown as custodian or owner; and

(*b*) in any other province, in respect of

(i) a tort committed by a servant of the Crown, or

(ii) a breach of duty attaching to the ownership, occupation, possession or control of property.

8. [Saving in respect of prerogative and statutory powers] Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute, and, in particular, but without restricting the generality of the foregoing, nothing in those sections makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority exercisable by the Crown, whether in time of peace or of war, for the purpose of the defence of Canada or of training, or maintaining the efficiency of, the Canadian Forces.

21. (1) [Concurrent jurisdiction of provincial court] In all cases where a claim is made against the Crown, except where the Federal Court has exclusive jurisdiction with respect to it, the superior court of the province in which the claim arises has concurrent jurisdiction with respect to the subject-matter of the claim.

IV. Analysis

[18] This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

[19] If a claimant seeks to set aside the order of a federal decision maker, it will have to proceed by judicial review, as the *Grenier* court held. However, if the claimant is content to let the order stand and instead seeks compensation for alleged losses (as here), there is no principled reason why it should be forced to detour to the Federal Court for the extra step of a judicial review application (itself sometimes a costly undertaking) when that is not the relief it seeks. Access to justice requires that the claimant be permitted to pursue its chosen remedy directly and, to the greatest extent possible, without procedural detours.

[20] The Attorney General argues that a detour to the Federal Court is necessary because the damages action represents a "collateral attack" prohibited by "inferences" derived from s. 18 of the *Federal Courts Act*. His argument, in a nutshell, is:

> Simply pleading damages, or some other remedy that is not available by way of judicial review in the Federal Court, should not be accepted as a means to bypass the intention of Parliament that review of federal administrative decisions must take place in the Federal Court.
>
> (A.G. Factum,[1] at para. 4)

[21] The Attorney General accepts that judicial review is not required "for all proceedings that in any manner involve a decision or conduct of a federal board, commission or tribunal" (para. 29). However, the detour is required for claims that engage, directly or indirectly, the "validity and unlawfulness" of such decisions (para. 2). "Lawfulness" is a broad term. The Attorney General uses "invalid" and "unlawful" conjunctively (e.g., at para. 49). He seems to use the term "unlawful" to cover virtually any government order that could lay the basis

for a finding of fault in the private law sense although he excludes such bureaucratic actions as providing erroneous information, performing a "physical task or activity" negligently, or breaching a duty to warn (Factum, at para. 50).

[22] The Attorney General's concern is that permitting different damages claims to proceed in different provinces before a variety of superior court judges arising out of the same or related federal government decisions would re-introduce the spectre of inconsistency and uncertainty across Canada which the enactment of the *Federal Courts Act* was designed to alleviate. However, this concern must have been considered by Parliament when it granted concurrent jurisdiction in all cases in which relief is claimed against the federal Crown to the superior courts. Undoubtedly, the juxtaposition of ss. 17 and 18 of the *Federal Courts Act* creates a certain amount of subject matter overlap with respect to holding the federal government to account for its decision making. This degree of overlap is inherent in the legislative scheme designed to provide claimants with "convenience" and "a choice of forum" in the provincial courts (see statement of the Minister of Justice in Parliament, *House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414, reproduced below, at para. 58).

[23] I do not interpret Parliament's intent, as expressed in the text, context and purposes of the *Federal Courts Act*, to require an awkward and duplicative two-court procedure with respect to all damages claims that directly or indirectly challenge the validity or lawfulness of federal decisions. Such an outcome would have to be compelled by clear and explicit statutory language. Neither the *Federal Courts Act* nor the *Crown Liability and Proceedings Act* do so, in my opinion. With respect, not only is such language absent, but the reasonable inferences from both statutes, especially the concurrent jurisdiction in all cases where relief is claimed against the Crown granted to the provincial superior courts, leads to the opposite conclusion.

A. *The Nature of Judicial Review*

[24] The Attorney General correctly points to "the substantive differences between public law and private law principles" (Factum, at para. 6). Judicial review is directed at the legality, reasonableness, and fairness of the procedures employed and actions taken by government decision makers. It is designed to enforce the rule of law and adherence to the Constitution. Its overall objective is good governance. These public purposes are fundamentally different from those underlying contract and tort cases or causes of action under the *Civil Code of Québec*, R.S.Q., c. C-1991, and their adjunct remedies, which are primarily designed to right private wrongs with compensation or other relief.

[25] Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that *do* occur will lay the basis for a private cause of action. Subordinate legislative and adjudicative functions do not in general attract potential government liability for damages. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

[26] The focus of judicial review is to quash invalid government decisions — or require government to act or prohibit it from acting — by a speedy process. A bookstore, for example, will have a greater interest in getting its foreign books through Canada Customs — despite ill-founded allegations of obscenity — than in collecting compensation for the trifling profit lost on each book denied entry (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38). Thus s. 18.1 of the *Federal Courts Act* establishes a summary procedure with a 30-day time limit. There is no pre-hearing discovery, apart from what can be learned through affidavits and cross-examination. The applications judge hears no *viva voce* evidence. Damages are not available. Judicial review suits the litigant who wishes to strike quickly and directly at the action (or inaction) it complains about. A damages claimant, on the other hand, will often be unaware of the nature or extent of its losses in a 30-day time frame, and may need pre-trial discovery to either make its case or find out it has none.

[27] The question must therefore be asked: What is the practical benefit to a litigant who wants compensation rather than a reversal of a government decision to undergo the *Grenier* two-court procedure? TeleZone, for example, would acquire no practical benefit from a judicial review application. Its primary complaint is for damages arising from the breach of an alleged tendering contract. It no longer seeks the benefit of the contract (or the PCS licence). It seeks compensation for substantial costs thrown away and lost profits. The Crown does not argue that the tendering contract (if it was made) was *ultra vires*, or that the alleged breach (if it occurred) was mandated by statutory authority. The argument, instead, is that TeleZone's claim constitutes a

collateral attack on the ministerial order under the *Radiocommunication Act* that failed to award it a PCS licence. But in TeleZone's circumstances, judicial review of the Minister's decision would not address the claimed harm and would seem to offer little except added cost and delay.

[28] Negligence is also alleged by TeleZone. Tort liability, of course, is based on fault, not invalidity. As the Court made clear many years ago in *The Queen in Right of Canada v. Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC), [1983] 1 S.C.R. 205, at pp. 222-25, breach of a statute is neither necessary nor is it sufficient to ground a private cause of action. It is not necessary because a government decision that is perfectly valid may nevertheless give rise to liability in contract (*Agricultural Research Institute of Ontario v. Campbell-High* (2002), 2002 CanLII 10432 (ON CA), 58 O.R. (3d) 321 (C.A.), leave to appeal refused, [2003] 1 S.C.R. vii) or tort (*Ryan v. Victoria (City)*, 1999 CanLII 706 (SCC), [1999] 1 S.C.R. 201).

[29] Nor is a breach of statutory power necessarily sufficient. Many losses caused by government decision making do not give rise to any cause of action known to the law. As the Attorney General correctly points out, "[e]ven if a discretionary decision of a federal board, commission or tribunal has been declared invalid or unlawful, that in itself does not create a cause of action in tort or under the Quebec regime of civil liability" (Factum, at para. 28).

[30] In *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, Charron J. wrote that "[a] person accused of a criminal offence enjoys a private right of action when a prosecutor acts maliciously in fraud of his or her prosecutorial duties with the result that the accused suffers damage. However, the civil tort of malicious prosecution is not an after-the-fact judicial review of a Crown's exercise of prosecutorial discretion" (para. 7 (emphasis added)). H. Woolf, J. Jowell and A. Le Sueur point out in *De Smith's Judicial Review* (6th ed. 2007), that "[u]nlawfulness (in the judicial review sense) and negligence are conceptually distinct" (pp. 924-25). Put another way, while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

[31] The main difficulty in suing government for losses arising out of statutory decisions is often not the public law aspects of the decision but the need to identify a viable private cause of action, and thereafter to meet such special defences as statutory authority. In *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, for example, it was alleged that the conduct of the Registrar of mortgage brokers contributed significantly to the loss of some claimant investors, but it was held that there was insufficient proximity between the Registrar and the claimants to give rise to a duty of care. See also *Edwards v. Law Society of Upper Canada*, 2001 SCC 80, [2001] 3 S.C.R. 562; *Holland v. Saskatchewan*, 2008 SCC 42, [2008] 2 S.C.R. 551, at para. 8.

[32] The enactment of the *Federal Court Act*, S.C. 1970-71-72, c. 1, and the subsequent amendments in 1990 were designed to enhance government accountability as well as to promote access to justice. The legislation should be interpreted in such a way as to promote those objectives. The *Grenier* approach does not do so, in my respectful opinion, as will now be discussed.

B. *The Grenier Case*

[33] The shadow of the *Grenier* case perhaps extends beyond what was intended by the *Grenier* court itself.

[34] *Grenier* did not concern a conflict between the Federal Court and a provincial superior court. It concerned which of two alternative Federal Court modes of procedure should be pursued by an inmate of a federal penitentiary. He complained of the adverse effects of administrative segregation for 14 days pursuant to the *Corrections and Conditional Release Act*, S.C. 1992, c. 20. The inmate did not seek judicial review of the decision of the head of the institution to place him in administrative segregation. Instead, after waiting three years, he brought an action for damages against the federal Crown under s. 17 of the *Federal Courts Act*. At trial, the administrative segregation was found to be arbitrary. He was awarded $5,000 in compensatory and exemplary damages.

[35] On appeal, the Attorney General objected that the inmate should have sought judicial review of his administrative segregation under s. 18 of the Act before bringing his action for damages under s. 17 of the Act. The argument, in essence, was that the *Federal Courts Act* has several procedural doors and the inmate had tried to

enter the wrong one. He knocked on s. 17 whereas he should have gone through s. 18. The Federal Court of Appeal agreed, taking the view that "Parliament assigned the exercise of reviewing the lawfulness of the decisions of federal agencies to a single court, the Federal Court. This review must be exercised under section 18, and only by filing an application for judicial review" (para. 24 (emphasis added)). The court reasoned that even within the same court, the s. 17 action for damages constituted an impermissible collateral attack on the decision of the prison authority (paras. 32-33) because the trial court "had to review the lawfulness of the institutional head's decision . . . and set it aside" (para. 34), which could only be done under s. 18 of the same Act. It was thought that the judicial review jurisdiction of the Federal Court, with its unique statutory procedure, must be protected from erosion. Such a conclusion, in the *Grenier* court's view, was consistent with *R. v. Consolidated Maybrun Mines Ltd.*, 1998 CanLII 820 (SCC), [1998] 1 S.C.R. 706.

[36] Moreover, according to the *Grenier* court, it made no difference that the administrative segregation Mr. Grenier complained of had long since been served. "[A] decision of a federal agency, such as the one by the institutional head in this case", the court reasoned, "retains its legal force and authority, and remains juridically operative and legally effective so long as it has not been invalidated" (para. 19). Accordingly, the prison order, even in its afterlife, was still a complete answer to the s. 17 damages action.

[37] More recently, the Federal Court of Appeal itself seems to be losing some enthusiasm for *Grenier*'s "separate silos" approach. In *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215, [2009] 1 F.C.R. 476, the court allowed an application for judicial review to be converted into an action for damages which was also certified as a class action, Sexton J.A. commenting that "[s]ometimes, such as the case at bar, it may prove too cumbersome to initiate a separate action for damages either concurrently with, or subsequent to, an application for judicial review" (para. 50).

[38] More recently in *Parrish & Heimbecker Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2008 FCA 362, [2009] 3 F.C.R. 568 (which, on appeal, was heard concurrently in this Court with the present appeal), Sharlow J.A., dissenting, took the view that "the *Grenier* principle was developed without taking into account certain aspects of the statutory scheme governing federal Crown litigation [including the *Crown Liability and Proceedings Act*] that in my view cast doubt on the *Grenier* analysis" (para. 41).

[39] At the same time, some provincial courts have accepted the *Grenier* approach: see, e.g., *Donovan v. Canada (Attorney General)*, 2008 NLCA 8, 273 Nfld. & P.E.I.R. 116; *Lidstone v. Canada (Minister of Canadian Heritage)*, 2008 PESCTD 6, 286 Nfld. & P.E.I.R. 244. Most provincial courts, however, have either not followed *Grenier* or distinguished it: see, e.g., *River Valley Poultry Farm Ltd. v. Canada (Attorney General)*, 2009 ONCA 326, 95 O.R. (3d) 1, at para. 30; *Los Angeles Salad Co. v. Canadian Food Inspection Agency*, 2009 BCSC 109, 92 B.C.L.R. (4th) 379, at para. 24; *Leroux v. Canada Revenue Agency*, 2010 BCSC 865, 2010 D.T.C. 5123, at para. 54; see also *Fantasy Construction Ltd., Re*, 2007 ABCA 335, 89 Alta. L.R. (4th) 93, at para. 43; *Genge v. Canada (Attorney General)*, 2007 NLCA 60, 270 Nfld. & P.E.I.R. 182, at para. 34.

C. *The Attorney General's Expansive View of the Grenier Decision*

[40] According to the Attorney General, *Grenier* denied the *jurisdiction* of either the Federal Court or a provincial superior court to proceed to adjudicate a damages claim without first passing through the "unique" judicial review procedure set out in s. 18 of the *Federal Courts Act* if the "lawfulness" of an administrative decision or order is in issue. The Attorney General uses the expression "invalidity or lawfulness" which, he points out, may extend even to contract claims. He cites *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, 1995 CanLII 3600 (FCA), [1995] 2 F.C. 694, at pp. 703-6, where the Federal Court of Appeal concluded that the exercise by a Minister of a statutory power to seek tenders and to enter into contracts for the lease of land by the Crown could be subject to judicial review. See also *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, 314 D.L.R. (4th) 340, at paras. 21-25, leave to appeal refused, [2009] 3 S.C.R. vii. However, in this Court's decision in *Martel Building Ltd. v. Canada*, 2000 SCC 60, [2000] 2 S.C.R. 860, a tendering case, although in the end the claim was dismissed, there was no suggestion in the judgment that judicial review was a necessary preliminary step to the recovery of contract damages against the Crown.

[41] Moreover, I do not think the Attorney General's position is supported by *Consolidated Maybrun* or its companion case of *R. v. Al Klippert Ltd.*, 1998 CanLII 821 (SCC), [1998] 1 S.C.R. 737. Those cases dealt with the narrow issue of whether a person facing penal charges for failing to comply with an

administrative order can challenge the validity of the order by way of defence despite failure to take advantage of the appeal process provided for by the law under which the order was issued. In both cases, the Court paid close attention to the regulatory statute under which an order is made and concluded that to permit such a defence "would encourage conduct contrary to the [regulatory] Act's objectives and would tend to undermine its effectiveness" (*Consolidated Maybrun*, at para. 60). These cases thus stand for a rather nuanced view of where collateral attack is (or is not) permissible. The outcome largely depends on the court's view of the statute under which an order is made "and must be answered in light of the legislature's intention as to the appropriate forum" for resolving the dispute (*Consolidated Maybrun*, at para. 52). In my respectful view, having regard to these policy considerations, it would be adherence to the *Grenier* approach that "would tend to undermine [the] effectiveness" of the *Federal Courts Act* reforms which had as one of their objectives making the provincial superior courts an equally "appropriate forum" for resolving in an efficient way financial claims against the federal Crown.

D. *The Jurisdiction of the Provincial Superior Courts*

[42] What is required, at this point of the discussion, is to remind ourselves of the rule that any derogation from the jurisdiction of the provincial superior courts (in favour of the Federal Court or otherwise) requires clear and explicit statutory language: "[The] ouster of jurisdiction from the provincial superior courts in favour of vesting exclusive jurisdiction in a statutory court . . . requires clear and explicit statutory wording to this effect": *Ordon Estate v. Grail*, 1998 CanLII 771 (SCC), [1998] 3 S.C.R. 437, at para. 46; see also *Pringle v. Fraser*, 1972 CanLII 14 (SCC), [1972] S.C.R. 821, at p. 826; *Canada (Human Rights Commission) v. Canadian Liberty Net*, 1998 CanLII 818 (SCC), [1998] 1 S.C.R. 626, at para. 38. The Attorney General's argument rests too heavily on what he sees as the negative implications to be read into s. 18.

[43] The oft-repeated incantation of the common law is that "nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so; and, on the contrary, nothing shall be intended to be within the jurisdiction of an Inferior Court but that which is so expressly alleged": *Peacock v. Bell* (1667), 1 Wms. Saund. 73, 85 E.R. 84, at pp. 87-88. In contrast, the jurisdiction of the Federal Court is purely statutory.

[44] The term "jurisdiction" simply is shorthand for the collection of attributes that enables a court or tribunal to issue an enforceable order or judgment. A court has jurisdiction if its authority extends to "the person and the subject matter in question and, in addition, has authority to make the order sought": *Mills v. The Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863, *per* McIntyre J., at p. 960, quoting Brooke J.A. in *R. v. Morgentaler* (1984), 1984 CanLII 55 (ON CA), 41 C.R. (3d) 262, at p. 271, and *per* Lamer J., dissenting, at p. 890; see also *R. v. Rahey*, 1987 CanLII 52 (SCC), [1987] 1 S.C.R. 588, at p. 603; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 15; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765. The Attorney General does not deny that the Superior Court possesses *in personam* jurisdiction over the parties, or dispute the Superior Court's authority to award damages. The dispute centres on subject matter jurisdiction.

[45] It is true that apart from constitutional limitations (see, e.g., *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307, and cases under s. 96 of the *Constitution Act, 1867*, which are not relevant here), Parliament may by statute transfer jurisdiction from the superior courts to other adjudicative bodies including the Federal Court. It did so, for example, with respect to the judicial review of federal decision makers: *Canada Labour Relations Board v. Paul L'Anglais Inc.*, 1983 CanLII 121 (SCC), [1983] 1 S.C.R. 147, at p. 154. However, the onus lies here on the Attorney General to establish the existence and extent of such a transfer of jurisdiction in statutory terms that are clear, explicit and unambiguous.

[46] Nothing in the *Federal Courts Act* satisfies this test. Indeed, as mentioned, the explicit grant to the provincial superior courts of concurrent jurisdiction in claims against the Crown in s. 17 of that Act (as well as s. 21 of the *Crown Liability and Proceedings Act*) directly refutes it. As Sharlow J.A., dissenting, pointed out in *Parrish & Heimbecker Ltd.* (appeal allowed and judgment released concurrently herewith, 2010 SCC 64, [2010] 3 S.C.R. 639), s. 8 of the *Crown Liability and Proceedings Act*, which codifies the defence of statutory authority, is evidence that Parliament envisaged that the assessment of lawfulness would be made by the provincial superior court in the course of adjudicating a claim for damages (para. 39).

E. *Claimed "Inferences" From Section 18 of the Federal Courts Act*

[47] An application for judicial review under the *Federal Courts Act* combines an allegation that a federal authority has acted contrary to the substantive principles of public law, along with a claim for one of the kinds of relief listed in s. 18(1). It is only this procedure that is in the exclusive jurisdiction of the Federal Court. As the Court recently observed in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, "[t]he genesis of the *Federal Courts Act* lies in Parliament's decision in 1971 to remove from the superior courts of the provinces the jurisdiction over prerogative writs, declarations, and injunctions against federal boards, commissions and other tribunals" (para. 34). Section 18 does *not* say that a dispute over the lawfulness of exercise of statutory authority cannot be assessed in the course of a trial governed by the *Crown Liability and Proceedings Act* brought in the provincial superior court or pursuant to s. 17 of the *Federal Courts Act* itself.

[48] The Attorney General argues that a "remedies" oriented approach, similar to the view adopted by the Ontario Court of Appeal in this case, results in "a rigid, formalistic and literal interpretation" of s. 18 (Factum, at para. 66) and gives insufficient weight to context and, in particular, to the intention of Parliament. I agree that the context and Parliamentary purpose are essential to a proper interpretation of s. 18, but I do not think a broad and contextual approach assists the Attorney General's argument.

(i) The Parliamentary Context

[49] The Parliamentary debates in 1971 took place in the context of the enormous growth of federal regulatory regimes, the perceived need for a "national perspective" on judicial review, and a concern about inconsistent supervision of federal public bodies by various provincial superior courts across the country (see D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 2:4100). Thus, Parliament radically transformed the old Exchequer Court into a new Federal Court and crafted a new procedure which resulted in the Federal Court's supervisory jurisdiction over federal decision makers.

[50] The Minister of Justice in 1970 emphasized that Parliament's concern was supervision (not compensation) and in particular its concern was about fragmented judicial review of federal adjudicative tribunals. One provincial superior court might uphold as valid an important decision, e.g., by the National Energy Board, which a superior court in a different province might decide to quash. Thus:

> This multiple supervision [by the provincial courts], with a lack of consistent jurisprudence and application, can work serious hardship not only on the boards and commissions but on those who appear before them. . . . It is for this reason . . . that the conclusion was reached that this superintending jurisdiction should be vested in a single court that enjoyed the same nation wide jurisdiction as the federal boards, commissions and tribunals themselves. The bill is therefore designed to create a single and uniform basis of superintending jurisdiction in relation to federal boards and commissions and to place them on the same footing in this regard as provincial boards and commissions.
>
> (*House of Commons Debates*, 2nd Sess., 28th Parl. March 25, 1970, at pp. 5470-71; see also A.G. Factum, at para. 79; *Khosa*, at para. 34.)

However, the very broad statutory definition in s. 2 of "federal board, commission or other tribunal" goes well beyond what are usually thought of as "boards and commissions" and its very breadth belatedly (and perhaps unintentionally) precipitated the *Grenier* controversy about how to prioritize the overlapping subject matter shared by judicial review and the trial of common law claims for compensation based on fault. The grant of concurrent jurisdiction in s. 17 does not negate the possibility of inconsistency, but Parliament has agreed to live with the possibility in the interest of easier access to justice.

(ii) The Statutory Text

[51] The grant of *exclusive* jurisdiction to judicially review federal decision makers is found in s. 18 of the *Federal Courts Act* and is expressed in terms of particular remedies:

> **18.** (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
>
> (*a*) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(*b*) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (*a*), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

. . .

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

[52] All of the remedies listed in s. 18(1)(*a*) are traditional administrative law remedies, including the four prerogative writs — *certiorari*, prohibition, *mandamus* and *quo warranto* — and declaratory and injunctive relief in the administrative law context. Section 18 does not include an award of damages. If a claimant seeks compensation, he or she cannot get it on judicial review. By the same token, the plaintiff in a damages action is not entitled to add a supplementary claim for a declaration or injunction to prevent the government from acting on a decision said to be tainted by illegality. That is the domain of the Federal Court.

(iii) Reading the Act as a Whole

[53] There is much internal evidence in ss. 18 and 18.1 of the *Federal Courts Act* to indicate that Parliament could not have intended judicial review to have the gatekeeper function envisaged by *Grenier*.

[54] As mentioned, the 30-day limitation period for judicial review applications under s. 18.1(2) of the *Federal Courts Act* is one such indication. Such a short limitation is consistent with a quick and summary judicial review procedure — but not a damages action. TeleZone's action in Ontario would have a six-year limitation. A 30-day cut off for a damages claimant would be unrealistic. The claimant may not be in a position to apply for judicial review within the limitation period. The facts necessary to ground a civil cause of action may not emerge until after 30 days have passed.

[55] The 30-day limit can be extended by order of a Federal Court judge (s. 18.1(2)) but the extension is discretionary, and would subordinate the fate of a civil suit brought in a superior court to the discretion of a Federal Court judge ruling upon a request for an extension of time for reasons that have to do with public law concerns, not civil damages. In practical terms, the effect of the *Grenier* argument would be to impose a discretionary limitation period (determined by the Federal Court) on actions for damages against the Crown in a provincial superior court, an outcome which, in my opinion, Parliament cannot have intended. Apart from anything else, it undermines s. 39 of the *Federal Courts Act*, which provides that, ordinarily, claims against the Crown in the Federal Court are subject to the limitation period applicable "between subject and subject" in the province where the claim arose, or six years in respect of a "cause of action arising otherwise than in a province".

[56] As recently affirmed in *Khosa*, the grant of relief on judicial review is in its nature discretionary and may be denied even if the applicant establishes valid grounds for the court's intervention:

> . . . the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief. Whether or not the court should exercise its discretion in favour of the application will depend on the court's appreciation of the respective roles of the courts and the administration as well as the "circumstances of each case". [para. 36]

See also *Harelkin v. University of Regina*, 1979 CanLII 18 (SCC), [1979] 2 S.C.R. 561, at pp. 592-93; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, 1991 CanLII 82 (SCC), [1991] 1 S.C.R. 326, at p. 372. Such an approach does not align well with the paradigm of a common law action for damages where, if the elements of the claim are established, compensation ought generally to follow as a matter of course. In judicial review, "the discretionary nature of the courts' supervisory jurisdiction reflects the fact that unlike private law, its orientation is not, and never has been, directed exclusively to vindicating the rights of individuals" (Brown and Evans, at para. 3:1100).

(iv) The 1990 Amendments to the *Federal Courts Act*

[57] The current version of s. 17 of the *Federal Courts Act*, which only came into force on February 1, 1992, allows parties to institute civil claims against the Federal Crown in the superior courts of the provinces. For ease of reference, I repeat the operative language:

> **17.** (1) Except as otherwise provided in this Act or any other Act of Parliament, the Federal Court has concurrent original jurisdiction in all cases in which relief is claimed against the Crown.

The grant of jurisdiction is thus framed in terms of relief, i.e.,"all cases in which relief is claimed" except as otherwise provided. Section 18(1) otherwise provides in relation to the specific forms of relief listed therein. Section 18(3) of the Act expressly provides that *remedies in the nature of judicial review* "may be obtained only on an application for judicial review made under section 18.1". The *Federal Courts Act* lists no other relevant exclusions from s. 17, and we have not been referred to any other Act of Parliament having a bearing on this subject.

[58] As the Minister of Justice stated in 1989 before the Legislation Committee examining Bill C-38, which resulted in, among other changes, today's version of s. 17:

> [W]e have made provision in the bill whereby ordinary common law and civil law actions for relief against the federal Crown, which are presently the exclusive jurisdiction of the Federal Court, may also be heard by provincial courts. Such provision acknowledges the fact that the Federal Court possesses no unique expertise in areas of ordinary contract and tort law. [The Minister here went on to describe the practical jurisdictional and procedural problems created by the Federal Court's prior exclusive jurisdiction over federal authorities.]
>
> (*Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-38*, No. 1, 2nd Sess., 34th Parl., November 23, 1989, at pp. 14-15)

On second reading of the Bill, the Minister again emphasized that the purpose of the amendments was to allow the plaintiffs to sue the federal Crown in either the provincial superior courts or the Federal Court:

> For example, a person should be able to sue the Crown in a suitably convenient court for breach of contract to purchase goods or for negligent driving by a Crown employee that causes injuries to another motorist. At the moment, such actions can only be brought in the Federal Court. However, it is not as available as provincial courts.
>
> . . .
>
> Moreover, for both citizen and lawyer alike, provincial courts, including their procedures and personnel, are much more familiar.
>
> Therefore, the Federal Court is often not the most convenient one for the private litigant. With this in mind, the government has proposed that both the provincial courts and the Federal Court share jurisdiction with respect to such actions, thereby generally giving a plaintiff a choice of forum. [Emphasis added.]
>
> (*House of Commons Debates*, 2nd Sess., 34th Parl., November 1, 1989, at p. 5414)

[59] The effect of the argument of the Attorney General, if accepted, would be to undermine the purpose and intended effect of the 1990 amendment by retaining in the Federal Court exclusive jurisdiction over a key element of many causes of action proceeding in the provincial courts despite the promise to give plaintiffs a "choice of forum" and to make available relief in the provincial superior courts that may be more "familiar" to litigants.

F. *The Doctrine of Collateral Attack*

[60] The Attorney General contends that to permit TeleZone to proceed with its claim in the provincial superior court in the absence of prior judicial review would be to allow an impermissible "collateral attack" on the Minister's decision. The Court has described a collateral attack as

> an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.
>
> (*Wilson v. The Queen*, 1983 CanLII 35 (SCC), [1983] 2 S.C.R. 594, at p. 599)

[61] The rule is a judicial creation (which must therefore yield to a contrary legislative enactment) based on general considerations related to the administration of justice, as explained in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 72:

> The fundamental policy behind the rule against collateral attack is to "maintain the rule of law and to preserve the repute of the administration of justice" (*R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, at p. 349). The idea is that if a party could avoid the consequences of an order issued against it by going to another forum, this would undermine the integrity of the justice system. Consequently, the doctrine is intended to prevent a party from circumventing the effect of a decision rendered against it. [Emphasis added.]

[62] In *R. v. Litchfield*, 1993 CanLII 44 (SCC), [1993] 4 S.C.R. 333, the criminal case referred to in *Garland*, the Court declined to apply the rule against collateral attack. In *Garland* itself, class action plaintiffs brought a claim against a gas company seeking restitution on the grounds of unjust enrichment of late payment penalties previously approved by the Ontario Energy Board. In its defence, the gas company argued that the claim for restitution was a collateral attack on the Board's order. The defence failed.

[63] I do not think the Attorney General's collateral attack argument can succeed on this appeal for three reasons. Firstly, as Borins J.A. pointed out in his scholarly judgment, the doctrine of collateral attack may be raised by the Attorney General in the provincial superior court as a defence if he or she believes that, in the particular circumstances, to do so is appropriate. However, the possible availability of the defence is not an argument against provincial superior court jurisdiction. Nor does it justify inserting the Federal Court into every claim for damages predicated on an allegation that the government's decision that caused the loss was "invalid or unlawful".

[64] Secondly, TeleZone is not seeking to "avoid the consequences of [the ministerial] order issued against it" (*Garland*, at para. 72). On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim. This was the result in *Garland* itself, where Iacobucci J. held for the Court:

> Based on a plain reading of this rule, the doctrine of collateral attack does not apply in this case because here the specific object of the appellant's action is not to invalidate or render inoperative the Board's orders, but rather to recover money that was illegally collected by the respondent as a result of Board orders. Consequently, the collateral attack doctrine does not apply. [Emphasis added; para. 71.]

[65] Similarly in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J. declined to apply the collateral attack doctrine in a case arising out of a grievance arbitration where CUPE sought to challenge the underlying facts of a conviction of one of its members for sexual assault. Arbour J. reasoned that the Union's argument was "an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does" (para. 34).

[66] Thirdly, the Attorney General's argument fails even if one takes a more expansive view of the doctrine of collateral attack, as does Professor David Mullan:

> The cause of action [in *Garland*] depended necessarily on establishing the invalidity of the Board's order on which the utility was relying in collecting interest. If the order had been valid, there would have been no cause of action. This was in every sense a collateral attack on the Board's orders. Collateral attack is not and never has been confined to situations where the challenge is by way of resistance to the enforcement of an order. It is also implicated in situations where someone, in asserting a civil claim for

> monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based. . . . [Emphasis added.]
>
> (D. J. Mullan, "Administrative Law Update — 2008-2009", prepared for the Continuing Legal Education conference, *Administrative Law Conference—2009*, October 2009, at p. 1.1.22.)

In Professor Mullan's view, the Court in *Garland* should have taken what he sees as the more principled route of applying the factors in *Consolidated Maybrun* to determine whether the collateral attack was of a permissible variety. In that case, as set out in the judgment of L'Heureux-Dubé J., the appropriate factors to apply in determining whether the Court is confronted with an impermissible collateral attack on an administrative order are (1) the wording of the statute from which the power to issue the order derives; (2) the purpose of the legislation; (3) the availability of an appeal; (4) the nature of the collateral attack in light of the tribunal's expertise and *raison d'être* (including whether "the legislature intended to confer jurisdiction to hear and determine the question raised"); and (5) the penalty on a conviction for failing to comply with the order (paras. 45, 50-51 and 62). These factors have also been applied in the civil context; see, generally, K. Horsman and G. Morley, eds., *Government Liability: Law and Practice* (loose-leaf), at p. 11-9.

[67] Judicial doctrine necessarily yields to a contrary statutory enactment. Accepting, as Professor Mullan puts it, at p. 1.1.22, that the rule against collateral attack may be "implicated in situations where someone, in asserting a civil claim for monetary or other relief, needs to attack a law or order that the defendant is advancing as justification for the actions on which the plaintiff's claim is based", the s. 17 statutory grant of concurrent jurisdiction again defeats the Attorney General's submission. This is because the claimant's "need to attack a law or order" is essential to its cause of action, and adjudication of that allegation (even if raised by way of reply) is a necessary step in disposing of the claim. Parliament has stated that provincial superior courts possess the concurrent necessary jurisdiction to dispose of the whole of such a claim, not just part of it.

[68] In summary, I agree with Borins J.A. that the *Grenier* approach cannot be justified by the rule against collateral attack.

G. *The Defence of Statutory Authority*

[69] It would also be open to the Crown, by way of defence to a damages action, to argue that the government decision maker was acting under a statutory authority which precludes compensation for consequent losses. This, again, is a matter of defence, not jurisdiction. It is a hurdle facing any claimant. Governments make discretionary decisions all the time which will inflict losses on people or businesses without conferring any cause of action known to the law.

[70] In a case of nuisance, for example, the claimant property owner may have all the elements of a good common law action in nuisance yet be defeated by the defence that the government was authorized to do what it did and that collateral damage to the claimant was an inevitable result of the authority so provided. See, e.g., P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000), at p. 139, and Horsman and Morley, at p. 6-41.

[71] However, as stated earlier, the defence of "statutory authority" will not always provide a complete answer to a damages claim. In some cases, the outcome may depend on whether the statute either explicitly or implicitly authorized the act that caused the harm. In *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, Sopinka J. pointed out, referring to the dictum of Viscount Dunedin in *City of Manchester v. Farnworth*, [1930] A.C. 171 (H.L.), that there may be "alternate methods of carrying out the work [that would have avoided the loss]. The mere fact that one is considerably less expensive will not avail. If only one method is practically feasible, it must be established that it was practically impossible to avoid the nuisance" (p. 1226). Reference should also be made to the qualifying observation of what is "practically impossible" made by Viscount Dunedin and quoted by Sopinka J., at p. 1224:

> The onus of proving that the result is inevitable is on those who wish to escape liability for nuisance, but the criterion of inevitability is not what is theoretically possible but what is possible according to the state of scientific knowledge at the time, having also in view a certain common sense appreciation, which cannot be rigidly defined, of practical feasibility in view of situation and of expense. [Emphasis added.]

This caveat, also quoted by Wilson J., at p. 1213 of *Tock*, was the subject of some disagreement on the Court, an issue that need not detain us. The issue of statutory authority does not go to the jurisdiction of the provincial superior courts. That is all that needs to be decided here.

[72] It is sufficient to say that it is always open to the Crown to argue the defence of statutory authority; see, e.g., in s. 8 of the *Crown Liability and Proceedings Act*:

> Nothing in sections 3 to 7 makes the Crown liable in respect of anything done or omitted in the exercise of any power or authority that, if those sections had not been passed, would have been exercisable by virtue of the prerogative of the Crown, or any power or authority conferred on the Crown by any statute . . . .

The defence of statutory authority is regularly interpreted and applied by the provincial superior courts: see, e.g., *Sutherland v. Canada (Attorney General)*, 2002 BCCA 416, [2002] 10 W.W.R. 1, leave to appeal refused, [2003] 1 S.C.R. xi (*sub nom. Jones v. Attorney General of Canada*); *Lake v. St. John's (City)*, 2000 NFCA 48, 192 Nfld. & P.E.I.R. 84; *Neuman v. Parkland (County)*, 2004 ABPC 58, 36 Alta. L.R. (4th) 161; *Danco v. Thunder Bay (City)* (2000), 13 M.P.L.R. (3d) 130 (Ont. S.C.J.); *Landry v. Moncton (City)*, 2008 NBCA 32, 329 N.B.R. (2d) 212.

[73] I give an example. In *Ryan v. Victoria (City)*, the "inevitable result" defence was tested in a claim for damages arising out of road works. Mr. Ryan, a motorcyclist, sued the municipality and a railway for negligence and nuisance after he was injured while crossing tracks in an urban area. The front wheel of the plaintiff's motorcycle got caught in the flangeway gap of the rail whose width was at the upper end of the allowed range set by the applicable regulation. The defence argued statutory authority. Writing for a unanimous Court, Major J. noted that "[s]tatutory authority provides, at best, a narrow defence to nuisance" (para. 54), and rejected it on the facts of the case.

[74] For present purposes, we need go no further than to repeat that "statutory authority" is an argument that goes to defence, not jurisdiction. If the provincial superior court (or the Federal Court under s. 17) finds that the government has a good defence based on statutory authority, it will simply dismiss the claimant's action.

H. *The Concern About "Artful Pleading"*

[75] The Crown contends that TeleZone's argument would risk putting judicial review of federal decision makers back in the provincial superior courts dressed up as damages claims. On this view the "artful pleader" will forum-shop by the way the case is framed. Of course, "artful pleaders" exist and they will formulate a claim in a way that best suits their clients' interests. However, no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement. Such relief is not available in the provincial superior court. The claimant must, as here, be content to take its money (if successful) and walk away leaving the order standing.

[76] Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

[77] In the U.K., a similar position has been expressed by the House of Lords in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee*, [1992] 1 A.C. 624, *per* Lord Bridge, at pp. 628-29:

> . . . where a litigant asserts his entitlement to a subsisting right in private law, whether by way of claim or defence, the circumstance that the existence and extent of the private right asserted may incidentally involve the examination of a public law issue cannot prevent the litigant from seeking to establish his right by action commenced by writ or originating summons, any more than it can prevent him from setting up his private law right in proceedings brought against him.

It is generally true here, as it is in the U.K., that a plaintiff is not required to bring an application for judicial review so long as private rights are legitimately engaged by the action. Under the English authorities, as in Canada, there is a special concern where the availability of judicial review depends on special leave, or is restricted by an abbreviated limitation period, or where the relief available on judicial review is discretionary (*Roy*, *per* Lord Lowry, at p. 654). See also P. P. Craig, *Administrative Law* (6th ed. 2008), at p. 869. These considerations echo the concerns already canvassed in rejecting the *Grenier* approach.

[78] To this discussion, I would add a minor *caveat*. There is always a residual discretion in the inherent jurisdiction of the provincial superior court (as well as in the Federal Court under s. 50(1) of its Act), to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong. Generally speaking the fundamental issue will always be whether the claimant has pleaded a reasonable private cause of action for damages. If so, he or she should generally be allowed to get on with it.

I. *Application to the Facts*

[79] TeleZone is not attempting to nullify or set aside the Minister's order. Its case is that the Minister, in deciding not to issue a licence to TeleZone, acted in breach of his contractual and equitable duties or in breach of a duty of care. TeleZone does not say that the Minister's decision should be quashed. On the contrary, TeleZone's causes of action in contract, tort and equity are predicated on the finality of that decision excluding TeleZone from participation in the telecommunications market, thereby (it says) causing it financial loss. Nor does TeleZone seek to deprive the Minister's decision of any legal effect. It does not challenge the licences issued to its competitors. It does not seek to undo what was done. It complains about what was *not* done, namely fulfilment by Industry Canada of its alleged contractual and equitable duties and its duty of care towards TeleZone itself.

[80] To the extent that TeleZone's claim can be characterized as a collateral attack on the Minister's order (i.e., because the order failed to include TeleZone), I conclude, for the reasons discussed, that the grant of concurrent jurisdiction to determine claims against the Crown to the provincial superior courts negates any inference the Crown seeks to draw that Parliament intended the detour to the Federal Court advocated by *Grenier*. The TeleZone claim as pleaded is dominated by private law considerations. In a different case, on different facts, the Attorney General is free to raise "collateral attack" as a defence and the superior court will consider and deal with it.

V. Disposition

[81] The Superior Court of Ontario has jurisdiction over the parties and the subject matter, and has the power to grant the remedy of damages. There is nothing in the *Federal Courts Act* to prevent the Ontario Superior Court from adjudicating this claim. I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: Attorney General of Canada, Ottawa.

Solicitors for the respondent: Stikeman Elliott, Toronto.

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[1] The Attorney General's principal argument was filed in the companion case of *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626, and references herein are to that factum unless otherwise noted.