Court File No. CV-20-00649404-0000

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

NELL TOUSSAINT

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

and

CHARTER COMMITTEE ON POVERTY ISSUES, CANADIAN HEALTH COALITION, FCJ REFUGEE CENTRE, AMNESTY INTERNATIONAL CANADA, INTERNATIONAL NETWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS, THE COLOUR OF POVERTY/COLOUR OF CHANGE NETWORK, THE BLACK LEGAL ACTION CENTRE, THE SOUTH ASIAN LEGAL CLINIC OF ONTARIO, AND THE CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC AND CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

BRIEF OF AUTHORITIES

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	Case Law	Cited
1.	*Toussaint v Canada* CCPR/C/123/D/2348/2014 (30 August 2018)	para 6.5 para 10.9 para 12 para 13
2.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44	paras 91-94 paras 97-106 para 117 paras 127-133
3.	*Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441	para 50
4.	*Toussaint v Canada (Attorney General)*, 2010 FC 810	para 13 paras 63-70 para 75 Note 3
5.	*Toussaint v. Canada (Attorney General)*, 2011 FCA 213	para 99.
6.	*Slaight Communications Inc. v Davidson*, 1989 CanLII 92 (SCC)	1056
7.	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791	para 104
8.	*Tanudjaja v AG (Canada)* 2013 ONSC 5410	para 32, paras 37- 40
9.	*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA	para 52
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1	*Toussaint v Canada* CCPR/C/123/D/2348/2014 (30 August 2018)

United Nations CCPR/C/123/D/2348/2014

International Covenant on Civil and Political Rights

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Human Rights Committee

Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2348/2014*, **

Communication submitted by:	Nell Toussaint (represented by counsel, Andrew Dekany, and by Bruce Porter, of Social Rights Advocacy Centre)
Alleged victim:	The author
State party:	Canada
Date of communication:	24 December 2013 (initial submission)
Document references:	Decision taken pursuant to rules 92 and 97 of the Committee's rules of procedure, transmitted to the State party on 14 February 2014 (not issued in document form)
Date of adoption of Views:	24 July 2018
Subject matter:	Denial of access to health insurance and health care and its consequences for author's life and health
Procedural issues:	Victim status (*actio popularis*); abuse of submission — incompatibility with the Covenant; non-exhaustion of domestic remedies
Substantive issues:	Right to equal protection without distinction of any kind; right to an effective remedy; right to life; risk of ill-treatment; right to security of person; right to equality before the law
Articles of the Covenant:	2 (1) and (3) (a), 6, 7, 9 (1) and 26
Articles of the Optional Protocol:	1, 2, 3 and 5 (2) (a) and (b)

1. The author of the communication is Nell Toussaint, a national of Grenada born in 1969 who has lived in Canada since 1999. She claims to be a victim of violations by Canada of her rights under articles 2 (1) and (3) (a), 6, 7, 9 (1) and 26 of the Covenant. The

* Adopted by the Committee at its 123rd session (2–27 July 2018).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Yadh Ben Achour, Ilze Brands Kehris, Sarah Cleveland, Ahmed Amin Fathalla, Olivier de Frouville, Christof Heyns, Bamariam Koita, Duncan Laki Muhumuza, Mauro Politi, José Manuel Santos Pais, Yuval Shany and Margo Waterval. Pursuant to rule 90, paragraph 1 (a), of the Committee's rules of procedure, Marcia V.J. Kran did not participate in the examination of the communication.

Optional Protocol entered into force for Canada on 19 August 1976. The author is represented by counsel.

The facts as submitted by the author

2.1 On 11 December 1999, the author lawfully entered Canada as a visitor from Grenada. She worked in Canada from 1999 to 2008 without obtaining residency status or permission to work. However, some of her employers made deductions from her salary to cover federal and provincial taxes, Canada Pension Plan and Employment Insurance. During this period, she managed to pay privately for any medical costs.

2.2 Encouraged by an employer who wished to hire her permanently, the author began to seek regularization of her status in Canada in 2005. That year, she paid a significant part of her savings to an immigration consultant who turned out to be dishonest and provided no useful service. The author could not afford to make further attempts to regularize her status for some time.

2.3 In 2006, her health began to deteriorate as she developed chronic fatigue and abscesses. In November 2008, she became unable to work due to illness, and in 2009 her health deteriorated to life-threatening status. In February 2009, she was diagnosed with pulmonary embolism and suffered from poorly controlled diabetes with complications of renal dysfunction, proteinuria, retinopathy and peripheral neuropathy, according to Dr. Guyatt, a professor of clinical epidemiology and biostatistics at McMaster University. Her neurological problems resulted in severe functional disability with marked reduction in mobility and impairment of basic activities. She also suffered from hyperlipidaemia and hypertension.

2.4 In 2008, the author received free assistance from a qualified immigration consultant and made an application for permanent resident status on humanitarian and compassionate grounds to Citizenship and Immigration Canada.

2.5 In April 2009, the author was informed that she had qualified for provincial social assistance under the Ontario Works programme due to her pending application for permanent residence in Canada based on humanitarian and compassionate grounds. She was also deemed eligible for social assistance from the Ontario Disability Support Program, but neither of those programmes covered health care or the cost of fees for a humanitarian and compassionate application.

2.6 On 6 May 2009, she applied for health-care coverage under the Federal Government's programme of health care for immigrants, called the Interim Federal Health Benefit Program (IFHP),[1] established pursuant to a 1957 Order-in-Council.

2.7 On 10 July 2009, the author was denied health coverage under IFHP by an immigration officer as she did not fit into any of the four categories of immigrants eligible for IFHP coverage as set out in the Citizenship and Immigration Canada guidelines: refugee claimants, resettled refugees, persons detained under the Immigration and Refugee Protection Act and victims of trafficking in persons. The life-threatening nature of the author's health problems was not mentioned as a consideration.

2.8 The author sought judicial review before the Federal Court of Canada of the decision denying her health-care coverage under IFHP. She argued that the decision was in breach of her rights to life, to security of the person and to non-discrimination under sections 7 and 15, respectively, of the Canadian Charter of Rights and Freedoms and that the immigration officer had failed to apply domestic law in a manner consistent with the international human rights treaties ratified by Canada. The author also provided the Court with extensive medical evidence proving that her life had been put at risk.

2.9 During the Federal Court procedures, Dr. Guyatt provided expert evidence describing the author's medical situation and the implications for her health status of failure

[1] The Interim Federal Health Benefit Program was authorized to expend funds for medical or dental care, hospitalization or any incidental expenses for immigrants or anyone "subject to immigration jurisdiction or for whom the immigration authorities feel responsible" where the person lacks the resources to pay the costs of the medical care.

to provide appropriate medical treatment.[2] Similarly, Dr. Hwang[3] commented on the likely medical consequences should she be unable to obtain adequate health care from a hospital.[4]

2.10 The Federal Court found that the evidence established a deprivation of the author's right to life and security of the person that was caused by her exclusion from IFHP. However, the Court found that the deprivation of the rights to life and security of the person in the author's case was not contrary to section 7 of the Canadian Charter, that denying financial coverage for health care to persons who have chosen to enter or remain in Canada illegally is consistent with fundamental justice and that the impugned policy was a permissible means to discourage defiance of Canada's immigration laws.

2.11 The author then appealed to the Federal Court of Appeal, arguing that the Federal Court's decision was contrary to the right to life under article 6 of the Covenant and to protection from discrimination on the ground of immigration status under international human rights law.

2.12 The Federal Court of Appeal upheld the Federal Court's finding that the author "was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person". The Court held, however, that the "operative cause" of the risk to her life was her decision to remain in Canada without legal status and agreed with the lower court's finding that the deprivation of the right to life and security of the person in this case accorded with the principles of fundamental justice. The Federal Court of Appeal further held that discrimination on the grounds of immigration or citizenship status did not qualify for protection as an "analogous ground" of discrimination under the Canadian Charter. The Court also commented that in assessing whether the exclusion of immigrants without legal status from access to health care was justifiable as a reasonable limit under section 1 of the Canadian Charter, appropriate weight should be given to the interests of the State in defending its immigration laws. The Court held that while international human rights law could be considered in interpreting the Canadian Charter, it was not relevant in this case.

2.13 The author then sought leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada.[5] The application for leave to appeal was denied on 5 April 2012.[6]

2.14 Shortly afterwards, the Government of Canada repealed the 1957 Order-in-Council and replaced it with the Order Respecting the Interim Federal Health Program. The new policy in relation to access to IFHP does not, however, provide undocumented migrants with health-care coverage under the Program and makes no explicit exception for situations where life or health is at risk, except where there is a clear health risk to the public.

[2] "The author has severe medical problems that markedly impair her quality of life, are likely to decrease her longevity, and could be life-threatening over the short term. She requires intensive medical management by highly skilled professionals, including medical subspecialists. Negotiating pro bono care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous. Delays resulting from lack of coverage and an inability to pay for the health care that she needs and the risk that she will not have access to necessary services create serious risk to her health and may have life-threatening consequences."

[3] A physician at St. Michael's Hospital and a professor in the Faculty of Medicine at the University of Toronto.

[4] "The [author] would be at extremely high risk of suffering severe health consequences if she does not receive health care in a timely fashion …. She has already suffered from serious and to some degree irreversible health consequences due to lack of access to appropriate care, [which has] resulted in inadequately treated, uncontrolled diabetes and hypertension. As documented in her medical records, her inability to afford medications in the past has also contributed to the poor control of her diabetes and hypertension. If she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes."

[5] A letter from the Office of the United Nations High Commissioner for Human Rights was attached to the application for leave to appeal, affirming the importance of the issues raised in relation to compliance by Canada with its international human rights treaty obligations.

[6] The Supreme Court of Canada grants leave to appeal only in exceptional circumstances and does not indicate the reasons for its negative decisions.

2.15 On 30 April 2013, the author became eligible for health-care coverage as a result of her application for permanent residence based on spousal sponsorship and a confirmation by Citizenship and Immigration Canada that she met the criteria for spousal sponsorship. Since then, the author was granted health-care coverage under the provincial Ontario Health Insurance Plan and has been receiving health care.

2.16 The author claims that she has exhausted all available and effective domestic remedies and that she has not submitted her communication to any other procedure of international investigation or settlement.

2.17 The remedy sought by the author is twofold. She requests the State party (a) to ensure that illegal immigrants have access to IFHP coverage for health care necessary for the protection of their rights to life and security of person; and (b) to provide her with compensation for the severe psychological distress, inhuman treatment and exposure to a risk to life and to long-term negative health consequences as a result of the violation of her rights.[7]

The complaint

3.1 The author claims that the State party violated its obligations under articles 2 (1) and (3) (a), 6, 7, 9 (1) and 26 of the Covenant by denying her access to health care necessary for the protection of her life and health from 10 July 2009 through 30 April 2013, on the basis of her irregular immigration status. She submits that she lacked the means to pay for the care herself.

3.2 The author submits that the exclusion from health-care coverage on the basis of her particular immigration status constitutes a violation of her rights under articles 2 (1) and 26 of the Covenant. The author asserts that the domestic courts' findings concerning the denial of health care on the basis of her immigration status is not an objective, proportionate or reasonable means of deterring illegal immigration. The author also submits that she did not migrate to Canada to secure health care; she decided to remain in Canada in order to work. She claims that excluding her from IFHP coverage on the basis of her immigration status constituted a discriminatory distinction and that her circumstances, particularly her life-threatening status, were not taken into consideration.

3.3 The author further claims that the denial of access to health care put her life at risk and constituted cruel and inhuman treatment, in violation of her rights under articles 6 and 7 of the Covenant. She underscores that the Federal Court and the Federal Court of Appeal agreed with the fact that her life and health had been placed at significant risk by the State party's denial of access to health-care coverage under IFHP and was thus, she claims, a violation of her rights to life and not to be subjected to cruel, inhuman or degrading treatment under articles 6 and 7, respectively.

3.4 The author also claims that the denial of such access caused her physical and mental suffering that may also constitute a violation of article 9 (1). In this regard, the author requests that the Committee, which has generally restricted the application of article 9 to issues relating to the administration of justice, extend the scope of the right to security of person under this article to also cover access to health care, with reference to the practice of the Canadian courts.

3.5 The author finally claims that the State party has violated article 2 (3) (a) of the Covenant by failing to provide effective remedies for the discrimination she experienced on the ground of her immigration status, as well as for the violation of her rights to life and to security of person. The author submits that the domestic courts should have interpreted and applied the relevant domestic law in accordance with the Covenant. She adds that she was denied an effective remedy as the domestic courts had failed to refer to expert evidence attesting to discriminatory stigmatization of undocumented migrants as a result of denying them access to health care.

[7] According to the affidavit of a doctor of internal medicine who testified in favour of the author before the Federal Court, it appears that she would suffer consequences from the past denial of access to health care.

State party's observations on admissibility

4.1 On 14 August 2014, the State party submitted its observations on admissibility, requesting separate consideration of admissibility from the merits.[8]

4.2 The State party submits that the author is not a victim of a violation according to articles 1 and 2 of the Optional Protocol, as she was ineligible to receive funding through the specialized IFHP and she has been the beneficiary of provincial health-care coverage since April 2013, after receiving a residence permit. The State party recalls the Committee's jurisprudence on *actio popularis*,[9] arguing that the author is not a representative of any victim claiming a violation among other potential undocumented migrants.

4.3 It asserts that the 1957 IFHP challenged by the author no longer exists, since it was replaced by the 2012 IFHP. Moreover, the 2012 IFHP was declared invalid on 4 July 2014 by the Federal Court for being inconsistent with sections 12 and 15 of the Canadian Charter. The Court held that the Program's provisions jeopardized the health of vulnerable individuals and failed to show that the denial of health-care coverage to those individuals was necessary to achieve any legitimate aim. The State party also claims that the author no longer has any need to obtain funding for medical care and that her medical needs have been addressed.

4.4 The State party also submits that the author has not exhausted available domestic remedies, as she failed to seek monetary compensation before domestic courts when she challenged the constitutionality of IFHP.

Author's comments on the State party's observations on admissibility

5.1 On 2 November 2014, the author submitted her comments on the State party's observations on admissibility.

5.2 She rejects the arguments that she does not qualify as a victim of the State party's policy of excluding undocumented migrants from IFHP coverage. She claims that her communication is not an *actio popularis*, as it does not address the effect of the impugned policy in general but pertains to its application in her case in particular. The author submits that she relies on the findings of the domestic courts and that, as a result of the denial of IFHP coverage, she suffered severe psychological stress and was exposed to a risk to her life, as well as to long-term, and potentially irreversible, negative health consequences.

5.3 The author also rejects the State party's assertions that her claim that she was excluded from IFHP coverage on the ground that she was an undocumented migrant has become moot because she is now receiving health care as a permanent resident. She argues that the provision of health-care coverage since 2013 has neither removed nor provided compensation for the effects of the psychological stress or long-term health consequences of the denial of health care she suffered as an undocumented migrant.

5.4 She also rejects the State party's assertions that her communication should be found moot because the 1957 IFHP was replaced by an amended system in 2012. The changes to IFHP modified some aspects of the eligibility of certain groups while continuing to deny coverage to undocumented migrants. The changes made by the State party have not remedied or mitigated in any way the exclusion of undocumented migrants from accessing the Program.

5.5 Regarding the exhaustion of domestic remedies, the author submits that there were no other effective domestic remedies available which would allow for seeking monetary compensation for the violation of her rights under the Covenant. She claims to have exhausted available remedies that would have resulted in monetary compensation for violations of the rights to life, security of the person and non-discrimination under the

[8] The State party's request was denied on 1 December 2014, as its inadmissibility arguments were not elaborate, compared to the author's detailed comments, and disregarded the author's health status.

[9] See, e.g., communications No. 318/1988, *E.P. et al. v. Colombia* (CCPR/C/39/D/318/1988), para. 8.2; and No. 1632/2007, *Picq v. France* (CCPR/C/94/D/1632/2007), para. 6.2.

Canadian Charter. The author admits that she did not initiate separate litigation under domestic law to seek only the monetary compensation.

State party's observations on admissibility and the merits

6.1 On 2 April 2015, the State party submitted its observations on admissibility and the merits.

6.2 Regarding admissibility, the State party reiterates its observations of 14 August 2014 that the communication should be declared inadmissible. Canada implemented a new policy ("2014 Policy") on 5 November 2014 to temporarily provide funded medical care to certain categories of foreign nationals with no legal status. The State party claims that the 2014 Policy allows the Minister of Health to grant a more comprehensive range of medical coverage "because of exceptional and compelling circumstances". As of the date of the submission, discretionary medical coverage had been applied to the situation of migrants with no legal status in Canada and granted in two such cases.

6.3 Regarding the merits, the State party considers the author's allegations with respect to articles 2, 6, 7 and 9 (1) as incompatible with the provisions of the Covenant, pursuant to article 3 of the Optional Protocol and rule 96 (d) of the Committee's rules of procedure.

6.4 Regarding article 2, the State party recalls the Committee's jurisprudence that the provisions of article 2 lay down general obligations for States parties and cannot, by themselves, give rise to a claim under the Optional Protocol.[10]

6.5 The State party recalls that article 6 provides a negative right, prohibiting laws or actions that cause arbitrary deprivations of life. The scope of the right to life cannot extend so far as to impose a positive obligation on States to provide an optimal level of State-funded medical insurance to undocumented migrants (inadmissibility *ratione materiae*).

6.6 The State party similarly argues that article 7 cannot be interpreted to impose a positive obligation to provide State funding for an optimal level of medical insurance.

6.7 The State party claims that the scope of article 9 (1) is generally limited to situations involving detention or other deprivations of liberty, although the Committee, in its general comment No. 35 (2014) on liberty and security of person, sought to expand its interpretation of the scope of the right to protection from "intentional infliction of bodily or mental injury, regardless of whether the victim is detained or non-detained".

6.8 Concerning the alleged violation of article 26 of the Covenant, the State party argues that health insurance coverage is provided to citizens and non-citizens, and to foreign nationals with a wide variety of immigration statuses. It also submits that the denial of health care was justified, as the author did not have legal residence. The State party further submits that legal residence is a neutral, objective requirement that cannot be considered as a prohibited ground of discrimination.

Author's comments on the State party's observations on admissibility and the merits

7.1 On 22 August 2015, the author submitted her comments on the State party's observations. She rejected the State party's argument that the Covenant does not impose positive obligations on States under articles 6, 7 and 9 (1) and that her claims are inadmissible *ratione materiae*. This argument is inconsistent with the Committee's general comment No. 6 (1982) on the right to life and its jurisprudence. She does not claim a right to health, but that specific rights under the Covenant have been violated in the context of access to health care through IFHP. The author also submits that the right to life, the prohibition of inhuman and degrading treatment or punishment, the right to security of person and the right to non-discrimination must be fully protected with respect to situations involving access to health care, including for irregular migrants.

7.2 The author also rejects the State party's argument that emergency and pro bono medical care were sufficient to protect her Covenant rights, recalling that the Federal Court

[10] See communications No. 1234/2003, *P.K. v. Canada* (CCPR/C/89/D/1234/2003), para. 7.6; and No. 1544/2007, *Hamida v. Canada* (CCPR/C/98/D/1544/2007), para. 7.3.

thoroughly reviewed the evidence with respect to access to emergency care and found that the author's life and long-term health had been placed at risk. Moreover, the State party's statement that irregular migrants are entitled to emergency care under provincial legislation is not true in all provinces and territories.

7.3 Regarding the State party's argument that immigration status is not a prohibited ground of discrimination under article 26, the author submits that irregular migrants face widespread discrimination, exclusion, exploitation and various abuses, and that depriving them of health care cannot be justified as a mean of encouraging compliance with immigration laws.

7.4 On 22 August 2015, the author submitted the legal opinions of International Network for Economic, Social and Cultural Rights (ESCR-Net) and Amnesty International Canada.

7.5 ESCR-Net submits that the narrow characterization by the State party of articles 6, 7 and 9 (1) is incorrect. The consideration of cases that involve situations of access to health care is not dependant on an explicit right to health, but should be undertaken with reference to all relevant human rights engaged. The right to life, the prohibition of inhuman and degrading treatment or punishment, the right to security of person and the right to non-discrimination must be fully protected with respect to situations involving access to necessary health care, especially in regard to the most vulnerable groups in society, including undocumented migrants. The Committee has affirmed on multiple occasions that access to health care falls under several rights of the Covenant and that such access must be respected and ensured without discrimination, including on the ground of immigration status.[11] ESCR-Net submits that in its 2015 concluding observations on Canada, the Committee called on Canada to "ensure that all refugee claimants and irregular migrants have access to essential health-care services irrespective of their status".[12] Similarly, in its 2014 concluding observations on the United States of America, the Committee called on the United States to "identify ways to facilitate access to adequate health care, including reproductive health care services, by undocumented immigrants …."[13] ESCR-Net underscores that the European Court of Human Rights regularly considers health-related situations by reference to articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment) and 8 (rights to respect for private and family life, home and correspondence), underscoring positive obligations to ensure access to health care in order to protect various human rights, and the right to life in particular.[14]

7.6 ESCR-Net also submits that the obligations contained in the Covenant extend to all levels of government and that the State party must ensure that, where the Federal Government has assumed responsibility for providing necessary health care to migrants who are ineligible for provincial health care, the federal programme complies with the Covenant.

7.7 ESCR-Net further submits that immigration should be clearly recognized as a prohibited ground of discrimination, following the interpretation of the Committee on Economic, Social, and Cultural Rights.[15] Therefore, ESCR-Net considers that State policy or practice that imposes regularization of immigration status as a requirement for the protection of the right to life does not meet any standard of reasonableness under

[11] See, e.g., communication No. 1020/2001, *Cabal and Pasini Bertran v. Australia* (CCPR/C/78/D/1020/2002), para. 7.7. See also Human Rights Committee, concluding observations on the initial report of Zimbabwe (CCPR/C/79/Add.89), para. 7; and ibid., comments on the initial report of Nepal (CCPR/C/79/Add.42), para. 8.

[12] See Human Rights Committee, concluding observations on the sixth periodic report of Canada (CCPR/C/CAN/CO/6), para. 12.

[13] Ibid., concluding observations on the fourth periodic report of the United States of America (CCPR/C/USA/CO/4), para. 15.

[14] See European Court of Human Rights, *Vo v. France* (application No. 53924/00), judgment of 8 July 2004, paras. 88 and 89. See also European Court of Human Rights, *Gorgiev v. The former Yugoslav Republic of Macedonia* (application No. 49382/06), judgment of 19 April 2012, para. 43.

[15] See Committee on Economic, Social and Cultural Rights, "An evaluation of the obligation to take steps to 'maximum of available resources' under an optional protocol to the Covenant" (E/C.12/2007/1), paras. 7–8.

international human rights law. It submits that States parties ought to consider and apply policies and practices that represent a proportionate response to any legitimate aims that might exist with respect to compliance with immigration laws.

7.8 In its legal opinion Amnesty International Canada also argues for admissibility of the complaint. It notes that the author has exhausted domestic remedies as leave to appeal the Federal Court of Appeal's decision to the Supreme Court of Canada was denied, leaving her with no further domestic recourse available. It recalls that it is only in the context of an absence of specific claimants who can be individually identified as having had their rights violated that a communication amounts to an *actio popularis*, and therefore inadmissible under article 1 of the Optional Protocol.

7.9 On the merits, Amnesty International Canada submits that the denial of access to necessary health care to irregular migrants amounts to unlawful discrimination, considering that the exclusion of irregular migrants from IFHP constitutes unequal treatment which is not based on reasonable and objective criteria and therefore cannot be justified. It underscores that the Supreme Court of Canada has already found that Canada had a positive obligation under section 15 of the Canadian Charter. In the case of *Eldrige v. British Columbia*, the Court stated that "the principle that non-discrimination can accrue from a failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public is widely accepted in the human rights field".[16] Regarding the alleged violation of the author's right to life, Amnesty International Canada requests the Committee to recognize that the obligations of Canada under the Covenant require it to take positive measures to protect the right to life. It recalls that the Committee's jurisprudence has established that, although the Covenant does not contain a self-standing "right to health", article 6 engages issues of access to health care.[17] It also recalls that the Committee has found that restricting "access to all basic and life-saving services such as food, health, electricity, water and sanitation" is inconsistent with the right to life under article 6.[18]

State party's additional observations

8.1 On 30 March 2016, the State party reiterates, as stated in its observations of 14 August 2014 and 2 April 2015, that the communication should be declared inadmissible.

8.2 Responding to the author's comments on emergency care under provincial legislation, the State party recalls that the administration and delivery of health-care services is the responsibility of each provincial or territorial government, guided by the Canada Health Act. It recalls that provinces and territories fund these services through public health-insurance programmes, with assistance from the Federal Government in the form of fiscal transfers. The State party argues that health-care services include insured primary health care and care in hospitals, and that the provinces and territories also provide some groups with supplementary health benefits not covered by the Health Act such as prescription medicine coverage.

8.3 The State party submits that public health care is administered and funded in Ontario through the Ontario Health Insurance Program. It recalls that the author inquired about her coverage under this programme in June 2009 but was told she did not qualify under the Ontario Health Insurance Act as she was not lawfully a resident of Ontario at the time. Under the Health Insurance Act, individuals must have a citizenship or immigration status that renders them eligible for publicly funded health care. The State party notes that many such types of residents are recognized, including permanent residents, eligible applicants for permanent residency, protected persons and persons with valid work permits issued under the Immigration and Refugee Protection Act. The State party submits that foreign nationals without legal status in Canada are not eligible for publicly funded health care.

[16] See Supreme Court of Canada, *Eldrige v. British Columbia* (Attorney General), judgment of 9 October 1997, para. 78.

[17] See *Cabal and Pasini Bertran v. Australia*, para. 7.7.

[18] See Human Rights Committee, concluding observations on the fourth periodic report of Israel (CCPR/C/ISR/CO/4), para. 12.

8.4 The State party also claims that the author did not seek a formal decision regarding her eligibility for the Ontario Health Insurance Program nor seek judicial review of the Province's response. The State party also considers that she has failed to challenge the constitutionality of the Ontario Health Insurance Program regime in Canadian courts. It notes that in Canada's federal system, the province has the responsibility to determine eligibility for publicly funded health care and it is thus against this level of government that the author should have sought a domestic remedy.

8.5 The State party recalls that the author has been a permanent resident of Canada since 2013 and has received comprehensive public health insurance sufficient to meet all her medical needs. The State party notes that the regularization of her status in Canada has provided her with comprehensive and publicly funded health care. It recalls that the Committee recognized in *Dranichnikov v. Australia*[19] that the granting of a civil status sufficient to provide the author with protection (such as a protection visa) rendered the claim moot and inadmissible on that basis.

8.6 The State party, recalling the Committee's decision in *A.P.L.-v.d.M. v. Netherlands*,[20] that the author "cannot, at the time of submitting the complaint, claim to be a victim of a violation of the Covenant", notes that the author began to receive publicly funded health care on 30 April 2013, eight months before she filed her communication with the Committee on 24 December 2013. The State party therefore states that the communication is inadmissible under article 1 of the Optional Protocol.

8.7 The State party maintains that the communication is an *actio popularis* and is therefore inadmissible. The State party recalls that the author, in addition to her individual claim, sought to "ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP coverage for health care". The State party notes that this part of the claim thus relates not to the author but to other undocumented migrants who may seek access to IFHP to fund their health-care needs. The State party therefore underscores that such an allegation lies outside the scope of the Optional Protocol and that the Committee has consistently recognized that "to the extent [an] author argues that [a] scheme as a whole is in breach of the Covenant, [the] claim amounts to an *actio popularis* reaching beyond the circumstances of the author's own case".[21]

8.8 The State party states that the alleged violations under articles 6, 7 and 9 (1) of the Covenant, including the denial of publicly funded primary health care, failed to fall within the scope of the Covenant. The State party, noting the Committee's views on the right to publicly funded primary or preventive health care, states that "deprivation of life involves a deliberate or otherwise foreseeable and preventable infliction of life-terminating harm or injury that goes beyond mere damage to health, of which the author would be at risk if she did not receive 'timely and appropriate health care and medication'". The State party submits that the author was provided with sufficient publicly funded emergency and essential health care available to everyone, regardless of civil status or residency. The State party also submits that the availability of emergency and essential health care fulfils its obligations related to the protection of life under article 6 (1) of the Covenant.

8.9 The State party also states that it has not sought to prevent the author from obtaining health-care services at community health centres[22] or elsewhere on a pro bono basis. It recalls that the Federal Court of Appeal noted that the author had access to medical assistance at these centres after her medical needs surpassed her ability to pay.

8.10 The State party maintains that the interpretation of the right to life cannot extend so far as to impose a positive obligation on States to provide an optimal level of State-funded medical insurance to undocumented migrants. In this regard, the State party relies on the Committee's decision in *Linder v. Finland* that the "right to health, as such, is not protected

[19] See communication No. 1291/2004, *Dranichnikov v. Australia* (CCPR/C/88/D/1291/2004), para. 6.3.

[20] See communication No. 478/1991, *A.P.L.-v.d.M. v. Netherlands* (CCPR/C/48/D/478/1991), para. 6.3.

[21] See communication No. 958/2000, *Jazairi v. Canada* (CCPR/C/82/D/958/2000), para. 7.6; see also communication No. 1114/2002, *Kavanagh v. Ireland* (CCPR/C/76/D/1114/2002), para. 4.3.

[22] The community health centres are non-profit organizations that provide primary health and health-promotion programmes to individuals in the community.

by the provisions of the Covenant".[23] The State party therefore states that the Covenant does not create an obligation to fund primary or preventive health care.

8.11 As regards the alleged violation under article 26, the State party submits that, in allocating public health-care funding, it may reasonably differentiate between those with lawful status in the country (whether citizens, permanent residents, asylum seekers or immigrants, inter alia) and foreign nationals who have not been lawfully admitted to Canada. The State party recalls the Committee's views that a "differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".[24] Relying on the case *Oulajin and Kaiss*,[25] the State argues that its requirement that foreign nationals be lawfully present in Canada before accessing publicly funded primary health care is both an objective and a reasonable criterion in respect of the principles of non-discrimination and equality before the law found in article 26 of the Covenant.

8.12 Regarding the merits, the State party recalls that the author received publicly funded emergency health-care services and was not prevented from obtaining primary health care from various community organizations, on a pro bono basis, or on the basis of private health insurance.

8.13 The State party concludes that there has been no violation of articles 2 (1) and (3) (a), 6, 7, 9 (1) or 26 of the Covenant and requests the Committee to declare the author's request for financial compensation inadmissible.

Author's comments on the State party's additional observations

9.1 On 26 July 2016, the author submitted comments on the State party's additional observations. She objects to the argument that she should have pursued remedies with provincial governments in Canada for her complaint against the Federal Government to be admissible. She submits that she challenged the Federal Government's denial of health care under IFHP and that this denial, as found by the Federal Court, violated her right to life by subjecting her to significant threats to her life and negative long-term health consequences. The author further submits that the exhaustion of domestic remedies requirement in federal States should be applied in a manner consistent with the Committee's observation at paragraph 4 of its general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant.[26]

9.2 The author submits that she has solicited the opinion of a group of leading experts in the field of constitutional and health law in Canada.[27] These experts are of the opinion that the author reasonably sought a remedy against the Federal Government, rather than a province, for failure to provide her with health-care coverage for emergency and essential health care.

9.3 The author rejects the State party's observation that her communication is moot, as in the case of *Dranichnikov v. Australia*. The author recalls that in that case, the author alleged that her rights under article 6, 7 and 9 of the Covenant would be violated if she were to be deported to the Russian Federation. The author notes that, having been granted a protection visa, the Committee found the allegations related to the threat of deportation to be moot, such that there were no longer any threats of deportation. In the present case, the

[23] See communication No. 1420/2005, *Linder v. Finland* (CCPR/C/85/D/1420/2005), para. 4.3.

[24] See communication No. 180/1984, *Danning v. Netherlands* (CCPR/C/29/D/180/1984), para. 13.

[25] See communications Nos. 406/1990 and 426/1990, *Oulajin and Kaiss v. Netherlands* (CCPR/C/46/D/406/1990 and 426/1990), para. 7.3.

[26] In general comment No. 31, the Committee reminded States parties with a federal structure of the terms of article 50, according to which the Covenant's provisions "shall extend to all parts of federal States without any limitations or exceptions".

[27] The opinion is attached to the communication. As of 3 June 2016, it had been signed by: Prof. Y.Y. Brandon Chen; Prof. Martha Jackman, Faculty of Law, University of Ottawa; Prof. Angela Cameron, PhD, Faculty of Law, University of Ottawa; Prof. Jennifer Koshan, Faculty of Law, University of Calgary; Prof. Bruce Ryder, Osgoode Hall Law School, York University; Prof. Margot Young, Allard School of Law, University of British Columbia; Prof. Catherine Dauvergne, Allard School of Law, University of British Columbia; Prof. Sharry Aiken, Faculty of Law, Queen's University; and Prof. Constance McIntosh, Schulich School of Law, Dalhousie University.

author alleges that she was denied access to health care necessary for the protection of her life and long-term health, not that she is under threat of such denial. The author submits, however, that her allegation is analogous to the elements of the communication in *Dranichnikov v. Australia*, which the Committee found to be admissible. Although in *Dranichnikov* the author was no longer subject to the procedures before the refugee tribunal and her family had been granted a permanent protection visa, the author had been subject to those procedures in the past and the allegation with respect to tribunal procedures was found to be admissible. In the present case, the author notes that, similarly, the allegation that her rights under the Covenant were violated in the past is not rendered moot by the fact that changes in her circumstances mean that the impugned policy is no longer applicable to her.

9.4 With regard to the State party's comments on the case *A.P.L.-v.d.M. v. Netherlands*, the author recalls that the Committee's decision relied on the particular fact of the case, in which an impugned restriction on benefits had been abolished, with retroactive effect. In the present case, the author notes that the exclusion of undocumented migrants from access to health care has not been abolished and the violation of her rights under the Covenant has not been remedied.

9.5 The author also rejects the State party's observation that her submission amounts to an *actio popularis*. The author recalls that the Committee held, in the case *Jazairi v. Canada*, that an "individual must be personally and directly affected by the violations claimed" and that the allegations with respect to the "scheme as a whole" reached "beyond the circumstances of the author's own case".[28] In the present case, the author maintains that she challenges her exclusion from IFHP, which personally and directly affects her. The author also submits that the discretion provided to the Minister of Health to grant access to the Program for individuals without lawful status in Canada was not in effect at the time she was denied. The author further submits that the State party has not indicated that the discretion is exercised according to any criterion related to the protection of life and long-term health. Furthermore, the author notes that the two cases in which discretion has been granted suggest that rare exceptions have been made based on particular immigration circumstances rather than on the basis of the need for health care under article 6 of the Covenant.

9.6 The author further rejects the State party's observation that her submission is not compatible with articles 6, 7 and 9 of the Covenant. The author maintains that she does not argue that the Covenant includes "a right to publicly funded and primary health care" but alleges a deprivation of her right to life which, in her circumstances, required access to a programme that provided coverage of emergency and essential health care. The author thus submits that the main question regarding the State party's compliance with article 6 which the State party does not address is the finding of the domestic courts that a violation of the right to life is not arbitrary because it was justified as a measure to promote compliance with immigration law.

9.7 As to the State party's comments on the alleged violation of article 26, the author notes that in the case *Danning v. Netherlands*,[29] the differentiation at issue was with respect to differential insurance rates for married and unmarried individuals, which the Committee found to be based on reasonable and objective criteria. The author finds that such distinction is not analogous to a refusal of emergency and essential health care on the basis of immigration status, both because the right to life and personal security are at stake and because the ground of the distinction at issue in the present case is recognized as a basis for widespread discrimination and stigmatization in many countries. Although the State party, relying on the case *Oulajin and Kaiss v. Netherlands*, argues that such a differentiation is not intended to stigmatize, the author submits that the distinction at issue in that case,

[28] See *Jazairi v. Canada*, para. 7.6.

[29] See communication No. 180/1984, *Danning v. Netherlands* (CCPR/C/29/D/180/1984), paras. 12.4–12.5.

between foster children and biological children, was entirely different from the nature of the distinction drawn in the present case.[30]

9.8 Finally, the author rejects the State party's observations on the merits. With respect to the comments made by the State party on the publicly funded emergency health-care services, the author notes that she was living in destitution at the time she applied for coverage under IFHP and had no possibility of paying for health care. In response to the State party's observation that she received publicly funded emergency health services, the author argues that the Federal Court found that she had been denied health care necessary for the protection of her life and long-term health, and that she was also billed for health care she had received from emergency departments because she did not have IFHP coverage. The author also refers to her attempt to have her application for permanent residency reviewed on humanitarian and compassionate grounds, a review that was prolonged by the refusal of the Minister of Health to consider the author's request that fees which she could not afford to pay be waived.[31]

Issues and proceedings before the Committee

Consideration of admissibility

10.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

10.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

10.3 The Committee notes the State party's objection to the admissibility of the communication on the ground that the author sought, by way of an *actio popularis*, to challenge the law in order to ensure that individuals residing in Canada with irregular immigration or citizenship status have access to IFHP health-care coverage and that the author is not a victim of a violation of articles 1 and 2 of the Optional Protocol, as she has been a beneficiary of provincial health-care coverage since April 2013. In this regard, the Committee recalls its jurisprudence according to which "a person may claim to be a victim under article 1 of the Optional Protocol only if his or her rights are effectively violated. The concrete application of this condition is a question of degree. However, no person can in the abstract, by way of *actio popularis*, challenge a law or practice claimed to be contrary to the Covenant."[32]

10.4 The Committee notes, however, the author's submission that her communication indicates how the policy was applied to her as an individual and how it personally and directly affected her from 2006 to 2013, as demonstrated by the findings of the domestic courts, including in regard to the admitted consequences that were harmful for her health (see para. 2.9). In the light of its jurisprudence, the Committee considers that, due to her exclusion from IFHP between 2006 and 2013 and the consequences thereof, the author may claim to be a victim of the alleged violation of her rights under the Covenant within the meaning of article 1 of the Optional Protocol.[33]

10.5 The Committee also notes the State party's objections to the admissibility of the communication on the grounds that the author's communication is moot since the health scheme challenged by the author no longer exists, having been modified in 2012 and in 2014, and that the regularization of the author's status in Canada allowed her to benefit

[30] In that case, the Committee found no violation of article 26 and noted that "the Child Benefit Act makes no distinction between Dutch nationals and non-nationals, such as migrant workers" (para. 7.5).

[31] The Minister agreed to consider her request only when ordered to do so by the Federal Court of Appeal.

[32] See communication No. 35/1978, *Aumeeruddy-Cziffra et al. v. Mauritius* (CCPR/C/12/D/35/1978), para. 9.2.

[33] See, e.g., communications No. 1024/2001, *Sanlés v. Spain* (CCPR/C/80/D/1024/2001), para. 6.2; No. 318/1988, *E.P. et al. v. Colombia* (CCPR/C/39/D/318/1988), para. 8.2; and No. 1632/2007 *Picq v. France* (CCPR/C/94/D/1632/2007), para. 6.2. See also *Jazairi v. Canada*, para. 7.6.

from full public health care from 2013 onwards. The Committee further notes, however, that neither the changes made to the federal programme in 2014 nor the regularization of the author's status could retroactively remedy the harm she actually suffered between 2006 and 2013 due to the denial of her access to health care appropriate to her medical condition.[34] Accordingly, the Committee considers that this part of the communication is admissible pursuant to article 3 of the Optional Protocol.

10.6 The Committee notes the State party's contention that the communication should be declared inadmissible because the author has not exhausted available domestic remedies as required by article 5 (2) (b) of the Optional Protocol. The Committee recalls its jurisprudence according to which the author must exhaust, for the purpose of article 5 (2) (b) of the Optional Protocol, all judicial or administrative remedies that offer him or her a reasonable prospect of redress.[35] The Committee takes note of the State party's objection that the author has failed to seek monetary compensation before domestic courts when she challenged the constitutionality of IFHP. The author has, however, explained that she had exhausted domestic remedies for violation of her rights under the Canadian Charter of Rights and Freedoms. She argues that under section 24 (1) of the Canadian Charter, courts may grant remedies to individuals for infringement of Charter rights which include, in certain circumstances, monetary compensation. The Committee notes the author's assertion that since the Federal Court of Appeal found that the Charter had not been breached, she had no prospect of success for any claims of monetary compensation. It also notes the author's submission that the courts would have had broad discretion to award appropriate and just remedies, including compensation, if the Federal Court or the Federal Court of Appeal had upheld her allegations.

10.7 The Committee also notes the State party's contention that the administration and provision of health-care services is the responsibility of the government of each province or territory and that the author should have requested remedies from the Province of Ontario. The State party also points out that the author could have challenged the constitutionality of the Ontario health insurance scheme. At the same time, the Committee notes the State party's explanation (see para. 8.3.) that the author did not meet the conditions set out in the Ontario Health Insurance Act because she was not a legal resident of Ontario and therefore could not benefit from the provincial programme. The Committee also notes the author's arguments and the opinion of the "group of leading experts" composed of nine Canadian law professors who believe that it was reasonable for the author to seek a remedy at the federal and not at the provincial level. The Committee notes in particular: (a) that while responsibility for health care may be shared between the provincial and the federal levels of government, federal institutions are responsible for the delivery of health care for certain categories of the population, including some categories of foreigners in an irregular situation; (b) that federal institutions are responsible for health care for immigrants in detention, rejected asylum seekers awaiting renewal of their immigration status at the border and expelled persons whose status renewal has been suspended due to the conditions of detention or insecurity prevailing in their country; and (c) that provincial legislation explicitly excludes from its jurisdiction all persons who do not have a right to lawfully reside in Canada and that such exclusion is confirmed by consistent jurisprudence of Canadian courts. As a result, remedies at the provincial level would have protracted the procedure unnecessarily, whereas the author was looking for an emergency solution. The State party does not explain how such remedies could have been effective in the author's case. Consequently, the Committee considers that the requirements of article 5 (2) (b) of the Optional Protocol have been met.

10.8 Furthermore, the Committee notes the State party's assertion that the author's allegations of a violation of articles 2 (1) and (3) (a), 6, 7 and 9 (1) should be found incompatible with the Covenant under article 3 of the Optional Protocol.

10.9 Concerning article 6, the Committee notes the State party's argument that the right to life cannot be interpreted as far as to impose on States a positive obligation to provide undocumented migrants with an optimal level of health insurance. The Committee recalls

[34] See *Dranichnikov v. Australia*, para. 6.3; and *A.P.L.-v.d.M. v. Netherlands*, para. 6.3.
[35] See communication No. 437/1990, *Patiño v. Panama* (CCPR/C/52/D/437/1990), para. 5.2.

its jurisprudence according to which the right to health, as such, is not protected by the provisions of the Covenant.[36] However, the author has explained that she does not claim a violation of the right to health but of her right to life, arguing that the State party failed to fulfil its positive obligation to protect her right to life which, in her particular circumstances, required provision of emergency and essential health care (see para. 9.7) Accordingly, the Committee declares the claims under article 6 admissible.

10.10 The Committee takes note of the claims of the author under articles 7 and 9 (1) and considers that the author did not provide sufficient information to explain how the denial of access to health care could have exposed her to cruel, inhuman or degrading treatment or could have undermined her enjoyment of rights under article 9 (1) of the Covenant. Consequently, the Committee considers that these claims have not been sufficiently substantiated and are therefore inadmissible under article 2 of the Optional Protocol.

10.11 Concerning the author's claims under article 26, the Committee notes that the State party has not contested the admissibility of these claims, arguing instead that the Government justified its decision to deny health-care coverage to undocumented migrants on the basis of the desire to encourage compliance with federal immigration laws. The Committee notes that the Federal Government has not denied that it could have provided the author with necessary health care by permitting her, as an undocumented migrant with a need for urgent medical assistance, to receive coverage for essential health care under IFHP. Consequently, the part of the complaint referring to article 26 is declared admissible in accordance with article 2 of the Optional Protocol.

10.12 Recalling its jurisprudence according to which the provisions of article 2 lay down general obligations for States parties and cannot, by themselves, give rise to a separate claim under the Optional Protocol as they can be invoked only in conjunction with other substantive articles of the Covenant,[37] the Committee considers the author's claims under article 2 (1) and (3) (a) to be inadmissible under article 3 of the Optional Protocol.

10.13 Accordingly, the Committee declares the author's claims under articles 6 and 26 to be admissible and proceeds with its consideration of the merits.

Consideration of the merits

11.1 The Committee has considered the communication in the light of all the information submitted to it by the parties, in accordance with article 5 (1) of the Optional Protocol.

11.2 Concerning the alleged violation of article 6, the Committee takes note of the author's claims that (a) the denial of her access to health care put her life and health at risk, as she could not receive medical treatment corresponding to the seriousness of her health problems; (b) her already critical health status deteriorated to life-threatening status in 2009; and (c) the Federal Court and the Federal Court of Appeal agreed that her life and health had been put at significant risk by the State party's denial of access to health-care coverage under IFHP. In that context, the Committee notes that the author resided in Canada for a period of time, worked there from 1999 to 2008 and sought to regularize her status in 2005.

11.3 The Committee recalls that in its general comment No. 6, it noted that the right to life had been too often narrowly interpreted and that it could not properly be understood in a restrictive manner, and that the protection of the right required that States adopt positive measures. The Committee considers that the right to life concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Furthermore, the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life. States parties may be in violation of article 6 even if such threats and situations do not

[36] See *Linder v. Finland*, para. 4.3.

[37] See, e.g., communications No. 2343/2014, *H.E.A.K. v. Denmark* (CCPR/C/114/D/2343/2014), para. 7.4; No. 2202/2012, *Castañeda v. Mexico* (CCPR/C/108/D/2202/2012), para. 6.8; No. 2195/2012, *Ch.H.O. v. Canada* (CCPR/C/118/D/2195/2012), para. 9.4; No. 1887/2009, *Peirano Basso v. Uruguay* (CCPR/C/99/D/1887/2009), para. 9.4; and No. 1834/2008, *A.P. v. Ukraine* (CCPR/C/105/D/1834/2008), para. 8.5.

result in loss of life. In particular, as a minimum, States parties have the obligation to provide access to existing health-care services that are reasonably available and accessible when lack of access to the health care would expose a person to a reasonably foreseeable risk that can result in loss of life.

11.4 The Committee notes the State party's observations that the author was able to receive publicly funded medical care through access to hospital emergency care and was not prevented from obtaining primary health care from various community organizations, on a pro bono basis or on the basis of private health insurance. Due to the provision of such health care, the State party considers that it has fulfilled its obligations relative to the protection of the author's right to life under article 6 (1) of the Covenant. The Committee notes, however, that both the Federal Court and the Federal Court of Appeal acknowledged that, despite the care she may have received, the author had been exposed to a serious threat to her life and health because she had been excluded from the benefits of IFHP. The Committee also notes the medical opinions submitted to this effect in the Federal Court proceedings (see para. 2.9).

11.5 In the light of the serious implications of the denial of IFHP health-care coverage to the author under the Program from July 2009 to April 2013, as evidenced in her communication and reviewed in detail by the Federal Courts, the Committee concludes that the facts before it disclose a violation of the author's rights under article 6.

11.6 The Committee notes the author's claim under article 26 that excluding her from IFHP coverage on the basis of her immigration status is not an objective, proportionate or reasonable means of deterring illegal immigration, in particular as her life-threatening health conditions were not taken into account. The Committee also notes the State party's submission that in allocating public health-care funding, it may reasonably differentiate between those with legal status in the country, including immigrants, and foreign nationals who have not been lawfully admitted to Canada and that legal residence is a neutral, objective requirement that cannot be considered as a prohibited ground of discrimination.

11.7 The Committee recalls its general comment No. 18 (1989) on non-discrimination, in which it reaffirmed that article 26 entitled all persons to equality before the law and equal protection of the law, prohibited any discrimination under the law and guaranteed to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (para. 1). While article 2 limits the scope of the rights to be protected against discrimination to those provided for in the Covenant, article 26 does not specify such limitations and prohibits discrimination in law or in fact in any field regulated and protected by public authorities. The Committee also recalls that in its general comment No. 15 (1986) on the position of aliens under the Covenant, it stated that the general rule was that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. While the Covenant does not recognize the right of aliens to enter and reside in the territory of a State party, the Committee also stated that aliens had an "inherent right to life". States therefore cannot make a distinction, for the purposes of respecting and protecting the right to life, between regular and irregular migrants.[38] More generally, the Committee also recalls that not every differentiation based on the grounds listed in article 26 amounts to discrimination, as long as it is based on reasonable and objective criteria,[39] in pursuit of an aim that is legitimate under the Covenant.[40]

11.8 The Committee considers that in the particular circumstances of the case where, as alleged by the author, recognized by the domestic courts and not contested by the State party, the exclusion of the author from the care under IFHP could result in the author's loss of life or irreversible, negative consequences for the author's health, the distinction drawn by the State party for the purpose of admission to the Programme between those with legal

[38] See also Inter-American Court of Human Rights, *Juridical conditions and rights of undocumented migrants*, advisory opinion AO-18/03 of 17 September 2003.

[39] See, e.g., communications No. 172/1984, *Broeks v. Netherlands* (CCPR/C/29/D/172/1984), para. 13; and No. 182/1984, *Zwaan-de Vries v. Netherlands* (CCPR/C/29/D/182/1984), para. 13.

[40] See, e.g., communication No. 1314/2004, *O'Neill and Quinn v. Ireland* (CCPR/C/87/D/1314/2004), para. 8.3.

status in the country and those who had not been fully admitted to Canada was not based on a reasonable and objective criterion and therefore constituted discrimination under article 26.

12. The Committee, acting under article 5 (4) of the Optional Protocol, is of the view that the facts before it disclose violations by the State party of articles 6 and 26.

13. Pursuant to article 2 (3) (a) of the Covenant, the State party is under an obligation to provide the author with an effective remedy. This requires it to make full reparation to individuals whose Covenant rights have been violated. Accordingly, the State party is obliged, inter alia, to take appropriate steps to provide the author with adequate compensation. The State party is also under an obligation to take all steps necessary to prevent similar violations in the future, including reviewing its national legislation to ensure that irregular migrants have access to essential health care to prevent a reasonably foreseeable risk that can result in loss of life.

14. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State party has undertaken to guarantee to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy when it has been determined that a violation has occurred, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the present Views and to have them widely disseminated in the official languages of the State party.

2	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

SUPREME COURT OF CANADA

CITATION: Canada (Attorney General) *v.* PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R. 134

DATE: 20110930
DOCKET: 33556

BETWEEN:

Attorney General of Canada and Minister of Health for Canada
Appellants / Respondents on cross-appeal
and
PHS Community Services Society, Dean Edward Wilson, Shelly Tomic and Attorney General of British Columbia
Respondents
Vancouver Area Network of Drug Users (VANDU)
Respondent / Appellant on cross-appeal
- and -
Attorney General of Quebec, Dr. Peter AIDS Foundation, Vancouver Coastal Health Authority, Canadian Civil Liberties Association, Canadian HIV/AIDS Legal Network, International Harm Reduction Association, CACTUS Montréal, Canadian Nurses Association, Registered Nurses' Association of Ontario, Association of Registered Nurses of British Columbia, Canadian Public Health Association, Canadian Medical Association, British Columbia Civil Liberties Association, British Columbia Nurses' Union and REAL Women of Canada
Interveners

CORAM: McLachlin C.J. and Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ.

REASONS FOR JUDGMENT: (paras. 1 to 159)	McLachlin C.J. (Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein and Cromwell JJ. concurring)

Canada (Attorney General) *v.* PHS Community Services Society, 2011 SCC 44, [2011] 3 S.C.R. 134

Attorney General of Canada and Minister of Health for Canada *Appellants/Respondents on cross-appeal*

v.

PHS Community Services Society, Dean Edward Wilson, Shelly Tomic and Attorney General of British Columbia *Respondents*

and

Vancouver Area Network of Drug Users (VANDU) *Respondent/Appellant on cross-appeal*

and

Attorney General of Quebec, Dr. Peter AIDS Foundation, Vancouver Coastal Health Authority, Canadian Civil Liberties Association, Canadian HIV/AIDS Legal Network, International Harm Reduction Association, CACTUS Montréal, Canadian Nurses Association, Registered Nurses' Association of Ontario, Association of Registered Nurses of British Columbia, Canadian Public Health Association, Canadian Medical Association, British Columbia Civil Liberties Association, British Columbia Nurses' Union and REAL Women of Canada *Interveners*

Indexed as: Canada (Attorney General) *v.* PHS Community Services Society

2011 SCC 44

File No.: 33556.

2011: May 12; 2011: September 30.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Division of powers — Criminal law — Safe injection site — Sections 4(1) and 5(1) of Controlled Drugs and Substances Act ("CDSA") prohibiting possession and trafficking of illegal drugs subject to exemption from federal Minister of Health — Clinic operating safe injection site pursuant to ministerial exemption granted under s. 56 of Act — Minister subsequently revoking exemption — Whether division of powers exempts clinic as health facility from application of CDSA as exercise of federal jurisdiction over criminal law — Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), 5(1), 56 — Constitution Act, 1867, ss. 91(27), 92(7), 92(13), 92(16).

Constitutional law — Charter of Rights — Right to life, liberty and security of the person — Safe injection site — Sections 4(1) and 5(1) of Controlled Drugs and Substances Act prohibiting possession and trafficking of illegal drugs subject to exemption from federal Minister of Health — Clinic operating safe injection site pursuant to ministerial exemption granted under s. 56 of Act — Minister subsequently revoking exemption — Whether ss. 4(1) and 5(1) of Act contravene claimants' rights to life, liberty and security of the person — Whether decision of Minister to revoke accords with principles of fundamental justice — Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), 5(1), 56 — Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitutional law — Charter of Rights — Remedies — Safe injection site — Sections 4(1) and 5(1) of Controlled Drugs and Substances Act prohibiting possession and trafficking of illegal drugs subject to exemption from federal Minister of Health granted under s. 56 of Act — Clinic operating safe injection site pursuant to ministerial exemption — Minister subsequently revoking exemption — Appropriate remedy — Canadian Charter of Rights and Freedoms, s. 24(1).

In the early 1990s, injection drug use reached crisis levels in Vancouver's downtown eastside ("DTES"). Epidemics of HIV/AIDS and hepatitis C soon followed, and a public health emergency was declared in the DTES in September 1997. Health authorities recognized that creative solutions would be required to address the needs of the population of the DTES, a marginalized population with complex mental, physical, and emotional health issues. After years of research, planning, and intergovernmental cooperation, the authorities proposed a scheme of care for drug users that would assist them at all points in the treatment of their disease, not simply when they quit drugs for good. The proposed plan included supervised drug consumption facilities which, though controversial in North America, have been used with success to address health issues associated with injection drug use in Europe and Australia.

Operating a supervised injection site required an exemption from the prohibitions of possession and trafficking of controlled substances under s. 56 of the *CDSA*, which provides for exemption at the discretion of the Minister of Health, for medical and scientific purposes. Insite received a conditional exemption in September 2003, and opened its doors days later. North America's first government-sanctioned safe injection facility, it has operated constantly since then. It is a strictly regulated health facility, and its personnel are guided by strict policies and procedures. It does not provide drugs to its clients, who must check in, sign a waiver, and are closely monitored during and after injection. Its clients are provided with health care information, counselling, and referrals to various service providers or an on-site, on demand detox centre. The experiment has proven successful. Insite has saved lives and improved health without increasing the incidence of drug use and crime in the surrounding area. It is supported by the Vancouver police, the city and provincial governments.

In 2008, a formal application for a new exemption was made before the initial one expired. The Minister had granted temporary extensions in 2006 and 2007, but he indicated that he had decided to deny the application. When the expiry of the extensions loomed, this action was started in an effort to keep Insite open.

The trial judge found that the application of ss. 4(1) and 5(1) of the *CDSA* violated the claimants' rights under s. 7 of the *Charter*. He granted Insite a constitutional exemption, permitting it to continue to operate free from federal drug laws. The Court of Appeal dismissed the appeal and held that the doctrine of interjurisdictional immunity applied.

Held: The appeal and the cross-appeal are dismissed. The Minister of Health is ordered to grant an exemption to Insite under s. 56 of the *CDSA* forthwith.

The criminal prohibitions on possession and trafficking in the *CDSA* are constitutionally valid and applicable to Insite under the division of powers. First, the impugned provisions of the *CDSA* are, in pith and substance, valid exercises of the federal criminal law power. The fact that they have the incidental effect of regulating provincial health institutions does not mean that they are constitutionally invalid. Second, provincial programmes designed to advance the public interest are not, by virtue of their public interest status, exempt from the operation of criminal laws unless the law is expressly or impliedly so limited. The *CDSA* does not contain such a limit. Third, the doctrine of interjurisdictional immunity does not apply. Decisions about what treatment may be offered in provincial health facilities do not constitute a protected core of the provincial power over health care and are not, therefore, immune from federal interference. In addition, the doctrine of interjurisdictional immunity is narrow, and its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism. To apply it here would disturb settled competencies and introduce uncertainties for new ones. Finally, as it is common ground that, absent a constitutional immunity, the federal law constrains operations at Insite and trumps any provincial legislation or policies that conflict with it, it is unnecessary to inquire into whether the doctrine of paramountcy applies.

The claimants' lack of success on the division of powers issue does not doom their claim that the law deprives them of a s. 7 *Charter* right. There is no conflict between saying that a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and that the same law, in purpose of effect, deprives individuals of rights guaranteed by the *Charter*.

Section 4(1) of the *CDSA* engages the s. 7 *Charter* rights of the individual claimants and others like them, but, because the Minister has the power to grant exemptions from s. 4(1), it does so in accordance with the principles of fundamental justice. Section 4(1) directly engages the liberty interests of the health professionals who provide the supervised services at Insite because of the availability of a penalty of imprisonment in ss. 4(3) to 4(6) of the *CDSA*. It also directly engages the rights to life, liberty and security of the person of the clients of Insite. In order to make use of the lifesaving and health-protecting services offered at Insite, clients must be allowed to be in possession of drugs on the premises. Prohibiting possession at large engages drug users' liberty interests; prohibiting possession at Insite engages their rights to life and to security of the person. However, because s. 56 gives the Minister a broad discretion to grant exemptions from the application of the *CDSA* if, "in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest", s. 4(1) does not violate s. 7. The exemption acts as a safety valve that prevents the *CDSA* from applying where it would be arbitrary, overbroad or grossly disproportionate in its effects.

On the facts, the prohibition on trafficking in s. 5(1) of the *CDSA* does not constitute a limitation of the claimants' s. 7 rights because trafficking charges would not apply to the activities of Insite staff.

The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*. If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally. In the special circumstances of this case, the Court should go on to consider whether the Minister's decision violated the clamaints' *Charter* rights. The issue is properly before the Court and justice requires that it be considered.

There is no reason to conclude that the deprivation the claimants would suffer was due to personal choice rather than government action. The ability to make some choices does not negate the trial judge's findings that addiction is a disease in which the central feature is impaired control over the use of the addictive substance. Additionally, the morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right. Finally, the issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. While it is for the relevant governments to make criminal and health policy, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*. The issue is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use, but whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

The Minister's failure to grant a s. 56 exemption to Insite engaged the claimants' s. 7 rights and contravened the principles of fundamental justice. The Minister of Health must be regarded as having made a decision whether to grant an exemption, since he considered the application before him and decided not to grant it. The Minister's decision, but for the trial judge's interim order, would have prevented injection drug users from accessing the health services offered by Insite, threatening their health and indeed their lives. It thus engages the claimants' s. 7 interests and constitutes a limit on their s. 7 rights. Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary regardless of which test for arbitrariness is used because it undermines the very purposes of the *CDSA* — the protection of health and public safety. It is also grossly disproportionate: during its eight years of operation, Insite has been proven to save lives with no discernable negative impact on the public safety and health objectives of Canada. The effect of denying the services of Insite to the population it serves and the correlative increase in the risk of death and disease to injection drug users is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

If a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed. The goals of the *CDSA* are the maintenance and promotion of public health and safety. The Minister's decision to refuse the exemption bears no relation to these objectives, therefore they cannot justify the infringement of the complainants' s. 7 rights.

As the infringement is ongoing, and the concern is a governmental decision, s. 24(1) allows the court to fashion an appropriate remedy. In the special circumstances of this case, an order in the nature of mandamus is warranted. The Minister is ordered to grant an exemption to Insite under s. 56 of the *CDSA* forthwith. A declaration that the Minister erred in refusing the exemption would be inadequate, given the seriousness of the infringement and the grave consequences that might result from a lapse in Insite's current constitutional exemption, and for various reasons, granting a permanent constitutional exemption would be inappropriate.

On future applications, the Minister must exercise that discretion within the constraints imposed by the law and the *Charter*, aiming to strike the appropriate balance between achieving public health and public safety. In accordance with the *Charter*, the Minister must consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. Where, as here, a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption.

VANDU's cross-appeal, which challenges the application of the prohibition on possession to all addicted persons, lacks an adequate basis in the record.

Cases Cited

Distinguished: *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 188 D.L.R. (4th) 385; **referred to:** *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307; *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629; *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *Derrickson v. Derrickson*, 1986 CanLII 56 (SCC), [1986] 1 S.C.R. 285; *Natural Parents v. Superintendent of Child Welfare*, 1975 CanLII 143 (SCC), [1976] 2 S.C.R. 751; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616; *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463; *New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, 1993 CanLII 153 (SCC), [1993] 1 S.C.R. 319; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519; *R. v. York*, 2005 BCCA 74, 193 C.C.C. (3d) 331; *R. v. Spooner* (1954), 1954 CanLII 398 (BC CA), 109 C.C.C. 57; *R. v. Hess (No. 1)* (1948), 1948 CanLII 349 (BC CA), 94 C.C.C. 48; *R. v. Ormerod*, 1969 CanLII 210 (ON CA), [1969] 4 C.C.C. 3; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1).

Constitution Act, 1867, ss. 91(27), 92(7), (13), (16).

Constitution Act, 1982, s. 52.

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), (3) to (6), 5(1), 10(1), 55, 56.

Criminal Code, R.S.C. 1985, c. C-46, s. 4(3).

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Canada. Health Canada. *Vancouver's INSITE service and other Supervised injection sites: What has been learned from research? — Final report of the Expert Advisory Committee*, March 31, 2008 (online: http://www.hc-sc.gc.ca/ahc-asc/pubs/_sites-lieux/insite/index-eng.php).

Canada. House of Commons. *Evidence of the Standing Committee on Health*, No. 032, 2nd Sess., 39th Parl., May 29, 2008 (online: http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=3529880&Language=E&Mode=1&Parl=39&Ses=2).

APPEAL and CROSS-APPEAL from a judgment of the British Columbia Court of Appeal (Rowles, Huddart and D. Smith JJ.A.), 2010 BCCA 15, 100 B.C.L.R. (4th) 269, 314 D.L.R. (4th) 209, 250 C.C.C. (3d) 443, 207 C.R.R. (2d) 232, [2010] 2 W.W.R. 575, 281 B.C.A.C. 161, 475 W.A.C. 161, [2010] B.C.J. No. 57 (QL), 2010 CarswellBC 50, affirming the decisions of Pitfield J., 2008 BCSC 661, 85 B.C.L.R. (4th) 89, 293 D.L.R. (4th) 392, 173 C.R.R. (2d) 82, [2009] 3 W.W.R. 450, [2008] B.C.J. No. 951 (QL), 2008 CarswellBC 1043, and 2008 BCSC 1453, 91 B.C.L.R. (4th) 389, 302 D.L.R. (4th) 740, [2009] 3 W.W.R. 494, [2008] B.C.J. No. 2057 (QL), 2008 CarswellBC 2300. Appeal and cross-appeal dismissed.

Robert J. Frater and *W. Paul Riley*, for the appellants/respondents on cross-appeal.

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Craig E. Jones and *Karrie Wolfe*, for the respondent the Attorney General of British Columbia.

John W. Conroy, *Q.C.*, and *Stephen J. Mulhall*, *Q.C.*, for the respondent/appellant on cross-appeal.

Hugo Jean, for the intervener the Attorney General of Quebec.

Andrew I. Nathanson and *Brook Greenberg*, for the intervener the Dr. Peter AIDS Foundation.

Sheila M. Tucker, for the intervener the Vancouver Coastal Health Authority.

Paul F. Monahan and *Antonio Di Domenico*, for the intervener the Canadian Civil Liberties Association.

Michael A. Feder, *Angela M. Juba* and *Louis Letellier de St-Just*, for the interveners the Canadian HIV/AIDS Legal Network, International Harm Reduction Association and CACTUS Montréal.

Rahool P. Agarwal, *John M. Picone* and *Michael Kotrly*, for the interveners the Canadian Nurses Association, the Registered Nurses' Association of Ontario and the Association of Registered Nurses of British Columbia.

Owen M. Rees and *Fredrick Schumann*, for the intervener the Canadian Public Health Association.

Guy J. Pratte, *Nadia Effendi* and *Jean Nelson*, for the intervener the Canadian Medical Association.

Ryan D. W. Dalziel and *Thomas J. Moran*, for the intervener the British Columbia Civil Liberties Association.

Marjorie Brown, for the intervener the British Columbia Nurses' Union.

Michael A. Chambers, for the intervener REAL Women of Canada.

The judgment of the Court was delivered by

[1] THE CHIEF JUSTICE — Since 2003, the Insite safe injection facility has provided medical services to intravenous drug users in the Downtown Eastside of Vancouver ("DTES"). Local, provincial and federal authorities came together to create a legal framework for a safe injection facility in which clients could inject drugs under medical supervision without fear of arrest and prosecution. Insite was widely hailed as an effective response to the catastrophic spread of infectious diseases such as HIV/AIDS and hepatitis C, and the high rate of deaths from drug overdoses in the DTES.

[2] In 2008, the federal government failed to extend Insite's exemption from the operation of criminal laws in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). Faced with the threat that Insite would have to stop offering services, the claimants brought an action for declarations that the *CDSA* is inapplicable to Insite and that its application to Insite resulted in a violation of the claimants' s. 7 rights under the *Canadian Charter of Rights and Freedoms*, or, in the alternative, that the federal Minister of Health, in refusing to grant an extension of Insite's exemption, had violated the claimants' s. 7 rights.

[3] The question in this appeal is whether Insite is exempt from the federal criminal laws that prohibit the possession and trafficking of controlled substances, either because Insite is a health facility within the exclusive jurisdiction of the Province, or because the application of the criminal law would violate the *Charter*. For the reasons that follow, we conclude that the *CDSA* is applicable to Insite, and that the scheme of the *CDSA* conforms to the *Charter*. However, the actions of the federal Minister of Health in refusing to extend Insite's exemption under s. 56 of the *CDSA* are in violation of s. 7 of the *Charter*, and cannot be justified under s. 1. Accordingly, we order the Minister to grant Insite an extended exemption, and dismiss the appeal.

I. Introduction and Background

[4] The DTES is home to some of the poorest and most vulnerable people in Canada. Its population includes 4,600 intravenous drug users, which is almost half of the intravenous drug users in the city as a whole. This number belies the size of the DTES. It is in fact a very small area, stretching for a few blocks in each direction from its heart at the intersection of Main and Hastings.

[5] There is no single reason for the concentration of intravenous drug users in this urban neighbourhood. Contributing factors include the presence of several single room occupancy hotels, the de-institutionalization of the mentally ill, the effect of drug enforcement policies over the years, and the availability of illicit narcotics at street level.

[6] The injection drug use problem of the DTES is not hidden. At any given time of day drug transactions can be witnessed in the open air on the very steps of the historic Carnegie Community Centre at Main and Hastings. In alleys steps away, addicts tie rubber bands around their arms to find veins in which to inject heroin and cocaine, or smoke crack from glass pipes.

[7] The residents of the DTES who are intravenous drug users have diverse origins and personal histories, yet familiar themes emerge. Many have histories of physical and sexual abuse as children, family histories of drug abuse, early exposure to serious drug use, and mental illness. Many injection drug users in the DTES have been addicted to heroin for decades, and have been in and out of treatment programmes for years.

Many use multiple substances, and suffer from alcoholism. Some engage in street-level survival sex work in order to support their addictions. It should be clear from the above that these people are not engaged in recreational drug use: they are addicted. Injection drug use is both an effect and a cause of a life that is a struggle on a day to day basis.

[8] While some affordable housing is available in the DTES, living conditions there would shock many Canadians. The DTES is one of the few places where Vancouver's poorest people, crippled by disability and addiction, can afford to live. Twenty percent of its population is homeless. Of those who are not homeless, many live in squalid conditions in single-room occupancy hotels. Residents of single-room occupancy hotels live with little in the way of security, privacy or hygienic facilities. The residents of one building often have to share a single bathroom. Single-room occupancy hotels are commonly infested with bedbugs and rats. Existence is bleak.

[9] A survey of approximately 1,000 drug users living in the DTES was presented to the federal Minister of Health in a 2008 report (*Vancouver's INSITE service and other Supervised injection sites: What has been learned from research? — Final report of the Expert Advisory Committee*, March 31, 2008 (online)), and summarized by the trial judge at para. 16 of his reasons (2008 BCSC 661, 85 B.C.L.R. (4th) 89). Generally, he found that:

- those surveyed had been injecting drugs for an average of 15 years;
- the majority (51%) inject heroin and 32% inject cocaine;
- 87% are infected with hepatitis C virus (HCV) and 17% with human immunodeficiency virus (HIV);
- 18% are Aboriginal;
- 20% are homeless and many more live in single resident rooms;
- 80% have been incarcerated;
- 38% are involved in the sex trade;
- 21% are using methadone; and
- 59% reported a non-fatal overdose in their lifetime.

[10] For injection drug users, the nature of addiction makes for a desperate and dangerous existence. Aside from the dangers of the drugs themselves, addicts are vulnerable to a host of other life-threatening practices. Although many users are educated about safe practices, the need for an immediate fix or the fear of police discovering and confiscating drugs can override even ingrained safety habits. Addicts share needles, inject hurriedly in alleyways and dissolve heroin in dirty puddle water before injecting it into their veins. In these back alleyways, users who overdose are often alone and far from medical help. Shared needles transmit HIV and hepatitis C. Unsanitary conditions result in infections. Missing a vein in the rush to inject can mean the development of abscesses. Not taking adequate time to prepare can result in mistakes in measuring proper amounts of the substance being injected. It is not uncommon for injection drug users to develop dangerous infections or endocarditis. These dangers are exacerbated by the fact that injection drug users are a historically marginalized population that has been difficult to bring within the reach of health care providers.

[11] Although injection drug use is by no means a new problem in Vancouver, or for that matter in the rest of the country, in the early 1990s it reached crisis levels in the DTES. In just six years, the number of annual deaths from overdose in Vancouver increased exponentially, from 16 in 1987 to 200 in 1993. In 1996, Vancouver's medical health officer reported an increase in infectious diseases in the DTES, including HIV/AIDS, hepatitis A, B and C, skin and blood-borne infections, endocarditis and septicaemia, as well as fatal and non-fatal overdoses. All were related to injection drug use. The same year, the British Columbia Centre for Excellence in

HIV/AIDS reported an HIV/AIDS epidemic in the neighbourhood. The following year, an epidemic of hepatitis C was reported. A public health emergency was declared in the DTES in September 1997.

[12] The decision to implement a supervised safe injection site was the result of years of research, planning, and intergovernmental cooperation. The process of research and planning is described in the affidavit of Heather Hay, the Director of Addictions, HIV/AIDS and Aboriginal Health Services for the Vancouver Coastal Health Authority ("VCHA"). In her affidavit, Ms. Hay describes the response of the various government agencies to the crisis in the DTES. From the beginning, health authorities recognized that creative solutions would be required to address the needs of the difficult-to-reach population of the DTES.

[13] In 1997, the Vancouver/Richmond Health Board adopted the "Vancouver Downtown Eastside HIV/AIDS Action Plan", which introduced harm reduction strategies such as the creation of the Vancouver Area Network of Drug Users (VANDU) ("VANDU") to provide peer outreach and support, and the establishment of needle exchanges. In 1999, VCHA issued a report identifying injection drug use as the root of the health concerns in the DTES, and recommended an integrated health approach that had as its focus harm reduction: expansion of primary care services, the development of creative interventions to address communicable disease, the development of a scheme of drug and alcohol services including harm reduction strategies, and improved access to stable housing. In accordance with this plan, new low threshold health clinics were opened in the DTES, needle exchange services were expanded, methadone service was increased, and access to antiretroviral drugs was improved.

[14] In April 2002, the Province transferred responsibility for adult alcohol and drug services to the regional health authorities, allowing the VCHA to integrate its approach to addictions treatment. In September 2002, the VCHA proposed a new addictions plan for Vancouver that adopted harm reduction strategies and moved away from traditional abstinence-based programmes. The plan envisioned a scheme of care for drug users that would assist them at all points in the treatment of their disease, not simply at the exit point when they quit drugs for good. The proposed plan included supervised drug consumption facilities.

[15] The notion of a supervised injection facility, although politically contentious in North America, has precedent elsewhere. Supervised injection sites have been used with success to address health issues associated with injection drug use in other parts of the world. Safe injection sites operate in 70 cities in 6 European countries, and in Sydney, Australia. These sites are evidence that health authorities are increasingly recognizing that health care for injection drug users cannot amount to a stark choice between abstinence and forgoing health services. Successful treatment requires acknowledgment of the difficulties of reaching a marginalized population with complex mental, physical, and emotional health issues.

[16] Ms. Hay prepared a proposal for a supervised injection site, which received the approval of the Board of the VCHA in March 2003. In May 2003, the proposal was submitted to Health Canada for consideration. Federal approval was required in order to obtain an exemption from the prohibitions on possession and trafficking of controlled substances in the *CDSA*. The scheme of the *CDSA* provides for such exemptions, at the discretion of the Minister of Health, under s. 56. Health Canada gave final approval for conditional exemption of the facility from possession and trafficking laws as a pilot research project under s. 56 of the *CDSA* on September 12, 2003.

[17] Insite opened its doors on September 21, 2003. It was North America's first government-sanctioned safe injection facility. It has operated constantly since then, seven days a week, 18 hours a day. Its operations are described at paras. 71-77 of the trial judge's reasons:

> Insite is located on East Hastings Street between Carrall and Main Streets. It is open daily from 10:00 a.m. to 4:00 a.m. the following day. The facility is known to DTES residents. Police refer addicts to it. Insite operates under an extensive and detailed operating protocol approved by Health Canada. It is staffed by a combination of PHS, Health Authority and community workers.
>
> Users must be 16 years of age or over, must sign a user agreement, release and consent form, must agree to adhere to a code of conduct, and cannot be accompanied by children. Users must register at each visit to the site and each is asked to identify the substance that will be injected. No substances are provided by staff. It goes without saying that the substances brought to Insite by users have been obtained from a trafficker in an illegal transaction. Users are obviously in possession of their substance en route to Insite. Approximately 60% of the drugs injected are opioids, of which two-thirds are heroin and one-third

morphine or hydromorphone. Approximately 40% of injected drugs are stimulants, approximately 90% of which are cocaine and 10%, methamphetamine.

Insite has 12 injection bays. Users are provided with clean injection equipment which is the only equipment that can be used at the site. Users are monitored by staff during injection. Nurses and paramedical staff provide treatment in the event of overdose and contact a physician and the ambulance service as necessary. Overdoses vary in severity and treatment.

The protocol permits pregnant women to use Insite. They are required to undergo a more intensive assessment than others before being allowed access to the injection room. Those women are also referred to a clinic and child daycare facilities directly managed by the Health Authority, which provides pre- and post-natal care to pregnant women who are actively using illegal substances.

Users who have completed an injection are assessed by staff. They may be discharged to the "chill-out" lounge or treated by a nurse in the treatment room for injection-related conditions. Users requiring extensive or ongoing care are referred to the closest primary care facility, either the Downtown Community Health Centre or the Pender Clinic.

Staff and support workers interact with users at Insite on a one-to-one basis. Users are provided with health care information, counselling and referrals to Health Authority and other service providers. Records indicate that in 2005, 2006 and 2007, staff made 2,270, 1,828, and 2,269 referrals, respectively, to community clinic, hospital emergency, outpatient medical mental health, emergency shelter and community services; and to addiction counselling, housing, withdrawal, methadone treatment, drug recovery, and miscellaneous other services.

Since the fall of 2007, the staff has also been able to refer users to "Onsite", a detox centre located above Insite which permits Insite to provide detox on demand. Onsite is a drug free environment supported by physicians who are addiction specialists and general practitioners, nurses and peers. Users may also be referred to residential detox and additional treatment services.

[18] This passage describes a strictly regulated health facility. It operates under the authority of the VCHA, and its personnel are guided by strict policies and procedures. It does not provide drugs to its clients, who must check in, must sign a waiver, and are closely monitored during and after injection. There are guidelines for staff to follow in the disposal of used injection equipment and the containment of leftover drugs.

[19] Insite was the product of cooperative federalism. Local, provincial and federal authorities combined their efforts to create it. It was launched as an experiment. The experiment has proven successful. Insite has saved lives and improved health. And it did those things without increasing the incidence of drug use and crime in the surrounding area. The Vancouver police support Insite. The city and provincial government want it to stay open. But continuing the Insite project will be impossible without a federal government exemption from the laws criminalizing possession of prohibited substances at Insite.

[20] The federal *CDSA* is the federal government's response to the problem of illegal drug use across Canada. By way of the *CDSA*, the federal government has chosen an approach that favours a blanket prohibition on possession and trafficking in illegal drugs. At the same time, Parliament has recognized that there are good reasons to allow the use of illegal substances in certain circumstances. The federal Minister of Health can issue exemptions for medical and scientific purposes under s. 56 of the *CDSA*. Section 55 of the *CDSA* allows for the Governor in Council to make regulations for the medical, scientific and industrial use of illegal substances. In this manner, Parliament has attempted to balance the two competing interests of public safety and public health. In 2008, the federal exemption for Insite from the operation of the criminal drug laws expired. This action was started in an effort to keep Insite open.

II. Procedural History

[21] This action was brought by Dean Edward Wilson, Shelly Tomic, PHS Community Services ("PHS"), and VANDU. PHS is a non-profit organization that oversees the operation of Insite. VANDU is a non-profit society that advocates on behalf of drug users.

[22] The individual claimants, Mr. Wilson and Ms. Tomic, are residents of the DTES and are (or have been) clients of Insite. Mr. Wilson is 55 years old and has been injecting heroin since he was 13. He has been injecting cocaine for almost as long. His drug use has had serious health consequences: he is hepatitis C positive, and is frequently ill. He has tried to stop or reduce his drug use many times, but has been unable to go completely clean. Mr. Wilson has translated his own experiences into a positive role in helping to educate and improve the health situation of other drug users in the community. He was the first person to use Insite's facilities, and continues to go back when he relapses into heroin use. He considers Insite to be an important resource for injection drug users in the DTES, and believes that he has reduced his own risk of serious overdose by injecting there. Most importantly, he says, "Insite has given dignity to people who have to struggle to have their humanity recognized" (A.R., vol. II, at p. 44).

[23] Ms. Tomic is 43 years old, and was born addicted to speed. She began injecting cocaine when she was 19 or 20, heroin when she was 26 or 27. She has turned to sex work at times to support her addiction. Like Mr. Wilson, she is hepatitis C positive. She is treating her addiction with methadone, but occasionally relapses and uses heroin. Ms. Tomic started injecting at Insite as soon as it opened in 2003, and immediately noticed that she stopped getting abscesses when she injected there. She also credits Insite with getting her started on methadone treatment. Like Mr. Wilson, she attests to the psychological and emotional support that Insite and its staff provide, and its role in keeping her on the path to recovery.

[24] Ms. Tomic, Mr. Wilson and PHS seek a declaration that ss. 4(1) and 5(1) of the *CDSA* are constitutionally inapplicable to Insite, because as a health facility it is under exclusive provincial control, making an exemption under s. 56 unnecessary. They also allege that the application of the criminal prohibitions in the *CDSA* to Insite violates their constitutional rights under s. 7 of the *Charter*, and to this extent are invalid under s. 52 of the *Constitution Act, 1982*. In the alternative, they seek a declaration that any decision of the federal Minister of Health to refuse to grant or extend the exemption constitutes a violation of the individual plaintiffs' s. 7 *Charter* rights.

[25] At this Court, VANDU supports the submissions of Ms. Tomic, Mr. Wilson and PHS and seeks a declaration that the offence of possession of all addictive drugs violates s. 7 of the *Charter*.

A. *British Columbia Supreme Court, 2008 BCSC 661, 85 B.C.L.R. (4th) 89*

[26] The action was brought by way of a summary trial before Pitfield J. at the British Columbia Supreme Court in May 2008, shortly before the federal exemption was set to expire. The evidence was presented in affidavit form.

[27] Pitfield J. recognized that there are competing approaches to dealing with addiction, and limited his findings of fact to what was necessary to decide the matter before him. His factual findings are key to this appeal. He summarized those findings at paras. 87-89 of his reasons:

> . . . all of the evidence adduced by PHS, VANDU and Canada supports some incontrovertible conclusions:
>
> 1. Addiction is an illness. One aspect of the illness is the continuing need or craving to consume the substance to which the addiction relates.
>
> 2. Controlled substances such as heroin and cocaine that are introduced into the bloodstream by injection do not cause Hepatitis C or HIV/AIDS. Rather, the use of unsanitary equipment, techniques, and procedures for injection permits the transmission of those infections, illnesses or diseases from one individual to another; and
>
> 3. The risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals.
>
> What is less certain and more controversial are the root causes of addiction. The evidence adduced in these proceeding[s] regarding the character of the DTES, many of its inhabitants, and the nature of addiction leads me to the following assessment.
>
> Residents of the DTES who are addicted to heroin, cocaine, and other controlled substances are not engaged in recreation. Their addiction is an illness frequently, if not invariably, accompanied by serious infections and the real risk of overdose that compromise their physical health and the health of

other members of the public. I do not assign or apportion blame, but I conclude that their situation results from a complicated combination of personal, governmental and legal factors: a mixture of genetic, psychological, sociological and familial problems; the inability, despite serious and prolonged efforts, of municipal, provincial and federal governments, as well as numerous non-profit organizations, to provide meaningful and effective support and solutions; and the failure of the criminal law to prevent the trafficking of controlled substances in the DTES as evidenced by the continuing prevalence of addiction in the area.

[28] With respect to outcomes, Pitfield J. accepted the findings of the Expert Advisory Committee's report to the federal Minister of Health with respect to Insite (para. 85). In its report, the Expert Advisory Committee concluded, *inter alia*, that:

- observations in the period shortly before and after the opening of Insite indicated a reduction in the number of people injecting in public;

- there was no evidence of increases in drug-related loitering, drug dealing or petty crime in the area around Insite;

- the local Chinese Business Association reported reductions in crime in the Chinese business district outside the DTES;

- police data showed no changes in rates of crime recorded in the DTES;

- there was no evidence that Insite increased the relapse rate among injection drug users; and

- the cost/benefit analysis was favourable.

[29] Pitfield J. rejected VANDU's application for a declaration that the activities of the staff of Insite did not amount to possession or trafficking. The question of whether an individual has committed either offence is fact-dependent and not amenable to a judicial declaration "in the air" (para. 98).

[30] Pitfield J. also rejected the claim that Insite was shielded from the application of ss. 4(1) and 5(1) of the *CDSA* by the operation of the doctrine of interjurisdictional immunity. He noted this Court's ambivalence towards the doctrine in recent years and its view that interjurisdictional immunity should only be employed sparingly (para. 118). In cases of "double aspect" where both levels of government may regulate the same subject matter, Pitfield J. held that the courts "must strive to give legitimacy to both legislative initiatives" (para. 119). The federal and provincial legislation conflicted, with the result that the federal scheme prevailed to the extent of the conflict by virtue of the doctrine of federal paramountcy.

[31] With respect to the *Charter* claim, Pitfield J. found that the s. 7 rights of life, liberty, and security of the person were all engaged by the application of ss. 4(1) and 5(1) of the *CDSA* to Insite. Applied to Insite, the impugned provisions of the *CDSA* did not accord with the principles of fundamental justice because they arbitrarily prohibited the management of addiction and its associated risks. The arbitrariness of the scheme was not cured by s. 56 of the *CDSA*, because the Minister's discretion to grant exemptions was unfettered. Pitfield J. went on to hold that the violation of s. 7 could not be saved under s. 1 of the *Charter*. Accordingly, he declared ss. 4(1) and 5(1) of the *CDSA* unconstitutional and of no force and effect. He suspended the declaration of constitutional invalidity and granted Insite a constitutional exemption, permitting it to continue to operate free from federal drug laws.

B. *British Columbia Court of Appeal, 2010 BCCA 15, 100 B.C.L.R. (4th) 269*

[32] The British Columbia Court of Appeal upheld the trial judge's conclusion that Insite should continue to operate free from federal drug prohibitions. Rowles J.A., writing for herself and concurring with Huddart J.A., upheld the trial judge's decision with respect to the *Charter* claim, although she would have found the law overbroad, rather than arbitrary. She agreed with Pitfield J. that the application of the *CDSA* to the activities at

Insite would have a grossly disproportionate effect on its clients by denying them access to necessary health care, with no corresponding benefit either to themselves or to society at large.

[33] Rowles J.A. also concurred with the reasons of Huddart J.A., holding that the federal drug laws were inapplicable to Insite by virtue of the doctrine of interjurisdictional immunity. Insite, Huddart J.A. held, is a provincial undertaking created under the provincial power over hospitals. The determination of the nature of services to be provided by a hospital, she held, is at the core of the purpose of the provincial health power, and cannot be undercut by conflicting federal laws. At para. 162, she wrote:

> If the federal executive, in exercising or failing to exercise authority granted to it by Parliament, can effectively prohibit a form of health care vital to the delivery of a provincial health care program, that means Parliament has an effective veto over provincial health care services, to the extent its use of the criminal power can be justified by the potential for harm to public health or safety. That is just the sort of intrusion into a provincial domain that constituted an impermissible intrusion into the federal domain in *Bell Canada* [*v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749, at pp. 797-98].

The immunity created, Huddart J.A. held, "would apply only to exempt a health care service considered essential by a provincial agency with the authority to make that decision under provincial legislation" (para. 167). She concluded that "[i]f interjurisdictional immunity is not available to a provincial undertaking on the facts of this case, then it may well be said the doctrine is not reciprocal and can never be applied to protect exclusive provincial powers" (para. 176).

[34] D. Smith J.A. dissented on both the *Charter* and the division of powers issues. With respect to the *Charter*, she held that although a deprivation of s. 7 rights had been made out, the claimants had not established that the deprivation was not in accordance with the principles of fundamental justice. With respect to arbitrariness, she found that "there was no evidence presented to show that the blanket prohibition of possession of illegal drugs is not rationally connected to or is inconsistent with the overall state interest in health and public safety" (para. 291). Similar conclusions were reached with respect to disproportionality and overbreadth. The claimants "provided no evidence to show that Parliament could prevent increased drug use, addiction, and associated crime by something other than a blanket prohibition" (para. 297). The claimants had provided no evidence upon which the court could conclude that Parliament could have achieved its goals of protecting the health and safety of all Canadians from dangerous and addictive drugs by alternative and narrower legislative means (para. 303).

[35] On the division of powers issue, D. Smith J.A. essentially agreed with the trial judge. She reviewed the recent jurisprudence of this Court on interjurisdictional immunity, and concluded that the doctrine was limited to circumstances in which previous case law had identified an area of exclusive legislative authority (para. 225). Accordingly, she concluded that the doctrine of interjurisdictional immunity should not apply to the provincial power over health care services and hospitals.

III. Questions on Appeal

[36] The Attorney General of Canada asks this Court to overturn the Court of Appeal's holdings on the division of powers and the *Charter*. These questions are considered separately below. The first question is whether ss. 4(1) and 5(1) of the *CDSA* are constitutionally inapplicable to the activities of the staff and clients at Insite by virtue of the division of powers. The second question is whether ss. 4(1) and 5(1) infringe the rights guaranteed by s. 7 of the *Charter*, and if so, whether the infringement is justified under s. 1 of the *Charter*.

IV. Statutory and Constitutional Provisions

A. *The CDSA*

[37] The federal government, exercising its criminal law power, has enacted the *CDSA*. The *CDSA* makes it a crime to possess or traffic in illegal drugs across Canada. The *CDSA* regulates drug possession and trafficking in two complementary ways.

[38] First, the *CDSA* prohibits possession and trafficking in ss. 4(1) and 5(1):

> **4.** (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.
>
> . . .
>
> **5.** (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

[39] Second, the *CDSA* empowers the Minister of Health to issue exemptions for medical or scientific reasons, or for any purpose the Minister deems to be in the public interest:

> **56.** The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[40] Section 55 complements the s. 56 exemption power by giving the Governor in Council the power to make regulations concerning the use and distribution of controlled substances in their permitted applications.

[41] The mechanisms embodied in the *CDSA* — general prohibitions subject to targeted ministerial exemptions — reflect the dual purpose of the *CDSA*: the protection of both public safety and public health. This dual purpose is also reflected in the sentencing provision of the *CDSA*, s. 10(1), which directs that "the fundamental purpose of any sentence for an offence under this Part is to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging rehabilitation, and treatment in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community".

B. *The Constitutional Provisions*

[42] Canada has asserted jurisdiction to prohibit the possession and trafficking of illicit drugs by virtue of its power to enact criminal laws under s. 91(27) of the *Constitution Act, 1867*:

> **91.** . . . it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —
>
> . . .
>
> 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

[43] The claimants and the Attorney General of British Columbia submit that Insite is exempt from the prohibitions in the federal *CDSA* because decisions about health facilities fall within provincial jurisdiction over health under s. 92(7), (13) and (16) of the *Constitution Act, 1867*:

> **92.** In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —
>
> 7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
>
> . . .
>
> 13. Property and Civil Rights in the Province.

. . .

16. Generally all Matters of a merely local or private Nature in the Province.

The Province, exercising these powers, has delegated them to the VCHA, which in turn established Insite.

[44] The claimants also invoke ss. 1 and 7 of the *Charter*:

> **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.

V. Division of Powers Arguments

[45] All the parties accept that apart from its application to provincial health facilities, the *CDSA* is valid legislation, pursuant to Parliament's criminal law power, s. 91(27). The issue before the Court is whether, as a result of the division of powers between the federal government and the provinces, Insite is not bound by the valid criminal laws that prohibit the possession and trafficking of controlled substances. The parties and interveners have advanced three arguments in support of this position.

[46] First, the Attorney General of Quebec argues that the impugned provisions of the *CDSA* are *ultra vires* insofar as Insite is concerned because the federal criminal law power cannot interfere with the regulation of provincial health facilities.

[47] Second, the Attorney General of British Columbia argues that the *CDSA* should be read as avoiding interfering with the Province's jurisdiction over health policy. When the *CDSA* is interpreted in this way, British Columbia argues that any institution that a province identifies as serving the public interest must be exempted from the criminal prohibitions of possession and trafficking.

[48] Third, the Attorney General of British Columbia, Mr. Wilson, Ms. Tomic and PHS argue that the doctrine of interjurisdictional immunity should apply to shield provincial decisions about medical treatments from interference by the federal government.

[49] I consider each of these arguments below.

A. *Are the Impugned Provisions of the CDSA Ultra Vires?*

[50] The Attorney General of Quebec submits that ss. 4(1) and 5(1) of the *CDSA* are partially invalid because they exceed Parliament's jurisdiction to enact criminal laws under s. 91(27) of the *Constitution Act, 1867*. Quebec argues that while the federal government is permitted to criminalize the possession and trafficking of illicit drugs in many contexts, prohibiting these drugs in a medical context is *ultra vires* the federal government. Quebec acknowledges that its approach might appear novel.

[51] This argument appears to confuse the constitutional validity of a law with the applicability of a valid law. When determining whether a law is valid under the division of powers, the Court looks to the dominant purpose of the law. The fact that the law at issue in this case has the incidental effect of regulating provincial health institutions does not mean that it is constitutionally invalid. A valid federal law may have incidental impacts on provincial matters: *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 28; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 23. It is therefore untenable to argue, as I understand Quebec to do, that a valid federal law becomes invalid if it affects a provincial subject, in this case health.

[52] In pith and substance, the impugned provisions of the *CDSA* are valid exercises of the federal criminal law power. At trial, PHS conceded that ss. 4(1) and 5(1) of the *CDSA* were "concerned with suppressing the availability of drugs that have harmful effects on human health" (para. 112). The protection of public health and safety from the effects of addictive drugs is a valid criminal law purpose: *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 77-78. Additionally, the prohibitions in ss. 4(1) and 5(1) are backed by penalties. Since none of the parties have argued that the impugned provisions colourably intrude on provincial jurisdiction, I conclude that they are valid exercises of the criminal law power.

B. *Should Sections 4(1) and 5(1) Be Read as Not Applying to Insite?*

[53] The Attorney General of British Columbia argues that ss. 4(1) and 5(1) of the *CDSA* should be read as not applying to Insite. Relying on this Court's decision in *Attorney General of Canada v. Law Society of British Columbia*, 1982 CanLII 29 (SCC), [1982] 2 S.C.R. 307 ("*Jabour*"), British Columbia argues that federal criminal laws are "implicitly constrained to operate consistently with the public interest" (AGBC Factum, at para. 47). It argues that once a province establishes that a particular activity (in this case the provision of health services through Insite) serves the public interest, that activity is exempt from the operation of federal criminal laws. Since the Province has authorized the operation of Insite in the public interest, the prohibitions in ss. 4(1) and 5(1) of the *CDSA* do not apply to it.

[54] *Jabour* does not establish that federal criminal laws cease to apply if their application is inconsistent with the public interest, as defined by a province. The issue before the Court in *Jabour* was whether s. 32 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, which only prohibited activities that harmed the public interest, interfered with the operation of a provincial law society. The Court, *per* Estey J., held that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (p. 356).

[55] The decision in *Jabour* rested on the fact that the prohibition in the *Combines Investigation Act* extended only to activities that harmed the public interest. *Jabour* was about interpreting the federal statute. It did not establish a general rule that provincial programmes designed to advance the public interest are always exempt from the operation of the criminal law. The Court made this point in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, *per* Iacobucci J., who wrote that the principle of interpretation adopted in *Jabour* would only apply where Parliament has "expressly or by necessary implication . . . granted leeway to those acting pursuant to a valid provincial regulatory scheme" (para. 77).

[56] The wording of s. 56 of the *CDSA* makes clear that the federal government did not grant any leeway to the provinces. Section 56 establishes that the federal Minister may grant exemptions "on such terms and conditions as the Minister deems necessary . . . if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest". The federal Minister alone has the power to determine if an activity should be exempt from the prohibitions in the *CDSA*. Action by provincial authorities is neither contemplated nor authorized by the *CDSA*. To put it another way, the *CDSA* grants no leeway to the provinces, and cannot be interpreted as exempting the provinces from its provisions.

C. *Interjurisdictional Immunity*

[57] British Columbia, Mr. Wilson, Ms. Tomic and PHS argue that Insite is shielded from the operation of the *CDSA* by virtue of the doctrine of interjurisdictional immunity. The argument, accepted by the majority of the Court of Appeal, is that decisions about what treatment may be offered in provincial health facilities lie at the core of the provincial jurisdiction in the area of health care, and are therefore protected from federal intrusions by the doctrine of interjurisdictional immunity. Accordingly, they say that ss. 4(1) and 5(1) of the *CDSA* are of no force or effect to the extent that they impair the Province's ability to make decisions about health care services.

[58] The doctrine of interjurisdictional immunity is premised on the idea that there is a "basic, minimum and unassailable content" to the heads of powers in ss. 91 and 92 of the *Constitution Act, 1867* that must be protected from impairment by the other level of government: *Bell Canada v. Quebec (Commission de la santé et de la sécurité du travail)*, 1988 CanLII 81 (SCC), [1988] 1 S.C.R. 749, at p. 839. In cases where interjurisdictional

immunity is found to apply, the law enacted by the other level of government remains valid, but has no application with regard to the identified "core".

[59] It is not necessary to show that there is a conflict between the laws adopted by the two levels of government for interjurisdictional immunity to apply: *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 52 ("*COPA*"). Indeed, it is not even necessary for the government benefiting from the immunity to be exercising its exclusive authority: *Canadian Western Bank*, at para. 34.

[60] The doctrine of interjurisdictional immunity has been applied to circumscribed areas of activity referred to in the cases as undertakings. These include aviation, ports, interprovincial rail and federal communications works. The doctrine has also been applied to federal things like Aboriginal land, and federally regulated persons such as Aboriginal peoples: *Derrickson v. Derrickson*, 1986 CanLII 56 (SCC), [1986] 1 S.C.R. 285; *Natural Parents v. Superintendent of Child Welfare*, 1975 CanLII 143 (SCC), [1976] 2 S.C.R. 751; see also *Canadian Western Bank*, at para. 41. It has never been applied to a broad and amorphous area of jurisdiction.

[61] Recent jurisprudence has tended to confine the doctrine of interjurisdictional immunity. In *Canadian Western Bank*, the majority stated that "although the doctrine of interjurisdictional immunity has a proper part to play in appropriate circumstances, we intend now to make it clear that the Court does not favour an intensive reliance on the doctrine, nor should we accept the invitation of the appellants to turn it into a doctrine of first recourse in a division of powers dispute" (para. 47). More recently, in *COPA*, the majority held that the doctrine "has not been removed from the federalism analysis", but rather remains "in a form constrained by principle and precedent" (para. 58).

[62] This caution reflects three related concerns. First, the doctrine of interjurisdictional immunity is in tension with the dominant approach that permits concurrent federal and provincial legislation with respect to a matter, provided the legislation is directed at a legitimate federal or provincial aspect, as the case may be. This model of federalism recognizes that in practice there is significant overlap between the federal and provincial areas of jurisdiction, and provides that both governments should be permitted to legislate for their own valid purposes in these areas of overlap.

[63] Second, the doctrine is in tension with the emergent practice of cooperative federalism, which increasingly features interlocking federal and provincial legislative schemes. In the spirit of cooperative federalism, courts "should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest": *Canadian Western Bank*, at para. 37. Where possible, courts should allow both levels of government to jointly regulate areas that fall within their jurisdiction: *Canadian Western Bank*, at para. 37.

[64] Third, the doctrine of interjurisdictional immunity may overshoot the federal or provincial power in which it is grounded and create legislative "no go" zones where neither level of government regulates. Since it is not necessary for the government benefiting from the immunity to actually regulate in the field in question, extension of the doctrine of interjurisdictional immunity risks creating "legal vacuums": *Canadian Western Bank*, at para. 44.

[65] While the doctrine of interjurisdictional immunity has been narrowed, it has not been abolished. Predictability, important to the proper functioning of the division of powers, requires recognition of previously established exclusive cores of power: *Canadian Western Bank*, at paras. 23-24. Nor, in principle, is the doctrine confined to federal powers: *Canadian Western Bank*. However, in areas of overlapping jurisdiction, the modern trend is to strike a balance between the federal and provincial governments, through the application of pith and substance analysis and a restrained application of federal paramountcy. Therefore, before applying the doctrine of interjurisdictional immunity in a new area, courts should ask whether the constitutional issue can be resolved on some other basis.

[66] The question in this case is whether the delivery of health care services constitutes a protected core of the provincial power over health care in s. 92(7), (13) and (16) of the *Constitution Act, 1867*, and is therefore immune from federal interference. I conclude that it is not, for three related reasons.

[67] First, the proposed core of the provincial power over health has never been recognized in the jurisprudence. This is not determinative since new areas of exclusive jurisdiction could in theory be identified in the future. However, as noted above, courts are reluctant to identify new areas where interjurisdictional immunity applies.

[68] Second, and more importantly, the claimants in this case have failed to identify a delineated "core" of an exclusively provincial power. The provincial health power is broad and extensive. It extends to thousands of activities and to a host of different venues. Such a vast core would sit ill with the restrained application of the doctrine called for by the jurisprudence. To complicate the matter, Parliament has power to legislate with respect to federal matters, notably criminal law, that touch on health. For instance, it has historic jurisdiction to prohibit medical treatments that are dangerous, or that it perceives as "socially undesirable" behaviour: *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616; *R. v. Morgentaler*, 1993 CanLII 74 (SCC), [1993] 3 S.C.R. 463. The federal role in the domain of health makes it impossible to precisely define what falls in or out of the proposed provincial "core". Overlapping federal jurisdiction and the sheer size and diversity of provincial health power render daunting the task of drawing a bright line around a protected provincial core of health where federal legislation may not tread.

[69] Third, application of interjurisdictional immunity to a protected core of the provincial health power has the potential to create legal vacuums. Excluding the federal criminal law power from a protected provincial core power would mean that Parliament could not legislate on controversial medical procedures, such as human cloning or euthanasia. The provinces might choose not to legislate in these areas, and indeed might not have the power to do so. The result might be a legislative vacuum, inimical to the very concept of the division of powers.

[70] In summary, the doctrine of interjurisdictional immunity is narrow. Its premise of fixed watertight cores is in tension with the evolution of Canadian constitutional interpretation towards the more flexible concepts of double aspect and cooperative federalism. To apply it here would disturb settled competencies and introduce uncertainties for new ones. Quite simply, the doctrine is neither necessary nor helpful in the resolution of the contest here between the federal government and the provincial government.

D. *Paramountcy*

[71] In the case of a conflict between a federal law and a provincial law, the doctrine of paramountcy means that the federal law prevails to the extent of the inconsistency: *Canadian Western Bank*, at para. 69. While the Attorney General of Canada did not rely on this principle, it merits mention. The doctrine of federal paramountcy applies when there is operational conflict between a federal and provincial law, or when a provincial law would frustrate the purpose of a federal law.

[72] It can be argued that, absent an exemption, the Insite program involves an operational conflict with the federal prohibition on possession of illegal drugs under the *CDSA*. A detailed analysis of paramountcy is unnecessary in this case, however. The complainants concede that if interjurisdictional immunity does not apply, the federal prohibitions on drugs in the *CDSA* apply to Insite, whether by operation of paramountcy or by the requirement that the VCHA exercise its delegated authority within the limits of the criminal law. Indeed, the claimants' *Charter* arguments are premised on the proposition that these prohibitions, absent an exemption, effectively prevent them from operating Insite. It is common ground that absent a constitutional immunity, the federal law constrains operation at Insite and trumps any provincial legislation or policies that conflict with it. It is therefore unnecessary to inquire into whether the conditions for the application of the doctrine of paramountcy and ouster of the provincial scheme are present.

E. *Conclusion on Division of Powers*

[73] None of the arguments raised against the constitutional validity or applicability of the *CDSA* withstand scrutiny. I conclude that the criminal prohibitions on possession and trafficking in the *CDSA* are constitutionally valid and applicable to Insite under the division of powers.

VI. *Charter* Claims

[74] Three *Charter* claims fall for consideration.

[75] Ms. Tomic, Mr. Wilson and PHS argue that ss. 4(1) and 5(1) of the *CDSA*, which prohibit possession and trafficking respectively, are invalid because they limit the claimants' s. 7 rights to life, liberty and security of the person and are not in accordance with the principles of fundamental justice.

[76] In the alternative, they assert that their s. 7 rights have been infringed by the Minister's refusal to extend the exemption for Insite from the application of the federal drug laws.

[77] Finally, VANDU submits that the *CDSA*'s prohibition on possession of drugs limits the s. 7 *Charter* rights of all addicted drug users everywhere, not just at Insite.

[78] Before addressing these arguments, it is necessary to consider Canada's preliminary submission that if the claimants' division of powers arguments fail, their *Charter* arguments must also fail.

A. *Relationship Between the Division of Powers Claim and the Charter Claims*

[79] Canada submits that if this Court concludes that the *CDSA* is valid and applies to Insite under the division of powers, the *Charter* arguments must also fail.

[80] Canada asserts that if the *CDSA* is valid federal legislation, then the Province has no legal jurisdiction to operate Insite without federal approval. The idea appears to be that absent a federal exemption, the provincial government does not have the legal authority to provide the safe injection service. It is that constitutional inability, not the *CDSA*, that threatens Insite's delivery of health services. Therefore, the *CDSA* cannot be said to deprive the claimants of any right. Canada also supports its preliminary objection as "a novel variation on the rule that 'one part of the Constitution cannot be abrogated or diminished by another part of the Constitution'" (A.F., at para. 93, citing *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. 373). The idea here seems to be that if the *CDSA* is valid and applicable, upholding *Charter* claims would amount to an internal contradiction within the Constitution.

[81] The answer to the first part of this argument is that the Province does in fact have the constitutional power to establish Insite without federal approval. No one argues that the provision of the health services offered by Insite is not within the provincial health power. The claimants seek a federal exemption from operation of the *CDSA*, not because this is necessary to validate the Province's decision to operate Insite as a health service, but because it is necessary as a practical matter to implement the decision. Insite cannot operate without a federal exemption, not for lack of constitutional powers in the Province, but for the practical reason that neither workers nor clients will come to the facility, making it effectively impossible to offer the proposed health services. Thus, the premise of Canada's argument — that the Province has no legal jurisdiction to operate Insite without federal approval — fails.

[82] More broadly, the principle that one part of the Constitution cannot be abrogated or diminished by another part of the Constitution is of no assistance in dealing with division of powers issues on the one hand, and *Charter* issues on the other. There is no conflict between saying a federal law is validly adopted under s. 91 of the *Constitution Act, 1867*, and asserting that the same law, in purpose or effect, deprives individuals of rights guaranteed by the *Charter*. The *Charter* applies to all valid federal and provincial laws. Indeed, if the *CDSA* were *ultra vires* the federal government, there would be no law to which the *Charter* could apply. Laws must conform to the constitutional division of powers and to the *Charter*.

[83] I conclude that the claimants' lack of success on the division of powers issues does not doom their claim that the law deprives them of a s. 7 *Charter* right. Any deprivation of s. 7 rights arises, not because the province is constitutionally unable to establish Insite, but because of the application of ss. 4(1) and 5(1) of the *CDSA* to Insite.

B. *Challenge to Sections 4(1) and 5(1) of the CDSA*

[84] The inquiry into the validity of legislation under s. 7 of the *Charter* requires us to ask: (1) whether ss. 4(1) or 5(1) of the *CDSA* limit the right of the claimants to life, liberty or security of the person (i.e. the "deprivation" or "engagement" issue); and (2) if so, whether that limitation is in accordance with the principles of fundamental justice: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 109, *per* McLachlin C.J. and Major J., *Malmo-Levine*, at para. 83.

(1) Are the Claimants' Section 7 Interests Engaged by the Prohibition on Possession of Drugs in Section 4(1) of the *CDSA*?

[85] Section 7 of the *Charter* states that everyone "has the right to life, liberty and security of the person". A law that interferes with any of these rights may be said to "engage" s. 7 of the *Charter* or constitute a "deprivation" under s. 7.

[86] I begin with the offence of possession of prohibited drugs under s. 4(1) of the *CDSA*. The question is whether it engages or limits the s. 7 rights of Insite staff and/or clients.

[87] I turn first to the argument that s. 7 is engaged because of the impact of s. 4(1) of the *CDSA* on staff. The argument is that the prohibition on possession of proscribed drugs on Insite's premises engages the liberty interests of the staff of Insite, because it exposes them to the threat of being imprisoned for carrying out their duties. This constitutes a direct limit on the s. 7 rights of staff.

[88] The actions of the staff at Insite could be construed as the offence of possession. The definition of possession of prohibited drugs under the *CDSA* is broad enough to encompass the activities of staff at Insite. "Possession" in the *CDSA* is defined with reference to s. 4(3) of the *Criminal Code*, R.S.C. 1985, c. C-46, which provides:

> **4**. . . .
>
> (3) For the purposes of this Act,
>
> (*a*) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[89] I conclude that, without a s. 56 exemption, s. 4(1) applies to the staff of Insite because, by operating the premises — opening the doors and welcoming prohibited drugs inside — the staff responsible for the centre may be "in possession" of drugs brought in by clients. They have knowledge of the presence of drugs, and consent to their presence in the facility over which they have control.

[90] The evidence is clear that staff do not buy drugs or assist with their injection. Yet their minimal involvement with clients' drugs may bring them within the legal concept of illegal possession of drugs, contrary to s. 4(1) of the *CDSA*. As such, the availability of a penalty of imprisonment in ss. 4(3) to 4(6) of the *CDSA* engages the liberty interests of staff: *Malmo-Levine*, at para. 84. The threat to the liberty of the staff in turn impacts on the s. 7 rights of clients who seek the health services provided by Insite.

[91] The record supports the conclusion that, without an exemption from the application of the *CDSA*, the health professionals who provide the supervised services at Insite will be unable to offer medical supervision and counselling to Insite's clients. This deprives the clients of Insite of potentially lifesaving medical care, thus engaging their rights to life and security of the person. The result is that the limits on the s. 7 rights of staff will in turn result in limits on the s. 7 rights of clients.

[92] The application of s. 4(1) to the clients of Insite also directly engages their s. 7 interests. In order to make use of the lifesaving and health-protecting services offered at Insite, clients must be allowed to be in possession of drugs on the premises. To prohibit possession by drug users *anywhere* engages their liberty interests; to prohibit possession at Insite engages their rights to life and to security of the person.

[93] The trial judge made crucial findings of fact that support the conclusion that denial of access to the health services provided at Insite violates its clients' s. 7 rights to life, liberty and security of the person. He found that many of the health risks of injection drug use are caused by unsanitary practices and equipment, and not by the drugs themselves. He also found that "[t]he risk of morbidity and mortality associated with addiction and injection is ameliorated by injection in the presence of qualified health professionals" (para. 87). Where a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out: *Morgentaler* (1988), at p. 59, *per* Dickson C.J., and pp. 105-6, *per* Beetz J.; *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 589, *per* Sopinka J.; *Chaoulli*, at para. 43, *per* Deschamps J., and, at paras. 118-19, *per* McLachlin C.J. and Major J.; *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 188 D.L.R. (4th) 385 (Ont. C.A.). Where the law creates a risk not just to the health but also to the lives of the claimants, the deprivation is even clearer.

[94] I conclude that s. 4(1) of the *CDSA* limits the s. 7 rights of staff and clients of Insite.

[95] However, I am unable to conclude that the claimants have shown that the prohibition on trafficking in s. 5(1) of the *CDSA* constitutes a limitation of their s. 7 rights to life and security of the person, on the record before us. The clients of Insite are not involved in trafficking. They do not obtain their drugs at the facility, and are not permitted to engage in activities that could be construed as trafficking while they are on the premises.

[96] Nor are the staff of Insite involved in trafficking. Canada concedes that trafficking charges would not lie against the staff of Insite for their legitimate activities on the premises. Staff members do not handle drugs at Insite, except to safely remove and hand over to the police any substances left behind by clients. Delivering leftover drugs to the police does not constitute possession, let alone trafficking: *R. v. York*, 2005 BCCA 74, 193 C.C.C. (3d) 331; *R. v. Spooner* (1954), 1954 CanLII 398 (BC CA), 109 C.C.C. 57 (B.C.C.A.); *R. v. Hess (No. 1)* (1948), 1948 CanLII 349 (BC CA), 94 C.C.C. 48 (B.C.C.A.); *R. v. Ormerod*, 1969 CanLII 210 (ON CA), [1969] 4 C.C.C. 3 (Ont. C.A.).

(2) Canada's Argument on Choice

[97] Canada argues that any negative health risks drug users may suffer if Insite is unable to provide them with health services, are not caused by the *CDSA*'s prohibition on possession of illegal drugs, but rather are the consequence of the drug users' decision to use illegal drugs.

[98] Canada's position, deconstructed, reveals three distinct strands.

[99] The first strand is that from a factual perspective, personal choice, not the law, is the cause of the death and disease Insite prevents. Canada's difficulty is that this assertion contradicts the uncontested factual findings of the trial judge. The trial judge found that addiction is an illness, characterized by a loss of control over the need to consume the substance to which the addiction relates (para. 87).

[100] This does not negate the fact that some addicts may retain some power of choice. Insite is premised on the assumption that at least some addicts will be capable of making the choice to consume drugs in the safety of the facility and under the supervision of its staff. The range of services offered at the facility, from peer counselling to detox, assume at least a limited capacity on the part of some people to choose not to consume drugs.

[101] The ability to make some choices, whether with the aid of Insite or otherwise, does not negate the trial judge's findings on the record before him that addiction is a disease in which the central feature is impaired control over the use of the addictive substance (para. 142). At trial, Pitfield J. adopted the definition of addiction developed by the Canadian Society of Addiction Medicine:

> A primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behaviour. Clinically, the manifestations occur along biological, psychological, sociological and

> spiritual dimensions. Common features are change in mood, relief from negative emotions, provision of pleasure, pre-occupation with the use of substance(s) or ritualistic behaviour(s); and continued use of the substance(s) and/or engagement in behaviour(s) despite adverse physical, psychological and/or social consequences. Like other chronic diseases, it can be progressive, relapsing and fatal. [para. 48]

That finding was not challenged here. Indeed, Canada conceded at trial that addiction is an illness.

[102] The second strand of Canada's choice argument is a moral argument that those who commit crimes should be made to suffer the consequences. On this point it suffices to say that whether a law limits a *Charter* right is simply a matter of the purpose and effect of the law that is challenged, not whether the law is right or wrong. The morality of the activity the law regulates is irrelevant at the initial stage of determining whether the law engages a s. 7 right.

[103] The third way to view Canada's choice argument is as a matter of government policy. Canada argues that the decision to allow supervised injection is a policy question, and thus immune from *Charter* review.

[104] The answer, once again, is that policy is not relevant at the stage of determining whether a law or state action limits a *Charter* right. The place for such arguments is when considering the principles of fundamental justice or at the s. 1 stage of justification if a *Charter* breach has been established.

[105] The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

[106] I conclude that, whatever form it takes, Canada's assertion that choice rather than state conduct is the cause of the health hazards Insite seeks to address and the claimants' resultant deprivation must be rejected.

(3) Is the Deprivation in Accordance With the Principles of Fundamental Justice?

[107] For the reasons just discussed, I conclude that the prohibition on possession in s. 4(1) of the *CDSA* limits the s. 7 interests of the claimants and others like them. The next question is whether this limitation is in accordance with the principles of fundamental justice.

[108] The claimants argue that the prohibition on possession of illegal drugs in s. 4(1) of the *CDSA* is not in accordance with the principles of fundamental justice because it is arbitrary, disproportionate in its effects, and overbroad. They say it is arbitrary because, when applied to Insite, it is not only inconsistent with the goals of the *CDSA*, but undermines them. They submit that it is disproportionate in its effects, as it causes significant harm to the clients of Insite and those like them, while providing no commensurate benefit. And they assert that it is overbroad because its application to Insite is unnecessary to meet the state's objectives.

[109] The difficulty with this submission is that it considers s. 4(1) in isolation, rather than in the context of other provisions of the *CDSA*, notably s. 56. If the Act consisted solely of blanket prohibitions with no provision for exemptions for necessary medical or scientific use of drugs, the assertions that it is arbitrary, overbroad and disproportionate in its effects might gain some traction. However, the Act contains not only a prohibition on possession of illegal drugs, but a provision, s. 56, that empowers the Minister to grant exemptions from the prohibition to health service providers like Insite. The constitutional validity of s. 4(1) of the Act cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of that prohibition.

[110] The scheme of the *CDSA* reveals that it has two purposes: the protection of public health and the maintenance of public safety. The public safety purpose of the Act is achieved by the prohibition on possession and

trafficking in listed substances. The public health purpose of the statute is achieved not only by the prohibitions in ss. 4(1) and 5(1), which seek to avert the use of dangerous substances, but also by the provision of regulations guiding exemptions for and the use of listed substances for medical and scientific purposes in ss. 55 and 56 of the Act.

[111] Section 55(1) provides that "[t]he Governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances". There follows a lengthy non-exhaustive list of matters in respect of which regulations may be made, including regulations exempting a person or class of person from the application of the Act: s. 55(1)(*z*).

[112] Section 56 gives the Minister of Health a broad discretion to grant exemptions from the application of the Act "if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest".

[113] The availability of exemptions acts as a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects.

[114] I conclude that while s. 4(1) of the *CDSA* engages the s. 7 *Charter* rights of the individual claimants and others like them, it does not violate s. 7. This is because the *CDSA* confers on the Minister the power to grant exemptions from s. 4(1) on the basis, *inter alia*, of health. Indeed, if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt just this type of scheme — a prohibition combined with the power to grant exemptions. If there is a *Charter* problem, it lies not in the statute but in the Minister's exercise of the power the statute gives him to grant appropriate exemptions.

[115] The claimants' s. 7 challenge to the *CDSA* accordingly fails.

C. *Has the Minister's Decision Violated the Claimants' Section 7 Rights?*

[116] The main issue, as the appeal was argued, was the constitutionality of the *CDSA* itself. I have concluded that, properly interpreted, the statute is valid. This leaves the question of the Minister's decision to refuse an exemption. A preliminary issue arises whether the Court should consider this issue. In the special circumstances of this case, I conclude that it should. The claimants pleaded in the alternative that, if the *CDSA* were valid, the Minister's decision violated their *Charter* rights. The issue was raised at the hearing and the parties afforded an opportunity to address it. It is therefore properly before us and the Attorney General of Canada cannot complain that it would be unfair to deal with it. Most importantly, justice requires us to consider this issue. The claimants have established that their s. 7 rights are at stake. They should not be denied a remedy and sent back for another trial on this point simply because it is the Minister's decision and not the statute that causes the breach when the matter has been pleaded and no unfairness arises.

[117] The discretion vested in the Minister of Health is not absolute: as with all exercises of discretion, the Minister's decisions must conform to the *Charter*: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3. If the Minister's decision results in an application of the *CDSA* that limits the s. 7 rights of individuals in a manner that is not in accordance with the *Charter*, then the Minister's discretion has been exercised unconstitutionally.

[118] I note that this case is different from *Parker*, where the Ontario Court of Appeal held that the general prohibition on possession of marihuana was not saved by the availability of an exemption for possession for medical purposes under s. 56. No decision of the Minister was at stake in *Parker*, and the Court's conclusion rested on findings of the trial judge that, at that time, "the availability of the exemption was illusory" (para. 174).

(1) Has the Minister Made a Decision?

[119] The Attorney General of Canada argues that the Minister has not violated s. 7 because the Minister has not yet made a decision whether to grant a s. 56 exemption to Insite. He also submits that the decision of the British Columbia Courts that ss. 4(1) and 5(1) of the *CDSA* are unconstitutional prevents the Minister from exercising his powers to grant an exemption under s. 56. Although the declaration of unconstitutionality has been

suspended and a temporary constitutional exemption granted to Insite by judicial order, the Minister says it would be improper for him to exercise his s. 56 discretion until the constitutionality of the *CDSA* has been finally resolved by this Court.

[120] In my view, the record establishes that the Minister *has* made a decision on the request for an exemption for Insite, and that that decision was to refuse the exemption.

[121] The essential facts are as follows. The first exemption for Insite, which lasted three years, was effective as of September 12, 2003. The Minister granted a temporary extension on September 11, 2006, to expire December 31, 2007. On October 2, 2007, the exemption was extended for another six months to June 30, 2008. In his letters to the VCHA granting the exemption, the Minister stated that the extensions were to be for the purpose of allowing time for additional research on the impact of Insite on prevention, treatment and crime. In the course of the summary trial, on May 2, 2008, the VCHA sent an application to Health Canada formally requesting an extension of the exemption for another three years. The application was supported by the provincial Minister of Health. Health Canada responded on December 19, 2008, after the trial judge had rendered his judgment. It stated that, in view of the result at trial, an exemption was not required at that time.

[122] However, before December 2008, the Minister indicated that he had decided not to grant the exemption. The then federal Minister of Health, Tony Clement, spoke to the Standing Committee on Health on May 29, 2008. He had at that point received the report of the Expert Advisory Committee, a formal application for a continued exemption, and a statement of support for Insite from the provincial Minister of Health. The federal Minister's comments can be summarized briefly: he approved of the other services Insite was providing, but not supervised injection. He felt that the scientific evidence with respect to its effectiveness was mixed, but that the "public policy is clear", and that "the site itself represents a failure of public policy" (12:40 (online)). He disagreed with the experts who saw Insite as a public health success, and stated he intended to appeal the trial judge's decision. These comments, coupled with the failure to accord an exemption, amount to an effective refusal of the application.

[123] The Attorney General of Canada draws our attention to this statement by the Minister near the end of his presentation to the Committee:

> Indeed, I want to state for the record, if I might, that should another exemption application come forward, I have a duty to once again look at all the evidence and once again turn my mind to it in a way that gives due process. So I'm not resigning from that obligation that I have as health minister. [13:20 (online)]

This statement can be interpreted only in one way. The Minister was rejecting the formal application that was then before him, while asserting he would consider any new application "in a way that gives due process".

[124] To recap, the Minister had before him a formal application dated May 2, 2008. He was obliged, as he conceded, to consider all applications. The Minister treated the application before him as denied; it was spent, and a duty to reconsider could only be triggered by a new application. The only rational conclusion is that the Minister had considered the application for an exemption that was then before him, and had decided not to grant it.

[125] More broadly, Canada's submission that there has been no decision to refuse the s. 56 application is in tension with its argument that this case is essentially about conflicting policy choices. Implicit in this is the concession that the federal government, through the Minister of Health, has made a policy choice to deny exemption under s. 56 of the *CDSA*.

(2) Are the Claimants' Section 7 Rights Engaged by the Minister's Decision?

[126] The last ministerial exemption expired on June 30, 2008. Absent the judicial exemption granted by Pitfield J. and extended by the Court of Appeal, the prohibition contained in s. 4(1) of the *CDSA* would apply to Insite. For the reasons discussed above, the application of s. 4(1) to the staff engages the staff's liberty interests, and engages the security of the person and life interests of the clients of Insite. I conclude that the Minister's rejection of the application for a s. 56 exemption likewise engages the s. 7 rights of the claimants. The only reason

Insite users have continued to receive its health services is because of a temporary remedial order made by the trial judge, pending completion of these proceedings. A judicial order directed at preserving the *status quo* pending resolution of a dispute does not prevent the claimants from asserting their s. 7 rights.

(3) Does the Minister's Refusal to Grant an Exemption to Insite Accord With the Principles of Fundamental Justice?

[127] The next question is whether the Minister's decision that the *CDSA* applies to Insite is in accordance with the principles of fundamental justice. On the basis of the facts established at trial, which are consistent with the evidence available to the Minister at the relevant time, I conclude that the Minister's refusal to grant Insite a s. 56 exemption was arbitrary and grossly disproportionate in its effects, and hence not in accordance with the principles of fundamental justice.

[128] As noted above, the Minister, when exercising his discretion under s. 56, must respect the rights guaranteed by the *Charter*. This means that, where s. 7 rights are at stake, any limitations imposed by ministerial decision must be in accordance with the principles of fundamental justice. The Minister cannot simply deny an application for a s. 56 exemption on the basis of policy *simpliciter*; insofar as it affects *Charter* rights, his decision must accord with the principles of fundamental justice.

(a) *Arbitrariness*

[129] When considering whether a law's application is arbitrary, the first step is to identify the law's objectives. Decisions of the Minister under s. 56 of the *CDSA* must target the purpose of the Act. The legitimate state objectives of the *CDSA* (then the *Narcotic Control Act*, R.S.C. 1986, c. N-1) were identified by this Court in *Malmo-Levine* as the protection of health and public safety.

[130] The second step is to identify the relationship between the state interest and the impugned law, or, in this case, the impugned decision of the Minister. The relationship between the general prohibition on possession in the *CDSA* and the state objective was recognized in *Malmo-Levine* with respect to marihuana:

> The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana . . ., and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. [para. 136]

The question is whether the decision that the *CDSA* applies to the activities at Insite bears the same relationship to the state objective. As noted above, the burden is on the claimants to establish that the limit imposed by the law is not in accordance with the principles of fundamental justice.

[131] The trial judge's key findings in this regard are consistent with the information available to the Minister, and are those on which successive federal Ministers have relied in granting exemption orders over almost five years, including the facts that: (1) traditional criminal law prohibitions have done little to reduce drug use in the DTES; (2) the risk to injection drug users of death and disease is reduced when they inject under the supervision of a health professional; and (3) the presence of Insite did not contribute to increased crime rates, increased incidents of public injection, or relapse rates in injection drug users. On the contrary, Insite was perceived favourably or neutrally by the public; a local business association reported a reduction in crime during the period Insite was operating; the facility encouraged clients to seek counselling, detoxification and treatment. Most importantly, the staff of Insite had intervened in 336 overdoses since 2006, and no overdose deaths had occurred at the facility. (See trial judgment, at paras. 85 and 87-88.) These findings suggest not only that exempting Insite from the application of the possession prohibition does not undermine the objectives of public health and safety, but furthers them.

[132] The jurisprudence on arbitrariness is not entirely settled. In *Chaoulli*, three justices (*per* McLachlin C.J. and Major J.) preferred an approach that asked whether a limit was "necessary" to further the state objective (paras. 131-32). Conversely, three other justices (*per* Binnie and LeBel JJ.), preferred to avoid the

language of necessity and instead approved of the prior articulation of arbitrariness as where "[a] deprivation of a right . . . bears no relation to, or is inconsistent with, the state interest that lies behind the legislation" (para. 232). It is unnecessary to determine which approach should prevail, because the government action at issue in this case qualifies as arbitrary under both definitions.

(b) *Gross Disproportionality*

[133] The application of the possession prohibition to Insite is also grossly disproportionate in its effects. Gross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest: *Malmo-Levine*, at para. 143. Insite saves lives. Its benefits have been proven. There has been no discernable negative impact on the public safety and health objectives of Canada during its eight years of operation. The effect of denying the services of Insite to the population it serves is grossly disproportionate to any benefit that Canada might derive from presenting a uniform stance on the possession of narcotics.

(c) *Overbreadth*

[134] Having found the Minister's decision arbitrary and its effects grossly disproportionate, I need not consider this aspect of the argument.

[135] I conclude that, on the basis of the factual findings of the trial judge, the claimants have met the evidentiary burden of showing that the failure of the Minister to grant a s. 56 exemption to Insite is not in accordance with the principles of fundamental justice.

(4) Conclusion on the Challenge to Minister's Decision

[136] The Minister made a decision not to extend the exemption from the application of the federal drug laws to Insite. The effect of that decision, but for the trial judge's interim order, would have been to prevent injection drug users from accessing the health services offered by Insite, threatening the health and indeed the lives of the potential clients. The Minister's decision thus engages the claimants' s. 7 interests and constitutes a limit on their s. 7 rights. Based on the information available to the Minister, this limit is not in accordance with the principles of fundamental justice. It is arbitrary, undermining the very purposes of the *CDSA*, which include public health and safety. It is also grossly disproportionate: the potential denial of health services and the correlative increase in the risk of death and disease to injection drug users outweigh any benefit that might be derived from maintaining an absolute prohibition on possession of illegal drugs on Insite's premises.

D. *Section 1*

[137] If a s. 1 analysis were required, a point not argued, no s. 1 justification could succeed. The goals of the *CDSA*, as I have stated, are the maintenance and promotion of public health and safety. The Minister's decision to refuse the exemption bears no relation to these objectives; therefore they cannot justify the infringement of the complainants' s. 7 rights. However one views the matter, the Minister's decision was arbitrary and unsustainable. See *Chaoulli*, at para. 155, *per* McLachlin C.J. and Major J.

[138] Before leaving s. 1, I turn to the Minister's argument that granting a s. 56 exemption to Insite would undermine the rule of law and that denying an exemption is therefore justified.

[139] Canada submits that exempting Insite from the prohibitions in the *CDSA* "would effectively turn the rule of law on its head by dictating that where a particular individual breaks the law with such frequency and persistence that he or she becomes unable to comply with it, it is unconstitutional to apply the law to that person" (A.F., at para. 101). Canada raises the spectre of a host of exempt sites, where the country's drug laws would be flouted with impunity.

[140] The conclusion that the Minister has not exercised his discretion in accordance with the *Charter* in this case is not a licence for injection drug users to possess drugs wherever and whenever they wish. Nor is it an invitation for anyone who so chooses to open a facility for drug use under the banner of a "safe injection facility".

The result in this case rests on the trial judge's conclusions that Insite is effective in reducing the risk of death and disease and has had no negative impact on the legitimate criminal law objectives of the federal government. Neither s. 56 of the *CDSA* nor s. 7 of the *Charter* require condonation of crime. They demand only that, in administering the criminal law, the state not deprive individuals of their s. 7 rights to life, liberty and security of the person in a manner that violates the principles of fundamental justice.

VII. Remedy

[141] Having found that the Minister's refusal to grant an exemption to Insite violates s. 7 in a manner that cannot be justified under s. 1, we must find the appropriate remedy.

[142] What is required is a remedy that vindicates the respondents' *Charter* rights in a responsive and effective manner: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 25.

[143] The infringement of the claimants' s. 7 rights is ongoing. The federal exemption for Insite expired on June 30, 2008. The application of the federal drug laws to Insite has been suspended in the interim only by judicial intervention.

[144] The claimants asked for a declaration that the impugned provisions be struck down. Given my conclusion that s. 4(1) of the *CDSA*, considered with s. 56, is constitutionally valid, no remedy lies under s. 52 of the *Constitution Act, 1982*. Where, as here, the concern is a government decision that is inconsistent with the *Charter*, s. 24(1) applies and allows the court to fashion an appropriate remedy: *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575, at para. 14 ("*Dunedin*").

[145] Section 24(1) confers a broad discretion on the Court to craft an appropriate remedy that is responsive to the violation of the respondents' *Charter* rights. As the Court said in *Dunedin*:

> Section 24(1)'s interpretation necessarily resonates across all *Charter* rights, since a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach. From the outset, this Court has characterized the purpose of s. 24(1) as the provision of a "direct remedy" (*Mills* [*v. the Queen*, 1986 CanLII 17 (SCC), [1986] 1 S.C.R. 863], p. 953, *per* McIntyre J.). As Lamer J. stated in *Mills*, "[a] remedy must be easily available and constitutional rights should not be 'smothered in procedural delays and difficulties'" (p. 882). Anything less would undermine the role of s. 24(1) as a cornerstone upon which the rights and freedoms guaranteed by the *Charter* are founded, and a critical means by which they are realized and preserved. [Emphasis in original; para. 20.]

[146] One option would be to issue a declaration that the Minister erred in refusing to grant a further exemption to Insite in May 2008, and return the matter to the Minister to reconsider the matter and make a decision that respects the claimants' *Charter* rights.

[147] However, this remedy would be inadequate.

[148] The infringement at stake is serious; it threatens the health, indeed the lives, of the claimants and others like them. The grave consequences that might result from a lapse in the current constitutional exemption for Insite cannot be ignored. These claimants would be cast back into the application process they have tried and failed at, and made to await the Minister's decision based on a reconsideration of the same facts. Litigation might break out anew. A bare declaration is not an acceptable remedy in this case.

[149] Nor is the granting of a permanent constitutional exemption appropriate where the remedy is for a state action, not a law. In any event, such exemptions are to be avoided: *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96. Moreover, the Minister should not be precluded from withdrawing an exemption to Insite should changed circumstances at Insite so require. The flexibility contemplated by s. 56 of the *CDSA* would be lost.

[150] In the special circumstances of this case, an order in the nature of mandamus is warranted. I would therefore order the Minister to grant an exemption to Insite under s. 56 of the *CDSA* forthwith. (This of

course would not affect the Minister's power to withdraw the exemption should the operation of Insite change such that the exemption would no longer be appropriate.) On the trial judge's findings of fact, the only constitutional response to the application for a s. 56 exemption was to grant it. The Minister is bound to exercise his discretion under s. 56 in accordance with the *Charter*. On the facts as found here, there can be only one response: to grant the exemption. There is therefore nothing to be gained (and much to be risked) in sending the matter back to the Minister for reconsideration.

[151] This does not fetter the Minister's discretion with respect to future applications for exemptions, whether for other premises, or for Insite. As always, the Minister must exercise that discretion within the constraints imposed by the law and the *Charter*.

[152] The dual purposes of the *CDSA* — public health and public safety — provide some guidance for the Minister. Where the Minister is considering an application for an exemption for a supervised injection facility, he or she will aim to strike the appropriate balance between achieving the public health and public safety goals. Where, as here, the evidence indicates that a supervised injection site will decrease the risk of death and disease, and there is little or no evidence that it will have a negative impact on public safety, the Minister should generally grant an exemption.

[153] The *CDSA* grants the Minister discretion in determining whether to grant exemptions. That discretion must be exercised in accordance with the *Charter*. This requires the Minister to consider whether denying an exemption would cause deprivations of life and security of the person that are not in accordance with the principles of fundamental justice. The factors considered in making the decision on an exemption must include evidence, if any, on the impact of such a facility on crime rates, the local conditions indicating a need for such a supervised injection site, the regulatory structure in place to support the facility, the resources available to support its maintenance, and expressions of community support or opposition.

VIII. VANDU's Cross-Appeal

[154] VANDU, in its cross-appeal, brings a much broader challenge to s. 4(1) of the *CDSA*. VANDU challenges the application of the prohibition on possession to all addicted persons, not only those who are seeking treatment at supervised injection sites. The argument is that because addicted persons have no control over the urge to consume addictive substances, they are forced by fear of arrest and prosecution to procure and consume drugs in a manner that threatens their lives and health, and which causes them a high level of psychological stress. This is a very different argument than that advanced by Ms. Tomic, Mr. Wilson and PHS.

[155] VANDU's contention lacks an adequate basis in the record. The evidence at trial and the factual findings of the trial judge related to the nature of addiction and its attendant dangers, and how Insite responds to those dangers. There is nothing in Pitfield J.'s reasons which would permit this Court to conclude that there is a causal connection between the prohibition on possession and the deprivation of all addicts' s. 7 rights.

IX. Disposition

[156] The *CDSA* is constitutionally valid and applies to the activities at Insite. However, the Minister of Health's actions in refusing to exempt Insite from the operation of the *CDSA* are in violation of the respondents' s. 7 *Charter* rights. The Minister is ordered to grant an exemption for Insite under s. 56 of the *CDSA*.

[157] Canada's appeal is dismissed, as is VANDU's cross-appeal. I would answer the constitutional questions as follows:

1. Are ss. 4(1) and 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, constitutionally inapplicable to the activities of staff and users at Insite, a health care undertaking in the Province of British Columbia?

No.

2. Does s. 4(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

3. 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.

4. Does s. 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, infringe the rights guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*?

No.

5. 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.

X. Costs

[158] The trial judge awarded special costs in favour of the claimants: 2008 BCSC 1453, 91 B.C.L.R. (4th) 389. Such an order was within his discretion, and in my view there is no reason to disturb it.

[159] The respondents will also have their costs on this appeal. There will be no costs on the cross-appeal.

Appeal dismissed with costs. Cross-appeal dismissed without costs.

Solicitors for the appellants/respondents on cross-appeal: Attorney General of Canada, Ottawa.

Solicitors for the respondents PHS Community Services Society, Dean Edward Wilson and Shelly Tomic: Arvay Finlay, Vancouver; Ethos Law Group, Vancouver.

Solicitor for the respondent the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the respondent/appellant on cross-appeal: Conroy & Company, Abbotsford.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Ste-Foy.

Solicitors for the intervener the Dr. Peter AIDS Foundation: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Vancouver Coastal Health Authority: Davis, Vancouver.

Solicitors for the intervener the Canadian Civil Liberties Association: Fasken Martineau DuMoulin, Toronto.

Solicitors for the interveners the Canadian HIV/AIDS Legal Network, International Harm Reduction Association and CACTUS Montréal: McCarthy Tétrault, Vancouver.

Solicitors for the interveners the Canadian Nurses Association, the Registered Nurses' Association of Ontario and the Association of Registered Nurses of British Columbia: Norton Rose OR, Toronto.

Solicitors for the intervener the Canadian Public Health Association: Stockwoods, Toronto.

Solicitors for the intervener the Canadian Medical Association: Borden Ladner Gervais, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Bull, Housser & Tupper, Vancouver.

Solicitors for the intervener the British Columbia Nurses' Union: Victory Square Law Office, Vancouver.

Solicitors for the intervener REAL Women of Canada: Maclaren Corlett, Ottawa.

3	*Operation Dismantle v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 SCR 441

Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441

Date:	1985-05-09
File number:	18154
Other citations:	[1985] ACS no 22 — 31 ACWS (2d) 45 — [1985] SCJ No 22 (QL) — [1985] CarswellNat 151 — EYB 1985-150374 — JE 85-495 — 12 Admin LR 16 — 13 CRR 287 — 18 DLR (4th) 481 — 59 NR 1
Citation:	Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, <https://canlii.ca/t/1fv0g>, retrieved on 2022-02-27
Most recent unfavourable mention:	Sierra Club of Canada v. Canada (Minister of Finance), 1998 CanLII 9124 (FC), [1999] 2 FC 211 [...] **Operation Dismantle is easily distinguishable** . [...]

Operation Dismantle *v.* The Queen, [1985] 1 S.C.R. 441

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace Group, Thunder Bay Coalition for Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch) *Appellants*;

and

Her Majesty The Queen, The Right Honourable Prime Minister, the Attorney General of Canada, the Secretary of State for External Affairs, the Minister of Defence *Respondents*.

File No.: 18154.

1984: February 14, 15; 1985: May 9.

Present: Ritchie* Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

*Ritchie J. took no part in the judgment.

on appeal from the federal court of appeal

Constitutional law -- Canadian Charter of Rights and Freedoms -- Right to life, liberty and security of person -- U.S. cruise missile testing in Canada -- Testing alleged to increase risk of nuclear war in violation of that right -- Motion to strike out -- Whether or not facts as alleged in violation of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) -- Constitution Act, 1982, s. 52(1).

Jurisdiction -- Judicial review -- Cabinet decision relating to national defence and external affairs -- Whether or not decision reviewable by courts.

Practice -- Motion to strike -- U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter -- Whether or not statement of claim should be struck out -- Whether or not statement of claim can be amended before statement of defence filed -- Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the *Charter*. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the *Charter*.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only be a matter of speculation. The appellants could never prove the causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the courts under s. 32(1)(*a*) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(*a*) of the *Charter*. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1) under s. 24(1) of the *Charter*, (2) under s. 52(1) of the *Constitution Act, 1982* or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the *Charter* the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the *Charter*. To obtain a declaration of unconstitutionality under s. 52(1) of the *Constitution Act, 1982*, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the

person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the *Charter* was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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Constitution Act, 1982, s. 52.

Federal Court Rules, ss. 408, 419(1)(*a*), 421, 469, 1104, 1723.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 1983 CanLII 3008 (FCA), 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.

Gordon F. Henderson, Q.C., *Lawrence Greenspon* and *Emilio Binavince*, for the appellants.

W. I. C. Binnie, Q.C., and *Graham R. Garton*, for the respondents.

The judgment of Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

1. DICKSON J.--This case arises out of the appellants' challenge under s. 7 of the *Canadian Charter of Rights and Freedoms* to the decision of the federal cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory. The issue that must be addressed is whether the appellants' statement of claim should be struck out, before trial, as disclosing no reasonable cause of action. In their statement of claim, the appellants seek: (i) a declaration that the decision to permit the testing of the cruise missile is unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. Cattanach J. of the Federal Court, Trial Division, refused the respondents' motion to strike. The Federal Court of Appeal unanimously allowed the respondents' appeal, struck out the statement of claim and dismissed the appellants' action.

2. The facts and procedural history of this case are fully set out and discussed in the reasons for judgment of Madame Justice Wilson. I agree with Madame Justice Wilson that the appellants' statement of claim should be struck out and this appeal dismissed. I have reached this conclusion, however, on the basis of reasons which differ somewhat from those of Madame Justice Wilson.

3. In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the *Charter*. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal cabinet are reviewable by the courts under the *Charter*, and the government bears a general duty to act in accordance with the *Charter's* dictates, no duty is imposed on the Canadian government by s. 7 of the *Charter* to refrain from permitting the testing of the cruise missile.

I

The Appellants' Statement of Claim

4. The relevant portion of the appellants' statement of claim is found in paragraph 7 thereof. The deprivation of s. 7 *Charter* rights alleged by the appellants and the facts they advance to support this deprivation are described as follows:

7. The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:

(a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;

(b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;

(c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

Section 7 of the *Charter* provides in English:

> **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.

and in French:

> **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

5. Before turning to an examination of the appellants' allegations concerning the results of the decision to permit testing and its consequences on their rights under s. 7, I think it would be useful to examine the principles governing the striking out of a statement of claim and dismissal of a cause of action.

(a) Striking Out a Statement of Claim

6. The respondents, by a motion pursuant to Rule 419(1)(*a*) of the *Federal Court Rules*, moved for an order to strike out the appellants' statement of claim as disclosing no reasonable cause of action. Rule 419(1)(*a*) reads as follows:

Rule 419. (1) The Court may at any stage of an action order any pleading to be struck out, with or without leave to amend, on the ground that

(*a*) it discloses no reasonable cause of action or defence, as the case may be,...

7. The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 47 O.L.R. 308 (App. Div.)

8. Madame Justice Wilson in her reasons in the present case [at p. 486] summarized the relevant principles as follows:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 1981 CanLII 2612 (FCA), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

9. I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief--whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law--they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter*.

10. In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the *Charter*.

(b) The Allegations of the Statement of Claim

11. The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict, and thus violates the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter*.

12. As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s. 7 they allege is not clear.

There seem to be two possibilities. The violation could be the result of actual deprivation of life and security of the person that would occur in the event of a nuclear attack on Canada, or it could be the result of general insecurity experienced by all people in Canada as a result of living under the increased threat of nuclear war.

13. The first possibility is apparent on a literal reading of the statement of claim. The second possibility, however, appears to be more consistent with the appellants' submission at p. 31 of their factum, that:

...at the minimum, the above allegations show [in paragraph 7 of the statement of claim] that there is a "threat" to the life and security of the Appellants which "threat", depending upon the construction of the concept "infringe" or "deny" in Section 7 [*sic*], could arguably constitute an infringement or denial of their right to life and security of the person. The amendment to the Statement of Claim, rejected by the Court of Appeal, would have made infringement or denial more explicit when it states: "The very testing of the cruise missile *per se* in Canada endangers the *Charter of Rights and Freedoms* Section 7: (sic) Rights".

14. I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

15. Thus, I am prepared to accept that the appellants intended both of these possible deprivations as a basis for the violation of s. 7. It is apparent, however, that the violation of s. 7 alleged turns upon an actual increase in the risk of nuclear war, resulting from the federal cabinet's decision to permit the testing of the cruise missile. Thus, to succeed at trial, the appellants would have to demonstrate, *inter alia*, that the testing of the cruise missile would cause an increase in the risk of nuclear war. It is precisely this link between the cabinet decision to permit the testing of the cruise and the increased risk of nuclear war which, in my opinion, they cannot establish. It will not be necessary therefore to address the issue of whether the deprivations of life and security of the person advanced by the appellants could constitute violations of s. 7.

16. As I have noted, both interpretations of the nature of the infringement of the appellants' rights are founded on the premise that if the Canadian government allows the United States government to test the cruise missile system in Canada, then there will be an increased risk of nuclear war. Such a claim can only be based on the assumption that the net result of all of the various foreign powers' reactions to the testing of the cruise missile in Canada will be an increased risk of nuclear war.

17. The statement of claim speaks of weapons control agreements being "practically unenforceable", Canada being "more likely to be the target of a nuclear attack", "increasing the likelihood of either a pre-emptive strike or an accidental firing, or both", and "escalation of the nuclear arms race". All of these eventualities, culminating in the increased risk of nuclear war, are alleged to flow from the Canadian government's single act of allowing the United States to test the cruise missile in Canada.

18. Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.

19. An analysis of the specific allegations of the statement of claim reveals that they are all contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada. The gist of paragraphs (a) and (b) of the statement of claim is that verification of the cruise missile system is impossible because the missile cannot be detected by surveillance satellites, and that, therefore, arms control agreements will be unenforceable. This is based on two major assumptions as to how foreign powers will react to the development of the cruise missile: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement. With respect to the latter of these points, it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise could precipitate a system of enforcement based on co-operation rather than surveillance.

20. As for paragraph (c), even if it were the case that the testing of the air-launched cruise missile would result in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. It also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. Given the impossibility of determining how an independent sovereign nation

might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

21. Paragraph (d) assumes that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise. It would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or pre-emptive strike.

22. Finally, paragraph (e) asserts that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react. One could equally argue that the cruise would be the precipitating factor in compelling the nuclear powers to negotiate agreements that would lead to a de-escalation of the nuclear arms race.

23. One final assumption, common to all the paragraphs except (c), is that the result of testing of the cruise missile in Canada will be its development by the United States. In all of these paragraphs, the alleged harm flows from the production and eventual deployment of the cruise missile. The effect that the testing will have on the development and deployment of the cruise can only be a matter of speculation. It is possible that as a result of the tests, the Americans would decide not to develop and deploy the cruise since the very reason for the testing is to establish whether the missile is a viable weapons system. Similarly, it is possible that the Americans would develop the cruise missile even if testing were not permitted by the Canadians.

24. In the final analysis, exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision.

25. What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.

26. The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.

(c) The Rule that Facts in a Statement of Claim Must be Taken as Proven

27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

II

The Cabinet's Decision to Permit the Testing of the Cruise Missile and the Application of the *Charter of Rights and Freedoms*

(a) Application of the *Charter* to Cabinet Decisions

28. I agree with Madame Justice Wilson that cabinet decisions fall under s. 32(1)(*a*) of the *Charter* and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have

no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*. Specifically, the cabinet has a duty to act in a manner consistent with 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.

(b) The Absence of a Duty on the Government to Refrain from Allowing Testing

29. I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the *Charter*. Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.

30. The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

31. The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": (*The Law of Declaratory Judgments* (1978), at p. 179).

32. None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

> ...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty....

33. Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In *Solosky*, *supra*, one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.

(Emphasis added.)

34. A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, *Injunctions and Specific Performance* (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective at pp. 30-31:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered ....
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*--because he fears--and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

35. The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": Sharpe, *supra*, at p. 31. In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, at p. 665, *per* Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

36. It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

37. In the present case, the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the *Charter* and, thus, no duty can arise.

III

Justiciability

38. The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts. My concerns in the present case focus on the impossibility of the Court finding, on the basis of evidence, the connection, alleged by the appellants, between the duty of the government to act in accordance with the *Charter of Rights and Freedoms* and the violation of their rights under s. 7. As stated above, I do not believe the alleged violation--namely, the increased threat of nuclear war--could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the *Charter*.

IV

Section 52 of the *Constitution Act, 1982* and Section 1 of the *Charter*

39. I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52. Equally, it is not necessary for the resolution of this case to express any opinion on the application of s. 1 of the *Charter* or the appropriate principles for its interpretation.

V

Conclusion

40. I would accordingly dismiss the appeal with costs.

The following are the reasons delivered by

41. WILSON J.--This litigation was sparked by the decision of the Canadian government to permit the United States to test the cruise missile in Canada. It raises issues of great difficulty and considerable importance to all of us.

1. The Facts

42. The appellants are a group of organizations and unions claiming to have a collective membership of more than 1.5 million Canadians. They allege that a decision made by the Canadian government on July 15, 1983 to allow the United States to test cruise missiles within Canada violates their constitutional rights as guaranteed by the *Canadian Charter of Rights and Freedoms*. More specifically, quoting from their statement of claim:

7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:

(a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;

(b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;

(c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

43. The plaintiffs, in addition to declaratory relief, seek consequential relief in the nature of an injunction and damages. The defendants, by a motion pursuant to Rule 419(1) of the *Federal Court Rules*, moved to strike out the plaintiffs' statement of claim and to dismiss it as disclosing no reasonable cause of action. Cattanach J. dismissed the defendants' motion to strike on the grounds that the *Charter* applied to the Government of Canada, including executive acts of the cabinet, and that the statement of claim contained "the germ of a cause of action" and raised a "justiciable issue". The Federal Court of Appeal unanimously allowed the defendants' appeal.

2. The Judgment Appealed From

44. Each of the five judges who sat on the appeal to the Federal Court of Appeal delivered separate reasons for allowing the appeal. Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of s. 7 of the *Charter* must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged any such failure.

45. Three of the justices (Pratte, Marceau and Hugessen JJ.) were of the opinion that the facts as alleged did not constitute a violation of the right to life, liberty and security of the person as guaranteed by s. 7. Pratte and Hugessen JJ. thought that any breach of s. 7 would only occur as the result of actions by foreign powers who were not bound by the *Charter*. Pratte J. went further and stated that the only "liberty and security of the person" that was protected by s. 7 was security against arbitrary arrest or detention. Marceau J. felt that s. 7 could never

have "any higher mission than that of protecting the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power".

46. Two of the justices (Ryan and Le Dain JJ.) would have allowed the appeal on the fundamental ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court. Ryan J. thought that the question whether national security was impaired, and hence whether the plaintiffs' own personal security had been affected, was not triable because it was not susceptible of proof. Le Dain J. took the central issue to be the effect of testing cruise missiles on the risk of nuclear conflict, a matter which he asserted to be non-justiciable as involving factors either inaccessible to a court or incapable of being evaluated by it. The other three judges did not directly address this point.

47. Marceau J. would have allowed the appeal on the additional ground that the *Charter* did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the *Charter* did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.

48. None of the five judges was prepared to say that the cabinet's decision to test the cruise missile was unreviewable because it involved a "political question". Pratte and Marceau JJ. expressly rejected this argument, Le Dain and Hugessen JJ. did not consider it necessary to deal with it, and Ryan J. did not mention it.

3. The Issues

49. The issues to be addressed on the appeal to this Court may be conveniently summarized as follows:

(1) Is a decision made by the Government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:

(a) it is an exercise of the royal prerogative;

(b) it is, because of the nature of the factual questions involved, inherently non-justiciable;

(c) it involves a "political question" of a kind that a court should not decide?

(2) Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?

(3) Do the facts as alleged in the Statement of Claim, which must be taken as proven, constitute a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*? and

(4) Do the plaintiffs have a right to amend the Statement of Claim before the filing of a Statement of Defence?

(1) Is the Government's Decision Reviewable?

(a) The Royal Prerogative

50. The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the *Constitution Act, 1867* the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(*a*) the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the *Charter's* application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercice of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature of each province" in s. 32(1)(*b*), are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is

no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also.

(b) Non-Justiciability

51. Le Dain and Ryan JJ. in the Federal Court of Appeal were of the opinion that the issues involved in this case are inherently non-justiciable, either because the question whether testing the cruise missile increases the risk of nuclear war is not susceptible of proof and hence is not triable (*per* Ryan J.) or because answering that question involves factors which are either inaccessible to a court or are of a nature which a court is incapable of evaluating (*per* Le Dain J.) To the extent that this objection to the appellants' case rests on the inherent evidentiary difficulties which would obviously confront any attempt to prove the appellants' allegations of fact, I do not think it can be sustained. It might well be that, if the issue were allowed to go to trial, the appellants would lose simply by reason of their not having been able to establish the factual basis of their claim but that does not seem to me to be a reason for striking the case out at this preliminary stage. It is trite law that on a motion to strike out a statement of claim the plaintiff's allegations of fact are to be taken as having been proved. Accordingly, it is arguable that by dealing with the case as they have done Le Dain and Ryan JJ. have, in effect, made a presumption against the appellants which they are not entitled, on a preliminary motion of this kind, to make.

52. I am not convinced, however, that Le Dain and Ryan JJ. were restricting the concept of non-justiciability to difficulties of evidence and proof. Both rely on Lord Radcliffe's judgment in *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.), and especially on the following passage at p. 151:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all. The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.

(Emphasis added.)

In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess. Le Dain J. maintains that the difficulty is one of judicial competence rather than anything resembling the American "political questions" doctrine. However, in response to that contention it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions of principle and policy. As Melville Weston points out in "Political Questions," 38 *Harv. L. Rev.* 296 (1925), at p. 299:

> The word "justiciable" ... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication from which practical consequences in human conduct are to follow. For example, when nations decline to submit to arbitration or to the compulsory jurisdiction of a proposed international tribunal those questions of honor or interest which they call "non-justiciable", they are really avoiding that broad sense of the word, but what they mean is a little less clear. Probably they mean only that they will not, or deem they ought not, endure the presentation of evidence on such questions, nor bind their conduct to conform to the proposed adjudications. So far as "non-justiciable" is for them more than an epithet, it expresses a sense of a lack of fitness, and not of any inherent impossibility, of submitting these questions to judicial or *quasi*-judicial determination.

53. In the 1950's and early 1960's there was considerable debate in Britain over the question whether restrictive trade practices legislation gave rise to questions which were subject to judicial determination: see

Marshall, "Justiciability," in *Oxford Essays in Jurisprudence* (1961), ed. A.G. Guest; Summers, "Justiciability" (1963), 26 *M.L.R.* 530; Stevens, "Justiciability: The Restrictive Practices Court Re-Examined," [1964] *Public Law* 221. I think it is fairly clear that the British restrictive trade practices legislation did not involve the courts in the resolution of issues more imponderable than those facing American courts administering the *Sherman Act*. Indeed, there is significantly less "policy" content in the decisions of the courts in those cases than there is in the decisions of administrative tribunals such as the Canadian Transport Commission or the CRTC. The real issue there, and perhaps also in the case at bar, is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes.

54. I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us. I will return to this question later.

(c) The Political Questions Doctrine

55. It is a well established principle of American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide. In *Baker v. Carr*, 369 U.S. 186 (1962), at pp. 210-11, Brennan J. discussed the nature of the doctrine in the following terms:

> We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman* v. *Miller*, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

At page 217 he said:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While one or two of the categories of political question referred to by Brennan J. raise the issue of judicial or institutional competence already referred to, the underlying theme is the separation of powers in the sense of the proper role of the courts *vis-à-vis* the other branches of government. In this regard it is perhaps noteworthy that a distinction is drawn in the American case law between matters internal to the United States on the one hand and foreign affairs on the other. In the area of foreign affairs the courts are especially deferential to the executive branch of government: see *e.g. Atlee v. Laird*, 347 F.Supp. 689 (1972) (U.S. Dist. Ct.), at pp. 701 *ff*.

56. While Brennan J.'s statement, in my view, accurately sums up the reasoning American courts have used in deciding that specific cases did not present questions which were judicially cognizable, I do not think it is particularly helpful in determining when American courts will find that those factors come into play. In cases from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *United States v. Nixon*, 418 U.S. 683 (1974), the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In *Baker v. Carr* itself, *supra*, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of

the desegregation decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.

57. Academic commentators have expended considerable effort trying to identify when the political questions doctrine should apply. Although there are many theories (perhaps best summarized by Professor Scharpf in his article "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L.J.* 517 (1966)), I think it is fair to say that they break down along two broad lines. The first, championed by scholars such as Weston, "Political Questions," *supra*, and Wechsler, *Principles, Politics, and Fundamental Law* (1961); Wechsler, Book Review, 75 *Yale L.J.* 672 (1966), define political questions principally in terms of the separation of powers as set out in the Constitution and turn to the Constitution itself for the answer to the question when the Courts should stay their hand. The second school, represented by Finkelstein, "Judicial Self-Limitation," 37 *Harv. L.Rev.* 338 (1924), and Bickel *The Least Dangerous Branch* (1962), especially chapter 4, "The Passive Virtues," roots the political questions doctrine in what seems to me to be a rather vague concept of judicial "prudence" whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas. More recently, commentators such as Tigar, "Judicial Power, the 'Political Question Doctrine,' and Foreign Relations," 17 *U.C.L.A. L.R.* 1135 (1970), and Henkin, "Is There a `Political Question' Doctrine?" 85 *Yale L.J.* 597 (1976), have doubted the need for a political questions doctrine at all, arguing that all the cases which were correctly decided can be accounted for in terms of orthodox separation of powers doctrine.

58. Professor Tigar in his article suggests that the political questions doctrine is not really a doctrine at all but simply "a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government" (p. 1163). He sees Justice Brennan's formulation of the doctrine in *Baker v. Carr*, *supra*, as an "unsatisfactory effort to rationalize a collection of disparate precedent" (p. 1163).

59. In the House of Lords in *Chandler*, *supra*, Lord Devlin expressed a similar reluctance to retreat from traditional techniques in the interpretation of the phrase "purpose prejudicial to the safety or interests of the state..." in the *Official Secrets Act, 1911*. His colleagues, in particular Lord Radcliffe and Lord Reid, seem to have been of the view that in matters of defence the Crown's opinion as to what was prejudicial to the safety or interests of the State was conclusive upon the courts. Lord Devlin agreed with the result reached by his colleagues on the facts before him, and with the observation of Lord Parker on the Court of Criminal Appeal ([1962] 2 All E.R. 314, at pp. 319-20) that "the manner of the exercise of... [the Crown's] prerogative powers [over the disposition and armament of the military] cannot be inquired into by the courts, whether in a civil or a criminal case...." ([1962] 3 All E.R. 142, at p. 157) but went on to make three observations in clarification of his position.

60. Lord Devlin's first observation was that the principle that the <u>substance</u> of discretionary decisions is not reviewable in the courts is one basic to administrative law and is not confined to matters of defence or the exercise of the prerogative. The second point was that even though review on the merits of a discretionary decision was excluded, that did not mean that judicial review was excluded entirely. The third comment was that the nature and effect of the principle of judicial review is "[to limit] the issue which the court has to determine...." ([1962] 3 All E.R. 142, at p. 158).

61. Lord Devlin then proceeded to apply these propositions to the case before him and asked what it was that the jury was required to determine. In his view "the fact to be proved is the existence of a purpose prejudicial to the state--not a purpose which `appears to the Crown' to be prejudicial to the state" ([1962] 3 All E.R. 142, at p. 158). He accordingly went on to conclude at p. 159:

> Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown wherever it may be necessary to do so. In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised just as it may be presumed that it is contrary to the interests of an industrialist to have his factory immobilised. The thing speaks for itself, as the Attorney-General submitted. But the presumption is not irrebuttable. Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. <u>It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative</u>. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be or that it was exaggerating the perils of interference with their effectiveness.

(Emphasis added.)

62. It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.

63. It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function," 94 *Yale L.J.* 71 (1984).

64. I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

65. One or two hypothetical situations will, I believe, illustrate the point. Let us take the case of a person who is being conscripted for service during wartime and has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the *Charter* have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.

66. By way of contrast, one can envisage a situation in which the government decided to force a particular group to participate in experimental testing of a deadly nerve gas. Although the government might argue that such experiments were an important part of our defence effort, I find it hard to believe that they would survive judicial review under the *Charter*. Equally we could imagine a situation during wartime in which the army began to seize people for military service without appropriate enabling legislation having been passed by Parliament. Such "press gang" tactics would, one might expect, be subject to judicial review even if the executive thought they were justified for the prosecution of the war.

67. Returning then to the present case, it seems to me that the legislature has assigned to the courts as a constitutional responsibility the task of determining whether or not a decision to permit the testing of cruise missiles violates the appellants' rights under the *Charter*. The preceding illustrations indicate why the legislature has done so. It is therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so.

(2) In What Circumstances May a Statement of Claim Seeking Declaratory Relief Be Struck Out?

68. In order to put this issue in context it is necessary to review the procedural history of the case.

69. On July 20, 1983 the appellants filed a statement of claim seeking a declaration that their constitutional rights had been violated and consequential relief in the form of an injunction, damages and costs. The respondents moved on August 11, 1983 under Rule 419(1) of the *Federal Court Rules* to strike out the statement of claim primarily on the ground that it disclosed no reasonable cause of action. The statement was also alleged to be frivolous and vexatious and an abuse of the process of the Court. Cattanach J. denied the motion on September 15, 1983. He noted the requirement under Rule 408 that a statement of claim contain a precise statement of the material facts upon which the plaintiff relies and must stand or fall on the allegations of fact. He said that a statement of claim would not be struck out if the facts alleged were capable of constituting "the scintilla of a cause of action". He noted that by virtue of s. 32(1)(*a*) the *Charter* applies to the Parliament and government of Canada and by virtue of s. 24(1) the Court has jurisdiction to administer and provide appropriate remedies. He concluded that the statement of claim contained sufficient allegations to raise a justiciable issue and analogized the alleged liability of the respondents to liability for extra-hazardous activities contemplated by the rule in *Rylands v. Fletcher*, [1861-73] All E.R. 1 (H.L.) He concluded that there was a "germ of a cause of action" disclosed in the statement of claim.

70. On September 19, 1983 the respondents appealed to the Federal Court of Appeal. On October 7, 1983 the appellants sought leave from the Court of Appeal to amend their statement of claim under Rule 1104 to include an allegation that the testing of the cruise missile in Canada *per se* violated the appellants' rights under s. 7 of the *Charter*. Pratte J. dimissed the application without reasons on October 11, 1983. The Federal Court of Appeal heard the case on November 28, 1983 and allowed the respondents' appeal for the reasons outlined earlier.

71. The appeal to this Court was heard on February 14 and 15, 1984. On March 6, 1984 the appellants applied to Muldoon J. for an injunction under Rule 469 of the *Federal Court Rules* to prevent testing until the case was decided. Muldoon J. concluded that until this Court decreed differently the law applicable to the matter was that the appellants' claim was non-justiciable. He held that in order to get an interlocutory injunction "cogent" evidence of a violation of a right had to be presented. The evidence presented was speculative only and could not establish a "real and proximate jeopardy" to the appellants' rights. There was nothing therefore to support the issue of an injunction.

72. The procedural issue before the Court then is: did the appellants' statement of claim disclose a reasonable cause of action within the meaning of Rule 419 of the *Federal Court Rules*?

(a) The Applicable Principle

73. Estey J. stated the applicable principle in *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 47 O.L.R. 308 (App. Div.)

74. In *Shawn v. Robertson* (1964), 1964 CanLII 166 (ON SC), 46 D.L.R. (2d) 363, a declaration was sought against a ministerial exercise of discretion. An application for striking out on the basis of no reasonable cause of action was made under the Ontario Rules. Grant J. stated, at p. 365:

> The principles to be applied by the Court in determining whether to exercise jurisdiction conferred by Rule 126 or not are set out in the following cases; in *Ross v. Scottish Union & National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 53 D.L.R. 415 at pp. 421-2, 47 O.L.R. 308 at p. 316, Magee, J.A., states:

> That inherent jurisdiction is partly embodied in our Rule 124 (now R. 126) ... The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.

And at p. 423 D.L.R., p. 317 O.L.R.: "To justify the use of Rule 124 ... it is not sufficient that the plaintiff is not likely to succeed at the trial."

In *Gilbert Surgical Supply Co. and Gilbert v. Frank W. Horner Ltd.*, 34 C.P.R. 17, [1960] O.W.N. 289, 19 Fox Pat. C. 209, Aylesworth, J.A., speaking for himself, Porter C.J.O., and LeBel, J.A., states as follows at p. 289 O.W.N.:

He said that the action was novel and he could not agree that the defendant had shown the case to be one within the Rule. At this stage of litigation the Court could not conclude that the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown.

75. A case analogous to the present case, not in the nature of the issues involved but in the novelty of the alleged cause of action and the absence of precedent, is *McKay v. Essex Area Health Authority*, [1982] 2 All E.R. 771. In that case a pregnant mother contracted German measles in the early months of her pregnancy. Her doctor took blood samples from her which were tested by the defendant Health Authority but the infection was not diagnosed and the child was born severely disabled. The mother and child sued the doctor and the Health Authority for negligence, the child claiming damages for her "entry into a life in which her injuries are highly debilitating". The Master struck out the child's claim on the basis it disclosed no reasonable cause of action. His order was set aside on appeal, the judge holding that the defendants owed a duty of care to the child and her real claim was not that she had suffered damage by reason of "wrongful entry into life" but by reason of having been born deformed. This gave rise to a reasonable cause of action. An appeal to the Court of Appeal was allowed and the order of the Master striking out the claim restored.

76. Stephenson L.J. had to struggle with the question whether a child had a right not to be born deformed which in the case of a child deformed or disabled before birth by disease meant a right to be aborted. Counsel for the child submitted that this could not be viewed as a plain and obvious case susceptible of only one result, nor could it be viewed as frivolous or vexatious; although it might be novel, it raised issues of real substance which ought to go to trial. His Lordship disagreed. He said at p. 778:

Here the court is considering not `ancient law' but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding.

(Emphasis added.)

77. It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

78. It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in *Fleming v. Hislop* (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It

was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word `would' is a word of futurity, the words `would cause' do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, *per* Lord Salmon, at pp. 489-90.

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

79. In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": see *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350, at p. 363, *per* Lord Dunedin. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

(b) Declaratory Relief

80. This may be an appropriate point at which to consider the appellants' submission that in order to establish a reasonable cause of action in relation to their claim for declaratory relief as opposed to their claim for an injunction and damages, they do not have to allege in their statement of claim the violation of a right or the threat of a violation of a right. It is sufficient, they submit, that the plaintiff have standing, that a "serious constitutional issue" is raised, and that the declaration sought serves a useful purpose. In support of this contention the appellants rely on *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, and *Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138. *Thorson* involved an alleged excess of legislative power by the Parliament of Canada as did the later case of *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265. Given the nature of such questions it is undoubtly true that no violation of a right need necessarily be involved.

81. Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant....

Borchard then goes to expand upon the concept of a "legal interest" at pp. 48-49:

> It is an essential condition of the right to invoke judicial relief that the plaintiff have a protectible interest. The fact that under declaratory procedure so many types of legal issues are presentable for determination which are incapable of any other form of relief, has imposed upon the courts at the outset the function of determining whether the facts justify the grant of judicial relief, and more particularly, whether the plaintiff has a "legal interest" in the relief he seeks. In the more familiar executory action, the legal interest is sought in the "cause of action," but, as already observed, the narrow scope often given to this ambiguous term has served to conceal from view the many occasions and situations in which a plaintiff not yet physically injured or one seeking escape from dilemma and uncertainty by a clarification of his legal position has need for judicial relief not of the traditional kind. The wider opportunity and necessity for judicial usefulness disclosed by the declaratory judgment make necessary either a more flexible and comprehensive connotation of the term "cause of action" or the employment of a less chameleonic term to indicate when the petitioner may be accorded judicial protection. Without losing sight of the necessity for jurisdictional facts, it is suggested that the term "legal interest" meets the need.

82. Where, however, the unconstitutionality of a law or an act is founded upon its conflict with a right, then the right must be alleged to have been violated. Such was the case in *Borowski* where a declaration was being sought to the effect that the abortion provisions in the *Criminal Code* contravened the right to life guaranteed by s. 1(*a*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. It was alleged in *Borowski* that rights were being violated even although they were the rights of human foetuses and not rights of the plaintiff. It seems to me that whenever a litigant raises a "serious constitutional issue" involving a violation of the *Charter* or the *Canadian Bill of Rights* then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, s. 24(1) of the *Charter* makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. That being so, it seems to follow that the infringement or denial complained of must be specifically pleaded.

83. The appellants submit, however, that while their consequential relief in the form of an injunction and damages is made pursuant to s. 24(1) of the *Charter*, their claim for declaratory relief is at large. It is not sought pursuant to that section in paragraph 9(c) of their statement of claim which merely seeks a declaration of unconstitutionality. It is, they submit, a separate cause of action at common law and also under s. 52 of the *Constitution Act, 1982* and can stand alone even if they fail in their claim for consequential relief under s. 24(1). They cite Rule 1723 of the *Federal Court Rules* which provides:

Rule 1723. No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

84. The appellants acknowledge that a declaration of unconstitutionality is a discretionary remedy (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821) but say that the discretion lies with the trial court and is exercisable only after a trial on the merits. Accordingly, their claim for this relief should not have been struck out at the preliminary stage regardless of the fate of their other claims. However, as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out: see Zamir, *The Declaratory Judgment* (1962), at p. 193. The Court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court.

(i) Inconsistency with the *Constitution Act, 1982*, s. 52(1)

85. Section 52(1) of the *Constitution Act, 1982*, provides:

> **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.

86. Section 52 would appear to have the same role in terms of imposing a constitutional limitation on law-making power in Canada as its predecessors, s. 2 of the *Colonial Laws Validity Act*, *1865*, 28 & 29 Vict., c. 63 and s. 7 of the *Statute of Westminster, 1931*, 22 Geo. 5, c. 4 (R.S.C. 1970, App. II, No. 26): see La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 *Can. Bar Rev.* 19, at p. 28. Section 2 of the *Colonial Laws Validity Act 1865* provides:

> **2.** Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 7 of the *Statute of Westminster, 1931* provides:

> **7.** (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Accordingly, Dickson J., as he then was, is unquestionably correct when he states in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 at p. 313:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme.

Dickson J. then goes on to note that where a declaration is sought under s. 52 to the effect that legislation is unconstitutional the standing requirements for constitutional litigation must of course be met.

87. If the appellants are relying on s. 52(1) of the *Constitution Act, 1982* as the source of their right to a declaration of unconstitutionality, which it would appear from their factum that they are, it is noted that that provision is directed to "laws" which are inconsistent with the provisions of the Constitution.

88. Counsel for the appellants submitted in oral argument that they should not be prejudiced in the relief sought by the absence of any law authorizing, ratifying or implementing the agreement between Canada and the United States since legislation, they submitted, should have been passed. The government should not therefore be allowed to immunize itself against judicial review under s. 52 of the *Constitution Act, 1982* by its own omission to do that which it ought to have done.

89. This argument assumes, of course, that legislation was required and this does not appear to be so. The law in relation to treaty-making power was definitively established for Canada and the rest of the Commonwealth in *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326, where Lord Atkin stated at pp. 347-48:

> It will be essential to keep in mind the distinction between (I.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.

(Emphasis added.)

90. A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation: see R. St. J. Macdonald: "The Relationship between International Law and Domestic Law in Canada," in *Canadian Perspectives on International Law and Organization* (1974), eds. Macdonald, Morris and Johnston, p. 88.

91. The agreement in this case took the form of an "exchange of notes" between Allan Gotlieb, Canadian Ambassador to the United States and Kenneth W. Dam, Acting Secretary of State, The United States State Department. As Mr. Gotlieb points out in an article entitled "Canadian Treaty-Making: Informal Agreements and Interdepartmental Arrangements," in *Canadian Perspectives on International Law and Organization*, *supra*, at p. 230, Canadian treaty-making practice has been characterized by a movement away from formal, full-fledged governmental "treaties" and towards informal "exchange of notes" arrangements. There is nothing unusual, therefore, in the procedure adopted in relation to the cruise testing agreement.

92. Although little, if any, argument has been addressed in this case to the question whether the government's decision to permit testing of the cruise missile in Canada falls within the meaning of the word "law" as used in s. 52 of the *Constitution Act, 1982*, I am prepared to assume, without deciding, that it does. I am also prepared to assume that the appellants could establish their standing to bring an action under s. 52. The question remains, however, whether the appellants' claim raises a serious question of constitutional inconsistency. This in turn depends on the answer to the question whether the government's decision violates the appellants' rights under s. 7. If it does not, there is no inconsistency with the provisions of the Constitution.

(ii) At common law

93. If the appellants' claim for declaratory relief is a claim at common law of the type upheld in *Dyson v. Attorney-General*, [1911] 1 K.B. 410, no issue arises as to whether or not there is a "law" implementing the cruise testing agreement. The common law action affords a means of attack on the acts of public officials who have allegedly exceeded their powers. However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, *supra*, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. The same point is made in de Smith, *Constitutional and Administrative Law* (4th ed.), at p. 604:

> The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie--the most important exception is that interim relief cannot be granted by way of a declaration--and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). The rules governing *locus standi* are in a state of confusion. In *Gouriet* v. *Union of Post Office Workers* [[1977] 3 All E.R. 70 (H.L.)] Mr. Gouriet eventually amended his claim to an application for a declaration that the Union of Post Office Workers was acting unlawfully in blocking mail from this country to South Africa. He was refused such a declaration. Lord Wilberforce said: '... there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their legal respective rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff.'
>
> (Emphasis added.)

I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the *Charter* in order to bring a viable claim for declaratory relief against governmental action.

94. The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 1981 CanLII 2612 (FCA), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

(3) Could the Facts as Alleged Constitute a Violation of Section 7 of the *Charter*?

95. Section 7 of the *Canadian Charter of Rights and Freedoms* provides as follows:

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

96. Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the

second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(*a*) of the *Canadian Bill of Rights*: see *e.g., Miller v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680, *per* Ritchie J., at pp. 703-04.

97. The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the *Charter* but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.

98. In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one's goals free of governmental constraint, must accommodate the corresponding rights of others. The concept of "right" as used in the *Charter* postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted. As Mortimer J. Adler expressed it in *Six Great Ideas* (1981), at p. 144:

> Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.

99. The concept of "right" as used in the *Charter* must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the *Charter*.

100. In the same way, the concept of "right" as used in the *Charter* must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the *Charter* as giving rise to violations of s. 7. As John Rawls states in *A Theory of Justice* (1971), at p. 213:

> The government's right to maintain public order and security is ... a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

101. The rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1. As was pointed out by the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983), 1983 CanLII 1774 (ON CA), 41 O.R. (2d) 225, at p. 244:

> ... the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws....

There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, *Taking Rights Seriously* (1977), p. 267. This paradox caused Roscoe Pound to conclude:

> There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense it means a reasonable expectation involved in civilized life. [See *Jurisprudence*, vol. 4, (1959), p. 56.]

102. It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

103. I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action *vis-à-vis* other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the *Charter*.

104. This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace--as, for example, if it were being tested with live warheads--I think that might well raise different considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the *Charter*. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

105. The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

The very testing of the cruise missiles *per se* in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

106. Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, *per* Gale J. at pp. 221-22, but they do not form part of the factual allegations which must be taken as proved for purposes of a motion to strike. No appeal was taken from the order of Pratte J.

107. Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the Court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

108. The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

109. In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the *Charter*; or

(b) a cause of action for declaratory relief at common law on the principle of *Dyson v. Attorney-General*, *supra*; or

(c) a cause of action under s. 52(1) of the *Constitution Act, 1982* for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the *Charter* so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

110. I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier.

Solicitor for the respondents: R. Tassé, Ottawa.

Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441

Date:	1985-05-09
File number:	18154
Other citations:	[1985] ACS no 22 — 31 ACWS (2d) 45 — [1985] SCJ No 22 (QL) — [1985] CarswellNat 151 — EYB 1985-150374 — JE 85-495 — 12 Admin LR 16 — 13 CRR 287 — 18 DLR (4th) 481 — 59 NR 1
Citation:	Operation Dismantle v. The Queen, 1985 CanLII 74 (SCC), [1985] 1 SCR 441, <https://canlii.ca/t/1fv0g>, retrieved on 2022-02-27
Most recent unfavourable mention:	Sierra Club of Canada v. Canada (Minister of Finance), 1998 CanLII 9124 (FC), [1999] 2 FC 211 [...] **Operation Dismantle is easily distinguishable** . [...]

Operation Dismantle *v.* The Queen, [1985] 1 S.C.R. 441

Operation Dismantle Inc., Canadian Union of Public Employees, Canadian Union of Postal Workers, National Union of Provincial Government Employees, Ontario Federation of Labour, Arts for Peace, Canadian Peace Research and Education Association, World Federalists of Canada, Alberni Valley Coalition for Nuclear Disarmament, Comox Valley Nuclear Responsibility Society, Cranbrook Citizens for Nuclear Disarmament, Peace Education Network, Windsor Coalition for Disarmament, Union of Spiritual Communities of Christ Committee for World Disarmament and Peace, Against Cruise Testing Coalition, B.C. Voice of Women, National Action Committee on the Status of Women, Carman Nuclear Disarmament Committee, Project Survival, Denman Island Peace Group, Thunder Bay Coalition for Peace and Nuclear Disarmament, Muskoka Peace Group, Global Citizens' Association, Physicians for Social Responsibility (Montreal Branch) *Appellants*;

and

Her Majesty The Queen, The Right Honourable Prime Minister, the Attorney General of Canada, the Secretary of State for External Affairs, the Minister of Defence *Respondents*.

File No.: 18154.

1984: February 14, 15; 1985: May 9.

Present: Ritchie* Dickson, Estey, McIntyre, Chouinard, Lamer and Wilson JJ.

*Ritchie J. took no part in the judgment.

on appeal from the federal court of appeal

Constitutional law -- Canadian Charter of Rights and Freedoms -- Right to life, liberty and security of person -- U.S. cruise missile testing in Canada -- Testing alleged to increase risk of nuclear war in violation of that right -- Motion to strike out -- Whether or not facts as alleged in violation of Charter -- Canadian Charter of Rights and Freedoms, ss. 1, 7, 24(1), 32(1)(a) -- Constitution Act, 1982, s. 52(1).

Jurisdiction -- Judicial review -- Cabinet decision relating to national defence and external affairs -- Whether or not decision reviewable by courts.

Practice -- Motion to strike -- U.S. cruise missile tests alleged to increase risk of nuclear war in violation of s. 7 of Charter -- Whether or not statement of claim should be struck out -- Whether or not statement of claim can be amended before statement of defence filed -- Federal Court Rules, Rules 419(1), 421, 1104, 1723.

This appeal is from a judgment of the Federal Court of Appeal which allowed respondents' appeal from a judgment dismissing their motion to strike out the appellants' statement of claim.

Appellants alleged that a decision made by the Government of Canada to allow the United States to test cruise missiles in Canada violated s. 7 of the *Charter*. The development of the cruise missile, it was argued, heightened the risk of nuclear war and the increased American military presence and interest in Canada as a result of the testing allegedly made Canada more likely to be a target for nuclear attack. Declaratory relief, an injunction and damages were sought.

Held: The appeal should be dismissed.

Per Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: The appellants' statement of claim should be struck out and their cause of action dismissed. The statement of claim does not disclose facts which, if taken as true, would prove that the Canadian government's decision to permit the testing of the cruise missile in Canada could cause a violation or a threat of violation of their rights under s. 7 of the *Charter*.

The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict and thereby violates the right to life, liberty and security of the person. This alleged violation of s. 7 turns upon an actual increase in the risk of nuclear war resulting from the federal cabinet's decision to permit the testing. This allegation is premised upon assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of uncertainty and change, will react to the Canadian government's decision to permit the testing of the cruise. Since the foreign policy decisions of independent nations are not capable of prediction on the basis of evidence to any degree of certainty approaching probability, the nature of the reaction to the federal cabinet's decision to permit the testing can only be a matter of speculation. The appellants could never prove the causal link between the decision to permit the testing and the increase in the threat of nuclear conflict.

Cabinet decisions are reviewable by the courts under s. 32(1)(*a*) of the *Charter* and the executive branch of the Canadian government bears a general duty to act in accordance with the dictates of the *Charter*. The decision to permit the testing of the cruise missile cannot be considered contrary to the duties of the executive since the possible effects of this government action are matters of mere speculation. Section 7 could only give rise to a duty on the part of the executive to refrain from permitting the testing if it could be said that a deprivation of life or security of the person could be proven to result from the impugned government act.

Per Wilson J.: The government's decision to allow the testing of the U.S. cruise missile in Canada, even although an exercise of the royal prerogative, was reviewable by the courts under s. 32(1)(*a*) of the *Charter*. It was not insulated from review because it was a "political question" since the Court had a constitutional obligation under s. 24 of the *Charter* to decide whether any particular act of the executive violated or threatened to violate any right of the citizen.

On a motion to strike out a statement of claim as disclosing no reasonable cause of action, the court must take the allegations of fact therein as proved. If such allegations raise a justiciable issue the court cannot abdicate its responsibility for review on the basis of anticipated problems of proof.

This statement of claim was struck, notwithstanding the general hesitancy of the courts to strike, because the facts disclosed no reasonable cause of action (1) under s. 24(1) of the *Charter*, (2) under s. 52(1) of the *Constitution Act, 1982* or (3) under the common law power to grant declaratory relief. To succeed in their claim for relief under s. 24 of the *Charter* the plaintiffs would have to establish a violation or threat of violation of their right under s. 7 of the *Charter*. To obtain a declaration of unconstitutionality under s. 52(1) of the *Constitution Act, 1982*, the plaintiffs would have to show that the government's decision to test the cruise missile in Canada was inconsistent with their right under s. 7. To obtain declaratory relief at common law, they would have to establish a violation or threatened violation of their right under s. 7.

The government's decision to test the cruise missile in Canada does not give rise to a violation or threatened violation of the plaintiffs' right under s. 7. Even an independent, substantive right to life, liberty and security of the

person cannot be absolute. It must take account of the corresponding rights of others and of the right of the state to protect the collectivity as well as the individual against external threats. The central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. It does not extend to incidental effects of governmental action in the field of inter-state relations.

There is at the very least a strong presumption that governmental action concerning the relation of the state with other states, and not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may incidentally increase the risk of death or injury that individuals generally have to face.

Section 1 of the *Charter* was not called into operation here given the finding that the facts as alleged could not constitute a violation of s. 7.

Since the application to amend the statement of claim was filed after the Crown instituted its appeal, the application was made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal applied. Appellants' right under Rule 421 had therefore expired and their only recourse was to proceed under Rule 1104.

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APPEAL from a judgment of the Federal Court of Appeal, [1983] 1 F.C. 745, 1983 CanLII 3008 (FCA), 49 N.R. 363, allowing an appeal from a judgment of Cattanach J., [1983] 1 F.C. 429, dismissing a motion to strike out. Appeal dismissed.

Gordon F. Henderson, Q.C., *Lawrence Greenspon* and *Emilio Binavince*, for the appellants.

W. I. C. Binnie, Q.C., and *Graham R. Garton*, for the respondents.

The judgment of Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

1. DICKSON J.--This case arises out of the appellants' challenge under s. 7 of the *Canadian Charter of Rights and Freedoms* to the decision of the federal cabinet to permit the testing of the cruise missile by the United States of America in Canadian territory. The issue that must be addressed is whether the appellants' statement of claim should be struck out, before trial, as disclosing no reasonable cause of action. In their statement of claim, the appellants seek: (i) a declaration that the decision to permit the testing of the cruise missile is unconstitutional; (ii) injunctive relief to prohibit the testing; and (iii) damages. Cattanach J. of the Federal Court, Trial Division, refused the respondents' motion to strike. The Federal Court of Appeal unanimously allowed the respondents' appeal, struck out the statement of claim and dismissed the appellants' action.

2. The facts and procedural history of this case are fully set out and discussed in the reasons for judgment of Madame Justice Wilson. I agree with Madame Justice Wilson that the appellants' statement of claim should be struck out and this appeal dismissed. I have reached this conclusion, however, on the basis of reasons which differ somewhat from those of Madame Justice Wilson.

3. In my opinion, if the appellants are to be entitled to proceed to trial, their statement of claim must disclose facts, which, if taken as true, would show that the action of the Canadian government could cause an infringement of their rights under s. 7 of the *Charter*. I have concluded that the causal link between the actions of the Canadian government, and the alleged violation of appellants' rights under the *Charter* is simply too uncertain, speculative and hypothetical to sustain a cause of action. Thus, although decisions of the federal cabinet are reviewable by the courts under the *Charter*, and the government bears a general duty to act in accordance with the *Charter's* dictates, no duty is imposed on the Canadian government by s. 7 of the *Charter* to refrain from permitting the testing of the cruise missile.

I

The Appellants' Statement of Claim

4. The relevant portion of the appellants' statement of claim is found in paragraph 7 thereof. The deprivation of s. 7 *Charter* rights alleged by the appellants and the facts they advance to support this deprivation are described as follows:

7. The plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:

(a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;

(b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;

(c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

Section 7 of the *Charter* provides in English:

> **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.

and in French:

> **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

5. Before turning to an examination of the appellants' allegations concerning the results of the decision to permit testing and its consequences on their rights under s. 7, I think it would be useful to examine the principles governing the striking out of a statement of claim and dismissal of a cause of action.

(a) Striking Out a Statement of Claim

6. The respondents, by a motion pursuant to Rule 419(1)(*a*) of the *Federal Court Rules*, moved for an order to strike out the appellants' statement of claim as disclosing no reasonable cause of action. Rule 419(1)(*a*) reads as follows:

Rule 419. (1) The Court may at any stage of an action order any pleading to be struck out, with or without leave to amend, on the ground that

(*a*) it discloses no reasonable cause of action or defence, as the case may be,...

7. The most recent and authoritative statement of the principle applicable to determine when a statement of claim may be struck out is that of Estey J. in *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 47 O.L.R. 308 (App. Div.)

8. Madame Justice Wilson in her reasons in the present case [at p. 486] summarized the relevant principles as follows:

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 1981 CanLII 2612 (FCA), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed".

9. I agree with Madame Justice Wilson that, regardless of the basis upon which the appellants advance their claim for declaratory relief--whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law--they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the *Charter*.

10. In short then, for the appellants to succeed on this appeal, they must show that they have some chance of proving that the action of the Canadian government has caused a violation or a threat of violation of their rights under the *Charter*.

(b) The Allegations of the Statement of Claim

11. The principal allegation of the statement of claim is that the testing of the cruise missile in Canada poses a threat to the lives and security of Canadians by increasing the risk of nuclear conflict, and thus violates the right to life, liberty and security of the person guaranteed by s. 7 of the *Charter*.

12. As a preliminary matter, it should be noted that the exact nature of the deprivation of life and security of the person that the appellants rely upon as the legal foundation for the violation of s. 7 they allege is not clear.

There seem to be two possibilities. The violation could be the result of actual deprivation of life and security of the person that would occur in the event of a nuclear attack on Canada, or it could be the result of general insecurity experienced by all people in Canada as a result of living under the increased threat of nuclear war.

13. The first possibility is apparent on a literal reading of the statement of claim. The second possibility, however, appears to be more consistent with the appellants' submission at p. 31 of their factum, that:

...at the minimum, the above allegations show [in paragraph 7 of the statement of claim] that there is a "threat" to the life and security of the Appellants which "threat", depending upon the construction of the concept "infringe" or "deny" in Section 7 [*sic*], could arguably constitute an infringement or denial of their right to life and security of the person. The amendment to the Statement of Claim, rejected by the Court of Appeal, would have made infringement or denial more explicit when it states: "The very testing of the cruise missile *per se* in Canada endangers the *Charter of Rights and Freedoms* Section 7: (sic) Rights".

14. I believe that we are obliged to read the statement of claim as generously as possible and to accommodate any inadequacies in the form of the allegations which are merely the result of drafting deficiencies.

15. Thus, I am prepared to accept that the appellants intended both of these possible deprivations as a basis for the violation of s. 7. It is apparent, however, that the violation of s. 7 alleged turns upon an actual increase in the risk of nuclear war, resulting from the federal cabinet's decision to permit the testing of the cruise missile. Thus, to succeed at trial, the appellants would have to demonstrate, *inter alia*, that the testing of the cruise missile would cause an increase in the risk of nuclear war. It is precisely this link between the cabinet decision to permit the testing of the cruise and the increased risk of nuclear war which, in my opinion, they cannot establish. It will not be necessary therefore to address the issue of whether the deprivations of life and security of the person advanced by the appellants could constitute violations of s. 7.

16. As I have noted, both interpretations of the nature of the infringement of the appellants' rights are founded on the premise that if the Canadian government allows the United States government to test the cruise missile system in Canada, then there will be an increased risk of nuclear war. Such a claim can only be based on the assumption that the net result of all of the various foreign powers' reactions to the testing of the cruise missile in Canada will be an increased risk of nuclear war.

17. The statement of claim speaks of weapons control agreements being "practically unenforceable", Canada being "more likely to be the target of a nuclear attack", "increasing the likelihood of either a pre-emptive strike or an accidental firing, or both", and "escalation of the nuclear arms race". All of these eventualities, culminating in the increased risk of nuclear war, are alleged to flow from the Canadian government's single act of allowing the United States to test the cruise missile in Canada.

18. Since the foreign policy decisions of independent and sovereign nations are not capable of prediction, on the basis of evidence, to any degree of certainty approaching probability, the nature of such reactions can only be a matter of speculation; the causal link between the decision of the Canadian government to permit the testing of the cruise and the results that the appellants allege could never be proven.

19. An analysis of the specific allegations of the statement of claim reveals that they are all contingent upon the possible reactions of the nuclear powers to the testing of the cruise missile in Canada. The gist of paragraphs (a) and (b) of the statement of claim is that verification of the cruise missile system is impossible because the missile cannot be detected by surveillance satellites, and that, therefore, arms control agreements will be unenforceable. This is based on two major assumptions as to how foreign powers will react to the development of the cruise missile: first, that they will not develop new types of surveillance satellites or new methods of verification, and second, that foreign powers will not establish new modes of co-operation for dealing with the problem of enforcement. With respect to the latter of these points, it is just as plausible that lack of verification would have the effect of enhancing enforceability than of undermining it, since an inability on the part of nuclear powers to verify systems like the cruise could precipitate a system of enforcement based on co-operation rather than surveillance.

20. As for paragraph (c), even if it were the case that the testing of the air-launched cruise missile would result in an increased American military presence and interest in Canada, to say that this would make Canada more likely to be the target of a nuclear attack is to assume certain reactions of hostile foreign powers to such an increased American presence. It also makes an assumption about the degree to which Canada is already a possible target of nuclear attack. Given the impossibility of determining how an independent sovereign nation

might react, it can only be a matter of hypothesis whether an increased American presence would make Canada more vulnerable to nuclear attack. It would not be possible to prove it one way or the other.

21. Paragraph (d) assumes that foreign states will not develop their technology in such a way as to meet the requirements of effective detection of the cruise and that there will therefore be an increased likelihood of pre-emptive strike or an accidental firing, or both. Again, this assumption concerns how foreign powers are likely to act in response to the development of the cruise. It would be just as plausible to argue that foreign states would improve their technology with respect to detection of missiles, thereby decreasing the likelihood of accidental firing or pre-emptive strike.

22. Finally, paragraph (e) asserts that the development of the cruise will lead to an escalation of the nuclear arms race. This again involves speculation based on assumptions as to how foreign powers will react. One could equally argue that the cruise would be the precipitating factor in compelling the nuclear powers to negotiate agreements that would lead to a de-escalation of the nuclear arms race.

23. One final assumption, common to all the paragraphs except (c), is that the result of testing of the cruise missile in Canada will be its development by the United States. In all of these paragraphs, the alleged harm flows from the production and eventual deployment of the cruise missile. The effect that the testing will have on the development and deployment of the cruise can only be a matter of speculation. It is possible that as a result of the tests, the Americans would decide not to develop and deploy the cruise since the very reason for the testing is to establish whether the missile is a viable weapons system. Similarly, it is possible that the Americans would develop the cruise missile even if testing were not permitted by the Canadians.

24. In the final analysis, exactly what the Americans will decide to do about development and deployment of the cruise missile, whether tested in Canada or not, is a decision that they, as an independent and sovereign nation, will make for themselves. Even with the assistance of qualified experts, a court could only speculate on how the American government may make this decision, and how important a factor the results of the testing of the cruise in Canada will be in that decision.

25. What can be concluded from this analysis of the statement of claim is that all of its allegations, including the ultimate assertion of an increased likelihood of nuclear war, are premised on assumptions and hypotheses about how independent and sovereign nations, operating in an international arena of radical uncertainty, and continually changing circumstances, will react to the Canadian government's decision to permit the testing of the cruise missile.

26. The point of this review is not to quarrel with the allegations made by the appellants about the results of cruise missile testing. They are, of course, entitled to their opinion and belief. Rather, I wish to highlight that they are raising matters that, in my opinion, lie in the realm of conjecture, rather than fact. In brief, it is simply not possible for a court, even with the best available evidence, to do more than speculate upon the likelihood of the federal cabinet's decision to test the cruise missile resulting in an increased threat of nuclear war.

(c) The Rule that Facts in a Statement of Claim Must be Taken as Proven

27. We are not, in my opinion, required by the principle enunciated in *Inuit Tapirisat*, *supra*, to take as true the appellants' allegations concerning the possible consequences of the testing of the cruise missile. The rule that the material facts in a statement of claim must be taken as true for the purpose of determining whether it discloses a reasonable cause of action does not require that allegations based on assumptions and speculations be taken as true. The very nature of such an allegation is that it cannot be proven to be true by the adduction of evidence. It would, therefore, be improper to accept that such an allegation is true. No violence is done to the rule where allegations, incapable of proof, are not taken as proven.

II

The Cabinet's Decision to Permit the Testing of the Cruise Missile and the Application of the *Charter of Rights and Freedoms*

(a) Application of the *Charter* to Cabinet Decisions

28. I agree with Madame Justice Wilson that cabinet decisions fall under s. 32(1)(*a*) of the *Charter* and are therefore reviewable in the courts and subject to judicial scrutiny for compatibility with the Constitution. I have

no doubt that the executive branch of the Canadian government is duty bound to act in accordance with the dictates of the *Charter*. Specifically, the cabinet has a duty to act in a manner consistent with 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.

(b) The Absence of a Duty on the Government to Refrain from Allowing Testing

29. I do not believe the action impugned in the present case can be characterized as contrary to the duties of the executive under the *Charter*. Section 7 of the *Charter* cannot reasonably be read as imposing a duty on the government to refrain from those acts which might lead to consequences that deprive or threaten to deprive individuals of their life and security of the person. A duty of the federal cabinet cannot arise on the basis of speculation and hypothesis about possible effects of government action. Such a duty only arises, in my view, where it can be said that a deprivation of life and security of the person could be proven to result from the impugned government act.

30. The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not provable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

31. The reluctance of courts to provide remedies where the causal link between an action and the future harm alleged to flow from it cannot be proven is exemplified by the principles with respect to declaratory relief. According to Eager, *The Declaratory Judgment Action* (1971), at p. 5:

> 3. The remedy [of declaratory relief] is not generally available where the controversy is not presently existing but merely possible or remote; the action is not maintainable to settle disputes which are contingent upon the happening of some future event which may never take place.
>
> 4. Conjectural or speculative issues, or feigned disputes or one-sided contentions are not the proper subjects for declaratory relief.

Similarly, Sarna has said, "The court does not deal with unripe claims, nor does it entertain proceedings with the sole purpose of remedying only possible conflicts": (*The Law of Declaratory Judgments* (1978), at p. 179).

32. None of this is to deny the preventative role of the declaratory judgment. As Madame Justice Wilson points out in her judgment, Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, states that,

> ...no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty....

33. Nonetheless, the preventative function of the declaratory judgment must be based on more than mere hypothetical consequences; there must be a cognizable threat to a legal interest before the courts will entertain the use of its process as a preventive measure. As this Court stated in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, a declaration could issue to affect future rights, but not where the dispute in issue was merely speculative. In *Solosky*, *supra*, one of the questions was whether an order by a director of a prison to censor correspondence between the appellant inmate and his solicitor could be declared unlawful. The dispute had already arisen as a result of the existence of the censorship order and the declaration sought was a direct and present challenge to this order. This Court found that the fact that the relief sought would relate to letters not yet written, and thereby affect future rights, was not in itself a bar to the granting of a declaration. The Court made it clear, however, at p. 832:

> ... that a declaration will not normally be granted when the dispute is over and has become academic, or where the dispute has yet to arise and may not arise.

(Emphasis added.)

34. A similar concern with the problems inherent in basing relief on the prediction of future events is found in the principles relating to injunctive relief. Professor Sharpe, *Injunctions and Specific Performance* (1983), clearly articulates the difficulties in issuing an injunction where the alleged harm is prospective at pp. 30-31:

> All injunctions are future looking in the sense that they are intended to prevent or avoid harm rather than compensate for an injury already suffered ....
>
> Where the harm to the plaintiff has yet to occur the problems of prediction are encountered. Here, the plaintiff sues *quia timet*--because he fears--and the judgment as to the propriety of injunctive relief must be made without the advantage of actual evidence as to the nature of harm inflicted on the plaintiff. The court is asked to predict that harm will occur in the future and that the harm is of a type that ought to be prevented by injunction.

35. The general principle with respect to such injunctions appears to be that "there must be a high degree of probability that the harm will in fact occur": Sharpe, *supra*, at p. 31. In *Redland Bricks Ltd. v. Morris*, [1970] A.C. 652, at p. 665, *per* Lord Upjohn, the House of Lords laid down four general propositions concerning the circumstances in which mandatory injunctive relief could be granted on the basis of prospective harm. The first of these stated [at p. 665]:

> 1. A mandatory injunction can only be granted where the plaintiff shows a very strong probability upon the facts that grave damage will accrue to him in the future.... It is a jurisdiction to be exercised sparingly and with caution but in the proper case unhesitatingly.

36. It is clearly illustrated by the rules governing declaratory and injunctive relief that the courts will not take remedial action where the occurrence of future harm is not probable. This unwillingness to act in the absence of probable future harm demonstrates the courts' reluctance to grant relief where it cannot be shown that the impugned action will cause a violation of rights.

37. In the present case, the speculative nature of the allegation that the decision to test the cruise missile will lead to an increased threat of nuclear war makes it manifest that no duty is imposed on the Canadian government to refrain from permitting the testing. The government's action simply could not be proven to cause the alleged violation of s. 7 of the *Charter* and, thus, no duty can arise.

III

Justiciability

38. The approach which I have taken is not based on the concept of justiciability. I agree in substance with Madame Justice Wilson's discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the courts as the forum for the resolution of different types of disputes. I have no doubt that disputes of a political or foreign policy nature may be properly cognizable by the courts. My concerns in the present case focus on the impossibility of the Court finding, on the basis of evidence, the connection, alleged by the appellants, between the duty of the government to act in accordance with the *Charter of Rights and Freedoms* and the violation of their rights under s. 7. As stated above, I do not believe the alleged violation--namely, the increased threat of nuclear war--could ever be sufficiently linked as a factual matter to the acknowledged duty of the government to respect s. 7 of the *Charter*.

IV

Section 52 of the *Constitution Act, 1982* and Section 1 of the *Charter*

39. I would like to note that nothing in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the *Charter* is confined to statutes, regulations and the common law. It may well be that if the supremacy of the Constitution expressed in s. 52 is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52. Equally, it is not necessary for the resolution of this case to express any opinion on the application of s. 1 of the *Charter* or the appropriate principles for its interpretation.

V

Conclusion

40. I would accordingly dismiss the appeal with costs.

The following are the reasons delivered by

41. WILSON J.--This litigation was sparked by the decision of the Canadian government to permit the United States to test the cruise missile in Canada. It raises issues of great difficulty and considerable importance to all of us.

1. The Facts

42. The appellants are a group of organizations and unions claiming to have a collective membership of more than 1.5 million Canadians. They allege that a decision made by the Canadian government on July 15, 1983 to allow the United States to test cruise missiles within Canada violates their constitutional rights as guaranteed by the *Canadian Charter of Rights and Freedoms*. More specifically, quoting from their statement of claim:

7. The Plaintiffs state and the fact is that the testing of the cruise missile in Canada is a violation of the collective rights of the Plaintiffs and their members and all Canadians, specifically their right to security of the person and life in that:

(a) the size and eventual dispersion of the air-launched cruise missile is such that the missile cannot be detected by surveillance satellites, thus making verification of the extent of this nuclear weapons system impossible;

(b) with the impossibility of verification, the future of nuclear weapons' control and limitation agreements is completely undermined as any such agreements become practically unenforceable;

(c) the testing of the air-launched cruise missiles would result in an increased American military presence and interest in Canada which would result in making Canada more likely to be the target of a nuclear attack;

(d) as the cruise missile cannot be detected until approximately eight minutes before it reaches its target, a "Launch on Warning" system would be necessary in order to respond to the cruise missile thereby eliminating effective human discretion and increasing the likelihood of either a pre-emptive strike or an accidental firing, or both;

(e) the cruise missile is a military weapon, the development of which will have the effect of a needless and dangerous escalation of the nuclear arms race, thus endangering the security and lives of all people.

43. The plaintiffs, in addition to declaratory relief, seek consequential relief in the nature of an injunction and damages. The defendants, by a motion pursuant to Rule 419(1) of the *Federal Court Rules*, moved to strike out the plaintiffs' statement of claim and to dismiss it as disclosing no reasonable cause of action. Cattanach J. dismissed the defendants' motion to strike on the grounds that the *Charter* applied to the Government of Canada, including executive acts of the cabinet, and that the statement of claim contained "the germ of a cause of action" and raised a "justiciable issue". The Federal Court of Appeal unanimously allowed the defendants' appeal.

2. The Judgment Appealed From

44. Each of the five judges who sat on the appeal to the Federal Court of Appeal delivered separate reasons for allowing the appeal. Four of the five (Pratte, Le Dain, Marceau and Hugessen JJ.) held that a breach of s. 7 of the *Charter* must involve a failure to comply with the principles of fundamental justice and the appellants had not alleged any such failure.

45. Three of the justices (Pratte, Marceau and Hugessen JJ.) were of the opinion that the facts as alleged did not constitute a violation of the right to life, liberty and security of the person as guaranteed by s. 7. Pratte and Hugessen JJ. thought that any breach of s. 7 would only occur as the result of actions by foreign powers who were not bound by the *Charter*. Pratte J. went further and stated that the only "liberty and security of the person" that was protected by s. 7 was security against arbitrary arrest or detention. Marceau J. felt that s. 7 could never

have "any higher mission than that of protecting the life and the freedom of movement of the citizens against arbitrary action and despotism by people in power".

46. Two of the justices (Ryan and Le Dain JJ.) would have allowed the appeal on the fundamental ground that the issue was inherently non-justiciable and therefore incapable of adjudication by a court. Ryan J. thought that the question whether national security was impaired, and hence whether the plaintiffs' own personal security had been affected, was not triable because it was not susceptible of proof. Le Dain J. took the central issue to be the effect of testing cruise missiles on the risk of nuclear conflict, a matter which he asserted to be non-justiciable as involving factors either inaccessible to a court or incapable of being evaluated by it. The other three judges did not directly address this point.

47. Marceau J. would have allowed the appeal on the additional ground that the *Charter* did not give the courts a power to interfere with an exercise of the royal prerogative, especially when issues of defence and national security were involved. However, a majority of the Court (Pratte, Le Dain and Ryan JJ.) was of the opinion that the *Charter* did apply to decisions taken in the exercise of the royal prerogative. Hugessen J. did not deal with this question.

48. None of the five judges was prepared to say that the cabinet's decision to test the cruise missile was unreviewable because it involved a "political question". Pratte and Marceau JJ. expressly rejected this argument, Le Dain and Hugessen JJ. did not consider it necessary to deal with it, and Ryan J. did not mention it.

3. The Issues

49. The issues to be addressed on the appeal to this Court may be conveniently summarized as follows:

(1) Is a decision made by the Government of Canada in relation to a matter of national defence and foreign affairs unreviewable on any of the following grounds:

(a) it is an exercise of the royal prerogative;

(b) it is, because of the nature of the factual questions involved, inherently non-justiciable;

(c) it involves a "political question" of a kind that a court should not decide?

(2) Under what circumstances can a Statement of Claim seeking declaratory relief concerning the constitutionality of a law or governmental decision be struck out as disclosing no cause of action?

(3) Do the facts as alleged in the Statement of Claim, which must be taken as proven, constitute a violation of s. 7 of the *Canadian Charter of Rights and Freedoms*? and

(4) Do the plaintiffs have a right to amend the Statement of Claim before the filing of a Statement of Defence?

(1) Is the Government's Decision Reviewable?

(a) The Royal Prerogative

50. The respondents submit that at common law the authority to make international agreements (such as the one made with the United States to permit the testing) is a matter which falls within the prerogative power of the Crown and that both at common law and by s. 15 of the *Constitution Act, 1867* the same is true of decisions relating to national defence. They further submit that since by s. 32(1)(*a*) the *Charter* applies "to the Parliament and government of Canada in respect of all matters within the authority of Parliament", the *Charter's* application must, so far as the government is concerned, be restricted to the exercise of powers which derive directly from statute. It cannot, therefore, apply to an exercice of the royal prerogative which is a source of power existing independently of Parliament; otherwise, it is argued, the limiting phrase "within the authority of Parliament" would be deprived of any effect. The answer to this argument seems to me to be that those words of limitation, like the corresponding words "within the authority of the legislature of each province" in s. 32(1)(*b*), are merely a reference to the division of powers in ss. 91 and 92 of the *Constitution Act, 1867*. They describe the subject-matters in relation to which the Parliament of Canada may legislate or the government of Canada may take executive action. As Le Dain J. points out, the royal prerogative is "within the authority of Parliament" in the sense that Parliament is competent to legislate with respect to matters falling within its scope. Since there is

no reason in principle to distinguish between cabinet decisions made pursuant to statutory authority and those made in the exercise of the royal prerogative, and since the former clearly fall within the ambit of the *Charter*, I conclude that the latter do so also.

(b) Non-Justiciability

51. Le Dain and Ryan JJ. in the Federal Court of Appeal were of the opinion that the issues involved in this case are inherently non-justiciable, either because the question whether testing the cruise missile increases the risk of nuclear war is not susceptible of proof and hence is not triable (*per* Ryan J.) or because answering that question involves factors which are either inaccessible to a court or are of a nature which a court is incapable of evaluating (*per* Le Dain J.) To the extent that this objection to the appellants' case rests on the inherent evidentiary difficulties which would obviously confront any attempt to prove the appellants' allegations of fact, I do not think it can be sustained. It might well be that, if the issue were allowed to go to trial, the appellants would lose simply by reason of their not having been able to establish the factual basis of their claim but that does not seem to me to be a reason for striking the case out at this preliminary stage. It is trite law that on a motion to strike out a statement of claim the plaintiff's allegations of fact are to be taken as having been proved. Accordingly, it is arguable that by dealing with the case as they have done Le Dain and Ryan JJ. have, in effect, made a presumption against the appellants which they are not entitled, on a preliminary motion of this kind, to make.

52. I am not convinced, however, that Le Dain and Ryan JJ. were restricting the concept of non-justiciability to difficulties of evidence and proof. Both rely on Lord Radcliffe's judgment in *Chandler v. Director of Public Prosecutions*, [1962] 3 All E.R. 142 (H.L.), and especially on the following passage at p. 151:

> The disposition and equipment of the forces and the facilities afforded to allied forces for defence purposes constitute a given fact and it cannot be a matter of proof or finding that the decisions of policy on which they rest are or are not in the country's best interests. I may add that I can think of few issues which present themselves in less triable form. It would be ingenuous to suppose that the kind of evidence that the appellants wanted to call could make more than a small contribution to its final solution. The facts which they wished to establish might well be admitted: even so, throughout history men have had to run great risk for themselves and others in the hope of attaining objectives which they prize for all. The more one looks at it, the plainer it becomes, I think, that the question whether it is in the true interests of this country to acquire, retain or house nuclear armaments depends on an infinity of considerations, military and diplomatic, technical, psychological and moral, and of decisions, tentative or final, which are themselves part assessments of fact and part expectations and hopes. I do not think that there is anything amiss with a legal ruling that does not make this issue a matter for judge or jury.

(Emphasis added.)

In my opinion, this passage makes clear that in Lord Radcliffe's view these kinds of issues are to be treated as non-justiciable not simply because of evidentiary difficulties but because they involve moral and political considerations which it is not within the province of the courts to assess. Le Dain J. maintains that the difficulty is one of judicial competence rather than anything resembling the American "political questions" doctrine. However, in response to that contention it can be pointed out that, however unsuited courts may be for the task, they are called upon all the time to decide questions of principle and policy. As Melville Weston points out in "Political Questions," 38 *Harv. L. Rev.* 296 (1925), at p. 299:

> The word "justiciable" ... is legitimately capable of denoting almost any question. That is to say, the questions are few which are intrinsically incapable of submission to a tribunal having an established procedure, with an orderly presentation of such evidence as is available, for the purpose of an adjudication from which practical consequences in human conduct are to follow. For example, when nations decline to submit to arbitration or to the compulsory jurisdiction of a proposed international tribunal those questions of honor or interest which they call "non-justiciable", they are really avoiding that broad sense of the word, but what they mean is a little less clear. Probably they mean only that they will not, or deem they ought not, endure the presentation of evidence on such questions, nor bind their conduct to conform to the proposed adjudications. So far as "non-justiciable" is for them more than an epithet, it expresses a sense of a lack of fitness, and not of any inherent impossibility, of submitting these questions to judicial or *quasi*-judicial determination.

53. In the 1950's and early 1960's there was considerable debate in Britain over the question whether restrictive trade practices legislation gave rise to questions which were subject to judicial determination: see

Marshall, "Justiciability," in *Oxford Essays in Jurisprudence* (1961), ed. A.G. Guest; Summers, "Justiciability" (1963), 26 *M.L.R.* 530; Stevens, "Justiciability: The Restrictive Practices Court Re-Examined," [1964] *Public Law* 221. I think it is fairly clear that the British restrictive trade practices legislation did not involve the courts in the resolution of issues more imponderable than those facing American courts administering the *Sherman Act*. Indeed, there is significantly less "policy" content in the decisions of the courts in those cases than there is in the decisions of administrative tribunals such as the Canadian Transport Commission or the CRTC. The real issue there, and perhaps also in the case at bar, is not the ability of judicial tribunals to make a decision on the questions presented, but the appropriateness of the use of judicial techniques for such purposes.

54. I cannot accept the proposition that difficulties of evidence or proof absolve the Court from making a certain kind of decision if it can be established on other grounds that it has a duty to do so. I think we should focus our attention on whether the courts should or must rather than on whether they can deal with such matters. We should put difficulties of evidence and proof aside and consider whether as a constitutional matter it is appropriate or obligatory for the courts to decide the issue before us. I will return to this question later.

(c) The Political Questions Doctrine

55. It is a well established principle of American constitutional law that there are certain kinds of "political questions" that a court ought to refuse to decide. In *Baker v. Carr*, 369 U.S. 186 (1962), at pp. 210-11, Brennan J. discussed the nature of the doctrine in the following terms:

> We have said that "In determining whether a question falls within (the political question) category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." *Coleman* v. *Miller*, 307 U.S. 433, 454-455. The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the "political question" label to obscure the need for case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.

At page 217 he said:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

While one or two of the categories of political question referred to by Brennan J. raise the issue of judicial or institutional competence already referred to, the underlying theme is the separation of powers in the sense of the proper role of the courts *vis-à-vis* the other branches of government. In this regard it is perhaps noteworthy that a distinction is drawn in the American case law between matters internal to the United States on the one hand and foreign affairs on the other. In the area of foreign affairs the courts are especially deferential to the executive branch of government: see *e.g. Atlee v. Laird*, 347 F.Supp. 689 (1972) (U.S. Dist. Ct.), at pp. 701 *ff*.

56. While Brennan J.'s statement, in my view, accurately sums up the reasoning American courts have used in deciding that specific cases did not present questions which were judicially cognizable, I do not think it is particularly helpful in determining when American courts will find that those factors come into play. In cases from *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), to *United States v. Nixon*, 418 U.S. 683 (1974), the Court has not allowed the "respect due coordinate branches of government" to prevent it from rendering decisions highly embarrassing to those holding executive or legislative office. In *Baker v. Carr* itself, *supra*, Frankfurter J., in dissent, expressed concern that the judiciary could not find manageable standards for the problems presented by the reapportionment of political districts. Indeed, some would say that the enforcement of

the desegregation decision in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954), gave rise to similar problems of judicial unmanageability. Yet American courts have ventured into these areas undeterred.

57. Academic commentators have expended considerable effort trying to identify when the political questions doctrine should apply. Although there are many theories (perhaps best summarized by Professor Scharpf in his article "Judicial Review and the Political Question: A Functional Analysis," 75 *Yale L.J.* 517 (1966)), I think it is fair to say that they break down along two broad lines. The first, championed by scholars such as Weston, "Political Questions," *supra*, and Wechsler, *Principles, Politics, and Fundamental Law* (1961); Wechsler, Book Review, 75 *Yale L.J.* 672 (1966), define political questions principally in terms of the separation of powers as set out in the Constitution and turn to the Constitution itself for the answer to the question when the Courts should stay their hand. The second school, represented by Finkelstein, "Judicial Self-Limitation," 37 *Harv. L.Rev.* 338 (1924), and Bickel *The Least Dangerous Branch* (1962), especially chapter 4, "The Passive Virtues," roots the political questions doctrine in what seems to me to be a rather vague concept of judicial "prudence" whereby the courts enter into a calculation concerning the political wisdom of intervention in sensitive areas. More recently, commentators such as Tigar, "Judicial Power, the 'Political Question Doctrine,' and Foreign Relations," 17 *U.C.L.A. L.R.* 1135 (1970), and Henkin, "Is There a `Political Question' Doctrine?" 85 *Yale L.J.* 597 (1976), have doubted the need for a political questions doctrine at all, arguing that all the cases which were correctly decided can be accounted for in terms of orthodox separation of powers doctrine.

58. Professor Tigar in his article suggests that the political questions doctrine is not really a doctrine at all but simply "a group of quite different legal rules and principles, each resting in part upon deference to the political branches of government" (p. 1163). He sees Justice Brennan's formulation of the doctrine in *Baker v. Carr*, *supra*, as an "unsatisfactory effort to rationalize a collection of disparate precedent" (p. 1163).

59. In the House of Lords in *Chandler*, *supra*, Lord Devlin expressed a similar reluctance to retreat from traditional techniques in the interpretation of the phrase "purpose prejudicial to the safety or interests of the state..." in the *Official Secrets Act, 1911*. His colleagues, in particular Lord Radcliffe and Lord Reid, seem to have been of the view that in matters of defence the Crown's opinion as to what was prejudicial to the safety or interests of the State was conclusive upon the courts. Lord Devlin agreed with the result reached by his colleagues on the facts before him, and with the observation of Lord Parker on the Court of Criminal Appeal ([1962] 2 All E.R. 314, at pp. 319-20) that "the manner of the exercise of... [the Crown's] prerogative powers [over the disposition and armament of the military] cannot be inquired into by the courts, whether in a civil or a criminal case...." ([1962] 3 All E.R. 142, at p. 157) but went on to make three observations in clarification of his position.

60. Lord Devlin's first observation was that the principle that the <u>substance</u> of discretionary decisions is not reviewable in the courts is one basic to administrative law and is not confined to matters of defence or the exercise of the prerogative. The second point was that even though review on the merits of a discretionary decision was excluded, that did not mean that judicial review was excluded entirely. The third comment was that the nature and effect of the principle of judicial review is "[to limit] the issue which the court has to determine...." ([1962] 3 All E.R. 142, at p. 158).

61. Lord Devlin then proceeded to apply these propositions to the case before him and asked what it was that the jury was required to determine. In his view "the fact to be proved is the existence of a purpose prejudicial to the state--not a purpose which `appears to the Crown' to be prejudicial to the state" ([1962] 3 All E.R. 142, at p. 158). He accordingly went on to conclude at p. 159:

> Consequently, the Crown's opinion as to what is or is not prejudicial in this case is just as inadmissible as the appellants'. The Crown's evidence about what its interests are is an entirely different matter. They can be proved by an officer of the Crown wherever it may be necessary to do so. In a case like the present, it may be presumed that it is contrary to the interests of the Crown to have one of its airfields immobilised just as it may be presumed that it is contrary to the interests of an industrialist to have his factory immobilised. The thing speaks for itself, as the Attorney-General submitted. But the presumption is not irrebuttable. Men can exaggerate the extent of their interests and so can the Crown. The servants of the Crown, like other men animated by the highest motives, are capable of formulating a policy ad hoc so as to prevent the citizen from doing something that the Crown does not want him to do. <u>It is the duty of the courts to be as alert now as they have always been to prevent abuse of the prerogative</u>. But in the present case there is nothing at all to suggest that the Crown's interest in the proper operation of its airfields is not what it may naturally be presumed to be or that it was exaggerating the perils of interference with their effectiveness.

(Emphasis added.)

62. It seems to me that the point being made by Lord Devlin, as well as by Tigar and Henkin in their writings, is that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state. Equally, however, it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed. The first step is to determine who as a constitutional matter has the decision-making power; the second is to determine the scope (if any) of judicial review of the exercise of that power.

63. It might be timely at this point to remind ourselves of the question the Court is being asked to decide. It is, of course, true that the federal legislature has exclusive legislative jurisdiction in relation to defence under s. 91(7) of the *Constitution Act, 1867* and that the federal executive has the powers conferred upon it in ss. 9-15 of that Act. Accordingly, if the Court were simply being asked to express its opinion on the wisdom of the executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the executive to whom the decision-making power is given by the Constitution. Because the effect of the appellants' action is to challenge the wisdom of the government's defence policy, it is tempting to say that the Court should in the same way refuse to involve itself. However, I think this would be to miss the point, to fail to focus on the question which is before us. The question before us is not whether the government's defence policy is sound but whether or not it violates the appellants' rights under s. 7 of the *Charter of Rights and Freedoms*. This is a totally different question. I do not think there can be any doubt that this is a question for the courts. Indeed, s. 24(1) of the *Charter*, also part of the Constitution, makes it clear that the adjudication of that question is the responsibility of "a court of competent jurisdiction". While the court is entitled to grant such remedy as it "considers appropriate and just in the circumstances", I do not think it is open to it to relinquish its jurisdiction either on the basis that the issue is inherently non-justiciable or that it raises a so-called "political question": see Martin H. Redish, "Abstention, Separation of Powers, and the Limits of the Judicial Function," 94 *Yale L.J.* 71 (1984).

64. I would conclude, therefore, that if we are to look at the Constitution for the answer to the question whether it is appropriate for the courts to "second guess" the executive on matters of defence, we would conclude that it is not appropriate. However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of the citizens, then it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so.

65. One or two hypothetical situations will, I believe, illustrate the point. Let us take the case of a person who is being conscripted for service during wartime and has been ordered into battle overseas, all of this pursuant to appropriate legislative and executive authorization. He wishes to challenge his being conscripted and sent overseas as an infringement of his rights under s. 7. It is apparent that his liberty has been constrained and, if he is sent into battle, his security of the person and, indeed, his life are put in jeopardy. It seems to me that it would afford the conscriptee a somewhat illusory protection if the validity of his challenge is to be determined by the executive. On the other hand, it does not follow from these facts that the individual's rights under the *Charter* have been violated. Even if an individual's rights to life and liberty under s. 7 are interpreted at their broadest, it is clear from s. 1 that they are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". If the Court were of the opinion that conscription during wartime was a "reasonable limit" within the meaning of s. 1, a conscriptee's challenge on the facts as presented would necessarily fail.

66. By way of contrast, one can envisage a situation in which the government decided to force a particular group to participate in experimental testing of a deadly nerve gas. Although the government might argue that such experiments were an important part of our defence effort, I find it hard to believe that they would survive judicial review under the *Charter*. Equally we could imagine a situation during wartime in which the army began to seize people for military service without appropriate enabling legislation having been passed by Parliament. Such "press gang" tactics would, one might expect, be subject to judicial review even if the executive thought they were justified for the prosecution of the war.

67. Returning then to the present case, it seems to me that the legislature has assigned to the courts as a constitutional responsibility the task of determining whether or not a decision to permit the testing of cruise missiles violates the appellants' rights under the *Charter*. The preceding illustrations indicate why the legislature has done so. It is therefore, in my view, not only appropriate that we decide the matter; it is our constitutional obligation to do so.

(2) In What Circumstances May a Statement of Claim Seeking Declaratory Relief Be Struck Out?

68. In order to put this issue in context it is necessary to review the procedural history of the case.

69. On July 20, 1983 the appellants filed a statement of claim seeking a declaration that their constitutional rights had been violated and consequential relief in the form of an injunction, damages and costs. The respondents moved on August 11, 1983 under Rule 419(1) of the *Federal Court Rules* to strike out the statement of claim primarily on the ground that it disclosed no reasonable cause of action. The statement was also alleged to be frivolous and vexatious and an abuse of the process of the Court. Cattanach J. denied the motion on September 15, 1983. He noted the requirement under Rule 408 that a statement of claim contain a precise statement of the material facts upon which the plaintiff relies and must stand or fall on the allegations of fact. He said that a statement of claim would not be struck out if the facts alleged were capable of constituting "the scintilla of a cause of action". He noted that by virtue of s. 32(1)(*a*) the *Charter* applies to the Parliament and government of Canada and by virtue of s. 24(1) the Court has jurisdiction to administer and provide appropriate remedies. He concluded that the statement of claim contained sufficient allegations to raise a justiciable issue and analogized the alleged liability of the respondents to liability for extra-hazardous activities contemplated by the rule in *Rylands v. Fletcher*, [1861-73] All E.R. 1 (H.L.) He concluded that there was a "germ of a cause of action" disclosed in the statement of claim.

70. On September 19, 1983 the respondents appealed to the Federal Court of Appeal. On October 7, 1983 the appellants sought leave from the Court of Appeal to amend their statement of claim under Rule 1104 to include an allegation that the testing of the cruise missile in Canada *per se* violated the appellants' rights under s. 7 of the *Charter*. Pratte J. dimissed the application without reasons on October 11, 1983. The Federal Court of Appeal heard the case on November 28, 1983 and allowed the respondents' appeal for the reasons outlined earlier.

71. The appeal to this Court was heard on February 14 and 15, 1984. On March 6, 1984 the appellants applied to Muldoon J. for an injunction under Rule 469 of the *Federal Court Rules* to prevent testing until the case was decided. Muldoon J. concluded that until this Court decreed differently the law applicable to the matter was that the appellants' claim was non-justiciable. He held that in order to get an interlocutory injunction "cogent" evidence of a violation of a right had to be presented. The evidence presented was speculative only and could not establish a "real and proximate jeopardy" to the appellants' rights. There was nothing therefore to support the issue of an injunction.

72. The procedural issue before the Court then is: did the appellants' statement of claim disclose a reasonable cause of action within the meaning of Rule 419 of the *Federal Court Rules*?

(a) The Applicable Principle

73. Estey J. stated the applicable principle in *Attorney General of Canada v. Inuit Tapirisat of Canada*, 1980 CanLII 21 (SCC), [1980] 2 S.C.R. 735, at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": *Ross v. Scottish Union and National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 47 O.L.R. 308 (App. Div.)

74. In *Shawn v. Robertson* (1964), 1964 CanLII 166 (ON SC), 46 D.L.R. (2d) 363, a declaration was sought against a ministerial exercise of discretion. An application for striking out on the basis of no reasonable cause of action was made under the Ontario Rules. Grant J. stated, at p. 365:

> The principles to be applied by the Court in determining whether to exercise jurisdiction conferred by Rule 126 or not are set out in the following cases; in *Ross v. Scottish Union & National Insurance Co.* (1920), 1920 CanLII 437 (ON CA), 53 D.L.R. 415 at pp. 421-2, 47 O.L.R. 308 at p. 316, Magee, J.A., states:

> That inherent jurisdiction is partly embodied in our Rule 124 (now R. 126) ... The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence.

And at p. 423 D.L.R., p. 317 O.L.R.: "To justify the use of Rule 124 ... it is not sufficient that the plaintiff is not likely to succeed at the trial."

In *Gilbert Surgical Supply Co. and Gilbert v. Frank W. Horner Ltd.*, 34 C.P.R. 17, [1960] O.W.N. 289, 19 Fox Pat. C. 209, Aylesworth, J.A., speaking for himself, Porter C.J.O., and LeBel, J.A., states as follows at p. 289 O.W.N.:

He said that the action was novel and he could not agree that the defendant had shown the case to be one within the Rule. At this stage of litigation the Court could not conclude that the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown.

75. A case analogous to the present case, not in the nature of the issues involved but in the novelty of the alleged cause of action and the absence of precedent, is *McKay v. Essex Area Health Authority*, [1982] 2 All E.R. 771. In that case a pregnant mother contracted German measles in the early months of her pregnancy. Her doctor took blood samples from her which were tested by the defendant Health Authority but the infection was not diagnosed and the child was born severely disabled. The mother and child sued the doctor and the Health Authority for negligence, the child claiming damages for her "entry into a life in which her injuries are highly debilitating". The Master struck out the child's claim on the basis it disclosed no reasonable cause of action. His order was set aside on appeal, the judge holding that the defendants owed a duty of care to the child and her real claim was not that she had suffered damage by reason of "wrongful entry into life" but by reason of having been born deformed. This gave rise to a reasonable cause of action. An appeal to the Court of Appeal was allowed and the order of the Master striking out the claim restored.

76. Stephenson L.J. had to struggle with the question whether a child had a right not to be born deformed which in the case of a child deformed or disabled before birth by disease meant a right to be aborted. Counsel for the child submitted that this could not be viewed as a plain and obvious case susceptible of only one result, nor could it be viewed as frivolous or vexatious; although it might be novel, it raised issues of real substance which ought to go to trial. His Lordship disagreed. He said at p. 778:

Here the court is considering not `ancient law' but a novel cause of action, for or against which there is no authority in any reported case in the courts of the United Kingdom or the Commonwealth. <u>It is tempting to say that the question whether it exists is so difficult and so important that it should be argued out at a trial and on appeal up to the House of Lords. But it may become just as plain and obvious, after argument on the defendants' application to strike it out, that the novel cause of action is unarguable or unsustainable or has no chance of succeeding</u>.

(Emphasis added.)

77. It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs.

78. It has been suggested, however, that the plaintiffs' claim should be struck out because some of the allegations contained in it are not matters of fact but matters of opinion and that matters of opinion, being to some extent speculative, do not fall within the principle that the allegations of fact in the statement of claim must be taken as proved. I cannot accept this proposition since it appears to me to imply that a matter of opinion is not subject to proof. What we are concerned with for purposes of the application of the principle is, it seems to me, "evidentiary" facts. These may be either real or intangible. Real facts are susceptible of proof by direct evidence. Intangible facts, on the other hand, may be proved by inference from real facts or through the testimony of experts. Intangible facts are frequently the subject of opinion. The question of the probable cause of a certain result is a good illustration and germane to the issues at hand. An allegation that the lack of shower facilities at a defendant's brickworks probably resulted in a plaintiff employee's skin disease may in lay language appear to be merely an expression of medical opinion, but it is also in law a determination which the courts can properly infer from the surrounding facts and expert opinion evidence: see *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.) Indeed, even a finding that an event "would cause" a certain result in the future is a finding of intangible fact. For example, in *Fleming v. Hislop* (1886), 11 A.C. 686, it was necessary to determine whether or not the finding "that the ignition of any other heap or bing of blaes on said farm or in the vicinity of the pursuers' land would cause material discomfort and annoyance to the pursuers," was a finding of fact or a finding of law. It

was argued that it could not be a finding of fact because it related to something that was "prospective, future, not actually in existence". The Earl of Selborne agreed that, since the thing had not actually happened, a finding of fact as a thing past was impossible. But it was nevertheless a finding of fact and "there is a fallacy in saying that, because the word `would' is a word of futurity, the words `would cause' do not mean something which is properly a fact" (p. 690). See also on causation as an issue of fact *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, *per* Lord Salmon, at pp. 489-90.

> The nature of causation has been discussed by many eminent philosophers and also by a number of learned judges in the past. I consider, however, that what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than abstract metaphysical theory.

79. In my view, several of the allegations contained in the statement of claim are statements of intangible fact. Some of them invite inferences; others anticipate probable consequences. They may be susceptible to proof by inference from real facts or by expert testimony or "through the application of common sense principles": see *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350, at p. 363, *per* Lord Dunedin. We may entertain serious doubts that the plaintiffs will be able to prove them by any of these means. It is not, however, the function of the Court at this stage to prejudge that question. I agree with Cattanach J. that the statement of claim contains sufficient allegations to raise a justiciable issue.

(b) Declaratory Relief

80. This may be an appropriate point at which to consider the appellants' submission that in order to establish a reasonable cause of action in relation to their claim for declaratory relief as opposed to their claim for an injunction and damages, they do not have to allege in their statement of claim the violation of a right or the threat of a violation of a right. It is sufficient, they submit, that the plaintiff have standing, that a "serious constitutional issue" is raised, and that the declaration sought serves a useful purpose. In support of this contention the appellants rely on *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, and *Thorson v. Attorney General of Canada*, 1974 CanLII 6 (SCC), [1975] 1 S.C.R. 138. *Thorson* involved an alleged excess of legislative power by the Parliament of Canada as did the later case of *Nova Scotia Board of Censors v. McNeil*, 1975 CanLII 14 (SCC), [1976] 2 S.C.R. 265. Given the nature of such questions it is undoubtly true that no violation of a right need necessarily be involved.

81. Borchard, *Declaratory Judgments* (2nd ed. 1941), at p. 27, suggests that declaratory relief in cases which are not susceptible of any other relief is distinctive in that:

> ... no "injury" or "wrong" need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant....

Borchard then goes to expand upon the concept of a "legal interest" at pp. 48-49:

> It is an essential condition of the right to invoke judicial relief that the plaintiff have a protectible interest. The fact that under declaratory procedure so many types of legal issues are presentable for determination which are incapable of any other form of relief, has imposed upon the courts at the outset the function of determining whether the facts justify the grant of judicial relief, and more particularly, whether the plaintiff has a "legal interest" in the relief he seeks. In the more familiar executory action, the legal interest is sought in the "cause of action," but, as already observed, the narrow scope often given to this ambiguous term has served to conceal from view the many occasions and situations in which a plaintiff not yet physically injured or one seeking escape from dilemma and uncertainty by a clarification of his legal position has need for judicial relief not of the traditional kind. The wider opportunity and necessity for judicial usefulness disclosed by the declaratory judgment make necessary either a more flexible and comprehensive connotation of the term "cause of action" or the employment of a less chameleonic term to indicate when the petitioner may be accorded judicial protection. Without losing sight of the necessity for jurisdictional facts, it is suggested that the term "legal interest" meets the need.

82. Where, however, the unconstitutionality of a law or an act is founded upon its conflict with a right, then the right must be alleged to have been violated. Such was the case in *Borowski* where a declaration was being sought to the effect that the abortion provisions in the *Criminal Code* contravened the right to life guaranteed by s. 1(*a*) of the *Canadian Bill of Rights*, R.S.C. 1970, App. III. It was alleged in *Borowski* that rights were being violated even although they were the rights of human foetuses and not rights of the plaintiff. It seems to me that whenever a litigant raises a "serious constitutional issue" involving a violation of the *Charter* or the *Canadian Bill of Rights* then, since what is being complained of is an alleged violation of a right, it follows almost by definition that the nature of the alleged violation must be asserted. Moreover, as the respondents point out, s. 24(1) of the *Charter* makes the infringement or denial of a right a pre-condition to obtaining relief in the courts under that section. That being so, it seems to follow that the infringement or denial complained of must be specifically pleaded.

83. The appellants submit, however, that while their consequential relief in the form of an injunction and damages is made pursuant to s. 24(1) of the *Charter*, their claim for declaratory relief is at large. It is not sought pursuant to that section in paragraph 9(c) of their statement of claim which merely seeks a declaration of unconstitutionality. It is, they submit, a separate cause of action at common law and also under s. 52 of the *Constitution Act, 1982* and can stand alone even if they fail in their claim for consequential relief under s. 24(1). They cite Rule 1723 of the *Federal Court Rules* which provides:

Rule 1723. No action shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

84. The appellants acknowledge that a declaration of unconstitutionality is a discretionary remedy (*Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821) but say that the discretion lies with the trial court and is exercisable only after a trial on the merits. Accordingly, their claim for this relief should not have been struck out at the preliminary stage regardless of the fate of their other claims. However, as the respondents point out, declaratory relief is only discretionary in the sense that a court may refuse it even if the case for it has been made out: see Zamir, *The Declaratory Judgment* (1962), at p. 193. The Court, therefore, on a motion to strike on the basis that no reasonable cause of action has been disclosed in the statement of claim is not in any sense usurping the discretionary power of the trial court.

(i) Inconsistency with the *Constitution Act, 1982*, s. 52(1)

85. Section 52(1) of the *Constitution Act, 1982*, provides:

> **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.

86. Section 52 would appear to have the same role in terms of imposing a constitutional limitation on law-making power in Canada as its predecessors, s. 2 of the *Colonial Laws Validity Act*, *1865*, 28 & 29 Vict., c. 63 and s. 7 of the *Statute of Westminster, 1931*, 22 Geo. 5, c. 4 (R.S.C. 1970, App. II, No. 26): see La Forest, "The Canadian Charter of Rights and Freedoms: An Overview" (1983), 61 *Can. Bar Rev.* 19, at p. 28. Section 2 of the *Colonial Laws Validity Act 1865* provides:

> **2.** Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Section 7 of the *Statute of Westminster, 1931* provides:

> **7.** (1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.
>
> (2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

> (3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

Accordingly, Dickson J., as he then was, is unquestionably correct when he states in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295 at p. 313:

> Section 52 sets out the fundamental principle of constitutional law that the Constitution is supreme.

Dickson J. then goes on to note that where a declaration is sought under s. 52 to the effect that legislation is unconstitutional the standing requirements for constitutional litigation must of course be met.

87. If the appellants are relying on s. 52(1) of the *Constitution Act, 1982* as the source of their right to a declaration of unconstitutionality, which it would appear from their factum that they are, it is noted that that provision is directed to "laws" which are inconsistent with the provisions of the Constitution.

88. Counsel for the appellants submitted in oral argument that they should not be prejudiced in the relief sought by the absence of any law authorizing, ratifying or implementing the agreement between Canada and the United States since legislation, they submitted, should have been passed. The government should not therefore be allowed to immunize itself against judicial review under s. 52 of the *Constitution Act, 1982* by its own omission to do that which it ought to have done.

89. This argument assumes, of course, that legislation was required and this does not appear to be so. The law in relation to treaty-making power was definitively established for Canada and the rest of the Commonwealth in *Attorney-General for Canada v. Attorney-General for Ontario (Labour Conventions)*, 1937 CanLII 362 (UK JCPC), [1937] A.C. 326, where Lord Atkin stated at pp. 347-48:

> It will be essential to keep in mind the distinction between (I.) the formation, and (2.) the performance, of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign States. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament, from refusing to give its sanction to any legislative proposals that may subsequently be brought before it. Parliament, no doubt, as the Chief Justice points out, has a constitutional control over the executive: but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their form and quality are the function of the executive alone.

(Emphasis added.)

90. A treaty, therefore, may be in full force and effect internationally without any legislative implementation and, absent such legislative implementation, it does not form part of the domestic law of Canada. Legislation is only required if some alteration in the domestic law is needed for its implementation: see R. St. J. Macdonald: "The Relationship between International Law and Domestic Law in Canada," in *Canadian Perspectives on International Law and Organization* (1974), eds. Macdonald, Morris and Johnston, p. 88.

91. The agreement in this case took the form of an "exchange of notes" between Allan Gotlieb, Canadian Ambassador to the United States and Kenneth W. Dam, Acting Secretary of State, The United States State Department. As Mr. Gotlieb points out in an article entitled "Canadian Treaty-Making: Informal Agreements and Interdepartmental Arrangements," in *Canadian Perspectives on International Law and Organization*, *supra*, at p. 230, Canadian treaty-making practice has been characterized by a movement away from formal, full-fledged governmental "treaties" and towards informal "exchange of notes" arrangements. There is nothing unusual, therefore, in the procedure adopted in relation to the cruise testing agreement.

92. Although little, if any, argument has been addressed in this case to the question whether the government's decision to permit testing of the cruise missile in Canada falls within the meaning of the word "law" as used in s. 52 of the *Constitution Act, 1982*, I am prepared to assume, without deciding, that it does. I am also prepared to assume that the appellants could establish their standing to bring an action under s. 52. The question remains, however, whether the appellants' claim raises a serious question of constitutional inconsistency. This in turn depends on the answer to the question whether the government's decision violates the appellants' rights under s. 7. If it does not, there is no inconsistency with the provisions of the Constitution.

(ii) At common law

93. If the appellants' claim for declaratory relief is a claim at common law of the type upheld in *Dyson v. Attorney-General*, [1911] 1 K.B. 410, no issue arises as to whether or not there is a "law" implementing the cruise testing agreement. The common law action affords a means of attack on the acts of public officials who have allegedly exceeded their powers. However, in order to have standing to bring such an action a plaintiff must, as noted from Borchard, *supra*, be able to show that he or she will suffer injury to a right or legally protected interest from the conduct of such officials. The same point is made in de Smith, *Constitutional and Administrative Law* (4th ed.), at p. 604:

> The declaratory judgment is basically a twentieth-century judicial remedy and has come to be used for a great variety of purposes in public and private law. Declarations can be awarded in almost every situation where an injunction will lie--the most important exception is that interim relief cannot be granted by way of a declaration--and they extend to a number of situations where an injunction would be inappropriate (for example, because there is nothing to prohibit) or could not be obtained for other reasons (for example, because the prospective defendant was the Crown). The rules governing *locus standi* are in a state of confusion. In *Gouriet* v. *Union of Post Office Workers* [[1977] 3 All E.R. 70 (H.L.)] Mr. Gouriet eventually amended his claim to an application for a declaration that the Union of Post Office Workers was acting unlawfully in blocking mail from this country to South Africa. He was refused such a declaration. Lord Wilberforce said: '... there is no support for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and defendant concerning their legal respective rights and liabilities, either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him, or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff.'
>
> (Emphasis added.)

I believe, therefore, that the appellants, even on the common law action for a declaration, must establish at least a threat of violation, if not an actual violation, of their rights under s. 7 of the *Charter* in order to bring a viable claim for declaratory relief against governmental action.

94. The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, *i.e.* a cause of action "with some chance of success" (*Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in *Dowson v. Government of Canada* (1981), 1981 CanLII 2612 (FCA), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?" Is it plain and obvious that the plaintiffs' claim for declaratory or consequential relief cannot succeed?

(3) Could the Facts as Alleged Constitute a Violation of Section 7 of the *Charter*?

95. Section 7 of the *Canadian Charter of Rights and Freedoms* provides as follows:

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

96. Whether or not the facts that are alleged in the appellants' statement of claim could constitute a violation of s. 7 is, of course, the question that lies at the heart of this case. If they could not, then the appellants' statement of claim discloses no reasonable cause of action and the appeal must be dismissed. The appellants submit that on its proper construction s. 7 gives rise to two separate and presumably independent rights, namely the right to life, liberty and security of the person, and the right not to be deprived of such life, liberty and security of the person except in accordance with the principles of fundamental justice. In their submission, therefore, a violation of the principles of fundamental justice would only have to be alleged in relation to a claim based on a violation of the

second right. As Marceau J. points out in his reasons, the French text of s. 7 does not seem to admit of this two-rights interpretation since only one right is specifically mentioned. Moreover, as the respondents point out, the appellants' suggestion does not accord with the interpretation that the courts have placed on the similarly structured provision in s. 1(*a*) of the *Canadian Bill of Rights*: see *e.g., Miller v. The Queen*, 1976 CanLII 12 (SCC), [1977] 2 S.C.R. 680, *per* Ritchie J., at pp. 703-04.

97. The appellants' submission, however, touches upon a number of important issues regarding the proper interpretation of s. 7. Even if the section gives rise to a single unequivocal right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice, there nonetheless remains the question whether fundamental justice is entirely procedural in nature or whether it has a substantive aspect as well. This, in turn, leads to the related question whether there might not be certain deprivations of life, liberty or personal security which could not be justified no matter what procedure was employed to effect them. These are among the most important and difficult questions of interpretation arising under the *Charter* but I do not think it is necessary to deal with them in this case. It can, in my opinion, be disposed of without reaching these issues.

98. In my view, even an independent, substantive right to life, liberty and security of the person cannot be absolute. For example, the right to liberty, which I take to be the right to pursue one's goals free of governmental constraint, must accommodate the corresponding rights of others. The concept of "right" as used in the *Charter* postulates the inter-relation of individuals in society all of whom have the same right. The aphorism that "A hermit has no need of rights" makes the point. The concept of "right" also premises the existence of someone or some group against whom the right may be asserted. As Mortimer J. Adler expressed it in *Six Great Ideas* (1981), at p. 144:

> Living in organized societies under effective government and enforceable laws, as they must in order to survive and prosper, human beings neither have autonomy nor are they entitled to unlimited liberty of action. Autonomy is incompatible with organized society. Unlimited liberty is destructive of it.

99. The concept of "right" as used in the *Charter* must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the *Charter*.

100. In the same way, the concept of "right" as used in the *Charter* must take account of the fact that the self-contained political community which comprises the state is faced with at least the possibility, if not the reality, of external threats to both its collective well-being and to the individual well-being of its citizens. In order to protect the community against such threats it may well be necessary for the state to take steps which incidentally increase the risk to the lives or personal security of some or all of the state's citizens. Such steps, it seems to me, cannot have been contemplated by the draftsman of the *Charter* as giving rise to violations of s. 7. As John Rawls states in *A Theory of Justice* (1971), at p. 213:

> The government's right to maintain public order and security is ... a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

101. The rights under the *Charter* not being absolute, their content or scope must be discerned quite apart from any limitation sought to be imposed upon them by the government under s. 1. As was pointed out by the Ontario Court of Appeal in *Re Federal Republic of Germany and Rauca* (1983), 1983 CanLII 1774 (ON CA), 41 O.R. (2d) 225, at p. 244:

> ... the Charter was not enacted in a vacuum and the rights set out therein must be interpreted rationally having regard to the then existing laws....

There is no liberty without law and there is no law without some restriction of liberty: see Dworkin, *Taking Rights Seriously* (1977), p. 267. This paradox caused Roscoe Pound to conclude:

> There is no more ambiguous word in legal and juristic literature than the word right. In its most general sense it means a reasonable expectation involved in civilized life. [See *Jurisprudence*, vol. 4, (1959), p. 56.]

102. It is not necessary to accept the restrictive interpretation advanced by Pratte J., which would limit s. 7 to protection against arbitrary arrest or detention, in order to agree that the central concern of the section is direct impingement by government upon the life, liberty and personal security of individual citizens. At the very least, it seems to me, there must be a strong presumption that governmental action which concerns the relations of the state with other states, and which is therefore not directed at any member of the immediate political community, was never intended to be caught by s. 7 even although such action may have the incidental effect of increasing the risk of death or injury that individuals generally have to face.

103. I agree with Le Dain J. that the essence of the appellants' case is the claim that permitting the cruise missile to be tested in Canada will increase the risk of nuclear war. But even accepting this allegation of fact as true, which as I have already said I think we must do on a motion to strike, it is my opinion for the reasons given above that this state of affairs could not constitute a breach of s. 7. Moreover, I do not see how one can distinguish in a principled way between this particular risk and any other danger to which the government's action *vis-à-vis* other states might incidentally subject its citizens. A declaration of war, for example, almost certainly increases the risk to most citizens of death or injury. Acceptance of the appellants' submissions, it seems to me, would mean that any such declaration would also have to be regarded as a violation of s. 7. I cannot think that that could be a proper interpretation of the *Charter*.

104. This is not to say that every governmental action that is purportedly taken in furtherance of national defence would be beyond the reach of s. 7. If, for example, testing the cruise missile posed a direct threat to some specific segment of the populace--as, for example, if it were being tested with live warheads--I think that might well raise different considerations. A court might find that that constituted a violation of s. 7 and it might then be up to the government to try to establish that testing the cruise with live warheads was justified under s. 1 of the *Charter*. Section 1, in my opinion, is the uniquely Canadian mechanism through which the courts are to determine the justiciability of particular issues that come before it. It embodies through its reference to a free and democratic society the essential features of our constitution including the separation of powers, responsible government and the rule of law. It obviates the need for a "political questions" doctrine and permits the Court to deal with what might be termed "prudential" considerations in a principled way without renouncing its constitutional and mandated responsibility for judicial review. It is not, however, called into operation here since the facts alleged in the statement of claim, even if they could be shown to be true, could not in my opinion constitute a violation of s. 7.

(4) Can the Statement of Claim be Amended?

105. The appellants were denied leave by Pratte J. to amend their statement of claim by adding the following:

The very testing of the cruise missiles *per se* in Canada endangers the Charter of Rights and Freedoms Section 7: Rights.

106. Since this is a conclusion of law, not fact, it cannot in my view affect the factual allegations which the Court must accept as proved in order to decide whether the statement of claim should be struck out. We do not know the basis on which Pratte J. refused the amendment. He gave no reasons, nor was he obliged to. The matter was purely discretionary under Rule 1104. Certainly conclusions of law may be pleaded: see *Famous Players Canadian Corp. v. J.J. Turner and Sons Ltd.*, [1948] O.W.N. 221, *per* Gale J. at pp. 221-22, but they do not form part of the factual allegations which must be taken as proved for purposes of a motion to strike. No appeal was taken from the order of Pratte J.

107. Counsel for the appellants submit that prior to the filing of a statement of defence they were entitled to amend as of right under Rule 421 and that they should not be prejudiced with respect to this right because they invoked the discretion of the Court under Rule 1104. It may, however, be of significance in this connection that their application for amendment to the statement of claim was filed after the Crown had instituted its appeal to the Federal Court of Appeal. In my view, their application was therefore one made "during the pendency of an appeal" to which the Rules of the Federal Court of Appeal would apply. This means, in my view, that the appellants' right under Rule 421 had expired and their only recourse was to proceed under Rule 1104.

108. The point, however, may be academic. The proposed amendment amounts to no more than an assertion of the conclusion which the appellants submit the Court ought to come to on the main issue in the case. Since the Court must address that issue in any event, the addition of the suggested amendment could, it seems to me, make no difference one way or the other to the appellants' case.

Conclusions

109. In summary, it seems to me that the issues raised on the appeal are to be disposed of as follows:

(1) The government's decision to permit testing of the cruise missile in Canada cannot escape judicial review on any of the grounds advanced;

(2) The statement of claim may be struck out if the facts as alleged do not disclose a reasonable cause of action which in this case could be either

(a) a cause of action under s. 24(1) of the *Charter*; or

(b) a cause of action for declaratory relief at common law on the principle of *Dyson v. Attorney-General*, *supra*; or

(c) a cause of action under s. 52(1) of the *Constitution Act, 1982* for a declaration of unconstitutionality.

(3) Taking the facts alleged as proven, they could not constitute a violation of s. 7 of the *Charter* so as to give rise to a cause of action under s. 24(1);

(4) The appellants could not establish their status to sue at common law for declaratory relief for the same reason that they could not establish a cause of action under s. 24(1); and

(5) The appellants could not establish a cause of action for declaratory relief under s. 52(1) since the facts as alleged could not constitute a violation of s. 7 and therefore no inconsistency with the provisions of the Constitution could be established.

110. I would accordingly dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: Karam, Tannis, Greenspon, Vanier.

Solicitor for the respondents: R. Tassé, Ottawa.

4	*Toussaint v Canada (Attorney General)*, 2010 FC 810

Federal Court Cour fédérale

Date: 20100806
Docket: T-1301-09
Citation: 2010 FC 810

Ottawa, Ontario, August 6, 2010
PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

NELL TOUSSAINT

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by a person who is illegally in Canada. She challenges a decision of an official of Citizenship and Immigration Canada (CIC) that denied her request to pay the cost of her medical care, hospitalization, and related expenses under the Interim Federal Health Program (IFHP).

Procedural Background

[2] Ms. Toussaint filed two applications for judicial review because of an uncertainty as to the proper procedural avenue to get her concern before the Court. This application (Docket T-1310-09) is made pursuant to section 18.1 of the *Federal Courts Act*. She also filed a second application (Docket IMM-3761-09) pursuant to section 72 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act). The substantive aspects of each application are identical. These reasons apply to both and a copy will be ordered to be filed in Docket IMM-3761-09.

[3] The respondent brought a motion to strike the T-1310-09 application arguing that the decision under review was captured by section 72 of the Act and that the simultaneous filing of two applications was an abuse of process.

[4] By Order of the Chief Justice dated January 26, 2010, leave was granted in IMM-3761-09 and these applications were ordered to be heard together. Remaining to be determined is the issue of which of these applications is properly before the Court. The parties at the hearing acknowledged that the only impact that will have is with

respect to the avenues available for appeal. If the matter is properly constituted in T-1310-09, either side can appeal as of right, but if the matter is properly constituted as IMM-3761-09, then a question would have to be certified before an appeal could be undertaken.

Substantive Background

[5] Ms. Toussaint is a citizen of Grenada. She came to Canada more than 10 years ago on December 11, 1999, as a visitor. She overstayed her temporary resident visa and has no status in Canada. She is forty years old, divorced, and lives in poverty.

[6] From 1999 until 2006, Ms. Toussaint worked in Canada without authorization and was able to support herself, including paying for minor medical care when needed. Her health began to deteriorate in 2006. She developed an abscess and chronic fatigue that left her unable to work.

[7] In June 2008, Ms. Toussaint sought a referral for surgical removal of uterine fibroids, which were causing her pain. After receiving the referral, she was denied service at the Women's College Hospital because she had no public or private medical insurance and was unable to pay for the procedure. Ms. Toussaint eventually had the procedure performed in November 2008 at Humber River Regional Hospital. She was billed $9,385 for her care and is unable to pay the bill.

[8] On November 27, 2008, Ms. Toussaint attended at St. Michael's Hospital with uncontrolled hypertension. She was admitted for ten days and diagnosed with nephrotic syndrome, a kidney disorder. Ms. Toussaint also has diabetes and the nephrotic syndrome may be caused by her diabetes or it may have another cause. The test required for determining the cause was not performed, apparently in large part because she would not be able to pay for complications that might arise, including special medication that might be needed. Instead, Ms. Toussaint was discharged with a prescription for high blood pressure medication.

[9] In late February 2009, Ms. Toussaint developed increasing pain in her right leg. Her doctor sent her to the emergency department at St. Michael's Hospital with a suspicion of deep venous thrombosis. Ms. Toussaint was asked to return the following day for an ultrasound. When she returned, she was denied the ultrasound on the basis that she could not afford to pay. She left the hospital and shortly thereafter developed chest pain. Two days later, on the advice of her doctor, Ms. Toussaint returned to the emergency room with her counsel. An investigation was finally performed that found a pulmonary embolism. Ms. Toussaint was hospitalized for eight days and discharged with a prescription for warfarin. Unable to pay for the medication, Ms. Toussaint was eventually able to convince the hospital to provide her with the necessary month's supply of the medication.

[10] Ms. Toussaint also suffers from decreased mobility and shortness of breath upon exertion. Dr. Guyatt, a Professor of Clinical Epidemiology & Biostatistics at McMaster University, swore an affidavit detailing Ms. Toussaint's medical situation. Dr. Guyatt states:

> Ms. Toussaint is a 40-year-old woman suffering from poorly controlled diabetes with complications of renal dysfunction, proteinuria, retinopathy and peripheral neuropathy. In addition to diabetic renal complications, she may well have primary renal diseases, though the biopsy needed to determine this has not been carried out. Her neurological problems result in severe functional disability with marked reduction in mobility and impairment of basic activities such as dressing. Other problems include hyperlipidemia and hypertension.

[11] Dr. Guyatt concludes that Ms. Toussaint has medical problems that require further investigation:

> Ms. Toussaint has severe medical problems that markedly impair her quality of life, are likely to decrease her longevity, and could be life-threatening over the short term. She requires intensive medical management by highly skilled professionals, including medical subspecialists. Negotiating pro bono care by a number of such doctors is clearly extremely unsatisfactory and potentially dangerous. Delays resulting from lack of coverage and an inability to pay for the healthcare that she needs and the risk that she will not have access to necessary services creates serious risk to her health and may have life threatening consequences.

[12] Dr. Hwang, a physician at St. Michael's Hospital and a professor in the Faculty of Medicine at the University of Toronto, also swore an affidavit detailing Ms. Toussaint's medical condition. He comments on the likely medical outcome for Ms. Toussaint, should she be unable to obtain adequate healthcare:

> Ms. Toussaint would be at extremely high risk of suffering severe health consequences if she does not receive health care in a timely fashion. As noted above, she has already suffered from serious and to some degree irreversible health consequences due to lack of access to appropriate care, which resulted in inadequately treated, uncontrolled diabetes and hypertension. As documented in her medical records, her inability to afford medications in the past has also contributed to the poor control of her diabetes and hypertension. If she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).

[13] Ms. Toussaint provided an affidavit in which she addresses the impact her healthcare situation has caused her:

> I never know whether I will be able to get treatment or tests I need in a timely fashion. I cannot predict when doctors or service providers will agree to provide services without pay and when they will not. This makes me feel that I lack control over my health.
>
> I am extremely grateful for the services that I have been provided by doctors and service providers, despite the fact that I am unable to pay for them. On the other hand, I find it humiliating and degrading to have to negotiate with doctors and other healthcare service providers to receive healthcare, out of charity. It makes me feel that I am not considered of the same worth or value as other patients.
>
> I am aware that many doctors, receptionists and people in waiting rooms who hear me explain why I have no health coverage and ask for compassion based on my serious circumstances may have negative attitudes about immigrants seeking healthcare in Canada. I feel vulnerable to being treated as an outsider. I feel that administrators, receptionists, other patients and doctors who do not know the details of my circumstances may have negative ideas about people in my situation. They may think that I have set out to 'take advantage' of Canada's healthcare system, rather than thinking of me as an equal human being, a resident of Canada who has worked hard and contributed to society but who has become ill and needs healthcare to save my life.
>
> When people are hostile toward me or do not want to allow me to have access to the healthcare I require, I feel that my life and health are devalued because of my immigration status and my disability. This leaves me depressed and anxious about my vulnerable situation and I have to work hard to maintain my dignity and self-esteem.

[14] Ms. Toussaint took no steps to regularize her status in Canada until September 12, 2008, when she submitted an application for permanent residence based on humanitarian and compassionate (H&C) grounds accompanied by a request to the Minister to waive the $550 fee associated with this application because of her poverty. The waiver request was denied by the Minister. The Minister's decision was upheld by this Court in *Toussaint v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 873 [*Toussaint I*]. An appeal to the Federal Court of Appeal is pending.

[15] In March 2009, Ms. Toussaint made an application for a Temporary Resident Permit to the Minister so that she could become eligible for coverage under the Ontario Health Insurance Program (OHIP): see section 1.4 of Regulation 550, R.R.O. 1990 to the *Health Insurance Act*, R.S.O. 1990, c. H.6. Ms. Toussaint again requested a waiver of the required fee because of her poverty. This request was denied.

[16] In April 2009, Ms. Toussaint was informed that she qualified for welfare in Ontario because she was in the process of applying for permanent residence from within Canada based on H&C grounds. While the welfare program covers the costs of certain medications, it does not pay for medical services. I express no comment on whether, given the decision of this Court in 2010 FC 873 regarding the H&C application, this welfare entitlement was correctly decided.

[17] In June 2009, Ms. Toussaint inquired about coverage under OHIP but was told that she was not eligible. She took no steps to obtain a formal decision on eligibility from OHIP or to judicially review this response.

[18] In May 2009, Ms. Toussaint applied to the IFHP for coverage. A negative decision was rendered July 10, 2009. It is from this decision that Ms. Toussaint seeks judicial review.

[19] The decision is short. The relevant portions are as follows:

> Health care services are provided by the Provinces and Territories. As such, access or denial to health care rests with those Provincial and Territorial authorities, in this case the Province of Ontario.
>
> The Interim Federal Health Program is an interim measure to provide emergency and essential health care coverage to eligible individuals who do not qualify for private or public health coverage and who demonstrate financial need. IFHP services aim to serve individuals in the following four groups of recipients:
>
> - Refugee claimants;
> - Resettled Refugees;
> - Persons detained under the Immigration and Refugee Protection Act (IRPA); and,
> - Victims of Trafficking in Persons (VTIPs).
>
> As you have not provided any information to demonstrate that your client falls into any of the above-mentioned categories, I regret to inform you that your request for IFHP coverage cannot be approved.
>
> Please be advised that your client has no active immigration application with Citizenship and Immigration Canada (CIC).

Issues

[20] I would rephrase the issues the parties set out in their memoranda and oral submissions as follows:

1. Whether either or both of the applications in Docket T-1310-09, filed pursuant to section 18.1 of the *Federal Courts Act,* or in Docket IMM-3761-09 filed pursuant to section 72 of the *Immigration and Refugee Protection Act*, are properly before the Court;
2. Whether the decision-maker committed a reviewable error in determining that the applicant was not entitled to benefits under the IFHP;
3. Whether the decision denying the applicant coverage under the IFHP violated principles of international law, including international conventions to which Canada is signatory;
4. Whether the decision denying the applicant coverage under the IFHP violated section 7 of the *Charter of Rights and Freedoms* and, if so, whether it is saved under section 1 of the *Charter*; and
5. Whether the decision denying the applicant coverage under the IFHP violated section 15 of the *Canadian Charter of Rights and Freedoms* and, if so, whether it is saved under section 1 of the *Charter*.

[21] The first issue is procedural. The remaining issues are dependant upon and necessitate an interpretation of Order-in-Council number 157-11/848, effective June 20, 1957, that established the current IFHP. I will first examine the procedural issue, and then turn to the proper interpretation of the Order-in-Council before addressing the four remaining issues set out above.

Analysis

Which application is properly before the Court?

[22] The applicant submits that the decision denying her coverage under the IFHP was made under authority given to what was the Department of National Health and Welfare by Order-in-Council number 157-11/848, effective June 20, 1957. The applicant submits that this authority was transferred to CIC but that it was never promulgated either in the Act or its associated *Immigration and Refugee Protection Regulations*, S.O.R./2002-227. The applicant says that section 72 of the Act cannot be read to include decisions made pursuant to an order-in-council and consequently that this application is properly brought as an application pursuant to section 18.1 of the *Federal Courts Act*.

[23] The respondent submits that IFHP has been exclusively under the jurisdiction of CIC as an "immigration matter" since 1993. The respondent submits that it was Parliament's intention in enacting section 72 of the Act to ensure that all decisions made in relation to immigration matters be subject to the leave requirement of that section. The respondent submits that a matter may fall within section 72 of the Act, whether or not it is explicitly mentioned in either the Act or its Regulations. The respondent says that it is the immigration-related content of the Order-in-

Council that should be considered, and that this content brings decisions made pursuant to it under section 72 of the Act.

[24] Subsection 72(1) of the Act reads as follows:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court (emphasis added).	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation (je souligne).

[25] The operative part of subsection 72(1), for the purpose of the issue before the Court, is the phrase "under this Act." When subsection 72(1) is read without the words between the hyphens it reads as follows:

72. (1) Judicial review by the Federal Court with respect to any matter … under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure … prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.

[26] In my view, this language makes it clear that the intent of Parliament was that in order to come within the scope of subsection 72(1) of the Act, the subject of the application must be a matter under the Act. Had Parliament intended the broad scope urged upon the Court by the respondent, it would have added the words "immigration" before "matter" and the words "or otherwise" after "this Act", but it did not.

[27] It is my view that properly interpreted, for a decision to be subject to subsection 72(1) of the Act, it must be made pursuant to the Act or its associated Regulations. Decisions related to IFHP eligibility cannot be said to be "under this Act" because there is no statutory authority for the IFHP under either the Act or the Regulations. The Order-in-Council pursuant to which this decision was made and the others that preceded it were not made under the Act; indeed the Act, as it currently stands, did not exist at the time.

[28] Given the wording of subsection 72(1) of the Act and the fact that the legal basis for the decision under review is an Order-in-Council and is not the Act, it follows that an application for judicial review under the Act is not proper; an application challenging the decision may only be made pursuant to section 18.1 of the *Federal Courts Act*. For this reason that application in Docket No. IMM-3761-09 will be dismissed.

What is the proper interpretation of Order-in-Council number 157-11/848?

[29] The parties differ on the fundamental question of whether, given her particular circumstances, the Order-in-Council authorizes the Minister to pay the applicant's medical expenses. The applicant submits that "as someone without status who has submitted various applications to Citizenship and Immigration Canada [she] is clearly someone who is 'subject to Immigration jurisdiction'" as set out in paragraph (b) of the Order-in-Council. The respondent submits that "a careful reading … shows that the beneficiaries of the IFHP, consistently throughout its entire 60 years of its existence, have almost exclusively been those legally admitted to Canada as new immigrants, and more recently, also those persons welcomed to Canada on the basis of their need for Canada's protection on refugee or humanitarian grounds" (emphasis in the original omitted).

[30] The respondent provided the Court with a historical record of the provisions that have permitted the relevant government department to pay for medical care. The respondent submits that this record affirms his view that medical care provided at the expense of the government is available only to those legally admitted to Canada.

[31] The record reveals that Canada initially provided payment of medical expenses to specific classes of immigrants – ex-members of the Polish Armed Forces from the Second World War, followed by those in displaced persons' camps in Europe.

[32] The first authority for such payments was Order in Council P.C. 3112 of July 23, 1946. That Order authorized the selection and movement of some 4,000 single ex-members of the Polish Armed Forces from Europe to Canada to undertake employment in agriculture. It also provided authority to the government to pay for medical and hospital expenses for those suffering from specified diseases or conditions during the first two years "following entry into Canada." The payment of such services was later extended, under prescribed circumstances, beyond the two-year period by P.C. Minute dated March 15, 1949.

[33] The next authorization is set out in a Minute of the Privy Council dated December 30, 1947. The Minute stipulated that it was to apply only to those who had been in Canada for less than six months. It reads, in relevant part, as follows:

> … [I]n a number of instances where immigrants have been brought to Canada from Displaced Persons' camps in Europe pursuant to Order in Council P.C. 2180 and from other places under similar arrangements, hospital or medical care has been found necessary for such persons within a short time following entry into Canada.
>
> …
>
> … [T]he Department of Labour be authorized to pay or to guarantee the payment of costs of hospitalization and medical services for immigrants brought to Canada under the provisions of Order in Council P.C. 2180 … where in the opinion of the Department of Labour it is necessary that such services be provided to take care of an emergency situation occasioned by accident or sickness and the immigrant is, in the opinion of the Department, unable to pay or give acceptable assurance for the payment of such services or other expenses.

[34] This class-specific authorization was followed in 1949 by a broader authorization that more generally covered immigrants to Canada. Order-in-Council P.C. 41/3888 of August 4, 1949, is described in a letter from the Deputy Minister of Citizenship and Immigration to the Secretary of The Treasury Board to have authorized the Department "to pay hospital accounts and maintenance expenses of immigrants who may become suddenly ill after being admitted at the port of entry and prior to their arrival at destination, in such cases where immigrants lack the financial resources to bear these expenses themselves."

[35] Order-in-Council P.C. 41/3888 was rescinded and replaced by Order in Council P.C. 4/3263 of June 6, 1952, which "authorized the Department of Citizenship and Immigration to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of immigrants who require such medical attention after being admitted at a port of entry and prior to their arrival at destination, or while receiving care and maintenance pending placement in employment, in cases where the immigrants lack the financial resources to pay these expenses."

[36] I agree with the respondents that these instruments provided that it was only those who had been legally admitted to Canada as immigrants who could benefit from the payment of their medical expenses. The issue that requires the Court's determination, is whether that continued to be the case when, on June 20, 1957, Order-in-Council P.C. 157-11/848 was passed. It is the current authority for the IFHP and it provides as follows:

> The Board recommends that Order in Council P.C. 4/3263 of June 6, 1952, be revoked, and that the Department of National Health and Welfare be authorized to pay costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:
>
> (a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and
>
> (b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer,
>
> in cases where the immigrant or such a person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department of National Health and Welfare. (underlining in the original)

[37] It will be noted that paragraph (a) above, is largely a reiteration of Order in Council P.C. 4/3263 of June 6, 1952. In order to be covered under (a), the person whose medical expenses are being paid must be an "immigrant" to Canada. The terms "immigrant" and "Immigration jurisdiction", which are found in paragraph (b) of the Order-in-Council are not defined therein or in the current Act or its Regulations. The term "immigrant" was defined in *The Immigration Act* which was in force at the time the Order-in-Council was passed. It provided that "immigrant" meant "a person who seeks admission to Canada for permanent residence:" *The Immigration Act*, S.C. 1952, c. 42, s. 2(i).

[38] The applicant submits that she became an "immigrant" within the meaning of paragraph (a) of the Order-in-Council when she "filed" her H&C application. However, an H&C application can only be said to have been filed when it has been filed in accordance with the rules and regulations that pertain to it. In the applicant's case, that was not done and therefore no H&C application for the applicant has been filed.

[39] The history of the applicant's purported application is described by Justice Snider in *Toussaint I* and may be summarized as follows. On September 12, 2008, the applicant forwarded an H&C application under cover requesting that she be exempted from paying the processing fee of $550.00. On January 12, 2009, her application was returned without processing with a cover letter that provided, in part: "If you wish to apply for permanent residence in Canada your application must be accompanied by the required fee." There is no evidence that the applicant has ever submitted an application with the required fee and, in my opinion, the applicant cannot be said to have sought admission to Canada for permanent residence. To hold otherwise would entail that anyone who sends a letter or an application without payment to the Minister requesting permanent resident status would be an "immigrant" to Canada. This, in my view, would expand the meaning of the term beyond recognition. In any event, paragraph (a) provides that it applies to an immigrant "after being admitted at a port of entry and prior to his arrival at destination." In my view, this means that the person covered must have been admitted at a port of entry as an immigrant. Ms. Toussaint has never been admitted to Canada as an immigrant. She entered Canada on a visitor's visa and was thus admitted to Canada as a temporary resident, not as an immigrant. Furthermore, her temporary resident visa has expired.

[40] The applicant further submits that she is covered under paragraph (b) because she is a person "subject to Immigration jurisdiction". The applicant's position is that anyone who may possibly be captured by the provisions of the Act is someone who is "subject to Immigration jurisdiction" within the meaning of the Order-in-Council. This would entail that anyone in Canada, other than a Canadian citizen or a permanent resident whose status is not under challenge, would be a person subject to Immigration jurisdiction.

[41] I do not accept that submission. If the phrase "subject to Immigration jurisdiction" were to be given the broad interpretation the applicant proposes, then it would include, among others, "an immigrant, after being admitted at a port of entry and prior to his arrival at destination." In short, the persons captured under paragraph (a) would be also captured under paragraph (b). Paragraph (a) would thus be redundant.

[42] It is a principle of statutory interpretation that it is presumed that the legislators avoid superfluous words: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis, 2008) at p. 210. "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere surplusage:" *R. v. Proulx*, 2000 SCC 5 at para. 28. The interpretation proposed by the applicant offends this rule. Therefore, the phrase "subject to Immigration jurisdiction" must have a narrower meaning than the applicant submits.

[43] The respondent submits that one is subject to Immigration jurisdiction if there is some action or proceeding being taken with respect to that person under the legislative regime or powers by the Immigration authorities. The respondent says that these words in the Order-in-Council must be understood in their usual and ordinary sense. The respondent submits that everyone other than a citizen is subject to the provision of the Act, but not all of those people are subject to Immigration jurisdiction. It is submitted that it is only those persons who are under the custody and care of the Immigration authorities, or who are the subject of an immigration proceeding provided for in the Act, are subject to Immigration jurisdiction.

[44] In my view, the respondent's interpretation is correct. I find support for that view in the letter from the Minister of National Health and Welfare who, with the concurrence of the Minister of Health, recommended the wording of the Order-in-Council. The Ministers explained the rationale for recommending the revocation of Order in Council P.C. 4/3263 and the passage of Order-in-Council P.C. 157-11/848, as follows:

> THAT on occasion persons are referred for medical and hospital treatment during the time they are thought to be under the jurisdiction of the Immigration authorities but before it is possible to satisfactorily determine their status as immigrants as defined in the Immigration

Act, and because of the urgent nature of the disabling condition, treatment cannot be prudently postponed until their exact status has been completely established;

THAT in other instances persons who other than immigrants as defined who are temporarily under the jurisdiction of the Immigration authorities become urgently in need of medical care or hospital treatment, and at the time it is not humanely possible to defer medical action until the determination of who, if any third party, is financially responsible for the cost of such action;

THAT it is considered to be in the public interest and necessary for the maintenance of good public relations between the two Federal Departments concerned and the large number of individuals, societies and other agencies who work closely in association with these Departments during the ordinary course of Immigration operations, that the existing authority which is restrictive by reason of the term "immigrant" and also by reason of the conditions of "time" which are applied, be changed to permit the Department of National Health and Welfare to render the necessary medical assistance in these instances;

THAT both Departments undertake to administer this authority in such a way as to confine its use to those occasions only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility; …

[emphasis added]

[45] The words I have underlined in the third recital above make it clear that the intent of the legislators was to increase the scope of persons for whom the government could pay medical expenses by the addition of two specific groups of persons. As shall be discussed later, the increased scope of the Order-in-Council may extend somewhat beyond these two specific groups.

[46] The first group described in the Ministers' letter is comprised of those persons who are thought by the authorities to be immigrants but whom, in fact, may or may not be immigrants as their status has yet to be determined. A person whose status has not yet been determined must be a person who has not yet been admitted to Canada, because once admitted, their status, whether as an immigrant or otherwise, has been determined. Therefore, persons falling within this first group are persons who have not yet been admitted to Canada. Accordingly, the first group intended to be captured by the Order-in-Council are persons thought by the Immigration authorities to be immigrants but who may not be immigrants as their status has not yet been determined, and who have not yet been admitted to Canada.

[47] With respect to the first group, the most likely circumstance in which the authorities might think that a person is an immigrant but not yet have determined that to be the case, is when a person arrives at a port of entry and is unable because of illness, speech impairment, or inability to speak English or French to let it be known that he or she wishes to enter Canada as a permanent resident and not in some other capacity. In such circumstances, where the person is in immediate need of medical attention, the government may reimburse the medical costs.

[48] That first group of persons would not include persons who have made an application for permanent residence or have indicated their intent to do so because in those circumstances their immigration status has been determined, even if their application has not yet been processed or approved.

[49] The second group described in the Ministers' letter is comprised of those persons who are not immigrants but "who are temporarily under the jurisdiction of Immigration authorities" and who have an urgent need for medical treatment. Persons temporarily under the jurisdiction of the Immigration authorities who are not immigrants would be those persons who are passing through a port of entry and thus subject to the jurisdiction of the Immigration authorities, those persons whose status in Canada is being processed by the Immigration authorities, and those persons under detention and in the custody of the Immigration authorities. Persons temporarily under the jurisdiction of the Immigration authorities would also include refugee claimants since refugee claimants are subject to a removal order that is unenforceable pending determination of their eligibility to make a claim, adjudication of that claim, and any subsequent application for judicial review of a negative decision by the Immigration and Refugee Board.

[50] Paragraph (b) of the Order-in-Council includes these two groups of persons; however, it also says that it includes a person "for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer." This further extension of the payment of medical expenses is

consistent with the statement made in the fourth recital above that the department pays for medical expenses "when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility." The Department under this authority has accepted that it will cover medical expenses for persons who have been subject to human trafficking. The Department, under this authority, also covers the medical expenses of resettled refugees and successful refugee claimants pending their eligibility for provincial health care plans, and in some cases, provides supplemental coverage even after refugees qualify for provincial plans. These categories of persons, for which the Department feels responsible, are narrow, well-defined, temporary, and predominantly composed of individuals in high need of assistance; this narrow categorization is consistent with the requirement discussed above that such coverage only be given on rare and well justified occasions.

[51] Properly interpreted, Order-in-Council P.C. 157-11/848 does not apply to the applicant and she is not eligible for IFHP coverage. The applicant is not an "immigrant" in the sense that she is applying for permanent residence in Canada. The applicant is not temporarily under the jurisdiction of Immigration authorities. Nor does the applicant fall into one of the narrow, well-defined categories for which Immigration authorities feel responsible.

Did the Minister commit a reviewable error?

[52] Order-in-Council P.C. 157-11/848 authorizes but does not require the Minister or his delegate to pay the health care costs of certain classes of individuals. Thus, the provision of health coverage under the IFHP is a discretionary power exercised by the Minister or his delegate.

[53] The applicant submits that the Minister's delegate, the Director, Program Management and Control, Health Management Branch at CIC, fettered his discretion by relying solely on the Departmental guidelines and failing to consider whether she was eligible for the IFHP under Order-in-Council P.C. 157-11/848, notwithstanding the fact that she was ineligible pursuant to the guidelines. The applicant submits that had the decision-maker turned his mind to the Order-in-Council, he would have found that the applicant is subject to Immigration jurisdiction because she "has submitted various applications to Citizenship and Immigration Canada" and that this, combined with her medical need and inability to pay, qualify her for IFHP coverage under the Order-in-Council. The respondent submits that the decision-maker properly interpreted the Order-in-Council and reasonably concluded that the applicant was not eligible for IFHP coverage.

[54] Fettering is an error of law.

> [A]n agency may not fetter the exercise of its statutory discretion, or its duty to interpret and apply the provisions of its enabling statute, by mechanically applying a rule that it had previously formulated, other than where it is properly enacted pursuant to a statutory power to make subordinate legislation…. [T]he issue in each case is not whether the rule, guideline, precedent, policy, or contract was a factor, or even the determining factor, in the making of a decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case: Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada*, vol. 3, loose leaf (Toronto: Canvasback Publishing, 1998) at ¶12:4410.

[55] There is nothing improper about agencies making and relying on guidelines to assist in their administrative decision-making processes. On the contrary, guidelines have beneficial purposes such as ensuring administrative consistency in decision-making: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198. Agencies do not need enabling statutory authority to make and rely on guidelines: *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 1994 CanLII 2621 (ON CA), 21 O.R. (3d) 104 (C.A.). "Although not legally binding on a decision maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision maker's conduct:" *Thamotharem* at para. 59. Nonetheless, a decision-maker who makes a decision based solely on a guideline and without a focus on the underlying law, fetters his discretion.

> Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: *Thamotharem* at para. 62.

[56] In my view, the decision-maker in this case applied the Department's guidelines on eligibility for IFHP coverage as if they were law and fettered his discretion. The decision-maker reviewed the limited purpose of the

IFHP as adjunct coverage for certain groups of migrants who do not qualify for coverage under a provincial health care plan. The decision-maker listed examples of these groups as set out in the guidelines. The decision-maker determined that the applicant did not fall into any of these examples as found in the guidelines and that she had "no active immigration application with Citizenship and Immigration Canada (CIC)." The decision-maker did not expressly consider Order-in-Council P.C. 157-11/848.

[57] The decision-maker did not expressly consider whether the applicant was temporarily under the jurisdiction of Immigration authorities. It could be argued that the decision-maker's reference to a lack of an active immigration application is an implicit determination that the applicant was not subject to Immigration jurisdiction. However, there is no explicit or implicit consideration in the decision-maker's reasons of whether the Immigration authorities felt responsible for the applicant and should exercise the discretionary authority to provide IFHP coverage.

[58] The decision-maker's reasoning was limited to the applicant's failure to show how she fell into the categories of persons set out in the guidelines. The decision-maker never considered whether these categories were exhaustive and whether Order-in-Council P.C. 157-11/848 could embrace a wider group of persons that included the applicant. Instead, the decision-maker relied on the list of categories in the guidelines as if they were an exhaustive list of the persons eligible for IFHP coverage and as if they were the binding legal authority on the decision-maker. In this respect, the decision-maker fettered his discretion.

[59] Not every administrative error, even if it constitutes a reviewable error, will result in the quashing of a decision. Where the error is immaterial to the result, a reviewing court may exercise its discretion not to set aside the decision: *Patel v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55.

[60] In this case, the decision-maker's fettering of his discretion was not material to the outcome of the applicant's application for IFHP coverage. Had the decision-maker properly considered and interpreted Order-in-Council P.C. 157-11/848 he would have concluded that the applicant was not eligible for IFHP coverage. The applicant was not an immigrant in the sense that she was applying for permanent residence. The applicant was not temporarily under the jurisdiction of Immigration authorities.

[61] Furthermore, while the applicant did not fall under one of the categories of persons that the Department had traditionally felt responsible for and for which it was authorized under Order-in-Council P.C. 157-11/848 to pay the health care costs, she would not have fallen within the Order-in-Council, even if that category had been expanded to include her circumstances. The Order-in-Council provides that coverage may be provided to "a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer" (emphasis added). As is seen, it is not sufficient that the person be one for whom the authorities feel responsible, the person must also have been referred for examination and/or treatment by an authorized Immigration official. No such referral was made with respect to Ms. Toussaint.

[62] The applicant was in Canada on her own volition and without any legal status. Unlike resettled refugees or victims of trafficking, and given the applicant's lack of a permanent residence application, the applicant did not and would not qualify for IFHP coverage under Order-in-Council P.C. 157-11/848 if properly interpreted. As such, the decision-maker's error was immaterial to the result. I exercise my discretion not to set aside the decision on this basis.

Was the decision contrary to principles of international law?

[63] It is trite law that "[i]nternational treaties and conventions are not part of Canadian law unless they have been implemented by statutes:" *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 69. It is also well-established that international law can be used to interpret domestic law including the Constitution.

> 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: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para. 60.

[64] The applicant submits that the right to healthcare is protected by international law. More specifically, she says that Article 12(1) of the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46[1] [*ICESCR*] and the *International Convention on the Elimination of All Forms*

of Racial Discrimination, 7 March 1966, 660 U.N.T.S. 195, Can. T.S. 1970 No. 28[2] [*ICERD*] "should inform the interpretation and application" of the *Charter* in this case. The applicant submits that to comply with Canada's international human rights obligations the IFHP must be extended to cover "any person subject to Immigration jurisdiction who lacks the means to pay for necessary healthcare." The respondent, for its part, makes no submissions on the application of international law in this case.

[65] Article 12(1) of the *ICESCR* reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health."

[66] Article 5 of the *ICERD* reads:

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
> …
>
> (e) Economic, social and cultural rights, in particular:
> …
>
> (iv) The right to public health, medical care, social security and social services;
> …

[67] While there is an international right to health, "[d]efining the content of a right to health is a formidable challenge:" Eleanor D. Kinney, "The International Human Right to Health: What Does This Mean for Our Nation and World?" (2001) 34 Ind. L. Rev. 1457 at 1457. "Health" is not necessarily equivalent to "healthcare". Nor does a right to health necessarily place a positive obligation on a state to provide specific health services. Even more contentious at international law is whether a right to health places positive obligations on a state to provide certain health services to non-citizens present in a state's territory with or without status.

[68] The applicant cites various commentaries from the international bodies that supervise the *ICESCR* and the *ICERD*. Such commentaries are persuasive but not binding on the Court. The commentaries cited advocate an interpretation of the *ICESCR* and the *ICERD* that grants non-citizens the same right to health as citizens regardless of their immigration status. For example, the Committee on Economic, Social and Cultural Rights, in its general comment on the meaning of the "right to the highest attainable standard of health" contained in Article 12(1), contends that "States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including … illegal immigrants, to preventive, curative and palliative health services:" *The right to the highest attainable standard of health*, UNCESCR, 22d Sess., General Comment No. 14, UN Doc. E/C.12/2000/4 (2000) at para. 34. By contrast, the Office of the United Nations High Commissioner for Human Rights and the World Health Organization recognize that:

> States have explicitly stated before international human rights bodies or in national legislation that they cannot or do not wish to provide the same level of protection to migrants as to their own citizens. Accordingly, most countries have defined their health obligations towards non-citizens in terms of "essential care" or "emergency health care" only. Since these concepts mean different things in different countries, their interpretation is often left to individual health-care staff. Practices and laws may therefore be discriminatory: Office of the United Nations High Commissioner for Human Rights & World Health Organization, *The Right to Health: Fact Sheet No. 31* online: OHCHR < http://www.ohchr.org/Documents/Publications/Factsheet31.pdf> at 19.

[69] It is notable that Canada has not signed the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, 18 December 1990, UN Doc. A/RES/45/158. Article 28 of that Convention reads:

> Migrant workers and members of their families shall have the right to receive any medical care that is urgently required for the preservation of their life or the avoidance of irreparable harm to their health on the basis of equality of treatment with nationals of the State concerned. Such emergency medical care shall not be refused them by reason of any irregularity with regard to stay or employment.

If the right to health is as wide in scope as the above United Nations supervisory organizations advocate there would be little need for further protection of migrant workers such as those found in Article 28 of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*.

[70] Given the applicant's predominant reliance on the *Charter*, and the fact that Canada has not expressly implemented either the *ICESCR* or the *ICERD* in domestic legislation, it is not necessary to pronounce on the contested scope of the international legal right to health. This application cannot succeed on the basis of the alleged international law obligations of Canada because Canada has not expressly implemented them.

Whether the decision violated section 15 of the Charter?

[71] Before turning to the applicant's *Charter* arguments it is important to comment on the division of powers aspects of this case. Constitutional responsibility for healthcare in Canada falls primarily under provincial powers. Nonetheless, there is some federal responsibility for healthcare, most notably through the *Canada Health Act*, R.S.C. 1985, c. C-6. An argument could be made that the applicant should have formally applied for health coverage under the Province of Ontario's public insurance plan, and if refused, brought her *Charter* arguments on the basis of that refusal.

[72] Once cabinet passed Order-in-Council P.C. 157-11/848 it created a benefit program that, with the advent of the *Charter*, is subject to *Charter* scrutiny. Even though the applicant could have challenged her apparent exclusion from provincial health coverage there is nothing stopping her from challenging her exclusion from the IFHP on the basis that her exclusion from the IFHP violates her *Charter* rights.

[73] The applicant submits that the denial of her application for coverage under the IFHP violated her right to non-discrimination under s. 15 of the *Charter* because it amounted to a distinction on the basis of disability and citizenship. The respondent submits, citing *Chaoulli v. Québec (Attorney General)*, 2005 SCC 35, that there is no freestanding constitutional right to healthcare under the *Charter*. The respondent reasons that if there is no such freestanding right for citizens of Canada then "it clearly follows that non-citizens residing illegally in Canada certainly do not" possess such rights. The respondent submits that in *Auton v. British Columbia (Attorney General)*, 2004 SCC 78, the Supreme Court rejected the argument, based on s. 15 of the *Charter*, that Canadian citizens are entitled to all medically required treatment.

[74] The Supreme Court's decision in *Chaoulli* must be approached with some caution. In *Chaoulli*, the issue was not whether there is a freestanding right to health care under the *Charter*; the issue was whether the Province of Québec could prohibit Québeckers from purchasing insurance to obtain private medical services that were conjointly available under the public health care plan. I say that the decision must be approached with some caution because the dispositive, or "tie-breaker" reasons provided by Justice Deschamps were based on the *Québec Charter* and not the *Charter*. Three judges agreed with Justice Deschamps, but were also of the view that the prohibition of private medical insurance was also a violation of the *Charter*. Three judges disagreed with Justice Deschamps and were of the view that the prohibition did not violate the *Charter*. All the commentary provided by both the majority group of three and the dissenting group of three, insofar as it comments on the right to health and the *Charter*, is *obiter*.

[75] More importantly, in my view, the respondent has misconstrued the holding of the majority group of three. The respondent accurately cites the decision of Chief Justice McLachlin and Justice Major; they held that "[t]he *Charter* does not confer a freestanding constitutional right to health care": *Chaoulli* at para. 104. What the respondent fails to note is that they went on to state: "However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*": *Chaoulli* at para. 104. The present case is concerned with a scheme (the IFHP) that the government has put in place to provide health care to certain individuals; it is not concerned with whether non-citizens, or citizens for that matter, have a freestanding right to healthcare.

[76] Similarly, it is my view, that the respondent misconstrued the Supreme Court's decision in *Auton*. In *Auton*, the issue was whether the Province of British Columbia's "refusal to fund a particular treatment for preschool-aged autistic children violates the right to equality" under s. 15 of the *Charter*: *Auton* at para. 1. The Court determined that such refusal did not violate s. 15 of the Charter.

[77] The Supreme Court held, at para. 28, that s. 15(1) of the *Charter* is confined "to benefits and burdens imposed by law." The Court characterized the respondent autistic families' claim as "funding for all medically required treatment:" *Auton* at para. 30. The Court determined that "the legislative scheme does not promise that any Canadian will receive funding for all medically required treatment:" *Auton* at para. 35. Since the benefit claimed by

the respondents "was not provided for by the law" there could be no s. 15(1) breach. Everything else the Court discussed after this finding is *obiter*, including the paragraphs relied on by the respondent.

[78] The Supreme Court distinguished *Auton* from *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, which "was concerned with unequal access to a benefit that the law conferred and with applying a benefit-granting law in a non-discriminatory fashion:" *Auton* at para. 38 (emphasis in original). In the case before this Court, the applicant is not asking for funding for all medically required treatment. In this case, like in *Eldridge*, there is a law that confers a benefit; the eligibility requirements for that benefit result in unequal access and therefore, the question is whether the unequal access is discriminatory. The question is not whether the Department must establish the IFHP, the question is whether the IFHP, once established, is discriminatory on the ground that it excludes certain individuals on the basis of an enumerated ground.

[79] The applicant submits that she is discriminated against on the basis of her disability and on the basis of her lack of Canadian citizenship. Neither submission is convincing.

[80] There is no doubt that the applicant is disabled with high medical needs; however, the applicant was not excluded from IFHP coverage because of her disability. Unlike *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, to which the applicant attempted to draw an analogy, Ms. Toussaint's specific disability was not excluded from the benefit program.

[81] Similarly, the applicant was not excluded from IFHP coverage on the basis of her lack of Canadian citizenship. The applicant was excluded from coverage because of her illegal status in Canada. Only if "immigration status" is an analogous ground could the applicant's exclusion from IFHP coverage be said to violate s. 15(1) of the *Charter*.

[82] The applicant did not argue that "immigration status" was such an analogous ground. It is not for the Court in *Charter* cases to construct arguments for the parties or advance them on their behalf. Given the applicant's failure to argue that "immigration status" was an analogous ground, the applicant's s. 15(1) argument must fail.[3]

[83] In this case, the applicant has not established that in denying her IFHP coverage the decision-maker drew a distinction based on an enumerated ground. The applicant was not discriminated against because of her disability or because of her citizenship; consequently, the applicant's s. 15(1) argument must fail.

Whether the decision violated section 7 of the Charter?

[84] The applicant submits that delay in receiving medical treatment has been recognized by the Supreme Court as engaging s. 7 of the *Charter*. The applicant submits that in her case the delays she has experienced increased her "risk of life threatening illness," caused her to suffer long-term pain, and caused her serious psychological suffering and anxiety, all of which negatively impact her long-term health. The applicant contends that her circumstances are analogous to *Chaoulli* in that she is not asking for a "new benefit but only access to an existing one." The applicant submits that her exclusion from the IFHP is arbitrary and not consistent with the requirements of fundamental justice.

[85] The respondent submits that the applicant is the author of her own predicament. The respondent cites *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309 for the proposition that s. 7 of the *Charter* does not confer on individuals the most favourable procedure imaginable. The respondent says that

> [p]roviding unlimited and free access to Canada's healthcare to all persons living in Canada, be they Canadian citizens and permanent residents or nationals of other countries choosing to reside in Canada illegally, may indeed be 'the most favourable procedure imaginable', but it is not the procedure reasonably and legitimately chosen by the government of Canada.

[86] To establish a breach of s. 7 of the *Charter* the applicant must prove (1) that the *Charter* applies to her circumstances, (2) that she was deprived of her right to life, liberty and/or security of the person, and (3) that this deprivation was not consistent with principles of fundamental justice.

[87] In my view, there can be no doubt that the IFHP, and the applicant's exclusion, constitutes "government action" to which the *Charter* generally applies. In *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177 at 202, the Supreme Court held that the word "everyone" in s. 7 of the *Charter* "includes every human being who is physically present in Canada…." Accordingly, there can be no debate that non-citizens in Canada, including illegal immigrants, are entitled to the protections of s. 7 of the *Charter*. Such a broad conception of s. 7 is consistent with the notion that all human beings, regardless of their immigration status, are entitled to dignity

and the protection of their fundamental right to life, liberty and security of the person. This does not mean that non-citizens, and in particular illegal migrants, are entitled to remain in Canada.

[88] There is no international legal right to migration. Article 12 of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47[4] protects the freedom of mobility of persons "lawfully within the territory of a State" as well as the right of persons to leave any country and to return to their own country, but it does not confer a freestanding right to migration (emphasis added). Consistent with this absence of a right to migrate, the Supreme Court has held that:

> [t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para. 46.

[89] Further, s. 7 of the *Charter* may not be implicated even in situations where the deportation of a non-citizen to their home country exposes them to jeopardy resulting from the inability of their home country to provide life-sustaining medical treatment. In *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, the applicant suffered from end-stage renal failure for which he was receiving life-sustaining hemodialysis treatment in Canada. This treatment was not available in his home country. The applicant filed a pre-removal risk assessment (PRRA) application arguing that he faced a risk to his life if returned to his home country, where he would not be able to receive the same life-sustaining treatment, and would surely die. The Court of Appeal upheld the rejection of the applicant's PRRA application finding that another State's allocation of healthcare resources could not form the basis for a successful PRRA decision unless the allocation was made to deliberately exclude the specific applicant from treatment in a persecutory manner. The Court of Appeal did not address the applicant's *Charter* arguments finding that they were without the proper evidentiary foundation and that the applicant had other avenues to explore prior to bringing a *Charter* application.

[90] Ms. Toussaint is in Canada without status. She may not be able to obtain the medical care she needs if deported from Canada. Nonetheless, there are no current barriers that prevent Canada from instigating removal proceedings against the applicant. For reasons that are not before the Court, such proceedings have not been instigated and the applicant remains in Canada. In light of the applicant's physical presence in Canada, it is necessary to proceed to the second and third requirements for establishing a breach of s. 7 of the *Charter*.

[91] Delay in medical treatment and severe psychological stress caused by government action have both been recognized as implicating the life, liberty and security of the person protections in s. 7 of the *Charter*: *Chaoulli*, *supra*; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46. The evidence before the Court establishes both that the applicant has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, the record before the Court establishes that the applicant's exclusion from IFHP coverage has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences. The medical evidence before the Court establishes that

> [i]f she were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).

In my view, the applicant has established a deprivation of her right to life, liberty and security of the person that was caused by her exclusion from the IFHP.

[92] The applicant says that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. The respondent says that the applicant's exclusion from the IFHP is fundamentally just because the program was never intended for illegal migrants who chose to come to Canada and to remain here illegally by choice.

[93] At its core, the purpose of the IFHP is to provide temporary healthcare to legal migrants. Canada also provides IFHP coverage to some illegal migrants, such as victims of trafficking, who are often unwittingly illegal migrants. Canada feels responsible for such illegal migrants because of the fact that they have been exploited by unscrupulous human traffickers. Ms. Toussaint is neither a legal migrant nor is she unwittingly an illegal migrant. Although she entered this country legally, she chose to remain here illegally; there is nothing stopping her from returning to her country of origin. She has chosen her illegal status and, moreover, she has chosen to maintain it. I fail to see how her situation can be said to fall within the purpose of the IFHP. There is a principled reason why a victim of trafficking is entitled to health coverage for medical treatment if needed but other illegal migrants are not. The former is here through deception and manipulation by others; the latter is here by choice.

[94] I do not accept the applicant's submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. I see nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safe-haven for all who require heath care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.

[95] For these reasons this application is dismissed. Considering the issues involved which are in the public interest and beyond merely personal interests to the applicant, and considering the applicant's personal circumstances, it is appropriate that there be no order as to costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is dismissed;

2. A copy of these Reasons for Judgment and Judgment are to be filed in Docket IMM-3761-09; and

3. There is no order made as to costs.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: T-1301-09

STYLE OF CAUSE:	NELL TOUSSAINT v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	March 23, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	August 6, 2010

APPEARANCES:

Andrew C. Dekany Raj Anand Angus Grant	FOR THE APPLICANT
Marie-Louise Wcisio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ANDREW C. DEKANY Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
MYLES KIRVAN Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT

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[1] Entered into force on January 3, 1976; acceded to by Canada on May 19, 1976.
[2] Entered into force on January 4, 1969; ratified by Canada on October 14, 1970.
[3] The Supreme Court's decision in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203 leaves open the possibility that "immigration status" may be considered an analogous ground in the future. In *Corbiere*, at para. 60, the Court recognized that in analyzing whether a characteristic is an analogous ground "[i]t is also central to the analysis if those defined by the characteristic are lacking in political power, disadvantaged, or vulnerable to becoming disadvantaged or having their interests overlooked." It may be fair to say that illegal migrants lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse; this, combined with the difficulty of changing one's illegal migrant status, might support an argument that such a characteristic is an analogous ground.

[4] It was entered into force in March 23, 1976 and acceded to by Canada on May 19, 1976.

5	*Toussaint v. Canada (Attorney General)*, 2011 FCA 213

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110627
Docket: A-362-10
Citation: 2011 FCA 213

CORAM: BLAIS C.J.
NADON J.A.

STRATAS J.A.

BETWEEN:

NELL TOUSSAINT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

Heard at Ottawa, Ontario, on November 24, 2010.
Judgment delivered at Ottawa, Ontario, on June 27, 2011.

REASONS FOR JUDGMENT BY: STRATAS J.A.
CONCURRED IN BY: BLAIS C.J.
NADON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20110627
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CORAM: BLAIS C.J.
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BETWEEN:

NELL TOUSSAINT

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

and

THE CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

REASONS FOR JUDGMENT

STRATAS J.A.

[1] The applicant is a citizen of Grenada. In 1999, she entered Canada as a visitor. She never left. She has stayed in Canada, contrary to Canada's immigration laws.

[2] For her first seven years in Canada, the appellant worked and earned enough to sustain herself. However, in 2006, her health began to deteriorate. She could no longer work.

[3] Since 2006, the appellant has received some medical care without having to pay for it, but much more medical care is required. Her medical condition has become most serious.

[4] In September 2008, still in Canada contrary to Canada's immigration laws, the appellant took steps to try to regularize her status in Canada. She applied to Citizenship and Immigration Canada for permanent residence status. A few months later, she applied to Citizenship and Immigration Canada for a temporary residence permit so she could become eligible for health coverage under the Ontario Health Insurance Program. In both applications, she asked for a waiver of the fees. The waivers were refused, the fees remained unpaid, and so the applications were never considered.

[5] In May 2009, the appellant applied to Citizenship and Immigration Canada for medical coverage under its Interim Federal Health Program. As we shall see, this Program is actually embodied in one of Canada's immigration laws, Order in Council OIC 1957-11/848. Under this Order in Council, Citizenship and Immigration Canada covers the cost of emergency medical care for indigent persons that it has legally admitted to Canada.

[6] A Director with Citizenship and Immigration Canada found that the appellant was ineligible to receive medical coverage and rejected her application.

[7] The appellant brought an application for judicial review to the Federal Court, submitting that she was eligible for medical coverage. In the alternative, she submitted that her exclusion from medical coverage infringed her rights under sections 7 and 15 of the Charter. She requested the Federal Court to "read" the Order in Council as including her – in effect, to make this law compliant with sections 7 and 15 of the Charter by extending its terms to provide her with medical coverage.

[8] If the Federal Court accepted the appellant's request, the curiosity of some might be piqued: even though the appellant has disregarded Canada's immigration laws for the better part of a decade, she would be able to take one of Canada's immigration laws (the Order in Council), get a court to include her by extending the scope of that law, and then benefit from that extension while remaining in Canada contrary to Canada's immigration laws.

[9] But the Federal Court (*per* Justice Zinn) did not accept the appellant's request to extend the scope of the Order in Council. It rejected her submissions and dismissed the application for judicial review: 2010 FC 810 (main decision) and 2010 FC 926 (decision on motion for reconsideration).

[10] The appellant appeals to this Court, making submissions substantially similar to those that were made in the Federal Court.

[11] I also reject the appellant's submissions and would dismiss the appeal.

A. The Order in Council

[12] Order in Council OIC 1957-11/848, passed on June 20, 1957, provides as follows:

> The Board recommends that Order in Council P.C. 4/3263 of June 6, 1952, be revoked, and that the Department of National Health and Welfare be authorized to pay the costs of medical and dental care, hospitalization, and any expenses incidental thereto, on behalf of:
>
> (a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment, and
>
> (b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer,
>
> in cases where the immigrant or such a person lacks the financial resources to pay these expenses, chargeable to funds provided annually by Parliament for the Immigration Medical Services of the Department National Health and Welfare.

B. The Director's decision

[13] The decision-maker on the appellant's application to Citizenship and Immigration Canada for medical coverage was the Director, Program Management and Control, Health Management Branch.

[14] As mentioned above, the Director denied the appellant medical coverage. The Director's decision is as follows:

> Health care services are provided by the Provinces and Territories. As such, access or denial to health care rests with those Provincial and Territorial authorities, in this case the Province of Ontario.
>
> The Interim Federal Health Program is an interim measure to provide emergency and essential health care coverage to eligible individuals who do not qualify for private or public health coverage and who demonstrate financial need. IFHP services aim to serve individuals in the following four groups of recipients:
>
> - Refugee claimants;
> - Resettled Refugees;
> - Persons detained under the Immigration and Refugee Protection Act (IRPA); and,
> - Victims of Trafficking in Persons (VTIPs).
>
> As you have not provided any information to demonstrate that your client falls into any of the above-mentioned categories, I regret to inform you that your request for IFHP coverage cannot be approved.
>
> Please be advised that your client has no active immigration application with Citizenship and Immigration Canada (CIC).

C. The standard of review applicable to the Director's decision

[15] As mentioned above, the appellant applied to the Federal Court for judicial review of the Director's decision.

[16] The Federal Court did not explicitly select a standard of review for its consideration of the Director's decision. However, it did find, in effect on a correctness standard, that the appellant did not qualify for medical coverage.

[17] The first step in determining the standard of review is to appreciate the nature of the decision in issue. As mentioned at the outset, the Interim Federal Health Program mentioned by the Director is embodied in an Order in Council (P.C. 157-11/848) and the decision-maker is a delegate of the Minister of Citizenship and Immigration Canada. In effect, we are reviewing the legal interpretation and application of an Order in Council by a delegate of the Minister.

[18] The Supreme Court has told us that the standard of review will "usually" or "normally" be reasonableness where "a tribunal" is interpreting its "own statute" or "statutes closely connected to its function, with which it will have particular familiarity": 2008 SCC 9 at paragraph 54, [2008] 1 S.C.R. 190; *Celgene Corp. v. Canada (A.G.)*, 2011 SCC 1 at paragraph 34, 327 D.L.R. (4th) 513; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at paragraph 26, 328 D.L.R. (4th) 1.

[19] I am inclined to find that the Director is subject to this "normal" or "usual" position of deference to his decision-making. But there exists considerable uncertainty on this, arising from *Dunsmuir* itself, previous case law, and the unusual circumstances of this case:

(a) We are dealing with a Ministerial delegate, not a "tribunal" in any formal sense. In *Dunsmuir* the Supreme Court used the word "tribunal" on this point. In my view, although it is not perfectly clear, in *Dunsmuir* the Supreme Court did not intend to restrict this position of deference to interpretations by formal tribunals. Throughout its discussion of the standard of review, the Supreme Court used the terms "tribunal," "decision maker," "exercises of public authority," "administrative bodies," "adjudicative tribunal," "adjudicative bodies," "administrative tribunal," and "administrative actors": *Dunsmuir*, *supra* at paragraphs 28-29, 31, 33, 41, 47-50, 52, 54-56, and 59. It seems to have used the terms interchangeably and, collectively, they are wide enough to embrace a Ministerial delegate such as the Director.

(b) In a relatively recent decision, albeit before *Dunsmuir*, the Supreme Court did not defer to the interpretation of a Ministerial delegate who was interpreting a statute closely related to his function: *Hilewitz v. Canada (Minister of Citizenship and Immigration); De Jong v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706, (a visa officer making an assessment under subparagraph 19(1)(*a*)(ii) of the *Immigration Act*, R.S.C. 1985, c. I-2); see also *Canada (Minister of Citizenship and Immigration) v. Patel*, 2011 FCA 187 and cases cited at paragraph 27 of *Patel*. This is certainly consistent with how we today approach decisions involving some other Ministerial delegates. For example, in the income tax context, income tax assessors – Ministerial delegates – are very familiar with the *Income Tax Act*. One might think that the normal administrative law standard of review analysis would apply to appeals of these administrators, with deference to their legal interpretations being the result: see, *e.g.*, *Canada (Director of Investigation and Research) v. Southam Inc.*, 1997 CanLII 385 (SCC), [1997] 1 S.C.R. 748 and *Dunsmuir*, *supra* at paragraph 54. But it does not. The Tax Court of Canada, sitting in appeal on income tax assessments, and this Court do not defer at all to the statutory interpretations of the Minister's delegate.

(c) The Supreme Court spoke in *Dunsmuir* of deference to interpretations of certain types of "statutes." Did it mean to restrict this principle to "statutes"? There would appear to be no principled basis to do so. Deference probably also applies to interpretations of other types of laws, such as the Order in Council in this case.

(d) The Director's title seems to suggest that he administers programs such as this, and so he could be considered to be interpreting what *Dunsmuir* described as a law "closely connected with [his] function," warranting our deference. But there is no evidence in the record on this one way or the other, nor would one expect there to be such evidence given the narrow nature of a record on judicial review.

(e) The position of deference for administrative interpretations of statutes is said in *Dunsmuir* to apply only "usually" or "normally." Does this qualification refer to the situations mentioned in *Dunsmuir* where the correctness standard applies? Perhaps not, as these situations largely do not involve issues of statutory interpretation. Does this qualification refer to some as yet unidentified situations? We simply do not know.

(f) In this particular case, as we shall see, the Director did not engage in any actual interpretation of the Order in Council. Rather, he simply interpreted and applied an administrative policy made under that Order in Council. Does this mean that the Director's decision is subject to correctness review? I am not so sure. There are statements in *Dunsmuir* that suggest that the Director's failure to interpret the Order in

> Council may not matter. In two places in *Dunsmuir*, the Supreme Court suggests that in assessing the substance of decision-making under the reasonableness standard we are to examine the outcome reached by the decision-maker and not necessarily the plausibility of the reasons actually given. At paragraph 47, we are directed to ask ourselves "whether the decision falls within a range of possible, acceptable *outcomes* which are defensible in respect of the facts and law" and at paragraph 48 we are told that an administrative decision can be supported on the basis of reasons that "*could [have] be[en] offered*" [emphasis added].

(g) I am not alone in my doubts on this issue. Recently, this Court discussed *Dunsmuir* and the standard of review that should apply to the Governor in Council's interpretation of a statute. It found the law in this area to be unclear: *Global Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194 at paragraph 35.

[20] Fortunately, on the facts of this case, I need not decide whether the standard of review is correctness or the deferential standard of reasonableness. Regardless of the standard of review, the Director's decision passes muster: as the Director found, the appellant was not entitled to receive medical coverage in this case.

D. The Federal Court's conclusions concerning the decision of the Director

[21] The Federal Court found that the Director fettered his discretion by following a departmental guideline instead of interpreting the actual wording of the Order in Council. In its view, the Director was entitled to read and consider the departmental guideline but should have interpreted the actual wording of the Order in Council, the law that governed his discretion.

[22] However, the Federal Court held that this was immaterial: if the Director had regard to the Order in Council, he would have had to rule that the appellant was not entitled to receive coverage. Therefore, the Director's decision could stand.

[23] For the purposes of this appeal, the Federal Court's bottom-line conclusion was that the appellant was ineligible under the Order in Council to receive medical coverage.

E. Assessment of the Federal Court's decision that the appellant was ineligible to receive medical coverage under the Order in Council

(1) Introduction and overview

[24] In my view, the Federal Court's bottom line conclusion is correct: the appellant was ineligible to receive medical coverage under the Order in Council.

[25] In reaching its conclusion, the Federal Court relied upon the plain meaning of the words in the Order in Council. It examined the history behind the Order in Council in order to see if there was some special significance behind some of the wording used in it.

[26] The Federal Court also placed particular emphasis upon a rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957: see the Federal Court's reasons at paragraph 44. I agree with the Federal Court's view that the Minister's rationale was an important clue as to the intended scope of the Order in Council. It was right to place particular emphasis on it.

[27] The Minister's rationale was as follows:

> THAT on occasion persons are referred for medical and hospital treatment during the time they are thought to be under the jurisdiction of the Immigration authorities but before it is possible to satisfactorily determine their status as immigrants as defined in the Immigration Act, and because of the urgent nature of the disabling condition, treatment cannot be prudently postponed until their exact status has been completely established.

> THAT in other instances persons who other than immigrants as defined who are temporarily under the jurisdiction of the Immigration authorities become urgently in need of medical care or hospital treatment, and at the time it is not humanely possible to defer medical action until the determination of who, if any third party, is financially responsible for the cost of such action;
>
> THAT it is considered to be in the public interest and necessary for the maintenance of good public relations between the two Federal Departments concerned and the large number of individuals, societies and other agencies who work closely in association with these Departments during the ordinary course of Immigration operations, that the existing authority which is restrictive by reason of the term "immigrant" and also by reason of the conditions of "time" which are applied, be changed to permit the Department of National Health and Welfare to render the necessary medical assistance in these instances;
>
> THAT both Departments undertake to administer this authority in such a way as to confine its use to those occasions only when circumstances render it the best course of action in the public interest, and only when humane interests more or less obligate the Departments to accept the responsibility;…

[28] The Federal Court's overall conclusion was as follows (at paragraph 51):

> Properly interpreted, Order-in-Council P.C. 157-11/848 does not apply to the applicant and she is not eligible for [Program] coverage. The applicant is not an "immigrant" in the sense that she is applying for permanent residence in Canada. The applicant is not temporarily under the jurisdiction of immigration authorities. Nor does the applicant fall into one of the narrow, well-defined categories for which immigration authorities feel responsible.

[29] I agree with the general thrust of the conclusion in this passage. But I wish to amplify and clarify it somewhat. This is needed because parties might interpret this passage in future cases to ascribe to the Order in Council a scope of medical coverage greater than is warranted by its terms.

[30] As is seen from the text of the Order in Council quoted above at paragraph 12, the Order in Council contains two paragraphs, (a) and (b). Each of these sets out certain eligibility criteria. In addition to satisfying the eligibility criteria in paragraphs (a) or (b), a claimant must also "[lack] the financial resources to pay [the medical] expenses."

(2) Paragraph (a) of the Order in Council

[31] Paragraph (a) of the Order in Council provides as follows:

> (a) an immigrant, after being admitted at a port of entry and prior to his arrival at destination, or while receiving care and maintenance pending placement in employment…

[32] The Order in Council does not define "immigrant." However, the term "immigrant" was defined in *The Immigration Act*, S.C. 1952, c. 42, subsection 2(*i*) as "a person who seeks admission to Canada for permanent residence."

[33] Definitions of terms in statutes apply to terms contained in orders made under them: *Interpretation Act,* R.S.C. 1952, c. 158, section 38. It is not clear from the Order in Council whether it was made under the *Immigration Act*. But, in my view, the definition of "immigrant" in the *Immigration Act* sheds light on the meaning of that term in the Order in Council given that its subject-matter is related to immigration. I also note that the Minister of Health and Welfare, when offering a rationale for the Order in Council and in discussing its intended scope of coverage, referred to "immigrants as defined," which must be taken to be "immigrants" as defined under the *Immigration Act* as it stood at that time: see paragraph 27, above.

[34] In my view, only those who seek admission to Canada for permanent residence on or before entry to Canada fall under paragraph (a). Paragraph (a) uses the term "immigrant," meaning "a person who seeks admission to Canada for permanent residence," and the express wording of paragraph (a) shows that person seeking permanent residence must satisfy one of two conditions:

(i) The person seeking admission to Canada for permanent residence was "admitted at a port of entry" but has not "[arrived] at destination," *i.e.*, is in transit between entry and destination, or

(ii) The person seeking admission to Canada for permanent residence is receiving "care and maintenance pending placement in employment." A fair reading of the Order in Council is that the "care and maintenance" is at the direction of the immigration authorities who met the person upon entry to Canada. In my view, this is a fair reading in light of the history of the Order in Council, reviewed by the Federal Court at paragraphs 30-37, which shows that this medical coverage program was always focused on those entering Canada for the first time, not on those who had already arrived in Canada.

[35] The appellant does not qualify under either of these conditions. She was not admitted into Canada as an applicant for permanent residence. She was not in transit between entry and destination. The immigration authorities did not direct her "care and maintenance pending placement in employment." The appellant was simply a visitor who decided to remain in Canada, contrary to Canada's immigration law.

(3) Paragraph (b) of the Order in Council

[36] Paragraph (b) of the Order in Council provides as follows:

> (b) a person who at any time is subject to Immigration jurisdiction or for whom the Immigration authorities feel responsible and who has been referred for examination and/or treatment by an authorized Immigration officer…

[37] Paragraph (b) refers to "a person," not an "immigrant," the term used in paragraph (a). As a result, paragraph (b) covers more than those seeking permanent residence in Canada.

[38] One requirement that must be met under paragraph (b) is that the person is "subject to Immigration jurisdiction" or is a person "for whom the Immigration authorities feel responsible."

[39] At paragraph 46-50 of its reasons, the Federal Court interpreted these phrases in light of their plain wording and the rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957, excerpts of which are reproduced at paragraph 27, above. The Federal Court held (at paragraph 49) that those "subject to Immigration jurisdiction" are:

> …those persons who are passing through a port of entry and thus subject to the jurisdiction of the Immigration authorities, those persons whose status is being processed by the Immigration authorities, and those persons under detention and in the custody of the Immigration authorities. Persons temporarily under the jurisdiction of the Immigration authorities would also include refugee claimants…

I agree with this conclusion and the reasons the Federal Court offered in support of it (at paragraphs 46-50).

[40] However, by way of clarification, "those persons whose status is being processed by the Immigration authorities" must mean a person who sought that status before or upon entry to Canada. The Program could not have been intended to pay the medical expenses of those who arrive as visitors but remain illegally in Canada and who, after the better part of a decade of living illegally in Canada, suddenly choose to try to regularize their immigration status. Coverage for those persons would be against the whole tenor of the Order in Council, the history of the Order in Council, and the Minister's stated rationale.

[41] Paragraph (b) contains another requirement, expressed in the phrase "and who has been referred for examination and/or treatment by an authorized Immigration officer." Does that phrase apply only to those who "[have] been referred for examination and/or treatment by an authorized Immigration officer"? Or does it apply both to those who "[have] been referred for examination and/or treatment by an authorized Immigration officer" and to those who are "subject to Immigration jurisdiction"?

[42] In my view, the latter must be the correct interpretation: all those qualified under paragraph (b) must have been "referred for examination and/or treatment by an authorized Immigration officer."

[43] This interpretation is supported by the rationale offered by the Minister of National Health and Welfare for the Order in Council in 1957: see paragraph 27, above.

[44] Finally, it must be remembered that in 1957, when the Order in Council was passed, Canada did not have a government-administered medicare scheme. Canadians were obligated to pay for their own health care or arrange for insurance coverage. Given that historical context, it does not make sense that all those "subject to Immigration jurisdiction" would have emergency medical coverage courtesy of the state, even if not specifically "referred for examination and/or treatment by an authorized Immigration officer". I would add that there is no evidence before the Court to suggest that paragraph (b) was ever interpreted in that way.

[45] Given this interpretation, the appellant does not qualify under paragraph (b). Upon entry to Canada, she did not claim a status other than visitor and the Immigration authorities were not processing any other status. She was not in the custody of the Immigration authorities, nor was she a refugee claimant. At no time was she "referred for examination and/or treatment by an authorized Immigration officer." At no time did the "Immigration authorities feel responsible" for her. The appellant was just a visitor who decided to remain in Canada, contrary to Canada's immigration law.

[46] For the foregoing reasons, I find that the appellant was ineligible to receive medical coverage under the Order in Council. Therefore, the Director was correct in deciding to deny the appellant medical coverage and the Federal Court was correct in upholding the Director's decision.

F. Are the appellant's rights under sections 7 and 15 of the Charter infringed?

(1) A preliminary observation

[47] The appellant raised the constitutional issues for the first time in her application for judicial review in the Federal Court and filed her evidence on those issues in that Court. Before the Director, she did not raise the constitutional issues or offer evidence on those issues.

[48] Sometimes this is a fatal flaw that prevents the reviewing court from considering the constitutional issue on judicial review: *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General)*; *Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16 at paragraphs 38-40, [2005] 1 S.C.R. 257.

[49] In this case, however, the objection would not lie if the Director did not have the jurisdiction to decide the constitutional issues: *Okwuobi*, *supra*, at paragraphs 28-34 and 38; *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504. In that circumstance, the Federal Court would be the first place where the constitutional issues could be determined.

[50] The point was not argued before us and, given my ultimate disposition of the constitutional issues, I need not decide whether the objection lies in this case.

(2) The standard of review

[51] What is the standard of review of the Federal Court's decision on the constitutional issues? Since the Director did not consider the constitutional issues, we must look to the law concerning appellate standards of review, not administrative law standards of review.

[52] The normal rule on appeals is that on pure questions of law or questions of mixed fact and law where the law predominates or is "extricable", the standard of review is correctness. On questions of fact, or questions of mixed fact and law that are primarily factual in nature, the standard of review is palpable and overriding error. See *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *H.L. v. Canada (A.G.)*, 2005 SCC 25, [2005] 1 S.C.R. 401.

[53] On occasion, the Supreme Court has stated that the appellate standard of review on decisions in constitutional cases is correctness and has used language to suggest that there can be no deference on any question, factual or legal, in a constitutional case: see, *e.g.*, *Doucet-Boudreau v. Nova Scotia (Minister of Education),* 2003 SCC 62 at paragraph 36, [2003] 3 S.C.R. 3 ("[d]eference ends, however, where the constitutional rights that the courts are charged with protecting begin").

[54] I do not take these statements to mean that in a constitutional case an appellate court can readily interfere with factual findings and exercises of discretion that are heavily suffused with facts. There are many Supreme Court

decisions that confirm that deference on such matters is still warranted: see, *e.g.*, *Lake v. Canada (Minister of Justice)*, [2008] 1 S.C.R. 761 at paragraph 34, 2008 SCC 23; *R. v. Buhay*, [2003] 1 S.C.R. 631 at paragraphs 44-45, 2003 SCC 30; *R. v. Stillman*, 1997 CanLII 384 (SCC), [1997] 1 S.C.R. 607 at paragraph 68; *R. v. Belnavis*, 1997 CanLII 320 (SCC), [1997] 3 S.C.R. 341; *Dagenais v. Canadian Broadcasting Corporation*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835 at paragraphs 188-189.

[55] In other words, the normal appellate standards of review discussed in *Housen* and *H.L.* apply in constitutional cases. However, as a practical matter, it is fair to say that correctness review probably happens more frequently in constitutional appeals because of the centrality of the legal issues in such appeals, and the fact that questions of constitutional law are often extricable from the questions of mixed fact and law that arise.

(3) Section 7 of the Charter

[56] In the Federal Court and in this Court, the appellant submits that her exclusion from medical coverage under the Order in Council infringes her section 7 rights to life and security of the person and her right not to be deprived thereof except in accordance with the principles of fundamental justice.

(a) Rights to life and security of the person

[57] The Federal Court found that the appellant's rights to life and security of the person under section 7 of the Charter were infringed (at paragraph 91):

> The evidence before the Court establishes both that the [appellant] has experienced extreme delay in receiving medical treatment and that she has suffered severe psychological stress resulting from the uncertainty surrounding whether she will receive the medical treatment she needs. More importantly, the record before the Court establishes that the applicant's exclusion from…coverage [under the Order in Council] has exposed her to a risk to her life as well as to long-term, and potentially irreversible, negative health consequences…. In my view, the applicant has established a deprivation of her right to life, liberty and security of the person that was caused by her exclusion from the [Order in Council].

[58] This finding is open to challenge on two grounds. I would reject the first ground, but accept the second.

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[59] First, the respondent disputes the Federal Court's factual finding that the appellant has been exposed to delays and risks. On the facts, the respondent submits that the appellant has been able to obtain hospital admissions and surgeries when required and has been under the active care of both a family doctor and a number of specialists. The respondent adds that in Ontario, where the appellant lives, hospitals cannot deny emergency medical treatment to anyone, when to do so would endanger life: *Public Hospitals Act*, R.S.O. 1990, c. P.40. As a result, the respondent submits that the appellant has not established a serious deprivation of her right to life or security of the person under section 7 of the Charter.

[60] The respondent's submissions gain force from legal proposition that the effects on the protected interests under section 7 must be more than trivial. They must be serious: *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at paragraph 123, [2005] 1 S.C.R. 791; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 at pages 56 and 173; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46 at paragraph 60.

[61] Bearing in mind the standard of review, I am not prepared to interfere with the Federal Court's factual conclusion that the appellant was exposed to a significant risk to her life and health, a risk significant enough to trigger a violation of her rights to life and security of the person. The Federal Court had an evidentiary basis for its finding.

[62] At paragraphs 6 to 13, the Federal Court reviewed the appellant's medical condition while she has remained in Canada. Before 2006, she only required minor medical care. After 2006, however, her medical needs have substantially increased as her health has worsened. Her conditions include uterine fibroids, uncontrolled hypertension, nephrotic syndrome, poorly controlled diabetes, a pulmonary embolism, decreased mobility, shortness of breath, hyperlipidemia and anxiety.

[63] The Federal Court reviewed the appellant's access to health care services and medication (at paragraphs 6 to 9). Before 2006, the appellant was able to work. She earned enough income to pay for the minor medical care and medication that she required. After 2006, her medical needs surpassed her ability to pay but she was still able to obtain some treatment. There is some evidence that she had had access to medical assistance at a community health centre. In 2008 she underwent an operation at Humber River Regional Hospital for the removal of uterine fibroids. She was billed for that surgery, but was unable to pay the bill. Later in 2008, the appellant was admitted to St. Michael's Hospital for ten days for uncontrolled hypertension. In 2009, she was admitted to St. Michael's Hospital for eight days during which a pulmonary embolism was found. She was unable to pay for the medication to treat that, but the hospital gave her a supply.

[64] Evidence was before the Federal Court suggesting that the appellant's access to health care services and medication was impaired. While eventually the appellant did have her uterine fibroids surgically removed at Humber River Regional Hospital in 2006, at first she was denied service at Woman's College Hospital due to her lack of insurance coverage and her inability to pay. In 2008, while at St. Michael's Hospital, a test aimed at determining the cause of her nephritic syndrome could not be performed owing to her inability to pay for treatment and for the medicine that might be necessary if complications arose.

[65] Also before the Federal Court was expert medical evidence. Overall, this evidence, accepted by the Federal Court, suggested that (at paragraph 91):

> [if the appellant] were to not receive timely and appropriate health care and medications in the future, she would be at very high risk of immediate death (due to recurrent blood clots and pulmonary embolism), severe medium-term complications (such as kidney failure and subsequent requirement for dialysis), and other long-term complications of poorly-controlled diabetes and hypertension (such as blindness, foot ulcers, leg amputation, heart attack, and stroke).

[66] Given this evidence, and bearing in mind the deferential standard of review that must be applied to the Federal Court's findings of fact, I would not give effect to the respondent's submission that the Federal Court erred in finding that the appellant was exposed to serious health risks.

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[67] As mentioned above, based on this evidence, the Federal Court found that the Order in Council created a risk to the appellant. That is true in the sense that if the Order in Council were broader and provided her with all of the treatment and medication she needs, all risk would be averted. But that is not sufficient legally to demonstrate that the Order in Council has caused injury to the appellant's rights to life and security of the person.

[68] It is incumbent on the appellant to establish that the failure of the Order in Council to provide medical coverage to her is the operative cause of the injury to her rights to life and security of the person under section 7 of the Charter: *TrueHope Nutritional Support Limited v. Canada (A.G.)*, 2011 FCA 114 at paragraph 11.

[69] The provision of public health coverage and the regulation of access to it is primarily the responsibility of the provinces and the territories, with the federal government playing a role in funding, the setting of standards under the *Canada Health Act*, R.S.C. 1985, c C-6 and, occasionally, regulation in specific areas under its criminal law power: *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457.

[70] If there is an operative cause of the appellant's difficulties, it is the fact that although she is getting some treatment under provincial law (see paragraph 59, above), that law does not go far enough to cover all of her medical needs.

[71] The appellant has attempted to obtain coverage under the Ontario Health Insurance Plan. Ontario refused coverage because, as a person in Canada contrary to Canadian immigration law, the appellant is not a "resident" of Ontario under R.R.O. 1990, Regulation 552, section 1.4, enacted under the *Health Insurance Act*, R.S.O. 1990, c. H.6. She did not judicially review Ontario's refusal, nor did she argue that Ontario's eligibility requirements violate her rights under sections 7 and 15 of the Charter. Nor did she challenge the *Public Hospitals Act*, *supra*, and argue that it is constitutionally underinclusive or over restrictive. The record reveals no attempt by the appellant to assert section 7 or 15 of the Charter against provincial legislation that limits her access to health care.

[72] Further, and most fundamentally, the appellant by her own conduct – not the federal government by its Order in Council – has endangered her life and health. The appellant entered Canada as a visitor. She remained in

Canada for many years, illegally. Had she acted legally and obtained legal immigration status in Canada, she would have been entitled to coverage under the Ontario Health Insurance Plan: see section 1.4 of Regulation 552, *supra*.

[73] In my view, the appellant has not met her burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person under section 7 of the Charter.

(b) The principles of fundamental justice

[74] Even if the appellant had discharged the burden of showing that the Order in Council is the operative cause of the injury to her rights to life and security of the person, she would still have to establish that the deprivation of her rights to life and security of the person was contrary to the principles of fundamental justice. Here as well, the appellant has fallen short.

[75] The appellant submits at paragraph 34 of her memorandum of fact and law that "[g]overnments ought never to deny access to healthcare necessary to life as a means of discouraging unwanted or illegal activity, including to those who have entered or remained in a country without legal or documented status." The appellant submits that "[t]his principle is fundamental to judicial and legislative practice in Canada."

[76] At the root of the appellant's submission are assertions that the principles of fundamental justice under section 7 of the Charter require our governments to provide access to health care to everyone inside our borders, and that access cannot be denied, even to those defying our immigration laws, even if we wish to discourage defiance of our immigration laws. I reject these assertions. They are no part of our law or practice, and they never have been.

[77] The Charter does not confer a freestanding constitutional right to health care: *Chaoulli, supra* at paragraph 104 (*per* McLachlin C.J.C. and Major J.).

[78] The results reached in other recent cases confirm that the Charter does not confer a freestanding constitutional right to health care. In these recent cases, courts have denied claims under the Charter to obtain state funding or financial assistance for necessary treatments: *Auton (Guardian ad litem of) v. British Columbia (A.G.)*, 2004 SCC 78, [2004] 3 S.C.R. 657; *Ali v. Canada*, 2008 FCA 190; *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561 (C.A.); *Eliopoulos v. Ontario* (2006), 2006 CanLII 37121 (ON CA), 82 O.R. (3d) 321 (C.A.); *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538, (2008), 91 O.R. (3d) 412 (C.A.).

[79] In words apposite to the case at Bar, Justice Linden of this Court wrote:

> The appellants are, in essence, seeking to expand the law…so as to create a new human right to a minimum level of health care…. [T]he law in Canada has not extended that far…[A] freestanding right to health care for all of the people of the world who happen to be…in Canada would not likely be contemplated by the Supreme Court.

(*Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 at paragraph 36, [2007] 3 F.C.R. 169).

[80] These judicial statements and holdings suggest that the principle proffered by the appellant cannot qualify as a principle of fundamental justice under section 7 of the Charter. It is not a "legal principle" that is "vital or fundamental to our societal notion of criminal justice," nor is there "a consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate": *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 at paragraphs 112-113, [2003] 3 S.C.R. 571; *R. v. D.B.*, 2008 SCC 25 at paragraph 46, [2008] 2 S.C.R. 3; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3 at paragraph 23, [2010] 1 S.C.R. 44.

[81] The appellant invokes other principles of fundamental justice under section 7. She submits that her exclusion from coverage by the Order in Council is arbitrary. She rightly submits that the Supreme Court has recognized that an arbitrary law – a law that "bears no relation to, or is inconsistent with, the objective that lies behind [it]" – will be contrary to the principles of fundamental justice: *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at paragraph 103, [2009] 2 S.C.R. 181; *Chaoulli*, *supra* at paragraph 104 (*per* McLachlin C.J.C and Major J.), and *Malmo-Levine*, *supra* at paragraph 135.

[82] However, the Order in Council is not arbitrary. It is related to and consistent with the objective that lies behind it. As a general matter, as the analysis in paragraphs 31-46 above shows, the Order in Council is meant to

provide temporary, emergency assistance to those who lawfully enter Canada and find themselves under the jurisdiction of the immigration authorities, or for whom the immigration authorities feel responsible. The Order in Council is not meant to provide ongoing medical coverage to all persons who have entered and who remain in Canada, lawfully or unlawfully.

[83] In this regard, I agree with the Federal Court and adopt its words (at paragraph 94):

> I do not accept the applicant's submission that her exclusion from health care is not consistent with principles of fundamental justice because it is arbitrary. I see nothing arbitrary in denying financial coverage for health care to persons who have chosen to enter and remain in Canada illegally. To grant such coverage to those persons would make Canada a health-care safe-haven for all who require health care and health care services. There is nothing fundamentally unjust in refusing to create such a situation.

[84] The appellant also submits that the Order in Council offends the principles of fundamental justice because it is unacceptably vague in the sense that it is unintelligible and impossible to interpret. This is a very high standard to meet and, accordingly, successful claims on this basis are extremely rare: *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC), [1992] 2 S.C.R. 606; *Ontario v. Canadian Pacific Ltd.*, 1995 CanLII 112 (SCC), [1995] 2 S.C.R. 1031.

[85] The appellant falls well short of establishing that high standard. As is evident from paragraphs 31-46 above, the Order in Council can be interpreted and a clear meaning can be gleaned from it.

[86] Finally, the appellant submits that the principles of fundamental justice must also take into account Canada's obligations under various sources of international human rights law such as the right to life under article 6 of the International Covenant on Civil and Political Rights and rights to health under article 12 of the *International Covenant on Economic, Social and Cultural Rights* and article 5 of the *International Convention on the Elimination of All forms of Racial Discrimination*.

[87] On the basis of *Khadr*, *supra* at paragraph 23, I accept that, in appropriate cases, courts can be assisted by these sources when defining the precise content of certain principles of fundamental justice under section 7. But in this case we are not at the point of defining the content of a principle of fundamental justice. We are not even at first base. The appellant has not offered a principle that meets the criteria set out in *Malmo-Levine*, *supra* and *D.B.*, *supra* for admission as a principle of fundamental justice under section 7 of the Charter.

[88] Therefore, I conclude that the appellant's rights under section 7 are not infringed.

(4) Section 15 of the Charter

(a) General principles

[89] When assessing the merits of a subsection 15(1) claim, we must apply a two-part test: (1) whether the law creates a distinction that is based on an enumerated or analogous ground and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotyping: *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paragraph 30; *R. v. Kapp*, 2008 SCC 41 at paragraph 17, [2008] 2 S.C.R. 483.

[90] The first step tells us that not all distinctions, in and of themselves, are contrary to s. 15(1) of the *Charter*: *Withler*, *supra* at paragraph 31; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497; *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9 at paragraph 188, [2009] 1 S.C.R. 222. Subsection 15(1) only covers distinctions made on the basis of the grounds enumerated in subsection 15(1), or grounds analogous to them.

[91] The second step tells us that the focus under subsection 15(1) is not differential treatment, but rather discrimination. Therefore, in order to succeed, a section 15 claimant must show that the impact of the law is discriminatory: *Withler*, *supra* at paragraph 31; *Andrews*, *supra* at page 182; *Ermineskin Indian Band*, *supra* at paragraph 188; *Kapp*, *supra* at paragraph 28.

[92] Discrimination has been described as follows:

> …a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.

(*Andrews*, *supra*, at pages 174-175.)

(b) Application of the principles to this case

[93] The appellant submits that her exclusion from the medical coverage afforded by the Order in Council infringed subsection 15(1) of the Charter because that exclusion was based on an enumerated and analogous ground, and was discriminatory.

[94] The Federal Court rejected the appellant's subsection 15(1) submission, primarily on the basis (at paragraphs 79-83) that the appellant had failed to establish that her exclusion from coverage under the Order in Council was based on an enumerated or analogous ground.

[95] I find no error in the Federal Court's rejection of the appellant's section 15 submissions. In my view, there are four main reasons why the appellant's section 15 submissions must fail.

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[96] In my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation. On this point, I substantially agree with the Federal Court reasons.

[97] In this Court, the appellant suggests that the Order in Council creates a "primary distinction" enhanced by a "secondary intersecting ground."

[98] The primary distinction is said to be between foreign nationals possessing certain immigration status who are covered under the Order in Council, and other foreign nationals who possess another immigration status who are not covered. As we have seen, however, coverage is potentially available under paragraph (b) to all persons regardless of immigration status. For example, the appellant herself might have been covered by the Order in Council upon her arrival in Canada. Upon entry, she was legally admitted as a visitor. Had she been in desperate need of emergency medical attention at that time and could not otherwise afford it, and if the immigration authorities felt obligated to assist, she would have been covered by the Order in Council.

[99] Further, I do not accept that "immigration status" qualifies as an analogous ground under section 15 of the Charter, for many of the reasons set out in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203 at paragraph 13, recently approved by the Supreme Court in *Withler*, *supra* at paragraph 33. "Immigration status" is not a "[characteristic] that we cannot change." It is not "immutable or changeable only at unacceptable cost to personal identity." Finally "immigration status" – in this case, presence in Canada illegally – is a characteristic that the government has a "legitimate interest in expecting [the person] to change." Indeed, the government has a real, valid and justified interest in expecting those present in Canada to have a legal right to be in Canada. See also *Forrest v. Canada (A.G.)*, 2006 FCA 400 at paragraph 16; *Irshad (Litigation Guardian of) v. Ontario (Minister of Health)* (2001), 2001 CanLII 24155 (ON CA), 55 O.R. (3d) 43 (C.A.) at paragraphs 133-136.

[100] The "secondary intersecting ground" is said by the appellant to be "a distinction between undocumented migrants with disabilities, who are adversely affected by the policy, and those without disabilities, who are similarly disqualified from coverage, but who do not have serious disabilities or related healthcare needs, therefore experiencing a differential effect." Intersecting grounds can affect the quality of the alleged discrimination and influence the section 15 analysis: See, *e.g.*, Denise Reaume, "Of Pigeonholes and Principles: A reconsideration of discrimination law", (2002) 40 Osgoode Hall L.J. 113-144 at paragraphs 33-42 and Douglas Kropp, "Categorical Failure: Canada's

Equality Jurisprudence – Changing Notions of Identity and the Legal Subject," (1997) 23 Queen's L.J. 201 at paragraph 8. As the appellant has failed to establish her primary distinction, immigration status, and since there are other obstacles to her section 15 claim, discussed below, I need not consider this further.

[101] Therefore, in my view, the appellant has failed to demonstrate that the Order in Council makes a distinction based on any enumerated or analogous ground that is relevant to her situation.

[102] Parenthetically, I would note that if the appellant had prevailed on this point, subsection 15(2) of the Charter might become live. If the immigrants, refugees and others who do receive medical care under the Order in Council constitute a disadvantaged group embraced by the enumerated or analogous grounds, and if the Order in Council is aimed at ameliorating or remedying that group's condition, the Order in Council would be a "law, program or activity" within the meaning of subsection 15(2). In such a case, the Order in Council would not be found to be discriminatory under subsection 15(1): *Kapp*, *supra* at paragraph 41; *Lovelace v. Ontario*, 2000 SCC 37, [2000] 1 S.C.R. 950.

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[103] The appellant has failed to establish that the Order in Council relies upon, perpetuates or promotes prejudice or stereotyping.

[104] The appellant has been denied coverage because she did not enter as an applicant for permanent residence, is not a person under immigration jurisdiction, and is not a person for whom the immigration authorities feel responsible. In imposing these eligibility criteria, the Order in Council does not suggest that the appellant and others like her are less capable or less worthy of recognition or value as human beings. The Order in Council does not single out, stigmatize or expose the appellant and others like her to prejudice and stereotyping, nor does it perpetuate any pre-existing prejudice and stereotyping. Indeed, the Order in Council, with its eligibility criteria, denies medical coverage to the vast majority of us, and not just the appellant and others like her. The Order in Council treats the appellant – a non-citizen who has remained in Canada contrary to Canadian immigration law – in the same way as all Canadian citizens, rich or poor, healthy or sick.

- III -

[105] In my view, the facts and the holding of the Supreme Court in *Auton*, *supra* are directly on point and confirm that the Order in Council does not infringe section 15 of the Charter. In *Auton*, the claimants sought an order that British Columbia's medicare program should be extended to cover a particular treatment for autism. The denial of coverage was said to be discriminatory under section 15 of the Charter. The Supreme Court refused to order British Columbia to extend its medicare program to cover the treatment.

[106] At paragraph 41, the Supreme Court held that "[i]t is not open to Parliament…to enact a law whose policy objectives and provisions single out a disadvantaged group for inferior treatment." I note that the Order in Council does not do this. The Supreme Court then added (at paragraph 41):

> On the other hand, a legislative choice not to accord a particular benefit absent demonstration of discriminatory purpose, policy or effect…does not give rise to s. 15(1) review. This Court has repeatedly held that the legislature is under no obligation to create a particular benefit. It is free to target the social programs it wishes to fund as a matter of public policy, provided the benefit itself is not conferred in a discriminatory manner: *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28 at para. 61; *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, 2002 SCC 83, at para. 55; *Hodge*, *supra*, at para. 16.

[107] On the issue whether the benefit was conferred in a discriminatory manner, the Supreme Court stated (at paragraph 42):

> Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an

arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.

[108] The exclusion of the appellant from the coverage provided by the Order in Council does not undercut its overall purpose. On the other hand, the exclusion of the appellant from the coverage provided by the Order in Council is consistent with its purpose. The Order in Council is designed to provide emergency care to legal entrants into Canada who are under immigration jurisdiction or for whom immigration authorities feel responsible. Extending these benefits to all foreign nationals in Canada, even those in Canada illegally, stretches the program well beyond its intended purpose. Excluding persons such as the appellant keeps the program within its purpose. In the words of *Auton* (at paragraph 43), the appellant's exclusion from the Order in Council "cannot, without more, be viewed as an adverse distinction based on an enumerated ground"; rather, "it is an anticipated feature" of the Order in Council.

[109] Since the Order in Council does not confer benefits in a discriminatory manner, the general rule expressed by the Supreme Court in paragraph 41 of *Auton* prevails. The government was "under no obligation to create a particular benefit" in the Order in Council and was left "free to target the social programs it [wished] to fund as a matter of public policy."

[110] Finally, I query whether the Order in Council, said by the appellant to be discriminatory, is the operative cause of the disadvantage the appellant is encountering. The observations I made in paragraphs 67-73 also apply to the appellant's section 15 claim.

[111] Therefore, for all of the foregoing reasons, I conclude that the Order in Council does not infringe the appellant's rights under section 15 of the Charter.

G. Justification and remedy

[112] On the issue of justification under section 1 of the Charter – whether the Order in Council is a reasonable limit prescribed by law in a free and democratic society – the Federal Court held (at paragraph 94) that if the Order in Council were extended to prove medical coverage to persons illegally in Canada, such as the appellant, Canada would become a "health care safe haven." The Federal Court mentioned this in the context of the state's interest that forms part of the analysis of the principles of fundamental justice under section 7.

[113] In any analysis of justification under section 1 of the Charter in this case, the interests of the state in defending its immigration laws would deserve weight. If the appellant were to prevail in this case and receive medical coverage under the Order in Council without complying with Canada's immigration laws, others could be expected to come to Canada and do the same. Soon, as the Federal Court warned, Canada could become a health care safe haven, its immigration laws undermined. Many, desperate to reach that safe haven, might fall into the grasp of human smugglers, embarking upon a voyage of destitution and danger, with some never making it to our shores. In the end, the Order in Council – originally envisaged as a humanitarian program to assist a limited class of persons falling within its terms – might have to be scrapped.

[114] In this case, it is not necessary to comment on justification under section 1 any further. Nor is it necessary to comment on what constitutional remedy might be awarded under subsection 24(1) of the Charter. The appellant's constitutional challenge fails for want of proof of rights breach. The Order in Council does not infringe sections 7 and 15 of the Charter.

H. Concluding comments

[115] Just before the release of these reasons, this Court released its judgment in *Toussaint v. Canada (Citizenship and Immigration)*, 2011 FCA 146. It held that the Minister must consider the appellant's request for a waiver of fees for her application for permanent residence in Canada.

[116] On the evidence in this record, and given the reasons set out in paragraphs 35 and 45, above, a decision by the Minister to waive the fees and accept the appellant's application will not entitle her to medical coverage under the Order in Council. However, depending upon the terms of legislation in Ontario, she may be entitled to health coverage or assistance from Ontario, now or at some point in the future. That will be for others to decide.

I. Proposed disposition

[117] I would dismiss the appeal. In the circumstances, the Crown has asked that costs not be awarded against the appellant. Accordingly, I would not award costs.

"David Stratas"

J.A.

"I agree
Pierre Blais C.J."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-362-10
APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE ZINN DATED AUGUST 6, 2010 NO. T-1301-09	
STYLE OF CAUSE:	Nell Toussaint v. Attorney General of Canada
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 24, 2010
REASONS FOR JUDGMENT BY:	Stratas J.A.
CONCURRED IN BY:	Blais C.J. and Nadon J.A.
DATED:	June 27, 2011

APPEARANCES:

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Marie-Louise Wcislo Martin Anderson	FOR THE RESPONDENT
Iris Fischer Lindsay Aagaard	FOR THE INTERVENER

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Toronto, Ontario

6	*Slaight Communications Inc. v Davidson*, 1989 CanLII 92 (SCC)

Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038

Date:	1989-05-04
File number:	19412
Other citations:	15 ACWS (3d) 132 — [1989] ACS no 45 — [1989] SCJ No 45 (QL) — EYB 1989-67228 — JE 89-775 — 26 CCEL 85 — 40 CRR 100 — 59 DLR (4th) 416 — 93 NR 183
Citation:	Slaight Communications Inc. v. Davidson, 1989 CanLII 92 (SCC), [1989] 1 SCR 1038, <https://canlii.ca/t/1ft6r>, retrieved on 2022-02-25
Most recent unfavourable mention:	Certain employees of Brandt Tractor Ltd v International Union of Operating Engineers, Local No 115, 2012 CanLII 53287 (BC LRB) […] It submits that **Slaight Communications is distinguishable** from this case. […]

Slaight Communications Inc. *v.* Davidson, [1989] 1 S.C.R. 1038

Slaight Communications Incorporated
(operating as Q107 FM Radio) *Appellant*

v.

Ron Davidson *Respondent*

indexed as: slaight communications inc. *v.* davidson

File No.: 19412.

1987: October 8; 1989: May 4.

Present: Dickson C.J. and Beetz, Lamer, Wilson, Le Dain*, La Forest and L'Heureux-Dubé JJ.

on appeal from the federal court of appeal

Constitutional law -- Charter of Rights -- Freedom of expression -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(9)(c).

Labour relations -- Unjust dismissal -- Jurisdiction of adjudicator -- Adjudicator ordering employer to give unjustly dismissed employee letter of recommendation with specified content -- Adjudicator also ordering employer to answer request for information about employee only by sending letter -- Whether s. 61.5(9)(c) of Canada Labour Code authorizes adjudicator to make such orders -- Whether orders infringe employer's freedom of expression guaranteed by s. 2(b) of Canadian Charter of Rights and Freedoms -- If so, whether limitation on freedom of expression justifiable under s. 1 of Charter -- Whether orders unreasonable in administrative law sense.

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. Respondent filed a complaint and an adjudicator appointed by the Minister of Labour under s. 61.5(6) of the *Canada Labour Code* held that respondent had been

unjustly dismissed. Based on s. 61.5(9)(*c*) of the Code, the adjudicator made an initial order imposing on appellant an obligation to give respondent a letter of recommendation certifying (1) that he had been employed by the radio station from June 1980 to January 20, 1984; (2) the sales quotas he had been set and the amount of sales he actually made during this period; and (3) that an adjudicator had held that he was unjustly dismissed. The order specifically indicated the amounts to be shown as sales quotas and as sales actually made. A second order prohibited appellant from answering a request for information about respondent except by sending the letter of recommendation. The Federal Court of Appeal dismissed an application by appellant to review and set aside the adjudicator's decision. The purpose of the appeal at bar is to determine whether s. 61.5(9)(*c*) of the Code authorizes an adjudicator to make such orders; and in particular, whether the orders infringed appellant's freedom of expression guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*.

Held (Beetz J. dissenting and Lamer J. dissenting in part): The appeal should be dismissed. The orders infringe s. 2(*b*) of the *Charter* but are justifiable under s. 1.

The *Charter* applies to orders made by the adjudicator. The adjudicator is a creature of statute. He is appointed pursuant to a legislative provision and derives all his powers from statute. The Constitution is the supreme law of Canada, and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect. It is thus impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require this Court to declare the legislation to be of no force or effect, unless it could be justified under s. 1 of the *Charter*. It follows that an adjudicator, who exercises delegated powers, does not have the power to make an order that would result in an infringement of the *Charter*.

The word "like" in the English version of s. 61.5(9)(*c*) of the *Canada Labour Code* does not have the effect of limiting the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. It is impossible to apply this rule in the case at bar since one of the conditions essential for its application -- the presence of a common characteristic or common genus -- has not been met. The interpretation according to which the word "like" in the English version of para. (*c*) does not have the effect of limiting the general power conferred on the adjudicator is also more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal.

Per Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ.: The adjudicator's orders were reasonable in the administrative law sense. Administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact, in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*.

The adjudicator's first order infringed s. 2(*b*) of the *Charter* but is saved under s. 1.

The adjudicator's second order also infringed s. 2(*b*) of the *Charter*. It was an attempt to prevent the appellant from expressing its opinion as to the respondent's qualifications beyond the facts set out in the letter. But this order, too, was justifiable under s. 1. First, the objective was of sufficient importance to warrant overriding appellant's freedom of expression. Like the first order, the objective of the second order was to counteract the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. The adjudicator's remedy was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. The governmental objective, in a general sense, was that of protection of a particularly vulnerable group, or members thereof. To constitutionally protect freedom of expression in this case would be tantamount to condoning the continuation of an abuse of an already unequal relationship. Second, the means chosen were reasonable. Like the first order, the second order was rationally linked to the objective. With the proven history of promoting a fabricated version of the quality of respondent's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that the employer's representatives did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference. Further, no less intrusive measure could have been taken and still achieved the objective with any likelihood. Monetary compensation would not have been an acceptable substitute because it would only have been compensation

for the economic, not the personal, effects of unemployment. Labour should not be treated as a commodity and every day without work as exhaustively reducible to some pecuniary value. The letter was tightly and carefully designed to reflect only a very narrow range of facts which were not really contested. The appellant was not forced to state opinions which were not its own. The prohibition was also very circumscribed. It was triggered only in cases when the appellant was contacted for a reference and there was no requirement to send the letter to anyone other then prospective employers. In short, the adjudicator went no further than was necessary to achieve the objective. Finally, the effects of the measures were not so deleterious as to outweigh the objective of the measures. The objective in this case was a very important one, especially in light of Canada's international treaty commitment to protect the right to work in its various dimensions. For purposes of this final stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective.

Per Lamer J. (dissenting in part): The adjudicator did not exceed his jurisdiction by ordering appellant to give respondent a letter of recommendation with a specified content. Apart from the *Charter*, the only limitation imposed by s. 61.5(9)(*c*) is that the order must be designed to "remedy or counteract any consequence of the dismissal". That is the case here. The order prevents appellant's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute is not as such unreasonable and there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner.

However, the adjudicator exceeded his jurisdiction by prohibiting appellant from answering a request for information about respondent other than by sending the letter of recommendation. Though the order is also meant to remedy or counteract the consequences of the dismissal, its effect, by prohibiting appellant from adding any comments whatever, is to create circumstances in which the letter could be seen as the expression of appellant's opinions. This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada. Parliament therefore cannot have intended to authorize such an unreasonable use of the discretion conferred by it. The adjudicator lost this jurisdiction when he made a patently unreasonable order.

The first order limits appellant's freedom of expression but this limitation, which is prescribed by law -- the order made by the adjudicator is only an exercise of the discretion conferred on him by statute -- can be justified under s. 1 of the *Charter*. The purpose of the order is clearly, as required by the Code, to counteract the consequences of the unjust dismissal. Such an objective is sufficiently important to warrant a limitation on freedom of expression. It is essential for the legislator to provide mechanisms to restore equilibrium in employer/employee relations so the employee will not be subject to arbitrary action by the employer. Additionally, the means chosen to attain the objective are reasonable in the circumstances. The order is fair and was carefully designed. The purpose of the letter of recommendation is to correct the false impression given by the fact of the dismissal and it contains only facts that are not in dispute. It is rationally connected to the dismissal since in certain cases it is the only way of effectively remedying the consequences of the dismissal. Finally, the consequences of the order are proportional to the objective sought. The latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance.

Per Beetz J. (dissenting): Except for the attestation relating to the unjust dismissal, the first order violated the appellant's freedoms of opinion and of expression and could not be justified under s. 1 of the *Charter*. This order forced the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In short, the order may force the appellant to lie. To order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them constitutes a *prima facie* violation of the freedoms of opinion and expression. Such a violation was totalitarian in nature and could never be justified under s. 1 of the *Charter*.

The second order, coupled with the first, also violated the former employer's freedoms of opinion and of expression in a manner which was not justified under s. 1 of the *Charter*. The sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer had no further comment to make upon the performance of the respondent and that, accordingly, the letter reflected the opinion of the former employer. In any event, the second order was disproportionate and unreasonable. One should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Further, in cases of unjust dismissal, the issuance by an adjudicator of a blanket and perpetual prohibition against a former employer to write or say anything to a prospective employer but what the adjudicator has dictated in the letter of recommendation can lead to absurd and even counter-productive results. The adjudicator cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal. If it is disproportionate and unreasonable from a practical point of view, then it has to be unreasonable from an administrative law point of view and it is difficult to conceive how it could be reasonable within the meaning of s. 1 of the *Charter*.

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By Dickson C.J.

Distinguished: *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269; **referred to**: *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713; *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313.

By Lamer J. (dissenting in part)

National Bank of Canada v. Retail Clerks' International Union, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269; *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

By Beetz J. (dissenting)

National Bank of Canada v. Retail Clerks' International Union, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269; *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66; *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100.

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Canada Labour Code, R.S.C. 1970, c. L-1, s. 61.5(6) [ad. 1977-78, c. 27, s. 21], 61.5(9)(*a*), (*b*), (*c*) [*idem*].

Canadian Charter of Rights and Freedoms, ss. 1, 2(*b*).

Federal Court Act, R.S.C. 1970 (2nd Supp.), c. 10, s. 52(*d*).

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APPEAL from a judgment of the Federal Court of Appeal, [1985] 1 F.C. 253, 58 N.R. 150, 85 C.L.L.C. {PP} 14,053, dismissing appellant's application pursuant to s. 28 of the *Federal Court Act* to set aside an order made by an adjudicator under s. 61.5(9)(*c*) of the *Canada Labour Code*. Appeal dismissed, Beetz J. dissenting and Lamer J. dissenting in part.

Brian A. Grosman, *Q.C.*, and *John Martin*, for the appellant.

Morris Cooper and *Fern Weinper*, for the respondent.

//*The Chief Justice*//

The judgment of Dickson C.J. and Wilson, La Forest and L'Heureux-Dubé JJ. was delivered by

THE CHIEF JUSTICE --

I

The respondent, Mr. Ron Davidson, a radio time salesman, was dismissed by his employer, the appellant, Slaight Communications Incorporated, operating as Q107 FM Radio. A complaint was filed by Mr. Davidson under the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21, and an inquiry undertaken. As the matter could not be resolved or settled, Mr. Edward B. Joliffe, Q.C., was appointed by the Minister of Labour to act as adjudicator and to render a decision in accordance with the provisions of subss. (6) to (9) of s. 61.5, Division V.7, Part III of the *Canada Labour Code*. Two days of hearings were held in Toronto. Twelve days later, Mr. Joliffe received a letter, written on behalf of the employer, requesting Mr. Joliffe to consider reopening the adjudication because, the letter read in part, ". . . our client has advised us that it is in possession of certain material which may indicate that Mr. Davidson perjured his testimony before you in one or more respects." Mr. Joliffe demanded particulars of this very serious allegation. The company's counsel failed to comply. The application for another hearing was dismissed.

Adjudicator Joliffe reviewed at length the evidence of Ms. Stitt. Ms. Stitt was the sole witness on behalf of the employer and at the relevant time she was general sales manager of the company, though later dismissed. The adjudicator noted:

> In Ms. Stitt's letter to Labour Canada of February 27, 1984 . . . she specified that the "major complaint" was Mr. Davidson's failure to achieve "monthly sales budgets since October of 1983." To select four months (or less) from a total of 43 months of service as evidence of unsatisfactory service is obviously specious.

Later in his ruling the adjudicator stated:

> From first to last Ms. Stitt's attitude faithfully reflected the advice she attributes to Mr. Gary Slaight: "If he failed to make budget, I'd hear about it. If he made it, the complaint would be that he could do more." By this perverse logic it appears that the more Mr. Davidson sold, the more unacceptable his performance. Such absurd statements led this adjudicator to suggest disclosure of "the real reason for dismissal," but there was no response.

He concluded:

> An attempt has been made in this case to prove unsatisfactory performance as just cause for dismissal. The attempt has failed. I find that Mr. Davidson was dismissed without just cause.

Mr. Joliffe then turned his attention to the question of an appropriate remedy, quoting subs. (9) of s. 61.5 as follows:

> **61.5.** . . .
>
> (9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(*b*) reinstate the person in his employ; and

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

He ordered payment of $46,628.96 plus interest and legal costs of $2,500. He made a further order, which is central to this appeal, reading:

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;

(2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;

(3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;

(4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

An appeal by the employer to the Federal Court of Appeal was dismissed (Urie and Mahoney JJ., Marceau J. dissenting): [1985] 1 F.C. 253.

The question to be decided by this Court is whether para. (*c*) of s. 61.5(9) of the *Canada Labour Code* authorizes the adjudicator to order the employer to give the employee a letter of reference of specified content and to order the employer to say nothing further about the employee. Paragraph (*c*), it will be recalled, reads:

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.	(*c*) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

Resolution of the problem involves (1) the construction and the true meaning and effect of para. (*c*), (2) whether the adjudicator's order in this case infringed freedom of expression under s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, and (3) if so, whether the infringement is justified under s. 1 of the *Charter*.

Two constitutional questions were stated in this appeal as follows:

1. Do the provisions of the adjudicator's order, pursuant to s. 61.5(9) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended, whereby the appellant was ordered to provide the respondent with a letter of recommendation of specified content combined with the further stipulation that any communication to the appellant relating to the respondent's employment with the appellant be answered exclusively by sending or delivering a copy of the letter of recommendation, infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*?

2.If the provisions of the adjudicator's order infringe or deny the rights and freedoms guaranteed by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, are they justified by s. 1 of the *Charter* and therefore not inconsistent with the *Constitution Act, 1982*?

II

The Relationship Between Administrative Law Review and Review Under the *Charter*

I have had the benefit of reading the opinion of Justice Lamer and I am in complete agreement with his discussion of the applicability of the *Charter* to administrative decision-making. I also agree with his conclusion that the positive order made by adjudicator Joliffe (to draw up and to give the respondent a specified letter of reference) infringes s. 2(*b*) of the *Charter* but is saved by s. 1. However, with regard to the negative order (that any inquiry about the respondent's employment at Q107 be answered exclusively by the letter of reference which is the subject of the positive order), I must respectfully disagree with the conclusion of Lamer J. that it is patently unreasonable, thereby obviating the need to consider the *Charter*. Furthermore, not only am I of the view that the negative order is reasonable in the administrative law sense but I also believe that it is reasonable and demonstrably justified in the sense of s. 1 of the *Charter*.

I agree with Mahoney J. of the Federal Court of Appeal, at pp. 260-61, that:

> The ordering of provision of a totally factual letter of recommendation and foreclosing the undermining of its effect which, in the circumstances disclosed by the evidence, was patently foreseeable, seems to me to be an equitable remedial requirement. It is not punitive. It is appropriate redress to the wronged employee without, in any way, injuring the employer. In my view, the order was authorized by paragraph 61.5(9)(*c*).

The 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. A few comments nonetheless may be in order. A minimal proposition would seem to be that administrative law unreasonableness, as a preliminary standard of review, should not impose a more onerous standard upon government than would *Charter* review. While patent unreasonableness is important to maintain for questions untouched by the *Charter*, such as review of determinations of fact (see *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476, at pp. 494-95), in the realm of value inquiry the courts should have recourse to this standard only in the clearest of cases in which a decision could not be justified under s. 1 of the *Charter*. In contrast to s. 1, patent unreasonableness rests to a large extent on unarticulated and undeveloped values and lacks the same degree of structure and sophistication of analysis. It seems to me that had Lamer J. gone on to conduct a s. 1 inquiry, his excellent analysis of the contending values in the context of the positive order would have been equally applicable to the negative order which he has instead found to be patently unreasonable.

I agree with Lamer J. that the order in this case is considerably different from that at issue in *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269, and, therefore, the determination by Beetz J. that the letter in question in *National Bank* was patently unreasonable is not applicable to the facts of this case. The focus of condemnation in *National Bank* was on the "compelling [of] anyone to utter opinions that [were] not his own" (*per* Beetz J., at p. 296) which was exacerbated by the wide publication of the letter -- to all employees and management staff of the bank. That is not this case. As the adjudicator noted here, there was no real conflict of evidence about the accounts and reports.

III

The Negative Order and Section 2(*b*) of the *Charter*

Adjudicator Joliffe's order that Slaight Communications Inc. answer any reference inquiry exclusively by sending the specified letter is an infringement of s. 2(*b*) freedom of expression. The government is attempting to prevent Q107 from expressing its opinion as to the qualifications of Mr. Davidson beyond the facts set out in the letter. The harm that it was aiming to prevent, decreased job prospects for Mr. Davidson, is only relevant to s. 1 analysis and not to s. 2(*b*) analysis.

IV

Section 1 of the *Charter*

The basic test for s. 1 analysis formulated in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 138-39, has been reviewed in the reasons of Lamer J. and need not be reproduced here.

1. *Importance of the Objective*

I am in firm agreement with the conclusions of Lamer J. about the importance of the objective sought to be achieved by the positive order, namely, counteracting the effects of the unjust dismissal by enhancing the ability of the employee to seek new employment without being lied about by the previous employer. This is also the objective of the negative order which, in the words of Mahoney J. in the Federal Court of Appeal, at p. 260, was designed to "forclos[e] the undermining of [the] effect" of the positive order. Both orders seek to achieve the same goal, the negative order complementing and reinforcing the positive order.

It cannot be overemphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee. Thus, in a general sense, this case falls within a class of cases in which the governmental objective is that of protection of a particularly vulnerable group, or members thereof. In *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, I stated for the majority at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons. When the interests of more than seven vulnerable employees in securing a Sunday holiday are weighed against the interests of their employer in transacting business on a Sunday, I cannot fault the Legislature for determining that the protection of the employees ought to prevail.

Consistent with the above view of the place of the *Charter*, I can think of no better way to describe the employment relationship than as expressed in Davies and Freedland, *Kahn-Freund's Labour and the Law* (3rd ed. 1983), at p. 18:

> [T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination . . . The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation -- legislation on the employment of women, children and young persons, on safety in mines, factories, and offices, on payment of wages in cash, on guarantee payments, on race or sex discrimination, on unfair dismissal, and indeed most labour legislation altogether -- must be seen in this context. It is an attempt to infuse law into a relation of command and subordination.

The objective of both the positive and negative orders made by adjudicator Joliffe is sensitive to the reality identified by Kahn-Freund, Davies and Freedland. The courts must be just as concerned to avoid constitutionalizing inequalities of power in the workplace and between societal actors in general. It must be recalled that *Oakes*, *supra*, at p. 136, stated that "[t]he underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified." As long as the proportionality test is met, it would not, on the facts of this case, be in accordance with those underlying principles and values for the *Charter* to be successfully invoked by an employer. The inequality in one employment relationship would be continued even after its termination with the result that the worker looking for a new job would be placed in an even more unequal bargaining position *vis-à-vis* prospective employers than is normally the case. On the facts of this case, constitutionally protecting freedom of expression would be tantamount to condoning the continuation of an abuse of an already unequal relationship.

2. *Proportionality*

(a) Rational Connection

The negative order is very much rationally linked to the objective, no less than the positive order. The adjudicator was plainly of the view that the respondent had been the subject of some kind of personal vendetta or "set-up", as Mahoney J. termed it, *supra*, at p. 258, which had been initiated by the employer's general manager and executed by its sales manager, the latter of whom was Mr. Davidson's immediate superior.

As I have indicated, the representative of the employer was found to have engaged in bad faith and duplicitous conduct, giving misleading evidence about the Mr. Davidson's work performance both at the time of his dismissal and during the unjust dismissal hearing. Further, in deciding that reinstatement was not a viable remedy, the adjudicator gave as his reason that "[t]here is no sign that he would receive fair treatment by an employer which has made such vigorous efforts to justify the indefensible". With this proven history of promoting a fabricated version of the quality of Mr. Davidson's service and the concern that the employer would continue to treat him unfairly if he went back to work for the employer, it was rational for the adjudicator to attach a rider to the order for a reference letter so as to ensure that representatives of the employer did not subvert the effect of the letter by unjustifiably maligning its previous employee in the guise of giving a reference.

(b) Minimal Impairment

In my view, there was no less intrusive measure that the adjudicator could have taken and still have achieved the objective with any likelihood. To the extent there was a likelihood that representatives of Q107 would not be content to pass on the letter of reference absent the kind of untrue comments that had resulted in the finding of unjust dismissal, the letter of reference would have been rendered illusory to the same degree of likelihood.

While an order of additional monetary compensation would clearly be less intrusive upon the appellant's freedom of expression, it would not be an acceptable substitute. Even if the adjudicator had ordered that the Mr. Davidson could come back once he had secured a job and be granted compensation, above and beyond unemployment insurance, for the actual period out of work, this would only be compensation for the economic effects of lack of employment not the personal effects. This is directly contrary to the objective sought to be achieved by the order, which is securing new employment in the shortest order possible; the corollary of this objective is, of course, a concern to alleviate the personal problems associated with being out of work. As Professor Beatty puts it in "Labour is not a Commodity" in Reiter and Swan, eds., *Studies in Contract Law* (1980), at pp. 323-24:

> The personal meaning of work is seen to go beyond rather than to be completely dependent upon the purposes of production . . . [R]eflecting the characterization of humans as, for the most part, doers and makers, the identity aspect of employment is increasingly seen to serve deep psychological needs . . . It recognizes the importance of providing the members of society with an opportunity to realize some sense of identity and meaning, some sense of worth in the community beyond that which can be taken from the material product of the institution . . . [E]mployment is seen as providing recognition of the individual's being engaged in something worthwhile . . . [E]mployment 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. With such an emphasis on contributing to society one avoids the demoralization that inevitably attends idleness and exile, even when it is assuaged by social assistance.

Monetary compensation can only be an alternative measure if labour is treated as a commodity and every day without work seen as being exhaustively reducible to some pecuniary value. As I had occasion to say in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, at p. 368, "[a] person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being." Viewing labour as a commodity is incompatible with such a perspective, which is reflected in the remedial objective chosen by the adjudicator. To posit monetary compensation as a less intrusive measure is, in effect, to challenge the legitimacy of the objective.

Consider the facts of this particular case. The letter was tightly and carefully designed to reflect only a very narrow range of facts which, we saw, were not really contested. As already discussed, unlike in *National Bank*, *supra*, the employer has not been forced to state opinions ("views and sentiments", *per* Beetz J., at p. 295) which are not its own. Rather, the negative order seeks to prevent the employer from passing on an opinion, such prohibition being closely tied to the history of abuse of power which had been found to exist. Furthermore, that prohibition is very circumscribed. Firstly, it is triggered only in cases when the appellant is contacted for a reference and, secondly, there is no requirement to send the letter to anyone other then prospective employers. In sum, this is a much less intrusive and carefully designed order than that in *National Bank* in which the bank was required to send to a very large

audience (all the employees and management staff of the bank) what amounted to a letter of contrition which conveyed the impression that certain opinions expressed therein were those of the employer.

Finally, it cannot be ignored that a letter such as this may not have a great beneficial impact on an employee's job hunt. The letter is very neutral in tone, totally unembellished as it is by any opinion customary in letters of reference, and it refers to the fact of the finding of unjust dismissal. It seems to me that the adjudicator went no further than was necessary to achieve the objective and, even then, the measures adopted by the adjudicator cannot be said to have done more than to have enhanced, as opposed to having ensured, the chances of the respondent finding a job. The adjudicator did not in any sense pursue the objective without regard to the appellant's right to free expression.

(c) Deleterious Effects

It is clear to me that the effects of the measures are not so deleterious as to outweigh the objective of the measures. The importance of the above-discussed objective cannot be overemphasized. There are many diverse values that deserve protection in a free and democratic society such as that of Canada, only some of which are expressly provided for in the *Charter*. The underlying values of a free and democratic society both guarantee the rights in the *Charter* and, in appropriate circumstances, justify limitations upon those rights. As was said in *Oakes*, *supra*, at p. 136, among the underlying values essential to our free and democratic society are "the inherent dignity of the human person" and "commitment to social justice and equality". Especially in light of Canada's ratification of the *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 commitment therein to protect, *inter alia*, the right to work in its various dimensions found in Article 6 of that treaty, it cannot be doubted that the objective in this case is a very important one. In *Reference Re Public Service Employee Relations Act (Alta.)*, *supra*, I had occasion to say at p. 349:

> 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.

Given the dual function of s. 1 identified in *Oakes*, Canada's international human rights obligations should inform not only the interpretation of the content of the rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial s. 1 objectives which may justify restrictions upon those rights. Furthermore, for purposes of this stage of the proportionality inquiry, the fact that a value has the status of an international human right, either in customary international law or under a treaty to which Canada is a State Party, should generally be indicative of a high degree of importance attached to that objective. This is consistent with the importance that this Court has placed on the protection of employees as a vulnerable group in society.

In normal course, the suppression of one's right to express an opinion about a subject or person will be a serious infringement of s. 2(*b*) and only outweighed by very important objectives. In the foregoing analysis, I have sought to show that the negative order was minimally intrusive in a relative sense and also that the careful tailoring of both parts of the order has made this a much less serious infringement of s. 2(*b*) than, for instance, occurred in the *National Bank* case.

V

Conclusion

In conclusion, I am of the opinion that both of the adjudicator's orders at issue (the positive order and the negative order) infringe s. 2(*b*) but are saved by s. 1. I would answer both constitutional questions in the affirmative and dismiss the appeal with costs.

The following are the reasons delivered by

//*Beetz J.*//

BEETZ J. (dissenting) --

I - Introduction

I have had the advantage of reading the reasons for judgment written by Justice Lamer and then the reasons for judgment written by the Chief Justice. I refer to their statements of the facts, proceedings and constitutional questions as well as to their summary of the decisions rendered by the adjudicator and the Federal Court of Appeal.

Like the Chief Justice, I am in agreement with Lamer J.'s discussion of the applicability of the *Charter* to administrative decision-making. I also agree with Lamer J.'s construction of s. 61.5(9)(*c*) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, as amended by S.C. 1977-78, c. 27, s. 21.

However, I have the misfortune of not being able to concur with one of the two main conclusions reached by both my colleagues, and while I agree with the other main conclusion reached by Lamer J., I do so for reasons which differ in part from his own reasons.

The two impugned orders issued by the adjudicator in the case at bar read as follows:

> Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:
>
> That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:
>
> (1) Mr. Ron Davidson was employed by Station Q107 from June, 1980, to January 20, 1984, as a radio time salesman;
>
> (2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;
>
> (3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;
>
> (4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;
>
> (5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.
>
> I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

The first order, which has been labeled the positive order, relates to a letter of recommendation comprising five attestations numbered (1) to (5).

The second order, which has been labeled the negative order, forbids the appellant to answer any inquiry about the respondent's employment at Q107 otherwise than by the letter of recommendation dictated by the adjudicator in the first order.

The main issues are whether these two orders infringe or deny the freedoms guaranteed to the appellant by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* and, if so, whether they are justified by s. 1 of the *Charter*.

Sections 1 and 2(*b*) of the *Charter* provide:

> **1.** The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
>
> **2.** Everyone has the following fundamental freedoms:
>
> . . .
>
> (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

I state my conclusions at the outset. In my view, the first order, that is the positive one, except attestation number (5) thereof, as well as the second order, that is the negative one in its entirety, violate the appellant's freedom of opinion

and expression and cannot be justified under s. 1 of the *Charter*.

I hasten to add that the flaw which I find in the first order can easily be corrected. As for the second order, it can be replaced by another order which tends toward the same end without violating the *Charter*.

II - The First Order

The flaw which I find in the first order, with particular reference to its attestations numbered (1) to (4), is that this order forces the employer to write, as if they were his own, statements of facts in which, rightly or wrongly, he may not believe, or which he may ultimately find or think to be inaccurate, misleading or false. In other words, the first order may force the former employer to tell a lie. In this particular respect, this case cannot in my opinion be distinguished from the case of *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269, where a majority of this Court held as follows at p. 296:

> Remedies Nos. 5 and 6 thus force the Bank and its president to do something, and to write a letter, which may be misleading or untrue.
>
> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes. I cannot be persuaded that the Parliament of Canada intended to confer on the Canada Labour Relations Board the power to impose such extreme measures, even assuming that it could confer such a power bearing in mind the *Canadian Charter of Rights and Freedoms*, which guarantees freedom of thought, belief, opinion and expression. These freedoms guarantee to every person the right to express the opinions he may have: *a fortiori* they must prohibit compelling anyone to utter opinions that are not his own.

It was argued that the case at bar is different in that the letter of recommendation in question is totally factual and that the facts stated therein and found by the adjudicator were undisputed. In the Federal Court of Appeal, [1985] 1 F.C. 253, Mahoney J. accepted this argument. He wrote at p. 260:

> I am, of course, aware of the decision in *National Bank of Canada v. Retail Clerks' International Union et al.*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269. The letter ordered in that case required the employer to express, or at least imply, opinions which it did not necessarily hold. Here, the applicant has simply been ordered to tell the truth. The letter sets out bald facts that are neither misleading nor disputed. [Emphasis added.]

With the greatest of respect, in so accepting the argument, Mahoney J. missed the point altogether and begged the essential question: what is the truth? The facts found to be true by the adjudicator are binding for the purpose of establishing whether or not there had been an unjust dismissal. But the former employer cannot be forced to acknowledge and state them as the truth apart from his belief in their veracity. If he states these facts in the letter, as ordered, but does not believe them to be true, he does not tell the truth, he tells a lie. He may not have disputed these facts at the time of the hearing but he could change his mind later, for instance on the basis of evidence discovered after the adjudicator's decision was rendered.

There may be a distinction, somewhat difficult to apply, between being forced to express opinions or views which one does not necessarily entertain, and being compelled to state facts, the veracity of which one does not necessarily believe; but, in my opinion, both types of coercion constitute gross violations of the freedoms of opinion and expression or, at the very least, of the freedom of expression. That is why, with respect, I cannot possibly agree with the suggestion that the restriction to freedom of expression which results from the first order is not very serious or very grave. The superficial innocuousness of the first order should not blind us to the nature of this order and to the positive manner in which it violates the freedom of expression. It is one thing to prohibit the disclosure of certain facts. It is quite another to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them. The prohibition constitutes a *prima facie* violation of the freedoms of opinion and expression but such a prohibition may, in some circumstances, be justified under s. 1 of the *Charter*. On the other hand, to order the affirmation of facts, apart from belief in their veracity by the person who is ordered to affirm them, constitutes a much more serious violation of the freedoms of opinion and expression, as was held in the case of the *National Bank of Canada*, *supra*. In my view, such a violation is totalitarian in nature and can never be justified under s. 1 of the *Charter*. It does not differ, essentially, from the command given to Galileo by the Inquisition to abjure the cosmology of Copernicus. As was stated in the unanimous reasons of this Court in *Attorney General of Quebec v. Quebec*

Association of Protestant School Boards, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, s. 1 of the *Charter* cannot be used to justify a complete negation of a constitutionally protected right or freedom, at p. 88:

> The provisions of s. 73 of *Bill 101* collide directly with those of s. 23 of the *Charter*, and are not limits which can be legitimized by s. 1 of the *Charter*. Such limits cannot be exceptions to the rights and freedoms guaranteed by the *Charter* nor amount to amendments to the *Charter*. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(*a*) of the *Charter*, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. [Emphasis added.]

(See also the *Reference re Alberta Statutes*, 1938 CanLII 1 (SCC), [1938] S.C.R. 100, with respect to *The Accurate News and Information Act* of Alberta.)

In spite of its gravity however, and as indicated earlier, the flaw which I find in the first order can easily be corrected. It would suffice to add to the letter a sentence or sentences indicating that the attestations numbered (1) to (4) refer to facts as found by the adjudicator.

As for attestation number (5), it does not give rise to any difficulty in my view since it refers to a matter of record.

III - The Second Order

The second order is in the form of a prohibition to answer enquiries relating to the respondent's employment at Q107 otherwise than be the letter of recommendation described in the first order.

I agree with Lamer J. that the sending of the letter as drafted by the adjudicator, coupled with the prohibition to say or write anything else could lead to the implication that the former employer has no further comment to make upon the performance of the respondent and that, accordingly, the letter reflects the opinion of the former employer. This being the case, the second order, coupled with the first, also violates the former employer's freedoms of opinion and expression in a manner which, for the reasons given above, cannot be justified under s. 1 of the *Charter*.

The risks of such an implication might be reduced and perhaps eliminated should the first order be corrected as I suggested earlier. But I believe that we must decide the case on the basis of the orders as they now stand, and not as we would if they were corrected.

In any event, I find the second order disproportionate and unreasonable. I believe one should view with extreme suspicion an administrative order or even a judicial order which has the effect of preventing the litigants from commenting upon and even criticizing the rulings of the deciding board or court.

Adjudicators and boards who, in cases of unjust dismissal, order the sending of letters of recommendation by former employers face a dilemma. They cannot foresee all the possible types of exchanges which are susceptible to occur between former and prospective employers. They accordingly issue a blanket and perpetual prohibition to write or say anything but what they have dictated in the letter of recommendation. This can lead to absurd and even counter-productive results.

Thus, in the case at bar, if after having received the letter dictated by the adjudicator, a prospective employer were to address specific questions to the former employer, relating for instance to the respondent's health or drinking habits, the appellant would have to go on answering with sales statistics. This could not but compromise the respondent's chances for employment. Or if the former employer finally saw the light and, out of remorse, became inclined to write a letter considerably more complimentary and flattering than the one dictated by the adjudicator, he could not do so.

The absurdity which results from the adjudicator's second order is sufficient to warrant its reversal, in my view. It is disproportionate and unreasonable from a practical point of view. Then it has to be unreasonable from an administrative law point of view and I have difficulty in conceiving how it could be reasonable within the meaning of s. 1 of the *Charter*.

This being said, I agree that the adjudicator was legitimately concerned by the risk that the former employer undermine the effect of the letter of recommendation. While I believe that the prohibition he issued to foreclose that possibility is disproportionate and unreasonable, I think that other legitimate means might have been devised towards

the same end. The adjudicator could for instance have ordered the former employer to write in the letter that he had been instructed by the adjudicator to tell prospective employers that they would be well advised to read the adjudicator's decision. I do not believe that such a neutral order would be punitive, but it might alert prospective employers to the animosity displayed by the former employer towards the respondent.

IV - Conclusions

One last point before I reach my conclusions properly so-called.

I would not like it to be thought that I condone the highly reprehensible conduct of the appellant. But under the *Charter*, freedom of opinion and freedom of expression are guaranteed to "everyone", employers and employees alike, irrespective of their labour practices and of their bargaining power.

I would allow the appeal, set aside the judgment of the Federal Court of Appeal as well as the first and second order of the adjudicator quoted in these reasons for judgment, and refer the matter back to the adjudicator so that these orders be replaced by an order or orders compatible with these reasons.

I would give an affirmative answer to the first constitutional question and a negative answer to the second constitutional question.

I would not make any order as to costs.

//Lamer J.//

English version of the reasons delivered by

LAMER J. (dissenting in part) -- An adjudicator appointed by the Minister of Labour pursuant to s. 61.5(6) of the *Canada Labour Code*, R.S.C. 1970, c. L-1, made an order in favour of an employee based on s. 61.5(9) of the Code. The employer challenged the said order but its appeal was dismissed by the Federal Court of Appeal. With leave of this Court, the employer is now appealing here from this judgment of the Federal Court of Appeal. The outcome of this appeal involves determining whether, under s. 61.5(9) of the *Canada Labour Code*, as it read at the time of his decision, the adjudicator had the power to make the order at issue.

Facts

Respondent had been employed by appellant as a "radio time salesman" for three and a half years when he was dismissed on the ground that his performance was inadequate. It is not in dispute that when he was dismissed respondent received all monies to which he was entitled under his employment contract.

However, respondent filed a complaint with an inspector alleging that he had been unjustly dismissed. As the parties were unable to settle this complaint and respondent asked that it be referred to an adjudicator, the Minister of Labour appointed an adjudicator to hear and decide the matter in accordance with the Code.

After hearing the evidence and the submissions of the parties, the adjudicator made an order directing the employer to pay respondent as compensation the sum of $46,628.96 with interest at the rate of 12 per cent and to pay his counsel the sum of $2,500 to reimburse him for the legal costs incurred. The said order further imposed on the employer an obligation to give respondent a letter of recommendation certifying that he had been employed by Station Q107 from June 1980 to January 20, 1984, and that an adjudicator had found he was unjustly dismissed and indicating the sales quotas he had been set and the amount of sales he actually made during this period. It should be noted that the order made specifically indicates the amounts to be shown as sales quotas and as sales actually made. Finally, the order directed appellant to answer requests for information about respondent only by sending this letter of recommendation.

This order reads as follows:

> In the matter of compensation, I am satisfied that had he not been dismissed, the sales and commissions of the complainant would have at least equalled those of 1983. After taking into consideration the fact that he worked until January 20, 1984, and received certain commissions (at reduced levels) thereafter, my order is that he be paid forthwith the equivalent of 75 per cent of his 1983 earnings of $62,171.95, being the sum of $46,628.96.

I further order that interest be paid at the rate of 12 per cent per annum, divided by two, on the said amount from January 20 to November 20, 1984. Thereafter interest will be payable on any unpaid balance at the rate of 12 per cent per annum, which is not to be divided by two.

I say nothing of the U.I.C. payments received by the complainant, which is a matter to be resolved between the complainant and the Commission.

I further order payment of legal costs in the amount of $2,500.00 to the complainant's solicitor and counsel, Mr. Morris Cooper.

Further orders are necessary, resembling the order made by Adjudicator Adams in the *Roberts* case, but in greater detail.

Under the power given me by paragraph (c) in subsection (9) of Section 61.5, I further order:

That the employer give the complainant a letter of recommendation, with a copy to this adjudicator, certifying that:

(1) Mr. Ron Davidson was employed by Station Q107 from June, 1980 to January 20, 1984, as a radio time salesman;

(2) That his sales "budget" or quota for 1981 was $248,000 of which he achieved 97.3 per cent;

(3) That his sales "budget" or quota for 1982 was $343,500 of which he achieved 100.3 per cent;

(4) That his sales "budget" or quota for 1983 was $402,200 of which he achieved 114.2 per cent;

(5) That following termination in January, 1984, an adjudicator (appointed by the Minister of Labour) after hearing the evidence and representations of both parties, held that the termination had been an unjust dismissal.

I further order that any communication to Q107, its management or staff, whether received by letter, telephone or otherwise, from any person or company inquiring about Mr. Ron Davidson's employment at Q107, shall be answered exclusively by sending or delivering a copy of the said letter of recommendation.

Appellant is challenging in this Court only the parts of the order relating to (1) the sending of a letter of recommendation and (2) the prohibition on answering a request for information in any other way than by sending this letter.

Judgments of Lower Courts

Appellant challenged this order by filing an application with the Federal Court of Appeal to set it aside. However, the Federal Court of Appeal, made up of Urie and Mahoney JJ. with Marceau J. dissenting, dismissed this application to set aside: [1985] 1 F.C. 253.

In his reasons, Mahoney J. first said that the purpose of s. 61.5(9)(*c*) and the fact that it would be difficult or even impossible to find remedies similar to the remedies expressly authorized in paras. (*a*) and (*b*) meant that the presence of the word "like" in the English version of s. 61.5(9)(*c*) was not intended to restrict the powers conferred on the adjudicator. In his opinion, this paragraph simply expressed a kind of *ejusdem generis* rule which did not have the effect of limiting the scope of the powers conferred.

Ordering the employer to give respondent a letter of recommendation was in his opinion an equitable remedy designed to remedy the consequences of the dismissal, not to punish the employer. This letter, he thought, only stated objective facts that were not in dispute and so simply required the employer to tell the truth.

However, he agreed with appellant's argument that the part of the decision ordering the employer to issue a letter of recommendation imposed limitations on its freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. In his view, however, such a limitation was justified under s. 1 of that *Charter*. He stressed that the limitation on freedom of expression was prescribed by law, since it was the Act which authorized the adjudicator to make such an order.

Urie J., for his part, agreed with the reasons stated by his brother judge Mahoney. However, he indicated that he was not sure that the *ejusdem generis* rule applied in any way to the interpretation of s. 61.5(9)(*c*).

Finally, Marceau J. wrote his own reasons, which differ from the majority reasons in certain respects. First, he expressed agreement with Mahoney J. as to the way in which s. 61.5(9)(*c*) should be construed, but expressed some reservations regarding application of the *ejusdem generis* rule. He noted that the powers conferred on the adjudicator were already clearly limited by the fact that the orders he was empowered to make under para. (*c*) must be aimed at remedying or counteracting the consequences of the dismissal.

In his view the remedies ordered in the case at bar were of two types, positive and negative. The part of the order directing the employer to furnish respondent and any person seeking information about him with a letter of recommendation having a specified content was, in his opinion, an order that could be characterized as positive. It directed the employer to do something and sought to remedy the consequences of the dismissal found to be unjust: accordingly, it was authorized by s. 61.5(9)(*c*). The part of the order which also prohibited the employer from answering any request for information about respondent other than by issuing this letter might for its part be characterized as negative, since it prohibited the employer from doing something. Such an order, in his view, was not aimed at remedying the consequences of the dismissal and so was not authorized by the said paragraph.

He also considered that this part of the order infringed the freedom of thought, belief, opinion and expression guaranteed appellant by s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. He said he did not think it possible to say that the limitation was prescribed by law, since the extent of the limitation was not indicated by the legislation in question. He added, however, that in any case in his opinion these freedoms were not subject to reasonable limits that could be demonstrably justified in a free and democratic society. He therefore concluded that the application to set aside should be allowed and the matter referred back to the adjudicator concerned for him to determine what remedies it would be appropriate to impose in order to counteract the effects of the dismissal.

Legislation

The following legislation is relevant to this appeal:

Canada Labour Code

61.5. . . .

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

(*a*) pay the person compensation not exceeding the amount of money that is equivalent to the remuneration that would, but for the dismissal, have been paid by the employer to the person;

(*b*) reinstate the person in his employ; and

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal.

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:

(*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.

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Analysis

To begin with, appellant argued that the adjudicator had no power to make these parts of the order since the orders he is authorized to make under s. 61.5(9)(*c*) must be of the same kind as the orders expressly mentioned in s. 61.5(9)(*a*) and (*b*), in view of the word "like" that appears in the English version.

As can readily be seen, the English and French versions of s. 61.5(9)(*c*) are different. Section 61.5(9)(*c*) of the English version confers a general power on the adjudicator as follows:

61.5. . . .

(9) Where an adjudicator decides pursuant to subsection (8) that a person has been unjustly dismissed, he may, by order, require the employer who dismissed him to

. . .

(*c*) do any other like thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal. [Emphasis added.]

The French version, for its part, does not contain any word or expression equivalent to the word "like" used in the English version. The general power conferred on the adjudicator is conferred in the following language:

61.5. . . .

(9) Lorsque l'arbitre décide conformément au paragraphe (8) que le congédiement d'une personne a été injuste, il peut, par ordonnance, requérir l'employeur

. . .

c) de faire toute autre chose qu'il juge équitable d'ordonner afin de contrebalancer les effets du congédiement ou d'y remédier.

First of all, therefore, these two versions have to be reconciled if possible. To do this, an attempt must be made to get from the two versions of the provision the meaning common to them both and ascertain whether this appears to be consistent with the purpose and general scheme of the Code.

In the case at bar I consider, like the Federal Court of Appeal judges, that the presence of the word "like" in para. (*c*) of the English version was not intended to limit the powers conferred on the adjudicator by allowing him to make only orders similar to the orders expressly mentioned in paras. (*a*) and (*b*) of that subsection, and does not have that effect. Interpreting this provision in this way would mean applying the *ejusdem generis* rule. I think it is impossible to apply this rule in the case at bar since one of the conditions essential for its application has not been met. The specific terms (here the orders referred to in paras. (*a*) and (*b*)) which precede the general term (the power conferred on the adjudicator in para. (*c*) to make any order that is equitable) must have a common characteristic, a common genus. As Maxwell writes in *Maxwell on the Interpretation of Statutes* (12th ed. 1969), at p. 299:

Unless there is a genus or class or category, there is no room for any application of the *ejusdem generis* doctrine.

Professor Côté also notes this requirement when he writes in his work titled *The Interpretation of Legislation in Canada* (1984), at p. 245:

> As a third condition, the specific terms must have a significant common denominator to be considered within one given category. If this is lacking, *ejusdem generis* does not apply.

In the case at bar I do not see what characteristic could be described as common to a compensation order and a reinstatement order. The only "denominator" which seems to me common to these two orders in the context of s. 61.5(9) is the fact that these orders are both intended to remedy or counteract the consequences of the dismissal found by the adjudicator to be unjust. However, para. (*c*) expressly provides that an order made under that paragraph must be designed to remedy or counteract any consequence of the dismissal. This "common denominator" cannot therefore assist in the application of the *ejusdem generis* rule, since the legislator has already expressly provided that the orders the adjudicator is empowered to make must have this characteristic. Even if I were to admit that the English version should prevail over the French version, which I do not admit, I would still consider that this provision is ambiguous and that the most rational way of interpreting it is to say that the presence of the word "like" in this version does not have the effect of limiting the general power conferred on the adjudicator. This interpretation is in any case much more consistent with the general scheme of the Code, and in particular with the purpose of Division V.7, which is to give non-unionized employees a means of challenging a dismissal they feel to be unjust and at the same time to equip the adjudicator with the powers necessary to remedy the consequences of such a dismissal. Section 61.5 is clearly a remedial provision and must accordingly be given a broad interpretation. The consequence of interpreting para. (*c*) in the manner suggested by appellant would be to limit considerably the type of order the adjudicator could make. It would in fact be very difficult to find remedies like the remedies mentioned in paras. (*a*) and (*b*). The extent of the compensation that can be ordered has been carefully limited by the legislator and there is not really any similarity between reinstatement and any other measure. I believe that, on the contrary, by enacting s. 61.5(9)(*c*), the legislator intended to vest in the adjudicator powers that would be sufficiently wide and flexible for him to adequately perform the duties entrusted to him, in each of the cases that come before him. I therefore consider that the meaning to be given to both versions is what clearly appears on the face of the French version and that accordingly the type of order the adjudicator can make should not be limited to orders like those expressly authorized in paras. (*a*) and (*b*).

Appellant further argued that the adjudicator exceeded his jurisdiction since there is no connection between the order made in the case at bar, the dismissal and the consequences of that dismissal. I cannot entirely agree with him in this regard. The part of the order dealing with the sending of a letter of recommendation is, in my view, clearly meant to counteract the consequences of the dismissal found to be unjust by the adjudicator. This part of the order is designed to prevent the employer's decision to dismiss respondent from having negative consequences for the latter's chances of finding new employment. The letter of recommendation is intended to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust and by clearly setting out certain "objective" facts relating to respondent's performance. The situation is therefore very different from that which existed in *National Bank of Canada v. Retail Clerks' International Union*, 1984 CanLII 2 (SCC), [1984] 1 S.C.R. 269.

In that case the Canada Labour Relations Board had found that the National Bank of Canada, which had closed a unionized branch and incorporated it in a non-unionized branch, had taken its decision for anti-union reasons and had therefore infringed s. 184(1)(*a*) and (3)(*a*) of the *Canada Labour Code*. These provisions prohibit an employer, *inter alia*, from interfering with the formation or administration of a trade union and from suspending, transferring or laying off an employee on the ground that he is a member of a trade union. The Canada Labour Relations Board had therefore ordered the Bank to do a number of things. Among these were that it create a trust fund to further the objectives of the Code among all its employees and send the employees a letter telling them this fund had been created. The order specifically indicated what the wording of this letter should be and prohibited the employer from adding or deleting anything in its wording. Chouinard J., with whose reasons the other members of this Court concurred, said that in his opinion the part of the order prescribing the creation of a trust fund should be set aside since there was no relationship between this remedy and the alleged act and its consequences. He thought that the announcement of the creation of the fund was the key feature of the letter the employer was required to send, and concluded that this part of the order should suffer the same fate as that reserved for the part of the order dealing with the creation of the fund. Beetz J., for his part, added that in his opinion both the creation of the fund and the letter were open to the interpretation that they resulted from an initiative taken by the National Bank of Canada, reflecting the views of the Bank and in particular its approval of the *Canada Labour Code* and its objectives. He stated that in his opinion this part of the order was contrary to the democratic traditions of this country and so could not have been authorized by the Parliament of Canada.

In the case at bar the letter the employer is required to give respondent is of a different nature from the letter the National Bank of Canada was required to send in that case. It expresses no opinions and simply sets out facts which, as counsel for the appellant admitted at the hearing, and it is important to note this, are not in dispute. Ordering an employer to give a former employee a letter of recommendation containing only objective facts that are not in dispute does not seem to me to be as such unreasonable. Such an order may be completely justified in certain circumstances, and in the case at bar there is nothing to indicate that the adjudicator was pursuing an improper objective or acting in bad faith or in a discriminatory manner. As this order was not unreasonable, it is not the function of this Court to examine its appropriateness or to substitute its own opinion for that of the person making the order, unless of course the decision impinges on a right protected by the *Canadian Charter of Rights and Freedoms*.

Accordingly, I am not prepared to say at this stage that the nature of this part of the order is such that the adjudicator necessarily exceeded his jurisdiction in making it. Quite apart from the constitutional argument that this order infringes the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*, therefore, I consider that the adjudicator had the power to make this part of the order at issue here. The only limitation placed by s. 61.5(9) on the type of order the adjudicator can make is that any order must be designed to "remedy or counteract any consequence of the dismissal". In my view, this part of the order is clearly intended for that purpose.

However, I take a different view of the part of the order that prohibits the employer from answering a request for information about respondent other than by sending this letter of recommendation. Although this part of the order is probably meant to remedy or counteract the consequences of the dismissal, I believe that the issuing of this letter in such a context could be interpreted as meaning that appellant has no comments to make regarding the work done by respondent other than those mentioned in the letter. In such circumstances, it could thus be construed as expressing, at least by implication, appellant's opinion in this regard. Although requiring someone to write a letter is not unreasonable as such, the requirement becomes wholly unreasonable when the circumstances are such that the letter may be seen as reflecting their opinions when that is not necessarily the case. This part of the order does not prohibit the employer from stating facts found to be incorrect at the hearing, which might have been reasonable and justified: it prohibits the employer from making comments of any kind. In my view the effect of this part of the order, by thus prohibiting the employer from adding any comments whatever, is to create circumstances in which the letter of recommendation could be seen as the expression of appellant's opinions. As my brother Beetz J. so admirably phrased it in *National Bank of Canada*, *supra*, at p. 296:

> This type of penalty is totalitarian and as such alien to the tradition of free nations like Canada, even for the repression of the most serious crimes.

Parliament cannot have intended to authorize such an unreasonable use of the discretion conferred by it. A discretion is never absolute, regardless of the terms in which it is conferred. This is a long-established principle. H. W. R. Wade, in his text titled *Administrative Law* (4th ed. 1977), says the following at pp. 336-37:

> For more than three centuries it has been accepted that discretionary power conferred upon public authorities is not absolute, even within its apparent boundaries, but is subject to general legal limitations. These limitations are expressed in a variety of different ways, as by saying that discretion must be exercised reasonably and in good faith, that relevant considerations only must be taken into account, that there must be no malversation of any kind, or that the decision must not be arbitrary or capricious. [Emphasis added.]

This limitation on the exercise of administrative discretion has been clearly recognized in our law, by *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (SCC), [1979] 2 S.C.R. 227, and *Blanchard v. Control Data Canada Ltd.*, 1984 CanLII 27 (SCC), [1984] 2 S.C.R. 476, *inter alia*. Whether it is the interpretation of legislation that is unreasonable or the order made in my view matters no more than the question of whether the error is one of law or of fact. An administrative tribunal exercising discretion can never do so unreasonably. To reiterate what I said earlier in *Blanchard*, *supra*, at pp. 494-95:

> An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.
>
> Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable

> findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal.

In the case at bar I consider that the adjudicator was not authorized by s. 61.5(9)(*c*) to order the employer not to answer a request for information about respondent except by sending the letter of recommendation containing the aforementioned wording, since such an order is patently unreasonable. Though the adjudicator clearly had jurisdiction to make an order he felt to be equitable and proper, he lost this jurisdiction when he made a patently unreasonable decision.

Appellant further argued that s. 61.5(9)(*c*) did not empower the adjudicator to make such an order, since that paragraph does not clearly state that the adjudicator can use a remedy that differs from the remedies usually available under the ordinary rules of common law in such circumstances. The principle underlying this argument is that, in the absence of a clear provision to the contrary, the legislator should not be assumed to have intended to alter the pre-existing ordinary rules of common law. There is no need for me to rule on the merits of this principle, since I consider that in the case at bar, by enacting para. (*c*), the legislator clearly indicated his intent to confer wider powers on the adjudicator than those he usually has under the ordinary rules of common law in such circumstances.

It now remains to assess in light of the *Canadian Charter of Rights and Freedoms* the part of the order we have found to be not unreasonable in terms of the rules of administrative law. The fact that the part of the order relating to sending the letter of recommendation is not unreasonable from an administrative law standpoint does not mean that it is necessarily consistent with the *Charter*.

The fact that the *Charter* applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the *Charter* rights to be infringed. Accordingly, an adjudicator exercising delegated powers does not have the power to make an order that would result in an infringement of the *Charter*, and he exceeds his jurisdiction if he does so. This idea was very well expressed by Professor Hogg when he wrote in his text titled *Constitutional Law of Canada* (2nd ed. 1985), at p. 671:

> The reference in s. 32 to the "Parliament" and a "legislature" make clear that the Charter operates as a limitation on the powers of those legislative bodies. Any statute enacted by either Parliament or a Legislature which is inconsistent with the Charter will be outside the power of (ultra vires) the enacting body and will be invalid. It follows that any body exercising statutory authority, for example, the Governor in Council or Lieutenant Governor in Council, ministers, officials, municipalities, school boards, universities, administrative tribunals and police officers, is also bound by the Charter. Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the Charter, neither body can authorize action which would be in breach of the Charter. Thus, the limitations on statutory authority which are imposed by the Charter will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.

Section 61.5(9)(*c*) must therefore be interpreted as conferring on the adjudicator a power to require the employer to do any other thing that it is equitable to require the employer to do in order to remedy or counteract any consequence of the dismissal, provided however that such an order, if it limits a protected right or freedom, only does so within reasonable limits that can be demonstrably justified in a free and democratic society. It is only if the limitation on a right or freedom is not kept within reasonable and justifiable limits that one can speak of an infringement of the *Charter*. The *Charter* does not provide an absolute guarantee of the rights and freedoms mentioned in it. What it guarantees is the right to have such rights and freedoms subject only to such reasonable limits prescribed by law as can

be demonstrably justified in a free and democratic society. There is thus no reason not to ascribe to Parliament an intent to limit a right or freedom mentioned in the *Charter* or to allow a protected right or freedom to be limited when the language used by Parliament suggests this.

It would be useful, in my view, to describe the steps that must be taken to determine the validity of an order made by an administrative tribunal, which are as follows.

First, there are two important principles that must be borne in mind:

--an administrative tribunal may not exceed the jurisdiction it has by statute; and

--it must be presumed that legislation conferring an imprecise discretion does not confer the power to infringe the *Charter* unless that power is conferred expressly or by necessary implication.

The application of these two principles to the exercise of a discretion leads to one of the following two situations:

1. The disputed order was made pursuant to legislation which confers, either expressly or by necessary implication, the power to infringe a protected right.

   --It is then necessary to subject the legislation to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society.

2. The legislation pursuant to which the administrative tribunal made the disputed order confers an imprecise discretion and does not confer, either expressly or by necessary implication, the power to limit the rights guaranteed by the *Charter*.

   --It is then necessary to subject the order made to the test set out in s. 1 by ascertaining whether it constitutes a reasonable limit that can be demonstrably justified in a free and democratic society;

   --if it is not thus justified, the administrative tribunal has necessarily exceeded its jurisdiction;

   --if it is thus justified, on the other hand, then the administrative tribunal has acted within its jurisdiction.

There is no doubt in the case at bar that the part of the order dealing with the issuing of a letter of recommendation places, in my opinion, a limitation on freedom of expression. There is no denying that freedom of expression necessarily entails the right to say nothing or the right not to say certain things. Silence is in itself a form of expression which in some circumstances can express something more clearly than words could do. The order directing appellant to give respondent a letter containing certain objective facts in my opinion unquestionably limits appellant's freedom of expression.

However, this limitation is prescribed by law and can therefore be justified under s. 1. The adjudicator derives all his powers from statute and can only do what he is allowed by statute to do. It is the legislative provision conferring discretion which limits the right or freedom, since it is what authorizes the holder of such discretion to make an order the effect of which is to place limits on the rights and freedoms mentioned in the *Charter*. The order made by the adjudicator is only an exercise of the discretion conferred on him by statute.

To determine whether this limitation is reasonable and can be demonstrably justified in a free and democratic society, therefore, one must examine whether the use made of the discretion has the effect of keeping the limitation within reasonable limits that can be demonstrably justified in a free and democratic society. If the answer is yes, we must conclude that the adjudicator had the power to make such an order since he was authorized to make an order reasonably and justifiably limiting a right or freedom mentioned in the *Charter*. If on the contrary the answer is no, then one has to conclude that the adjudicator exceeded his jurisdiction since Parliament has not delegated to him a power to infringe the *Charter*. If he has exceeded his jurisdiction, his decision is of no force or effect.

The test that must be applied in such an assessment has been largely defined by my brother Dickson C.J. in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. According to that test, the objective to be served by the disputed measures must first be sufficiently important to warrant limiting a right or freedom protected by the *Charter*. Second, the party seeking to maintain the limitation must show that the means selected to attain this objective are reasonable

and justifiable. To do this, it will be necessary to apply a form of proportionality test involving three separate components: the disputed measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. The means chosen must also be such as to impair the right or freedom as little as possible, and finally, its effects must be proportional to the objective sought.

I consider that the objective sought by the order made in the case at bar is sufficiently important to justify some limitation on freedom of expression. The purpose of the order is clearly, as required by the Code and as I indicated above, to counteract, or at least to remedy, the consequences of the dismissal found by the adjudicator to be unjust. In my opinion such an objective is sufficiently important to warrant a limitation on a right or freedom mentioned in the *Charter*. I think it is important for the legislator to provide certain mechanisms to restore equilibrium in the relations between an employer and his employee, so that the latter will not be subject to arbitrary action by the former. These observations should not be taken as meaning that in my view all employers necessarily try to abuse their position. However, it cannot be denied that some employees are in an especially vulnerable position in relation to their employers and that the forces involved are usually not equal. Accordingly, I think that mechanisms designed to remedy or counteract the consequences of an unlawful action taken by an employer are justified in such a context. It should also be noted that in these circumstances the limitation on rights or freedoms is not in fact made until after the act committed by the employer has been found by an adjudicator to be unlawful, and only in order to remedy the consequences of that act found to be unlawful.

An order directing the employer to give respondent a letter of recommendation containing objective facts also seems to me to be reasonable and justifiable in these circumstances. It has the three characteristics necessary to meet the proportionality test. As I mentioned earlier, the purpose of the letter of recommendation is to correct the impression given by the fact of the dismissal, by clearly indicating that the dismissal was found by an adjudicator to be unjust, and by clearly indicating certain "objective" facts that are not in dispute regarding the respondent's performance. A reinstatement order is not always desirable and a compensation order is not always adequate to remedy the consequences of an unjust dismissal. It is possible in some cases for a dismissal to have very negative consequences on the former employee's chances of finding new employment. It seems to me, therefore, that there will be times when such an order is the only means of attaining the objective sought, that of counteracting or remedying the consequences of the dismissal. It is certainly very rationally connected to the latter, since in certain cases it is the only way of effectively remedying the consequences of the dismissal. It is also limited to requiring that the employer state "objective" facts which, in the case at bar, are not in dispute and do not require the employer to express any opinion, since the part of the order regarding the prohibition on answering a request for information about respondent other than by issuing this letter has been found to be unreasonable, and accordingly outside the jurisdiction conferred on the adjudicator. The employer may thus, if this part found to be unreasonable is removed, indicate for example that he was directed to write the letter and that it therefore does not necessarily contain all his views about the work done by respondent. Taking these circumstances into account, I do not see any way of attaining this objective in the case at bar without impairing the employer's freedom of expression. Finally, I consider that the consequences of the order are proportional to the objective sought. As I have already said, the latter is important in our society. The limitation on freedom of expression is not what could be described as very serious. It does not abolish that freedom, but simply limits its exercise by requiring the employer to write something determined in advance. This limitation on freedom of expression mentioned in the *Charter* is thus in my opinion kept within reasonable limits that can be demonstrably justified in a free and democratic society. In making this part of the order, therefore, the adjudicator did not infringe the *Charter* and acted within his jurisdiction.

As this appeal is covered by s. 52(*d*) of the *Federal Court Act*, R.S.C. 1970 (2nd Supp.), c. 10, I would refer the matter back to the adjudicator in question for him to make an order consistent with this judgment.

Accordingly, I would allow the appeal at bar, reverse the judgment of the Federal Court of Appeal, invalidate the order made by the adjudicator and refer the matter back to him so he may make a new order consistent with the instant judgment; the whole with costs.

Appeal dismissed with costs, BEETZ J. *dissenting and* LAMER J. *dissenting in part.*

Solicitor for the appellant: Brian A. Grosman, Toronto.

Solicitor for the respondent: Morris Cooper, Toronto.

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*Le Dain J. took no part in the judgment.

7	*Chaoulli v. Quebec (Attorney General),* 2005 SCC 35, [2005] 1 SCR 791.

SUPREME COURT OF CANADA

CITATION: Chaoulli *v.* Quebec (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35

DATE: 20050609
DOCKET: 29272

BETWEEN:

Jacques Chaoulli and George Zeliotis
Appellants
v.
Attorney General of Quebec and Attorney General of Canada
Respondents
- and -
Attorney General of Ontario, Attorney General of New Brunswick, Attorney General for Saskatchewan, Augustin Roy, Senator Michael Kirby, Senator Marjory Lebreton, Senator Catherine Callbeck, Senator Joan Cook, Senator Jane Cordy, Senator Joyce Fairbairn, Senator Wilbert Keon, Senator Lucie Pépin, Senator Brenda Robertson and Senator Douglas Roche, Canadian Medical Association and Canadian Orthopaedic Association, Canadian Labour Congress, Charter Committee on Poverty Issues and Canadian Health Coalition, Cambie Surgeries Corp., False Creek Surgical Centre Inc., Delbrook Surgical Centre Inc., Okanagan Plastic Surgery Centre Inc., Specialty MRI Clinics Inc., Fraser Valley MRI Ltd., Image One MRI Clinic Inc., McCallum Surgical Centre Ltd., 4111044 Canada Inc., South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Associates Inc., Surgical Centres Inc., British Columbia Orthopaedic Association and British Columbia Anesthesiologists Society
Interveners

OFFICIAL ENGLISH TRANSLATION: Reasons of Deschamps J.

CORAM: McLachlin C.J. and Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Chaoulli *v.* Quebec (Attorney General), [2005] 1 S.C.R. 791, 2005 SCC 35

Jacques Chaoulli and George Zeliotis *Appellants*

v.

Attorney General of Quebec and Attorney General of Canada *Respondents*

and

Attorney General of Ontario, Attorney General of New Brunswick, Attorney General for Saskatchewan, Augustin Roy, Senator Michael Kirby, Senator Marjory Lebreton, Senator Catherine Callbeck, Senator Joan Cook, Senator Jane Cordy, Senator Joyce Fairbairn, Senator Wilbert Keon, Senator Lucie Pépin, Senator Brenda Robertson and Senator Douglas Roche, Canadian Medical Association and Canadian Orthopaedic Association, Canadian Labour Congress, Charter Committee on Poverty Issues and Canadian Health Coalition, Cambie Surgeries Corp., False Creek Surgical Centre Inc., Delbrook Surgical Centre Inc., Okanagan Plastic Surgery Centre Inc., Specialty MRI Clinics Inc., Fraser Valley MRI Ltd., Image One MRI Clinic Inc., McCallum Surgical Centre Ltd., 4111044 Canada Inc., South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Associates Inc., Surgical Centres Inc., British Columbia Orthopaedic Association and British Columbia Anesthesiologists Society *Interveners*

Indexed as: Chaoulli *v.* Quebec (Attorney General)

Neutral citation: 2005 SCC 35.

File No.: 29272.

2004: June 8; 2005: June 9.*

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

on appeal from the court of appeal for quebec

Human rights — Right to life and to personal inviolability — Waiting times in public health system — Provincial legislation prohibiting Quebec residents from taking out insurance to obtain in private sector health care services already available under Quebec's public health care plan — Prohibition depriving Quebec residents of access

to private health care services not coming with waiting times inherent in public system — Whether prohibition infringing rights to life and to personal inviolability guaranteed by s. 1 of Charter of Human Rights and Freedoms — If so, whether infringement can be justified under s. 9.1 of Charter — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, ss. 1, 9.1 — Health Insurance Act, R.S.Q., c. A-29, s. 15 — Hospital Insurance Act, R.S.Q., c. A-28, s. 11.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Waiting times in public health system — Provincial legislation prohibiting Quebec residents from taking out insurance to obtain in private sector health care services already available under Quebec's public health care plan — Prohibition depriving Quebec residents of access to private health care services not coming with waiting times inherent in public system — Whether prohibition constituting deprivation of rights to life, liberty and security of person guaranteed by s. 7 of Canadian Charter of Rights and Freedoms and, if so, whether deprivation in accordance with principles of fundamental justice — If there violation, whether it can be justified under s. 1 of Charter — Canadian Charter of Rights and Freedoms, ss. 1, 7 — Health Insurance Act, R.S.Q., c. A-29, s. 15 — Hospital Insurance Act, R.S.Q., c. A-28, s. 11.

Over the years, Z experienced a number of health problems that prompted him to speak out against waiting times in Quebec's public health care system. C is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. By means of a motion for a declaratory judgment, the appellants, Z and C, contested the validity of the prohibition on private health insurance provided for in s. 15 of the *Health Insurance Act* ("*HEIA*") and s. 11 of the *Hospital Insurance Act* ("*HOIA*"). They contended that the prohibition deprives them of access to health care services that do not come with the waiting times inherent in the public system. They claimed, *inter alia*, that s. 15 *HEIA* and s. 11 *HOIA* violate their rights under s. 7 of the *Canadian Charter of Rights and Freedoms* and s. 1 of the Quebec *Charter of Human Rights and Freedoms*. The Superior Court dismissed the motion for a declaratory judgment. In the court's view, even though the appellants had demonstrated a deprivation of the rights to life, liberty and security of the person guaranteed by s. 7 of the *Canadian Charter*, this deprivation was in accordance with the principles of fundamental justice. The Court of Appeal affirmed that decision.

Held (Binnie, LeBel and Fish JJ. dissenting): The appeal should be allowed. Section 15 *HEIA* and s. 11 *HOIA* are inconsistent with the *Quebec Charter*.

Per Deschamps J.: In the case of a challenge to a Quebec statute, it is appropriate to look first to the rules that apply specifically in Quebec before turning to the *Canadian Charter*, especially where the provisions of the two charters produce cumulative effects, but where the rules are not identical. Given the absence in s. 1 of the *Quebec Charter* of the reference to the principles of fundamental justice found in s. 7 of the *Canadian Charter*, the scope of the *Quebec Charter* is potentially broader than that of the *Canadian Charter*, and this characteristic should not be disregarded. What is more, it is clear that the protection of s. 1 of the *Quebec Charter* is not limited to situations involving the administration of justice. [26-33]

In the instant case, the trial judge's conclusion that s. 11 *HOIA* and s. 15 *HEIA* constitute a deprivation of the rights to life and security of the person protected by s. 7 of the *Canadian Charter* applies in full to the rights to life and to personal inviolability protected by s. 1 of the *Quebec Charter*. The evidence shows that, in the case of certain surgical procedures, the delays that are the necessary result of waiting lists increase the patient's risk of mortality or the risk that his or her injuries will become irreparable. The evidence also shows that many patients on non-urgent waiting lists are in pain and cannot fully enjoy any real quality of life. The right to life and to personal inviolability is therefore affected by the waiting times. [38-43]

The infringement of the rights protected by s. 1 is not justified under s. 9.1 of the *Quebec Charter*. The general objective of the *HOIA* and the *HEIA* is to promote health care of the highest possible quality for all Quebeckers regardless of their ability to pay. The purpose of the prohibition on private insurance in s. 11 *HOIA* and s. 15 *HEIA* is to preserve the integrity of the public health care system. Preservation of the public plan is a pressing and substantial objective, but there is no proportionality between the measure adopted to attain the objective and the objective itself. While an absolute prohibition on private insurance does have a rational connection with the objective of preserving the public plan, the Attorney General of Quebec has not demonstrated that this measure meets the minimal impairment test. It cannot be concluded from the evidence concerning the Quebec plan or the plans of the other provinces of Canada, or from the evolution of the systems of various OECD countries that an absolute prohibition on private insurance is necessary to protect the integrity of the public plan. There are a wide range of measures that are less drastic and also less intrusive in relation to the protected rights. [49-58] [68] [83-84]

This is not a case in which the Court must show deference to the government's choice of measure. The courts have a duty to rise above political debate. When, as in the case at bar, the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch. While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of a violation of Quebeckers' right to security. Inertia cannot be used as an argument to justify deference. [87-89] [97]

Per McLachlin C.J. and Major and Bastarache JJ.: The conclusion of Deschamps J. that the prohibition on private health insurance violates s. 1 of the *Quebec Charter* and is not justifiable under s. 9.1 is agreed with. The prohibition also violates s. 7 of the *Canadian Charter* and is not justifiable under s. 1. [102]

While the decision about the type of health care system Quebec should adopt falls to the legislature of that province, the resulting legislation, like all laws, must comply with the *Canadian Charter*. Here, it is common ground that the effect of the prohibition on private health insurance set out in s. 11 *HOIA* and s. 15 *HEIA* is to allow only the very rich, who can afford private health care without need of insurance, to secure private care in order to avoid any delays in the public system. Given the prohibition, most Quebeckers have no choice but to accept any delays in the public health regime and the consequences this entails. [104-111] [119]

The evidence in this case shows that delays in the public health care system are widespread, and that, in some serious cases, patients die as a result of waiting lists for public health care. The evidence also demonstrates that the prohibition against private health insurance and its consequence of denying people vital health care result in physical and psychological suffering that meets a threshold test of seriousness. [112] [123]

Where lack of timely health care can result in death, the s. 7 protection of life is engaged; where it can result in serious psychological and physical suffering, the s. 7 protection of security of the person is triggered. In this case, the government has prohibited private health insurance that would permit ordinary Quebeckers to access private health care while failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death. In so doing, it has interfered with the interests protected by s. 7 of the *Canadian Charter*. [123-124]

Section 11 *HOIA* and s. 15 *HEIA* are arbitrary, and the consequent deprivation of the interests protected by s. 7 is therefore not in accordance with the principles of fundamental justice. In order not to be arbitrary, a limit on life, liberty or security of the person requires not only a theoretical connection between the limit and the legislative goal, but a real connection on the facts. The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. Here, the evidence on the experience of other western democracies with public health care systems that permit access to private health care refutes the government's theory that a prohibition on private health insurance is connected to maintaining quality public health care. It does not appear that private participation leads to the eventual demise of public health care. [126-131] [139] [149-150]

The breach of s. 7 is not justified under s. 1 of the *Canadian Charter*. The government undeniably has an interest in protecting the public health regime but, given that the evidence falls short of demonstrating that the prohibition on private health insurance protects the public health care system, a rational connection between the prohibition on private health insurance and the legislative objective is not made out. In addition, on the evidence, the prohibition goes further than would be necessary to protect the public system and is thus not minimally impairing. Finally, the benefits of the prohibition do not outweigh its deleterious effects. The physical and psychological suffering and risk of death that may result from the prohibition on private health insurance outweigh whatever benefit — and none has been demonstrated here — there may be to the system as a whole. [154-157]

Per Binnie, LeBel and Fish JJ. (dissenting): The question in this appeal is whether the province of Quebec not only has the constitutional authority to establish a comprehensive single-tier health plan, but to discourage a second (private) tier health sector by prohibiting the purchase and sale of private health insurance. This issue has been the subject of protracted debate in Quebec and across Canada through several provincial and federal elections. The debate cannot be resolved as a matter of constitutional law by judges. [161]

Canadian Charter interests under s. 7 are enumerated as life, liberty and security of the person. The trial judge found that the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of some individuals on some occasions, of putting at risk their life or

security of the person. The courts can use s. 7 of the *Canadian Charter* to pre-empt the ongoing public debate only if the current health plan violates an established "principle of fundamental justice". That is not the case here. [164] [200]

The public policy objective of "health care of a reasonable standard within a reasonable time" is not a legal principle of fundamental justice. There is no "societal consensus" about what this non-legal standard means or how to achieve it. It will be very difficult for those designing and implementing a health plan to predict when judges will think its provisions cross the line from what is "reasonable" into the forbidden territory of what is "unreasonable". [209]

A deprivation of a right will be arbitrary, and will thus infringe s. 7, if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation. Quebec's legislative objective is to provide high-quality health care, at a reasonable cost, for as many people as possible in a manner that is consistent with principles of efficiency, equity and fiscal responsibility. An overbuilt health system is no more in the larger public interest than a system that on occasion falls short. [232-236]

The Quebec health plan shares the policy objectives of the *Canada Health Act*, and the means adopted by Quebec to implement these objectives are not arbitrary. In principle, Quebec wants a health system where access is governed by need rather than wealth or status. To accomplish this objective, Quebec seeks to discourage the growth of private sector delivery of "insured" services based on wealth and insurability. The prohibition is thus rationally connected to Quebec's objective and is not inconsistent with it. In practical terms, Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system. [237-240]

The view of the evidence taken by the trial judge supports that belief. She found that the expansion of private health care would undoubtedly have a negative impact on the public health system. The evidence indicates that a parallel private system will not reduce, and may worsen, the public waiting lists and will likely result in a decrease in government funding for the public system. In light of these findings, it cannot be said that the prohibition against private health insurance "bears no relation to, or is inconsistent with" the preservation of a health system predominantly based on need rather than wealth or status. Prohibition of private insurance is not "inconsistent" with the State interest; still less is it "unrelated" to it. People are free to dispute Quebec's strategy, but it cannot be said that the province's version of a single-tier health system, and the prohibition on private health insurance designed to protect that system, is a legislative choice that has been adopted "arbitrarily" by the Quebec National Assembly as that term has been understood to date in the *Canadian Charter* jurisprudence. [235-248] [256-258]

The limits on legislative action fixed by the *Quebec Charter* are no more favourable to the appellants' case than are those fixed by the *Canadian Charter*. Section 1 of the *Quebec Charter*, in essence, covers about the same ground as s. 7 of the *Canadian Charter*, but it does not mention the principles of fundamental justice. Here, the prohibition against private insurance is justifiable under s. 9.1 of the *Quebec Charter*, which requires rights to be exercised with "proper regard" to "democratic values, public order and the general well-being of the citizens of Québec". On the evidence, the exercise by the appellants of their claimed *Quebec Charter* rights to defeat the prohibition against private insurance would not have proper regard for "democratic values" or "public order", as the future of a publicly supported and financed single-tier health plan should be in the hands of elected representatives. Nor would it have proper regard for the "general well-being of the citizens of Québec", who are the designated beneficiaries of the health plan, and in particular for the well-being of the less advantaged Quebeckers. The evidence amply supports the validity of the prohibition of private insurance under the *Quebec Charter*: the objectives are compelling; a rational connection between the measure and the objective has been demonstrated, and the choice made by the National Assembly is within the range of options that are justifiable under s. 9.1. In respect of questions of social and economic policy, the minimal impairment test leaves a substantial margin of appreciation to the Quebec legislature. Designing, financing and operating the public health system of a modern democratic society remains a challenging task and calls for difficult choices. Shifting the design of the health system to the courts is not a wise outcome. [179] [271-276]

The safety valve (however imperfectly administered) of allowing Quebec residents to obtain essential health care outside the province when they are unable to receive the care in question at home in a timely manner is of importance. If, as the appellants claim, this safety valve is opened too sparingly, the courts are available to supervise enforcement of the rights of those patients who are directly affected by the decision on a case-by-case basis. [264]

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Written submissions only by *Gabriel Bourgeois*, *Q.C.*, for the intervener the Attorney General of New Brunswick.

Written submissions only by *Graeme G. Mitchell*, *Q.C.*, for the intervener the Attorney General for Saskatchewan.

Written submissions only by the intervener Augustin Roy.

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Written submissions only by *Steven Barrett*, *Steven Shrybman*, *Ethan Poskanzer* and *Vanessa Payne*, for the intervener the Canadian Labour Congress.

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Marvin R. V. Storrow, *Q.C.*, and *Peter W. Hogg*, *Q.C.*, for the interveners Cambie Surgeries Corp., False Creek Surgical Centre Inc., Delbrook Surgical Centre Inc., Okanagan Plastic Surgery Centre Inc., Specialty MRI Clinics Inc., Fraser Valley MRI Ltd., Image One MRI Clinic Inc., McCallum Surgical Centre Ltd., 4111044 Canada Inc., South Fraser Surgical Centre Inc., Victoria Surgery Ltd., Kamloops Surgery Centre Ltd., Valley Cosmetic Surgery Associates Inc., Surgical Centres Inc., the British Columbia Orthopaedic Association and the British Columbia Anesthesiologists Society.

English version of the reasons delivered by

1 DESCHAMPS J. — Quebeckers are prohibited from taking out insurance to obtain in the private sector services that are available under Quebec's public health care plan. Is this prohibition justified by the need to preserve the integrity of the plan?

2 As we enter the 21st century, health care is a constant concern. The public health care system, once a source of national pride, has become the subject of frequent and sometimes bitter criticism. This appeal does not question the appropriateness of the state making health care available to all Quebeckers. On the contrary, all the parties stated that they support this kind of role for the government. Only the state can make available to all Quebeckers the social safety net consisting of universal and accessible health care. The demand for health care is constantly increasing, and one of the tools used by governments to control this increase has been the management of waiting lists. The choice of waiting lists as a management tool falls within the authority of the state and not of the courts. The appellants do not claim to have a solution that will eliminate waiting lists. Rather, they submit that the delays resulting from waiting lists violate their rights under the *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), and the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"). They contest the validity of the prohibition in Quebec, as provided for in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29 ("*HEIA*"), and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 ("*HOIA*"), on private insurance for health care services that are available in the public system. The appellants contend that the prohibition deprives them of access to health care services that do not come with the wait they face in the public system.

3 The two sections in issue read as follows:

15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf.

. . .

11. (1) No one shall make or renew, or make a payment under a contract under which

(*a*) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;

(*b*) payment is conditional upon the hospitalization of a resident; or

(*c*) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

4 In essence, the question is whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state. For the reasons that follow, I find that the prohibition infringes the right to personal inviolability and that it is not justified by a proper regard for democratic values, public order and the general well-being of the citizens of Quebec.

5 The validity of the prohibition is contested by the appellants, George Zeliotis and Jacques Chaoulli. Over the years, Mr. Zeliotis has experienced a number of health problems and has used medical services that were available in the public system, including heart surgery and a number of operations on his hip. The difficulties he encountered prompted him to speak out against waiting times in the public health care system. Mr. Chaoulli is a physician who has tried unsuccessfully to have his home-delivered medical activities recognized and to obtain a licence to operate an independent private hospital. Mr. Zeliotis and Mr. Chaoulli joined forces to apply to the court by way of motion for a declaration that s. 15 *HEIA* and s. 11 *HOIA* are unconstitutional and invalid. Mr. Chaoulli argues, first, that the prohibition is within the federal government's legislative jurisdiction in relation to criminal law and, second, that the prohibition violates the rights to life and to personal security, inviolability and freedom protected by s. 1 of the *Quebec Charter* and ss. 7, 12 and 15 of the *Canadian Charter*. The respondents contested the motion both in the Superior Court and in the Court of Appeal.

6 The Superior Court dismissed the motion for a declaratory judgment: 2000 CanLII 17910 (QC CS), [2000] R.J.Q. 786. With respect to the province's power to enact s. 11 *HOIA* and s. 15 *HEIA*, Piché J. found that the purpose of the prohibition is to discourage the development of parallel private health care services and that it is not a criminal law matter.

7 On the subject of s. 7 of the *Canadian Charter*, she noted that according to this Court, its scope may include certain economic rights that are intimately connected with the right to life, liberty and security of the person. She found that the appellants had demonstrated a deprivation of the right to life, liberty and security of the person within the meaning of s. 7 of the *Canadian Charter*. Piché J. then considered whether this deprivation was in accordance with the principles of fundamental justice. She was of the opinion that the purpose of the *HOIA* and the *HEIA* is to establish a public health system that is available to all residents of Quebec. The purpose of s. 11 *HOIA* and s. 15 *HEIA* is to guarantee that virtually all of Quebec's existing health care resources will be available to all residents of Quebec. In her opinion, the enactment of these provisions was motivated by considerations of equality and human dignity. She found no conflict with the general values expressed in the *Canadian Charter* or in the *Quebec Charter*. She did find that waiting lists are long and the health care system must be improved and transformed. In her opinion, however, the expert testimony could not serve to establish with certainty that a parallel health care system would solve all the current problems of waiting times and access.

8 In light of her conclusion regarding s. 7 of the *Canadian Charter*, Piché J. did not address the question of justification pursuant to s. 1 of the *Canadian Charter*. However, she did express the opinion that the s. 1 analysis would show that the impugned provisions constitute a reasonable limit in a free and democratic society. Although the arguments based on the *Quebec Charter* were raised formally and expressly argued, and although this ground was mentioned at the start of the judgment, Piché J. did not address them in her analysis.

9 With respect to s. 12 of the *Canadian Charter*, Piché J. found that the state's role with regard to the prohibitions is not sufficiently active for the prohibitions to be considered a "treatment" within the meaning of the *Canadian Charter*.

10 The argument based on s. 15 of the *Canadian Charter* relates to place of residence. The prohibition does not apply to non-residents but does apply to residents. Piché J. found that in the circumstances of this case, place of residence is not used to devalue certain individuals or to perpetuate stereotypes. She found that the guarantee of protection against discrimination had not been violated.

11 The Court of Appeal dismissed the appeal: 2002 CanLII 33075 (QC CA), [2002] R.J.Q. 1205. The three judges wrote separate reasons. Delisle J.A. considered all the arguments addressed by the Superior Court. He disagreed with Piché J. regarding s. 7 of the *Canadian Charter*. According to Delisle J.A., the right affected by s. 11 *HOIA* and s. 15 *HEIA* is an economic right and is not fundamental to an individual's life. In addition, in his opinion, the appellants had not demonstrated a real, imminent or foreseeable deprivation. He was also of the view that s. 7 of the *Canadian Charter* may not be raised to challenge a societal choice in court. Forget J.A. essentially agreed with the Superior Court judge. Like Piché J., he found that the appellants had demonstrated a deprivation of their rights under s. 7 of the *Canadian Charter*, but that this deprivation was in accordance with the principles of fundamental justice. Brossard J.A. agreed with Delisle J.A. regarding the economic nature of the right affected by s. 11 *HOIA* and s. 15 *HEIA*. However, he felt that a risk to life or security resulting from a delay in obtaining medical services would constitute a deprivation within the meaning of s. 7 of the *Canadian Charter*. He declined to express an opinion as to whether this deprivation was in accordance with the principles of fundamental justice. Although the arguments based on the *Quebec Charter* were mentioned in the notice of appeal and in Delisle J.A.'s statement of the grounds of appeal, none of the Court of Appeal judges addressed them.

12 The arguments based on the *Quebec Charter* were expressly raised before this Court.

13 Given that I have had the opportunity to read the reasons of Binnie and LeBel JJ., I think it would be appropriate to highlight the main points on which we agree and disagree before addressing the issues raised by the appellants.

14 As I mentioned at the beginning of my reasons, no one questions the need to preserve a sound public health care system. The central question raised by the appeal is whether the prohibition is justified by the need to preserve the integrity of the public system. In this regard, when my colleagues ask whether Quebec has the power under the Constitution to discourage the establishment of a parallel health care system, I can only agree with them that it does. But that is not the issue in the appeal. The appellants do not contend that they have a constitutional right to private insurance. Rather, they contend that the waiting times violate their rights to life and security. It is the measure chosen by the government that is in issue, not Quebeckers' need for a public health care system.

15 To put the problem in context, the legislative framework of the impugned provisions must first be explained. Considering the provisions in their legislative context will make it possible to address the division of powers argument. I will then explain why, in my opinion, the case must first be considered from the standpoint of the *Quebec Charter*. Next, I will examine the appeal from the standpoint of s. 1 of the *Quebec Charter* before considering whether the prohibition is justified under s. 9.1 of the *Quebec Charter*. Because I conclude that the *Quebec Charter* has been violated, it will not be necessary for me to consider the arguments based on the *Canadian Charter*.

I. Legislative Context

16 Although the federal government has express jurisdiction over certain matters relating to health, such as quarantine, and the establishment and maintenance of marine hospitals (s. 91(11) of the *Constitution Act, 1867*), it is in practice that it imposes its views on the provincial governments in the health care sphere by means of its spending power: *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, at para. 25; *YMHA Jewish Community Centre of Winnipeg Inc. v. Brown*, 1989 CanLII 53 (SCC), [1989] 1 S.C.R. 1532, at p. 1548; see also: P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 6-15; A. Lajoie, "L'impact des Accords du Lac Meech sur le pouvoir de dépenser", in *L'adhésion du Québec à l'Accord du Lac Meech* (1988), 163, at pp. 164 *et seq.* In order to receive federal funds, a provincial plan must conform to the principles set out in the *Canada Health Act*, R.S.C. 1985, c. C-6: it must be administered publicly, it must be comprehensive and universal, it must provide for portability from one province to another and it must be accessible to everyone. These broad principles have become the hallmarks of Canadian identity. Any measure that might be perceived as compromising them has a polarizing effect on public opinion. The debate about the effectiveness of public health care has become an emotional one. The Romanow Report stated that the *Canada Health Act* has achieved an iconic status that makes it untouchable by politicians (*Building on Values: The Future of Health Care in Canada: Final Report* (2002) (Romanow Report), at p. 60). The tone adopted by my colleagues Binnie and LeBel JJ. is indicative of this type of emotional reaction. It leads them to characterize the debate as pitting rich against poor when the case is really about determining whether a specific measure is justified under either the *Quebec Charter* or the *Canadian Charter*. I believe that it is essential to take a step back and consider these various reactions objectively. The *Canada Health Act* does not prohibit private health care services, nor does it provide benchmarks for the length of waiting times that might be regarded as consistent with the principles it lays down, and in particular with the principle of real accessibility.

17 In reality, a large proportion of health care is delivered by the private sector. First, there are health care services in respect of which the private sector acts, in a sense, as a subcontractor and is paid by the state. There are also many services that are not delivered by the state, such as home care or care provided by professionals other than physicians. In 2001, private sector services not paid for by the state accounted for nearly 30 percent of total health care spending (Canadian Institute for Health Information, *National Health Expenditure Trends, 1975-2003* (2003), at p. 16, Figure 13, "Public and Private Shares of Total Health Expenditure, by Use of Funds, Canada, 2001"). In the case of private sector services that are not covered by the public plan, Quebeckers may take out private insurance without the spectre of the two-tier system being evoked. The *Canada Health Act* is therefore only a general framework that leaves considerable latitude to the provinces. In analysing the justification for the prohibition, I will have occasion to briefly review some of the provisions of Canada's provincial plans. The range of measures shows that there are many ways to deal with the public sector/private sector dynamic without resorting to a ban.

18 The basis for provincial jurisdiction over health care is more clear. The *Constitution Act, 1867* provides that the provinces have jurisdiction over matters of a local or private nature (s. 92(16)), property and civil rights (s. 92(13)), and the establishment of hospitals, asylums, charities and eleemosynary institutions (s. 92(7)). In Quebec, health care services are delivered pursuant to the *Act respecting health services and social services*, R.S.Q., c. S-4.2 ("*AHSSS*"). The *AHSSS* regulates the institutions where health care services are delivered and sets out the principles that guide the delivery of such services in Quebec. For example, under s. 5 *AHSSS*, Quebeckers are "entitled to receive, with continuity and in a personalized and safe manner, health services and social services which are scientifically, humanly and socially appropriate".

19 The other two main legislative instruments that govern the health care system in Quebec are the *HOIA* and the *HEIA*. The *HOIA* establishes access to hospital services in Quebec; it also regulates hospitals. The purpose of the *HEIA* is to ensure that Quebeckers have access to certain medical services that they need for health reasons.

20 Before discussing the effect of waiting times on human rights, I will address the question of whether the province has the power to impose a prohibition on private insurance.

II. Validity of the Prohibition in Relation to Provincial Jurisdiction

21 The appellant Chaoulli argues that the prohibition is a criminal law matter. In his submission, it was adopted because the provincial government of the time wished to impose an egalitarian system and to eliminate the opportunity for profit in the provision of health care services. He contends that the operation of a health care service for profit was regarded at that time as socially undesirable.

22 If the Court is to accept this argument, it must find, first, that the effect of the prohibition on private insurance is to exclude the private sector and, second, that the main purpose of excluding the private sector, as distinct from the overall purpose of the *HOIA* and the *HEIA*, is to avert criminal conduct.

23 The Superior Court judge found that the purpose of the prohibition is to ensure that health care is available [TRANSLATION] "by significantly limiting access to, and the profitability of, the private system in Quebec" (p. 812). I will review later in these reasons the evidence accepted by the Superior Court judge in finding that the prohibition is useful having regard to the intended purpose, and so for the moment I reserve comment on this point. It is sufficient, at the stage of identification of the intended purpose, to determine whether ensuring access to health care services by limiting access to the private system is a valid objective for the provincial government. On this point, and based on the division of powers analysis in the preceding section, it is indisputable that the provincial government has jurisdiction over health care and can put mechanisms in place to ensure that all Quebeckers have access to health care.

24 It is difficult to see the argument that the provision of parallel private sector services was perceived as being socially undesirable as an independent objective, unconnected with the social policy pursued by the government in the area of health care. The appellants were alone in contending that the purpose of the prohibition was to eliminate morally reprehensible conduct. The Attorney General of Quebec argued that the prohibition resulted from a desire to pool the financial resources available for health care. This explanation coincides with the objective identified by the Superior Court judge, which is not, strictly speaking, a criminal law objective. Rather, it is a social objective that the provincial legislature may pursue in accordance with the powers conferred on it by s. 92 of the *Constitution Act, 1867*. In my opinion, the argument that the provincial government has trenched on the federal criminal law power cannot succeed.

III. Priority Given to Arguments Based on the *Quebec Charter*

25 The *Canadian Charter* is neither an ordinary statute nor an extraordinary statute like the *Canadian Bill of Rights*, R.S.C. 1985, App. III. It is a part of the Constitution: *Law Society of Upper Canada v. Skapinker*, 1984 CanLII 3 (SCC), [1984] 1 S.C.R. 357, at p. 365. As a result, the *Canadian Charter* is different from the *Quebec Charter* in that the *Quebec Charter* is the product of the legislative will of Quebec's National Assembly. In addition, while the *Quebec Charter* has no constitutional dimension, it is also different from ordinary statutes by virtue of its considerably broader purpose: to guarantee respect for human beings (see A. Morel, "La coexistence des Chartes canadienne et québécoise: problèmes d'interaction" (1986), 17 *R.D.U.S.* 49). The *Quebec Charter* protects not only the fundamental rights and freedoms, but also certain civil, political, economic and social rights. By virtue of

s. 52, Quebec courts have the power to review legislation to determine whether it is consistent with the rules set out in the *Quebec Charter*. The *Quebec Charter* has an identity that is independent of the statutes of Quebec.

26 In the case of a challenge to a Quebec statute, it is appropriate to look first to the rules that apply specifically in Quebec before turning to the *Canadian Charter*, especially where the provisions of the two charters are susceptible of producing cumulative effects, but where the rules are not identical. This is the approach suggested by Beetz J. in *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 224:

> Thus, the *Canadian Bill of Rights* retains all its force and effect, together with the various provincial charters of rights. Because these constitutional or quasi-constitutional instruments are drafted differently, they are susceptible of producing cumulative effects for the better protection of rights and freedoms. But this beneficial result will be lost if these instruments fall into neglect.

27 In the instant case, s. 7 of the *Canadian Charter* and s. 1 of the *Quebec Charter* have numerous points in common:

Canadian Charter

> **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.

Quebec Charter

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.

28 The similarities between these two provisions probably explain in part why the Superior Court and the Court of Appeal considered only the *Canadian Charter* in their decisions. With regard to certain aspects of the two charters, the law is the same. For example, the wording of the right to life and liberty is identical. It is thus appropriate to consider the two together. Distinctions must be made, however, and I believe that it is important to begin by considering the specific protection afforded by the *Quebec Charter* for the reason that it is not identical to the protection afforded by the *Canadian Charter*.

29 The most obvious distinction is the absence of any reference to the principles of fundamental justice in s. 1 of the *Quebec Charter*. The analysis dictated by s. 7 of the *Canadian Charter* is twofold. Under the approach that is generally taken, the claimant must prove, first, that a deprivation of the right to life, liberty and security of the person has occurred and, second, that the deprivation is not in accordance with the principles of fundamental justice (*Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at para. 205, *per* Bastarache J.). If this is proved, the state must show under s. 1 of the *Canadian Charter* that the deprivation is justified in a free and democratic society.

30 According to established principles, the onus is on the claimant to prove a violation of constitutional rights: *R. v. Collins*, 1987 CanLII 84 (SCC), [1987] 1 S.C.R. 265, and *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, 1987 CanLII 72 (SCC), [1987] 2 S.C.R. 59; see also Hogg, at p. 44-3. Under s. 7 of the *Canadian Charter*, the claimant would thus have a dual burden. The effect of placing this burden of proof on the claimant is that it makes his or her task more onerous. There is no such dual burden of proof under the *Quebec Charter* because the principles of fundamental justice are not incorporated into s. 1 of the *Quebec Charter*. For this reason, the *Quebec Charter* has a scope that is potentially broader. This characteristic should not be disregarded.

31 Ruling on the points in issue by applying the *Quebec Charter* enhances an instrument that is specific to Quebec; this approach is also justified by the rules of Canadian constitutional law.

32 Before getting into the heart of the debate regarding s. 1 of the *Quebec Charter*, I must address three preliminary arguments raised by the respondent Attorney General of Quebec: (a) that the protection of the right to freedom and life is limited to situations involving the administration of justice, (b) that the right asserted is economic and is not a fundamental right, and (c) that the appellants do not have standing.

IV. Preliminary Objections

A. *Scope of Section 1 of the Quebec Charter*

33 The trial judge adopted a liberal approach to applying the protection afforded by s. 7 of the *Canadian Charter*. She expressed the opinion that the protection is not limited to situations involving the administration of justice. This Court has not yet achieved a consensus regarding the scope of this protection. In *Gosselin*, at paras. 78 and 83, McLachlin C.J. did not consider it necessary to answer the question definitively. In my opinion, the same question of law does not arise in the context of the *Quebec Charter*. The *Quebec Charter* has a very broad scope of application. It extends to relationships between individuals and relationships between individuals and the state. Limiting the scope of s. 1 of the *Quebec Charter* to matters connected with the administration of justice is not justified in light of the general scope of this quasi-constitutional instrument.

B. *Economic Right or Fundamental Right*

34 Delisle J.A. accepted the argument of the Attorney General of Quebec and declined to apply s. 7 of the *Canadian Charter* on the basis that the right in issue, which in his opinion is an economic right, is not protected by the *Canadian Charter*. This appeal does not require the Court to establish a general rule including or excluding economic rights in or from the scope of s. 1 of the *Quebec Charter*. The Superior Court judge made the following observation in this regard (at pp. 822-23):

> [TRANSLATION] . . . the economic barriers . . . are closely related to the possibility of gaining access to health care. Having regard to the costs involved, access to private care without the rights in question is illusory. Accordingly, those provisions are an impediment to access to health care services and therefore potentially infringe the right to life, liberty and security of the person. [Emphasis deleted.]

Piché J.'s analysis is correct. Limits on access to health care can infringe the right to personal inviolability. The prohibition cannot be characterized as an infringement of an economic right.

C. *Standing*

35 Clearly, a challenge based on a charter, whether it be the *Canadian Charter* or the *Quebec Charter*, must have an actual basis in fact: *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441. However, the question is not whether the appellants are able to show that they are personally affected by an infringement. The issues in the instant case are of public interest and the test from *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, applies. The issue must be serious, the claimants must be directly affected or have a genuine interest as citizens and there must be no other effective means available to them. These conditions have been met. The issue of the validity of the prohibition is serious. Chaoulli is a physician and Zeliotis is a patient who has suffered as a result of waiting lists. They have a genuine interest in the legal proceedings. Finally, there is no effective way to challenge the validity of the provisions other than by recourse to the courts.

36 The three preliminary objections are therefore dismissed. I will now turn to the analysis of the infringement of the rights protected by s. 1 of the *Quebec Charter*.

V. Infringement of the Rights Protected by Section 1 of the *Quebec Charter*

37 The appellant Zeliotis argues that the prohibition infringes Quebeckers' right to life. Some patients die as a result of long waits for treatment in the public system when they could have gained prompt access to care in the private sector. Were it not for s. 11 *HOIA* and s. 15 *HEIA*, they could buy private insurance and receive care in the private sector.

38 The Superior Court judge stated [TRANSLATION] "that there [are] serious problems in certain sectors of the health care system" (p. 823). The evidence supports that assertion. After meticulously analysing the evidence, she found that the right to life and liberty protected by s. 7 of the *Canadian Charter* had been infringed. As I mentioned above, the right to life and liberty protected by the *Quebec Charter* is the same as the right protected by the *Canadian Charter*. Quebec society is no different from Canadian society when it comes to respect for these two fundamental rights. Accordingly, the trial judge's findings of fact concerning the infringement of the right to life and liberty protected by s. 7 of the *Canadian Charter* apply to the right protected by s. 1 of the *Quebec Charter*.

39 Not only is it common knowledge that health care in Quebec is subject to waiting times, but a number of witnesses acknowledged that the demand for health care is potentially unlimited and that waiting lists are a more or less implicit form of rationing (report by J.-L. Denis, *Un avenir pour le système public de santé* (1998), at p. 13; report by Y. Brunelle, *Aspects critiques d'un rationnement planifié* (1993), at p. 21). Waiting lists are therefore real and intentional. The witnesses also commented on the consequences of waiting times.

40 Dr. Daniel Doyle, a cardiovascular surgeon, testified that when a person is diagnosed with cardiovascular disease, he or she is [TRANSLATION] "always sitting on a bomb" and can die at any moment. In such cases, it is inevitable that some patients will die if they have to wait for an operation. Dr. Doyle testified that the risk of mortality rises by 0.45 percent per month. The right to life is therefore affected by the delays that are the necessary result of waiting lists.

41 The *Quebec Charter* also protects the right to personal inviolability. This is a very broad right. The meaning of "inviolability" is broader than the meaning of the word "security" used in s. 7 of the *Canadian Charter*. In civil liability cases, it has long been recognized in Quebec that personal inviolability includes both physical inviolability and mental or psychological inviolability. This was stated clearly in *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211, at para. 95:

> Section 1 of the *Charter* guarantees the right to personal "inviolability". The majority of the Court of Appeal was of the opinion, contrary to the trial judge's interpretation, that the protection afforded by s. 1 of the *Charter* extends beyond physical inviolability. I agree. The statutory amendment enacted in 1982 (see *An Act to amend the Charter of Human Rights and Freedoms*, S.Q. 1982, c. 61, in force at the time this cause of action arose) which, *inter alia*, deleted the adjective "*physique*", in the French version, which had previously qualified the expression "*intégrité*" (inviolability), clearly indicates that s. 1 refers inclusively to physical, psychological, moral and social inviolability.

Furthermore, arts. 1457 and 1458 of the *Civil Code of Québec*, S.Q. 1991, c. 64, refer expressly to "moral" injury.

42 In the instant case, Dr. Eric Lenczner, an orthopaedic surgeon, testified that the usual waiting time of one year for patients who require orthopaedic surgery increases the risk that their injuries will become

irreparable. Clearly, not everyone on a waiting list is in danger of dying before being treated. According to Dr. Edwin Coffey, people may face a wide variety of problems while waiting. For example, a person with chronic arthritis who is waiting for a hip replacement may experience considerable pain. Dr. Lenczner also stated that many patients on non-urgent waiting lists for orthopaedic surgery are in pain and cannot walk or enjoy any real quality of life.

43 Canadian jurisprudence shows support for interpreting the right to security of the person generously in relation to delays. In *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 59, Dickson C.J. found, based on the consequences of delays, that the procedure then provided for in s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, jeopardized the right to security of the person. Beetz J., at pp. 105-6, with Estey J. concurring, was of the opinion that the delay created an additional risk to health and constituted a violation of the right to security of the person. Likewise, in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 589, Sopinka J. found that the suffering imposed by the state impinged on the right to security of the person. See also *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] 2 S.C.R. 307, 2000 SCC 44, with respect to mental suffering. If the evidence establishes that the right to security of the person has been infringed, it supports, *a fortiori*, the finding that the right to the inviolability of the person has been infringed.

44 In the opinion of my colleagues Binnie and LeBel JJ., there is an internal mechanism that safeguards the public health system. According to them, Quebeckers may go outside the province for treatment where services are not available in Quebec. This possibility is clearly not a solution for the system's deficiencies. The evidence did not bring to light any administrative mechanism that would permit Quebeckers suffering as a result of waiting times to obtain care outside the province. The possibility of obtaining care outside Quebec is case-specific and is limited to crisis situations.

45 I find that the trial judge did not err in finding that the prohibition on insurance for health care already insured by the state constitutes an infringement of the right to life and security. This finding is no less true in the context of s. 1 of the *Quebec Charter*. Quebeckers are denied a solution that would permit them to avoid waiting lists, which are used as a tool to manage the public plan. I will now consider the justification advanced under s. 9.1 of the *Quebec Charter*.

VI. Justification for the Prohibition

46 Section 9.1 of the *Quebec Charter* sets out the standard for justification. It reads as follows:

> **9.1.** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

47 The Court had occasion to consider the scope of this provision in *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), [1988] 2 S.C.R. 712. In its view, in the context of the relationship between citizens and the state, the provision is of the same nature as s. 1 of the *Canadian Charter* (at pp. 769-71):

> It was suggested in argument that because of its quite different wording s. 9.1 was not a justificatory provision similar to s. 1 but merely a provision indicating that the fundamental freedoms and rights guaranteed by the Quebec *Charter* are not absolute but relative and must be construed and exercised in a manner consistent with the values, interests and considerations indicated in s. 9.1 — "democratic values, public order and the general well-being of the citizens of Québec." In the case at bar the Superior Court and

the Court of Appeal held that s. 9.1 was a justificatory provision corresponding to s. 1 of the Canadian *Charter* and that it was subject, in its application, to a similar test of rational connection and proportionality. This Court agrees with that conclusion. The first paragraph of s. 9.1 speaks of the manner in which a person must exercise his fundamental freedoms and rights. That is not a limit on the authority of government but rather does suggest the manner in which the scope of the fundamental freedoms and rights is to be interpreted. The second paragraph of s. 9.1, however — "In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law" — does refer to legislative authority to impose limits on the fundamental freedoms and rights. The words "In this respect" refer to the words "maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec". Read as a whole, s. 9.1 provides that limits to the scope and exercise of the fundamental freedoms and rights guaranteed may be fixed by law for the purpose of maintaining a proper regard for democratic values, public order and the general well-being of the citizens of Quebec. That was the view taken of s. 9.1 in both the Superior Court and the Court of Appeal. As for the applicable test under s. 9.1, Boudreault J. in the Superior Court quoted with approval from a paper delivered by Raynold Langlois, Q.C., entitled "Les clauses limitatives des Chartes canadienne et québécoise des droits et libertés et le fardeau de la preuve", and published in *Perspectives canadiennes et européennes des droits de la personne* (1986), in which the author expressed the view that under s. 9.1 the government must show that the restrictive law is neither irrational nor arbitrary and that the means chosen are proportionate to the end to be served. In the Court of Appeal, Bisson J.A. adopted essentially the same test. He said that under s. 9.1 the government has the onus of demonstrating on a balance of probabilities that the impugned means are proportional to the object sought. He also spoke of the necessity that the government show the absence of an irrational or arbitrary character in the limit imposed by law and that there is a rational link between the means and the end pursued. We are in general agreement with this approach. . . . [I]t is an implication of the requirement that a limit serve one of these ends that the limit should be rationally connected to the legislative purpose and that the legislative means be proportionate to the end to be served. That is implicit in a provision that prescribes that certain values or legislative purposes may prevail in particular circumstances over a fundamental freedom or right. That necessarily implies a balancing exercise and the appropriate test for such balancing is one of rational connection and proportionality. [Emphasis in original.]

48 The interpretation adopted by the Court in that decision still applies today, and the analytical approach developed in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, must be followed. This approach is well known. First, the court must determine whether the objective of the legislation is pressing and substantial. Next, it must determine whether the means chosen to attain this legislative end are reasonable and demonstrably justifiable in a free and democratic society. For this second part of the analysis, three tests must be met: (1) the existence of a rational connection between the measure and the aim of the legislation; (2) minimal impairment of the protected right by the measure; and (3) proportionality between the effect of the measure and its objective (*Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at para. 182). It is the minimal impairment analysis that has proven to be the most delicate stage in the instant case. The other stages cannot, however, be bypassed.

A. *Purpose of the Statute*

49 The prohibitions are set out in the *HOIA* and the *HEIA*. The general objective of these statutes is to promote health care of the highest possible quality for all Quebeckers regardless of their ability to pay. Quality of care and equality of access are two inseparable objectives under the statutes. At trial, Claude Castonguay, who was Quebec's Minister of Health at the time when the *HEIA* was enacted, testified regarding the legislation's objectives:

> [TRANSLATION] . . . we wanted to ensure that everyone would have access to health care, regardless of their ability to pay. Also, because the Health Insurance Act was part of a whole — there was Bill 65 respecting health services — we wanted a thorough reform. We wanted access to health care to be as equal as possible everywhere in Quebec, regardless of place of residence, regardless of financial circumstances . . . .

50 The quality objective is not formally stated, but it seems clear that a health care service that does not attain an acceptable level of quality of care cannot be regarded as a genuine health care service. Low-quality services can threaten the lives of users. The legislature accordingly required that there be supervision of health care. That supervision is essential to guarantee not only the quality of care, but also public safety.

51 To ensure supervision of these services, the *AHSSS* provides for program planning (s. 346), organization of services (ss. 347 to 349), allocation of financial resources (ss. 350 and 351), coordination of health services and social services (ss. 352 to 370), and management of human, material and financial resources (ss. 376 to 385). An institution that provides services may be private and may receive government funding, in which case it is referred to as a "private institution under agreement". In such cases, the state delegates its responsibilities to a private sector service provider. The services of public institutions and private institutions under agreement relate, on the whole, to a single offer of services, namely the one established by the government. If a legal or natural person wishes to provide health services or social services contemplated by the *AHSSS* from an institution, the person must obtain a permit to operate an institution (ss. 316 and 437). Because private institutions are not prohibited by the *AHSSS*, the Minister may not refuse to issue a permit solely because he or she wishes to slow down the development of private institutions that are not under agreement (*Charles Bentley Nursing Home Inc. v. Ministre des Affaires sociales*, [1978] C.S. 30) (see M. Laverdière, "Le cadre juridique canadien et québécois relatif au développement parallèle de services privés de santé et l'article 7 de la *Charte canadienne des droits et libertés*" (1998-1999), 29 *R.D.U.S.* 117).

52 The *HOIA* and the *HEIA* provide that, within the framework they establish, the state is responsible for the provision and funding of health services. The *HEIA* provides (s. 3) that the state is to pay the cost of services rendered by a physician that are medically required as well as certain other services provided by, *inter alia*, dentists, pharmacists and optometrists. The insured services are funded by the state out of public moneys. The only contribution made by recipients of services toward the cost is through their income tax, if they are liable to pay income tax. The services covered must be provided by participating professionals or by professionals "who have withdrawn", although these professionals may not receive any fees in addition to those paid by the state (s. 22). The purpose of the *HOIA* is to ensure that hospital care is provided free of charge. The Act provides that hospital services are insured where they are medically required so that Quebeckers receive hospital services without charge and upon uniform terms and conditions (s. 2).

53 It can be seen from this brief review of the legislation governing health services that such services are controlled almost entirely by the state.

54 Although there are, at first glance, no provisions that prohibit the delivery of services by an individual or a legal person established for a private interest, a number of constraints are readily apparent. In addition to the restrictions relating to the remuneration of professionals, the requirement that a permit be obtained to provide hospital services creates a serious obstacle in practice. This constraint would not be problematic if the prevailing approach favoured the provision of private services. However, that is not the case. Not only are the restrictions real (Laverdière, at p. 170), but Mr. Chaoulli's situation shows clearly that they are. Here again, the executive branch is implementing the intention of the Quebec legislature to limit the provision of private services outside the public plan. That intention is evident in the preliminary texts tabled in the National Assembly, in the debate concerning those texts and, finally, in the written submissions filed by the Attorney General of Quebec in the instant case.

55 Section 11 *HOIA* and s. 15 *HEIA* convey this intention clearly. They render any proposal to develop private professional services almost illusory. The prohibition on private insurance creates an obstacle that is practically insurmountable for people with average incomes. Only the very wealthy can reasonably afford to pay for entirely private services. Assuming that a permit were issued, the operation of an institution that is not under agreement is the exception in Quebec. In fact, the trial judge found that the effect of the prohibition was to "significantly" limit the private provision of services that are already available under the public plan (p. 812). This observation relates to the effects of the prohibition. These effects must not be confused with the objective of the legislation. According to the Attorney General of Quebec, the purpose of the prohibition is to preserve the integrity of the public health care system. From this perspective, the objective appears at first glance to be pressing and substantial. Its pressing and substantial nature can be confirmed by considering the historical context.

56 Government involvement in health care came about gradually. Initially limited to extreme cases, such as epidemics or infectious diseases, the government's role has expanded to become a safety net that ensures that the poorest people have access to basic health care services. The enactment of the first legislation providing for universal health care was a response to a need for social justice. According to Dr. Fernand Turcotte, [TRANSLATION] "it was recognized [during the 1920s] that illness had become the primary cause of impoverishment for Canadians, owing to the loss of work that almost always results from serious illness and the loss of family assets, which were inevitably swallowed up to pay for health care" (report by F. Turcotte, *Le temps d'attente comme instrument de gestion du rationnement dans les services de santé du Canada* (1998), at p. 4). Since the government passed legislation based on its view that it had to be the principal actor in the health care sphere, it is easy to understand its distrust of the private sector. At the stage of analysis of the objective of the legislation, I believe that preserving the public plan is a pressing and substantial purpose.

B. *Proportionality*

(1) Rational Connection

57 The next question is whether the prohibition on private insurance has a rational connection with the objective of preserving the public plan. Does this measure assist the state in implementing a public plan that provides high-quality health care services that are accessible to all residents of Quebec?

58 According to the trial judge, the effect of the measure adopted by the state is to "significantly" limit private health care. Although the effect of a measure is not always indicative of a rational connection between the measure and its objective, in the instant case the consequences show an undeniable connection between the objective and the measure. The public plan is preserved because it has a quasi-monopoly.

(2) Minimal Impairment

59 The trial judge made certain assertions that suggest she found that the measure met the minimal impairment test. However, her approach was not appropriate to s. 9.1 of the *Quebec Charter*. Her comments must therefore be considered in their context, not only because she failed to address the *Quebec Charter*, but also because she appears to have placed the onus on the appellants to prove that private insurance would provide a solution to the problem of waiting lists (at p. 796):

> [TRANSLATION] The Court further finds that although some of these specialists indicated a desire to be free to obtain private insurance, none of them gave their full and absolute support to the applicants' proposals, as they explained that it was neither clear nor obvious that a reorganization of the health system with a parallel private system would solve all the existing problems of delays and access. On the contrary, the specialists who testified remained quite circumspect about this complex and difficult question.

60 The burden of proof does not rest on the appellants. Under s. 9.1 of the *Quebec Charter*, the onus was on the Attorney General of Quebec to prove that the prohibition is justified. He had to show that the measure met the minimal impairment test. The trial judge did not consider the evidence on the basis that there was a burden on the Attorney General of Quebec.

61 To determine whether the Attorney General of Quebec has discharged this burden, I will begin by analysing the expert evidence submitted to the Superior Court. I will then examine the situations in the other provinces of Canada and in certain countries of the Organization for Economic Cooperation and Development ("OECD"). Finally, I will address the deference the Court must show where the government has chosen among a number of measures that may impair protected rights.

(a) *The Experts Who Testified at Trial and Whose Evidence Was Accepted by the Superior Court Judge*

62 As can be seen from the evidence, the arguments made in support of the position that the integrity of the public system could be jeopardized by abolishing the prohibition can be divided into two groups. The first group of arguments relates to human reactions of the various people affected by the public plan, while the second group relates to the consequences for the plan itself.

(i) Human Reactions

63 1. Some witnesses asserted that the emergence of the private sector would lead to a reduction in popular support in the long term because the people who had private insurance would no longer see any utility for the public plan. Dr. Howard Bergman cited an article in his expert report. Dr. Theodore R. Marmor supported this argument but conceded that he had no way to verify it.

2. Some witnesses were of the opinion that the quality of care in the public plan would decline because the most influential people would no longer have any incentive to bring pressure for improvements to the plan. Dr. Bergman cited a study by the World Bank in support of his expert report. Dr. Marmor relied on this argument but confirmed that there is no direct evidence to support this view.

3. There would be a reduction in human resources in the public plan because many physicians and other health care professionals would leave the plan out of a motive for profit: Dr. Charles J. Wright cited a study done in the United Kingdom, but admitted that he had read only a summary and not the study itself. Although Dr. Marmor supported the assertion, he testified that there is really no way to confirm it empirically. In his opinion, it is simply a matter of common sense.

4. An increase in the use of private health care would contribute to an increase in the supply of care for profit and lead to a decline in the professionalism and ethics of physicians working in hospitals. No study was cited in support of this opinion that seems to be based only on the witnesses' common sense.

64 It is apparent from this summary that for each threat mentioned, no study was produced or discussed in the Superior Court. While it is true that scientific or empirical evidence is not always necessary, witnesses in a case in which the arguments are supposedly based on logic or common sense should be able to cite specific facts in support of their conclusions. The human reactions described by the experts, many of whom came from outside Quebec, do not appear to me to be very convincing, particularly in the context of Quebec legislation. Participation in the public plan is mandatory and there is no risk that the Quebec public will abandon the public plan. The state's role is not being called into question. As well, the *HEIA* contains a clear provision authorizing the Minister of Health to ensure that the public plan is not jeopardized by having too many physicians opt for the private system (s. 30 *HEIA*). The evidence that the existence of the health care system would be jeopardized by human reactions to the emergence of a private system carries little weight.

(ii) Impact on the Public Plan

65 1. There would be an increase in overall health expenditures: the alleged increase would come primarily from the additional expenditures incurred by individuals who decide to take out private insurance; the rest of the increase in costs would be attributable to the cost of management of the private system by the state.

2. Insurers would reject the most acute patients, leaving the most serious cases to be covered by the public plan.

3. In a private system, physicians would tend to lengthen waiting times in the public sector in order to direct patients to the private sector from which they would derive a profit.

66 Once again, I am of the opinion that the reaction some witnesses described is highly unlikely in the Quebec context. First, if the increase in overall costs is primarily attributable to the individual cost of insurance, it would be difficult for the state to prevent individuals who wished to pay such costs from choosing how to manage their own finances. Furthermore, because the public plan already handles all the serious cases, I do not see how the situation could be exacerbated if that plan were relieved of the clientele with less serious health problems. Finally, because of s. 1(*e*), non-participating physicians may not practise as participants; they will not therefore be faced with the conflict of interest described by certain witnesses. As for physicians who have withdrawn (s. 1(*d*) *HEIA*), the state controls their conditions of practice by way of the agreements (s. 1(*f*) *HEIA*) they are required to sign. Thus, the state can establish a framework of practice for physicians who offer private services.

67 The trial judge's assessment of the evidence was founded on the idea that the appellants had to prove that abolishing the prohibition would improve the public plan. She also analysed the case from the perspective of s. 7 of the *Canadian Charter*, which placed the burden on the appellants rather than on the Attorney General of Quebec. Furthermore, a number of witnesses failed to consider the legislation specific to Quebec. The combination of these three oversights or errors means that the findings must be qualified and adapted to s. 9.1 of the *Quebec Charter*.

68 Upon completing her analysis, the trial judge drew the following conclusion (at p. 827):

> [TRANSLATION] These provisions are based on the fear that the establishment of a private health care system would rob the public sector of a significant portion of the available health care resources. [Emphasis added.]

Thus, the judge's finding that the appellants had failed to show that the scope of the prohibition was excessive and that the principles of fundamental justice had not been violated was based solely on the "fear" of an erosion of resources or a [TRANSLATION] "threat [to] the integrity" of the system (p. 827 (emphasis deleted)). But the appellants did not have the burden of disproving every fear or every threat. The onus was on the Attorney General of Quebec to justify the prohibition. Binnie and LeBel JJ. rely on a similar test in asserting that private health care would likely have an impact on the public plan. This standard does not meet the requirement of preponderance under s. 9.1 of the *Quebec Charter*. It can be seen from the evidence that the Attorney General of Quebec failed to discharge his burden of proving that a total prohibition on private insurance met the minimal impairment test.

69 There is other evidence in the record that might be of assistance in the justification analysis. In this regard, it is useful to observe the approaches of the other Canadian provinces because they also operate within the financial framework established by the *Canada Health Act*.

(b) *Overview of Other Provincial Plans*

70 The approach to the role of the private sector taken by the other nine provinces of Canada is by no means uniform. In addition to Quebec, six other provinces have adopted measures to discourage people from turning to the private sector. The other three, in practice, give their residents free access to the private sector.

71 Ontario (*Health Care Accessibility Act*, R.S.O. 1990, c. H.3, s. 2), Nova Scotia (*Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, s. 29(2)) and Manitoba (*Health Services Insurance Act*, R.S.M. 1987, c. H35, s. 95(1)) prohibit non-participating physicians from charging their patients more than what physicians receive from the public plan. In practice, there is no financial incentive to opt for the private sector. It is worth noting that Nova Scotia does not prohibit insurance contracts to cover health care obtained in the private sector. Ontario and Manitoba prohibit insurance contracts but refund amounts paid by patients to non-participating physicians.

72 Alberta (*Alberta Health Care Insurance Act*, R.S.A. 2000, c. A-20, s. 9(1)), British Columbia (*Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 18(2)) and Prince Edward Island (*Health Services Payment Act*, R.S.P.E.I. 1988, c. H-2, ss. 10, 10.1 and 14.1) have adopted a very different approach. In those provinces, non-participating physicians are free to set the amount of their fees, but the cost of the services is not refunded and contracts for insurance to cover services offered by the public plan are prohibited. This is the same policy as has been adopted by Quebec.

73 Saskatchewan (*Saskatchewan Medical Care Insurance Act*, R.S.S. 1978, c. S-29, s. 18(1.1)), New Brunswick (*Medical Services Payment Act*, R.S.N.B. 1973, c. M-7, s. 2.01(*a*), and *General Regulation — Medical Services Payment Act*, N.B. Reg. 84-20, Sch. 2, para. (*n.1*)), and Newfoundland and Labrador (*Medical Care Insurance Act, 1999*, S.N.L. 1999, c. M-5.1, s. 10(5), and *Medical Care Insurance Insured Services Regulations*, C.N.L.R. 21/96, s. 3) are open to the private sector. New Brunswick allows physicians to set their own fees. In Saskatchewan, this right is limited to non-participating physicians. The cost is not refunded by the public plan, but patients may purchase insurance to cover those costs. Newfoundland and Labrador agrees to reimburse patients, up to the amount covered by the public plan, for fees paid to non-participating physicians. In Newfoundland and Labrador, patients may subscribe to private insurance to cover the difference.

74 Even if it were assumed that the prohibition on private insurance could contribute to preserving the integrity of the system, the variety of measures implemented by different provinces shows that prohibiting insurance contracts is by no means the only measure a state can adopt to protect the system's integrity. In fact, because there is no indication that the public plans of the three provinces that are open to the private sector suffer from deficiencies that are not present in the plans of the other provinces, it must be deduced that the effectiveness of the measure in protecting the integrity of the system has not been proved. The example illustrated by a number of other Canadian provinces casts doubt on the argument that the integrity of the public plan depends on the prohibition against private insurance. Obviously, since Quebec's public plan is in a quasi-monopoly position, its predominance is assured. Also, the regimes of the provinces where a private system is authorized demonstrate that public health services are not threatened by private insurance. It can therefore be concluded that the prohibition is not necessary to guarantee the integrity of the public plan.

75 In the context of s. 9.1 of the *Quebec Charter*, I must conclude that a comparison with the plans of the other Canadian provinces does not support the position of the Attorney General of Quebec.

76 There are also many reports in the record on which to base an overview of current practices in several OECD countries.

(c) *Overview of Practices in Certain OECD Countries*

77 Mr. Chaoulli, echoed by at least one of the witnesses (Dr. Coffey), argued that Canada is the only OECD country to prohibit insurance for health care provided by non-participating physicians. This assertion must be clarified as it relates to Canada: it is true of only six provinces. It must also be qualified in the international context: while no such prohibition is found in any other OECD country, it should nonetheless be mentioned that measures to protect the public plan have been implemented in a number of countries, even some of the countries whose health care plans have been provided as models. There is no single model; the approach in Europe is no more uniform than in Canada.

78 In a number of European countries, there is no insurance paid for directly out of public funds. In Austria, services are funded through decentralized agencies that collect the necessary funds from salaries. People who want to obtain health care in the private sector in addition to the services covered by the mandatory social insurance are free to do so, but private insurance may cover no more than 80 percent of the cost billed by professionals practising in the public sector. The same type of plan exists in Germany and the Netherlands, but people who opt for private insurance are not required to pay for the public plan. Only nine percent of Germans opt for private insurance.

79 Australia's public system is funded in a manner similar to the Quebec system. However, Australia's system is different in that the private and public sectors coexist, and insurance covering private sector health care is not prohibited. The government attempts to balance access to the two sectors by allowing taxpayers to deduct 30 percent of the cost of private insurance. Insurance rates are regulated to prevent insurers from charging higher premiums for higher-risk individuals (C. H. Tuohy, C. M. Flood and M. Stabile, "How Does Private Finance Affect Public Health Care Systems? Marshaling the Evidence from OECD Nations" (2004), 29 *J. Health Pol.* 359).

80 The United Kingdom does not restrict access to private insurance for health care (*The Health of Canadians — The Federal Role*, vol. 3, *Health Care Systems in Other Countries*, Interim Report (2002), at p. 38). Nor does the United Kingdom limit a physician's ability to withdraw from the public plan. However, physicians working full-time in public hospitals are limited in the amounts that they may bill in the private sector to supplement income earned in the public sector (p. 40). Only 11.5 percent of Britons had taken out private insurance in 1998 (Tuohy, Flood and Stabile, at p. 374), and only 8 percent of hospital beds in the United Kingdom are private (Quebec and France, *Health Indicators: International Comparisons: 15 years of Evolution: Canada, France, Germany, Québec, United Kingdom, United States* (1998), at p. 55). New Zealand has a plan similar to that of the United Kingdom with the difference that 40 percent of New Zealanders have private insurance (Tuohy, Flood and Stabile, at p. 363).

81 Sweden does not prohibit private insurance, and the state does not refund the cost of health care paid for in the private sector. Private insurance accounts for only two percent of total health care expenditures and there are only nine private hospitals (*The Health of Canadians — The Federal Role*, at pp. 31-33).

82 It can be seen from the systems in these various OECD countries that a number of governments have taken measures to protect their public plans from abuse. The measures vary from country to country depending on the nature of their specific systems. For example, in the United Kingdom, there are limits on the amounts physicians may earn in the private sector in addition to what they receive from the public plan. Australia has opted to regulate insurance premiums, but it is alone in this respect.

83 As can be seen from the evolution of public plans in the few OECD countries that have been examined in studies produced in the record, there are a wide range of measures that are less drastic, and also less intrusive in relation to the protected rights. The Quebec context is a singular one, not only because of the distinction between participating physicians, non-participating physicians and physicians who have withdrawn (s. 1 *HEIA*), but also because the Minister may require non-participating physicians to provide health services if he or she considers it likely that the services will not be provided under uniform conditions throughout Quebec or in a particular region (s. 30 *HEIA*). A measure as drastic as prohibiting private insurance contracts appears to be neither essential nor determinative.

84 It cannot therefore be concluded from the evidence relating to the Quebec plan or the plans of the other provinces of Canada, or from the evolution of the systems in place in various OECD countries, that the Attorney General of Quebec has discharged his burden of proof under s. 9.1 of the *Quebec Charter*. A number of measures are available to him to protect the integrity of Quebec's health care plan. The choice of prohibiting private insurance contracts is not justified by the evidence. However, is this a case in which the Court should show deference?

(d) *Level of Deference Required*

85 In the past, the Court has considered the question of the basis of its power of judicial review (*Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 155; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, at para. 56; *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 98), and it is not necessary to retrace the source of the powers deriving from s. 52 of the *Constitution Act, 1982* and s. 52 of the *Quebec Charter*. Section 52 of the *Quebec Charter* reads as follows:

> **52.** No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

However, as can be seen from the large number of interveners in this appeal, differences of views over the emergence of a private health care plan have a polarizing effect on the debate, and the question of the deference owed to the government by the courts must be addressed. Some of the interveners urge the courts to step in, while others argue that this is the role of the state. It must be possible to base the criteria for judicial intervention on legal principles and not on a socio-political discourse that is disconnected from reality.

86 Under the charters, the government is responsible for justifying measures it imposes that impair rights. The courts can consider evidence concerning the historical, social and economic aspects, or any other evidence that may be material.

87 It cannot be said that the government lacks the necessary resources to show that its legislative action is motivated by a reasonable objective connected with the problem it has undertaken to remedy. The courts are an appropriate forum for a serious and complete debate. As G. Davidov said in "The Paradox of Judicial Deference" (2000-2001), 12 *N.J.C.L.* 133, at p. 143, "[c]ourts do not have to define goals, choose means or come up with ideas. They do not have to create social policies; they just have to understand what the other branches have created. No special expertise is required for such an understanding." In fact, if a court is satisfied that all the evidence has been presented, there is nothing that would justify it in refusing to perform its role on the ground that it should merely defer to the government's position. When the courts are given the tools they need to make a decision, they should not hesitate to assume their responsibilities. Deference cannot lead the judicial branch to abdicate its role in favour of the legislative branch or the executive branch.

88 The question submitted by the appellants has a factual content that was analysed by the trial judge. One part of her findings must be adapted to the context of s. 9.1 of the *Quebec Charter*. The other findings remain unchanged. The questions of law are not complex.

89 The courts have a duty to rise above political debate. They leave it to the legislatures to develop social policy. But when such social policies infringe rights that are protected by the charters, the courts cannot shy away from considering them. The judicial branch plays a role that is not played by the legislative branch. Professor Roach described the complementary role of the courts *vis-à-vis* the legislature as follows (K. Roach, "Dialogic Judicial Review and its Critics" (2004), 23 *Sup. Ct. L. Rev.* (2d) 49, at pp. 69-71):

> [Some] unique attributes of courts include their commitment to allowing structured and guaranteed participation from aggrieved parties; their independence from the executive, and their commitment to giving reasons for their decisions. In addition, courts have a special commitment to make sense of legal texts that were democratically enacted as foundational documents.
>
> . . . The pleader in court has a guaranteed right of participation and a right to a reasoned decision that addresses the arguments made in court, as well as the relevant text of the democratically enacted law. . . .

> Judges can add value to societal debates about justice by listening to claims of injustice and by promoting values and perspectives that may not otherwise be taken seriously in the legislative process.

90 From this perspective, it is through the combined action of legislatures and courts that democratic objectives can be achieved. In their analysis of the Quebec secession reference, Choudhry and Howse describe this division of constitutional responsibilities accurately (S. Choudhry and R. Howse, "Constitutional Theory and The *Quebec Secession Reference*" (2000), 13 *Can. J. L. & Jur.* 143, at pp. 160-61):

> [I]nterpretive responsibility for particular constitutional norms is both shared and divided. It is shared to the extent that courts are responsible for articulating constitutional norms in their conceptually abstract form. But interpretive responsibility is divided because beyond the limits of doctrine, constitutional interpretation is left to the political organs. The image which emerges is one of "judicial and legislative cooperation in the molding of concrete standards through which elusive and complex constitutional norms . . . come to be applied."

91 To refuse to exercise the power set out in s. 52 of the *Quebec Charter* would be to deny that provision its real meaning and to deprive Quebeckers of the protection to which they are entitled.

92 In a given case, a court may find that evidence could not be presented for reasons that it considers valid, be it due to the complexity of the evidence or to some other factor. However, the government cannot argue that the evidence is too complex without explaining why it cannot be presented. If such an explanation is given, the court may show greater deference to the government. Based on the extent of the impairment and the complexity of the evidence considered to be necessary, the court can determine whether the government has discharged its burden of proof.

93 The court's reasons for showing deference must always reflect the two guiding principles of justification: the measure must be consistent with democratic values and it must be necessary in order to maintain public order and the general well-being of citizens. The variety of circumstances that may be presented to a court is not conducive to the rigidity of an exhaustive list.

94 In past cases, the Court has discussed a number of situations in which courts must show deference, namely situations in which the government is required to mediate between competing interests and to choose between a number of legislative priorities (*Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at pp. 993-94). It is also possible to imagine situations in which a government might lack time to implement programs or amend legislation following the emergence of new social, economic or political conditions. The same is true of an ongoing situation in which the government makes strategic choices with future consequences that a court is not in a position to evaluate.

95 In short, a court must show deference where the evidence establishes that the government has assigned proper weight to each of the competing interests. Certain factors favour greater deference, such as the prospective nature of the decision, the impact on public finances, the multiplicity of competing interests, the difficulty of presenting scientific evidence and the limited time available to the state. This list is certainly not exhaustive. It serves primarily to highlight the facts that it is up to the government to choose the measure, that the decision is often complex and difficult, and that the government must have the necessary time and resources to respond. However, as McLachlin J. (as she then was) said in *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 136, ". . . care must be taken not to extend the notion of deference too far".

96 The instant case is a good example of a case in which the courts have all the necessary tools to evaluate the government's measure. Ample evidence was presented. The government had plenty of time to act. Numerous commissions have been established (Commission d'étude sur les services de santé et les services sociaux (Quebec) (Clair Commission), 2000; Comité sur la pertinence et la faisabilité d'un régime universel public d'assurance médicaments (Quebec) (Montmarquette Committee), 2001; Commission on the Future of Health Care in Canada (Canada) (Romanow Commission), 2002), and special or independent committees have published reports (Quebec, *Emerging Solutions: Report and Recommendations* (2001) (Clair Report); Quebec, *Pour un régime d'assurance médicaments équitable et viable* (2001) (Montmarquette Report); Canada, *The Health of Canadians — The Federal Role*, vol. 6, *Recommendations for Reform*, Final Report (2002) (Kirby Report); Canada, *Waiting Lists and Waiting Times for Health Care in Canada: More Management!! More Money??* (1998)). Governments have promised on numerous occasions to find a solution to the problem of waiting lists. Given the tendency to focus the debate on a sociopolitical philosophy, it seems that governments have lost sight of the urgency of taking concrete action. The courts are therefore the last line of defence for citizens.

97 For many years, the government has failed to act; the situation continues to deteriorate. This is not a case in which missing scientific data would allow for a more informed decision to be made. The principle of prudence that is so popular in matters relating to the environment and to medical research cannot be transposed to this case. Under the Quebec plan, the government can control its human resources in various ways, whether by using the time of professionals who have already reached the maximum for payment by the state, by applying the provision that authorizes it to compel even non-participating physicians to provide services (s. 30 *HEIA*) or by implementing less restrictive measures, like those adopted in the four Canadian provinces that do not prohibit private insurance or in the other OECD countries. While the government has the power to decide what measures to adopt, it cannot choose to do nothing in the face of the violation of Quebeckers' right to security. The government has not given reasons for its failure to act. Inertia cannot be used as an argument to justify deference.

98 In the instant case, the effectiveness of the prohibition has by no means been established. The government has not proved, by the evidence in the record, that the measure minimally impairs the protected rights. Moreover, the evidence shows that a wide variety of measures are available to governments, as can be seen from the plans of other provinces and other countries.

(3) Proportionality

99 Having found that s. 15 *HEIA* and s. 11 *HOIA* do not meet the minimal impairment test, I do not need to consider proportionality. If the prohibition is not minimally impairing, it obviously cannot be regarded as a measure that sufficiently addresses the effect of the measure on the protected rights.

VII. Conclusion

100 The relief sought by the appellants does not necessarily provide a complete response to the complex problem of waiting lists. However, it was not up to the appellants to find a way to remedy a problem that has persisted for a number of years and for which the solution must come from the state itself. Their only burden was to prove that their right to life and to personal inviolability had been infringed. They have succeeded in proving this. The Attorney General of Quebec, on the other hand, has not proved that the impugned measure, the prohibition on private insurance, was justified under s. 9.1 of the *Quebec Charter*. Given that this finding is sufficient to dispose of the appeal, it is not necessary to answer the other constitutional questions.

101 For these reasons, I would allow the appeal with costs throughout and would answer the questions relating to the *Quebec Charter* as follows:

Question 1: Does s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, infringe the rights guaranteed by s. 1 of the *Quebec Charter*?

Answer: Yes.

Question 2: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 9.1 of the *Quebec Charter*?

Answer: No.

Question 3: Does s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, infringe the rights guaranteed by s. 1 of the *Quebec Charter*?

Answer: Yes.

Question 4: If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 9.1 of the *Quebec Charter*?

Answer: No.

The reasons of McLachlin C.J. and Major and Bastarache JJ. were delivered by

102 THE CHIEF JUSTICE AND MAJOR J. — We concur in the conclusion of our colleague Deschamps J. that the prohibition against contracting for private health insurance violates s. 1 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, and is not justifiable under s. 9.1. On the argument that the anti-insurance provision also violates s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), we conclude that the provision impermissibly limits the right to life, liberty and security of the person protected by s. 7 of the *Charter* and has not been shown to be justified as a reasonable limit under s. 1 of the *Charter*.

103 The appellants do not seek an order that the government spend more money on health care, nor do they seek an order that waiting times for treatment under the public health care scheme be reduced. They only seek a ruling that because delays in the public system place their health and security at risk, they should be allowed to take out insurance to permit them to access private services.

104 The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.

105 The primary objective of the *Canada Health Act*, R.S.C. 1985, c. C-6, is "to protect, promote and restore the physical and mental well-being of residents of Canada and to facilitate reasonable access to health services without financial or other barriers" (s. 3). By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the *Charter*.

106 The *Canada Health Act*, the *Health Insurance Act*, and the *Hospital Insurance Act* do not expressly prohibit private health services. However, they limit access to private health services by removing the ability to contract for private health care insurance to cover the same services covered by public insurance. The result is a virtual monopoly for the public health scheme. The state has effectively limited access to private health care except for the very rich, who can afford private care without need of insurance. This virtual monopoly, on the

evidence, results in delays in treatment that adversely affect the citizen's security of the person. Where a law adversely affects life, liberty or security of the person, it must conform to the principles of fundamental justice. This law, in our view, fails to do so.

107 While the decision about the type of health care system Quebec should adopt falls to the Legislature of that province, the resulting legislation, like all laws, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*. The fact that the matter is complex, contentious or laden with social values does not mean that the courts can abdicate the responsibility vested in them by our Constitution to review legislation for *Charter* compliance when citizens challenge it. As this Court has said on a number of occasions, "it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power": *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 497, *per* Lamer J. (as he then was), quoting *Amax Potash Ltd. v. Government of Saskatchewan*, 1976 CanLII 15 (SCC), [1977] 2 S.C.R. 576, at p. 590, *per* Dickson J. (as he then was).

108 The government defends the prohibition on medical insurance on the ground that the existing system is the only approach to adequate universal health care for all Canadians. The question in this case, however, is not whether single-tier health care is preferable to two-tier health care. Even if one accepts the government's goal, the legal question raised by the appellants must be addressed: is it a violation of s. 7 of the *Charter* to prohibit private insurance for health care, when the result is to subject Canadians to long delays with resultant risk of physical and psychological harm? The mere fact that this question may have policy ramifications does not permit us to avoid answering it.

I. Section 7 of the *Charter*

109 Section 7 of the *Charter* guarantees that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The disposition of this appeal therefore requires us to consider (1) whether the impugned provisions deprive individuals of their life, liberty or security of the person; and (2) if so, whether this deprivation is in accordance with the principles of fundamental justice: see, e.g., *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 83.

A. *Deprivation of Life, Liberty or Security of the Person*

110 The issue at this stage is whether the prohibition on insurance for private medical care deprives individuals of their life, liberty or security of the person protected by s. 7 of the *Charter*.

111 The appellants have established that many Quebec residents face delays in treatment that adversely affect their security of the person and that they would not sustain but for the prohibition on medical insurance. It is common ground that the effect of the prohibition on insurance is to allow only the very rich, who do not need insurance, to secure private health care in order to avoid the delays in the public system. Given the ban on insurance, most Quebeckers have no choice but to accept delays in the medical system and their adverse physical and psychological consequences.

112 Delays in the public system are widespread and have serious, sometimes grave, consequences. There was no dispute that there is a waiting list for cardiovascular surgery for life-threatening problems. Dr. Daniel Doyle, a cardiovascular surgeon who teaches and practises in Quebec City, testified that a person with coronary disease is [TRANSLATION] "sitting on a bomb" and can die at any moment. He confirmed, without challenge, that patients die while on waiting lists: A.R., at p. 461. Inevitably, where patients have life-threatening conditions, some will die because of undue delay in awaiting surgery.

113 The same applies to other health problems. In a study of 200 subjects aged 65 and older with hip fractures, the relationship between pre-operative delay and post-operative complications and risk of death was examined. While the study found no relationship between pre-operative delay and post-operative complications, it concluded that the risk of death within six months after surgery increased significantly, by 5 percent, with the length of pre-operative delay: A. Laberge, P. M. Bernard and P. A. Lamarche, "Relationships between the delay before surgery for a hip fracture, postoperative complications and risk of death" (1997), 45 *Rev. Epidém. et Santé Publ.* 5, at p. 9.

114 Dr. Eric Lenczner, an orthopaedic surgeon, testified that the one-year delay commonly incurred by patients requiring ligament reconstruction surgery increases the risk that their injuries will become irreparable (A.R., at p. 334). Dr. Lenczner also testified that 95 percent of patients in Canada wait well over a year, and many two years, for knee replacements. While a knee replacement may seem trivial compared to the risk of death for wait-listed coronary surgery patients, which increases by 0.5 percent per month (A.R., at p. 450), the harm suffered by patients awaiting replacement knees and hips is significant. Even though death may not be an issue for them, these patients "are in pain", "would not go a day without discomfort" and are "limited in their ability to get around", some being confined to wheelchairs or house bound (A.R., at pp. 327-28).

115 Both the individual members of the Standing Senate Committee on Social Affairs, Science and Technology who intervened in this appeal and the Canadian Medical Association cited a Statistics Canada study demonstrating that over one in five Canadians who needed health care for themselves or a family member in 2001 encountered some form of difficulty, from getting an appointment to experiencing lengthy waiting times: C. Sanmartin et al., *Access to Health Care Services in Canada, 2001* (June 2002), at p. 17. Thirty-seven percent of those patients reported pain.

116 In addition to threatening the life and the physical security of the person, waiting for critical care may have significant adverse psychological effects. Serious psychological effects may engage s. 7 protection for security of the person. These "need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 60.

117 Studies confirm that patients with serious illnesses often experience significant anxiety and depression while on waiting lists. A 2001 study concluded that roughly 18 percent of the estimated five million people who visited specialists for a new illness or condition reported that waiting for care adversely affected their lives. The majority suffered worry, anxiety or stress as a result. This adverse psychological impact can have a serious and profound effect on a person's psychological integrity, and is a violation of security of the person (*Access to Health Care Services in Canada, 2001*, at p. 20).

118 The jurisprudence of this Court holds that delays in obtaining medical treatment which affect patients physically and psychologically trigger the protection of s. 7 of the *Charter*. In *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, Dickson C.J. concluded that the delay in obtaining therapeutic abortions, which increased the risk of complications and mortality due to mandatory procedures imposed by the state, was sufficient to trigger the physical aspect of the woman's right to security of the person: *Morgentaler*, at p. 59. He found that the psychological impact on women awaiting abortions constituted an infringement of security of the person. Beetz J. agreed with Dickson C.J. that "[t]he delays mean therefore that the state has intervened in such a manner as to create an additional risk to health, and consequently this intervention constitutes a violation of the woman's security of the person": see *Morgentaler*, at pp. 105-6.

119 In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s. 7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. (That the sanction in *Morgentaler* was criminal prosecution while the sanction here is administrative prohibition and penalties is irrelevant. The important point is that in both cases, care outside the legislatively provided system is effectively prohibited.) In *Morgentaler* the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s. 7 of the *Charter*.

120 In *Morgentaler*, Dickson C.J. and Wilson J. found a deprivation of security of the person because the legislative scheme resulted in the loss of control by a woman over the termination of her pregnancy: see *Morgentaler*, at pp. 56 and 173.

121 The issue in *Morgentaler* was whether a system for obtaining approval for abortions (as an exception to a prohibition) that in practice imposed significant delays in obtaining medical treatment unjustifiably violated s. 7 of the *Charter*. Parliament had established a mandatory system for obtaining medical care in the termination of pregnancy. The sanction by which the mandatory public system was maintained differed: criminal in *Morgentaler*, "administrative" in the case at bar. Yet the consequences for the individuals in both cases are serious. In *Morgentaler*, as here, the system left the individual facing a lack of critical care with no choice but to travel outside the country to obtain the required medical care at her own expense. It was this constraint on s. 7 security, taken from the perspective of the woman facing the health care system, and not the criminal sanction, that drove the majority analysis in *Morgentaler*. We therefore conclude that the decision provides guidance in the case at bar.

122 In *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, Sopinka J., writing for the majority, held that security of the person encompasses "a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress" (pp. 587-88). The prohibition against private insurance in this case results in psychological and emotional stress and a loss of control by an individual over her own health.

123 Not every difficulty rises to the level of adverse impact on security of the person under s. 7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s. 7 protection of security of the person is engaged. Access to a waiting list is not access to health care. As we noted above, there is unchallenged evidence that in some serious cases, patients die as a result of waiting lists for public health care. Where lack of timely health care can result in death, s. 7 protection of life itself is engaged. The evidence here demonstrates that the prohibition on health insurance results in physical and psychological suffering that meets this threshold requirement of seriousness.

124 We conclude, based on the evidence, that prohibiting health insurance that would permit ordinary Canadians to access health care, in circumstances where the government is failing to deliver health care in a reasonable manner, thereby increasing the risk of complications and death, interferes with life and security of the person as protected by s. 7 of the *Charter*.

125 The remaining question is whether this inference is in accordance with the principles of fundamental justice. "[I]f the state [interferes] with security of the person, the *Charter* requires such interference to conform with the principles of fundamental justice": *Morgentaler*, at p. 54, *per* Dickson C.J.

B. *Deprivation in Accordance with the Principles of Fundamental Justice*

126 Having concluded that the ban on private medical insurance constitutes a deprivation of life and security of the person, we now consider whether that deprivation is in accordance with the principles of fundamental justice. Our colleagues Binnie and LeBel JJ. argue that the record here provides no ground for finding that the deprivation violates the principles of fundamental justice. With respect, we cannot agree.

127 In *Rodriguez*, at pp. 590-91 and 607, Sopinka J. for a majority of this Court defined the principles of fundamental justice as legal principles that are capable of being identified with some precision and are fundamental in that they have general acceptance among reasonable people.

128 The principle of fundamental justice implicated in this case is that laws that affect the life, liberty or security of the person shall not be arbitrary. We are of the opinion that the evidence before the trial judge supports a finding that the impugned provisions are arbitrary and that the deprivation of life and security of the person that flows from them cannot therefore be said to accord with the principles of fundamental justice.

(1) Laws Shall Not Be Arbitrary: A Principle of Fundamental Justice

129 It is a well-recognized principle of fundamental justice that laws should not be arbitrary: see, e.g., *Malmo-Levine*, at para. 135; *Rodriguez*, at p. 594. The state is not entitled to arbitrarily limit its citizens' rights to life, liberty and security of the person.

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

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

132 In *Morgentaler*, Beetz J., Estey J. concurring, found that the limits on security of the person caused by rules that endangered health were "manifestly unfair" and did not conform to the principles of fundamental justice, in reasons that invoke arbitrariness. Some of the limitations bore no connection to Parliament's objectives, in his view, while others were unnecessary to assure that those objectives were met (p. 110).

133 While cloaked in the language of manifest unfairness, this reasoning evokes the principle of fundamental justice that laws must not be arbitrary, and was so read in *Rodriguez*, at p. 594. Beetz J.'s concurring reasons in *Morgentaler* thus serve as an example of how the rule against arbitrariness may be implicated in the particular context of access to health care. The fact that Dickson C.J., Lamer J. concurring, found that the scheme offended a different principle of fundamental justice, namely that defences to criminal charges must not be illusory,

does not detract from the proposition adopted by Beetz J. that rules that endanger health arbitrarily do not comply with the principles of fundamental justice.

(2) Whether the Prohibition on Private Medical Insurance is Arbitrary

134 As discussed above, interference with life, liberty and security of the person is impermissibly arbitrary if the interference lacks a real connection on the facts to the purpose the interference is said to serve.

135 The government argues that the interference with security of the person caused by denying people the right to purchase private health insurance is necessary to providing effective health care under the public health system. It argues that if people can purchase private health insurance, they will seek treatment from private doctors and hospitals, which are not banned under the Act. According to the government's argument, this will divert resources from the public health system into private health facilities, ultimately reducing the quality of public care.

136 In support of this contention, the government called experts in health administration and policy. Their conclusions were based on the "common sense" proposition that the improvement of health services depends on exclusivity (R.R., at p. 591). They did not profess expertise in waiting times for treatment. Nor did they present economic studies or rely on the experience of other countries. They simply assumed, as a matter of apparent logic, that insurance would make private health services more accessible and that this in turn would undermine the quality of services provided by the public health care system.

137 The appellants, relying on other health experts, disagreed and offered their own conflicting "common sense" argument for the proposition that prohibiting private health insurance is neither necessary nor related to maintaining high quality in the public health care system. Quality public care, they argue, depends not on a monopoly, but on money and management. They testified that permitting people to buy private insurance would make alternative medical care more accessible and reduce the burden on the public system. The result, they assert, would be better care for all. The appellants reinforce this argument by pointing out that disallowing private insurance precludes the vast majority of Canadians (middle-income and low-income earners) from accessing additional care, while permitting it for the wealthy who can afford to travel abroad or pay for private care in Canada.

138 To this point, we are confronted with competing but unproven "common sense" arguments, amounting to little more than assertions of belief. We are in the realm of theory. But as discussed above, a theoretically defensible limitation may be arbitrary if in fact the limit lacks a connection to the goal.

139 This brings us to the evidence called by the appellants at trial on the experience of other developed countries with public health care systems which permit access to private health care. The experience of these countries suggests that there is no real connection in fact between prohibition of health insurance and the goal of a quality public health system.

140 The evidence adduced at trial establishes that many western democracies that do not impose a monopoly on the delivery of health care have successfully delivered to their citizens medical services that are superior to and more affordable than the services that are presently available in Canada. This demonstrates that a monopoly is not necessary or even related to the provision of quality public health care.

141 In its report *The Health of Canadians — The Federal Role*, the Standing Senate Committee on Social Affairs, Science and Technology discussed in detail the situations in several countries, including Sweden, Germany and the United Kingdom. The following discussion of the health care systems in these three countries is

drawn directly from the findings in volume 3 of that report (*The Health of Canadians — The Federal Role*, vol. 3, *Health Care Systems in Other Countries*, Interim Report (2002) ("Kirby Report")).

142 In Sweden, as in Canada, access to public health care is universal. The public health care system is financed predominantly by the public sector through a combination of general taxation and social insurance (i.e., employer/employee contributions) and employs a user fee mechanism. Unlike in Canada, private health care insurance that covers the same benefits as public insurance is "legal" in Sweden. However, only a small minority of the population purchase private insurance. The result is a system of public health care coverage that provides quality care on a broader basis than in Canada and encompasses physicians, hospital services, drugs and dental care: Kirby Report, vol. 3, at pp. 29-36. In Sweden, the availability of private health care insurance appears not to have harmed the public health care system.

143 In Germany, public health care insurance is administered by 453 Sickness Funds — private non-profit organizations structured on a regional task or occupational basis. Sickness Fund membership is compulsory for employees with gross incomes lower than approximately $63,000 Canadian, and voluntary for those with gross incomes above that level. Although all Sickness Funds are regulated at the federal level through what is known as the "Social Code Book", they are essentially run by representatives of employees and employers. As in Sweden, public health care coverage is broader in Germany than in Canada, including physician services, hospitals, prescription drugs, diagnostic services, dental care, rehabilitative care, medical devices, psychotherapists, nursing care at home, medical services by non-physicians (physiotherapists, speech therapists, occupational therapists, etc.) and income support during sick leave: Kirby Report, vol. 3, at p. 14.

144 In Germany, as in Sweden, private health insurance is available to individuals at a certain income level who may voluntarily opt out of the Sickness Funds. Private coverage is currently offered by 52 private insurance companies that are obliged to offer an insurance policy with the same benefits as the Sickness Funds at a premium that is no higher than the average maximum contribution to the Sickness Funds. Private health care coverage is also available to self-employed people who are excluded from the Sickness Funds and public servants who are *de facto* excluded from participating in Sickness Funds as their health care bills are reimbursed at the rate of 50 percent by the federal government. Private insurance covers the remainder: Kirby Report, vol. 3, at p. 15.

145 Despite the availability of alternatives, 88 percent of the German population are covered by the public Sickness Funds: this includes 14 percent to whom private insurance is available. Of the remaining 12 percent, only 9 percent are covered by private insurance and less than 1 percent have no health insurance at all. The remaining 2 percent are covered by government insurance for military and other personnel: Kirby Report, vol. 3, at p. 15.

146 The United Kingdom offers a comprehensive public health care system — the National Health Service (NHS) — while also allowing for private insurance. Unlike Canada, the United Kingdom allows people to purchase private health care insurance that covers the same benefits as the NHS if these services are supplied by providers working outside of the NHS. Despite the existence of private insurance, only 11.5 percent of the population have purchased it: Kirby Report, vol. 3, at pp. 37-44. Again, it appears that the public system has not suffered as a result of the existence of private alternatives.

147 After reviewing a number of public health care systems, the Standing Senate Committee on Social Affairs, Science and Technology concluded in the Kirby Report that far from undermining public health care, private contributions and insurance improve the breadth and quality of health care for all citizens, and it ultimately concluded, at p. 66:

> The evidence suggests that a contribution of direct payments by patients, allowing private insurance to cover some services, even in publicly funded hospitals, and an expanded role for the private sector in the delivery of health services are the factors which have enabled countries to achieve broader coverage of health services for all their citizens. Some countries like Australia and Singapore openly encourage private sector participation as a means to ensure affordable and sustainable health services.

148 Nor does it appear that private participation leads to the eventual demise of public health care. It is compelling to note that not one of the countries referred to relies exclusively on either private insurance or the public system to provide health care coverage to its citizens. Even in the United States, where the private sector is a dominant participant in the field of health care insurance, public funding accounts for 45 percent of total health care spending: Kirby Report, vol. 3, at p. 66.

149 In summary, the evidence on the experience of other western democracies refutes the government's theoretical contention that a prohibition on private insurance is linked to maintaining quality public health care.

150 Binnie and LeBel JJ. suggest that the experience of other countries is of little assistance. With respect, we cannot agree. This evidence was properly placed before the trial judge and, unless discredited, stands as the best guide with respect to the question of whether a ban on private insurance is necessary and relevant to the goal of providing quality public health care. The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. This is supported by our jurisprudence, according to which the experience of other western democracies may be relevant in assessing alleged arbitrariness. In *Rodriguez*, the majority of this Court relied on evidence from other western democracies, concluding that the fact that assisted suicide was heavily regulated in other countries suggested that Canada's prohibition was not arbitrary: pp. 601-5.

151 Binnie and LeBel JJ. also suggest that the government's continued commitment to a monopoly on the provision of health insurance cannot be arbitrary because it is rooted in reliance on "a series of authoritative reports [that analysed] health care in this country and in other countries" (para. 258); they are referring here to the reports of Commissioner Romanow (*Building on Values: The Future of Health Care in Canada: Final Report* (2002)), and Senator Kirby. We observe in passing that the import of these reports, which differ in many of their conclusions, is a matter of some debate, as attested by our earlier reference to the Kirby Report. But the conclusions of other bodies on other material cannot be determinative of this litigation. They cannot relieve the courts of their obligation to review government action for consistency with the *Charter* on the evidence before them.

152 When we look to the evidence rather than to assumptions, the connection between prohibiting private insurance and maintaining quality public health care vanishes. The evidence before us establishes that where the public system fails to deliver adequate care, the denial of private insurance subjects people to long waiting lists and negatively affects their health and security of the person. The government contends that this is necessary in order to preserve the public health system. The evidence, however, belies that contention.

153 We conclude that on the evidence adduced in this case, the appellants have established that in the face of delays in treatment that cause psychological and physical suffering, the prohibition on private insurance jeopardizes the right to life, liberty and security of the person of Canadians in an arbitrary manner, and is therefore not in accordance with the principles of fundamental justice.

II. Section 1 of the *Charter*

154 Having concluded that the prohibition on private health insurance constitutes a breach of s. 7, we must now consider whether that breach can be justified under s. 1 of the *Charter* as a reasonable limit demonstrably justified in a free and democratic society. The evidence called in this case falls short of demonstrating such justification.

155 The government undeniably has an interest in protecting the public health regime. However, given the absence of evidence that the prohibition on the purchase and sale of private health insurance protects the health care system, the rational connection between the prohibition and the objective is not made out. Indeed, we question whether an arbitrary provision, which by reason of its arbitrariness cannot further its stated objective, will ever meet the rational connection test under *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

156 In addition, the resulting denial of access to timely and effective medical care to those who need it is not proportionate to the beneficial effects of the prohibition on private insurance to the health system as a whole. On the evidence here and for the reasons discussed above, the prohibition goes further than necessary to protect the public system: it is not minimally impairing.

157 Finally, the benefits of the prohibition do not outweigh the deleterious effects. Prohibiting citizens from obtaining private health care insurance may, as discussed, leave people no choice but to accept excessive delays in the public health system. The physical and psychological suffering and risk of death that may result outweigh whatever benefit (and none has been demonstrated to us here) there may be to the system as a whole.

158 In sum, the prohibition on obtaining private health insurance, while it might be constitutional in circumstances where health care services are reasonable as to both quality and timeliness, is not constitutional where the public system fails to deliver reasonable services. Life, liberty and security of the person must prevail. To paraphrase Dickson C.J. in *Morgentaler*, at p. 73, if the government chooses to act, it must do so properly.

159 We agree with Deschamps J.'s conclusion that the prohibition against contracting for private health insurance violates s. 1 of the Quebec *Charter of Human Rights and Freedoms* and is not justifiable under s. 9.1. We also conclude that this prohibition violates s. 7 of the *Canadian Charter of Rights and Freedoms* and cannot be saved under s. 1.

160 We would allow the appeal, with costs to the appellants throughout.

The reasons of Binnie, LeBel and Fish JJ. were delivered by

BINNIE AND LEBEL JJ. (dissenting) —

I. Introduction

161 The question in this appeal is whether the province of Quebec not only has the constitutional authority to establish a comprehensive single-tier health plan, but to discourage a second (private) tier health sector by prohibiting the purchase and sale of private health insurance. The appellants argue that timely access to needed medical service is not being provided in the publicly funded system and that the province cannot therefore deny to those Quebeckers (who can qualify) the right to purchase private insurance to pay for medical services whenever and wherever such services can be obtained for a fee, i.e., in the private sector. This issue has been the subject of protracted debate across Canada through several provincial and federal elections. We are unable to agree with our

four colleagues who would allow the appeal that such a debate can or should be resolved as a matter of law by judges. We find that, on the legal issues raised, the appeal should be dismissed.

162 Our colleagues the Chief Justice and Major J. state at para. 105:

> By imposing exclusivity and then failing to provide public health care of a reasonable standard within a reasonable time, the government creates circumstances that trigger the application of s. 7 of the [*Canadian*] *Charter*. [Emphasis added.]

163 The Court recently held in *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657, 2004 SCC 78, that the government was not required to fund the treatment of autistic children. It did not on that occasion address in constitutional terms the scope and nature of "reasonable" health services. Courts will now have to make that determination. What, then, are constitutionally required "reasonable health services"? What is treatment "within a reasonable time"? What are the benchmarks? How short a waiting list is short enough? How many MRIs does the Constitution require? The majority does not tell us. The majority lays down no manageable constitutional standard. The public cannot know, nor can judges or governments know, how much health care is "reasonable" enough to satisfy s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and s. 1 of the *Charter of Human Rights and Freedoms*, R.S.Q. c. C-12 ("*Quebec Charter*"). It is to be hoped that we will know it when we see it.

164 The policy of the *Canada Health Act*, R.S.C. 1985, c. C-6, and its provincial counterparts is to provide health care based on need rather than on wealth or status. The evidence certainly established that the public health care system put in place to implement this policy has serious and persistent problems. This does not mean that the courts are well placed to perform the required surgery. The resolution of such a complex fact-laden policy debate does not fit easily within the institutional competence or procedures of courts of law. The courts can use s. 7 of the *Canadian Charter* to pre-empt the ongoing public debate only if the current health plan violates an established "principle of fundamental justice". Our colleagues McLachlin C.J. and Major J. argue that Quebec's enforcement of a single-tier health plan meets this legal test because it is "arbitrary". In our view, with respect, the prohibition against private health insurance is a rational consequence of Quebec's commitment to the goals and objectives of the *Canada Health Act*.

165 Our colleague Deschamps J. states at para. 4:

> In essence, the question is whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state. [Emphasis added.]

This is so, but of course it must be recognized that the liberty and security of Quebeckers who do not have the money to afford private health insurance, who cannot qualify for it, or who are not employed by establishments that provide it, are not put at risk by the absence of "upper tier" health care. It is Quebeckers who have the money to afford private medical insurance and can qualify for it who will be the beneficiaries of the appellants' constitutional challenge.

166 The Quebec government views the prohibition against private insurance as essential to preventing the current single-tier health system from disintegrating into a *de facto* two-tier system. The trial judge found, and the evidence demonstrated, that there is good reason for this fear. The trial judge concluded that a private health sector fuelled by private insurance would frustrate achievement of the objectives of the *Canada Health Act*. She thus found no legal basis to intervene, and declined to do so. This raises the issue of *who* it is that *should* resolve these important and contentious issues. Commissioner Roy Romanow makes the following observation in his Report:

> Some have described it as a perversion of Canadian values that they cannot use their money to purchase faster treatment from a private provider for their loved ones. I believe it is a far greater perversion of Canadian values to accept a system where money, rather than need, determines who gets access to care.
>
> (*Building on Values: The Future of Health Care in Canada: Final Report* (2002) ("Romanow Report"), at p. xx)

Whether or not one endorses this assessment, his premise is that the debate is about social values. It is not about constitutional law. We agree.

167 We believe our colleagues the Chief Justice and Major J. have extended too far the strands of interpretation under the *Canadian Charter* laid down in some of the earlier cases, in particular the ruling on abortion in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30 (which involved criminal liability, not public health policy). We cannot find in the constitutional law of Canada a "principle of fundamental justice" dispositive of the problems of waiting lists in the Quebec health system. In our view, the appellants' case does not rest on constitutional law but on their disagreement with the Quebec government on aspects of its social policy. The proper forum to determine the social policy of Quebec in this matter is the National Assembly.

168 Our colleagues the Chief Justice and Major J. write:

> The task of the courts, on s. 7 issues as on others, is to evaluate the issue in the light, not just of common sense or theory, but of the evidence. [para. 150]

This, of course, is precisely what the learned trial judge did after weeks of listening to expert testimony and argument. In general, we agree with her conclusions. There is nothing in the evidence to justify our colleagues' disagreement with her conclusion that the general availability of health insurance will lead to a significant expansion of the private health sector to the detriment of the public health sector. While no one doubts that the Quebec health plan is under sustained and heavy criticism, and that at least some of the criticisms were supported by the trial judge on the basis of the evidence, the trial judge rejected the appellants' contention (now accepted by our colleagues the Chief Justice and Major J.) that the prohibition on private insurance is contrary to the principles of fundamental justice. The trial judge's conclusion was endorsed by Justice Forget of the Quebec Court of Appeal. As a matter of law, we see no reason to interfere with their collective and unanimous judgment on this point. Whatever else it might be, the prohibition is not arbitrary.

169 We can all support the vague objective of "public health care of a reasonable standard within a reasonable time". Most people have opinions, many of them conflicting, about how to achieve it. A legislative policy is not "arbitrary" just because we may disagree with it. As our colleagues the Chief Justice and Major J. fully recognize, the legal test of "arbitrariness" is quite well established in the earlier case law. In our view that test is not met in this case, for reasons we will develop in some detail. Suffice it to say at this point that in our view, the appellants' argument about "arbitrariness" is based largely on generalizations about the public system drawn from fragmentary experience, an overly optimistic view of the benefits offered by private health insurance, an oversimplified view of the adverse effects on the public health system of permitting private sector health services to flourish and an overly interventionist view of the role the courts should play in trying to supply a "fix" to the failings, real or perceived, of major social programs.

A. *The Argument About Adding an "Upper Tier" to the Quebec Health Plan*

170 The nature of a two-tier system is explained as follows:

> In the broad sense, a two-tier system refers to two co-existing health care systems: a publicly funded system and a privately funded system. This definition implies that there is a differential access to health services based on one's ability to pay, rather than according to need. In other words, those who can afford it may

> either obtain access to better quality care or to quicker care in the privately funded system, while the rest of the population continues to access health care only through the publicly funded system. [Emphasis added.]
>
> (*The Health of Canadians — The Federal Role*, vol. 4, *Issues and Options*, Interim Report (2001) ("Kirby Report"), at p. 67)

It is evident, of course, that neither Quebec nor any of the other provinces has a "pure" single-tier system. In the area of uninsured medical services, for example, the private sector is the dominant supplier. In other cases, the private sector may perform the service but is paid by the state. The issue here, as it is so often in social policy debates, is where to draw the line. One can rarely say in such matters that one side of a line is "right" and the other side of a line is "wrong". Still less can we say that the boundaries of the Quebec health plan are dictated by the Constitution. Drawing the line around social programs properly falls within the legitimate exercise of the democratic mandates of people elected for such purposes, preferably after a public debate.

B. *Background to the Health Policy Debate*

171 Prior to 1961, only 53 percent of Canadians were covered by some form of health insurance, leaving approximately 8 million Canadians without insurance coverage (*Voluntary Medical Insurance and Prepayment* (1965) ("Berry Commission"), at pp. 177-78). At that time, health care costs were the number one cause of personal bankruptcy in Canada.

172 In these circumstances, the people of Quebec, through their elected representatives, opted for a need-based, rather than a wealth-based, health care system. In the Castonguay-Nepveu Report, said to be the foundation of the public health care system in Quebec, it was stated:

> The maintenance of the people's health more and more is accepted as a collective responsibility. This is not surprising since it must be admitted that without vigorous State action, the right to health would remain a purely theoretical notion, without any real content. [Emphasis added.]
>
> (*Report of the Commission of Inquiry on Health and Social Welfare*, vol. IV, *Health*, t. 1, *The Present Situation* (1970) ("Castonguay-Nepveu Report"), at p. 30)

173 The Kirby Report noted in 2001 that "Canadians' attachment to a sense of collective responsibility for the provision of health care has remained largely intact despite a shift towards more individualistic values" (vol. 4, at p. 137); see also *Emerging Solutions: Report and Recommendations* (2001) ("Clair Report"), at p. 243; *La complémentarité du secteur privé dans la poursuite des objectifs fondamentaux du système public de santé au Québec: Rapport du groupe de travail* (1999) ("Arpin Report"), at p. 34. Both the Kirby Report and the Romanow Report contained extensive investigations into the operations and problems of the current public health systems across Canada. They acknowledged that the financing of health care is putting a growing stress on public finances and national resources. For fiscal year 2004-2005, federal/provincial/territorial spending on health care is estimated to be about $88 billion (Finance Canada, *Federal Support for Health Care: The Facts* (September 2004)). Whether this growing level of expenditure is sustainable, justified or wise is a matter on which we all have opinions. In the absence of a violation of a recognized "principle of fundamental justice", the opinions that prevail should be those of the legislatures.

174 Not all Canadian provinces prohibit private health insurance, but all of them (with the arguable exception of Newfoundland) take steps to protect the public health system by discouraging the private sector, whether by prohibiting private insurance (Quebec, Ontario, Manitoba, British Columbia, Alberta and Prince Edward Island) or by prohibiting doctors who opt out of the public sector, from billing their private patients more than the public sector tariff, thereby dulling the incentive to opt out (Ontario, Manitoba and Nova Scotia), or eliminating any form of cross-subsidy from the public to the private sector (Quebec, British Columbia, Alberta, Prince Edward Island, Saskatchewan and New Brunswick). The mixture of deterrents differs from province to province, but the underlying policies flow from the *Canada Health Act* and are the same: i.e., as a matter of *principle*, health care should be based on need, not

wealth, and as a matter of *practicality* the provinces judge that growth of the private sector will undermine the strength of the public sector and its ability to achieve the objectives of the *Canada Health Act*.

175 The argument for a "two-tier system" is that it will enable "ordinary" Canadians to access private health care. Indeed, this is the view taken by our colleagues the Chief Justice and Major J. who quote the appellants' argument that "disallowing private insurance precludes the vast majority of Canadians (middle-income and low-income earners) from accessing" private health care (para. 137). This way of putting the argument suggests that the Court has a mandate to save middle-income and low-income Quebeckers from themselves, because both the Romanow Report and the Kirby Report found that the vast majority of "ordinary" Canadians want a publicly financed single-tier (more or less) health plan to which access is governed by need rather than wealth and where the availability of coverage is not contingent on personal insurability. Our colleagues rely in part on the experience in the United States (para. 148) and the fact that public funding in that country accounts for only 45 percent of total health care spending. But if we look at the practical reality of the U.S. system, the fact is that 15.6 percent of the American population (i.e., about 45 million people) had no health insurance coverage at all in 2003, including about 8.4 million children. As to making health care available to medium and low-income families, the effect of "two-tier" health coverage in the U.S. is much worse for minority groups than for the majority. Hispanics had an uninsured rate of 32.7 percent, and African Americans had an uninsured rate of 19.4 percent. For 45 million Americans, as for those "ordinary" Quebeckers who cannot afford private medical insurance or cannot obtain it because they are deemed to be "bad risks", it is a matter of public health care or no care at all (C. DeNavas-Walt, B. D. Proctor and R. J. Mills, *Income, Poverty, and Health Insurance Coverage in the United States: 2003* (2004), at pp. 56-59).

176 It would be open to Quebec to adopt a U.S.-style health care system. No one suggests that there is anything in our Constitution to prevent it. But to do so would be contrary to the policy of the Quebec National Assembly, and its policy in that respect is shared by the other provinces and the federal Parliament. As stated, Quebec further takes the view that significant growth in the private health care system (which the appellants advocate) would inevitably damage the public system. Our colleagues the Chief Justice and Major J. disagree with this assessment, but governments are entitled to act on a reasonable apprehension of risk of such damage. As noted by the majority in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, at para. 133:

> Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do.

While the existence of waiting times is undoubted, and their management a matter of serious public concern, the proposed constitutional right to a two-tier health system for those who can afford private medical insurance would precipitate a seismic shift in health policy for Quebec. We do not believe that such a seismic shift is compelled by either the *Quebec Charter* or the *Canadian Charter*.

II. Analysis

177 The appellants' principal argument is that the existence of waiting lists in Quebec and the concurrent prohibition on private health insurance violate s. 7 of the *Canadian Charter*, which guarantees everyone 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.

178 The *legal* question raised by our colleagues the Chief Justice and Major J. under the *Canadian Charter* is whether or not the Quebec health plan violates a *principle of fundamental justice* and, if so, whether the plan can nevertheless be saved under s. 1.

179 The reasons of our colleague Deschamps J., on the other hand, are limited to s. 1 of the *Quebec Charter* which protects the right of every human being to life and to personal security, inviolability and freedom. The

Quebec Charter does not talk explicitly about "principles of fundamental justice". Nevertheless, in our view, the legislative limits fixed by the *Quebec Charter* are no more favourable to the appellants' case than are those fixed by the *Canadian Charter*. Rights under the *Quebec Charter* are to be exercised with "proper" regard to "democratic" values (including those of the electorate) "public order and the general well-being of the citizens of Québec" (including those who cannot afford, or may not qualify for, private health insurance coverage). We address this issue below starting at para. 266.

180 Our colleagues the Chief Justice and Major J. agree with the appellants that there is a violation of s. 7 of the *Canadian Charter*. As mentioned earlier, their opinion rests in substantial part on observations made by various members of this Court in *Morgentaler*. At issue in that case was the criminal liability of doctors and their patients under s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34, for performing abortions. The nub of the legal challenge was that in creating the abortion offence Parliament had qualified the charge with a "therapeutic abortion" defence, but the defence was not working. The factual and legal issues raised in that criminal law problem are, we think, far removed from the debate over a two-tiered health system. *Morgentaler* applied a "manifest unfairness" test which has never been adopted by the Court outside the criminal law, and certainly not in the context of the design of social programs. The *Morgentaler* judgment fastened on internal inconsistencies in s. 251 of the *Code*, which find no counterpart here. In our view, with respect, *Morgentaler* provides no support for the appellants in this case, as we discuss commencing at para. 259.

181 As stated, we accept the finding of the courts below that a two-tier health care system would likely have a negative impact on the integrity, functioning and viability of the public system: 2000 CanLII 17910 (QC CS), [2000] R.J.Q. 786, at p. 827; reasons of Forget J.A., 2002 CanLII 33075 (QC CA), [2002] R.J.Q. 1205, at p. 1215. Although this finding is disputed by our colleagues the Chief Justice and Major J. (a point to which we will return), it cannot be contested that as a matter of *principle*, access to private health care based on wealth rather than need contradicts one of the key social policy objectives expressed in the *Canada Health Act*. The state has established its interest in promoting the equal treatment of its citizens in terms of health care. The issue of arbitrariness relates only to the validity of the *means* adopted to achieve that policy objective. Counsel for the appellant Zeliotis was not oblivious to the potential danger posed by the re-allocation of health resources to the private sector. In opening his oral submissions to the Court, he acknowledged the need as a matter of social policy to protect the public health system:

> [TRANSLATION] May a person use his or her own resources to obtain medical care outside the public system if the public system is unable to provide medical care within an acceptable time and if doing so *would not deprive the public system of the resources it needs*? . . .
>
> . . . we recognize that it is perfectly legitimate for the state to make sure that the public system has on a priority basis all the resources it needs to function. *Thus, we concede that, if this were in fact impossible, our appeal should fail.* [Emphasis added.]
>
> (Oral Transcript, Mr. Trudel, at p. 25)

While Quebec does not outlaw private health care, which is therefore accessible to those with cash on hand, it wishes to discourage its growth. Failure to stop the few people with ready cash does not pose a structural threat to the Quebec health plan. Failure to stop private health insurance will, as the trial judge found, do so. Private insurance is a condition precedent to, and aims at promoting, a flourishing parallel private health care sector. For Dr. Chaoulli in particular, that is the whole point of this proceeding.

A. *Preliminary Objections*

182 The Attorneys General made two preliminary objections: first, that the claims raised on this appeal are not properly justiciable; and second, that neither Dr. Chaoulli nor Mr. Zeliotis has standing to bring their claim. These objections should be rejected.

(1) Justiciability

183 The Attorneys General of Canada and Quebec argue that the claims advanced by the appellants are inherently political and, therefore, not properly justiciable by the courts. We do not agree. Section 52 of the *Constitution Act, 1982* affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution. Where a violation stems from a *Canadian Charter* breach, the court may also order whatever remedy is "appropriate and just" in the circumstances under s. 24. There is nothing in our constitutional arrangement to exclude "political questions" from judicial review where the Constitution itself is alleged to be violated.

184 Nevertheless, a correct balance must be struck between the judiciary and the other branches of government. Each branch must respect the limits of its institutional role. As stated in *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, "the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts" (para. 136).

185 In the present case, the appellants are challenging the legality of Quebec's prohibition against private health insurance. While the issue raises "political questions" of a high order, the alleged *Canadian Charter* violation framed by the appellants is in its nature justiciable, and the Court should deal with it.

(2) Standing of Dr. Chaoulli and Mr. Zeliotis

186 Article 55 of the *Code of Civil Procedure*, R.S.Q., c. C-25, requires that the party bringing an action have a "sufficient interest" in the litigation. In our view, for the reasons given by the trial judge, as previously mentioned, Mr. Zeliotis has not demonstrated that systemic waiting lists were the cause of his delayed treatment.

187 Dr. Chaoulli's situation is different. He offers himself as an advocate for private health insurance. He is a medically trained individual who has a history of conflict with the Quebec health authorities and of disobedience to their rules governing medical practice. The trial judge found Dr. Chaoulli's motives to be questionable:

> [TRANSLATION] At first, Dr. Chaoulli was supposed to complete his initial contract in a remote region. He did not do so but returned to Montréal and, contrary to what he was entitled to do, began practising on the South Shore. He then obstinately insisted on practising medicine as he pleased, disregarding the regional board's decisions. Dr. Chaoulli never testified that he had received inadequate care or that the system had not responded to his personal health needs. He still faces substantial penalties at the Régie de l'assurance-maladie du Québec. He was released from his obligations, returned to the public system, and is still not satisfied. All this leads the Court to question Dr. Chaoulli's real motives in this dispute. It is impossible not to be struck by the contradictions in his testimony and by the impression that Dr. Chaoulli has embarked on a crusade that now raises questions transcending his own personal case. [p. 795]

188 Nevertheless, we accept that the appellants have a sufficient interest in the constitutional questions to be given public interest standing. In *Minister of Justice of Canada v. Borowski*, 1981 CanLII 34 (SCC), [1981] 2 S.C.R. 575, at p. 598, Martland J. wrote that to qualify in that regard, a person must satisfy three requirements:

> [T]o establish status as a plaintiff in a suit seeking a declaration that legislation is invalid, if there is a serious issue as to its invalidity, a person need only to show that he is affected by it directly or that he has a genuine

> interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court.

See also *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, 1992 CanLII 116 (SCC), [1992] 1 S.C.R. 236.

189 All three of these conditions are met in the present case. First, there is a serious challenge to the invalidity of the impugned provisions. Access to medical care is a concern of all Quebec residents. Second, Dr. Chaoulli and Mr. Zeliotis are both Quebec residents and are therefore directly affected by the provisions barring access to private health insurance. Third, the appellants advance the broad claim that the Quebec health plan is unconstitutional for *systemic* reasons. They do not limit themselves to the circumstances of any particular patient. Their argument is not limited to a case-by-case consideration. They make the generic argument that Quebec's chronic waiting lists destroy Quebec's legislative authority to draw the line against private health insurance. From a practical point of view, while individual patients could be expected to bring their own cases to court if they wished to do so, it would be unreasonable to expect a seriously ailing person to bring a systemic challenge to the whole health plan, as was done here. The material, physical and emotional resources of individuals who are ill, and quite possibly dying, are likely to be focussed on their own circumstances. In this sense, there is no other class of persons that is more directly affected and that could be expected to undertake the lengthy and no doubt costly systemic challenge to single-tier medicine. Consequently, we agree that the appellants in this case were rightly granted public interest standing. However, the corollary to this ruling is that failure by the appellants in their systemic challenge would not foreclose constitutional relief to an individual based on, and limited to, his or her particular circumstances.

B. *Canadian Charter of Rights and Freedoms*

190 The Chief Justice and Major J. would strike down the Quebec legislation on the basis of s. 7 of the *Canadian Charter*, which provides:

> **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.

191 Like our colleagues McLachlin C.J. and Major J., we accept the trial judge's conclusion that in *some* circumstances *some* Quebeckers may have their life or "security of the person" put at risk by the prohibition against private health insurance. However, unlike our colleagues, we agree with the trial judge and the Quebec Court of Appeal that this situation, however deplorable, is not capable of resolution as a matter of constitutional law. At the same time, we reject some of the constraints that the Attorney General of Quebec would place on the Court's analysis.

(1) The Application of Section 7 to Matters Not Falling Within the Administration of Justice

192 The Attorney General of Quebec argues that s. 7 does not protect economic rights. This is true, but is somewhat beside the point. The appellants seek access to a two-tier health system. The fact it will cost money to the people in the "upper tier" is an incidental (although important) aspect of their challenge, which is principled in nature.

193 Section 7 gives rise to some of the most difficult issues in *Canadian Charter* litigation. Because s. 7 protects the most basic interests of human beings — life, liberty and security — claimants call on the courts to adjudicate many difficult moral and ethical issues. It is therefore prudent, in our view, to proceed cautiously and incrementally in applying s. 7, particularly in distilling those principles that are so vital to our society's conception of "principles of fundamental justice" as to be constitutionally entrenched.

194 At first blush, s. 15 of the *Health Insurance Act*, R.S.Q., c. A-29, and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28, seem far removed from the usual concerns of s. 7 of the *Canadian Charter*. The provisions sought to be invalidated provide:

> **15.** No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf.
>
> . . .
>
> **11.** (1) No one shall make or renew, or make a payment under a contract under which
>
> (*a*) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;
>
> (*b*) payment is conditional upon the hospitalization of a resident; or
>
> (*c*) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

195 The present challenge does not arise out of an adjudicative context or one involving the administration of justice. Sections 11 and 15 are plainly not adjudicative provisions. Nor are they administrative provisions in the sense of being part of the administrative scheme for the provision of health services, though they do form part of the regulatory health regime. Section 11 is a *civil* prohibition against the making or renewing of a contract for insurance for "insured services" and against the payment under such a contract for "insured services". Any contract entered into in contravention of s. 11 and s. 15 would be absolutely null and unenforceable because it is contrary to the general interest: art. 1417 of the *Civil Code of Québec*, S.Q. 1991, c. 64. Although small fines may be imposed for the breach of these provisions, we think that regulations providing for such fines, which are wholly incidental to the regulatory purpose, would not create a sufficient nexus with the adjudicative context to ground the application of s. 7 on that basis.

196 It will likely be a rare case where s. 7 will apply in circumstances entirely unrelated to adjudicative or administrative proceedings. That said, the Court has consistently left open the possibility that s. 7 may apply outside the context of the administration of justice: *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, at paras. 78-80 and 414.

197 The Court has been moving away from a narrow approach to s. 7, which restricted the scope of the section to legal rights to be interpreted in light of the rights enumerated in ss. 8 to 14: see, e.g., *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*"), at pp. 1171-74. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, the majority held that s. 7 can apply outside of the criminal context. Further, in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, the Court noted that it had held in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, that the wardship provisions of the *Child Welfare Act*, R.S.O. 1980, c. 66, denying parents the ability to choose medical treatment for their infants, implicated the s. 7 liberty interests of parents.

198 Placing s. 7 under the heading "Legal Rights" in the *Canadian Charter* does not narrow or control its scope. Such a result would be unduly formalistic and inconsistent with the large, liberal and purposive interpretation of s. 7 that has been the hallmark of this Court's approach since *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486. This is evidenced by the refusal of the majority in that case to restrict "principles of fundamental justice" solely to procedural guarantees. Lamer J. observed that "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" (p. 512 (emphasis added)).

199 Claimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaint arises from a breach of an identifiable principle of fundamental justice. The real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice. The further a challenged state action lies from the traditional adjudicative context, the more difficult it will be for a claimant to make that essential link. As will become clear, that is precisely the difficulty encountered by the claimants here: they are unable to demonstrate that any principle of fundamental justice has been contravened.

(2) Which Section 7 Interests Are Engaged?

200 Section 7 interests are enumerated as life, liberty and security of the person. As stated, we accept the trial judge's finding that the current state of the Quebec health system, linked to the prohibition against health insurance for insured services, is capable, at least in the cases of some individuals on some occasions, of putting at risk their life or security of the person.

201 We do not agree with the appellants, however, that the Quebec Health Plan puts the "liberty" of Quebeckers at risk. The argument that "liberty" includes freedom of contract (in this case to contract for private medical insurance) is novel in Canada, where economic rights are not included in the *Canadian Charter* and discredited in the United States. In that country, the liberty of individuals (mainly employers) to contract out of social and economic programs was endorsed by the Supreme Court in the early decades of the 20th century on the theory that laws that prohibited employers from entering into oppressive contracts with employees violated their "liberty" of contract; see, e.g., *Lochner v. New York*, 198 U.S. 45 (1905), at p. 62:

> . . . a prohibition to enter into any contract of labor in a bakery for more than a certain number of hours a week, is, in our judgment, so wholly beside the matter of a proper, reasonable and fair provision, as to run counter to that liberty of person and of free contract provided for in the Federal Constitution.

Of this line of cases, which was not brought to an end until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), Professor L. H. Tribe has written that the Supreme Court of the United States:

> . . . relied on the Fourteenth Amendment's Due Process Clause to strike down economic legislation that the Court saw as improperly infringing on contractual liberty, but in which the Court was widely (even if not always correctly) perceived to be substituting its own judgment, in the absence of any actual constitutional mandate, for that of the legislature. [Emphasis added.]
>
> (*American Constitutional Law* (3rd ed. 2000), vol. 1, at p. 1318)

202 Nor do we accept that s. 7 of the *Canadian Charter* guarantees Dr. Chaoulli the "liberty" to deliver health care in a private context. The trial judge correctly concluded that [TRANSLATION] "*s. 7* of the Canadian charter does not protect a physician's right to practise his or her profession without restrictions in the private sector. That is a purely economic right." (p. 823 (emphasis in original)) The fact that state action constrains an individual's freedom by eliminating career choices that would otherwise be available does not in itself attract the protection of the liberty interest under s. 7. The liberty interest does not, for example, include the right to transact business whenever one wishes: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713, at p. 786. Nor does it protect the right to exercise one's chosen profession: *Prostitution Reference*, at p. 1179, *per* Lamer J. We would therefore reject Dr. Chaoulli's claim on behalf of care providers that their liberty interest under either the *Canadian Charter* or the *Quebec Charter* has been infringed by Quebec's single-tier public health system.

(3) Is There a Constitutional Right to Spend Money?

203 Reference has already been made to the question raised by our colleague Deschamps J. at para. 4 of her reasons:

> In essence, the question is whether Quebeckers who are prepared to spend money to get access to health care that is, in practice, not accessible in the public sector because of waiting lists may be validly prevented from doing so by the state.

While we do not accept that there is a constitutional right "to spend money", which would be a property right, we agree that if the public system fails to deliver life-saving care and an individual is simultaneously prevented from seeking insurance to cover the cost of that care in a private facility, then the individual is potentially caught in a situation that may signal a deprivation of his or her security of the person.

204 This is not to say that every encounter with a waiting list will trigger the application of s. 7. The interference with one's mental well-being must not be trivial. It must rise above the ordinary anxiety caused by the vicissitudes of life, but it need not be so grave as to lead to serious mental anguish or nervous breakdown. Some individuals that meet this test are to be found entangled in the Quebec health system. The fact that such individuals do not include the appellants personally is not fatal to their challenge because they come here as plaintiffs purporting to represent the public interest.

205 The Court has found a deprivation of one's psychological integrity sufficient to ground a s. 7 claim in a range of cases. In *Morgentaler*, the majority held that the impugned abortion provisions seriously compromised a woman's physical and psychological integrity in a manner that constituted an infringement of her security of the person: at pp. 56-57, *per* Dickson C.J. (Lamer J. concurring), at pp. 104-5, *per* Beetz J. (Estey J. concurring); at pp. 173-74, *per* Wilson J. The Court subsequently held that the criminal prohibition against assisting someone to commit suicide constituted an impingement of the claimant's physical and psychological integrity that amounted to a deprivation of the right to security of the person under s. 7; the claimant in that case was suffering from Lou Gehrig's disease, a rapidly deteriorating condition, which results in paralysis and eventually requires invasive life-prolonging measures to be taken: *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519. More recently, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, the Court was unanimous in saying that removal of a child from parental custody by the state pursuant to its wardship jurisdiction constituted a serious interference with the psychological integrity of the parent that deprived the parent of the security of the person.

206 It may also be that a lack of timely medical intervention will put the *physical* security of the patient at risk. The condition of a cardiac or cancer patient, for example, may seriously deteriorate if treatment is not available quickly.

207 As stated, the principal legal hurdle to the appellants' *Canadian Charter* challenge is not the preliminary step of identifying a s. 7 interest potentially affected in the case of some Quebeckers in some circumstances. The hurdle lies in their failure to find a fundamental principle of justice that is violated by the Quebec health plan so as to justify the Court in striking down the prohibition against private insurance for what the government has identified as "insured services".

C. *Principles of Fundamental Justice*

208 For a principle to be one of fundamental justice, it must count among the basic tenets of our legal system: *Re B.C. Motor Vehicle Act*, at p. 503. It must generally be accepted as such among reasonable people. As explained by the majority in *Malmo-Levine*, at para. 113:

> The requirement of "general acceptance among reasonable people" enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental "in the eye of the beholder only": *Rodriguez*, at pp. 607 and 590 . . . . In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, 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. [First emphasis in *Rodriguez*; subsequent emphasis added.]

See also *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] 1 S.C.R. 76, 2004 SCC 4, at para. 8.

209 Thus, the formal requirements for a principle of fundamental justice are threefold. First, it must be a legal principle. Second, the reasonable person must regard it as vital to our societal notion of justice, which implies a significant societal consensus. Third, it must be capable of being identified with precision and applied in a manner that yields predictable results. These requirements present insurmountable hurdles to the appellants. The aim of "health care of a reasonable standard within a reasonable time" is not a legal principle. There is no "societal consensus" about what it means or how to achieve it. It cannot be "identified with precision". As the testimony in this case showed, a level of care that is considered perfectly reasonable by some doctors is denounced by others. Finally, we think it will be very difficult for those designing and implementing a health plan to predict when its provisions cross the line from what is "reasonable" into the forbidden territory of what is "unreasonable", and how the one is to be distinguished from the other.

(1) The Experts Recognized That the Potential Market for Health Services Is Almost Limitless, and the Supply Must Therefore Be Rationed Whether by Governments in the Public Sector or Insurers or Other Health Care Providers in the Private Sector

210 Much of the argument pursued by the Chief Justice and Major J., as well as by Deschamps J. in her reasons relating to the *Quebec Charter*, revolves around the vexing issue of waiting lists, which have notoriously fuelled major public debates and controversies.

211 The case history of the appellant Zeliotis illustrates why rationing of health services is necessary and how it works. The trial judge, having heard all the evidence, concluded that the delays Mr. Zeliotis experienced in obtaining hip surgery were caused not by excessive waiting lists but by a number of other factors, including his pre-existing depression and his indecision and unfounded medical complaints (p. 793):

> [TRANSLATION] The truth is that, in light of his personal medical impediments, the fact that he was already suffering from depression, his indecision and his complaints, which in many respects were unwarranted, it is hard to conclude that the delays that occurred resulted from lack of access to public health services, and in fact even Mr. Zeliotis's complaints about delays are questionable. It was he who initially wanted a second opinion, it was his surgeon who hesitated because of his problems, and so on. Thus, his complaint to the director of professional services at the Royal Victoria Hospital . . . was not corroborated. An out-of-court examination in connection with another case is puzzling, as Mr. Zeliotis said he was in very good health . . . .

Mr. Zeliotis sought a second opinion, which he was entitled to do, and this further delayed his surgery. More importantly, his physician believed that Mr. Zeliotis was not an "ideal candidate" for the surgery because he had suffered a heart attack and undergone bypass surgery earlier that year. Accordingly, neither the mere existence of waiting lists, nor the fact that certain individuals like Mr. Zeliotis feel unfairly dealt with, necessarily points to a constitutional problem with the public health system as a whole.

(a) *There Is No Consensus About What Constitutes "Reasonable" Waiting Times*

212 A review of the expert evidence and the medical literature suggests that there is no consensus regarding guidelines for timely medical treatment. Dr. Wright remarked:

> So the issue of defining what is a reasonable waiting list is a very difficult one because if you have a hundred (100) surgeons, you have a hundred (100) opinions, it's very difficult to come to a consensus on these questions. [A.R., at p. 1186]

There are currently no national standards for timely treatment: see C. Sanmartin et al., "Waiting for medical services in Canada: lots of heat, but little light" (2000), 162 *C.M.A.J.* 1305; S. Lewis et al., "Ending waiting-list mismanagement: principles and practice" (2000), 162 *C.M.A.J.* 1297; N. E. Mayo et al., "Waiting time for breast cancer surgery in Quebec" (2001), 164 *C.M.A.J.* 1133.

213 It is therefore convenient to look further into the expert evidence, not to dispute the existence of waiting list problems or to understate the level of public anxiety they create, but simply to illustrate the complexity of the situation and the dangers of oversimplification.

(b) *The Experts Accepted by the Trial Judge Relied on More Than Just "Common Sense"*

214 Our colleagues the Chief Justice and Major J. dismiss the experts accepted by the trial judge as relying on little more than "common sense" (para. 137). Although we agree that the experts offered "common sense", they offered a good deal more. The experts heard by the trial court included Mr. Claude Castonguay, who was Quebec's Minister of Health in 1970 (the [TRANSLATION] "father of Quebec health insurance") and who chaired the Commission of Inquiry on Health and Social Welfare, as well as a number of other public health experts, including Dr. Fernand Turcotte, a professor of medicine at Laval University, who holds degrees from the University of Montreal and Harvard and has been certified by the Royal College of Physicians and Surgeons of Canada as a specialist in community medicine; Dr. Howard Bergman, Chief of the Division of Geriatric Medicine at Montreal's Jewish General Hospital, Director of the Division of Geriatric Medicine and a professor in the departments of Internal Medicine and Family Medicine at McGill University, a fellow of the American Geriatrics Society and an associate professor at the University of Montreal in the department of health administration; Dr. Charles J. Wright, a physician specialized in surgery, Director of the Centre for Clinical Epidemiology & Evaluation at the Vancouver Hospital & Health Sciences Centre, and a faculty member of the University of British Columbia and of the British Columbia Office of Health Technology Assessment; Professor Jean-Louis Denis, a community health doctor of the University of Montreal's [TRANSLATION] "health services organization"; Professor Theodore R. Marmor, a professor of public policy and management and of political science at Yale University, who holds a PhD from Harvard University in politics and history and is a graduate research fellow at Oxford; and Dr. J. Edwin Coffey, a graduate of McGill University in medicine who specializes in obstetrics and gynecology, a fellow of the Royal College of Physicians and Surgeons of Canada and of the American College of Obstetricians and Gynecologists, and a former associate professor in the McGill University Faculty of Medicine. The respondent's experts testified and were cross-examined. The trial judge found them to be credible and reliable. We owe deference to her findings in this respect.

215 The trial judge, having heard the evidence, concluded as follows:

> [TRANSLATION] . . . although some of these specialists indicated a desire to be free to obtain private insurance, none of them gave their full and absolute support to the applicants' proposals, as they explained <u>that it was neither clear nor obvious that a reorganization of the health system with a parallel private system would solve all the existing problems of delays and access</u>. On the contrary, the specialists who testified remained quite circumspect about this complex and difficult question. [Emphasis added; p. 796.]

The exception to the consensus was the appellants' expert, Dr. Coffey, who stated that in his opinion the development of a private insurance scheme would not affect the public health scheme. This is the argument accepted by our colleagues the Chief Justice and Major J. However on this point the trial judge observed, as on others, [TRANSLATION]

"*that Dr. Coffey stood alone in both his expert evaluation and the conclusions he reached*" (p. 808 (emphasis in original)).

216 In addition, the Court was presented with a number of government reports and independent studies. They bear out the wisdom of the comment in *Un avenir pour le système public de santé* (1998) ("Denis Report"), at p. 20: [TRANSLATION] "It is important that we quickly distance ourselves from a position advocating simple solutions to complex problems."

(c) *The Lack of Accurate Data*

217 How serious is the waiting-list problem? No doubt it is serious; but *how* serious? The first major evidentiary difficulty for the appellants is the lack of accurate data. The major studies concluded that the real picture concerning waiting lists in Canada is subject to contradictory evidence and conflicting claims (Romanow Report, at p. 139, and the Kirby Report, vol. 4, at p. 41, and vol. 6, at pp. 109-10). This can also be seen from the evidence of the experts who testified at trial in the present case (see *Waiting Lists in Canada and the Potential Effects of Private Access to Health Care Services* (1998) ("Wright Report"), at p. 7; *Le temps d'attente comme instrument de gestion du rationnement dans les services de santé du Canada* (1998) ("Turcotte Report")), and from the available literature (see *Waiting Lists and Waiting Times for Health Care in Canada: More Management!! More Money??* (1998) ("McDonald Report")). At trial, Dr. Wright also discounted the value of random opinion surveys:

> The information is based on no formal structured data collection of any kind and has no credibility whatever with any health service researcher or epidemiologist.
>
> (Wright Report, at p. 8)

218 In a commentary for the *Canadian Medical Association Journal*, S. Lewis et al. observed:

> The waiting-list "nonsystem" in Canada is a classic case of forced decision-making in the absence of good management information. There is a surfeit of nonstandardized data and a dearth of usable, policy-oriented information about waiting lists. The most serious consequence is that information and management defects are almost always prematurely diagnosed as financial shortages. [p. 1299]

219 Professor Marmor also subscribed to the view that waiting lists cannot serve as a "simple indicator" of a failing health care system (*Expert Witness Report* (1998) ("Marmor Report"), at p. 11) in part because studies of waiting lists have demonstrated that up to one third of patients on lists no longer need to be on them because the procedure has already been performed elsewhere; the patient has already been admitted on an emergency basis; the patient no longer wishes the procedure to be performed; the procedure is no longer medically necessary; the patient has already been called in to have the procedure but refused for personal reasons or due to inconvenient timing; or the patient is on multiple waiting lists at different hospitals thereby inflating numbers (Wright Report, at pp. 7-8).

(d) *The Impact of Waiting Times on Individual Patients*

220 It is even more difficult to generalize about the potential impact of a waiting list on a particular patient. The most comprehensive overview of the literature on waiting lists available to the trial judge was the McDonald Report, at p. 14. It presents a review of studies of patients' experiences while awaiting surgery. That review prompted the authors to conclude, among other things, that patients awaiting care for a range of procedures — including knee and hip replacement, cardiac care and cataract care — may experience "emotional strains such as increased levels of anxiety due to a range of factors including lack of information and uncertainty regarding the timeline for care" (p. 267 (emphasis added)) or the "normal" anxiety or apprehension felt by anyone faced with a serious surgical procedure. In other words, waiting lists may be serious in some cases, but in how many cases and how serious?

(e) *The Need to Ration Services*

221 Waiting times are not only found in public systems. They are found in all health care systems, be they single-tier private, single-tier public, or the various forms of two-tier public/private (see, e.g., Kirby Report, vol. 1, at p. 111). Waiting times in Canada are not exceptional (see Kirby Report, vol. 4, at p. 41). The consequence of a quasi-unlimited demand for health care coupled with limited resources, be they public or private, is to ration services. As noted by the Arpin Report, *Constats et recommandations sur les pistes à explorer: Synthèse*, at p. 37:

> [TRANSLATION] In any health care system, be it public or private, there is an ongoing effort to strike the proper balance. . . . For a public system like our own, waiting lists, insofar as priority is given to urgent cases, do not *in themselves* represent a flaw in the system. They are the inevitable result of a public system that can consequently offer universal access to health services within the limits of sustainable public spending. Thus, to a certain extent, they play a necessary role. [Emphasis in original.]

222 The expert witnesses at trial agreed that waiting lists are inevitable (*Expertise déposée par Howard Bergman* (1998) ("Bergman Report"), at p. 5; Marmor Report, at p. 11). The only alternative is to have a substantially overbuilt health care system with idle capacity (Wright Report, at p. 6). This is not a financially feasible option, in the public *or* private sector.

(f) *Who Should Be Allowed to Jump the Queue?*

223 In a public system founded on the values of equity, solidarity and collective responsibility, rationing occurs on the basis of clinical need rather than wealth and social status (see, e.g., Turcotte Report, at pp. 4 and 10; Denis Report, at p. 11; Clair Report, at p. 129; *Rapport de la Commission d'enquête sur les services de santé et les services sociaux* (1988) ("Rochon Report"), at p. 651). As a result, there exists in Canada a phenomenon of "static queues" whereby a group of persons may remain on a waiting list for a considerable time if their situation is not pressing. Patients who are in greater need of health care are prioritized and treated before those with a lesser need (Kirby Report, vol. 5, at pp. 56-57; see also Turcotte Report, at p. 12). In general, the evidence suggests that patients who need immediate medical care receive it. There are of course exceptions, and these exceptions are properly the focus of controversy, but in our view they can and should be addressed on a case-by-case basis.

(g) *Availability of Public Funding for Out-of-Province Medical Care*

224 Section 10 of the *Health Insurance Act* provides that in certain circumstances Quebeckers will be reimbursed for the cost of "insured services" rendered outside Quebec but in Canada (*Regulation respecting the application of the Health Insurance Act*, R.R.Q. 1981, c. A-29, s. 23.1), or outside Canada altogether (s. 23.2). There is no doubt that the power of reimbursement is exercised sparingly, and on occasion unlawfully; see for example *Stein v. Tribunal administratif du Québec*, 1999 CanLII 11195 (QC CS), [1999] R.J.Q. 2416 (S.C.). One of the difficulties in assessing the effectiveness of this individual remedy is that neither Dr. Chaoulli nor Mr. Zeliotis is before the Court with an actual medical problem. (The trial judge, as stated, dismissed Mr. Zeliotis' personal health complaints as unsubstantiated.) The reimbursement scheme for out-of-province services exists as a form of safety valve for situations in which Quebec facilities are unable to respond. As *Stein* shows, there are lapses of judgment, as there will be in the administration of any government plan. The existence of the individual remedy, however, introduces an important element of flexibility, if administered properly.

(h) *The Evidence Relied on by the Chief Justice and Major J. Did Not Satisfy the Trial Judge and Is Not, in Our View, Persuasive*

225 The Chief Justice and Major J. cite Dr. Lenczner as an authority at para. 114 but the trial judge pointed out that Dr. Lenczner had not been qualified as an expert witness and counsel for Mr. Zeliotis agreed (A.R., at pp. 330-31). Dr. Lenczner's comments were largely anecdotal and of little general application. He described a patient who was a golfer, and thus lost his access to his golf membership for that season. He also stated that a tear can increase over time and get to the point of being irreparable, but no studies or general evidence was adduced to show the incidence of such cases in Quebec. Our colleagues comment at para. 112 that "a person with coronary disease is [TRANSLATION] 'sitting on a bomb' and can die at any moment". This is true, of course. He or she can die at home, or in an ambulance on the way to a hospital. Again, our colleagues write, "patients die while on waiting lists" (para. 112). This, too, is true. But our colleagues are not advocating an overbuilt system with enough idle capacity to eliminate waiting lists, and such generalized comments provide no guidance for what in practical terms *would* constitute an appropriate level of resources to meet their suggested standard of "public health care of a reasonable standard within a reasonable time" (para. 105).

226 We have similar concerns about the use made by the appellants of various reports in connection with other OECD countries. These "country" reports were included in an Interim Kirby Report but not in its final version. The Final Kirby Report's recommendation was to stick with a single-tier system. We think the Court is sufficiently burdened with conflicting evidence about our own health system without attempting a detailed investigation of the merits of trade-offs made in other countries, for their own purposes. A glance at the evidence shows why.

227 Our colleagues the Chief Justice and Major J. state, at para. 142, that in Sweden only a very small minority of the population actually utilize private insurance. Yet, the Interim Kirby Report goes on to take note of more recent trends:

> *The growing rate of the number of insured, or people on private health care insurance, is some 80% or something like that now. It is growing very fast due to the normal waiting lists and the problems within the system today*. [Emphasis in original.]
>
> (Interim Kirby Report, vol. 3, at pp. 31-32)

228 With respect to the United Kingdom, the Interim Kirby Report states:

> *One of the major reasons given by people who take private insurance is they want the peace of mind of being able to have elective operations for themselves or their families more quickly or at more convenient times than if they must depend on the National Health Service. That is seen, of course, as a cause of unfairness, which is one of the reasons that the government is committed to bringing down waiting times for National Health Service patients as rapidly as it can.* [Emphasis in original.]
>
> (Interim Kirby Report, vol. 3, at p. 38)

In fact, in the actual conclusion of vol. 3 of the Interim Kirby Report on *Health Care Systems in Other Countries*, the report's authors state (at p. 73):

> Canadians may find some consolation in the fact that Canada is not alone in confronting complex health care issues. Everywhere in the industrialized world health care policy is thoroughly intertwined with the political, social, and even cultural life of each country. As such, every health care system is unique. Therefore, no single international model constitutes a blueprint for solving the challenges confronted by the Canadian health care system. However, experts told the Committee that careful consideration must be given to the repercussions in Canada of introducing, on a piecemeal basis, changes undertaken in other countries.

229 We are not to be taken as disputing the undoubted fact that there are serious problems with the single-tier health plan in Canada. Our point is simply that bits of evidence must be put in context. With respect, it is particularly dangerous to venture selectively into aspects of foreign health care systems with which we, as Canadians,

have little familiarity. At the very least such information should be filtered and analysed at trial through an expert witness.

230 Taking the good with the bad, the Final Kirby Report recommended continuation of a single-tier health system (as did the Romanow Report). The authors of the Kirby Report were fully aware of the extracts from their interim report relied upon by our colleagues the Chief Justice and Major J., yet they specifically rejected two-tier health care:

> Repeated public opinion polling data have shown that having to wait months for diagnostic or hospital treatment is the greatest concern and complaint that Canadians have about the health care system. The solution to this problem is not, as some have suggested, to allow wealthy Canadians to pay for services in a private health care institution. Such a solution would violate the principle of equity of access. The solution is the care guarantee as recommended in this report. [Emphasis added.]
>
> (Final Kirby Report, vol. 6, at p. 321)

We thus conclude that our colleagues' extracts of some of the *tour d'horizon* data published in the Interim Kirby Report do not displace the conclusion of the trial judge, let alone the conclusion of the Kirby Report itself. Apart from everything else, it leaves out of consideration the commitment in principle in this country to health care based on need, not wealth or status, as set out in the *Canada Health Act*.

(2) Arbitrariness

231 Our colleagues the Chief Justice and Major J. take the view that a law which arbitrarily violates life or security of the person is unconstitutional. We agree that this is a principle of fundamental justice. We do not agree that it applies to the facts of this case.

232 A deprivation of a right will be arbitrary and will thus infringe s. 7 if it bears no relation to, or is inconsistent with, the state interest that lies behind the legislation: *Rodriguez*, at pp. 619-20; *Malmo-Levine*, at para. 135. As Sopinka J. explained in *Rodriguez*, at pp. 594-95:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose. . . . It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because (in the words of my colleague, McLachlin J. at pp. 619-20) "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation" without considering the state interest and the societal concerns which it reflects. [Emphasis added.]

233 We agree with our colleagues the Chief Justice and Major J. that a law is arbitrary if "it bears no relation to, or is inconsistent with, the objective that lies behind [the legislation]" (para. 130). We do not agree with the Chief Justice and Major J. that the prohibition against private health insurance "bears no relation to, or is inconsistent with" the preservation of access to a health system based on need rather than wealth in accordance with the *Canada Health Act*. We also do not agree with our colleagues' expansion of the *Morgentaler* principle to invalidate a prohibition simply because a court believes it to be "unnecessary" for the government's purpose. There must be more than that to sustain a valid objection.

234 The accepted definition in *Rodriguez* states that a law is arbitrary only where "it bears no relation to, or is inconsistent with, the objective that lies behind the legislation". To substitute the term "unnecessary" for

"inconsistent" is to substantively alter the meaning of the term "arbitrary". "Inconsistent" means that the law logically contradicts its objectives, whereas "unnecessary" simply means that the objective could be met by other means. It is quite apparent that the latter is a much broader term that involves a policy choice. If a court were to declare unconstitutional every law impacting "security of the person" that the court considers unnecessary, there would be much greater scope for intervention under s. 7 than has previously been considered by this Court to be acceptable. (In *Rodriguez* itself, for example, could the criminalization of assisted suicide simply have been dismissed as "unnecessary"? As with health care, many jurisdictions have treated euthanasia differently than does our *Criminal Code*.) The courts might find themselves constantly second-guessing the validity of governments' public policy objectives based on subjective views of the *necessity* of particular means used to advance legitimate government action as opposed to other means which critics might prefer.

235 Rejecting the findings in the courts below based on their own reading of the evidence, our colleagues the Chief Justice and Major J. state (at para. 128):

> We are of the opinion that the evidence before the trial judge supports a finding that the impugned provisions are arbitrary and that the deprivation of life and security of the person that flows from them cannot therefore be said to accord with the principles of fundamental justice.

We note that our colleagues refer to the evidence before the trial judge rather than the view taken of that evidence by the trial judge. The trial judge reached a contrary conclusion on the facts, and deference is due to her view of that evidence; see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. In any event, with respect, we accept the contrary conclusions of the trial judge and the Quebec Court of Appeal. We approach the issue of arbitrariness in three steps:

(i) What is the "state interest" sought to be protected?

(ii) What is the relationship between the "state interest" thus identified and the prohibition against private health insurance?

(iii) Have the appellants established that the prohibition bears no relation to, or is inconsistent with, the state interest?

We will address each question in turn.

(a) *What Is the "State Interest" Sought To Be Protected?*

236 Quebec's legislative objective is to provide high quality health care, at a reasonable cost, for as many people as possible in a manner that is consistent with principles of efficiency, equity and fiscal responsibility. Quebec (along with the other provinces and territories) subscribes to the policy objectives of the *Canada Health Act*, which include (i) the equal provision of medical services to all residents, regardless of status, wealth or personal insurability, and (ii) fiscal responsibility. An overbuilt health system is seen as no more in the larger public interest than a system that on occasion falls short. The legislative task is to strike a balance among competing interests.

237 The appellants do not challenge the constitutional validity of the objectives set out in the *Canada Health Act*. Thus our job as judges is not to agree or disagree with these objectives but simply to determine whether the *means* adopted by Quebec to *implement* these objectives are arbitrary.

(b) *What Is the Relationship Between the "State Interest" Thus Identified and the Prohibition Against Private Health Insurance?*

238 The relationship lies both in principle and in practicality.

239 In principle, Quebec wants a health system where access is governed by need rather than wealth or status. Quebec does not want people who are uninsurable to be left behind. To accomplish this objective endorsed by the *Canada Health Act*, Quebec seeks to discourage the growth of private-sector delivery of "insured" services based on wealth and insurability. We believe the prohibition is rationally connected to Quebec's objective and is not inconsistent with it.

240 In practical terms, Quebec bases the prohibition on the view that private insurance, and a consequent major expansion of private health services, would have a harmful effect on the public system.

241 The trial judge put her conclusion this way (at p. 827):

> [TRANSLATION] The *Health Insurance Act* ["HEIA"] and the *Hospital Insurance Act* ["HOIA"] are pieces of legislation whose *purpose is to create and maintain a public health care plan open to all residents of Quebec*. These enactments *are intended to promote the overall health of all Quebeckers without discrimination based on economic circumstances*. In short, they constitute a government action whose *purpose is to promote the well-being of all the people of the province*.
>
> Plainly, s. 15 HEIA and s. 11 HOIA erect economic barriers to access to private health care. However, these measures are not really intended to limit access to health care; rather, their *purpose is to prevent the establishment of a parallel private system*. These provisions are based on the fear that the establishment of a private health care system would rob the public sector of a significant portion of the available health care resources. *The Quebec government enacted s. 15 HEIA and s. 11 HOIA to guarantee that virtually all the existing health care resources in Quebec would be available to all the people of Quebec. That is clear.*
>
> *The purpose* of the impugned provisions *is to guarantee equal and adequate access* to health care *for all Quebeckers*. The enactment of s. 15 HEIA and s. 11 HOIA *was motivated by considerations of equality and human dignity, and it is therefore clear that there is no conflict with the general values expressed in the Canadian Charter or in the Quebec Charter of human rights and freedoms*. [Emphasis in original.]

We agree.

(c) *Have the Appellants Established That the Prohibition Bears No Relation to, or Is Inconsistent With, the State Interest?*

242 The trial judge considered all the evidence and concluded that the expansion of private health care would undoubtedly have a negative impact on the public health system (at p. 827):

> [TRANSLATION] The evidence has shown that the right of access to a parallel private health care system claimed by the applicants *would have repercussions on the rights of the population as a whole. We cannot bury our heads in the sand. The effect of establishing a parallel private health care system would be to threaten the integrity, proper functioning and viability of the public system*. Section 15 HEIA and s. 11 HOIA prevent this from happening and secure the existence in Quebec of a public health care system of high quality.
>
> As well, the Court finds that s. 15 HEIA and s. 11 HOIA *are not overbroad*. The only way to guarantee that all the health care resources will benefit all Quebeckers without discrimination is to prevent the establishment of a parallel private health care system. That is in fact the effect of the impugned provisions in the case at bar. [Emphasis in original.]

These findings were explicitly adopted by Forget J.A. of the Court of Appeal and implicitly endorsed by the other judges of that court. The trial judge relied on the reports available to her in rejecting the appellants' constitutional challenge, and none of the material that has since been added (such as the Romanow Report) changes or modifies the correctness of her conclusion, in our view. We therefore agree with the trial judge and the Quebec Court of Appeal

that the appellants failed to make out a case of "arbitrariness" on the evidence. Indeed the evidence proves the contrary. We now propose to review briefly some of the evidence supporting the findings of the trial judge.

(i) A Parallel Private Regime Will Have a Negative Impact on Waiting Times in the Public System

243 The appellants' argument in favour of a parallel private regime is one of a "win/win" prediction; i.e., that waiting times in the public regime will be reduced if those who can afford private insurance leave the public waiting lists in order to receive private health care. However, the Kirby Report states flatly that "allowing a private parallel system will . . . make the public waiting lines worse" (vol. 4, at p. 42 (emphasis added)). This conclusion is supported by the Romanow Report (p. 139: "[P]rivate facilities may improve waiting times for the select few . . . but . . . worse[n them for the many]"), the Turcotte Report (pp. 13-14), and the expert witnesses at trial (Marmor Report; Wright Report; and Bergman Report).

244 A study of a Manitoba pilot project found that in the case of cataract operations, public health patients who went to surgeons working in both private and public clinics waited far longer than patients who went to surgeons working only in the public system. The same private sector patient preference is evident from other studies and experience: See Wright Report, at p. 17; Bergman Report, at p. 8; J. Hurley et al., *Parallel Private Health Insurance in Australia: A Cautionary Tale and Lessons for Canada* (2002); C. DeCoster, L. MacWilliam and R. Walld, *Waiting Times for Surgery: 1997/98 and 1998/99 Update* (2000); W. Armstrong, *The Consumer Experience with Cataract Surgery and Private Clinics in Alberta: Canada's Canary in the Mine Shaft* (2000); Canadian Health Services Research Foundation, *Mythbusters — Myth: A parallel private system would reduce waiting times in the public system* (2001); Québec, Rapport du Conseil de la santé et du bien-être social, *Le financement privé des services médicaux et hospitaliers* (2003), at p. 30.

245 The Australian experience, as reported by Dr. Wright, is that at present delays in the Australian public system are caused largely by surgeons' reluctance to work in public hospitals and by their encouragement of patients to use the private system on a preferential basis (Wright Report, at p. 15; Hurley, at p. 17).

246 The same is true for the United Kingdom, which has a two-tier health system where physicians who want to practise privately are required to practise a minimum number of hours in the public system. There, an Audit Commission of the National Health Service reported that surgeons do on average a third to half again as many operations for private fees as they do in the public system, and that they spend less time than they are contracted for working in the public system in order to conduct private practice (Wright Report, at p. 16; see also *Le financement privé des services médicaux et hospitaliers*, at p. 30).

247 Both the Romanow Report and the Kirby Report examine the current shortage of health care professionals in Canada (Kirby Report, vol. 2, at p. 76, and vol. 4, at pp. 7 and 107; Romanow Report, at p. 92), and in rural parts of Canada in particular (Kirby Report, vol. 2, at p. 137; Romanow Report, at p. 166). Dr. Wright testified that the experience in all jurisdictions with two-tier health care systems (e.g., the United Kingdom, Australia, New Zealand and Israel) demonstrates a diversion of energy and commitment by physicians and surgeons from the public system to the more lucrative private option (Wright Report, at pp. 15 and 22). This evidence is supported by the Romanow Report (at p. 92), the Kirby Report (vol. 1, at p. 105) and a 2003 Quebec report (*Le financement privé des services médicaux et hospitaliers*, at p. 6). See also Marmor Report (at p. 5) and Denis Report (at p. 14). Furthermore, the experts testified that there are no firm data whatsoever showing that a parallel private system would enhance potential for recruiting highly trained specialists (see Wright Report, at p. 19).

(ii) The Impact of a Parallel Private Regime on Government Support for a Public System

248 The experience in other OECD countries shows that an increase in private funding typically leads to a decrease in government funding (*Le financement privé des services médicaux et hospitaliers*, at p. 7; Marmor Report, at p. 6). At trial, Dr. Bergman explained that a service designed purely for members of society with less socio-economic power would probably lead to a decline in quality of services, a loss of political support and a decline in the quality of management (Bergman Report, at pp. 6-7; see also Marmor Report, at pp. 6 and 8; Denis Report, at p. 5).

(iii) Private Insurers May "Skim the Cream" and Leave the Difficult and Costly Care to the Public Sector

249 The evidence suggests that parallel private insurers prefer to siphon off high income patients while shying away from patient populations that constitute a higher financial risk, a phenomenon known as "cream skimming" (Wright Report, at p. 17; Kirby Report, vol. 6, at p. 301). The public system would therefore carry a disproportionate burden of patients who are considered "bad risks" by the private market by reason of age, socio-economic conditions, or geographic location.

250 Similarly, private insurers may choose to avoid "high-risk" surgery. The public system is likely to wind up carrying the more complex high acuity end of the health care spectrum and, as a consequence, increase rather than reduce demand (proportionately) in the public system for certain services (Wright Report, at p. 18).

(iv) The U.S. Two-Tier System of Health Coverage

251 Reference has already been made to the U.S. health care system, which is the most expensive in the world, even though by some measures Americans are less healthy than Canadians (Kirby Report, vol. 1, at p. 101, and vol. 4, at p. 28; Romanow Report, at p. 14). The existence of a private system has not eliminated waiting times. The availability, extent and timeliness of health care is rationed by private insurers, who may determine according to cost, not need, what is "medically" necessary health care and where and when it is to occur (Kirby Report, vol. 3, at p. 48; Denis Report, at pp. 12 and 16). Whether or not the private system in the U.S. is better managed is a matter of debate amongst policy analysts. The point here is simply that the appellants' faith in the curative power of private insurance is not borne out by the evidence put before the Court.

(v) Moreover the Government's Interest in Fiscal Responsibility and Efficiency May Best Be Served by a Single-Tier System

252 The expert witnesses at trial (other than the appellants' witness Dr. Coffey), the Romanow Report and the Kirby Report all agree that the most cost-effective method of providing health care is through public single-tier financing. Dr. Wright testified at trial that the "public administration criterion [of the *Canada Health Act*] renders the Canadian Health Care System one of the most efficient in terms of the ratio of productivity to administrative costs in the world" (Wright Report, at p. 2; see also Marmor Report, at p. 9; Denis Report, at p. 8; Kirby Report, vol. 3, at p. 67, and vol. 4, at p. 23; Romanow Report, at p. 43; *The World Health Report 1999: Making a Difference* (1999); Report of the National Advisory Council on Aging, *The NACA Position on the Privatization of Health Care* (1997), at p. 14).

253 In particular, much is saved in a single-tier public system as a result of lower administrative costs and advertising expenses, the absence of overhead and the fact that the risk is spread over the entire population (see Romanow Report, at pp. 60ff; Kirby Report, vol. 4, at p. 31).

254 Not only is there "no evidence [that the] adoption [of a private health care system] would produce a more efficient, affordable or effective system" (Romanow Report, at p. xxiv), there is also no clear evidence that private surgical services are more efficient or less costly (Wright Report, at p. 14; Romanow Report, at p. 8; *Le financement privé des services médicaux et hospitaliers*, at pp. 23 and 33).

255 With respect to the impact on the financial resources of the public system, the experts testified that the introduction of a parallel private health regime would likely increase the overall cost of health care to Canadians (Marmor Report, at pp. 8 and 10; Bergman Report, at p. 7; Turcotte Report, at p. 11; see also *Le financement privé des services médicaux et hospitaliers*, at p. 24).

(vi) Conclusion on "Arbitrariness"

256 For all these reasons, we agree with the conclusion of the trial judge and the Quebec Court of Appeal that in light of the legislative objectives of the *Canada Health Act* it is not "arbitrary" for Quebec to discourage the growth of private sector health care. Prohibition of private health insurance is directly related to Quebec's interest in promoting a need-based system and in ensuring its viability and efficiency. Prohibition of private insurance is not "inconsistent" with the state interest; still less is it "unrelated" to it.

257 In short, it cannot be said that the prohibition against private health insurance "bears no relation to, or is inconsistent with" preservation of a health system predominantly based on need rather than wealth or status, as required by the *Rodriguez* test, at pp. 594-95.

258 As to our colleagues' dismissal of the factual basis for Quebec's legislative choice, the public has invested very large sums of money in a series of authoritative reports to analyse health care in this country and in other countries. The reports uniformly recommend the retention of single-tier medicine. People are free to challenge (as do the appellants) the government's reliance on those reports but such reliance cannot be dismissed as "arbitrary". People are also free to dispute Quebec's strategy, but in our view it cannot be said that a single-tier health system, and the prohibition on private health insurance designed to protect it, is a legislative choice that has been adopted "arbitrarily" by the Quebec National Assembly as that term has been understood to date in the *Canadian Charter* jurisprudence.

(3) The *Morgentaler* Case Is Not Applicable

259 Our colleagues the Chief Justice and Major J. rely substantially on comments made by Beetz J. (concurred in by Estey J.) in *Morgentaler* when he invoked a principle of "manifest unfairness". Nowhere in his analysis pertaining to the principles of fundamental justice did Beetz J. use the words "arbitrary" or "arbitrariness". Moreover the context for his remarks was the prospect of a criminal prosecution of a pregnant woman. Section 251(2) of the *Criminal Code* stated that a pregnant woman who used "any means or permit[ted] any means to be used" for the purpose of procuring her own miscarriage was guilty of an indictable offence punishable with imprisonment for two years. Parliament provided a defence if the continued pregnancy would or would be likely to, in the opinion of a therapeutic abortion committee, "endanger her life or health" (s. 251(4)(*c*)). The Court struck down the criminal prohibition because the prohibition was designed to operate only with the statutory defence, and the Court found that in practice these committees operated unevenly and that the statutory scheme "contain[ed] so many potential barriers to its own operation that the defence it create[d would] in many circumstances be practically unavailable to women who would *prima facie* qualify . . . ." (pp. 72-73, *per* Dickson C.J.). For Beetz J., too, a key issue was that a significant proportion of Canada's population is not served by hospitals in which therapeutic abortions could lawfully be performed (pp. 94-95).

260 At page 81, Beetz J. went on to say that "s. 7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction" (emphasis added). The context of this appeal is entirely different. This case, on the contrary, invites the application of the *dictum* of Dickson C.J. in *Morgentaler* "that the courts should avoid 'adjudication of the merits of public policy'" (p. 53).

261 There were two aspects of s. 251 which caused Beetz J. particular concern. Firstly, s. 251 required that abortions be performed in an "eligible hospital", and not in clinics like those operated by Dr. Morgentaler (p. 114). This limitation, he found, had no logical connection with the state's avowed interest "in the protection of the foetus" (p. 115), i.e., the termination of the foetus would be the same wherever the abortion was performed. Secondly, Beetz J. objected to "the requirement that the committee come from the accredited or approved hospital in which the abortion is to be performed" (p. 119). He said:

> It is difficult to see a connection between this requirement and any of the practical purposes for which s. 251(4) was enacted. It cannot be said to have been adopted in order to promote the safety of therapeutic abortions or the safety of the pregnant woman. Nor is the rule designed to preserve the state interest in the foetus. [p. 119]

262 There is, we think, a world of difference between the sort of statutory analysis conducted by Beetz J. in *Morgentaler* and the re-weighing of expert evidence engaged in by our colleagues the Chief Justice and Major J. in this case. Having established that the s. 251 requirements had nothing to do with the avowed state interest in the protection of the foetus, all that remained in *Morgentaler* was to show that these requirements were inconsistent with the competing state interest in preserving the life and health of the mother. We see no parallel between the analysis of Beetz J. in *Morgentaler* and what is asked of the Court by the appellants in this case.

263 On the contrary, given its goal of providing necessary medical services to all Quebec residents based on need, Quebec's determination to protect the equity, viability and efficiency of the public health care system is rational. The chosen means are designed to further the state interest and not (as in *Morgentaler*) to contradict it.

264 The safety valve (however imperfectly administered) of allowing Quebec residents to obtain essential health care outside the province when they are unable to receive the care in question at home in a timely way is of importance. If, as the appellants claim, this safety valve is opened too sparingly, the courts are available to supervise enforcement of the rights of those patients who are directly affected by the decision on a case-by-case basis. Judicial intervention at this level on a case-by-case basis is preferable to acceptance of the appellants' global challenge to the entire single-tier health plan. It is important to emphasize that rejection of the appellants' global challenge to Quebec's health plan would not foreclose individual patients from seeking individual relief tailored to their individual circumstances.

(4) Conclusion Under Section 7 of the *Canadian Charter*

265 For the foregoing reasons, even accepting (as we do) the trial judge's conclusion that the claimants have established a deprivation of the life and security of some Quebec residents occasioned in some circumstances by waiting list delays, the deprivation would not violate any legal principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter*. On that point, too, we share the opinion of the trial judge and the Quebec Court of Appeal, as previously mentioned.

D. *The Appellants' Challenge Under the Quebec Charter*

266 The *Quebec Charter* is a major quasi-constitutional instrument. Our colleague Deschamps J. finds a violation of s. 1, which provides:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.

267 Section 1 of the *Quebec Charter* must be read with s. 9.1:

> **9.1** In exercising his fundamental freedoms and rights, a person shall maintain a proper regard for democratic values, public order and the general well-being of the citizens of Québec.
>
> In this respect, the scope of the freedoms and rights, and limits to their exercise, may be fixed by law.

268 The factual basis of the opinion of our colleague Deschamps J. seems to rest largely on her view of the problem of waiting lists in Quebec, a matter we have already discussed, commencing at para. 210.

269 As to the legal principles applicable under the *Quebec Charter*, our Court in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, noted a functional analogy between s. 1 of the *Canadian Charter* and s. 9.1 of the *Quebec Charter*. However, s. 9.1 has the added feature of placing on the claimant the obligation to exercise *Quebec Charter* rights with "proper" regard to "democratic values, public order and the general well-being of the citizens of Québec". These limitations have particular relevance to the public health system context of the present claim.

270 Within the legislative jurisdiction of the National Assembly of Quebec, absent an express provision to the contrary, other statutes may not derogate from its ss. 1-38 (s. 52). It was adopted and came into force several years before the *Canadian Charter*. It applies not only to state action but also to many forms of private relationships. It often covers the same grounds as the *Canadian Charter*. Nevertheless, it remains distinct in its drafting and methodology (A. Morel, "La coexistence des Chartes canadienne et québécoise: problèmes d'interaction" (1986), 17 *R.D.U.S.* 49, at pp. 80-81; *Godbout v. Longueuil (Ville de)*, 1995 CanLII 4750 (QC CA), [1995] R.J.Q. 2561 (C.A.), at p. 2568, *per* Baudouin J.A.).

271 Section 1 of the *Quebec Charter*, in essence, covers about the same ground as s. 7 of the *Canadian Charter*, but it does not mention the principles of fundamental justice. As stated earlier, it reads:

> **1.** Every human being has a right to life, and to personal security, inviolability and freedom.
>
> He also possesses juridical personality.

272 Under s. 1 of the *Quebec Charter*, as at the first stage of a s. 7 analysis, the claimant bears the burden of establishing, on a balance of probabilities, that the impugned law infringes his or her protected rights and interests. If such a claim is made out, the focus of the analysis may shift to s. 9.1 of the *Quebec Charter* in order to determine whether the claimed exercise of the right is made with due regard for "democratic values, public order and the general well-being of the citizens of Québec".

273 In our view, on the evidence, the exercise by the appellants of their claimed *Quebec Charter* rights to defeat the prohibition against private insurance would not have "proper regard for democratic values" or "public order", as the future of a publicly supported and financed single-tier health plan should be in the hands of elected representatives. Nor would it have proper regard for the "general well-being of the citizens of Québec", who are the designated beneficiaries of the health plan, and in particular for the well-being of the less advantaged Quebeckers.

274 Those who seek private health insurance are those who can afford it and can qualify for it. They will be the more advantaged members of society. They are differentiated from the general population, not by their health problems, which are found in every group in society, but by their income status. We share the view of Dickson

C.J. that the *Canadian Charter* should not become an instrument to be used by the wealthy to "roll back" the benefits of a legislative scheme that helps the poorer members of society. He observed in *Edwards Books*, at p. 779:

> In interpreting and applying the *Charter* I believe that the courts must be cautious to ensure that it does not simply become an instrument of better situated individuals to roll back legislation which has as its object the improvement of the condition of less advantaged persons.

The concern, of course, is that once the health needs of the wealthier members of society are looked after in the "upper tier", they will have less incentive to continue to pressure the government for improvements to the public system as a whole.

275 The comments of Dickson C.J. are even more relevant to the *Quebec Charter* given its broad scope and its potential application to a wide range of private relationships.

276 This is not a case, in our view, where the onus of proof determines the outcome. The evidence amply supports the validity of the prohibition of private insurance under the *Quebec Charter*. The objectives are compelling. A rational connection is demonstrated. The decision boils down to an application of the minimal impairment test. In respect of questions of social and economic policy, this test leaves a substantial margin of appreciation to the Quebec legislature. Designing, financing and operating the public health system of a modern democratic society like Quebec remains a challenging task. It calls for difficult choices. In the end, we find that the choice made a generation ago by the National Assembly of Quebec remains within the range of options that are justifiable under s. 9.1. Shifting the design of the health system to the courts is not a wise choice.

277 In this respect, we should bear in mind that the legislative provisions challenged under s. 1 concern all citizens of Quebec. They address concerns shared by all and rights belonging to everyone. The legislative solution affects not only individuals but also the society to which all those individuals belong. It is a problem for which the legislature attempted to find a solution that would be acceptable to everyone in the spirit of the preamble of the *Quebec Charter*:

> WHEREAS every human being possesses intrinsic rights and freedoms designed to ensure his protection and development;
>
> Whereas all human beings are equal in worth and dignity, and are entitled to equal protection of the law;
>
> Whereas respect for the dignity of the human being and recognition of his rights and freedoms constitute the foundation of justice and peace;
>
> Whereas the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being;
>
> . . .

278 The evidence reviewed above establishes that the impugned provisions were part of a system which is mindful and protective of the interests of all, not only of some.

279 We would dismiss the appeal.

APPENDIX

Health Insurance Act, R.S.Q., c. A-29

15. No person shall make or renew a contract of insurance or make a payment under a contract of insurance under which an insured service is furnished or under which all or part of the cost of such a service is paid to a resident or a deemed resident of Québec or to another person on his behalf.

. . .

Hospital Insurance Act, R.S.Q., c. A-28

11. (1) No one shall make or renew, or make a payment under a contract under which

(*a*) a resident is to be provided with or to be reimbursed for the cost of any hospital service that is one of the insured services;

(*b*) payment is conditional upon the hospitalization of a resident; or

(*c*) payment is dependent upon the length of time the resident is a patient in a facility maintained by an institution contemplated in section 2.

(2) This section does not apply for such time after a person arrives in Québec as a resident as he is not an insured person.

Appeal allowed with costs, BINNIE, LEBEL *and* FISH JJ. *dissenting.*

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* On August 4, 2005, the Court stayed the judgment for a period of 12 months from the date of the judgment.

8	*Tanudjaja v AG (Canada)* 2013 ONSC 5410

Tanudjaja et al. v. The Attorney General of Canada et al.

[Indexed as: Tanudjaja v. Canada (Attorney General)]

Ontario Reports

Ontario Superior Court of Justice,

Lederer J.

September 6, 2013

116 O.R. (3d) 574 | 2013 ONSC 5410

Case Summary

Charter of Rights and Freedoms — Equality rights — Applicants bringing application alleging that provincial and federal governments had breached s. 15 of Charter by making decisions and implementing program changes which eroded access to affordable housing — Application dismissed as it was plain and obvious that it could not succeed and as it raised non-justiciable issues — Impugned decisions and changes not denying applicants benefit given to others and not imposing burden on them that was not placed on others — Homelessness not constituting analogous ground of discrimination under s. 15(1) of Charter — Canadian Charter of Rights and Freedoms, s. 15.

Fundamental justice — Housing — Applicants bringing application alleging that provincial and federal governments had breached s. 7 of Charter by making decisions and implementing program changes which [page575] eroded access to affordable housing — Application dismissed as it was plain and obvious that it could not succeed and as it raised non-justiciable issues — Section 7 not providing positive right to affordable housing and not placing positive obligation on state to provide it — Canadian Charter of Rights and Freedoms, s. 7.

The applicants brought an application alleging that the provincial and federal governments had breached ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* by making decisions and implementing changes to programs which eroded access to affordable housing. They sought a broad range of remedies, including a declaration that the failure to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing had violated their rights under ss. 7 and 15, and mandatory orders that such strategies be developed and implemented in consultation with affected groups. The respondents brought motions to dismiss the application on the grounds that it did not disclose a reasonable cause of action and that the issues raised were not justiciable.

Held, the motions should be granted and the application dismissed.

It was plain and obvious that the application could not succeed. Section 7 of the *Charter* does not impose a positive obligation on the state to act to protect life, liberty or security of the person. In particular, s. 7 does not protect a right to affordable housing and does not impose an obligation on the state to provide it. While there may be a positive obligation in special circumstances, the applicants did not allege that any such circumstances existed in this case. The applicants' argument under s. 15 of the *Charter* was also bound to fail. The impugned decisions and program changes did not deny the applicants a benefit given to others or place a burden on them that was not placed on others. Moreover, "homelessness" is not an analogous ground under s. 15(1) of the *Charter*. Finally, the issues raised in the application were not justiciable, as the courts are not the proper place to determine the wisdom of the kind of policy choices that were attacked in this case.

Gosselin v. Quebec (Attorney General), [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85, 2002 SCC 84, 221 D.L.R. (4th) 257, 298 N.R. 1, J.E. 2003-126, 100 C.R.R. (2d) 1, 119 A.C.W.S. (3d) 43; *Masse v. Ontario (Ministry of Community and Social Services)*, 1996 CanLII 12491 (ON SCDC), [1996] O.J. No. 363, 134 D.L.R. (4th) 20, 89 O.A.C. 81, 40 Admin. L.R. (2d) 87, 35 C.R.R. (2d) 44, 61 A.C.W.S. (3d) 410 (Div. Ct.) [Leave to appeal refused [1996] O.J. No. 1526, 62 A.C.W.S. (3d) 1228 (C.A.), and leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 373]; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12, 2011 SCC 12, 229 C.R.R. (2d) 329, 412 N.R. 149, 2011EXP-867, 87 C.C.P.B. 161, J.E. 2011-461, D.T.E. 2011T-181, EYB 2011-187170, [2011] 4 W.W.R. 383, 15 B.C.L.R. (5th) 1, 329 D.L.R. (4th) 193, 300 B.C.A.C. 120, **apld**

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48, 191 D.L.R. (4th) 1, 230 W.A.C. 161, 260 N.R. 203, [2001] 1 W.W.R. 1, J.E. 2000-1923, 150 Man. R. (2d) 161, 78 C.R.R. (2d) 1, 10 R.F.L. (5th) 122, 100 A.C.W.S. (3d) 77; *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561, [2006] O.J. No. 2732, 269 D.L.R. (4th) 435, 213 O.A.C. 48, 40 C.C.L.T. (3d) 176, 142 C.R.R. (2d) 311, 149 A.C.W.S. (3d) 791 (C.A.)

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Sossin, Lorne M., *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012)

MOTIONS to dismiss an application for remedies for violations of ss. 7 and 15 of the *Charter*.

Peter Rosenthal, *Fay Faraday* and *Tracy Heffernan*, for plaintiffs.

Gail Sinclair, *Michael Morris* and *Ayesha Laldin*, for respondent Attorney General of Canada.

Janet E. Minor and *Arif Virani*, for respondent Attorney General of Ontario.

Molly M. Reynolds, for intervenor Amnesty Canada/ESCR-Net coalition.

Kent Roach and *Cheryl Milne*, for intervenor David Asper Centre for Constitutional Rights.

Martha Jackman and *Jackie Esmonde*, for intervenor *Charter* Committee on Poverty Issues, Pivot Legal Society, Income Security Advocacy Centre, Justice for Girls.

LEDERER J.: —

[1] These reasons consider two motions to dismiss an application. Each of the respondents, the Attorney General of Canada and the Attorney General of Ontario, bring the same motion saying, among other things, that the amended notice of application (the "application") does not disclose a reasonable

cause of action and that the issues raised are not justiciable. The motions were heard together and dealt with as one, relying on the same submissions.

Introduction

[2] The application is premised on an obligation said to be imposed, by the *Canadian Charter of Rights and Freedoms*, on [page579] the Government of Canada and the Government of Ontario (respectively, "Canada" and "Ontario") to put in place policies and strategies that ensure that affordable, adequate and accessible housing is available for all Ontarians and Canadians. The application relies on s. 7 (life, liberty and security of the person) and s. 15 (equal protection and equal benefit of the law without discrimination) of the *Charter*, which, it alleges, have been breached. The breaches, as identified in the application, arise out of changes to legislative policies, programs and services which are said to have resulted in increased homelessness and inadequate housing. The application states that, beginning in the mid-1990s, both Canada and Ontario took decisions which have eroded access to affordable housing. It is said that these decisions were made, and the program changes which implemented them put in place, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures have been provided to protect vulnerable groups from these effects. The application seeks a broad set of remedies, including declarations that the failure of both Canada and Ontario to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing has violated the rights of the applicants under s. 7 and s. 15 of the *Charter*. As remedial measures, the application seeks mandatory orders that such strategies be developed and implemented "in consultation with affected groups" and include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms". The application requests that the court remain "seized of supervisory jurisdiction to address concerns regarding implementation of the order".[1]

[3] The motions are founded on the proposition that the jurisprudence that has considered the *Charter* has consistently held that s. 7 places no positive obligation on Canada or Ontario to ensure that each person enjoys "life, liberty or security of the person". Section 7 restricts the ability of the two governments to deprive people of these rights. Similarly, s. 15 of the *Charter* does not provide a general guarantee of equality or impose positive obligations on the state. Canada and Ontario submit that the application cannot succeed because it requires the court to find that there is a positive obligation to provide for affordable, adequate and accessible housing. For their part, the applicants submit that there are cases that have recognized positive [page580] obligations arising from rights expressed in the *Charter* and that the existing case law acknowledges that, over time, there may be a broader recognition of such obligations. On this basis, it cannot be said that the application must fail and so the motions should be dismissed and the application permitted to proceed.

[4] I feel obliged, even at this early point in these reasons, to say that, to my mind, the application is misconceived. It is an attempt, under the guise of alleged breaches of the *Charter*, to compel there to be a full examination of the policies that may affect the availability of affordable, adequate and accessible housing. The application seeks the subsequent implementation of programs designed to ensure that housing which satisfies these requirements is made available, by Canada and Ontario, to the poor, disadvantaged and vulnerable members of our society. This is a desirable end. Who could not be sympathetic to any proper effort to confront the issue of inadequate housing in all Canadian communities? The question is whether the courtroom is the proper place to resolve the issues involved. It is not, at least as it is being attempted on the application.

The Applicable Rules and the Test

[5] The motions are brought pursuant to rule 14.09 and rule 21.01(1)(b) of the Rules of Civil Procedure.[2] Under the latter, a pleading may be struck if it fails to disclose a reasonable cause of action. The former allows such a motion to be brought in respect to applications. The parties agree that, to succeed on a motion to strike, the moving party, in this case Canada and Ontario, must show that it is "plain and obvious" that no reasonable cause of action is disclosed by the application. Another way of putting the test is to determine that the application has no reasonable prospect of success.[3]

Preliminary Motions

(a) *Motions to intervene*

[6] On March 7 and 8, 2013, the court heard five motions by which one party and four proposed coalitions (groups of parties) sought to intervene in the two motions to dismiss the application. The

decision and reasons that dealt with these [page581] proposed interventions were released on April 3, 2013.[4] Three interventions were permitted; two were refused. Each of the intervenors was limited as to the issues that could be the subject of its participation in the motions to dismiss. The three intervenors are

(1) a coalition of the *Charter* Committee on Poverty Issues, Pivot Legal Society, the Income Security Advocacy Centre and Justice for Girls (hereinafter referred to collectively as "the *Charter* Committee coalition"), which is described as representing those with low incomes and living in poverty, including marginalized young women or girls. Its intervention was restricted to how s. 7 and s. 15 of the *Charter* are to be, or could be, interpreted such that it would not be plain and obvious that the application cannot succeed;

(2) a coalition of Amnesty Canada/ESCR-Net coalition (hereinafter referred to collectively as "the Amnesty coalition"). Amnesty Canada is the Canadian branch of Amnesty International and works to further Canada's compliance with its domestic and international human rights obligations. Its intervention was restricted to a consideration of if and how international conventions, to which the Government of Canada is a signatory, could impact on the proper interpretation of s. 7 and s. 15 of the *Charter* such that it would not be plain and obvious that the application could not succeed; and

(3) the David Asper Centre for Constitutional Rights (hereinafter referred to as "the David Asper Centre"), which is concerned with the development of constitutional law in Canada. Its intervention was restricted to the "availability of the requested remedies" and when in the proceedings it would be appropriate for the court to take this into account. Should it be on the motions to dismiss or reserved to the hearing of the application?

(b) *Motion to dismiss for delay*

[7] At the outset of their submissions, counsel for the applicants said that the motion should be dismissed for delay. Rule 21.02 states that "[a] motion under rule 21.01 shall be made promptly", but goes on to qualify this by saying that "a failure to do so may [page582] be taken into account by the court in awarding costs".[5] Nonetheless, the court does maintain a general jurisdiction to dismiss a motion where there has been unreasonable delay:

> In my view rule 21.02 should be read as requiring that a rule 21.01 motion be brought promptly. While rule 21.02 goes on to state that failure to do so may be taken into account in awarding costs, this latter part of the rule does not limit the generality of the first part. The obligation to act promptly is clear and the failure to bring a rule 21.01 motion promptly can, in the appropriate circumstances, be the basis for the judge exercising his discretion pursuant to rule 21.01 not to grant the relief sought.[6]

[8] In this case, the application was issued on May 26, 2010. The applicants served their supporting record nearly 18 months later, on November 22, 2012. The record consists of 16 volumes, containing 19 affidavits, 13 by experts, apparently totalling 9,811 pages. Once served, the Attorney General of Canada advised the applicants that, given the "voluminous size", time would be required to review and analyze the record and to decide if preliminary motions were warranted. Approximately six months later, the applicants were advised that the Attorneys General had reviewed the record, sought instructions, consulted with each other and would respond with motions to strike.

[9] As counsel for the applicants sees it, this decision should have been made months earlier, even before the record was delivered. After all, for the purposes of the motion the facts as referred to in the application are to be taken as proved. If the motion is successful, all the time and effort put into compiling the record will turn out to have been unnecessary. I am not prepared to accept these submissions. Of the two years that passed between the issuance of the application and the advice that the motions would be brought, only six months is attributable to the respondent governments. It is not reasonable to require that a decision be made and a motion to dismiss be brought before the record is served. Only then will the respondents have an appreciation of the case they have to meet. Given the size of the record and the significant issues being raised by the application, I am not prepared to accept that six months is so long that the motion should be dismissed for delay. To the contrary, it was reasonable to take that time to review the record, consider the nature of the application and to decide how to proceed.

[10] The motion to dismiss for delay is dismissed. [page583]

Background

[11] As I have already noted, when a motion to dismiss is made, as these two are, on the basis that there is no cause of action, the facts as pleaded are to be taken as proved. In this case, those facts are

to be found in the application. Counsel for the applicants was careful to review the facts, as he sees them, with the court.

(a) *The individual applicants*

[12] The applicants are four individuals described by the application and counsel, in their submissions, as "homeless" and a public interest group described as providing ". . . direct services to low income tenants and the homeless on human rights and housing issues."[7]

[13] Without in any sense intending to be critical, it is inaccurate and somewhat misleading to refer to each the four individual applicants as "homeless". In fact, three of them have homes, albeit in circumstances which are said to be unaffordable and inadequate. They are described as and, for the purposes of the motions, are accepted to be

(1) a single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, she has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years;[8]

(2) a man who was severely disabled in an industrial accident. Two of his children are also severely disabled, including one son who is confined to a wheelchair. The applicant lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years;[9] and [page584]

(3) a woman and her two sons who became homeless after her spouse died suddenly. For several years, she lived in shelters and on the streets and was forced to place her children in her parents' care. Now housed, she currently spends 64 per cent of her small monthly income on rent, placing her in grave danger of becoming homeless again.[10]

[14] The fourth of the individual applicants has no home. He is described as having been diagnosed with cancer after which he was unable to work and unable to pay his rent, as a result of which he lost his apartment. He has been living on the streets and in shelters and has been on a waiting list for subsidized housing for four years.[11]

(b) *Housing is a basic necessity*

[15] In the application, housing is described as a "necessity of life". Adequate housing is said to be fundamental to ensuring basic human survival, health, social inclusion, participation in society and the capacity to realize other fundamental rights. The application states that there are hundreds of thousands of people in Canada who are currently homeless or inadequately housed.

(c) *The role of government and the right to adequate housing*

[16] The application notes that the protections against homelessness and inadequate housing include at least three important and interconnected components:

(i) access to affordable housing;

(ii) income supports to ensure affordability of housing; and

(iii) access to accessible housing with housing supports.

[17] I pause to observe that this speaks to the breadth of the considerations engaged by the development of the policies and strategies the application seeks to review. This is a recurring concern raised in these reasons.

[18] The application goes on to say the following, which counsel for the applicants submitted was "a central fact" and "fatal" to the governments' motions: [page585]

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures to address the impact of these changes on groups most vulnerable to, and at risk of, becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness. As a result, they have created and sustain conditions which lead to, support and sustain homelessness and inadequate housing.

(d) *Eroding access to affordable housing*

[19] The application states that both Canada and Ontario have had an active role in supporting access to affordable housing. Historically, Canada has had an active and central role in relation to affordable housing since the adoption of the *Dominion Housing Act* in 1935 and the establishment of the Central Mortgage and Housing Corporation (now the Canada Mortgage and Housing Corporation) in 1946.

[20] The application follows this by saying that, beginning in the mid-1990s and continuing to the present, both Canada and Ontario have taken decisions which have eroded access to affordable housing. The application says that Canada and Ontario have taken these decisions and implemented these program changes without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures are provided to protect vulnerable groups from homelessness and inadequate housing.

(e) *Erosion of income support programs*

[21] The application addresses the role of Canada and Ontario in providing income support programs. It notes that both levels of government have historically been active in implementing a variety of such programs. It says that these programs were aimed at ensuring support at a level that could realistically enable those who are impoverished to access affordable housing. The application states that Canada and Ontario have made decisions, taken actions and implemented changes to those programs that have the effect of increasing the risk of homelessness and inadequate housing for vulnerable groups.

[22] The application repeats that Canada and Ontario have taken the decisions and implemented the program changes, in respect of income supports, without appropriately addressing their impact on homelessness and inadequate housing and without ensuring that alternative measures are provided to protect vulnerable groups from homelessness and inadequate housing. [page586]

(f) *Inadequate support for housing*

[23] The application states that, beginning in the 1960s and carrying on into the 1990s, a general policy was implemented in Canada and Ontario of deinstitutionalizing people with psycho-social and intellectual disabilities. Implementing this policy of deinstitutionalization in the absence of providing effective mechanisms to support independent community living for persons with psycho-social and intellectual disabilities has resulted in widespread homelessness among persons with these disabilities. In Canada and Ontario, persons with psycho-social and intellectual disabilities currently are unable to access adequate housing which provides appropriate supports for daily living. In addition, they are often discharged with outpatient medical care without appropriate attention to whether they have access to adequate housing with appropriate supports. Both Ontario and Canada have failed to ensure the provision of adequate support services so that those affected by these policies can access and maintain adequate housing in their communities.

(g) *The impact of homelessness and inadequate housing*

[24] The application summarizes the harm caused by homelessness and inadequate housing by saying that it has direct and substantial effects, including, but not limited to, reduced life expectancy; hunger; increased and significant damage to physical, mental and emotional health; and, in some cases, death. It goes on to particularize these harms:

(i) the inability to access affordable housing causes particular harm to women in situations of domestic violence. Without access to adequate housing, women trying to escape from domestic violence are forced to choose between returning to or staying in a violent situation or facing homelessness for themselves and their children;

(ii) homelessness and inadequate housing contribute to and result in parents and, in particular single mothers, losing custody of their children;

(iii) people with disabilities are disproportionately vulnerable to the effects of homelessness and inadequate housing. Existing housing is often inaccessible while sufficient new accessible affordable housing is not being built. It is not uncommon for people with disabilities to wait ten years or longer to get into affordable housing that meets their needs; [page587]

(iv) aboriginal people are overrepresented in the homeless and inadequately housed population, suffering some of the worst housing conditions in the country; and

(v) newcomers, "racialized" communities, seniors and youth are disproportionately affected by homelessness and inadequate housing.

[25] The applicants say that all of this is demonstrable of breaches of the *Charter* by both Canada and Ontario. Counsel on their behalf submitted that the harm caused by the failure to implement effective strategies to address homelessness and inadequate housing deprive the applicants and others similarly

affected of life, liberty and security of the person in violation of s. 7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice. The deprivation is arbitrary, disproportionate to any government interest, fundamentally unfair to the applicants and contrary to international human rights norms. Further, it is said that the failure of Canada and Ontario to effectively address homelessness and inadequate housing violates s. 15 of the *Charter* by creating and sustaining conditions of inequality.

[26] During the course of the hearing, there was some discussion as to what the governments were accepting as facts and what stood apart as legal conclusions to which there was no implied or actual acceptance. In the end, as counsel for Canada and Ontario see it, these differences are without significance. The factual context does not affect the fundamental proposition on which their motions to dismiss are based. There cannot be a breach of the *Charter* that is based on the assertion of a positive obligation on the state to provide for life, liberty and the security of the person and there is no general obligation that all people will be treated equally.

The Charter of Rights and Freedoms: Section 7

[27] The full statement of s. 7 of the *Charter* is:

> 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.

[28] From the beginning, there has been general acceptance that the second clause, the fundamental justice clause, qualifies the otherwise unlimited scope of the first clause that refers to the right to "life liberty and the security of the person": [page588]

> 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.[12]

[29] This understanding has been confirmed by the recognition that an examination of compliance with s. 7 of the *Charter* is subject to a two-stage test:

> There are two components of s. 7 that must be satisfied before finding a violation. First, there must be a breach of one of the s. 7 interests of the individual -- life, liberty or security of the person. Second, the law that is responsible for that breach must be found to violate the principles of fundamental justice.[13]
>
> and
>
> Section 7 of the *Charter* requires the following two-step analysis to determine whether legislation or other state action infringes a protected *Charter* right: (1) Is there an infringement of the right to "life, liberty and security of the person"? (2) If so, is the infringement contrary to the principles of fundamental justice? See *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, at p. 584; *R. v. Beare*, 1988 CanLII 126 (SCC), [1988] 2 S.C.R. 387, at p. 401; *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 53; *Singh v. Minister of Employment and Immigration*, 1985 CanLII 65 (SCC), [1985] 1 S.C.R. 177, at p. 212.[14]

[30] In short, the court is required to ask: Was there a breach of the rights prescribed and, if so, did the beach contravene the principles of fundamental justice?

[31] This approach supports the position of Canada and Ontario that, to date, s. 7 of the *Charter* has not been interpreted to impose a positive obligation on them to see that the rights it refers to are recognized and acted on. The parameters for this proposition are neatly set by *Chaoulli v. Quebec (Attorney General)*.[15] The case concerned widespread delays in the health care system in Quebec and the accompanying prohibition against private health care insurance that prevented those resident in that province from accessing private health care. The reasons of [page589] Mme. Justice Deschamps considered the Quebec *Charter of Human Rights and Freedoms*[16] (the "*Quebec Charter*"), which was said to be potentially broader than the *Charter* in that it contains no reference to, and places no reliance on, the principles of fundamental justice.[17] These reasons conclude that the prohibition against contracting for private health insurance violates s. 1 and is not justifiable under s. 9.1 of the *Quebec Charter*.[18] The concurring reasons written by the chief justice consider the impact of the *Charter*:

> The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*. We are of the view that the prohibition on medical insurance in s. 15 of the *Health Insurance Act* R.S.Q., c. A-29 and s. 11 of the *Hospital Insurance Act*, R.S.Q., c. A-28 (see Appendix), violates s. 7 of

the *Charter* because it impinges on the right to life, liberty and security of the person in an arbitrary fashion that fails to conform to the principles of fundamental justice.[19]

[32] In this case, Canada and Ontario say there is no free-standing right to affordable, adequate and accessible housing. It could as well have been put that there is no free-standing right to "life, liberty and security of the person". These rights, as protected by the *Charter*, are only impinged on when they are breached in a fashion that is inconsistent with the "principles of fundamental justice". In *Chaoulli*, it is only because the government chose to act "in an arbitrary fashion" and prohibit the purchase of private health insurance that the breach occurred. It was that act that caused the deprivation without adherence to fundamental justice.

[33] It could be argued that, in acting to erode income support programs by deciding to provide inadequate housing supports and thereby eroding access to affordable housing, Canada and Ontario have acted arbitrarily and precipitated increased homelessness in our communities. It could be said that, in this way, they have breached s. 7 of the *Charter* in a fashion that is similar to what took place in *Chaoulli.* There is a difference. In that case, the Government of Quebec made a self-contained decision to disallow the purchase of private insurance. The result was a deprivation that limited access to timely health care. This was a breach of s. 7 of the *Charter.* In this case, it is alleged (and, for [page590] the purposes of the application, accepted) that programs and policies that were directed to helping those in need were amended so as to provide more limited assistance. This position proposes that, by creating programs that assist vulnerable segments of our society, Canada and Ontario are, in turn, creating a constitutional right to the benefits those programs provide at the level initially authorized or to which they have been allowed to climb. The level of benefit could never be lowered except if justified under s. 1 of the *Charter*.[20] I shall have more to say about this as these reasons progress.

[34] The position taken by the applicants asserts that the *Charter* includes a positive obligation, placed on Canada and Ontario, to see that the rights included in the *Charter* are provided for. In such circumstances, the question of whether there is an accompanying breach of fundamental justice would not arise. In this approach, the only issue would be whether the rights to "life, liberty and security of the person" are being breached. If they are, the state would be obliged to act. There is a broad array of cases which say that this is not so.

[35] In *Doe v. Ontario*,[21] the plaintiff provided evidence as part of a criminal investigation and was assisted through a witness protection program. The assistance was withdrawn or came to an end. The witness sued seeking entry into, or confirmation that he had been placed in, the program. He claimed, among other things, that his rights under s. 7 of the *Charter* had been breached. Ontario brought a motion for summary judgment dismissing the action. In granting the motion, the judge noted:

> Mr. Doe may feel deprived of liberty or security of the person, but what he is actually seeking and what he submits that he is entitled to under s. 7 of the *Charter* is that Ontario takes steps to ensure that he enjoyed life, liberty or security of the person. Section 7, however, is a preclusive provision and not one that imposes positive obligations on governments: *Wynberg v. Ontario*, 2006 CanLII 22919 (ON CA), [2006] O.J. No. 2732 (C.A.); *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429.[22]

[36] This quotation was referred to in the recent case of *Good v. Toronto (City) Police Services Board*.[23] In that case, the plaintiff [page591] sought to certify as a class, pursuant to the *Class Proceedings Act, 1992*,[24] those individuals in the City of Toronto who were arrested or subjected to mass detention by police in reference to the G20 Summit which was held in the city during June 26 and 27, 2010. The motion to certify the class was dismissed. In her reasons, immediately before referring to the quotation from *Doe v. Ontario*, the motion judge said:

> The pleading attempts to hold all of the defendants responsible for the Charter violations by alleging that they failed in their "planning, preparing, directing, and overseeing the G20 Summit security operations" and "failed to put adequate measures in place to ensure that these rights would be protected" (para. 29). This pleading appears to allege that the defendants had a positive obligation to prevent the Charter breaches and failed to do so. If this is what the plaintiff intended to plead, it is wrong in law and must be struck. The Charter does not impose a positive obligation on the defendants to prevent Charter breaches.[25]

[37] In *Flora v. General Manager, Ontario Health Insurance Plan*,[26] the appellant was diagnosed with liver cancer. He was told that he did not qualify for a transplant in Ontario. He went to England. He received treatment including a transplant. It saved his life. He applied to the Ontario Health Insurance Plan for reimbursement of his expenses. This was denied on the basis that the treatment he had

received was not an "insured service". Did the *Health Insurance Act*[27] and the applicable regulation[28] violate the right of the appellant to the protections provided by s. 7 of the *Charter*? In determining that they did not, the Court of Appeal observed:

> In my view, on the current state of s. 7 constitutional jurisprudence, where -- as here -- the government elects to provide a financial benefit that is not otherwise required by law, legislative limitations on the scope of the financial benefit provided do not violate s. 7. On the law at present, the reach of s. 7 does not extend to the imposition of a positive constitutional obligation on the Ontario government to fund out-of-country medical treatments even where the treatment in question proves to be life-saving in nature.[29] [page592]

[38] This quotation is important for two reasons. First, it is a clear statement that, as matters stand, s. 7 of the *Charter* does not recognize a positive obligation that the state is required to act to satisfy any circumstance where "life, liberty and security of the person" are transgressed. Secondly, it makes clear that the government does not create such an obligation when it acts to ameliorate an apparent inequity in our society.[30] The policy of one government to respond to such a situation may not be the policy of its successor. The program may be changed. The benefits extended may be lowered or removed without opening up the proposition that there has been a breach of s. 7 of the *Charter.*

[39] In *Masse v. Ontario (Ministry of Community and Social Services)*,[31] the applicants were social assistance recipients. Their benefits were reduced by 21.6 per cent. The applicants complained of poverty and government inaction. The amount of the payments that remained was "not enough".[32] They argued that this was in a breach of both s. 7 and s. 15 of the *Charter*. The decision indicates that:

> In my view, section 7 does not provide the applicants with any legal right to minimal social assistance. The Legislature could repeal the social assistance statutes (the [Family Benefits Act] and the [General Welfare Assistance Act]); there is no question that the Lieutenant Governor in Council is empowered to increase and/or decrease the rates of social assistance.
>
> In my view, s. 7 does not confer any affirmative right to governmental aid.[33]

[40] Without going further, these cases, taken together, represent a determination that there can be no cause of action where, as here, the application is based on the premise that there is a positive right to the protections provided by s. 7 of the *Charter.* These cases contradict the idea that s. 7 will be breached whenever, or just because, the life, liberty or security of the person is transgressed. They do not say that when this happens there is any requirement on the state to act.

[41] Counsel for the applicants, the responding parties on the motions to dismiss, submitted that this has not been finally determined. They rely on *Gosselin v. Quebec (Attorney General)*.[34] [page593] In 1984, the Government of Quebec created a new social assistance scheme. It set the base amount of welfare payable to persons under the age of 30 at roughly one-third of the base amount payable to those 30 and over. In 1989, the scheme was replaced by legislation that no longer made this age-based distinction. A welfare recipient brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 that were subject to the differential regime. It was argued that the 1984 program violated s. 7 and s. 15 of the *Charter*, as well as s. 45 of the *Quebec Charter.* The Superior Court dismissed the class action. The Court of Appeal upheld the decision. A majority of the Supreme Court of Canada (five of its members) dismissed the further appeal. The remaining minority (four of the members of the court) dissented.

[42] At first blush, it would seem that the decision does not assist the applicants. The majority makes the following comment:

> Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right *not to be deprived* of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to *deprive* people of these. Such a deprivation does not exist in the case at bar.[35]

The reasons of the majority go on to say:

> One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and

expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*. [page594]

The question therefore is not whether s. 7 has ever been -- or will ever be -- recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.[36]

[43] In her dissenting judgment, Madam Justice Arbour explained that rights under s. 7 may well include a positive dimension. She described these as "rights of 'performance'".[37] She found support for this in the words of the section. As Madam Justice Arbour saw it, the "and" that stands between 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" does not join together two ideas where the application of the first is dependent on the determination of the second. Instead, the word "and" separates two free-standing and independent rights:

> It is in fact arguable, as Professor Hogg, *supra*, points out (at p. 44-3), "that s. 7 confers two rights": a right, set out in the section's first clause, to "life, liberty and security of the person" full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice.[38]

[44] This being the case, the presence of the second clause would not stand as an impediment to an interpretation that recognized that positive action, by the state, was included within the protection of "life, liberty and security of the person" provided by s. 7 of the *Charter.*

[45] For Madam Justice Arbour, this was confirmed in both the *Purposive* and *Contextual Analysis* she undertook. In the former, she determined that, with the limitation that the deprivation occur in the absence of fundamental justice, the "right to life", on its own, added little to the protections provided.[39] (Once life is lost, it does not much matter whether or not the loss occurred in the absence of the principles of fundamental justice.) In the latter, she noted that, in the context of the whole *Charter*, it does "have a positive purpose in that at least some of its constituent parts do"[40] contain such direction (see the protection of the right to vote (s. 3), the right to an interpreter in penal [page595] proceedings (s. 14), and the right of minority English- or French-speaking Canadians to have their children educated in their first language (s. 23)).[41] Moreover, "the justificatory mechanism in s. 1 . . . reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others".[42]

[46] Suffice it to say, the majority did not agree that the circumstances in *Gosselin* called for the "novel application of s. 7"[43] proposed by Madam Justice Arbour. It said:

> With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person *may be made out in special circumstances.* However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.[44]

(Emphasis added)

[47] As the applicants see it, this paragraph ought to be determinative of the motions to dismiss. It may be that the majority did not recognize the situation in *Gosselin* as one which warranted imposition of a positive obligation but it did not foreclose the possibility. From this foundation, the applicants suggest that it cannot be said that it was plain and obvious that the application cannot succeed.

[48] For their part, the moving parties, Canada and Ontario, submitted that the majority in *Gosselin* set a test which would have to be satisfied before a positive obligation could be found to exist and be required to be implemented. There would have to be "special circumstances". Counsel for Canada and Ontario say there are none. This is not the first time that it has been argued that s. 7 of the *Charter* provides a right to a minimal level of social benefits to ensure or protect "life, liberty and security of the person". As I have already noted, in *Masse v. Ontario (Ministry of Community and Social Services)*,[45] a reduction of certain social assistance benefits, by 21.6 per cent, was argued to be a breach of s. 7 of the *Charter.* The court did not accept this [page596] position. While it is true that this occurred some years prior to *Gosselin*, it was not without the court receiving

> . . . a considerable body of evidence concerning the deprivations of poverty and, in particular, the problems of children living in poverty. The effects of poverty include low birth weight, poor nutrition, inadequate housing, ill health, and stress, all of which affect the cognitive and psycho-social development of children. This is particularly true for very young children. There is a direct association between poverty and school drop-out rates.[46]

[49] In fact, the decision to reduce the benefits, referred to in that case, is one of the decisions on which the applicants rely on as demonstrating an erosion of access to affordable housing. As it is, the reasons in *Masse* make clear that among the impacts of the reduction being considered was the effect on housing and that, as a result of that reduction, many recipients of social assistance "may become homeless".[47] Nonetheless, this did not warrant positive action by Ontario. If it did not then, I cannot see why it would now.

[50] I note that the counsel for the intervenor, the *Charter* Committee coalition submitted that *Masse* was overruled by *N.A.P.E. v. Newfoundland (Treasury Board).*[48] I confess I do not understand how this could be, at least in any way that would affect the findings made in *Masse* with respect to s. 7 of the *Charter.* In *N.A.P.E.*, in 1988, the provincial government signed a pay equity agreement in favour of female employees in the health care sector. In 1991, the same government introduced legislation which deferred the commencement of the promised pay equity increase and extinguished the arrears that, then, existed. In *N.A.P.E.*, the reduction continued a breach of s. 15(1) but was justifiable under s. 1 of the *Charter.* Thus, counsel took the position that *N.A.P.E.* overruled the finding in *Masse* that discrimination cannot occur where the impact of fiscal constraints are borne disproportionately by an enumerated or analogous group. This does not affect the determination in *Masse* that there was no right under s. 7 to minimal social assistance.

[51] An approach similar to that in *Masse* was taken in *Clark v. Peterborough Utilities Commission*.[49] The commission required the payment of a security deposit from residential tenants who [page597] could not show "a satisfactory payment history or other reasonable assurance of payment of future charges". No guidelines on how to interpret this requirement were set out or provided. The applicants were recipients of social assistance. One applicant was told that her service would be disconnected if the deposit was not paid by a specified date. The other was told to pay one-half in September and the rest in October. His request for a longer period to pay was denied. The applicants sought an order, among other things, declaring that the requirement of a security deposit was contrary to s. 7 and s. 15 of the *Charter.*

> [52] In his reasons, the judge outlined the argument:
> Deprivation of electricity results in an absence of heat, light, cooling, refrigeration, hot water and fire alarms and would render their homes uninhabitable. It therefore becomes an issue of a *right to housing* which should be included within their right to life and security of the person under section 7.[50]

(Emphasis added)

[53] The judge acknowledged that the security deposit was one of the many factors relevant to housing rights and affordability. He understood that the deposit added to the human difficulties of day-to-day life. The question at hand was whether the rights the applicants sought to establish were protected as legal rights under s. 7. He found that they were not. There was no authority for the proposition that the requirement, by a utility company, for a security deposit to assure payment of future charges in case of an unsatisfactory utility-related credit history contravenes the applicants' rights under s. 7 of the *Charter*. It goes beyond the rights to life and security of the person, as provided for in s. 7, to seek a certain level of means and service as a guaranteed right. It was a plea for economic assistance which went beyond a claim that included an economic component.[51]

[54] *Masse* and *Clark* suggest that, if the decision of the majority in *Gosselin* set a test requiring the presence of "special circumstances" before a positive obligation could be imposed on the state to provide for the protections referred to in s. 7, it has not been met here. A right to housing is not demonstrative of such a circumstance. In *Masse*, the same protection was sought and refused. In *Clark*, the court recognized that framing a claim for increased economic benefits as a breach of a putative right to affordable housing based on the idea that it will make it more [page598] difficult for the disadvantaged to find reasonable accommodation does not result in a breach of s. 7 of the *Charter.*

[55] For the purposes of the two motions to strike the application, it does not matter whether the test as proposed by Canada and Ontario has been met. The motions require a determination of whether it is plain and obvious that the application cannot succeed. For their part, the applicants submit that a plain reading of the decision in *Gosselin* makes clear that the Supreme Court of Canada intended to and left open the question of whether a breach of s. 7 of the *Charter* could and, in time, may well lead to the imposition of positive obligations on the state, represented in this case by Canada and Ontario. As the applicants perceive it, the majority did not disagree with the analysis of Madam Justice Arbour. As their counsel sees it, the majority decision

> . . . simply finds the evidence of hardship in that case was "wanting" . . . *Gosselin* leaves open the extent to which s. 7 protects the necessities of life; the extent to which governments may have positive obligations under s. 7 and whether state action is required to trigger a s. 7 deprivation.[52]

[56] Counsel for the applicants submitted that such fundamental questions must be decided on the basis of a sufficient evidentiary record and should not be promptly disposed of on a motion to strike. There are difficulties with this position. It proposes that every time an application raises the prospect of a positive requirement being imposed on government in order to enforce compliance with s. 7 of the *Charter*, it will have to be the subject of a full hearing. The facts, as asserted, are to be taken as proved and, as a result of the decision in *Gosselin*, it will never be plain and obvious that the case cannot succeed. This is said to be so even in the face of the many cases that, in the years since *Gosselin* was decided, considered but have not recognized a positive obligation on the state to act to protect rights under s. 7.[53]

[57] This concern has arisen before in respect of claims that the *Charter* has been breached. In *Cosyns v. Canada (Attorney General)*,[54] [page599] motions to dismiss the claim or to determine certain questions of law raised in the pleadings had been dismissed. Leave to appeal to the Divisional Court was granted, but only in respect of those issues involving s. 7 and s. 15 of the *Charter.* The two appeals were treated as one appeal. It was allowed. In considering s. 7, the court recognized that the Supreme Court of Canada had not said that this section could never be applied to any interest with an economic, commercial property component. The plaintiff argued that, the door having been left open, any possible inclusion, under s. 7, of an interest in an economic or property component should be allowed to go to trial. The court noted:

> In our view this argument would mean that no application under rule 21.01(a) or (b) could ever succeed because someday the Supreme Court of Canada might take a different view of the law now in existence in Ontario. In Ontario the law is clear. Until the Supreme Court of Canada makes a decision that changes the law, the Divisional Court is bound by the Ontario Court of Appeal decisions and accordingly the plaintiff cannot succeed under s. 7.[55]

[58] The same applies here. As of this moment, there is no positive obligation placed on Canada or Ontario, arising out of an allegation of a breach of s. 7 of the *Charter*, having been found to apply in circumstances such as this. To the contrary, *Clark* and *Masse* demonstrate the opposite. It may be that values, attitudes and perspectives will change, but this evolution is not sufficient to trigger reconsideration in the lower courts:[56]

> If it were otherwise, every time a litigant came upon new evidence or a fresh perspective from which to view the problem, the lower courts would be forced to reconsider the case despite authoritative holdings from the Supreme Court on the very points at issue. This would undermine the legitimacy of *Charter* decisions and the rule of law generally.[57]

[59] The law is established. As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s. 7 of the *Charter.* The majority in *Gosselin* does not depart from this view. It confirms what has [page600] been understood since the early days of the *Charter.* Our

appreciation of its breadth and its limits will continue to evolve. This is no less the case for s. 7 than any of its provisions. It is not for a lower court to step outside the direction past cases provide.

[60] This takes me to *Grant v. Canada (Attorney General)*.[58] The Crown relocated a First Nation community. Toxic mould developed in the new housing. The plaintiff claimed this resulted from a failure of the Crown to properly assess the suitability of the new location for residential housing and the selection by the Crown of building materials, techniques and designs. It was alleged that the plaintiff and other members of the band were exposed to unsafe levels of toxic mould and developed a variety of illnesses. The plaintiff commenced an action alleging, among other things, breaches of s. 7 and s. 15 of the *Charter*. The Crown brought a motion to strike a number of paragraphs from the statement of claim on the ground that they disclosed no reasonable cause of action. While other claims were left to proceed, those claiming breaches of the *Charter* were struck.

[61] The motion judge considered the impact of the decisions in *Masse* and *Gosselin*. He noted:

> . . . the pleading alleges a breach of a positive duty to act. While in *Masse v. Ontario, (Ministry of Community and Social Services)* (1996), 1996 CanLII 12491 (ON SCDC), 134 D.L.R. (4th) 20 (S.C.J.) it was denied that section 7 imposes such duties, the possibility that this may occur "in special circumstances" was expressly left open in the majority judgment of the Supreme Court of Canada in *Gosselin v. Quebec (Attorney-General)*, 2002 SCC 84 (CanLII), [2002] 4 S.C.R 429, at para. 83. No special circumstances were identified here either in the pleading or in counsel's submission[.][59]

[62] In that case, no special circumstances were pleaded. The same is true in this case. No reliance was placed on the presence of "special circumstances" nor was it suggested that there were any. In *Grant*, the motion judge did not dismiss the claim on this basis. What is evident is his reliance on *Chaoulli* in determining that, absent a demonstration of an engagement of the principles of fundamental justice, there can be no breach of s. 7. The claim relying on a breach of s. 7 of the *Charter* failed because no breach of the principles of fundamental justice had been pleaded. In this case, a breach of these principles has been pleaded.[60] In *Chaoulli*, the decision to disallow the purchase of private health care insurance was arbitrary. It was not a [page601] decision that was made in accordance with the principles of fundamental justice. As I see it, the answer is simpler. There being no special circumstances suggested or alleged, there is no reason to step beyond the law that says there can be no positive obligation placed on the state to respond to s. 7 of the *Charter*. To find otherwise would ignore the injunction in *Cosyns* that, where the law is set by the Supreme Court of Canada, it is not for a lower court to set it aside.

[63] *Gosselin* provides a further confirmation of this approach. The majority reasons make the following observation:

> In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop *incrementally*, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated -- plainly it is not -- but whether the Court ought to apply s. 7 despite this fact.[61]

(Emphasis added)

[64] This quotation recognizes that s. 7 of the *Charter*, as part of our Constitution, is part of a "living tree". It recognizes that our understanding of its parameters should evolve gradually and not in unpredictable and unforeseen leaps. "Incrementally" refers to an increase in the size of something in a series of small, often regular or planned stages. Counsel for the applicants submitted that "the present Application does not request that either Respondent be ordered to implement any particular measures that would provide housing or would entail the expenditures of any monies. The most extensive remedy is merely an order that the Respondents begin addressing the problem of homelessness by adopting strategies to reduce and eliminate homelessness and inadequate housing." The submission concludes by saying, "It is difficult to imagine a more incremental advance towards remedying such a serious *Charter* violation".[62] I disagree. To describe the remedies requested, in this way, is the offering up of a Trojan horse. It hides the true impact.

[65] The request to adopt strategies directed to the elimination of homelessness and inadequate housing encompasses the possible review of all government policies, programs and legislation that may touch or affect the availability of "adequate housing" (whatever that may mean) and how it is to be financed by those [page602] who build or acquire it and paid for by those who come to live in it. The

decisions which the applicants seek to rely on as demonstrating the reduction in the ability of the disadvantaged to obtain and maintain housing all relate to the provision of monetary supplements that could be used to pay for proper accommodation. The policies that could be the subject of the review that is asked for go well beyond those affected by the decisions being questioned. At the hearing considering the motions to intervene, counsel for one of the moving parties advised as to some of the policies which could be the subject of this review. The decision on the motions commented on this:

> In his oral submissions, one of the two counsel who appeared proposed to review, on the motion, the full array of policies and legislation that could be said to influence the availability of affordable housing. By way of example, this was said to include planning policy and the *Planning Act*, R.S.O. 1990 c. P.13, as well as the general form of mortgages and the *Mortgages Act*, R.S.O. 1990 c. M. 40. The proposition was that this would raise the issue of whether affordable housing had played a role, or a sufficiently important role, in the development of these regulatory statutes and schemes.[63]

[66] The party on whose behalf these submissions were made was not granted the right to intervene. Those who were present on the motions to dismiss did not in any way step back or resile from the broad range of policies, programs and legislation that would be open to examination if the application succeeds. It was suggested that, in the end, the breadth of the review would be left to the representatives of Canada and Ontario, who were instructed to respond to the order of the court. This, too, disguises the true impact of what it is that the applicants seek. The order sought asks that the court seize itself of a supervisory jurisdiction in order that it may address any concerns regarding implementation of the order. It does not take much to foresee the applicants and any intervenors who support them asking the court to direct the inclusion of a broader set of government programs and actions in any review if they are dissatisfied with the work these governments undertake. What is sought here is anything but incremental. It perceives not a single act or action, but a wholesale review of an entire policy area that would undoubtedly touch on a large number of other areas of governmental concern and responsibility, areas that would be of interest to other groups of our citizens. The strategies are to be developed and implemented "in consultation with affected groups". There is no suggestion as to how far-reaching this consultation would [page603] be and how many "affected groups" would be involved. The nature of the positive action being requested informs the degree of change in the law that action represents. Contrary to the assertion of counsel for the applicants, there is nothing incremental about what is being proposed. This is another reason why this court should be mindful of what has gone before and consider carefully whether it leads properly to the conclusion that it is plain and obvious that the application cannot succeed. It is another demonstration of why *Gosselin* does not help in opening up the prospect that an application based on asserting a positive obligation to provide adequate housing could succeed.

[67] It was submitted that there are circumstances where the *Charter* allows for and recognizes positive obligations on the state to act to protect rights it provides for. This is obviously true where the *Charter* makes specific provision for such an obligation.[64] The submissions went further.

[68] Counsel for the *Charter* Committee coalition referred to *Vriend v. Alberta*.[65] The case deals primarily with an alleged breach of s. 15 of the *Charter*, but the arguments made could, just as well, apply to s. 7. The appellant was homosexual. He was fired from his job. The sole reason given was his non-compliance with his employer's policy on homosexual practice. The appellant attempted to file a complaint with the Alberta Human Rights Commission on the grounds that his employer had discriminated against him because of his sexual orientation. He was advised that he could not make such a complaint since the applicable legislation, the *Individual's Rights Protection Act*, did not include sexual orientation as a protected ground. Among the issues raised was whether the omission of sexual orientation from the legislation was a proper basis to find that the *Charter*, in particular s. 15, had been breached. In short, it was argued that the courts must defer to a decision of the legislature not to enact a particular provision and that the scope of *Charter* review should be restricted so that such decisions will be unchallenged. This position was not accepted by the Supreme Court of Canada.[66] As part of its consideration of this position, the court made the following observation on which counsel for the *Charter* Committee coalition relied: [page604]

> The relevant subsection, s. 32(1)(*b*), states that the *Charter* applies to "the legislature and government of each province in respect of all matters within the authority of the legislature of each province". There is nothing in that wording to suggest that a *positive act* encroaching on rights is required; rather the subsection speaks only of *matters within the authority of the legislature*. Dianne Pothier has correctly observed that s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" ("The Sounds of

Silence: *Charter* Application when the Legislature Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The application of the *Charter* is not restricted to situations where the government actively encroaches on rights.[67]

[69] Based on this, it was proposed that it was not plain and obvious that the court would not find a positive obligation on Canada and Ontario to act to provide adequate housing for the homeless. Statements such as the quotation relied on must be read in the context in which they are found. In *Vriend*, there was a legislative act undertaken by the province. There was a statute that was enacted. It was found to be deficient in that it failed to deal with discrimination based on sexual orientation and, thus, was in breach of the *Charter.* The breach was corrected by the court "reading in" the missing protection. Here, we are not dealing with the failure to include a provision in a statute. Canada and Ontario have, apparently, acted to reduce certain benefits which have caused an increase in the number of people that are without adequate housing. The resolution is to require Canada and Ontario under the supervision of the court and in consultation with "affected groups" to develop strategies directed to reducing and eradicating homelessness.

[70] In *Vriend*, the court went on to say:

It is also unnecessary to consider whether a government could properly be subjected to a challenge under s. 15 of the *Charter* for failing to act *at all*, in contrast to a case such as this where it acted in an under inclusive manner.[68]

And

It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney*, Wilson J. made a comment in *obiter* that "[i]t is not self-evident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1038, L'Heureux-Dubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, [page605] suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.[69]

[71] *Vriend* and each of the cases referred to in the second of these quotations pre-date *Gosselin.* Each of them did what it did. They acknowledged that it may be that special or unforeseen circumstances may cause the application of s. 15(1) or, by analogy, s. 7 of the *Charter* to evolve. That possibility does not change the law as it is. What is suggested here has been dealt with before. There is no positive obligation raised by the *Charter* that requires Canada and Ontario to provide for affordable, adequate, accessible housing.

[72] Counsel for the *Charter* Committee coalition referred to *Eldridge v. British Columbia (Attorney General)*.[70] Like *Vriend*, this case is principally concerned with an alleged breach of s. 15 of the *Charter*. Nonetheless, it was relied on as demonstrating a circumstance where the court imposed a positive obligation on the state; in that case, the Government of Alberta. The appellants were born deaf. Their preferred means of communication was sign language. They required interpreters to communicate with their doctors and other health care providers. In the past, interpretation had been provided, without charge, by a private, non-profit agency. It could no longer afford to do so. The service was discontinued. The Ministry of Health was requested to provide funding but decided not to do so. The failure to provide sign language interpretation, where it was necessary for effective communication in the delivery of medical services, was a denial of the rights that arise from s. 15(1) of the *Charter.* The breach was not in the statutes that applied, but in the exercise of the discretion left to those who implemented the provision of health care services. A declaration was granted that the failure to provide sign language interpretation services was unconstitutional and a direction made that the legislation be administered in a manner consistent with s. 15(1) of the *Charter*.

[73] It was submitted that this represents an order that requires positive action. This may be so but the action it compelled was not directed to the provision of programs to deal with a [page606] societal concern, but to ensure that an existing benefit the state was already delivering was provided in a manner that did not discriminate. In *Eldridge*, the court recognized this distinction. It said:

> It has been suggested that s. 15(1) of the *Charter* does not oblige the state to take positive actions, such as provide services to ameliorate the symptoms of systemic or general inequality; see *Thibaudeau*, *supra*, at para. 37 (*per* L'Heureux-Dubé J.). Whether or not this is true in all cases, and I do not purport to decide the matter here, the question raised in the present case is of a wholly different order. This Court has repeatedly held that once the state does provide a benefit, it is obliged to do so in a non-discriminatory manner; see *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22, *Haig v. Canada (Chief Electoral Officer)*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at pp. 1041-42, *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627, at p. 655, and *Miron*, *supra*. In many circumstances, this will require governments to take positive action, for example by extending the scope of a benefit to a previously excluded class of persons; see *Miron*, *Tétreault-Gadoury*, and *Schachter v. Canada*, [1992] 2 S.C.R. 679.[71]

[74] To be clear, what was applied in *Eldridge* is the concept of reasonable accommodation, the idea that to treat those with disabilities "equally", we may have to provide different treatment:

> It is also a cornerstone of human rights jurisprudence, of course, that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation. The obligation to make reasonable accommodation for those adversely affected by a facially neutral policy or rule extends only to the point of "undue hardship"; see *Simpsons-Sears*, *supra*, and *Central Alberta Dairy Pool*, *supra*. In my view, in s. 15(1) cases this principle is best addressed as a component of the s. 1 analysis. Reasonable accommodation, in this context, is generally equivalent to the concept of "reasonable limits". It should not be employed to restrict the ambit of s. 15(1).[72]

[75] In *Eldridge*, there was no s. 1 analysis. The declaration that the *Charter* was breached was suspended for six months to "enable the government to explore its options and formulate an appropriate response".[73]

[76] *Eldridge* does not support the proposition that the *Charter* places a positive obligation on the state to put in place programs that overcome societal concerns either because they transgress on the life, liberty security of the person or because they are discriminatory under the *Charter*. Counsel for the applicants submitted that the failure to provide adequate housing is discriminatory. It discriminates against the homeless and, [page607] thus, breaches s. 15(1), creating an obligation on Canada and Ontario to act independent of any consideration of "life, liberty and security of the person". I shall have more to say about this later in these reasons.

[77] It was suggested that *Canada (Attorney General) v. PHS Community Services Society*[74] was a case where a positive obligation was imposed on Canada by the Supreme Court of Canada in response to an allegation of a breach of s. 7 of the *Charter*. A supervised injection site where intravenous drug users could inject drugs under medical supervision without fear of arrest and prosecution was opened in Vancouver in the hope that it would assist in dealing with a catastrophic spread of infectious diseases. In order for the site to operate, an exemption from the prohibitions of possession and trafficking of controlled substances was required. Exemptions of this type are provided for by s. 56(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*").[75] The exemption was granted. The site was a success. It saved lives and improved health without increasing the incidence of drug use and crime in the surrounding area. It was necessary for the exemption to be renewed. Temporary extensions had been granted in 2006 and 2007. In 2008, a formal application for a new exemption was made. The minister indicated that he had decided to deny the application. An action was brought for a declaration that the application of the *CDSA* to the injection site resulted in a violation of the s. 7 rights of the people who worked there or, in the alternative, that the federal Minister of Health, in refusing to grant an extension, had violated the rights of those individuals. An order was made permitting the site to continue to operate free from federal drug laws. An appeal to the Court of Appeal was dismissed. The Supreme Court of Canada ordered the Minister of Health to grant the exemption. The court held that s. 4(1) of the *CDSA* (the prohibition on possession) engages but does not violate the s. 7 *Charter* rights of the individuals working at the site. This is because of the power conferred on the minister to grant exemptions.[76] On the other hand, the decision of the minister similarly engages the s. 7 rights of the same individuals, but the refusal to grant an exemption under s. 56 of the *CDSA* was arbitrary and grossly [page608] disproportionate in its effect and, hence, not in accordance with the principles of fundamental justice.[77] It is on this basis that the minister was ordered to grant an exemption. The case does not stand as a demonstration of the presence of a positive obligation on the minister. An application was made. In turn,

a decision was made to refuse the exemption. The refusal impinged on the s. 7 rights of those who had made the claim. There is nothing that suggests that, in the absence of an application, there was a positive obligation to allow the site to operate, whereas in this case it is argued that, in the absence of any application, under any statute, there is a positive obligation on Canada and Ontario to provide adequate housing. In *PHS Community Services Society*, it was recognized that it is for the relevant governments, not the court, to make policy with respect to health care and criminal law. The problem arose because the policy was translated into state action and, when that happened, those laws and actions were "subject to scrutiny under the *Charter*".[78] In the present case, the applicants complain there is no policy dealing with homelessness. The applicants' submission is that Canada and Ontario are obliged to have one. I disagree.

[78] Finally, on this issue, s. 7 of the *Charter* has been relied on to enjoin government from interfering with shelter used by the homeless, but not on the basis that there is a positive right to housing.

[79] *Victoria (City) v. Adams*[79] considered by-laws which were said to breach the rights of the homeless. There were insufficient shelter beds in Victoria. Homeless people erected a tent city in a public park. The city sought an injunction requiring its removal. The judge heard evidence on the circumstances of the homeless and the health risks imposed by homelessness and found that the by-laws interfered with the liberty of the homeless to protect themselves from the elements. The by-laws interfered with the security of the person by depriving the homeless of access to shelter. The matter proceeded to the Court of Appeal. There, the issue was whether a prohibition on the use of structures as temporary shelter, overnight, was constitutional. The court found that it was not. This was not because of any positive obligation placed upon the municipality. To the contrary, no positive benefit was requested. The trial [page609] judge had concluded that it was not necessary to consider whether s. 7 includes a positive right to the provision of shelter.[80] The Court of Appeal observed:

> Nor does the trial judge's decision that the Bylaws violated the rights of homeless people under s. 7 impose positive obligations on the City to provide adequate alternative shelter, or to take any positive steps to address the issue of homelessness. The decision only requires the City to refrain from legislating in a manner that interferes with the s. 7 rights of the homeless. While the factual finding of insufficient shelter alternatives formed an important part of the analysis of the trial judge, this does not transform either the respondents' claim or the trial judge's order into a claim or right to shelter.[81]

[80] *Adams* is a case of narrow application. Initially, the city left the by-law of concern in place. It adopted a policy allowing people to construct shelters and stay in the park overnight but continued to enforce the by-law during the day. Individuals who erected shelters during daytime hours were charged. The charges were dismissed based on the finding in *Adams* that the by-law was unenforceable.[82] The by-law was amended. Shelters were built and utilized during the daytime. More charges were laid. This time, the accused were convicted. The provincial court judge determined that the by-law, as amended, constituted a reasonable restriction on the rights of the appellant to erect a shelter in a public space.[83] There were enough shelter beds available for those who could not sleep at night and no need for the park to be available for this purpose. It could be left free for those members of the public who wished to use it as a park. The appeal to the Court of Appeal was dismissed. In respect of the putative right to shelter, the court said:

> In several places, the appeal decision [the decision of the Supreme Court of British Columbia on appeal from the provincial court] mistakenly refers to a right to erect temporary shelters. If that were so, it would amount to a property right which this Court, in *Adams*, said was not the legal result:
>
> > [100] The right asserted by the respondents and recognized by the trial judge is the right to provide oneself with rudimentary shelter on a temporary basis in areas where the City acknowledges that people can, and must, sleep. *This is not a property right*, but a right to be free of a [page610] state-imposed prohibition on the activity of creating or utilizing shelter, a prohibition which was found to impose significant and potentially severe health risks on one of the City's most vulnerable and marginalized populations.[84]

[Emphasis added in *Johnston*]

[81] This serves to confirm the current state of the law. Section 7 of *Charter* does not provide a positive right to affordable, adequate, accessible housing and places no positive obligation on the state to provide it.

[82] For the reasons referred to herein, insofar as the application asserts a breach of s. 7 of the *Charter*, it cannot succeed. There is no decision that engages s. 7 of the *Charter*. Accordingly, there is no breach of fundamental justice. There is no positive obligation on Canada or Ontario to act to reduce homelessness and there are no special circumstances that suggest that such an obligation could be imposed in this case. Finally, contrary to the submissions of counsel for the applicants, the remedy sought does not represent an incremental change in the applicable law. What it foresees is a complete and comprehensive review of all policies that touch on the availability of affordable, adequate and accessible housing and the development, under the supervision of the court, of "effective national and provincial strategies to reduce and eventually to eliminate homelessness and inadequate housing".[85]

[83] I turn now to the proposition that the application is misconceived. There is an inherent tension between, the "institutional boundaries" that, on one hand, define the authority of the legislature and, on the other hand, determine the responsibility of the courts to protect the substantive entitlements the *Charter* provides:

> . . . the Supreme Court's authority to enforce rights rests on a concept of function that separates and distinguishes the respective responsibilities of the courts and the legislatures . . . it follows from that assumption of separate functions that the legitimacy of review is weakest when the exercise of judicial power threatens to cross the boundaries that distinguish the branches of government.[86]

[84] Early cases that took account of the *Charter* recognized that it did not enable the courts to decide upon the appropriateness [page611] of policies underlying legislative enactments.[87] The role of the fundamental justice clause was to limit review by the courts to issues that were properly within their domain, justice not policy:

> . . . 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.[88]

[85] It has been suggested that, in the intervening years, the courts have largely concerned themselves with the entitlements found in the *Charter* and, for the most part, forsaken any concerns for the boundaries of the applicable institutional responsibilities:

> Though the judges are aware of the limits on their powers of review, the question of institutional boundaries has played a minor role in this jurisprudence. It is the merits of claims, rather than doubts about the legitimacy of review, that determine the outcome of these cases.[89]

[86] The transformative impact of the dissent of Madam Justice Arbour, in *Gosselin*, if acted on, is that it would remove the limit on judicial review imposed by the fundamental justice clause. The courts would be left to consider the rights protected by s. 7 free of that constraint. The last vestige of this impediment to the setting aside of the applicable institutional boundaries would be gone. The idea that the application is misconceived begins with this understanding. In effect, it suggests that the court should feel free to step in and take over the responsibilities typically understood to rest with the legislature.

[87] The applicants and the intervenors are dissatisfied with the manner in which Canada and Ontario have dealt with the fact that so many of our citizens are without affordable, adequate and accessible housing. The application says there are [page612] 140,000 households in Ontario on the waiting list for affordable housing in Ontario. This does not deal with other concerns that may be demonstrative of what is required to provide all of our citizens with adequate and accessible housing, considerations such as the number of family members to be accommodated, accessibility for those in wheelchairs and the special needs of those with psycho-social and intellectual disabilities.[90] The applicants want Canada and Ontario to act to correct what they see as a failure to deal with a broad societal issue. They want "provincial and national strategies to reduce and eliminate homelessness and inadequate housing".[91] It is not possible to know how far the policy review inherent in this request would go. Clearly, it would involve social assistance, Employment Insurance, income support programs and federal transfer payments to the provinces, all of which are referred to in the application as examples of areas where decisions that offend s. 7 of the *Charter* are said to have been made.[92] It could go much further. The required policy review could, as was suggested at the motion to intervene, extend to planning policy and the *Mortgages Act*, R.S.O. 1990, c. M.40 and beyond, literally to anything that might touch on housing. What the applicants seek would require the court to cross the institutional boundary and enter into the

area preserved for the legislature. It would require the court to supervise a full inquiry into all policy areas that could impact on housing and, through its supervision, to ensure that an appropriate policy with "timetables, reporting and monitoring regimes outcome measurements and complaint mechanisms"[93] was developed and implemented.

[88] It is all very well to say, as counsel for the applicants and counsel for the intervenor, the David Asper Centre, did, that a consideration of the appropriate remedy is only pertinent after a determination that the *Charter* has been breached has been made. However, in this case, the remedy requested provides insight as to the nature and extent of the government action being questioned. What is being asked for makes clear the danger of discarding reliance on the fundamental justice clause, withdrawing the limit it places on review by the courts, and [page613] inviting the court to cross institutional boundaries into an area that should be reserved for the legislature.

[89] Counsel for the David Asper Centre was at some pains to say that the remedy sought was, in all its parts, within the jurisdiction of the court. He noted the broad authority provided by s. 24(1)[94] of the *Charter* and relied on *Doucet-Boudreau v. Nova Scotia (Minister of Education)*.[95] Section 23 of the *Charter* provides a positive right to, and concomitant obligation on government to, provide minority language education rights.[96] A breach was found and a remedy imposed by the trial judge. The remedy required the province and the Conseil scolaire acadien provincial, a province-wide French-language school board, to use their best efforts to provide school facilities and programs by [page614] particular dates. He retained jurisdiction to hear reports on the status of the efforts being made. The province appealed the part of the order in which the trial judge retained his jurisdiction to hear reports. The Court of Appeal struck down the impugned portion of the order on the basis that the trial judge was *functus officio* (the duty and authority of the judge had come to an end). The further appeal to the Supreme Court of Canada was allowed. The order of the trial judge was restored.

[90] Counsel for the David Asper Centre submitted that this demonstrated the jurisdiction of the court to require the state to act in a complex policy area and to maintain a supervisory role. The circumstances here are very different from what they were there. Unlike s. 7, s. 23 of the *Charter* does provide a positive obligation on the state. In *Doucet-Boudreau*, there was no policy review to be undertaken. The *Charter* requires the services to be provided. "While the rights are granted to individuals . . . they apply only if the 'numbers warrant' and the specific programs or facilities that the government is required to provide varies depending on the number of students who can potentially be expected to participate".[97] In the case being decided, a policy review is at the heart of the application. Its breadth cannot be defined. No one can identify the program or strategies that will be implemented to provide affordable, adequate and accessible housing or the range of people who will be the beneficiaries of those programs.

The Charter: Section 15

[91] Section 15(1) of the *Charter* states:

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

[92] Like s. 7, the rights protected by s. 15 of the *Charter* have limits. The section sets tests that must be satisfied. There is no general right that everyone is to be free of unequal or differing treatment. A breach is discriminatory only insofar as it does not provide equal protection or equal benefit of the law and the discrimination must be directed against one of the enumerated grounds or an analogous ground: [page615]

> First, the claimant must show a denial of "equal protection" or "equal benefit" of the law, as compared with some other person. Second, the claimant must show the denial constitutes discrimination. At this second stage, in order for discrimination to be made out, the claimant must show that the denial rests on one of the grounds enumerated in s. 15(1) or an analogous ground and that the unequal treatment is based on the stereotypical application of presumed group or personal characteristics. If the claimant meets the onus under this analysis, violation of s. 15(1) is established.[98]

[93] In *Withler v. Canada (Attorney General)*,[99] the same tests are established, but the order of their consideration is reversed:

> The substantive equality analysis under s. 15(1), as discussed earlier, proceeds in two stages: (1) Does the law create a distinction based on an enumerated or analogous ground? and (2) Does the

distinction create a disadvantage by perpetuating prejudice or stereotyping? (See *Kapp*, at para. 17.) Comparison plays a role throughout the analysis.[100]

[94] In the succeeding paragraph, the court establishes the central thrust of the test:

> The role of comparison at the first step is to establish a "distinction". Inherent in the word "distinction" is the idea that the claimant is treated differently than others. Comparison is thus engaged, in that the claimant asserts that he or she is denied a benefit that others are granted or carries a burden that others do not, by reason of a personal characteristic that falls within the enumerated or analogous grounds of s. 15(1).[101]

[95] For there to be a breach of s. 15(1) of the *Charter*, the applicants must be treated differently, in that they are denied a benefit provided to others or have a burden imposed on them that others do not.

[96] The application of these tests to the assertions found in the application demonstrates that it is plain and obvious that the application cannot succeed.

(i) *Equal protection and benefit of the law*

[97] An application of this requirement is found in *Auton (Guardian ad litem) v. British Columbia (Attorney General).*[102] The infant petitioners suffered from autism. They alleged that the failure of British Columbia to fund a particular therapy violated [page616] s. 15 of the *Charter.* The trial judge agreed that the failure to fund the therapy violated the petitioners' equality rights. The Court of Appeal upheld the judgment. The Supreme Court of Canada did not. It set the test, later repeated in *Withler*, as follows:

> In order to succeed, the claimants must show unequal treatment under the law -- more specifically that they failed to receive a benefit that the law provided, or were saddled with a burden the law did not impose on someone else. The primary and oft-stated goal of s. 15(1) is to combat discrimination and ameliorate the position of disadvantaged groups within society. Its specific promise, however, is confined to benefits and burdens "of the law".[103]

[98] This confines s. 15(1) claims to benefits provided and burdens imposed by law.[104] *Auton* includes the following quotation from *R. v. Turpin*:[105]

> The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens *of the law* and not suffer any greater disability in the substance and application *of the law* than others.

(Emphasis added in *Auton*)[106]

[99] In *Auton*, the benefit claimed, being funding for all medically required treatment, was not provided by law. The legislation did not promise that any Canadian will receive funding for all medically required treatment. The law did not provide for funding for the therapy sought for the autistic children.[107] Where there is no benefit provided by law, there is no duty to distribute that non-existent benefit equally, without discrimination:

> The argument would be that the Medical Services Commission violated s. 15(1) by approving non-core services for non-disabled people, while denying the equivalent services to autistic children and their families.
>
> Such a claim depends on a prior showing that there is a benefit provided by law. There can be no administrative duty to distribute non-existent benefits equally.[108]

[100] In the case I am asked to decide, the applicants are seeking to require Canada and Ontario to develop and implement [page617] strategies to reduce and eliminate homelessness and inadequate housing. For their part, counsel for the respondents (the two governments) submitted that there is no law that requires Canada or Ontario to provide affordable, adequate and accessible housing to all persons in our society. Thus, they say, there can be no breach of s. 15(1) of the *Charter* in any failure or refusal of Canada or Ontario to provide this housing to the disadvantaged.

[101] Counsel for the applicants submitted that relying on *Auton* in this way arises from a too-narrow reading of that case. In *Auton*, there was no law requiring that treatment be provided, but that does not finally define the boundaries of the limitation found in s. 15(1) of the *Charter* that there be equal "benefit of the law without discrimination":

> There is no magic in a particular statement of the elements that must be established to prove a claim under s. 15(1). It is the words of the provision that must guide. Different cases will raise different

> issues. In this case, as will be discussed, an issue arises as to whether the benefit claimed is one provided by law. The important thing is to ensure that all the requirements of s. 15(1), as they apply to the case at hand, are met.[109]

[102] In *Auton*, there had been no government action in furtherance of providing the sought-after treatment for autistic children. Here, it is said, we are not dealing with an absence of government action. The application suggests government actions which have affected the availability of adequate, affordable and accessible housing:

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures, to address the impact of these changes on groups most vulnerable to, and at risk of becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs equally protect those who are homeless or most at risk of homelessness. As a result, they have created and sustain conditions which lead to, support and sustain homelessness and inadequate housing.[110]

[103] To the extent that this paragraph suggests that Canada and Ontario have breached s. 15(1) of the *Charter* by failing to take positive action to overcome homelessness, I repeat what I have already said. No positive obligation has, in general, been recognized as having been imposed by the *Charter* requiring the state to act to protect the rights it provides for. [page618]

[104] As confirmed in *Withler*, the issue is whether the changes to which the paragraph alludes could be demonstrative of benefits that are provided or burdens that are imposed in a fashion that discriminates against the homeless.[111] The application notes that Canada has had an active role in supporting access to affordable housing through programs such as

> (a) direct funding for the construction of affordable and rental housing units;
>
> (b) government administration of affordable rental housing through a variety of public housing, non-profit housing, co-operative and rent supplement rental units;
>
> (c) programs of affordable housing funded through cost-sharing sharing agreements with the provinces; and
>
> (d) the provision of rent supplements to tenants in private rental units.

[105] The application outlines changes on which the applicants rely. It says that, beginning in the mid-1990s and continuing to the present, Canada has undertaken a number of decisions which have eroded access to affordable housing. The decisions referred to reflect on each of the program areas which demonstrate the role Canada has played in supporting access to affordable housing. These decisions include

> (a) cancelling funding for the construction of new social housing;
>
> (b) withdrawing from administration of affordable rental housing; and
>
> (c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces.[112]

[106] A similar, if broader, range of these changes are said to have been implemented by Ontario. These include downloading responsibilities to municipalities and "heightening insecurity of tenancy by creating administrative procedures that facilitate evictions".[113] [page619]

[107] It may be that these decisions impact on those who have difficulty finding and maintaining affordable, adequate and accessible housing, but the nature or substance of that impact requires some examination. The programs that are affected by the decisions the applicants are complaining about are, for the most part, directed only to those who require the assistance they provide. They do not benefit those who do not need their help to find adequate housing or any other necessity of life. The security of tenancy is directed to a different problem, to protect landlords from recalcitrant tenants. If it places a burden on anyone, it would be to require them to pay rent and look after the places in which they live. These programs cannot be said to discriminate against those who benefit and favour those who do not. They do not "saddle" the homeless with burdens that are not placed on others. In making the latter observation, I point out that the "burden" of being without adequate housing is not caused by these programs. It arises from other wider characteristics of our society and approach to economic issues. The programs affected by the changes referenced by the applicants, to the extent that they benefit anyone, assist in overcoming the problems on which the application seeks to focus. It is not that these programs treat the homeless differently than they treat others in society, but that the homeless are being treated

differently than they were before the changes were made. The substance of the complaint is that what the homeless are receiving, through these programs, is not enough. It may not have been enough before the changes,[114] but what is being said is that the discrimination arises from the fact that it is less now. As was said in *Masse v. Ontario (Ministry of Community and Social Services)*:

> I cannot conclude that an overall reduction in the levels of social assistance creates a distinction as a result of a differential effect on social assistance recipients as a group when compared with others. In the context of this case, the applicants have not established that any differentiation has been made based on the personal characteristics of social assistance recipients.[115]

[108] The same is true here. The application says that there have been changes to programs that ameliorate the difficulties confronted by those who cannot find affordable, adequate and accessible housing. The support for those in need of housing is less than it was. There has been an erosion of access to affordable housing, erosion of income support programs and, for some, [page620] inadequate supports for housing provided.[116] None of this involves a comparison to how these programs treat other groups in society. There is nothing that suggests that these programs provide others with benefits that the homeless are being denied or that these programs impose burdens on the homeless that others do not suffer under. The application states:

> Those who are homeless and inadequately housed are subject to widespread discriminatory prejudice and stereotype that have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by governments. People who are homeless and inadequately housed are perhaps the most marginalized, disempowered, precarious and vulnerable group in Canadian society.
>
> Canada's and Ontario's failure to adopt effective strategies to address homelessness and inadequate housing, result in the further marginalization, exclusion and deprivation of this group. Canada and Ontario have failed to take into account the circumstance of people who are homeless and have created additional burdens, disadvantage, prejudice and stereotypes in violation of section 15 of the Charter.[117]

[109] These are statements concerning the plight and treatment of the homeless. They suggest a general failing to adopt effective strategies to address inadequate housing. There is nothing said that demonstrates that these actions deny the homeless benefits given to others or impose on the homeless burdens that others do not have to deal with.

[110] This brings these reasons back to the suggestion that, where there may be no legal requirement for the state to act, once it has done so, it may no longer be free to amend, lessen or cut the programs or benefits without breaching rights referred to in the *Charter*. It cannot be that by acting where there is no obligation to do so the government creates a right that obtains protection under the *Charter* that otherwise would be unavailable. This was touched on in *Masse.* In that case, there was evidence that social assistance, at a level that provided for all the basic necessities, would have a negative impact. It was suggested that this would discourage those who relied on social assistance from seeking employment.[118] This may or may not be so and it may or may not be that such a policy would affect the individual applicants, but if the benefits cannot be lowered without offending the *Charter*, [page621] Canada and Ontario would be unable to affect the adherence to such a policy that a lowering of rates could represent.

[111] The applicants suggest that this is not determinative of the first of the questions asked in respect of s. 15(1) of the *Charter*. They propose that the changes they rely on have a disproportionate impact on certain groups:

> Furthermore the persons affected by homelessness and the lack of adequate housing are disproportionately members of other groups protected from discrimination under s. 15(1) including: women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance. Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing therefore constitutes adverse effects discrimination against these groups under s. 15(1).[119]

[112] This touches on the second of the tests relevant to a consideration of whether s. 15 of the *Charter* has been breached: the discrimination must be based on an enumerated or analogous ground. It suggests that the comparator analysis, though relevant to direct discrimination, is supplanted for adverse effect discrimination by a need to show that the government action at issue (in this case, the policy

changes on which the applicants rely) fails to ameliorate the overrepresentation of s. 15(1) protected groups among the poor or homeless.[120] This has been found to be incorrect:

> The comparator analysis applies generally to s. 15(1) claims for either direct or adverse effect discrimination. Otherwise s. 15(1) would allow simply a freestanding duty of affirmative action instead of what the *Charter* intends, a remedy for differential treatment (unprotected grounds) that is discriminatory.[121]

[113] It is not sufficient for the purposes of this s. 15(1) analysis to simply assert an overrepresentation of protected groups among those denied the alleged benefit of adequate housing. Evidence of disadvantage or overrepresentation on the part of a protected group does not in and of itself demonstrate that an action violates s. 15(1) of the *Charter.* The disadvantage would have to result from the impugned action. In this case, it would be necessary to find that programs which provide assistance to the disadvantaged nonetheless discriminated against them or that, where there was no law requiring Canada and Ontario to [page622] act, a lowering of the benefits provided could, nevertheless, cause a breach of s. 15(1) of the *Charter*. This is not the case. The programs and decisions noted and complained of are not the cause of the harm described by the applicants. They are, if anything, part of the cure:

> In this case, the Applicants complain of poverty and government inaction insofar as the amount of GWAA and FBA payments are "not enough". However, in the absence of the reduced social assistance payments, the Applicants would face an even greater burden brought about by the cost of rent and food, non-governmental activity.
> In my view, the impugned regulations do not increase but alleviate the Applicants' burden (albeit not to their satisfaction). It is, in my view, government inaction that is complained of by the Applicants and not "government action" within the meaning of section 32 of the Charter. Government inaction cannot be the subject of a Charter challenge.[122]

[114] In the absence of anything that suggests that the decisions complained of are the cause of homelessness as suffered by any of the groups pointed at by the applicants, it stands to reason that

> [i]f the adverse effects analysis is to be coherent, it must not assume that a statutory provision has an effect which is not proved. We must take care to distinguish between the effects which are wholly caused, or contributed to, by an impugned provision, and those social circumstances which exist independently of such a provision.[123]

[115] In short, if there are a disproportionate number of disabled persons or single mothers that are unable to find adequate, affordable and accessible housing because of the impact of poverty and unemployment, it would not be appropriate to strike down programs that provide assistance to the homeless as discriminatory under s. 15(1) of the *Charter.* It is not the housing programs that are the cause of the difficulties these groups confront in looking for appropriate housing. To the contrary, they are attempting to alleviate rather than exacerbate the problem. This is not discrimination. It does not demonstrate any aspect of a breach of s. 15(1) of the *Charter.*

[116] Understood in this way, there is no basis on which it could be found that the applicants, as a result of the decisions they say have been made, have not received equal benefit of the law. The [page623] changes on which the applicants rely do not deny them a benefit given to others or impose on them a burden not placed on others. On this basis, there can be no breach of s. 15(1) of the *Charter.*

[117] What is apparent is the broad basis of the concern expressed on behalf of the applicants. The decisions which are the foundation of their complaints range beyond matters which point directly to the availability of affordable, adequate and accessible housing. The application provides specific examples:

(a) in 1996, federal transfer payments intended to contribute to social assistance were restructured. These payments had been conditioned on the province ensuring that social assistance would be provided at a level that would cover the cost of basic necessities, including housing. In 1996, this "legislated standard" was apparently repealed;[124]

(b) in the mid-1990s, Canada implemented changes to the *Employment Insurance Act* which caused far fewer people to qualify for benefits when unemployed. It is suggested that this resulted in those most vulnerable to homelessness being disproportionately disentitled to benefits under this legislation and without income replacement to meet their housing costs;[125]

(c) in 1995, Ontario cut provincial welfare rates by 21.6 per cent. Since that time, Ontario has maintained social assistance shelter allowances at levels far below what is required to secure rental housing in the private market. It is said that those in receipt of social assistance are often

unable to obtain adequate housing.[126] (It is this change that was considered in *Masse v. Ontario (Ministry of Community and Social Services)*;

(d) the deinstitutionalization of persons with psycho-social and intellectual disabilities. As stated in the application, this has resulted in widespread homelessness among persons with these disabilities. Both Canada and Ontario have [page624] failed to ensure the provision of adequate support services so that those affected by these policies can access and maintain adequate housing in their communities;[127] and

(e) there is concern about changes that facilitate evictions.[128]

[118] These are only examples. What they confirm is the wide examination of policy that the applicants seek. Social assistance is designed to provide assistance, not a basic level of subsistence.[129] It deals with the basic necessities of life, not just housing. Employment Insurance does not reflect directly on housing but on a benefit earned, while working, to which employers contribute. Taking those with psycho-social and intellectual disabilities out of institutions and reintroducing them into the community concerns not only their housing, but also their care and treatment. Facilitating evictions may respond to concerns that tenants were taking advantage of the pre-existing situation and staying in their homes while failing to pay rent. The issues these programs deal with extend well beyond housing. The impact on each of the areas affected would have to be part of any policy review undertaken as a result of the order sought by the applicants.

[119] This leads me back to the idea that the application is misconceived.

[120] The breadth of government action to be scrutinized gives credence to the proposition, raised by counsel for Ontario, that what is really being sought here is a determination that every citizen has a right, protected by the *Charter*, to a minimum standard of living. If there are individuals who do not live to that standard, and the applicants are correct in the assertions they seek to make, government would be compelled by the *Charter* to see that a minimum standard of living is provided. The *Charter* does nothing to provide assurance that we all share a right to a minimum standard of living. Any application built on the premise that the *Charter* imposes such a right cannot succeed and is misconceived. By its nature, such an application would require consideration of how our society distributes and redistributes wealth. General questions that reference, among many other issues, assistance to those in poverty, the levels of housing supports and income supplements, the basis on which [page625] people may be evicted from where they live and the treatment of those with psycho-social and intellectual disabilities are important, but the courtroom is not the place for their review.

[121] In this case, the applicants are seeking to compare those without adequate housing to those with it. The decisions complained of do not impact those who do not require government assistance in obtaining and maintaining appropriate housing. Accordingly, it cannot be said that the homeless are being denied equal benefit of any law as compared to other persons. There is no benefit the law provides to others that they have failed to receive or burden it imposes that they have been saddled with when others have not. The first part of the test to determine whether there has been a breach of s. 15(1) of the *Charter* cannot be met.

(ii) *Does the denial rest on an analogous ground?*

[122] Section 15(1) enumerates distinctions. Where the groups referred to are subjected to discrimination which arises from actions of the state, there will be a breach of protection the *Charter* provides. Those enumerated grounds are "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability". They are generally considered to be immutable, which is to say that they cannot be challenged. As such, they are indisputable, undeniable, not subject to change and permanent. It has been said that religion is not immutable.[130] Religion has been held to be constructively immutable, that is, changeable, but only at great personal cost.[131]

[123] The wording of s. 15(1) of the *Charter* makes clear,[132] and the law provides, that the protection of the section reaches beyond the enumerated grounds to grounds that are analogous to them. Over time, the following are among those that have been found to be analogous grounds: marital status,[133] aboriginality-residence (off-reserve band members),[134] employment [page626] status,[135] citizenship[136] and sexual orientation.[137] With the exception of sexual orientation, these are not immutable. Whatever an analogous ground may be, they are not restricted to characteristics that bear

that quality.[138] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*,[139] the Supreme Court set out the following criteria for identifying an analogous ground:

> What then are the criteria by which we identify a ground of distinction as analogous? The obvious answer is that we look for grounds of distinction that are analogous or like the grounds enumerated in s. 15 -- race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It seems to us that what these grounds have in common is the fact that they often serve as the basis for stereotypical decisions made not on the basis of merit but on the basis of a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity.[140]

[124] In this case, it is asserted that a group identified as the "homeless" represent an analogous ground. Can this be? In *Masse*, the applicants were the recipients of social assistance. Among the issues considered was whether this constituted an analogous ground, such that discrimination directed at them, by actions of the state, would result in a breach of s. 15(1) of the *Charter.* It was found not to be an analogous ground:

> Section 15 of the Charter protects discreet and insular minorities. It does not protect disparate and heterogeneous groups.
>
> The affidavit of Gerard Kennedy demonstrates that the class of social assistance recipients is heterogeneous and their status is not a personal characteristic within the meaning of s. 15(1) of the Charter. The class is not related to merit or capacity. Statistics show that the class is not immutable.
>
> In my view, those in receipt of social assistance do not constitute a named protected group under s. 15(1) nor a group analogous thereto. [page627]
>
> In my view, poverty embraces many more persons than those in receipt of social assistance.[141]

[125] In circumstances where the group encompassed by the word "homeless" includes not just those without homes but those without "adequate" housing, those with housing that is not "accessible" or those who cannot afford to pay for appropriate housing, it would seem that *Masse* would decide the issue. In the normal course, this would represent a disparate and heterogeneous group. On this understanding, it would not be a group protected under s. 15(1) of the *Charter.*

[126] The applicants submit that this issue should not be decided based on *Masse.* They rely on *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch).*[142] In that case, the definition of spouse in the regulations under the *Family Benefits Act* was amended. As a result, single mothers who had, under the prior definition, qualified to receive family benefits were no longer eligible. It was argued that the new definition distinguished between social assistance recipients and all others, and between women, including single mothers who were on social assistance and others also on social assistance. It was contended that these distinctions discriminated on the enumerated ground of sex and also imposed special burdens on two groups whose personal characteristics constituted analogous grounds: social assistance recipients generally and single mothers on social assistance. It was said that the definition was discriminatory because it reinforced stereotypes against women, especially single mothers and perpetuated their pre-existing disadvantage.[143]

[127] The Court of Appeal considered whether being in receipt of social assistance constituted an analogous ground under s. 15(1) of the *Charter.* The court found that it did and took into account the following factors:

-- The Court of Appeal considered that the recognition of recipients of social assistance as an analogous group would serve to further the purpose of s. 15 of the *Charter* being the protection of human dignity.[144] The Divisional Court had found, and the Court of Appeal accepted, that there was "significant evidence of historical disadvantage of and continuing prejudice [page628] against social assistance recipients, particularly sole-support mothers".[145]

-- The Court of Appeal observed that, while economic disadvantage did not justify protection under s. 15 of the *Charter*, it often coexists with other forms of disadvantage and found that was the circumstance in the case it was deciding.[146]

-- The Court of Appeal, adopting the approach of the Supreme Court of Canada, took a more expansive view of immutability. "[A] characteristic that is difficult to change, that the government has no legitimate interest in expecting us to change, that can be changed only at great personal cost or that can be changed only after significant period of time may be recognized as an analogous ground." The court found that receipt of social assistance fit into this "expansive and flexible concept of immutability".[147]

-- The Court of Appeal determined an important indicator of recognition to be whether the proposed analogous ground is protected in human rights statutes. The court noted that, in Ontario and Saskatchewan, discrimination is prohibited on the basis of "receipt of public assistance" with similar provisions in six other provinces.[148]

-- Finally, the Court of Appeal observed that homogeneity has never been a requirement for recognizing an analogous ground. Some recipients of social assistance may be more disadvantaged than others. This does not militate against recognizing membership in the group as an analogous ground.[149]

[128] The applicants are of the view that this analysis could apply here and, thus, the motions should be refused and the application be left to proceed. I have found that there can be no positive obligation on Canada and Ontario to undertake measures that would reduce or eliminate homelessness, meaning that there can be no breach of s. 7 of the *Charter*. I have found that [page629] the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the *Charter*. This being so, it does not matter, for the purposes of these motions, whether or not "homelessness" is an analogous ground of discrimination or unequal treatment. Nonetheless, I make the following observations.

[129] The reliance of the applicants on *Falkiner* misses a fundamental point. In *Falkiner*, the analogous ground was the receipt of social assistance. This is not, strictly speaking, immutable. The identity of the people who are eligible to collect these benefits will change as the vagaries of life impact on the individuals involved, for good or ill. The fact remains that, at any moment in time, it is possible to identify those who are collecting social assistance. In the circumstances of this application, it is not possible to identify who is "homeless". As I have already observed, homelessness is not, for the purposes of this application, restricted to those without homes. Three of the four individual applicants have homes. It may be that what is being referred to as "the homeless" includes those without "affordable, adequate and accessible" housing. What is adequate housing? Presumably, this depends on the circumstances of the individuals involved. What is adequate for a single mother with two children (the applicant Jennifer Tanudjaja) is different from what would be adequate for a family of six. The difference would be more pronounced if two of the four children in the family of six were disabled and even more pronounced if one of the children required a wheelchair (the applicant Ansar Mahmood). The need of the wheelchair introduces a need for accessibility. It does not seem out of line to suggest that a determination of what is adequate housing may be a matter to be decided on an individual basis.

[130] Being without adequate housing is not a personal characteristic ("race, national or ethnic origin, colour, religion, sex, age or mental or physical disability") or a fact that can be determined on objective criteria ("social assistance recipient", "marital status", "Aboriginality-residence (off-reserve band members)", "employment status", and "citizenship"). There will be a subjective component that arises from the circumstances of the individual and what they and others believe is "adequate" or "accessible". The lack of adequate or accessible housing is not a shared quality, characteristic or trait.

[131] This is not a question of a lack of homogeneity, as discussed in *Falkiner.* It is a circumstance where there is no means to understand the parameters that would define those who make up the analogous group. Who would be the members? On what [page630] basis is the group said to be analogous? In these circumstances, it is impossible to come to a substantive understanding of what the analogous ground is. It appears that the true shared characteristic is that applicants are poor. They cannot afford adequate housing, whatever that may be for each of them. This is not a basis for distinguishing an analogous group:

> A third reason lies in a consideration of those who make up the group of people who are in financial need. The poor in Canadian society are not a group in which the members are linked by shared personal or group characteristics. The absence of common or shared characteristics means, in my

> view, that poverty is not an analogous grounds to those enumerated. Those enumerated grounds are defined by one or more shared characteristics whether it be race, nationality, colour, religion, sex, age or disability.[150]

And

> I respectfully disagree that poverty is an analogous ground under s. 15(1).[151]

[132] The Court of Appeal, in *Falkiner*, recognized this limitation when it said:

> . . . receipt of social assistance reflects economic disadvantage, which alone does not justify protection under section 15.[152]

[133] In that case, the Court of Appeal went on to observe that "economic disadvantage often co-exists with other forms of disadvantage".[153] In *R. v. Banks*,[154] this was the basis on which *Falkiner* was distinguished:

> *Falkiner v. Ontario (Ministry of Community and Social Services)* (2002), 2002 CanLII 44902 (ON CA), 59 O.R. (3d) 481, [2002] O.J. No. 1771 (C.A.), on which the appellants rely, is distinguishable from the present case. The differential treatment in that case was based on three grounds: sex, marital status and "receipt of social assistance". *Falkiner* did not recognize poverty as a ground of discrimination.[155]

[134] Homelessness is not a term that, in the context of this case, can be understood. Without an understanding of the common characteristics which defines the group, it cannot be established as an analogous ground under s. 15(1) of the *Charter.* Poverty or [page631] economic status, which is seemingly the only common characteristic, is not an analogous ground.

[135] Again, I return to the concern that the application is misconceived. There is a list of groups which are said, in the application, to be protected from discrimination under s. 15(1) of the *Charter* and disproportionately affected by the lack of adequate housing. It includes "women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance".[156] The list is included as a demonstration of the discrimination required for there to be a breach of s. 15(1) of the *Charter.* It is said that the persons affected by homelessness and the lack of adequate housing are disproportionately members of these groups which are protected from discrimination under s. 15(1) of the *Charter.* The application is not based on discrimination against any of these groups, but on all of them as part of the homeless or those without adequate housing. The problem should be evident. Taken together, these groups include virtually everybody in our society. Taking into account only "women", "youth" and "seniors", the only groups in society not included are young and middle-aged men. What discrimination can there be when all of the groups identified as being subject to this discrimination, taken together, include virtually all of us? This serves to confirm that the issues raised by the application are not breaches of the *Charter*, but a general concern for those who live in poverty and without appropriate housing. This is an issue that should disturb us all. This does not mean that it as an issue that belongs in court.

[136] Homelessness is not an analogous ground under s. 15(1) of the *Charter.* The application does not propose to protect "discreet and insular minorities". It is an attempt to take "disparate and heterogeneous groups" and treat them as an analogous ground under s. 15(1) of the *Charter.* Such groups do not obtain this protection.[157]

[137] If I were required to do so, I would find that homelessness and being without adequate housing, as referred to in this case, cannot be an analogous grounds pursuant to s. 15(1) of the *Charter.*

Are the Issues Raised in the Application Justiciable?

[138] Not all matters are justiciable, that is, capable of being settled by law or by the action of a court: [page632]

> The justiciability of a matter refers to its being suitable for determination by a court. Justiciability involves the subject matter of the question, the manner of its presentation and the appropriateness of judicial adjudication in light of these factors. This *appropriateness may be determined according to both institutional and constitutional standards. It includes both the question of the adequacy of judicial machinery for the task as well as the legitimacy of using it*.[158]

[139] There is no doubt that an application that involves allegations of breaches of the *Charter* is justiciable. By now, it will be clear that I am not prepared to find that there is any reasonable prospect

that the claims made here can succeed. This is underscored by a consideration of whether what is here is justiciable. Do the issues raised belong in court?

[140] The doctrine of justiciability ensures respect for the functional separation of powers among the legislative and judicial branches of government in Canada:

> [I]n the context of constitutional remedies, courts must be sensitive to their role as judicial arbiters and not fashion remedies which usurp the role of the other branches of governance by taking on tasks to which other persons or bodies are better suited. Concern for the limits of the judicial role is interwoven throughout the law. The development of the doctrines of justiciability, and to a great extent mootness, standing, and ripeness resulted from concerns about the courts overstepping the bounds of the judicial function and their role *vis-à-vis* other branches of government.[159]

[141] In this, the role of the courts has been described in the following terms:

> In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.[160]

There is good reason for this:

> First, as a non-democratic (some would say anti-democratic) institution, courts do not have the resources or expertise to competently establish what policy or law best advances the public interest. Second, the legitimacy of judicial decision-making is more difficult to sustain where it appears that [page633] the judge is substituting her preferences for those of the legislative or executive branches.
>
> . . . . .
>
> Courts must reiterate this point often because they remain the recourse of last resort for groups which have unsuccessfully challenged the wisdom of government in other fora.[161]

[142] It is at this point that the idea that this application is misconceived comes to the fore.

[143] The courts are not the proper place to determine the wisdom of policy choices involved in balancing concerns for the supply of appropriate housing against the myriad of other concerns associated with the broad policy review this application envisages. What of the concern that increased social assistance might be a disincentive for some to seek work? What about the costs to both employers and employees of increasing the level of Employment Insurance? What are the considerations that go into a program to "deinsitutionalize" persons with psycho-social and intellectual disabilities? What is it that landlords experienced that caused administrative procedures to be changed to "facilitate evictions"? All of these examples are referred to in the application. What about the broader review envisaged by the reference to planning policy and the *Mortgages Act* referred to as part of the motion to intervene and the fundamental question of the allocation of government resources that are, by their nature, limited? These kinds of questions do not belong in court or with the judiciary.

[144] In *Clark v. Peterborough Utilities Commission*, which rejected the idea that a right to housing was protected under s. 7 of the *Charter*, the Ontario Court (General Division) said:

> This type of claim requires the kind of value and policy judgments and degree of social obligation which should properly be addressed by legislatures and responsible organs of government in a democratic society, not by courts under the guise of "principles of fundamental justice" under s. 7. I want to be very clear. This is not a matter of judicial deference to elected legislatures; it concerns limits and differences between the political process and the judicial in a democracy. It raises issues of priority and extent of social assistance and quality of life to which all should be automatically entitled. Courts are well equipped to hear and consider evidence, analyze concepts of law and justice, and apply those principles to the evidence. I think in these submissions the applicants seek to introduce social and economic ideas and policies which were intended to be considered and debated in a political forum when property-economic rights were excluded from s. 7.[162] [page634]

[145] In the same vein, it is not for the courts to look at the economic status of some in our society and declare it unacceptable, requiring Canada and Ontario to address the issue. Any disadvantage on its own is not enough. It has to be measured against how the actions taken by government treat others. In this case, pointing out that there are many people without appropriate housing (or living below an acceptable minimum standard) does not raise a viable issue with respect to s. 15(1) of the *Charter*. This is reinforced when the people suffering under the disadvantage cannot be separated from the majority of

those who live in our society. In *Dunmore v. Ontario (Attorney General)*,[163] the application judge commented on these questions:

> There are many forms of injustice in our society, particularly those resulting from uneven distribution of wealth, that cannot be remedied by the courts through interpretation of the *Charter* and that must be remedied through the legislative process. The flaw in the applicants' argument is that it focuses upon disadvantage alone whereas a s. 15(1) analysis requires evidence that the disadvantage point to a particular cause, namely discrimination on "stereotypical attribution of group characteristics."[164]

[146] In *Law Society of British Columbia v. Andrews*,[165] this was noted:

> . . . I am convinced that it was never intended in enacting s. 15 that it become a tool for the wholesale subjection to judicial scrutiny of variegated legislative choices in no way infringing on values fundamental to a free and democratic society. Like my colleague, I am not prepared to accept that all legislative classifications must be rationally supportable before the courts. Much economic and social policy-making is simply beyond the institutional competence of the courts: their role is to protect against incursions on fundamental values, not to second guess policy decisions.[166] [page635]

[147] There is no viable issue raised that could demonstrate a breach of either s. 7 or s. 15(1) of the *Charter*. It is plain and obvious the application cannot succeed. This is confirmed by the fact that what is being sought is a process initiated and supervised by the court, the implementation of which would cross institutional boundaries and enter into the area reserved for the legislature. Implicit in the inquiry that would be undertaken is that the value society places on the supply of adequate housing would stand above the many other concerns and values that we expect our government to take into account and plan for. The development and implementation of provincial and national strategies is not, as the applicants would have it, a small, "incremental" decision. It would result in a broad-based policy review involving a wide array of value judgments, the setting of priorities and the development of programs which would have impacts that would reach well beyond housing. The continued involvement of the court is not, as counsel for the David Asper Centre suggested, appropriate and justifiable as the supervision of the implementation of its decision. The continued involvement of the court would draw it, and "affected groups",[167] into the development of policy. If the application were to continue, it would serve to draw the court across the applicable institutional boundaries and into areas that are the responsibility of the legislature. This is all confirmed by the requirement that the strategies developed are to include "timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms".[168]

[148] Quite apart from the question of whether there is a viable claim for breaches of the *Charter*, what the court is ultimately being asked to do is beyond its competence and not justiciable.

Can International Treaties Assist in Interpreting the Charter?

[149] The one submission to which these reasons do not, as yet, refer is that made on behalf of the Amnesty coalition. Its intervention was restricted to submissions "demonstrating how international treaties may assist in determining how s. 7 and s. 15 of the *Canadian Charter of Rights and Freedoms* are to be, or could be, interpreted such that it is not plain and obvious that the application cannot succeed".[169] [page636]

[150] There is precedent for this. In *R. v. Oakes*,[170] the Supreme Court of Canada considered the reference to the presumption of innocence in major international human rights documents as evidence of its "widespread acceptance".[171] In this case, in the end, whatever international treaties may say about housing as a right is not of much help. The fundamental questions respect the tests set for a right to be recognized as protected by the *Charter*. Does there need to be a breach of fundamental justice for there to be a breach of s. 7 of the *Charter*? Is there any evidence of such a breach? Have the applicants been denied a benefit given to others as a result of actions by the state or has such action imposed a burden on the applicants that others have not been subjected to?

[151] These are not questions that reflect on what substantive rights the *Charter* protects but, instead, the basis on which rights are protected.

Conclusion

[152] For the reasons referred to herein, I find that it is plain and obvious that the application cannot succeed. The motions are granted. The application is dismissed.

Costs

[153] No submissions were made as to costs. If the parties are unable to agree, I may be spoken to.

Motions granted; application dismissed.

Notes

1 Amended notice of application, at paras. e(i), e(ii) and f.

2 Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

3 *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, at paras. 17-25.

4 *Tanudjaja v. Canada (Attorney General)*, [2013] O.J. No. 1604, 2013 ONSC 1878 (S.C.J.).

5 Rules of Civil Procedure, at rule 21.02.

6 *Fleet Street Financial Corp. v. Levinson*, [2003] O.J. No. 441, 31 C.P.C. (5th) 145 (S.C.J.), at para. 16.

7 Amended notice of application, at para. 5; factum of the applicants (respondents on the motion), at para. 8(v).

8 Amended notice of application, at para. 1; factum of the applicants (respondents on the motion), at para. 8(ii).

9 Amended notice of application, at para. 2; factum of the applicants (respondents on the motion), at para. 8(iii).

10 Amended notice of application, at para. 4; factum of the applicants (respondents on the motion), at para. 8(iv).

11 Amended notice of application, at para. 3; factum of the applicants (respondents on the motion), at para. 8(i).

12 *Reference re Motor Vehicle Act (British Columbia) S 94(2)*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, [1985] S.C.J. No. 73, at para. 62, and as referred to in Jamie Cameron, "Positive Obligations Under Sections 7 and 15 of the Charter: A Comment on Gosselin v. Quebec" (2003), 20 S.C.L.R. (2d), at p. 68.

13 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123, [1990] S.C.J. No. 52, at para. 14.

14 *Winnipeg Child and Family Services v. W. (K.L.)*, 2000 SCC 48 (CanLII), [2000] 2 S.C.R. 519, [2000] S.C.J. No. 48, at para. 70; see, also, *Cosyns v. Canada (Attorney General)* (1992), 1992 CanLII 8529 (ON SCDC), 7 O.R. (3d) 641, [1992] O.J. No. 91 (Div. Ct.), at para. 16; and *Reference re ss.193 and 195(1)(c) of the Criminal Code (Man.)*, *supra*, note 13, at para. 14.

15 2005 SCC 35 (CanLII), [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33.

16 R.S.Q., c. C-12.

17 *Chaoulli v. Quebec (Attorney General)*, *supra*, note 15, at paras. 28-30 and 33.

18 *Ibid.*, at paras. 45, 100 and 102.

19 *Ibid.*, at para. 104.

20 "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."

21 [2007] O.J. No. 3889, 162 C.R.R. (2d) 186 (S.C.J.), affd [2009] O.J. No. 570, 2009 ONCA 132.

22 *Ibid.*, at para. 113 (S.C.J.).

23 [2013] O.J. No. 2290, 2013 ONSC 3026 (S.C.J.) (released May 24, 2013).

24 S.O. 1992, c. 6.

25 *Ibid.*, at para. 143.

26 (2008), 91 O.R. (3d) 412, [2008] O.J. No. 2627, 2008 ONCA 538.

27 R.S.O. 1990, c. H.6, ss. 11.2(1) and 12(1); and see *ibid.*, p. 416 O.R.

28 R.R.O. 1990, Reg. 552, s. 28.4(2).

29 *Flora v. General Manager, Ontario Health Insurance Plan*, *supra*, note 26, at para. 108.

30 See para. 33, above.

31 1996 CanLII 12491 (ON SCDC), [1996] O.J. No. 363, 134 D.L.R. (4th) 20 (Div. Ct.), with leave to appeal denied at [1996] O.J. No. 1526, 62 A.C.W.S. (3d) 1228 (C.A.), and leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 373.

32 *Ibid.*, at para. 346 (Div. Ct.).

33 *Ibid.*, at paras. 350 and 351 (*per* O'Driscoll J.).

34 [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85, 2002 SCC 84.

35 *Ibid.*, at para. 81 [emphasis in original].

36 *Ibid.*, at para. 82.

37 *Ibid.*, at para. 319.

38 *Ibid.*, at para. 338.

39 *Ibid.*, at paras. 344 to 348.

40 *Ibid.*, at para. 350.

41 *Ibid.*, at para. 350.

42 *Ibid.*, at paras. 349 to 356 (for the quotation, see para. 356).

43 *Ibid.*, at para. 82, as quoted in para. 42, above.

44 *Ibid.*, at para. 83.

45 *Supra*, note 31.

46 *Ibid.*, at para. 51.

47 *Ibid.*, at para. 43.

48 [2004] 3 S.C.R. 381, [2004] S.C.J. No. 61, 2004 SCC 66.

49 (1995), 1995 CanLII 7090 (ON SC), 24 O.R. (3d) 7, [1995] O.J. No. 1743 (Gen. Div.), affd as moot (1998), 1998 CanLII 7133 (ON CA), 40 O.R. (3d) 409, [1998] O.J. No. 2915 (C.A.).

50 *Ibid.*, at p. 25 O.R.

51 *Ibid.*, at pp. 27-28 O.R.

52 Factum of the applicants (respondents on the motion to strike), at para. 58.

53 See, for example, *Doe v. Ontario*, *supra*, note 21, at paras. 113 and 20 (S.C.J.); *Sagharian (Litigation guardian of) v. Ontario (Minister of Education)*, [2008] O.J. No. 2009, 2008 ONCA 411, 172 C.R.R. (2d) 105, at para. 52; *Flora v. Ontario*, *supra*, note 26, at paras. 108-109; *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561, [2006] O.J. No. 2732 (C.A.), at paras. 218 and 220; and *Victoria (City) v. Adams*, 2009 BCCA 563 (CanLII), [2009] B.C.J. No. 2451, 313 D.L.R. (4th) 29, at paras. 90 to 97.

54 *Supra*, note 14.

55 *Ibid.*, at para. 17.

56 *Bedford v. Canada (Attorney General)* (2012), 2012 ONCA 186 (CanLII), 109 O.R. (3d) 1, [2012] O.J. No. 1296 (C.A.), at para. 83.

57 *Ibid.*, at para. 84.

58 (2005), 2005 CanLII 50882 (ON SC), 77 O.R. (3d) 481, [2005] O.J. No. 3796 (S.C.J.).

59 *Ibid.*, at para. 54.

60 Amended notice of application, at para. 34.

61 *Gosselin v. Quebec (Attorney General)*, *supra*, note 34, at para. 79.

62 Factum of the applicants (respondents on the motion to strike), at para. 62.

63 *Tanudjaja v. Canada (Attorney General)*, *supra*, note 4, at para. 34.

64 See para. 45, above.

65 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29.

66 *Ibid.*, para. 53.

67 *Ibid.*, at para. 60 [emphasis in original].

68 *Ibid.*, at para. 63 [emphasis in original].

69 *Ibid.*, at para. 64.

70 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86.

71 *Ibid.*, at para. 73.

72 *Ibid.*, at para. 79.

73 *Ibid.*, at para. 96.

74 [2011] 3 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44.

75 S.C. 1996, c. 19.

76 *Canada (Attorney General) v. PHS Community Services Society*, *supra*, note 74, at para. 114.

77 *Ibid.*, at para. 127.

78 *Ibid.*, at para. 105.

79 *Supra*, note 53.

80 *Ibid.*, at para. 94.

81 *Ibid.*, at para. 95.

82 *R. v. Woodruff*, Victoria Registry Numbers 145022-1 and 145159-1, January 28, 2009 (B.C. Prov. Ct.).

83 *Johnston v. Victoria (City)*, [2010] B.C.J. No. 2360, 2010 BCSC 1707, at para. 11.

84 *Johnston v. Victoria (City)*, [2011] B.C.J. No. 1920, 2011 BCCA 400, at para. 11.

85 Notice of application, dated May 26, 2010; amended notice of application, amended November 15, 2011, at p. 3, paras. a, b, c, d and e.

86 Cameron, *supra*, note 12, at p. 68.

87 *Re B.C. Motor Vehicle Act*, *supra*, note 12, at para. 14; and *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, *supra*, note 13, at 1176 S.C.R.:

> The courts must not, because of the nature of the institution, be involved in the realm of pure public policy; that is the exclusive role of the properly elected representatives, the legislators. To expand the scope of s. 7 too widely would be to infringe upon that role.

88 *Ibid.* (*Motor Vehicle Reference*), at para. 30.

89 Cameron, *supra*, note 12, at p. 66.

90 Amended notice of application, at paras. 1, 2, 3, 4 and 25.

91 *Ibid.*, at para. e.

92 *Ibid.*, at paras. 20, 21, 22 and 23.

93 *Ibid.*, at para. e(ii).

94 Section 24(1) of the *Charter of Rights and Freedoms* says:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

95 2003 SCC 62 (CanLII), [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63.

96 Section 23 of the *Charter* says:

> 23(1) Citizens of Canada
>
> *(a)* whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
>
> *(b)* who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the

right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

97 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, note 95, at para. 28.

98 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, note 31, at para. 26, quoting from *Miron v. Trudel* (1995), 1995 CanLII 97 (SCC), 23 O.R. (3d) 160, [1995] 2 S.C.R. 418, [1995] S.C.J. No. 44, at p. 485 S.C.R.

99 2011 SCC 12 (CanLII), [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12.

100 *Ibid.*, at para. 61.

101 *Ibid.*, at para. 62.

102 2004 SCC 78 (CanLII), [2004] 3 S.C.R. 657, [2004] S.C.J. No. 71.

103 *Ibid.*, at para. 27.

104 *Ibid.*, at para. 28.

105 1989 CanLII 98 (SCC), [1989] 1 S.C.R. 1296, [1989] S.C.J. No. 47.

106 *Ibid.*, at p. 1329 S.C.R., as quoted in *Auton (Guardian ad litem) v. British Columbia (Attorney General)*, *supra*, note 102, at para. 28.

107 *Auton (Guardian ad litem) v. British Columbia (Attorney General)*, *supra*, note 102, at paras. 35 and 36.

108 *Ibid.*, at paras. 45 and 46.

109 *Ibid.*, at para. 23.

110 Amended notice of application, at para. 14.

111 See paras. 94 and 97, above.

112 *Ibid.*, at paras. 15 and 16.

113 *Ibid.*, at para. 17.

114 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, at para. 277.

115 *Ibid.*, at para. 52.

116 Amended notice of application, at paras. 15 to 25.

117 *Ibid.*, at paras. 35 and 36.

118 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, at paras. 19, 117, 133 and 268.

119 Amended notice of application, at para. 37.

120 *Boulter v. Nova Scotia Power Inc.*, 2009 NSCA 17 (CanLII), [2009] N.S.J. No. 64, 307 D.L.R. (4th) 293 (C.A.), at para. 72.

121 *Ibid.*, at para. 73.

122 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, at paras. 346 and 347.

123 *Symes v. Canada*, 1993 CanLII 55 (SCC), [1993] 4 S.C.R. 695, [1993] S.C.J. No. 131, at para. 134, as quoted in *R. v. Nur*, 2011 ONSC 4874 (CanLII), [2011] O.J. No. 3878, 275 C.C.C. (3d) 330 (S.C.J.), at para. 79.

124 Amended notice of application, at para. 21. Note: This does not appear to be an entirely accurate depiction of the pre-existing policy. The *Canadian Assistance Plan* provided that contributions to social assistance made by the Government of Canada required the assistance provided take "into account the basic requirements" of those receiving it (see *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, note 31, at paras. 11, 14, 297 and 364).

125 *Ibid.*, at para. 22.

126 *Ibid.*, at para. 23.

127 *Ibid.*, at para. 25.

128 Amended notice of application, at para. 17(f).

129 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, note 31, at paras. 3 and 12.

130 *Leyte v. Newfoundland (Minister of Social Services)*, 1997 CanLII 16066 (NL SC), [1997] N.J. No. 332, 154 D.L.R. (4th) 739 (S.C.T.D.), at para. 48.

131 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, [1999] S.C.J. No. 24, at para. 13.

132 Section 15(1) notes: "in particular, without discrimination based on". The words "in particular" suggest the protection extends beyond the grounds that are listed.

133 *Miron v. Trudel*, *supra*, at paras. 61 to 63 (*per* Gontier J. dissenting), at para. 9 (*per* L'Heureux-Dubé J.), and at para. 70 (*per* McLachlin J. (as she then was).

134 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra*, note 131, at para. 6 (*per* McLachlin J. (as she then was)), and at para. 62 (*per* L'Heureux- Dubé J.).

135 *Leyte v. Newfoundland (Minister of Social Services)*, *supra*, note 130, at para. 66.

136 *Law Society British Columbia v. Andrews*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, [1989] S.C.J. No. 6, at para. 49 (*per* McIntyre J. (dissenting in part)).

137 *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, [1995] S.C.J. No. 43, at pp. 528 and 532 S.C.R. (*per* La Forest J.) and p. 576 S.C.R. (*per* Sopinka J.).

138 *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94 (CanLII), [2001] 3 S.C.R. 1016, [2001] S.C.J. No. 87, at para. 166 (*per* L'Heureux-Dubé J.) ("A ground need not be immutable to be analogous").

139 *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, *supra*, note 131, at para. 13.

140 *Ibid.*, at para. 13.

141 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, note 31, at paras. 373 to 376.

142 (2002), 2002 CanLII 44902 (ON CA), 59 O.R. (3d) 481, [2002] O.J. No. 1771 (C.A.).

143 *Ibid.*, at para. 6.

144 *Ibid.*, at para. 85.

145 *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, 2000 CanLII 30140 (ON SCDC), [2000] O.J. No. 2433, 188 D.L.R. (4th) 52 (Div. Ct.), at para. 86, as quoted by the C.A., at para. 86.

146 *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, *supra*, at para. 88 (C.A.).

147 *Ibid.*, at para. 89.

148 *Ibid.*, at para. 90.

149 *Ibid.*, at para. 91.

150 *Polewsky v. Home Hardware Stores Ltd.*, 1999 CanLII 14906 (ON SC), [1990] O.J. No. 4151, 40 C.P.C. (4th) 330 (S.C.J.), at para. 54.

151 *Boulter v. Nova Scotia Power Inc.*, *supra*, note 120, at para. 33.

152 *Falkiner v. Ontario (Ministry of Community and Social Services, Income Maintenance Branch)*, *supra*, note 145, at para. 88 (C.A.).

153 *Ibid.*, at para. 88.

154 (2007), 2007 ONCA 19 (CanLII), 84 O.R. (3d) 1, [2007] O.J. No. 99 (C.A.).

155 *Ibid.*, at para. 105.

156 Amended notice of application, at para. 37.

157 *Masse v. Ontario (Ministry of Community and Social Services)* (Div. Ct.), *supra*, note 31 (as quoted at para. 124, above).

158 Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough, Ont.: Carswell, 1999), at pp. 4-5, as quoted in *Friends of the Earth v. Canada (Governor in Council)*, [2008] F.C.J. No. 1464, 2008 FC 1183, [2009] 3 F.C.R. 201, and as further quoted in *Chauvin v. Canada*, [2009] F.C.J. No. 1496, 2009 FC 1202 [emphasis in original].

159 *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, *supra*, note 95, at para. 34.

160 *Vriend v. Alberta*, *supra*, note 65, at para. 136.

161 Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2d ed. (Toronto: Carswell, 2012), at pp. 204-205.

162 *Clark v. Peterborough Utilities Commission*, *supra*, note 49, at p. 28 O.R. See, also, *Beauchamp v. Canada (Attorney General)*, [2009] F.C.J. No. 437, 2009 FC 350, at para. 19; *Law Society of British Columbia v. Andrews*, *supra*, note 136, at paras. 65 to 66; *Shoppers Drug Mart Inc. v. Ontario (Minister of Health and Long-Term Care)* (2011), 2011 ONCA 830 (CanLII), 109 O.R. (3d) 279, [2011] O.J. No. 5894 (C.A.), at para. 46; *Ontario Federation of Anglers and Hunters v. Ontario (Ministry of Natural Resources)*, 2002 CanLII 41606 (ON CA), [2002] O.J. No. 1445, 158 O.A.C. 255 (C.A.), at para. 49.

163 (1997), 1997 CanLII 16229 (ON SC), 37 O.R. (3d) 287, [1997] O.J. No. 4947 (Gen. Div.) [affd 1999 CanLII 18653 (ON CA), [1999] O.J. No. 1104, 182 D.L.R. (4th) 471 (C.A.)] revd on other grounds by S.C.C., *supra*, note 138, *per* McLachlin C.J.C. and Gonthier, Iacobucci, Bastarache, Binnie, Arbour and LeBel JJ., where it was determined that it was not necessary to answer the questions in respect to s. 15(1) of the *Charter* and where L'Heureux-Dubé J. in separate reasons did find that excluding agricultural workers from the collective bargaining regime constituted discrimination on an analogous ground.

164 *Ibid.*, (Gen. Div.), at para. 50.

165 *Supra*, note 136.

166 *Ibid.*, at para. 65.

167 Amended notice of application, at para. e(i).

168 *Ibid.*, at para. e(ii).

169 *Tanudjaja v. Canada (Attorney General)*, *supra*, note 4, at para. 52.

170 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7.

171 *Ibid.*, at para. 31.

End of Document

9.	*Tanudjaja v. Canada (Attorney General)*, 2014 ONCA	para 52

Tanudjaja et al. v. The Attorney General of Canada et al.

[Indexed as: Tanudjaja v. Canada (Attorney General)]

Ontario Reports

Court of Appeal for Ontario,
Feldman, Strathy and Pardu JJ.A.
December 1, 2014

123 O.R. (3d) 161 | 2014 ONCA 852

Case Summary

Charter of Rights and Freedoms — Justiciability — Applicants applying for declarations that federal and provincial governments had violated ss. 7 and 15 of Charter by eroding access to affordable housing and for order that Canada and Ontario implement effective strategies to reduce and eliminate homelessness and inadequate housing — Applicants not challenging any particular state action or law — Motion judge properly striking application — Application raising political rather than legal issues and not being justiciable — Canadian Charter of Rights and Freedoms, ss. 7, 15.

The applicants brought an application alleging that the provincial and federal governments had breached ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* by making decisions and implementing changes to programs which eroded access to affordable housing. They did not challenge any particular legislation, nor did they allege that the particular application of any legislation or policy to any individual had violated his or her constitutional rights. They sought a broad range of remedies, including a declaration that the failure to implement effective national and provincial policies to reduce and eliminate homelessness and inadequate housing had violated ss. 7 and 15 and mandatory orders that such strategies be developed and implemented in consultation with affected groups. The respondents moved successfully to dismiss the application on the grounds that it did not disclose a reasonable cause of action and that the issues raised were not justiciable. The applicants appealed.

Held, the appeal should be dismissed.

Per Pardu J.A. (Strathy J.A. concurring): The motion judge properly struck the application on the basis

that it was not justiciable. The application raised political rather than legal issues. The assertion that s. 7 of the *Charter* confers a general free-standing right to adequate housing was doubtful. Moreover, the diffuse and broad nature of the claims did not permit an analysis under s. 1 of the *Charter*. 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. That 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. The court was not being 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.

Per Feldman J.A. (dissenting): The motion judge erred in law by striking the application at the pleadings stage. The applicants' approach to *Charter* claims was novel, but given the jurisprudential journey of the *Charter*'s development to date, it was neither plain nor obvious that the applicants' claims were doomed to fail.

Canada (Attorney General) v. PHS Community Services Society, [2011] 3 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44, 244 C.R.R. (2d) 209, 310 B.C.A.C. 1, 421 N.R. 1, 2011EXP-2938, J.E. 2011-1649, EYB 2011-196343, 336 D.L.R. (4th) 385, 272 C.C.C. (3d) 428, 86 C.R. (6th) 223, 22 B.C.L.R. (5th) 213, [2011] 12 W.W.R. 43, 205 A.C.W.S. (3d) 673, 96 W.C.B. (2d) 322; [page162] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35, 254 D.L.R. (4th) 577, 335 N.R. 25, J.E. 2005-1144, 130 C.R.R. (2d) 99, 139 A.C.W.S. (3d) 1080, **distd**

Other cases referred to

Canada Assistance Plan (Re), 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, [1991] S.C.J. No. 60, 83 D.L.R. (4th) 297, 127 N.R. 161, [1991] 6 W.W.R. 1, J.E. 91-1267, 1 B.C.A.C. 241, 58 B.C.L.R. (2d) 1, 1 Admin. L.R. (2d) 1, 28 A.C.W.S. (3d) 652; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80, 61 D.L.R. (4th) 604, 97 N.R. 241, J.E. 89-1184, 40 Admin. L.R. 1, 16 A.C.W.S. (3d) 407; *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, [2010] S.C.J. No. 3, 2010 SCC 3, 293 B.C.A.C. 144, 71 C.R. (6th) 201, 251 C.C.C. (3d) 435, 206 C.R.R. (2d) 1, EYB 2010-168789, 2010EXP-424, J.E. 2010-219, 397 N.R. 294, 315 D.L.R. (4th) 1; *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] All E.R. Rep. 1, [1932] A.C. 562, 101 L.J.P.C. 119, 147 L.T. 281, 48 T.L.R. 494, 76 Sol. Jo. 396 (H.L.); *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, 2003 SCC 62, 232 D.L.R. (4th) 577, 312 N.R. 1, J.E. 2003-2076, 218 N.S.R. (2d) 311, 45 C.P.C. (5th) 1, 112 C.R.R. (2d) 202; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, 151 D.L.R. (4th) 577, 218 N.R. 161, [1998] 1 W.W.R. 50, 96 B.C.A.C. 81, 38 B.C.L.R. (3d) 1, 46 C.R.R. (2d) 189, 74 A.C.W.S. (3d) 41; *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85, 2002 SCC 84, 221 D.L.R. (4th) 257, 298 N.R. 1, J.E. 2003-126, 100 C.R.R. (2d) 1, 119 A.C.W.S. (3d) 43; *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, J.E. 90-1436, 49 B.C.L.R. (2d) 273, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 23 A.C.W.S. (3d) 101; *Irwin Toy Ltd. v. Québec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, 58 D.L.R. (4th) 577, 94 N.R. 167, J.E. 89-772, 24 Q.A.C. 2, 25 C.P.R. (3d) 417, 39 C.R.R. 193, 15 A.C.W.S. (3d) 121; *Marshall v. Canada*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, 177 D.L.R. (4th) 513, 246 N.R. 83, J.E. 99-1800, 178 N.S.R. (2d) 201, 138 C.C.C. (3d) 97, [1999] 4 C.N.L.R. 161, 43 W.C.B. (2d) 383; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, 177 D.L.R. (4th) 124, 244 N.R. 276, J.E. 99-1756, 216 N.B.R. (2d) 25, 26 C.R. (5th) 203, 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 552 A.P.R. 25, 90 A.C.W.S. (3d) 698; *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42, 308 B.C.A.C. 1, 419 N.R. 1, 2011EXP-2380, J.E. 2011-1326, 335 D.L.R. (4th) 513, 21 B.C.L.R. (5th) 215, 25 Admin. L.R. (5th) 1, 86 C.C.L.T. (3d) 1, [2011] 11 W.W.R. 215, 83 C.B.R. (5th) 169, 205 A.C.W.S. (3d) 92; *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 26 D.L.R. (4th) 200, 65 N.R. 87, 14 O.A.C. 335, 24 C.C.C. (3d) 321, 50 C.R. (3d) 1, 19 C.R.R. 308, 16 W.C.B. 73; *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 2000 CanLII 17170 (ON CA), 49 O.R. (3d) 699, [2000] O.J. No. 2690, 188 D.L.R. (4th) 577, 135 O.A.C. 126, 2 C.C.L.T. (3d) 43, 47 C.P.C. (4th) 12, 98 A.C.W.S. (3d) 558 (C.A.) [Leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 547]; *Stouffville Assessment Commissioner v. Mennonite Home Assn.*, 1972 CanLII 9 (SCC), [1973] S.C.R. 189, [1972] S.C.J. No. 84, 31 D.L.R. (3d) 237; *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563, 100 B.C.L.R. (4th) 28, 313 D.L.R. (4th) 29, 280 B.C.A.C. 237, 79 C.P.C. (6th) 244, [2010] 3 W.W.R. 1, 66 M.P.L.R. (4th) 165, 203 C.R.R.

(2d) 87; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29, 156 D.L.R. (4th) 385, 224 N.R. 1, [1999] 5 W.W.R. 451, J.E. 98-847, 67 Alta. L.R. (3d) 1, 212 A.R. 237, 98 CLLC Â230-021, 50 C.R.R. (2d) 1, 78 A.C.W.S. (3d) 48; *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12, 2011 SCC 12, 229 C.R.R. (2d) 329, 412 N.R. 149, 2011EXP-867, 2011EXPT-511, 87 C.C.P.B. 161, J.E. 2011-461, D.T.E. 2011T-181, EYB 2011-187170, [2011] 4 W.W.R. 383, 15 B.C.L.R. (5th) 1, 329 D.L.R. (4th) 193, 300 B.C.A.C. 120; [page163] *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561, [2006] O.J. No. 2732, 269 D.L.R. (4th) 435, 213 O.A.C. 48, 40 C.C.L.T. (3d) 176, 142 C.R.R. (2d) 311, 149 A.C.W.S. (3d) 791 (C.A.) [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 441]

Statutes referred to

Assessment Act, R.S.O. 1990, c. A.31, s. 3(1)12(iii)

Canadian Charter of Rights and Freedoms, ss. 1, 7, 15, (1)

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52

Criminal Code, R.S.C. 1985, c. C-46, s. 215 [as am.]

Employment Insurance Act, S.C. 1996, c. 23 [as am.]

Hospital Insurance Act,R.S.Q. c. A-28 [as am.]

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rules 13.02, 14.09, 21, 21.01(1)(b)

Authorities referred to

Sossin, Lorne M., *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012)

Young, Margot, et al., eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007)

APPEAL from the judgment of Lederer J. (2013), 116 O.R. (3d) 574, [2013] O.J. No. 4078, 2013 ONSC 5410 (S.C.J.) striking an application for relief under the *Canadian Charter of Rights and Freedoms*.

Tracy Heffernan, *Fay Faraday* and *Peter Rosenthal*, for appellants.

Janet E. Minor and *Shannon Chace*, for respondent Attorney General of Ontario.

Michael H. Morris and *Gail Sinclair*, for respondent Attorney General of Canada.

Anthony D. Griffin, for intervenor Ontario Human Rights Commission.

Avvy Go and *Mary Eberts*, for intervenor Colour of Poverty/Colour of Change Network.

Cheryl Milne, for intervenor David Asper Centre for Constitutional Rights.

Marie Chen and *Jackie Esmonde*, for intervenor coalition of the Income Security and Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance.

Vasuda Sinha, *Rahool Agarwal* and *Lauren Posloski*, for intervenor Women's Legal Education and Action Fund.

Molly Reynolds and *Ryan Lax*, for intervenor coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights. [page164]

Laurie Letheren and *Renée Lang*, for intervenor coalition of ARCH Disability Law Centre, the Dream

Team, Canadian HIV/AIDS Legal Network and HIV/AIDS Legal Clinic Ontario.

Martha Jackman and *Benjamin Ries*, for intervenor coalition of the *Charter* Committee on Poverty, Pivot Legal Society and Justice for Girls.

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[1] **PARDU J.A.** (STRATHY J.A. concurring): — The appellants ask this court to overturn a decision of a motion judge dismissing their application for relief pursuant to the *Canadian Charter of Rights and Freedoms*. The motion judge concluded it was plain and obvious the application did not disclose a viable cause of action and the application had no reasonable prospect of success. The motion judge also found the appellant's claim was not justiciable.

The Applicants

[2] The application was brought by four individuals and an organization devoted to human rights and equality rights in housing.

[3] The individual applicants suffer from homelessness and inadequate housing.

[4] Brian DuBourdieu was diagnosed with cancer. As a result of his illness, he was unable to work, unable to pay his rent and lost his apartment. He has been living on the streets and in shelters and has been on the waiting list for subsidized housing for four years.

[5] Jennifer Tanudjaja is a young single mother in receipt of social assistance living in precarious housing with her two sons. Despite extensive efforts, Ms. Tanudjaja has been unable to secure housing within the social assistance shelter allowance. Her rent is almost double the shelter allowance allotted and is more than her total social assistance benefit. She has been on the waiting list for subsidized housing for over two years.

[6] Ansar Mahmood was severely disabled in an industrial accident. Two of his children are also disabled, including one son who uses a wheelchair. Mr. Mahmood lives with his wife and four children in a two-bedroom apartment that is neither accessible nor safe for persons with disabilities. The family survives on a fixed income and has been on the waiting list for subsidized accessible housing for four years.

[7] Janice Arsenault and her two young sons became homeless after her spouse died suddenly. For several years, she lived in shelters and on the streets. She was forced to place her children in her parents' care. Now housed, she currently spends 64 per cent [page165] of her small monthly income on rent, placing her in danger of becoming homeless again.

[8] The Centre for Equality Rights in Accommodation ("CERA") is an Ontario-based non-profit organization which provides direct services to low income tenants and the homeless on human rights and housing issues. CERA is membership-based. Many of CERA's members have experienced inadequate housing and homelessness.

The Application

[9] The appellants allege that actions and inaction on the part of Canada and Ontario have resulted in homelessness and inadequate housing. They argue that the governments have taken an approach that violates their s. 7 and s. 15 rights under the *Charter*. The core of their application is captured in para. 14 of the amended notice of application, which provides:

> Canada and Ontario have instituted changes to legislation, policies, programs and services which have resulted in homelessness and inadequate housing. Canada and Ontario have either taken no measures, and/or have taken inadequate measures, to address the impact of these changes on groups most vulnerable to, and at risk of, becoming homeless. Canada and Ontario have failed to undertake appropriate strategic coordination to ensure that government programs effectively protect those who are homeless or most at risk of homelessness. As a result, they have created and sustained conditions which lead to, support and sustain homelessness and inadequate housing.

[10] The appellants expressly disavow any challenge to any particular legislation, nor do they allege that the particular application of any legislation or policy to any individual has violated his or her constitutional rights. They do not point to a particular law which they say "in purpose or effect perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1)".[1] They do not identify any particular law which violates the s. 7 right to life, liberty and

security of the person. Rather, they submit that the social conditions created by the overall approach of the federal and provincial governments violate their rights to adequate housing.

[11] They submit that Canada has eroded access to affordable housing by

(a) cancelling funding for the construction of new social housing; [page166]

(b) withdrawing from administration of affordable rental housing;

(c) phasing out funding for affordable housing projects under cost-sharing agreements with the provinces; and

(d) failing to institute a rent supplement program comparable to those in other countries.

[12] They submit that Ontario has also diminished access to affordable housing by

(a) terminating the provincial program for constructing new social housing;

(b) eliminating protection against converting affordable rental housing to non-rental uses and eliminating rent regulation;

(c) downloading the cost and administration of existing social housing to municipalities;

(d) failing to implement a rent supplement program comparable to those in other countries;

(e) downloading responsibility for funding development of new social housing to municipalities which lack the tax base to support such construction; and

(f) heightening insecurity of tenancy by creating administrative procedures that facilitate evictions.

[13] The appellants also argue that Canada and Ontario have diminished income support programs, and that this has increased the risk of homelessness and inadequate housing. In 1996, federal transfer payments were no longer tied to a minimum standard for social assistance. Amendments to the *Employment Insurance Act*, S.C. 1996, c. 23 resulted in fewer people being entitled to benefits and Ontario has reduced welfare rates.

[14] Finally, the appellants submit that deinstitutionalization of persons afflicted with disabilities without adequate community support has resulted in widespread homelessness amongst those persons.

[15] The appellants claim wide-ranging remedies in their application:

(a) A declaration that decisions, programs, actions and failures to act by the government of Canada ("Canada") and the government of Ontario ("Ontario") have created conditions that lead to, support and sustain conditions of homelessness and inadequate housing. Canada and Ontario have failed to [page167] effectively address the problems of homelessness and inadequate housing.

(b) A declaration that Canada and Ontario have obligations pursuant to ss. 7 and 15 of the *Charter* to implement effective national and provincial strategies to reduce and eventually eliminate homelessness and inadequate housing.

(c) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' rights to life, liberty and security of the person contrary to s. 7 of the *Charter*. These violations are not in accordance with the principles of fundamental justice and are not demonstrably justifiable under s. 1 of the *Charter*.

(d) A declaration that the failure of Canada and Ontario to have implemented effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing violates the applicants' and others' right to equality contrary to s. 15(1) of the *Charter*. These violations are not demonstrably justifiable under s. 1 of the *Charter*.

(e) An order that Canada and Ontario must implement effective national and provincial strategies to reduce and eliminate homelessness and inadequate housing, and that such strategies

(i) must be developed and implemented in consultation with affected groups; and

(ii) must include timetables, reporting and monitoring regimes, outcome measurements and complaints mechanisms.

(f) An order that (the Superior Court of Justice) shall remain seized of supervisory jurisdiction to address concerns regarding implementation of the order in (e).

The Motion Judge's Decision

[16] The motion judge struck the appellants' application, without leave to amend, on the basis that it was plain and obvious that the application could not succeed. He found that the application disclosed no reasonable cause of action and was not justiciable. [page168]

[17] With respect to s. 7 of the *Charter*, the motion judge concluded that there was no positive *Charter* obligation which required Canada and Ontario to provide for "affordable, adequate, accessible housing" and that, in any event, the appellants had not identified any breach of the principles of fundamental justice. With respect to s. 15 of the *Charter*, he found [at para. 128] that "the actions and decisions complained of do not deny the homeless a benefit Canada and Ontario provide to others or impose a burden not levied on others, meaning there can be no breach of s. 15 of the *Charter*". In any event, he concluded that homelessness and inadequate housing were not analogous grounds under s. 15 of the *Charter*. The free-standing claim that homelessness might disproportionately affect persons such as [at para. 135] "women, single mothers, persons with mental and physical disabilities, aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance" did not engage s. 15 of the *Charter*, in the absence of discriminatory laws, or discriminatory application of those laws. Finally, he concluded [at para. 147] that, in any event, the issues raised by the application were not justiciable, that the implementation of the relief sought would "cross institutional boundaries and enter into the area reserved for the Legislature".

The Intervenors

[18] The following eight organizations, or groups of organizations, were granted leave to intervene in this appeal under rule 13.02 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194: (1) a coalition of the *Charter* Committee on Poverty, Pivot Legal Society and Justice for Girls (the *Charter* Committee coalition); (2) a coalition of Amnesty International Canada and the International Network for Economic, Social and Cultural Rights (the Amnesty coalition); (3) the David Asper Centre for Constitutional Rights (the Asper Centre); (4) a coalition of ARCH Disability Law Centre, the Dream Team, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario (the ARCH coalition); (5) a coalition of the Income Security Advocacy Centre, the ODSP Action Coalition and the Steering Committee on Social Assistance (the Income Security coalition); (6) the Colour of Poverty/Colour of Change Network (COPC); (7) the Ontario Human Rights Commission (OHRC); and (8) the Women's Legal Education Action Fund Inc. (LEAF). Each filed a factum and made brief oral submissions, generally in support of the appellants. [page169]

Analysis

[19] I would uphold the motion judge's conclusion that this application is not justiciable. In essence, the application asserts that Canada and Ontario have given insufficient priority to issues of homelessness and inadequate housing.

[20] As indicated in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, 1989 CanLII 73 (SCC), [1989] 2 S.C.R. 49, [1989] S.C.J. No. 80, at pp. 90-91 S.C.R., "[a]n inquiry into justiciability is, first and foremost, a normative inquiry into the appropriateness as a matter of constitutional judicial policy of the courts deciding a given issue, or instead deferring to other decision making institutions of the polity".

[21] Having analyzed the jurisprudence relating to justiciability in Lorne M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), the author identified several relevant factors, at p. 162:

> Political questions, therefore, must demonstrably be unsuitable for adjudication. These will typically involve moral, strategic, ideological, historical or policy considerations that are not susceptible to resolution through adversarial presentation of evidence or the judicial process. Justiciable questions and political questions lie at opposing ends of a jurisdiction spectrum.
>
> . . . . .
>
> [T]he political nature of a matter raises two related dilemmas for courts. The first is the dilemma of institutional capacity. Courts are designed to make pronouncements of law. Arguably, they accomplish this goal more effectively and efficiently than any other institution could. Where the heart of a dispute is political rather than legal, however, courts may have no particular advantage over other institutions in their expertise, and may well be less effective and efficient than other branches of government in resolving such controversies, as the judiciary is neither representative of the political spectrum, nor democratically accountable.

[22] A challenge to a particular law or particular application of such a law is an archetypal feature of *Charter* challenges under s. 7 and s. 15. As observed in *Canada Assistance Plan (Re)*, 1991 CanLII 74 (SCC), [1991] 2 S.C.R. 525, [1991] S.C.J. No. 60, at p. 545 S.C.R.:

> In considering its appropriate role the Court must determine whether the question is purely political in nature, and should therefore be determined in another forum or whether it has a sufficient legal component to warrant the intervention of the judicial branch.

[23] The Supreme Court discussed the difference between a political issue and a legal issue in *Canada (Attorney General) v. PHS Community Services Society*, [2011] 2 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44 and *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, [2005] S.C.J. No. 33, 2005 SCC 35. In both cases, the Attorneys General argued that the subject [page170] matter of the *Charter* challenge was immune from scrutiny, and the Supreme Court disagreed. Both cases are distinguishable.

[24] In *Canada (Attorney General) v. PHS Community Services Society*, the court observed, at para. 105:

> The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated *into law or state action*, those *laws and actions* are subject to scrutiny under the *Charter*: *Chaoulli*, at para. 89, *per* Deschamps J., at para. 107, *per* McLachlin C.J. and Major J., and at para. 183, *per* Binnie and LeBel JJ.; *Rodriguez*, at pp. 589-90, *per* Sopinka J. The issue before the Court at this point is not whether harm or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the *Charter*.

(Emphasis added)

[25] In *Chaoulli v. Quebec (Attorney General)*, *supra*, the applicant challenged a Quebec law that prohibited private health insurance for services that were available in the public sector. At para. 107, McLachlin C.J.C. and Major J. said:

> While the decision about the type of health care system Quebec should adopt falls to the legislature of the province, the resulting legislation, like ***all laws***, is subject to constitutional limits, including those imposed by s. 7 of the *Charter*.

(Emphasis added)

[26] Binnie and LeBel JJ. (dissenting on the merits in *Chaoulli*) also rejected the argument of the Attorneys General of Canada and Quebec that the claims advanced by the appellant were inherently political and therefore not properly justiciable by the courts. They pointed, at para. 183, to s. 52 of the *Constitution Act, 1982*, which "affirms the constitutional power and *obligation* of courts to declare laws of no force or effect to the extent of their inconsistency with the Constitution" (emphasis in original).

[27] In this case, unlike in *PHS Community Services* (where a specific state action was challenged) and *Chaoulli* (where a specific law was challenged), there is no sufficient legal component to engage the decision-making capacity of the courts.

[28] In *Chaoulli*, the Supreme Court found that the legislative prohibition against private insurance contained in the *Hospital Insurance Act*, R.S.Q. c. A-28 engaged the appellants' rights to security of the person and was arbitrary in that no link was established to tie the need for the prohibition to the goal of maintaining quality public health care. That kind of analysis, [page171] a comparison between the legislative means and purpose, is impossible in this case.

[29] This is not to say that constitutional violations caused by a network of government programs can never be addressed, particularly when the issue may otherwise be evasive of review.

[30] There are several aspects of this application, however, that make it unsuitable for *Charter* scrutiny. Here, the appellants assert that s. 7 confers a general free-standing right to adequate housing. This is a doubtful proposition in light of *Chaoulli*, where McLachlin C.J.C. and Major J. made the following unequivocal statement, at para. 104:

> The *Charter* does not confer a freestanding right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*.

[31] Further, as this court noted in *Wynberg v. Ontario* (2006), 2006 CanLII 22919 (ON CA), 82 O.R. (3d) 561, [2006] O.J. No. 2732 (C.A.), at para. 225, leave to appeal denied [2006] S.C.C.A. No. 441:

> [I]n *Gosselin*, *supra*, the Supreme Court of Canada rejected an argument that s. 7 of the *Charter* requires the provision of a minimum level of social assistance adequate to meet basic needs.

[32] Moreover, the diffuse and broad nature of the claims here does not permit an analysis under s. 1 of the *Charter*. As indicated in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, in the event of a violation of a right guaranteed by the *Charter*, the legislation will nonetheless be sustained if the objective of the legislation is pressing and substantial, the rights violation is rationally connected to the purpose of the legislation, the violation minimally impairs the guaranteed right and the impact of the infringement of the right does not outweigh the value of the legislative object. Here, in the absence of any impugned law there is no basis to make that comparison.

[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.

[34] Were the court to confine its remedy to a bare declaration that a government was required to develop a housing policy, that would be so devoid of content as to be effectively meaningless. [page172] To embark, as asked, on judicial supervision of the adequacy of housing policy developed by Canada and Ontario takes the court well beyond the limits of its institutional capacity. All agree that housing policy is enormously complex. It is influenced by matters as diverse as zoning by-laws, interest rates, procedures governing landlord and tenant matters, income tax treatment of rental housing, not to mention the involvement of the private sector and the state of the economy generally. Nor can housing policy be treated monolithically. The needs of aboriginal communities, northern regions and urban centres are all different, across the country.

[35] I add that complexity alone, sensitivity of political issues, the potential for significant ramifications flowing from a court decision and a preference that legislatures alone deal with a matter are not sufficient on their own to permit a court to decline to hear a matter on the ground of justiciability: see, for example, *Chaoulli*, at para. 107. Again, the issue is one of institutional competence. The question is whether there is a sufficient legal component to anchor the analysis.

[36] The application here is demonstrably unsuitable for adjudication, and the motion judge was correct to dismiss it on the basis that it was not justiciable.

[37] Given that this application was properly dismissed on the ground that it did not raise justiciable issues, it is not necessary to explore the limits, in a justiciable context, of the extent to which positive obligations may be imposed on government to remedy violations of the *Charter*, a door left slightly ajar in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85, 2002 SCC 84. Nor is it necessary to determine whether homelessness can be an analogous ground of discrimination under s. 15 of the *Charter* in some contexts.

[38] The appellants also argue that the motion judge ought to have refused to hear the respondents' motions to dismiss because the governments did not move to dismiss the application until two years after the application was issued on May 26, 2010, and after the appellants had compiled a voluminous record which was served on the respondents on November 22, 2012. Six months later, the respondents advised the appellants that they had reviewed the record, sought instructions, and consulted each other and would respond with motions to strike. The motion judge found that it was not reasonable to require that the motion to strike be brought before the record was served, and that only then would the respondents have an appreciation of the case to meet. Given the size of the record and the significance of the issues raised, the motion judge did [page173] not consider that six months was so long as to justify refusal to hear the motions to strike. I see no reason to interfere with this discretionary decision.

[39] I would add that although to issue of leave to amend was raised during argument, the appellants did not propose any specific amendment and I cannot conceive of any amendment that would cure the absence of a justiciable issue. None of the parties or intervenors thought it necessary to refer to any part of the evidentiary record, and I would not speculate that there is anything in that record which might alter these conclusions. The appeal is therefore dismissed, without costs by agreement of the parties.

FELDMAN J.A. (dissenting): --

Overview

[40] I have had the benefit of reading the reasons of Pardu J.A., but I do not agree with her conclusion that the appeal should be dismissed.

[41] The appellants seek constitutional remedies under ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* against the governments of Ontario and Canada for the myriad of problems related to homelessness and inadequate housing in this province and this country. The application does not attack any specific piece or pieces of legislation. Rather, the appellants seek remedies for what they say is the unconstitutional effect of the governments' withdrawal of programs and failure to legislate.

[42] The application for constitutional relief was struck out at the pleadings stage before the court had the opportunity to consider the 16-volume evidentiary record filed by the appellants.

[43] In my view, it was an error of law to strike this application at the pleadings stage. The application raises significant issues of public importance. The appellants' approach to *Charter* claims is admittedly novel. But given the jurisprudential journey of the *Charter*'s development to date, it is neither plain nor obvious that the appellants' claims are doomed to fail.

[44] I would allow the appeal, and allow the application to proceed.

Analysis

(1) *The rule in Hunt v. Carey Canada Inc.*

[45] The respondents moved to strike the appellants' application under rule 14.09 and rule 21.01(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [page174] on the ground that the application disclosed no reasonable cause of action. The leading case on the test for striking a claim as disclosing no reasonable cause of action is the Supreme Court of Canada's decision in *Hunt v. Carey Canada Inc.*, 1990 CanLII 90 (SCC), [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93.

[46] Justice Wilson summarized her holding in *Hunt*, at p. 980 S.C.R.:

> [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". 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 because it contains a radical defect . . . should the relevant portions of a plaintiff's statement of claim be struck out[.]

[47] Justice Wilson emphasized that novelty alone is not a reason to strike a claim. Rather, the claim must be "certain to fail" because, as pleaded, it contains a "radical defect". Chief Justice McLachlin recently discussed these principles in *R. v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45, [2011] S.C.J. No. 42, 2011 SCC 42. On the issue of the proper approach to novel claims, she stated, at para. 21:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.),a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson.* Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[48] In this passage, the chief justice reminds us that some very significant innovations in the law have developed from motions to strike or similar preliminary motions, including the general duty of care owed to one's neighbour, which came from the House of Lords' decision on such a motion in *Donoghue v. Stevenson*, 1932 CanLII 536 (FOREP), [1932] A.C. 562, [1932] All E.R. Rep. 1 (H.L.). [page175]

[49] To summarize, a claim should not be struck out at the pleadings stage unless it has no reasonable prospect of success, taking the facts pleaded to be true. The novelty of the claim alone is not a reason to strike the claim. Rather, there must be a radical defect in the claim that will be fatal to its success. The purpose of a motion to strike is to weed out, at an early stage, claims that have no reasonable chance of success, either because the legal issue raised has been conclusively decided against the claim or because the facts, taken at their highest, cannot support the claim. The motion to strike should not be used, however, as a tool to frustrate potential developments in the law.

(2) *The appellants' Charter claims*

[50] In the amended notice of application, the appellants set out the basis for their *Charter* claims, at paras. 34-38:

> 34. The harm caused by Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing deprives the applicants and others similarly affected of life, liberty and security of the person in violation of section 7 of the *Charter*. This deprivation is not in accordance with the principles of fundamental justice. The deprivation is arbitrary, disproportionate to any government interest, fundamentally unfair to the applicants, and contrary to international human rights norms. Further, Canada's and Ontario's failure to effectively address homelessness and inadequate housing violate s. 15 of the *Charter* by creating and sustaining conditions of inequality.
>
> 35. Those who are homeless and inadequately housed are subject to widespread discriminatory prejudice and stereotype and have been historically disadvantaged in Canadian society. Their rights, needs and interests have been frequently ignored or overlooked by governments. People who are homeless and inadequately housed are perhaps the most marginalized, disempowered, precarious and vulnerable group in Canadian society.
>
> 36. Canada's and Ontario's failure to adopt effective strategies to address homelessness and inadequate housing, result in the further marginalization, exclusion and deprivation of this group. Canada and Ontario have failed to take into account the circumstances of people who are homeless and have created additional burdens, disadvantage, prejudice and stereotypes, in violation of section 15 of the *Charter*.
>
> 37. Furthermore the persons affected by homelessness and the lack of adequate housing are disproportionately members of other groups protected from discrimination under s. 15(1) including: women, single mothers, persons with mental and physical disabilities, Aboriginal persons, seniors, youth, racialized persons, newcomers and persons in receipt of social assistance. Canada's and Ontario's failure to implement effective strategies to address homelessness and inadequate housing therefore constitutes adverse effects discrimination against these groups under s. 15(1).
>
> 38. There is no pressing and substantial objective served by these violations and the violations are not demonstrably justifiable under s. 1 of the *Charter*. [page176]

(3) *The appellants' s. 7 claim should not be struck*

[51] In a lengthy discussion, the motion judge defines the parameters of s. 7 of the *Charter*, as if those parameters were settled law. He concludes that the appellants' claim does not fit within those settled parameters, and as a result, it is plain and obvious that their claim cannot succeed.

[52] In my view, there are four problems with the motion judge's approach: (1) he misunderstood the appellants' s. 7 claim and stated it in an overly broad manner; (2) he erred in stating that the s. 7 jurisprudence on whether positive obligations can be imposed on governments to address homelessness is settled; (3) he erred in purporting to define the law in a critical area of Canadian jurisprudence on a motion to strike; and (4) most importantly, he erred in concluding that the issue of whether the appellants had a potential claim under s. 7 could be decided without considering the full evidentiary record.

[53] The motion judge first erred in misconstruing the appellants' claim. At para. 34, the motion judge articulated the claim as follows:

> The position taken by the applicants asserts that the *Charter* includes a positive obligation, placed on Canada and Ontario, to see that the rights included in the *Charter* are provided for. In such circumstances, the question of whether there is an accompanying breach of fundamental justice would not arise. In this approach, the only issue would be whether the rights to "life, liberty and security of the person" are being breached. If they are, the state would be obliged to act. There is a broad array of cases which say that this is not so.

[54] The motion judge understood the appellants to be making two assertions. The first was that the governments have positive obligations under s. 7. The second was that in order to succeed, the appellants need not prove a breach of a principle of fundamental justice. The appellants did make the first assertion, based on the Supreme Court of Canada's decision in *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, [2002] S.C.J. No. 85, 2002 SCC 84 and based on the record they sought to put before a trial court. However, they did not make the second assertion, as can be seen clearly from para. 34 of the amended notice of application, quoted above.[2]

[55] Following a lengthy discussion of some case law which both preceded and followed *Gosselin*, the motion judge concluded that the governments have no positive obligation under s. 7 to [page177] sustain life, liberty or security of the person and therefore there can be no deprivation under the first step of the s. 7 analysis. He then discussed the appellants' assertion that the majority judgment in *Gosselin* left open the possibility that, in appropriate circumstances in a future case, a court could recognize such an obligation, referring to the following significant passages from the majority decision, at paras. 82 and 83:

> *One day s. 7 may be interpreted to include positive obligations*. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe [v. British Columbia (Human Rights Commission*), 2000 SCC 44, [2000] 2 S.C.R. 307] . . . at para. 188 are apposite:
>
> > We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.
>
> *The question therefore is not whether s. 7 has ever been -- or will ever be -- recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.*
> I conclude that they do not. With due respect for the views of my colleague Arbour J., *I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances.* However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

(Emphasis added)

[56] While recognizing that the majority in *Gosselin* did not foreclose the possibility that, in "special circumstances" in a future case, a court could find that s. 7 imposes positive obligations on government, the motion judge nevertheless concluded the opposite, at para. 59:

> The law is established. As it presently stands, there can be no positive obligation on Canada and Ontario to act to put in place programs that are directed to overcoming concerns for the "life, liberty and security of the [page178] person". In this context, there is no fundamental right to affordable, adequate and accessible housing provided through s. 7 of the *Charter*.

[57] He also stated that the appellants had not pled any "special circumstances", as the majority in *Gosselin* referred to. He then, at para. 67, addressed and distinguished each of the cases that the appellants or the intervenors submitted did recognize "positive obligations on the state to act to protect rights [the *Charter*] provides for".

[58] For example, the motion judge quoted *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493, [1998] S.C.J. No. 29, in which the Supreme Court stated, at para. 64:

> It has not yet been necessary to decide in other contexts whether the *Charter* might impose positive obligations on the legislatures or on Parliament such that a failure to legislate could be challenged under the *Charter*. Nonetheless, the possibility has been considered and left open in some cases. For example, in *McKinney* [*v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229], Wilson J. made a comment in *obiter* that "[i]t is not selfevident to me that government could not be found to be in breach of the *Charter* for failing to act" (p. 412). In *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1038, L'HeureuxDubé J., speaking for the majority and relying on comments made by Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, suggested that in some situations, the *Charter* might impose affirmative duties on the government to take positive action. Finally, in *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, La Forest J., speaking for the Court, left open the question

whether the *Charter* might oblige the state to take positive actions (at para. 73). However, it is neither necessary nor appropriate to consider that broad issue in this case.

[59] The motion judge then responded, at para. 71:
Vriend and each of the cases referred to [in the quotation from *Vriend* reproduced above] . . . pre-date *Gosselin.* Each of them did what it did. They acknowledged that it may be that special or unforeseen circumstances may cause the application of s. 15(1) or, by analogy, s. 7 of the *Charter* to evolve. That possibility does not change the law as it is. What is suggested here has been dealt with before. There is no positive obligation raised by the *Charter* that requires Canada and Ontario to provide for affordable, adequate, accessible housing.

[60] The motion judge determined that other Supreme Court and appellate cases, including *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624, [1997] S.C.J. No. 86, *Canada (Attorney General) v. PHS Community Services Society*, [2011] 3 S.C.R. 134, [2011] S.C.J. No. 44, 2011 SCC 44 and *Victoria (City) v. Adams*, [2009] B.C.J. No. 2451, 2009 BCCA 563, 313 D.L.R. (4th) 29, where the court considered how the *Charter* may include positive obligations to act, nevertheless have no application to this proceeding. [page179]

[61] Finally, under his discussion of s. 7, the motion judge rejected the submission of the intervenor the David Asper Centre for Constitutional Rights that the pleaded *Charter* remedies were available in this case, including the possible application of the court's supervisory jurisdiction, as discussed in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, [2003] S.C.J. No. 63, 2003 SCC 62. He rejected that submission on the basis of his conclusion that the application necessarily requires a complex review of housing policy issues that the court is not equipped to supervise.

[62] In my view, the motion judge erred by concluding that it is settled law that the government can have no positive obligation under s. 7 to address homelessness. To the contrary, *Gosselin* specifically leaves the issue of positive obligations under s. 7 open for another day.

[63] Further, because a claim can only be struck where the law is clear that the claim cannot succeed, the court should not conduct a lengthy analysis of the case law as it does when making decisions after a trial, a summary judgment hearing or an appeal, and then draw conclusions that state the law in a new way: see *Spasic Estate v. Imperial Tobacco Ltd*. (2000), 2000 CanLII 17170 (ON CA), 49 O.R. (3d) 699, [2000] O.J. No. 2690 (C.A.), at paras. 22-23, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 547.

[64] However, in my view, the motion judge's larger error was to strike the claim without allowing a court to review the evidentiary record assembled by the appellants. In *Gosselin*, the Supreme Court stated that a positive obligation on the part of government to sustain life, liberty or security of the person may be established in "special circumstances". The motion judge stated that no "special circumstances" were pleaded or alleged.

[65] Whether a party characterizes the circumstances as "special" is not determinative. What matters is whether the court considers them sufficiently special. That can be determined only after a consideration of the full record, as well as the response from the governments. For example, in *Gosselin* (see para. 83, quoted above), the court stated that there was not enough evidence to support the proposed interpretation of s. 7.

[66] In this case, the appellants assembled a 16-volume record, totalling nearly 10,000 pages, which contains 19 affidavits, 13 of which were from experts. It is premature and not within the intent of *Gosselin* to decide there are no "special circumstances" in such a serious case, at the pleadings stage.

[67] One of the concerns raised by the motion judge was that, if *Gosselin* is always read as leaving the door open for the imposition of positive obligations on governments under s. 7 in the [page180] future, then no case pleading positive obligations could ever be struck out at the pleadings stage. In my view, that concern is misplaced. There may well be cases where the facts pleaded raise an issue that has been clearly decided in another case, or where the facts as pleaded do not raise a *Charter* issue, although *Charter* relief is requested.

[68] But this is not one of those cases. This application is a serious attempt made on behalf of a broad range of disadvantaged individuals and groups. It seeks to have the court address whether government action and inaction that results in homelessness and inadequate housing is subject to *Charter* scrutiny and justifies a *Charter* remedy. I will discuss this issue further at the conclusion of these reasons.

(4) *The appellants' s. 15 claim should not be struck*

[69] The appellants' s. 15 claim, while perhaps somewhat weaker than their s. 7 claim, should not have been struck at this early stage either. Importantly, the values underlying s. 15 can inform the s. 7 analysis. In their amended notice of application, at para. 37, the appellants observe that those affected

by homelessness and inadequate housing are often disproportionately members of other groups protected from discrimination under s. 15, such as women, persons with disabilities, aboriginal persons and seniors. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, [1999] S.C.J. No. 47, at para. 115, L'Heureux-Dubé J. (with whom Gonthier and McLachlin JJ. agreed), concurring in the result, stated:

> [I]n considering the s. 7 rights at issue, and the principles of fundamental justice that apply in this situation, it is important to ensure that the analysis takes into account the principles and purposes of the equality guarantee in promoting the equal benefit of the law and ensuring that the law responds to the needs of those disadvantaged individuals and groups whose protection is at the heart of s. 15. The rights in s. 7 must be interpreted through the lens of ss. 15 and 28, to recognize the importance of ensuring that our interpretation of the Constitution responds to the realities and needs of all members of society.

[70] In his discussion of whether the claim under s. 15 should be struck as disclosing no reasonable cause of action, the motion judge again conducted a lengthy and detailed discussion of the merits of the claim, concluding, in a number of places, that it is not the impugned government conduct that causes homelessness or the problems faced by the homeless. The motion judge stated, at para. 107, that "the 'burden' of being without adequate housing is not caused by these programs. It arises from other wider characteristics of our society and approach to economic issues." [page181]

[71] This is the very issue that is intended to be addressed by an application judge on a full record, including the responses by the respondent governments. It is only based on such a record that reliable conclusions regarding causation can be drawn. With evidence, it may be that, even if the motion judge's statement is partly true, the governments' conduct is a contributing factor to the burden of being without adequate housing. It is not the role of a motion judge on a motion to strike to make factual findings that are not in the pleadings.

[72] The fact that the motion judge found it necessary to make such factual findings in order to determine the motion further demonstrates that the motion to strike is ill-conceived. Such findings are appropriate only where a full record is placed before the court.

[73] Finally, in the s. 15 context, the motion judge made a number of significant "observations", the most important of which was that homelessness and being without adequate housing are not analogous grounds of discrimination under s. 15 of the *Charter*. He stated that the lack of adequate housing is not a shared quality, characteristic or trait.

[74] A court could very well decide this issue after considering the full evidentiary record and argument. It is an important issue. But it is not open for decision when the application is not allowed to proceed.

(5) *Justiciability*

[75] The motion judge also added that the issues raised in the application are not justiciable. It is for this reason that my colleague would dismiss the appeal.

[76] I would not strike this application at the pleadings stage on the basis that the claims raised are not justiciable.

[77] In *Boundaries of Judicial Review: The Law of Justiciability in Canada*, 2nd ed. (Toronto: Carswell, 2012), at pp. 242-44, Dean Lorne Sossin addresses the justiciability issue in the context of disputes involving social and economic rights. Citing the Supreme Court of Canada's decision in *Irwin Toy Ltd. v. Québec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36, he states, at p. 242:

> Canadian Courts have shown marked reluctance to invest rights and guarantees protected under the *Charter* with social and economic content. However, they have shown equal hesitation in foreclosing this possibility. The Supreme Court of Canada, for example, has expressly refrained from stating whether section 7 of the *Charter*, guaranteeing a right to security of the person, protects "economic rights fundamental to human life or survival."

(Footnote omitted) [page182]

[78] Dean Sossin outlines opposing views on whether, if claims for social and economic rights under the *Charter* were justiciable, courts would be deciding "political" or "policy" matters that should be left to the legislature. In response, he points out that courts may be accused of doing that very thing when they conduct the required analysis under s. 1 of the *Charter*.

[79] He then concludes that the justiciability of social and economic rights under the *Charter* is an open question:

> It is striking that, despite the rich jurisprudence which has developed under the *Charter*, such uncertainty remains with respect to a question of fundamental importance to the scope of judicial review of government action. For the moment, the justiciability of social and economic rights under the *Charter* remains an open question.

(Footnote omitted)

[80] In his chapter "Taking Competence Seriously" in Margot Young et al., eds., *Poverty: Rights, Social Citizenship, and Legal Activism* (Vancouver: UBC Press, 2007), at p. 273, Professor David Wiseman argues that courts are competent to adjudicate "poverty-related standards", and points to a number of cases outside the *Charter* context where courts have been prepared to do just that.[3] He also refers to the dissenting reasons of Arbour J. and L'Heureux-Dubé J. in *Gosselin*, *supra*, at paras. 141-42 and paras. 330-35, where they acknowledged that, while the court may not be able to determine the level of assistance that government should provide, that does not mean it cannot determine whether there is a constitutional obligation on government to provide some level of assistance.

[81] In *Gosselin*, the Supreme Court did not hold that claims for social and economic rights under the *Charter* were non-justiciable. As a result, courts should be extremely cautious before foreclosing any enforcement of these rights. In my view, to [page183] strike a serious *Charter* application at the pleadings stage on the basis of justiciability is therefore inappropriate.

[82] My colleague points to a number of concerns with the format of this application: in particular, unlike in many other *Charter* cases, the appellants have attacked no particular law. Therefore, there is no direct way to apply the s. 1 analysis from *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7.

[83] I agree that the broad approach taken in this application is novel and a number of procedural as well as conceptual difficulties could arise when the court addresses whether the *Charter* has been infringed, and if appropriate, determines and applies a reasonable and workable remedy.

[84] However, there are two answers to these concerns. First, as Wilson J. observed in Hunt, *supra*, at p. 980 S.C.R., and McLachlin C.J.C. observed in *Imperial Tobacco*, at para. 21, the novelty of a claim is not a bar to allowing it to proceed. Although the development of *Charter* jurisprudence has to date followed a fairly consistent procedural path, and has involved challenges to particular laws, we are still in the early stages of that development. There is no reason to believe that that procedural approach is fixed in stone. This application asks the court to view *Charter* claims through a different procedural lens. That novelty is not a reason to strike it out.

[85] Second, this court had cogent and helpful submissions from the intervenor the David Asper Centre for Constitutional Rights on the ability and authority of the court to grant one or more of the remedies requested in the application. Although the amended notice of application seeks, as one remedy, an order requiring the governments to implement strategies to reduce homelessness and inadequate housing and to consult with affected groups, under court supervision, the court need not make such a wide-ranging order if it finds a breach of the *Charter*. It may limit itself to granting declaratory relief only, as was done in *Canada (Prime Minister) v. Khadr*, [2010] 1 S.C.R. 44, [2010] S.C.J. No. 3, 2010 SCC 3. Four such declarations are requested in the amended notice of application.

Conclusion

[86] In my view, it was an error of law to strike this claim at the pleadings stage. The claim does not meet the test under rule 21.01(1)(b): while the claim is novel, both conceptually and substantively, it cannot be said, based on the state of the relevant jurisprudence to date, that the claim has no reasonable prospect of success. In *Gosselin*, the Supreme Court of Canada left open the issue of both the existence and the extent of positive [page184] obligations under the *Charter* to give effect to social and economic rights. It is therefore premature to decide at the pleadings stage that the issues are not justiciable.

[87] Chief Justice McLachlin described the purpose of motions to strike as follows in *Imperial Tobacco*, *supra*, at para. 19:

> The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.

[88] This application is simply not the type of "hopeless" claim for which Rule 21 was intended. It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who

face profound barriers to access to justice. It raises issues that are basic to their life and well-being. It is supported by a number of credible intervening institutions with considerable expertise in *Charter* jurisprudence and analysis. The appellants put together a significant record to support their application. That record should be put before the court.

[89] I would allow the appeal.

Appeal dismissed.

Notes

1 *Withler v. Canada (Attorney General)*, [2011] 1 S.C.R. 396, [2011] S.C.J. No. 12, 2011 SCC 12, at para. 35.

2 Later on in his reasons, at para. 62, the motion judge recognized that the appellants had pleaded a breach of the principles of fundamental justice.

3 For example, in *Marshall v. Canada*, 1999 CanLII 665 (SCC), [1999] 3 S.C.R. 456, [1999] S.C.J. No. 55, at paras. 58-59, the Supreme Court interpreted a treaty as providing the right to trade for "necessaries" or a "moderate livelihood", which "includes such basics as 'food, clothing and housing, supplemented by a few amenities', but not the accumulation of wealth. . . . It addresses day-to-day needs" (citation omitted). In *Stouffville Assessment Commissioner v. Mennonite Home Assn.*, 1972 CanLII 9 (SCC), [1973] S.C.R. 189, [1972] S.C.J. No. 84, the Supreme Court applied a statute that extended a benefit to "an incorporated charitable institution organized for the relief of the poor", and in so doing, considered what constitutes "relief of the poor". See *Assessment Act*, R.S.O. 1990, c. A.31, s. 3(1)12(iii). See, also, *Criminal Code*, R.S.C. 1985, c. C-46, s. 215, which creates the offence of failing to provide the "necessaries of life". In applying this section, courts have to decide what constitutes the "necessaries of life". See *Young*, at p. 273.

End of Document

10	*Gosselin v Quebec (Attorney General),* 2002 SCC 84, [2002] 4 SCR 429

Gosselin v. Québec (Attorney General), 2002 SCC 84 (CanLII), [2002] 4 SCR 429

Date:	2002-12-19
File number:	27418
Other citations:	119 ACWS (3d) 43 — [2002] ACS no 85 — [2002] SCJ No 85 (QL) — JE 2003-126 — 100 CRR (2d) 1 — 44 CHRR 363 — 221 DLR (4th) 257 — 298 NR 1
Citation:	Gosselin v. Québec (Attorney General), 2002 SCC 84 (CanLII), [2002] 4 SCR 429, <https://canlii.ca/t/1g2w1>, retrieved on 2022-02-27
Most recent unfavourable mention:	9910-07541R (Re), 2006 ONSBT 1 (CanLII) […] [73] The Tribunal finds that the **Gosselin case is clearly distinguishable** from the Appellants' case. […]

Gosselin *v*. Quebec (Attorney General), [2002] 4 S.C.R. 429, 2002 SCC 84

Louise Gosselin *Appellant*

v.

The Attorney General of Quebec *Respondent*

and

The Attorney General for Ontario,
the Attorney General for New Brunswick,
the Attorney General of British Columbia,
the Attorney General for Alberta,
Rights and Democracy (also known as International Centre for Human Rights and Democratic Development),
Commission des droits de la personne et des droits de la jeunesse,
the National Association of Women and the Law (NAWL),
the Charter Committee on Poverty Issues (CCPI) and
the Canadian Association of Statutory Human Rights Agencies (CASHRA) *Interveners*

Indexed as: Gosselin *v*. Quebec (Attorney General)

Neutral citation: 2002 SCC 84.

File No.: 27418.

2001: October 29; 2002: December 19.

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

on appeal from the court of appeal for quebec

Constitutional law — Charter of Rights — Equality — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs —

Whether Regulation infringed right to equality — Canadian Charter of Rights and Freedoms, s. 15 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

Constitutional law — Charter of Rights — Fundamental justice — Security of person — Welfare — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to security of person — Canadian Charter of Rights and Freedoms, s. 7 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

Civil rights — Economic and social rights — Financial assistance — Regulation providing for reduced welfare benefits for individuals under 30 not participating in training or work experience employment programs — Whether Regulation infringed right to measures of financial assistance — Charter of Human Rights and Freedoms, R.S.Q., c. C-12, s. 45 — Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1, s. 29(a).

In 1984 the Quebec government created a new social assistance scheme. Section 29(*a*) of the *Regulation respecting social aid*, made under the 1984 *Social Aid Act*, set the base amount of welfare payable to persons under the age of 30 at roughly one third of the base amount payable to those 30 and over. Under the new scheme, participation in one of three education or work experience programs allowed people under 30 to increase their welfare payments to either the same as, or within $100 of, the base amount payable to those 30 and over. In 1989 this scheme was replaced by legislation that no longer made this age-based distinction.

The appellant, a welfare recipient, brought a class action challenging the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989. The appellant argued that the 1984 social assistance regime violated ss. 7 and 15(1) of the *Canadian Charter of Rights and Freedoms* and s. 45 of the Quebec *Charter of Human Rights and Freedoms*. She requested that s. 29(*a*) of the Regulation be declared to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and that the government of Quebec be ordered to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of roughly $389 million, plus interest. The Superior Court dismissed the class action. The Court of Appeal upheld the decision.

Held (L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. dissenting): The appeal should be dismissed. Section 29(*a*) of the Regulation was constitutional.

(1) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: Section 29(*a*) of the Regulation did not infringe s. 15 of the Canadian *Charter*.

Per L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. (dissenting): Section 29(*a*) of the Regulation infringed s. 15 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

(2) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and LeBel JJ.: Section 29(*a*) of the Regulation did not infringe s. 7 of the Canadian *Charter*.

Per L'Heureux-Dubé and Arbour JJ. (dissenting): Section 29(*a*) of the Regulation infringed s. 7 of the Canadian *Charter* and the infringement was not justifiable under s. 1 of the *Charter*.

(3) *Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Binnie and LeBel JJ.: Section 29(*a*) of the Regulation did not violate s. 45 of the Quebec *Charter*.

Per Bastarache and Arbour JJ.: There is no need to determine whether s. 29(*a*) of the Regulation violated s. 45 of the Quebec *Charter* since the s. 45 right is unenforceable in the circumstances of this case.

Per L'Heureux-Dubé J. (dissenting): Section 29(*a*) of the Regulation violated s. 45 of the Quebec *Charter*.

Per McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ.: The differential welfare scheme did not breach s. 15 of the *Charter*. The appellant has failed to discharge her burden of proof on the third branch of the

Law test, as she has not demonstrated that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

An examination of the four contextual factors set out in *Law* does not support a finding of discrimination and denial of human dignity. First, this is not a case where members of the complainant group suffered from pre-existing disadvantage and stigmatisation on the basis of their age. Age-based distinctions are a common and necessary way of ordering our society, and do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization. Unlike people of very advanced age who may be presumed to lack abilities that they in fact possess, young people do not have a similar history of being undervalued.

Second, the record in this case does not establish a lack of correspondence between the scheme and the actual circumstances of welfare recipients under 30. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. The deep recession in the early 1980s, tightened eligibility requirements for federal unemployment insurance benefits, and a surge in the number of young people entering the job market caused an unprecedented increase in the number of people capable of working who ended up on the welfare rolls. The situation of young adults was particularly dire. The government's short-term purpose in adopting the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills to get permanent jobs. The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order to integrate into the workforce and become self-sufficient. The regime constituted an affirmation of young people's potential rather than a denial of their dignity. From the perspective of a reasonable person in the claimant's position, the legislature's decision to structure its social assistance programs to give young people the incentive to participate in programs specifically designed to provide them with training and experience was supported by logic and common sense. The allegation that there were not enough places in the programs to meet the needs of all welfare recipients under 30 who wanted to participate was rejected by the trial judge as unsubstantiated by the evidence. Absent demonstrated error, it is not open to this Court to revisit the trial judge's conclusion. Likewise, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected from the mere failure of government to prove that the assumptions upon which it proceeded were correct. Provided they are not based on arbitrary and demeaning stereotypes, the legislator is entitled to proceed on informed general assumptions that correspond, even if not perfectly, to the actual circumstances of the affected group. These considerations figure in assessing whether a reasonable person in the claimant's position would experience the legislation as a harm to her dignity.

Third, the "ameliorative purpose" contextual factor is neutral in the present case, since the scheme was not designed to improve the condition of another group. As a general contextual matter, a reasonable person in the appellant's position would take the fact that the Regulation was aimed at ameliorating the situation of welfare recipients under 30 into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society notwithstanding their membership in the class affected by the distinction. Despite possible short-term negative impacts on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the regime sought to improve the situation of people in this group and enhance their dignity and capacity for long-term self-reliance. This points not to discrimination but to concern for the situation of welfare recipients under 30.

The factual record is insufficient to support the appellant's claim that the state deprived her of her s. 7 right to security of the person by providing her with a lower base amount of welfare benefits, in a way that violated the principles of fundamental justice. The dominant strand of jurisprudence on s. 7 sees its purpose as protecting life, liberty and security of the person from deprivations that occur as a result of an individual's interaction with the justice system and its administration. The administration of justice can be implicated in a variety of circumstances and does not refer exclusively to processes operating in the criminal law. The meaning of the administration of justice and s. 7 should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. It is thus premature to conclude that s. 7 applies only in an adjudicative context. In the present case, the issue is whether s. 7 ought to apply despite the fact that the administration of justice is plainly not implicated. Thus far, the

jurisprudence does not suggest that s. 7 places positive obligations on the state. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of their right to life, liberty and security of the person. Such a deprivation does not exist here and the circumstances of this case do not warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

There is no breach of the right to measures of financial assistance and to social measures provided for by law, susceptible of ensuring an acceptable standard of living as protected by s. 45 of the Quebec *Charter of Human Rights and Freedoms*. Although s. 45 requires the government to provide social assistance measures, it places the adequacy of the particular measures adopted beyond the reach of judicial review. The language of s. 45 mandates only that the government be able to point to measures susceptible of ensuring an acceptable standard of living, without having to defend the wisdom of its enactments.

Per Bastarache J. (dissenting): Section 29(*a*) of the Regulation did not infringe s. 7 of the *Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the legislation substantially prevent or inhibit the appellant from protecting her own security. The right to security of the person is protected by s. 7 only insofar as the claimant is deprived of this right by the state, in a manner contrary to the principles of fundamental justice. The strong relationship between s. 7 and the role of the judiciary leads to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied. In this case, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. Although the required link to the judicial system does not mean that s. 7 is limited to purely criminal or penal matters, it signifies, at the very least, that some determinative state action, analogous to a judicial or administrative process, must be shown to exist in order for one to be deprived of a s. 7 right. The threat to the appellant's security was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order to receive more assistance. While underinclusive legislation may, in unique circumstances, substantially impact the exercise of a constitutional freedom, the exclusion of people under 30 from the full, unconditional benefit package did not render them substantially incapable of exercising their right to security of the person without government intervention. The appellant failed to demonstrate that there existed an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 and over been shown to reduce the potential of young people to exercise their right to security of the person. It has not been demonstrated that the legislation, by excluding young people, reduced their security any more than it would have already been given market conditions.

Section 29(*a*) of the Regulation infringed s. 15 of the *Charter*. Although age-based distinctions are often justified due to the fact that at different ages people are capable of different things, age is included as a prohibited ground of discrimination. Age, although constantly changing, is a personal characteristic that at any given moment one can do nothing to alter. Age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change. The grounds of discrimination enumerated in s. 15 function as legislative markers of suspect grounds associated with stereotypical or otherwise, discriminatory decision making. Legislation that draws a distinction on such grounds — including age — is suspect because it often leads to discrimination and denial of substantive equality.

Applying the *Law* test, the fundamental question that needs to be dealt with here is whether the distinction created by s. 29(*a*) is indicative that the government treated social assistance recipients under 30 in a way that is respectful of their dignity as members of society. This question is to be assessed from the perspective of a reasonable person in the claimant's circumstances having regard to four non-exhaustive contextual factors. While it is not enough for the appellant simply to claim that her dignity has been violated, a demonstration that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim.

First, with respect to the pre-existing disadvantage factor, we are not dealing in this case with a general age distinction but rather with one applicable within a particular social group, welfare recipients. Within this group the record makes it clear that it was not easier for persons under 30 to get jobs as opposed to their elders. The distinction was based on the stereotypical view that young welfare recipients suffer no special economic disadvantages. This view was not grounded in fact and was based on old assumptions regarding the employability of young people. Although there is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age, a contextual analysis requires us to

recognize that the precarious, vulnerable position of welfare recipients in general lends weight to the argument that a distinction that affects them negatively may pose a greater threat to their human dignity.

Second, there was a lack of correspondence between the differential welfare scheme and the actual needs, capacities and circumstances of welfare recipients under the age of 30. Based on the unverifiable presumption that people under 30 had better chances of employment and lesser needs, the program delivered to those people two-thirds less than what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control. Substantive equality permits differential treatment only where there is a genuine difference. The bright line drawn at 30 appears to have had little, if any, relationship to the real situation of younger people. The dietary and housing costs of people under 30 are no different from those of people 30 and over. The presumption adopted by the government that all persons under 30 received assistance from their family was unfounded. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances of welfare recipients under 30, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created substandard living conditions for them on the sole basis of their age. Where persons experience serious detriment as a result of a distinction and the evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary to demonstrate actual stereotyping, prejudice or other discriminatory intention. Moreover, a positive intention cannot save the regulation. At this stage of the *Law* analysis, the legislature's intention is much less important than the real effects of the scheme on the claimant. Treatment of legislative purpose under s. 15 must not undermine or replace the analysis that will be undertaken when applying s. 1 of the *Charter*.

Third, the ameliorative purpose factor is not useful in determining whether the differential treatment in this appeal was discriminatory. The legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are for their own good.

Finally, the differential treatment had a severe effect on an extremely important interest. The effect of the distinction in this case is that the appellant and others like her had their income set at only one third of what the government deemed to be the bare minimum for the sustainment of life. The government's argument that it was offering skills to allow young persons to enter into the workforce, thereby reinforcing their dignity and self-worth, neglects the fact that the reason why these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. The appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the differential treatment was such that beneficiaries under 30 could objectively be said to have experienced government treatment that failed to respect them as full persons. Any reading of the evidence indicates that it was highly improbable that a person under 30 could at all times be registered in a program and therefore receive the full subsistence amount. When between programs, individuals like the appellant were forced to survive on far less than the recognized minimum necessary for basic subsistence received by those 30 and over. Even when participating in a program, the fear of being returned to the reduced level of support dominated the appellant's life. Recipients 30 and over did not experience these consequences of the scheme. For the purposes of s. 15, what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one. The distinction in treatment was made simply on the basis of age, not of need, opportunity or personal circumstances, and was not respectful of the basic human dignity of welfare recipients under the age of 30.

The government has not discharged its burden of proving that the infringement of s. 15 is a reasonable limit that is demonstrably justifiable in a free and democratic society. Although a certain degree of deference should be accorded in reviewing social policy legislation of this type, the government does not have *carte blanche* to limit rights. The distinction created by s. 29(*a*) of the Regulation served two pressing and substantial objectives: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. There is a rational connection between the different treatment of those under 30 and the objective of encouraging their integration into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to work. Even according the government

a high degree of deference, however, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing of the appellant's equality rights. Other reasonable alternatives to achieve the objective were available. To begin with, the level of support provided to those under 30 could have been increased. There is no evidence to support the government's contention that such an approach would have prevented it from achieving the objective of integrating young people into the workforce. In addition, the 1989 reforms which made the programs universally conditional could have been implemented earlier. The programs themselves also suffered from several significant shortcomings and only 11 percent of social assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. One major branch of the scheme left participants $100 short of the base benefit. Likewise, waiting periods, prioritizations and admissibility criteria signified that the programs were not designed in such a way as to ensure that there would always be programs available to those who wanted to participate. In addition to the problems with the design of the programs, hurdles in their implementation presented young recipients with further barriers. Delays flowing from meetings with aid workers, evaluation interviews and finding space within the appropriate program signified that young welfare recipients would most likely spend some time on the reduced benefit. Finally, even though 85 000 single people under 30 years of age were on social assistance, the government at first made only 30 000 program places available. While the government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere, the very fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(*a*) of the Regulation was geared towards improving the situation of those under 30, as opposed to simply saving money.

The differential treatment had severe deleterious effects on the equality and self-worth of the appellant and those in her group which outweighed the salutary effects of the scheme in achieving the stated government objective. The government failed to demonstrate that the reduction in benefits contributed or would reasonably be expected to contribute to the integration of young social assistance beneficiaries into the workplace. When the potential deleterious effects of the legislation are so apparent, it is not asking too much of the government to craft its legislation more carefully.

The appropriate remedy in this case is to declare s. 29(*a*) of the Regulation invalid under s. 52(1) of the *Constitution Act, 1982*. Had the legislation still been in force, suspension of the declaration of invalidity for a period of 18 months to allow the legislature to implement changes to the legislation would have been appropriate. The appellant's request for an order for damages pursuant to s. 24(1) of the *Charter* should be dismissed. Where a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. Moreover, the facts of this case do not allow for such a result. First, a s. 24(1) remedy is more difficult in this case because it involves a class action. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Second, the significant costs that would be incurred by the government were it required to pay damages must be considered. While a consideration of expenses might not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province.

Although on its face, s. 45 of the Quebec *Charter of Human Rights and Freedoms* creates some form of positive right to a minimal standard of living, in this case, that right is unenforceable. The supremacy provision in s. 52 of the Quebec *Charter* clearly indicates that the courts have no power to declare any portion of a law invalid due to a conflict with s. 45. Moreover, the appellant is not entitled to damages pursuant to s. 49 of the Quebec *Charter*. In order to substantiate a s. 49 claim against the government for having drafted legislation that violates a right guaranteed by the Quebec *Charter*, one would have to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It is unlikely that the government could, under s. 49, be held responsible for having simply drafted faulty legislation.

Per LeBel J. (dissenting): Section 29(*a*) of the Regulation, when taken in isolation or considered in light of all employability programs, discriminated against young adults. The distinction based on age did not reflect either the needs or the abilities of social aid recipients under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. Because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, this distinction perpetuated a stereotypical view of young people's situation on the labour market. By trying to combat the pull of social assistance, for the "good" of the young people themselves who depended on it, the distinction perpetuated another stereotypical view, that a majority

of young social assistance recipients choose to freeload off society permanently. Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Even if the government could validly encourage young people to work, the approach adopted discriminated between social aid recipients under 30 years of age and those 30 years of age and over, for no valid reason. The defects in the scheme, together with the preconceived ideas that underpinned it, lead to the conclusion that s. 29(*a*) of the Regulation infringed the equality right guaranteed by s. 15 of the *Charter*. For the reasons given by Bastarache J., s. 29(*a*) of the Regulation is not saved by s. 1 of the *Charter*.

Although the appellant failed to establish a violation of s. 7 of the *Charter* in this case, for the reasons stated by the majority, it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system.

Section 45 of the Quebec *Charter* does not confer an independent right to an acceptable standard of living. That section protects only a right of access to social measures for anyone in need. Although the incorporation of social and economic rights into the Quebec *Charter* gives them a new dimension, it does not make them legally binding. A majority of the provisions in the chapter on "Economic and Social Rights" contain a reservation indicating that the exercise of the rights they protect depends on the enactment of legislation. In the case of s. 45, the fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, suggests that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard. The expression "provided for by law", when interpreted in light of the other provisions of the chapter on economic and social rights, confirms that the right in s. 45 is protected only to the extent provided for by law. Section 45 is not, however, without any obligational content. Because s. 10 of the Quebec *Charter* does not create an independent right to equality, the right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the Quebec *Charter* were it not for s. 45.

Per Arbour J. (dissenting): Section 29(*a*) of the Regulation infringed s. 7 of the *Charter* by depriving those to whom it applied of their right to security of the person. Section 7 imposes a positive obligation on the state to offer basic protection for the life, liberty and security of its citizens.

The barriers that are traditionally said to preclude a positive claim against the state under s. 7 are unconvincing. The fact that a right may have some economic value is an insufficient reason to exclude it from the ambit of s. 7. Economic rights that are fundamental to human life or survival are not of the same ilk as corporate-commercial economic rights. The right to a minimum level of social assistance is intimately intertwined with considerations related to one's basic health and, at the limit, even one's survival. These rights can be readily accommodated under the s. 7 rights to "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests. Nor should the interest claimed in this case be ruled out because it fails to exhibit the characteristics of a "legal right". The reliance on the subheading "Legal Rights" as a way of delimiting the scope of s. 7 protection has been supplanted by a purposive and contextual approach to the interpretation of constitutionally protected rights. New kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s. 7 protection. To continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner inconsistent with the vision of the Constitution as a "living tree". Furthermore, in order to ground a s. 7 claim, it is not necessary that there be some affirmative state action interfering with life, liberty or security of the person. In certain cases, s. 7 can impose on the state a duty to act where it has not done so. A requirement of positive state interference is not implicit in the use of the phrase "principles of fundamental justice" or the concept of "deprivation" in s. 7. The concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object. The context in which s. 7 is found within the *Charter* favours a conclusion that it can impose on the state a positive duty to act. Since illustrations of the "principles of fundamental justice" found in ss. 8 to 14 of the *Charter* entrench positive rights, it is to be expected that s. 7 rights also contain a positive dimension. Recent case law implies that mere state inaction will on occasion be sufficient to engage s. 7's protection. Finally, the concern that positive claims against the state are not justiciable does not present a barrier in the present case. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation, this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. This case raises the different question of whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. The role of the courts as interpreters of the *Charter* and

guardians of its fundamental freedoms requires them to adjudicate such rights-based claims. These claims can be dealt with here without addressing the question of how much expenditure by the state is necessary in order to secure the right claimed, a question which may not be justiciable.

A textual, purposive or contextual approach to the interpretation of s. 7 mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension. The grammatical structure of s. 7 seems to indicate that it protects two rights: a right, set out in the section's first clause, to "life, liberty and security of the person"; and a right, set out in the second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. As a purely textual matter, the fact that the first clause involves some greater protection than that accorded by the second clause seems beyond reasonable objection. There are at least two reasonable interpretations as to what this additional protection might consist of: the first clause may be interpreted as providing for a completely independent and self-standing right, which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation; another possible interpretation focuses on the absence of the term "deprivation" in the first clause and suggests that it is at most in connection with the right afforded in the second clause, if at all, that there must be positive state action to ground a violation. Either interpretation demands recognition of the sort of interest claimed by the appellant in this case and it is not necessary to decide which one is to be preferred.

A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. Reducing s. 7 only to the second clause leaves no useful meaning to the right to life. Such an interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, it must be recognized that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Section 7 must be interpreted as protecting something more than merely negative rights, otherwise the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 of the *Charter* — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

With respect to the contextual analysis, positive rights are an inherent part of the *Charter*'s structure. The *Charter* compels the state to act positively to ensure the protection of a significant number of rights. Moreover, justification under s. 1 which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference. They place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others. Thus if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

The interest claimed in this case falls within the range of entitlements that the state is under a positive obligation to provide under s. 7. Underinclusive legislation results in a violation of the *Charter* outside the context of s. 15 where: (1) the claim is grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime; (2) a proper evidentiary foundation demonstrates that exclusion from the regime constitutes a substantial interference with the exercise and fulfilment of a protected right; and (3) it is determined that the state can truly be held responsible for the inability to exercise the right or freedom in question. Here, exclusion from the statutory regime effectively excludes the claimants from any real possibility of having their basic needs met. It is not exclusion from the particular statutory regime that is at stake but the claimants' fundamental rights to security of the person and life itself, which exist independently of any statutory enactment. The evidence demonstrates that the physical and psychological security of young adults was severely compromised during the period at issue and that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and perhaps even their right to life. Freedom from state interference with bodily or psychological integrity is of little consolation to those who are faced with a daily struggle to meet their most basic bodily and psychological needs. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights. The state can properly be held accountable for the claimants' inability to exercise their s. 7 rights. The issue here is simply whether the state is under an obligation of performance to alleviate the claimants' condition. The claimants need not establish that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. The legislation is directed at providing supplemental aid to those who

fall below a subsistence level — an interest which s. 7 was meant to protect. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever "minimum state action" requirement might be necessary to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. As the protection of positive rights is grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person, and as the violation here consists of inaction and does not bring the justice system into motion, it is not necessary to determine whether the violation of the appellant's s. 7 rights was in accordance with the principles of fundamental justice.

The violation of the claimants' right to life, liberty and security of the person cannot be saved by s. 1 of the *Charter*. Although preventing the attraction of young adults to social assistance and facilitating their integration into the workforce might satisfy the "pressing and substantial objective" requirement of the *Oakes* test, it is difficult to accept that denial of the basic means of subsistence is rationally connected to promoting the long-term liberty and inherent dignity of young adults. Moreover, there is agreement with Bastarache J.'s finding that those means were not minimally impairing in a number of ways.

Section 29(*a*) of the Regulation infringed s. 15(1) of the *Charter*. On the s. 15 issue, there is general agreement with Bastarache J.'s analysis and conclusions. The infringement could not be saved by s. 1 for substantially the same reasons discussed in relation to the s. 7 violation.

There is also agreement with Bastarache J. that s. 45 of the Quebec *Charter* establishes a positive right to a minimal standard of living but that, in the circumstances of this case, this right cannot be enforced under s. 52 or s. 49.

Finally, there is agreement with Bastarache J. as to the appropriate remedy.

Per L'Heureux-Dubé J. (dissenting): There is agreement with Bastarache and LeBel JJ. that s. 29(*a*) of the Regulation violated s. 15 of the *Charter*. Presumptively excluding groups that clearly fall within an enumerated category from s. 15's protection does not serve the purposes of the equality guarantee. The enumerated ground of age is a permanent marker of suspect distinction. Any attempt to exclude youth from s. 15 protection misplaces the focus of a s. 15 inquiry, which is properly on the effects of discrimination and not on the categorizing of grounds. Furthermore, the perspective of the legislature should not be incorporated in a s. 15 analysis. An intention to discriminate is not necessary for a finding of discrimination. Conversely, the fact that a legislature intends to assist the group or individual adversely affected by the distinction does not preclude a finding of discrimination.

Section 29(*a*) clearly draws a distinction on an enumerated ground. The only issue is whether s. 29(*a*) denies human dignity in purpose or effect. Harm to dignity results from infringements of individual interests including physical and psychological integrity. Such infringements undermine self-respect and self-worth and communicate to the individual that he or she is not a full member of Canadian society. Stereotypes are not needed to find a distinction discriminatory. Here, the contextual factors listed in *Law* support a finding of discrimination. In particular, the severe harm suffered by the claimant to a fundamental interest, as a result of a legislative distinction drawn on an enumerated or analogous ground, was sufficient for a court to conclude that the distinction was discriminatory. Because she was under 30, the claimant was exposed to the risk of severe poverty. She lived at times below the government's own standard of bare subsistence. Her psychological and physical integrity were breached. A reasonable person in the claimant's position, apprised of all the circumstances, would have perceived that her right to dignity had been infringed as a sole consequence of being under 30 years of age, a condition over which she had no control, and that she had been excluded from full participation in Canadian society. With respect to the other contextual factors, a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of a personal characteristic which cannot be changed *prima facie* does not adequately take into account the needs, capacity or circumstances of the individual or group in question. An ameliorative purpose, as a contextual factor, must be for the benefit of a group less advantaged than the one targeted by the distinction. There is no such group in the present case. Finally, since unemployment was far higher among young adults as compared to the general active population, and an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, it is difficult to conclude that they did not suffer from a pre-existing disadvantage. Disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if, as in this case, it can be shown that only members

of that group suffered the disadvantage. The breach of s. 15 was not justified. On this point, there is agreement with Bastarache J.'s s. 1 analysis.

For the reasons given by Arbour J., s. 29(*a*) of the Regulation violated s. 7 of the *Charter*. Although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. A claimant should be able to establish with adequate evidence what would constitute a minimum level of assistance. For the reasons given by the dissenting judge in the Court of Appeal and substantially for the reasons expressed by Arbour J., the s. 7 violation was not justified.

For the reasons given by the dissenting judge in the Court of Appeal, s. 29(*a*) of the Regulation infringes s. 45 of the Quebec *Charter*.

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APPEAL from a judgment of the Quebec Court of Appeal, 1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033, [1999] Q.J. No. 1365 (QL), affirming a decision of the Superior Court, [1992] R.J.Q. 1647, [1992] Q.J. No. 928 (QL). Appeal dismissed, L'Heureux-Dubé, Bastarache, Arbour and LeBel JJ. dissenting.

Carmen Palardy, *Georges Massol* and *Stéphanie Bernstein*, for the appellant.

André Fauteux and *Isabelle Harnois*, for the respondent.

Janet E. Minor and *Peter Landmann*, for the intervener the Attorney General for Ontario.

Gabriel Bourgeois, *Q.C.*, for the intervener the Attorney General for New Brunswick.

Sarah Macdonald, for the intervener the Attorney General of British Columbia.

Margaret Unsworth, for the intervener the Attorney General for Alberta.

David Matas, for the intervener Rights and Democracy (also known as International Centre for Human Rights and Democratic Development).

Hélène Tessier, for the intervener Commission des droits de la personne et des droits de la jeunesse.

Gwen Brodsky and *Rachel Cox*, for the intervener the National Association of Women and the Law (NAWL).

Vincent Calderhead and *Martha Jackman*, for the intervener the Charter Committee on Poverty Issues (CCPI).

Chantal Masse and *Fred Headon*, for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA).

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major and Binnie JJ. was delivered by

THE CHIEF JUSTICE —

I. Introduction

1 Louise Gosselin was born in 1959. She has led a difficult life, complicated by a struggle with psychological problems and drug and alcohol addictions. From time to time she has tried to work, attempting jobs such as cook, waitress, salesperson, and nurse's assistant, among many. But work would wear her down or cause her stress, and she would quit. For most of her adult life, Ms. Gosselin has received social assistance.

2 In 1984, the Quebec government altered its existing social assistance scheme in an effort to encourage young people to get job training and join the labour force. Under the scheme, which has since been repealed, the base amount payable to welfare recipients under 30 was lower than the base amount payable to those 30 and over. The new feature was that, to receive an amount comparable to that received by older people, recipients under 30 had to participate in a designated work activity or education program.

3 Ms. Gosselin contends that the lower base amount payable to people under 30 violates: (1) s. 15(1) of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*"), which guarantees equal treatment without discrimination based on grounds including age; (2) s. 7 of the *Canadian Charter*, which prevents the government from depriving individuals of liberty and security except in accordance with the principles of fundamental justice; and (3) s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). She further argues that neither of the alleged *Canadian Charter* violations can be demonstrably justified under s. 1.

4 On this basis, Ms. Gosselin asks this Court to order the Quebec government to pay the difference between the lower and the higher base amounts to all the people who: (1) lived in Quebec and were between the ages of 18 and 30 at any time from 1985 to 1989; (2) received the lower base amount payable to those under 30; and (3) did not participate in the government programs, for whatever reason. On her submissions, this would mean ordering the government to pay almost $389 million in benefits plus the interest accrued since 1985. Ms. Gosselin claims this remedy on behalf of over 75 000 unnamed class members, none of whom came forward in support of her claim.

5 In my view, the evidence fails to support Ms. Gosselin's claim on any of the asserted grounds. Accordingly, I would dismiss the appeal.

II. Facts and Decisions

6 In 1984, in the face of alarming and growing unemployment among young adults, the Quebec legislature made substantial amendments to the *Social Aid Act*, R.S.Q., c. A-16, creating a new scheme — the scheme at issue in this litigation. Section 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, made under the Act continued to cap the base amount of welfare payable to those under 30 at roughly one third of the base amount payable to those 30 and over. However, the 1984 scheme for the first time made it possible for people under 30 to increase their welfare payments, over and above the basic entitlement, to the same (or nearly the same) level as those in the 30-and-over group.

7 The new scheme was based on the philosophy that the most effective way to encourage and enable young people to join the workforce was to make increased benefits conditional on participation in one of three programs: On-the-job Training, Community Work, or Remedial Education. Participating in either On-the-job Training or Community Work boosted the welfare payment to a person under 30 up to the base amount for those 30 and over; participating in Remedial Education brought an under-30 within $100 of the 30-and-over base amount. The 30-and-over base amount still represented only 55 percent of the poverty level for a single person. For example, in 1987, non-participating under-30s were entitled to $170 per month, compared to $466 per month for welfare recipients 30 and over. According to Statistics Canada, the poverty level for a single person living in a large metropolitan area was $914 per month in 1987. Long-term dependence on welfare was neither socially desirable nor, realistically speaking, economically feasible. The Quebec scheme was designed to encourage under-30s to get training or basic education, helping them to find permanent employment and avoid developing a habit of relying on social assistance during these formative years.

8 The government initially made available 30 000 places in the three training programs. The record indicates that the percentage of eligible under-30s who actually participated in the programs averaged around one-third, but it does not explain this participation rate. Although Ms. Gosselin filed a class action on behalf of over 75 000 individuals, she provided no direct evidence of any other young person's experience with the government programs. She alone provided first-hand evidence and testimony as a class member in this case, and she in fact participated in each of the Community Work, Remedial Education and On-the-job Training Programs at various times. She ended up dropping out of virtually every program she started, apparently because of her own personal problems and personality traits. The testimony from one social worker, particularly as his clinic was attached to a psychiatric hospital and therefore received a disproportionate number of welfare recipients who also had serious psychological problems, does not give us a better or more accurate picture of the situation of the other class members, or of the relationship between Ms. Gosselin's personal difficulties and the structure of the welfare program.

9 Ms. Gosselin challenged the 1984 social assistance scheme on behalf of all welfare recipients under 30 subject to the differential regime from 1985 to 1989 (when, for reasons unrelated to this litigation, it was replaced by legislation that does not make age-based distinctions). As indicated above, she argued that Quebec's social assistance scheme violates s. 7 and s. 15(1) of the *Canadian Charter*, and s. 45 of the *Quebec Charter*. She asks the Court to declare s. 29(*a*) of the Regulation — which provided a lesser base welfare entitlement to people under 30 — to have been invalid from 1987 (when it lost the protection of the notwithstanding clause) to 1989, and to order the government of Quebec to reimburse all affected welfare recipients for the difference between what they actually received and what they would have received had they been 30 years of age or over, for a total of roughly $389 million, plus interest.

10 The trial judge, Reeves J., held that the claim was not supported by the evidence and that the distinction made by Quebec's social assistance regime was not discriminatory under s. 15(1) of the *Canadian Charter* because it was based on genuine considerations that corresponded to relevant characteristics of the under-30 age group, including the importance of providing under-30s with incentives to get training and work experience in the face of widespread youth unemployment: [1992] R.J.Q. 1647. He dismissed Ms. Gosselin's s. 7 claim, holding that s. 7's protection of security of the person does not extend to economic security and does not create a

constitutional right to be free from poverty. He also rejected the claim under s. 45 of the *Quebec Charter* on the ground that s. 45 does not create an entitlement to a particular level of state assistance.

11 All three judges of the Quebec Court of Appeal agreed that s. 7 of the *Canadian Charter* was not engaged in this case: 1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033. Mailhot J.A. found this case indistinguishable from *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, and dismissed the s. 15(1) claim accordingly. Baudouin J.A. found that Quebec's social assistance scheme breached s. 15(1), but he found the breach justified in a free and democratic society under s. 1 of the *Canadian Charter*. Robert J.A. would have found that the social assistance scheme breached s. 15(1) of the *Canadian Charter* and was not saved by s. 1, but he would have dismissed the claim for damages as inappropriate. On s. 45 of the *Quebec Charter*, only Robert J.A. found a breach, for which he held damages unavailable.

III. Issues

12 This case raises the important question of how to determine when the differential provision of government benefits crosses the line that divides appropriate tailoring in light of different groups' circumstances, and discrimination. To what extent does the *Canadian Charter* restrict a government's discretion to extend different kinds of help, and different levels of financial assistance, to different groups of welfare recipients? How much evidence is required to compel a government to retroactively reimburse tens of thousands of people for alleged shortfalls in their welfare payments, arising from a conditional benefits scheme? These issues have implications for the range of options available to governments throughout Canada in tailoring welfare programs to address the particular needs and circumstances of individuals requiring social assistance.

13 The specific legal issues are found in the stated constitutional questions:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

14 A further issue is whether s. 29(*a*) of the Regulation violates s. 45 of the *Quebec Charter*, and if so, whether a remedy is available.

15 A preliminary issue arises in connection with s. 33 of the *Canadian Charter* — the "notwithstanding clause". By virtue of *An Act respecting the Constitution Act, 1982*, R.S.Q., c. L-4.2, the Quebec legislature withdrew all Quebec laws from the *Canadian Charter* regime for five years from their inception. This means that the Act is immune from *Canadian Charter* scrutiny from June 23, 1982 to June 23, 1987, and the programs part of the scheme is immune from April 4, 1984 to April 4, 1989 (see *An Act to amend the Social Aid*

Act, S.Q. 1984, c. 5, ss. 4 and 5). It could be argued, therefore, that the scheme is protected from *Canadian Charter* scrutiny on s. 7 or s. 15(1) grounds for the whole period except for the four months from April 4, 1989 to August 1, 1989. This raises the further question of whether evidence on the legislation's impact outside the four-month period subject to *Canadian Charter* scrutiny can be used to generate conclusions about compliance with the *Canadian Charter* within the four-month period. In view of my conclusion that the program is constitutional in any event, I need not resolve these issues.

IV. Analysis

A. *Does the Social Assistance Scheme Violate Section 15(1) of the Canadian Charter?*

1. The Section 15 Test

16 Section 15(1) of the *Canadian Charter* provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

17 To establish a violation of s. 15(1), the claimant must establish on a civil standard of proof that: (1) the law imposes differential treatment between the claimant and others, in purpose or effect; (2) one or more enumerated or analogous grounds are the basis for the differential treatment; and (3) the law in question has a purpose or effect that is discriminatory in the sense that it denies human dignity or treats people as less worthy on one of the enumerated or analogous grounds. In this case, the first two elements are clear, and the analysis focuses on whether the scheme was discriminatory.

18 My colleague Bastarache J. and I agree that *Law* remains the governing standard. We agree that the s. 15(1) test involves a contextual inquiry to determine whether a challenged distinction, viewed from the perspective of a reasonable person in the claimant's circumstances, violates that person's dignity and fails to respect her as a full and equal member of society. We agree that a distinction made on an enumerated or analogous ground violates essential human dignity to the extent that it reflects or promotes the view that the individuals affected are less deserving of concern, respect, and consideration than others: *Law*, *supra*, at para. 42; *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143, at p. 171, *per* McIntyre J. We agree that a claimant bears the burden under s. 15(1) of showing on a civil standard of proof that a challenged distinction is discriminatory, in the sense that it harms her dignity and fails to respect her as a full and equal member of society. We agree that, if a claimant meets this burden, the burden shifts to the government to justify the distinction under s. 1.

19 Where we disagree is on whether the claimant in this particular case has met her burden of proof. We both examine the contextual factors enunciated in *Law*, but we reach different conclusions with respect to the adequacy of the factual record, the nature of the inferences we can draw from that record, and the deference owed to the findings of the trial judge. Whatever sympathy Ms. Gosselin's economic circumstances might provoke, I simply cannot find that she has met her burden of proof in showing that the Quebec government discriminated against her based on her age. In my respectful view, she has not demonstrated that the government treated her as less worthy than older welfare recipients, simply because it conditioned increased payments on her participation in programs designed specifically to integrate her into the workforce and to promote her long-term self-sufficiency.

20 We must approach the question of whether the scheme was discriminatory in light of the purpose of the s. 15 equality guarantee. That purpose is to ensure that governments respect the innate and equal dignity of every individual without discrimination on the basis of the listed or analogous grounds: *Law*, *supra*, at para. 51. The aspect of human dignity targeted by s. 15(1) is the right of each person to participate fully in society

and to be treated as an equal member, regardless of irrelevant personal characteristics, or characteristics attributed to the individual based on his or her membership in a particular group without regard to the individual's actual circumstances. As Iacobucci J. put it in *Law* (at para. 51):

> [T]he purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration.

21 Discrimination occurs when people are marginalized or treated as less worthy on the basis of irrelevant personal characteristics, without regard to their actual circumstances. The enumerated and analogous grounds of s. 15 serve as "legislative markers of suspect grounds associated with stereotypical, discriminatory decision making"; differential treatment based on these grounds invites judicial scrutiny: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at para. 7, *per* McLachlin and Bastarache JJ. However, not every adverse distinction made on the basis of an enumerated or analogous ground constitutes discrimination: see *Corbiere*. Some group-based distinctions may be appropriate or indeed promote substantive equality, as envisaged in s. 15(2): see *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37.

22 Section 15(1) seeks to ensure that all are treated as equally worthy of full participation in Canadian society, regardless of irrelevant personal characteristics or membership in groups defined by the enumerated and analogous grounds: see D. Greschner, "The Purpose of Canadian Equality Rights" (2002), 6 *Rev. Const. Stud.* 291. The focus is not on whether or not the claimant is subject to a formal distinction, but on whether the claimant has in substance been treated as less worthy than others, whether or not a formal distinction exists: *Andrews*, *supra*, at pp. 164-69, *per* McIntyre J.; *Law*, *supra*, at para. 25; *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3.

23 Section 15's purpose of protecting equal membership and full participation in Canadian society runs like a leitmotif through our s. 15 jurisprudence. *Corbiere* addressed the participation of off-reserve Aboriginal band members in band governance. *Eaton* and *Eldridge* spoke of the harms of excluding disabled individuals from the larger society: *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624. *Vriend* dealt with a legislature's exclusion of the ground of sexual orientation from a human rights statute protecting individuals from discrimination based on a range of other grounds: *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. *Granovsky* resonated with the language of belonging: "Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself": *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 30.

24 To determine whether a distinction made on an enumerated or analogous ground is discriminatory, we must examine its context. As Binnie J. stated in *Granovsky*, *supra*, at para. 59, citing U.S. Supreme Court Marshall J.'s partial dissent in *Cleburne v. Cleburne Living Centre, Inc.*, 473 U.S. 432 (1985): "[a] sign that says 'men only' looks very different on a bathroom door than a courthouse door". In each case, we must ask whether the distinction, viewed in context, treats the subject as less worthy, less imbued with human dignity, on the basis of an enumerated or analogous ground.

25 The need for a contextual inquiry to establish whether a distinction conflicts with s. 15(1)'s purpose is the central lesson of *Law*. The issue, as my colleagues and I all agree, is whether "a reasonable person in circumstances similar to those of the claimant would find that the legislation which imposes differential treatment

has the effect of demeaning his or her dignity" having regard to the individual's or group's traits, history, and circumstances: *Law*, at para. 60, followed in *Lovelace*, *supra*, at para. 55. As an aid to determining whether a distinction has a discriminatory purpose or effect under part (3) of this test, *Law* proposes an investigation of four contextual factors relating to the challenged distinction: (1) pre-existing disadvantage; (2) correspondence between the ground of distinction and the actual needs and circumstances of the affected group; (3) the ameliorative purpose or effect of the impugned measure for a more disadvantaged group; and (4) the nature and scope of the interests affected.

26 Both the purpose of the scheme and its effect must be considered in making this evaluation. I agree with Bastarache J. that the effects of the scheme are critical. However, under *Law*, the context of a given legislative scheme also includes its purpose. Simply put, it makes sense to consider what the legislator intended in determining whether the scheme denies human dignity. Intent, like the other contextual factors, is not determinative. Our case law has established that even a well-intentioned or facially neutral scheme can have the effect of discriminating: *BCGSEU*, *supra*. The scheme here is not facially neutral: we are dealing with an explicit distinction. The purpose of the distinction, in the context of the overall legislative scheme, is a factor that a reasonable person in the position of the complainant would take into account in determining whether the legislator was treating him or her as less worthy and less deserving of concern, respect and consideration than others.

27 I emphasize that a beneficent purpose will not shield an otherwise discriminatory distinction from judicial scrutiny under s. 15(1). Legislative purpose is relevant only insofar as it relates to whether or not a reasonable person in the claimant's position would feel that a challenged distinction harmed her dignity. As a matter of common sense, if a law is designed to promote the claimant's long-term autonomy and self-sufficiency, a reasonable person in the claimant's position would be less likely to view it as an assault on her inherent human dignity. This does not mean that one must uncritically accept the legislature's stated purpose at face value: a reasonable person in the claimant's position would not accept the exclusion of women from the workplace based merely on the legislature's assertion that this is for women's "own good". However, where the legislature is responding to certain concerns, and where those concerns appear to be well founded, it is legitimate to consider the legislature's purpose as part of the overall contextual evaluation of a challenged distinction from the claimant's perspective, as called for in *Law*. This is reflected in the questions Iacobucci J. asked in *Law*: "Do the impugned CPP provisions, in purpose or effect, violate essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice?"; "Does the law, in purpose or effect, perpetuate the view that people under 45 are less capable or less worthy of recognition or value as human beings or as members of Canadian society?" (para. 99 (emphasis added)).

2. Applying the Test

28 The Regulation at issue made a distinction on the basis of an enumerated ground, age. People under 30 were subject to a different welfare regime than people 30 and over. The question is whether this distinction in purpose or effect resulted in substantive inequality contrary to s. 15(1)'s purpose of ensuring that governments treat all individuals as equally worthy of concern, respect, and consideration. More precisely, the question is whether a reasonable person in Ms. Gosselin's position would, having regard to all the circumstances and the context of the legislation, conclude that the Regulation in purpose or effect treated welfare recipients under 30 as less worthy of respect than those 30 and over, marginalizing them on the basis of their youth.

29 To answer this question, we must consider the four factors set out in *Law*. None of these factors is a prerequisite for finding discrimination, and not all factors will apply in every case. The list of factors is neither absolute nor exhaustive. In addition, the factors may overlap, since they are all designed to illuminate the relevant contextual considerations surrounding a challenged distinction. Nonetheless, the four factors provide a useful guide to evaluating an allegation of discrimination, and I will examine each of them in turn.

(a) *Pre-existing Disadvantage*

30 A key marker of discrimination and denial of human dignity under s. 15(1) is whether the affected individual or group has suffered from "pre-existing disadvantage, vulnerability, stereotyping, or prejudice": *Law*, at para. 63. Historic patterns of discrimination against people in a group often indicate the presence of stereotypical or prejudicial views that have marginalized its members and prevented them from participating fully in society. This, in turn, raises the strong possibility that current differential treatment of the group may be motivated by or may perpetuate the same discriminatory views. The contextual factor of pre-existing disadvantage invites us to scrutinize group-based distinctions carefully to ensure that they are not based, either intentionally or unconsciously, on these kinds of unfounded generalizations and stereotypes.

31 Many of the enumerated grounds correspond to historically disadvantaged groups. For example, it is clear that members of particular racial or religious groups should not be excluded from receiving public benefits on account of their race or religion. However, unlike race, religion, or gender, age is not strongly associated with discrimination and arbitrary denial of privilege. This does not mean that examples of age discrimination do not exist. But age-based distinctions are a common and necessary way of ordering our society. They do not automatically evoke a context of pre-existing disadvantage suggesting discrimination and marginalization under this first contextual factor, in the way that other enumerated or analogous grounds might.

32 To expand on the earlier example, a sign on a courthouse door proclaiming "Men Only" evokes an entire history of discrimination against a historically disadvantaged class; a sign on a barroom door that reads "No Minors" fails to similarly offend. The fact that "[e]ach individual of any age has personally experienced all earlier ages and expects to experience the later ages" (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-54) operates against the arbitrary marginalization of people in a particular age group. Again, this does not mean that age is a "lesser" ground for s. 15 purposes. However, pre-existing disadvantage and historic patterns of discrimination against a particular group do form part of the contextual evaluation of whether a distinction is discriminatory, as called for in *Law*. Concerns about age-based discrimination typically relate to discrimination against people of advanced age who are presumed to lack abilities that they may in fact possess. Young people do not have a similar history of being undervalued. This is by no means dispositive of the discrimination issue, but it may be relevant, as it was in *Law*.

33 Both as a general matter, and based on the evidence and our understanding of society, young adults as a class simply do not seem especially vulnerable or undervalued. There is no reason to believe that individuals between ages 18 and 30 in Quebec are or were particularly susceptible to negative preconceptions. No evidence was adduced to this effect, and I am unable to take judicial notice of such a counter-intuitive proposition. Indeed, the opposite conclusion seems more plausible, particularly as the programs participation component of the social assistance scheme was premised on a view of the greater long-term employability of under-30s, as compared to their older counterparts. Neither the nature of the distinction at issue nor the evidence suggests that the affected group of young adults constitutes a group that historically has suffered disadvantage, or that is at a particular risk of experiencing adverse differential treatment based on the attribution of presumed negative characteristics: see *Lovelace*, *supra*, at para. 69.

34 With regard to this contextual factor, Ms. Gosselin is in the same position as Mrs. Law. In *Law*, Iacobucci J. stated (at para. 95):

> Relatively speaking, adults under the age of 45 have not been consistently and routinely subjected to the sorts of discrimination faced by some of Canada's discrete and insular minorities. For this reason, it will be more difficult as a practical matter for this Court to reason, from facts of which the Court may

> appropriately take judicial notice, that the legislative distinction at issue violates the human dignity of the appellant.

If anything, people under 30 appear to be advantaged over older people in finding employment. As Iacobucci J. also stated in *Law*, with respect to adults under 45 (at para. 101):

> It seems to me that the increasing difficulty with which one can find and maintain employment as one grows older is a matter of which a court may appropriately take judicial notice. Indeed, this Court has often recognized age as a factor in the context of labor force attachment and detachment. For example, writing for the majority in *McKinney*, [1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229], LaForest J. stated as follows, at p. 299:
>
> > Barring specific skills, it is generally known that persons over 45 have more difficulty finding work than others. They do not have the flexibility of the young, a disadvantage often accentuated by the fact that the latter are frequently more recently trained in the more modern skills.

Iacobucci J. went on to note that "[s]imilar thoughts were expressed in *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC), [1992] 1 S.C.R. 986, at pp. 998-99, *per* Iacobucci J., and at pp. 1008-9, *per* McLachlin J., [. . . and] *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, at pp. 881-83, *per* McLachlin J."

35 Given the lack of pre-existing disadvantage experienced by young adults, Ms. Gosselin attempts to shift the focus from age to welfare, arguing that all welfare recipients suffer from stereotyping and vulnerability. However, this argument does not assist her claim. The ground of discrimination upon which she founds her claim is age. The question with respect to this contextual factor is therefore whether the targeted age-group, comprising young adults aged 18 to 30, has suffered from historic disadvantage as a result of stereotyping on the basis of age. Re-defining the group as welfare recipients aged 18 to 30 does not help us answer that question, in particular because the 30-and-over group that Ms. Gosselin asks us to use as a basis of comparison also consists entirely of welfare recipients.

36 I conclude that the appellant has not established that people aged 18 to 30 have suffered historical disadvantage on the basis of their age. There is nothing to suggest that people in this age group have historically been marginalized and treated as less worthy than older people.

(b) *Relationship Between Grounds and the Claimant Group's Characteristics or Circumstances*

37 The second contextual factor we must consider in determining whether the distinction is discriminatory in the sense of denying human dignity and equal worth is the relationship between the ground of distinction (age) and the actual characteristics and circumstances of the claimant's group: *Law*, at para. 70. A law that is closely tailored to the reality of the affected group is unlikely to discriminate within the meaning of s. 15(1). By contrast, a law that imposes restrictions or denies benefits on account of presumed or unjustly attributed characteristics is likely to deny essential human worth and to be discriminatory. Both purpose and effect are relevant here, insofar as they would affect the perception of a reasonable person in the claimant's position: see *Law*, at para. 96.

38 I turn first to purpose in order to evaluate whether or not the rationale for the challenged distinction corresponded to the actual circumstances of under-30s subject to differential welfare scheme. The evidence indicates that the purpose of the challenged distinction, far from being stereotypical or arbitrary, corresponded to the actual needs and circumstances of individuals under 30. In the late 1960s and early 1970s, the unemployment rate among young Quebecers was relatively low, as jobs were readily available. However, circumstances changed dramatically in the course of the ensuing years. First, North America experienced a deep recession in the early 1980s, which hit Quebec hard and drove unemployment from a traditional rate hovering around 8 percent to a peak of 14.4 percent of the active population in 1982, and among the young from 6 percent

(1966) to 23 percent. At the same time, the federal government tightened eligibility requirements for federal unemployment insurance benefits, and the number of young people entering the job market for the first time surged. These three events caused an unprecedented increase in the number of people capable of working who nevertheless ended up on the welfare rolls.

39 The situation of young adults was particularly dire. The unemployment rate among young adults was far higher than among the general population. People under 30, capable of working and without any dependants, made up a greater proportion of welfare recipients than ever before. Moreover, this group accounted for the largest — and steadily growing — proportion of new entrants into the welfare system: by 1983 fully two-thirds of new welfare recipients were under 30, and half were under the age of 23. In addition to coming onto the welfare rolls in ever greater numbers, younger individuals did so for increasingly lengthy periods of time. In 1975, 60 percent of welfare recipients under 30 not incapable of working left the welfare rolls within six months. By 1983, only 30 percent did so.

40 Behind these statistics lay a complex picture. The "new economy" emerging in the 1980s offered diminishing prospects for unskilled or under-educated workers. At the same time, a disturbing trend persisted of young Quebecers dropping out of school and trying to join the workforce. The majority of unemployed youths in the early 1980s were school drop-outs. Unemployed youths were, on average, significantly less educated than the general population, and the unemployment rate among young people with fewer than eight years of education stood at 40 percent to 60 percent. Lack of skills and basic education were among the chief causes of youth unemployment.

41 The government's short-term purpose in the scheme at issue was to get recipients under 30 into work and training programs that would make up for the lower base amount they received while teaching them valuable skills. The differential regime of welfare payments was tailored to help the burgeoning ranks of unemployed youths obtain the skills and basic education they needed to get permanent jobs. The mechanism was straightforward. In order to increase their welfare benefits, people under 30 would be required to participate in On-the-job Training, Community Work or Remedial Education Programs. Participating in the training and community service programs would bring welfare benefits up to the basic level payable to the 30-and-over group, and in the education program to about $100 less.

42 The government's longer-term purpose was to provide young welfare recipients with precisely the kind of remedial education and skills training they lacked and needed in order eventually to integrate into the workforce and become self-sufficient. This policy reflects the practical wisdom of the old Chinese proverb: "Give a man a fish and you feed him for a day. Teach him how to fish and you feed him for a lifetime." This was not a denial of young people's dignity; it was an affirmation of their potential.

43 Simply handing over a bigger welfare cheque would have done nothing to help welfare recipients under 30 escape from unemployment and its potentially devastating social and psychological consequences above and beyond the short-term loss of income. Moreover, opposition to the incentive program entirely overlooks the cost to young people of being on welfare during the formative years of their working lives. For young people without significant educational qualifications, skills, or experience, entering into the labour market presents considerable difficulties. A young person who relies on welfare during this crucial initial period is denied those formative experiences which, for those who successfully undertake the transition into the productive workforce, lay the foundation for economic self-sufficiency and autonomy, not to mention self-esteem. The longer a young person stays on welfare, the more difficult it becomes to integrate into the workforce at a later time. In this way, reliance on welfare can contribute to a vicious circle of inability to find work, despair, and increasingly dismal prospects.

44 Instead of turning a blind eye to these problems, the government sought to tackle them at their roots, designing social assistance measures that might help welfare recipients achieve long-term autonomy. Because federal rules in effect at the time prohibited making participation in the programs mandatory, the province's only real leverage in promoting these programs lay in making participation a prerequisite for increases in welfare. Even if one does not agree with the reasoning of the legislature or with its priorities, one cannot argue based on this record that the legislature's purpose lacked sufficient foundation in reality and common sense to fall within the bounds of permissible discretion in establishing and fine-tuning a complex social assistance scheme. Logic and common sense support the legislature's decision to structure its social assistance programs to give young people, who have a greater potential for long-term insertion into the workforce than older people, the incentive to participate in programs specifically designed to provide them with training and experience. As indicated above, the government's purpose is a relevant contextual factor in the s. 15(1) analysis insofar as it relates to how a reasonable person in the claimant's circumstances would have perceived the incentive-based welfare regime. In this case, far from ignoring the actual circumstances of under-30s, the scheme at issue was designed to address their needs and abilities. A reasonable person in the claimant's circumstances would have taken this into account.

45 Turning to effect, Ms. Gosselin argues that the regime set up under the Regulation in fact failed to address the needs and circumstances of welfare recipients under 30 because the ability to "top up" the basic entitlement by participating in programs was more theoretical than real. She argues that, notwithstanding the legislature's intentions, the practical consequence of the Regulation was to abandon young welfare recipients, leaving them to survive on a grossly inadequate sum of money. In this way the program did not correspond to their actual needs, she argues, and amounted to discriminatory marginalization of the affected group.

46 The main difficulty with this argument is that the trial judge, after a lengthy trial and careful scrutiny of the record, found that Ms. Gosselin had failed to establish actual adverse effect. Reeves J. cautioned against generalizing from Ms. Gosselin's experience, and against over-reliance on opinion statements by experts in this regard, given the absence of any evidence to support the experts' claims about the material situation of individuals in the under-30 age group. He concluded: [TRANSLATION] "It is therefore highly doubtful that the representative plaintiff, acting on behalf of some 75 000 individuals, has discharged her burden of proof concerning whether the law had adverse effects on them" (p. 1664).

47 I can find no basis upon which this Court can set aside this finding. There is no indication in the record that any welfare recipient under 30 wanting to participate in one of the programs was refused enrollment. Louise Gosselin, who in fact participated in each of the three programs, was the only witness to provide first-hand testimony about the programs at trial. There is no evidence that anyone who tried to access the programs was turned away, or that the programs were designed in such a way as to systematically exclude under-30s from participating. In fact, these programs were initially available only to people under 30 (and, in the case of the Remedial Education Program, to heads of single-parent households 30 and over); they were opened up to all welfare recipients in 1989. As the trial judge emphasized, the record contains no first-hand evidence supporting Ms. Gosselin's claim about the difficulties with the programs, and no indication that Ms. Gosselin can be considered representative of the under-30 class. It is, in my respectful opinion, utterly implausible to ask this Court to find the Quebec government guilty of discrimination under the *Canadian Charter* and order it to pay hundreds of millions of taxpayer dollars to tens of thousands of unidentified people, based on the testimony of a single affected individual. Nor does Ms. Gosselin present sufficient evidence that her own situation was a result of discrimination in violation of s. 15(1). The trial judge did not find evidence indicating a violation, and my review of the record does not reveal any error in this regard.

48 It is unnecessary to engage in the exercise of surmising how many program places would have been required had every eligible welfare recipient under 30 chosen to participate. In fact, contrary to her allegation,

Ms. Gosselin's own experience clearly establishes that participation was a real possibility. For most of the relevant period, Ms. Gosselin's benefits were increased as a result of program participation. On those occasions when Ms. Gosselin dropped out of programs, the record indicates that this was due to personal problems, which included psychological and substance abuse components, rather than to flaws in the programs themselves. Ms. Gosselin's experience suggests that even individuals with serious problems were capable of supplementing their income under the impugned regime.

49 Ms. Gosselin also objects to the fact that the Remedial Education Program yielded less of an increase in benefits than the other programs, leaving participants in that program with a lower basic entitlement than the older group. However, this seems to amount to little more than an incentive for young individuals to prefer some programs (On-the-job Training or Community Work) over another (Remedial Education). In addition, it is worth noting that the government provided books and other materials to Remedial Education participants free of charge. The decision to structure the programs in this particular fashion may be good or bad policy, but it does not establish a breach of the claimant's essential human dignity, or a lack of correlation between the provision and the affected group's actual circumstances.

50 My colleague Bastarache J. relies on the conclusion of Robert J.A., dissenting, that, based on the expert evidence, there were not enough places available in the programs to meet the needs of all welfare recipients under 30. This evidence was before the trial judge, who rejected it as insufficient and specifically cautioned against over-reliance on the experts' opinions. With respect, I am of the view that it is not open to this Court to revisit the trial judge's conclusion absent demonstrated error. Furthermore, my colleague appears to accept in the course of his s. 7 analysis that Ms. Gosselin's problems cannot be attributed solely to the age-based distinction she challenges under s. 15. He states, "[i]n this case, the threat to the appellant's right to security of the person [i.e., her poverty] was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance" (para. 217). And again: "[The appellant] has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions" (para. 222); "nor did the underinclusive nature of the Regulation substantially prevent or inhibit the appellant from protecting her own security" (para. 223).

51 My colleague Bastarache J. also relies on the claim that only a very small percentage of welfare recipients under 30 actually received the base amount allocated to those 30 and over, because the majority of participants tended to opt for the lower-paying Remedial Education Program (Robert J.A. cites a figure of 11.2 percent, apparently from an economist's 1988 report). The first point is, again, that the trial judge did not find Ms. Gosselin's statistical and expert evidence convincing, particularly given the absence of first-hand testimony from actual class members. But there are other problems. There is no evidence about why only about one-third of eligible welfare recipients participated in the programs. Nor is there evidence about the actual income of under-30s who did not participate; clearly "aid received" is not necessarily equivalent to "total income".

52 For these reasons, the appellant has not shown that the impugned Regulation effectively excluded her or others like her from the protection against extreme poverty afforded by the social security scheme. Rather, the effect was to cause young people to attend training and education programs as a condition of receiving the full "basic needs" level of social assistance. I do not believe that making payments conditional in this way violated the dignity or human worth of persons under 30 years of age. The condition was not imposed as a result of negative stereotypes. The condition did not effectively consign the appellant or others like her to extreme poverty. Finally, the condition did not force the appellant to do something that demeaned her dignity or human worth.

53 The long-term effects of the Regulation are also relevant in considering how a reasonable person in the claimant's position would have viewed the government program. The argument is that it imposed short-term

pain. But the government thought that in the long run the program would benefit recipients under 30 by encouraging them to get training and find employment. We do not know whether it did so; the fact that the scheme was subsequently revamped may suggest the contrary. The point is simply this: Ms. Gosselin has not established, on the record before us, that the scheme did not correspond to the needs and situation of welfare recipients under 30 in the short or the long term, or that a reasonable person in her circumstances would have perceived that the government's efforts to equip her with training rather than simply giving her a monthly stipend denied her human dignity or treated her as less than a "full perso[n]" (Bastarache J., at para. 258).

54 It may well be that some under-30s fell through the cracks of the system and suffered poverty. However, absent concrete evidence, it is difficult to infer from this that the program failed to correspond to the actual needs of under-30s. I find no basis to interfere with the trial judge's conclusion that the record here simply does not support the contention of adverse effect on younger welfare recipients. This makes it difficult to conclude that the effect of the program did not correspond to the actual situation of welfare recipients under 30.

55 I add two comments. Perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group is not required to find that a challenged provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. As Iacobucci J. noted in *Law*, *supra*, at para. 105, we should not demand "that legislation must always correspond perfectly with social reality in order to comply with s. 15(1) of the *Charter*". Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. No matter what measures the government adopts, there will always be some individuals for whom a different set of measures might have been preferable. The fact that some people may fall through a program's cracks does not show that the law fails to consider the overall needs and circumstances of the group of individuals affected, or that distinctions contained in the law amount to discrimination in the substantive sense intended by s. 15(1).

56 Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were correct. Bastarache J. argues that the distinction between people under 30 and older people lacks a "rational basis" because it is "[b]ased on the unverifiable presumption that people under 30 had better chances of employment and lower needs" (para. 248). This seems to place on the legislator the duty to verify all its assumptions empirically, even where these assumptions are reasonably grounded in everyday experience and common sense. With respect, this standard is too high. Again, this is primarily a disagreement as to evidence, not as to fundamental approach. The legislator is entitled to proceed on informed general assumptions without running afoul of s. 15, *Law*, at para. 106, provided these assumptions are not based on arbitrary and demeaning stereotypes. The idea that younger people may have an easier time finding employment than older people is not such a stereotype. Indeed, it was relied on in *Law* to justify providing younger widows and widowers with a lesser survivor's benefit.

57 A final objection is that the selection of 30 years of age as a cut-off failed to correspond to the actual situation of young adults requiring social assistance. However, all age-based legislative distinctions have an element of this literal kind of "arbitrariness". That does not invalidate them. Provided that the age chosen is reasonably related to the legislative goal, the fact that some might prefer a different age — perhaps 29 for some, 31 for others — does not indicate a lack of sufficient correlation between the distinction and actual needs and circumstances. Here, moreover, there is no evidence that a different cut-off age would have been preferable to the one selected.

58 I conclude that the record in this case does not establish lack of correlation in purpose or effect between the ground of age and the needs and circumstances of welfare recipients under 30 in Quebec.

(c) *The Ameliorative Purpose or Effect of the Impugned Law Upon a More Disadvantaged Person or Group in Society*

59 A third factor to be considered in determining whether the group-based devaluation of human worth targeted by s. 15 is established, is whether the challenged distinction was designed to improve the situation of a more disadvantaged group. In *Law*, the Court took into account that the lower pensions for younger widows and widowers were linked to higher pensions for needier, less advantaged, widows and widowers: *Law*, at para. 103.

60 Here there is no link between creating an incentive scheme for young people involving lower benefits coupled with a program participation requirement, and providing more benefits for older or more disadvantaged people. From this perspective, this contextual factor is neutral. More broadly, the distinction in benefits can be argued to reflect the different situations of recipients under 30 and recipients 30 and over. It is true that younger people require as much to live as older people. However, we may take judicial notice of the increased difficulty older people may encounter in finding employment, as this Court did in *Law*. At the same time, the benefits of training and entry into the workforce are greater for younger people than for older people: younger people have a longer career span ahead of them once they join the labour force, and, for them, dependence on welfare risks establishing a chronic pattern at an early age.

61 Viewed thus, the differential treatment of older and younger welfare recipients does not indicate that older recipients were more valued or respected than younger recipients. Older welfare recipients were, if not more disadvantaged (as in *Law*), "differently disadvantaged". Their different positions with respect to long-term employability as compared to younger people provided a reasonable basis for the legislature to tailor its programs to their different situations and needs. The provision of different initial amounts of monetary support to each of the two groups does not indicate that one group's dignity was prized above the other's. Those 30 and over and under-30s were not "similarly situated" in ways relevant to determining the appropriate level of social assistance in the form of unconditional welfare payments.

62 More generally, as discussed above, the Regulation was aimed at ameliorating the situation of welfare recipients under 30. A reasonable person in Ms. Gosselin's position would take this into account in determining whether the scheme treated under-30s as less worthy of respect and consideration than those 30 and over.

(d) *Nature and Scope of the Interests Affected by the Impugned Law*

63 This factor directs us to consider the impact of the impugned law — how "severe and localized the . . . consequences [are] on the affected group": *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at para. 63, quoted in *Law*, *supra*, at para. 74.

64 The trial judge, as noted, was unable to conclude that the evidence established actual adverse effects on welfare recipients under 30. The legislature thought it was helping under-30 welfare recipients; while we can surmise that the lower amount caused under-30s greater financial anxiety in the short term than a larger payment would have, we do not know how this actually played out in the context of the program participation scheme, or whether those 30 and over, who were only receiving 55 percent of the poverty level, experienced similar anxiety. The complainant argues that the lesser amount harmed under-30s and denied their essential human dignity by marginalizing them and preventing them from participating fully in society. But again, there is no evidence to

support this claim. For those under 30 who were unable, for whatever reason, to increase their base entitlement, the lower base amount might have represented a significant adverse impact, depending on the availability of other resources, like family assistance. But even if we are prepared to accept that some young people must have been pushed well below the poverty line, we do not know how many, nor for how long. In this situation, it is difficult to gauge the nature and scope of the interests affected by the Regulation. We return once more to the central difficulty faced by the trial judge: despite Ms. Gosselin's claim to speak on behalf of 75 000 young people, she simply did not give the court sufficient evidence to support her allegation that the lower base amount was discriminatory, either against her or against the class as a whole.

65 Assessing the severity of the consequences also requires us to consider the positive impact of the legislation on welfare recipients under 30. The evidence shows that the regime set up under the *Social Aid Act* sought to promote the self-sufficiency and autonomy of young welfare recipients through their integration into the productive workforce, and to combat the pernicious side effects of unemployment and welfare dependency. The participation incentive worked towards the realization of goals that go to the heart of the equality guarantee: self-determination, personal autonomy, self-respect, feelings of self-worth, and empowerment. These are the stuff and substance of essential human dignity: see *Law*, *supra*, at para. 53. I respectfully disagree with the suggestion that the incentive provisions somehow indicated disdain for young people or a belief that they could be made productive only through coercion. On the contrary, the program's structure reflected faith in the usefulness of education and the importance of encouraging young people to develop their skills and employability, rather than being consigned to dependence and unemployment. In my view, the interest promoted by the differential treatment at issue in this case is intimately and inextricably linked to the essential human dignity that animates the equality guarantee set out at s. 15(1) of the *Canadian Charter*.

66 We must decide this case on the evidence before us, not on hypotheticals, or on what we think the evidence ought to show. My assessment of the evidence leads me to conclude that, notwithstanding its possible short-term negative impact on the economic circumstances of some welfare recipients under 30 as compared to those 30 and over, the thrust of the program was to improve the situation of people in this group, and to enhance their dignity and capacity for long-term self-reliance. The nature and scope of the interests affected point not to discrimination but to concern for the situation of welfare recipients under 30. Absent more persuasive evidence to the contrary, I cannot conclude that a reasonable person in the claimant's position would have experienced this scheme as discriminatory, based on the contextual factors and the concern for dignity emphasized in *Law*.

(e) *Summary of Contextual Factors Analysis*

67 The question is whether a reasonable welfare recipient under age 30 who takes into account the contextual factors relevant to the claim would conclude that the lower base amount provided to people under 30 treated her, in purpose or effect, as less worthy and less deserving of respect, consideration and opportunity than people 30 and over. On the evidence before us, the answer to this question must be no.

68 Looking at the four contextual factors set out in *Law*, I cannot conclude that the denial of human dignity fundamental to a finding of discrimination is established. This is not a case where the complainant group suffered from pre-existing disadvantage and stigmatization. Lack of correspondence between the program and the actual circumstances of recipients under 30 is not established, in either purpose or effect. The "ameliorative purpose" factor is neutral with respect to discrimination. Finally, the findings of the trial judge and the evidence do not support the view that the overall impact on the affected individuals undermined their human dignity and their right to be recognized as fully participating members of society, notwithstanding their membership in the class affected by the distinction.

69 A reasonable welfare recipient under 30 might have concluded that the program was harsh, perhaps even misguided. (As noted, it eventually was repealed.) But she would not reasonably have concluded that it treated younger people as less worthy or less deserving of respect in a way that had the purpose or effect of marginalizing or denigrating younger people in our society. If anything, she would have concluded that the program treated young people as more able than older people to benefit from training and education, more able to get and retain a job, and more able to adapt to their situations and become fully participating and contributing members of society.

70 Far from relying on false stereotypes, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance, considered from both short-term and long-term perspectives. I do not suggest that stereotypical thinking must always be present for a finding that s. 15 is breached. However, its absence is a factor to be considered. The age-based distinction was made for an ameliorative, non-discriminatory purpose, and its social and economic thrust and impact were directed to enhancing the position of young people in society by placing them in a better position to find employment and live fuller, more independent lives. Nor, on the findings of the trial judge, is it established that the program's effect was to undermine the worth of its members in comparison with older people.

71 The most compelling way to put the claimant's case is this. We are asked to infer from the apparent lack of widespread participation in programs that some recipients under 30 must at some time have been reduced to utter poverty. From this we are further asked to infer that at least some of these people's human dignity and ability to participate as fully equal members of society were compromised.

72 The inferences that this argument asks us to draw are problematic. The trial judge, as discussed, was unable to find evidence of actual adverse impact on under-30s as a group. Moreover, the argument rests on a standard of perfection in social programs. As this Court noted in *Law*, that is not the standard to be applied. Some people will always fall through the cracks of social programs. That does not establish denial of human dignity and breach of s. 15. What is required is demonstration that the program as a whole and in the context of *Law*'s four factors in purpose or effect denied human dignity to the affected class, penalizing or marginalizing them simply for being who they were. In this case, that has not been shown.

73 In many respects, the case before us is strikingly similar to *Law*. The provision there drew an age-based distinction in a survivor's entitlement to pension benefits, allocating no benefit to survivors who were under 35 years of age at the time of the contributor's death, in the absence of specific circumstances provided for in the legislation. The provision here draws an age-based distinction in an unemployed individual's entitlement to welfare benefits, allocating a reduced monetary benefit coupled with a program participation incentive to unemployed individuals who are under 30 years of age at the time of receipt, in the absence of specific circumstances provided for in the Regulation. The appellant in *Law* argued that the distinction, however well intentioned, was based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant here argues that the distinction, however well intentioned, is based on a faulty assumption that younger people can more easily obtain employment than older people. The appellant in *Law* emphasized short-term differences, while the respondent emphasized long-term needs. The appellant here emphasizes short-term differences, while the respondent emphasizes long-term needs. The Court held in *Law* that while the law contained a facial age-based distinction that treated younger people adversely, "the differential treatment does not reflect or promote the notion that they are less capable or less deserving of concern, respect, and consideration, when the dual perspectives of long-term security and the greater opportunity of youth are considered" (para. 102). Similarly here, the aim of the legislation in averting long-term dependency on welfare and promoting insertion into the labour force, coupled with the provision of job training and remedial education programs, leads to the conclusion that the differential treatment does not reflect or promote the notion that young people are less capable or less deserving of concern, respect, and consideration. The Court found in *Law* that the legislation's failure to correspond perfectly to the circumstances of each and every individual member of the affected group did not "affect the ultimate conclusion that the legislation is consonant with the human dignity and freedom of the appellant" (para. 106). Likewise here,

the legislation's arguable failure to correspond perfectly to Ms. Gosselin's personal circumstances, the only circumstances described in the record, does not affect the ultimate conclusion that the legislation is consonant with her human dignity and freedom, and with the human dignity and freedom of under-30s generally.

74 I conclude that the impugned law did not violate the essential human dignity of welfare recipients under 30. We must base our decision on the record before us, not on personal beliefs or hypotheticals. On the facts before us, the law did not discriminate against Ms. Gosselin, either individually or as a member of the group of 18- to 30-year-olds in Quebec. The differential welfare scheme did not breach s. 15(1) of the *Canadian Charter*.

B. *Does the Social Assistance Scheme Violate Section 7 of the Canadian Charter?*

75 Section 7 states that "[e]veryone has the right to life, liberty and security of the person" and "the right not to be deprived" of these "except in accordance with the principles of fundamental justice". The appellant argues that the s. 7 right to security of the person includes the right to receive a particular level of social assistance from the state adequate to meet basic needs. She argues that the state deprived her of this right by providing inadequate welfare benefits, in a way that violated the principles of fundamental justice. There are three elements to this claim: (1) that the legislation affects an interest protected by the right to life, liberty and security of the person within the meaning of s. 7; (2) that providing inadequate benefits constitutes a "deprivation" by the state; and (3) that, if deprivation of a right protected by s. 7 is established, this was not in accordance with the principles of fundamental justice. The factual record is insufficient to support this claim. Nevertheless, I will examine these three elements.

76 The first inquiry is whether the right here contended for — the right to a level of social assistance sufficient to meet basic needs — falls within s. 7. This requires us to consider the content of the right to life, liberty and security of the person, and the nature of the interests protected by s. 7.

77 As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law" (*G. (J.)*, at para. 65). This view limits the potential scope of "life, liberty and security of the person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, 1990 CanLII 105 (SCC), [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*"), at pp. 1173-74, *per* Lamer J. (as he then was), writing for himself; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at paras. 21-23, *per* Lamer C.J., again writing for himself alone; and *G. (J.)*, *supra*, for the majority. This approach was affirmed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, *per* Bastarache J. for the majority.

78 This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law, as Lamer C.J. observed in *G. (J.)*, *supra*. Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances: see *Blencoe*, *supra* (human rights process); *B. (R.)*, *supra* (parental rights in relation to state-imposed medical treatment); *G. (J.)*, *supra* (parental rights in the custody process); *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, 1997 CanLII 336 (SCC), [1997] 3 S.C.R. 925 (liberty to refuse state-imposed addiction treatment). Bastarache J. argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion

may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is necessary in order for s. 7 to be implicated.

79 In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration. The issue here is not whether the administration of justice is implicated — plainly it is not — but whether the Court ought to apply s. 7 despite this fact.

80 Can s. 7 apply to protect rights or interests wholly unconnected to the administration of justice? The question remains unanswered. In *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 56, Dickson C.J., for himself and Lamer J. entertained (without deciding on) the possibility that the right to security of the person extends "to protect either interests central to personal autonomy, such as a right to privacy". Similarly, in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927, at p. 1003, Dickson C.J., for the majority, left open the question of whether s. 7 could operate to protect "economic rights fundamental to human . . . survival". Some cases, while on their facts involving the administration of justice, have described the rights protected by s. 7 without explicitly linking them to the administration of justice: *B.(R.)*, *supra*; *G. (D.F.)*, *supra*.

81 Even if s. 7 could be read to encompass economic rights, a further hurdle emerges. Section 7 speaks of the right not to be deprived of life, liberty and security of the person, except in accordance with the principles of fundamental justice. Nothing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person. Rather, s. 7 has been interpreted as restricting the state's ability to deprive people of these. Such a deprivation does not exist in the case at bar.

82 One day s. 7 may be interpreted to include positive obligations. To evoke Lord Sankey's celebrated phrase in *Edwards v. Attorney-General for Canada*, 1929 CanLII 438 (UK JCPC), [1930] A.C. 124 (P.C.), at p. 136, the *Canadian Charter* must be viewed as "a living tree capable of growth and expansion within its natural limits": see *Reference re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180, *per* McLachlin J. It would be a mistake to regard s. 7 as frozen, or its content as having been exhaustively defined in previous cases. In this connection, LeBel J.'s words in *Blencoe*, *supra*, at para. 188 are apposite:

> We must remember though that s. 7 expresses some of the basic values of the *Charter*. It is certainly true that we must avoid collapsing the contents of the *Charter* and perhaps of Canadian law into a flexible and complex provision like s. 7. But its importance is such for the definition of substantive and procedural guarantees in Canadian law that it would be dangerous to freeze the development of this part of the law. The full impact of s. 7 will remain difficult to foresee and assess for a long while yet. Our Court should be alive to the need to safeguard a degree of flexibility in the interpretation and evolution of s. 7 of the *Charter*.

The question therefore is not whether s. 7 has ever been — or will ever be — recognized as creating positive rights. Rather, the question is whether the present circumstances warrant a novel application of s. 7 as the basis for a positive state obligation to guarantee adequate living standards.

83 I conclude that they do not. With due respect for the views of my colleague Arbour J., I do not believe that there is sufficient evidence in this case to support the proposed interpretation of s. 7. I leave open

the possibility that a positive obligation to sustain life, liberty, or security of the person may be made out in special circumstances. However, this is not such a case. The impugned program contained compensatory "workfare" provisions and the evidence of actual hardship is wanting. The frail platform provided by the facts of this case cannot support the weight of a positive state obligation of citizen support.

84 In view of my conclusions under s. 15(1) and s. 7 of the *Canadian Charter*, the issue of justification under s. 1 does not arise. Nor does the issue of *Canadian Charter* remedies arise.

C. *Does the Social Assistance Scheme Violate Section 45 of the Quebec Charter?*

85 Section 45 of the *Quebec Charter* provides that every person in need has a right to "measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living".

86 Ms. Gosselin argues that s. 45 creates a right to an acceptable standard of living and that Quebec's social assistance scheme breached that right. On this issue, she substantially echoes the position of Robert J.A., dissenting, in the Quebec Court of Appeal. She further argues that a remedy for this alleged breach ought to be available under s. 49 of the *Quebec Charter*, a proposition that Robert J.A. rejected.

87 There can be no doubt that s. 45 purports to create a right. However, determining the scope and content of that right presents something of a challenge, as s. 45 is ambiguous, admitting of two possible interpretations. According to the first interpretation, by providing a right to "measures provided for by law, susceptible of ensuring . . . an acceptable standard of living", s. 45 requires courts to review social assistance measures adopted by the legislature to determine whether or not they succeed in ensuring an acceptable standard of living. This is the approach urged upon us by the appellant.

88 A second interpretation reads s. 45 as creating a far more limited right. On this view, s. 45 requires the government to provide social assistance measures, but it places the adequacy of the particular measures adopted beyond the reach of judicial review. The phrase "susceptible of ensuring . . . an acceptable standard of living" serves to identify the measures that are the subject matter of the entitlement, i.e. to specify the kind of measures the state is obliged to provide, but it cannot ground a review of their adequacy. In my view, several considerations militate in favour of this second interpretation, as I indicate below.

89 Attention to the other provisions of Chapter IV of the *Quebec Charter*, entitled "Economic and Social Rights", helps to put s. 45 in context, and sheds considerable light on the interpretive issue. Some of the provisions in Chapter IV deal with rights as between individuals, and do not directly implicate the state at all. For example, s. 39 provides that "[e]very child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing". However, most of Chapter IV's provisions do implicate the state, including s. 45. Of these provisions implicating the state, all but two deal with "positive rights". That is, the rights described correspond to obligations for the state to do, or to provide, something. These include s. 40 (right to free public education); s. 41 (right to religious or moral education); and s. 44 (right to information).

90 Most of the provisions creating positive rights contain limiting language sharply curtailing the scope of the right. For example, the right to free public education provided at s. 40 is stated in the following terms: "[e]very person has a right, to the extent and according to the standards provided for by law, to free public education" (emphasis added). It would be misleading to characterize that right as creating a free-standing

entitlement to free public education, in light of this limitation. Rather, the language of the provision suggests that the particulars of the regime enacted by the legislature in order to provide free education are beyond judicial review of their sufficiency.

91 This same structure applies to other key provisions in Chapter IV. For example:

> **41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.

> **42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.

> **44.** Every person has a right to information to the extent provided by law.

> **46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.

92 In all these cases, the rights provided are limited in such a way as to put the specific legislative measures or framework adopted by the legislature beyond the reach of judicial review. These provisions require the state to take steps to make the Chapter IV rights effective, but they do not allow for the judicial assessment of the adequacy of those steps. Indeed, the only provision creating a positive right that does not display this feature is s. 48, which states that "[e]very aged person and every handicapped person has a right to protection against any form of exploitation". However, this provision seems distinguishable in that, unlike the other rights discussed above, the right contemplated does not *a priori* require the adoption of a special regime for its fulfilment.

93 Was s. 45 intended to make the adequacy of a social assistance regime's specific provisions subject to judicial review, unlike the neighbouring provisions canvassed above? Had the legislature intended such an exceptional result, it seems to me that it would have given effect to this intention unequivocally, using precise language. There are examples of legal documents purporting to do just that. For example, Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". Article 22 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), provides that "[e]veryone, as a member of society, has the right to social security" and is "entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". Article 25(1) provides that:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

In contrast to these provisions, which unambiguously and directly define the rights to which individuals are entitled (even though they may not be actionable), s. 45 of the *Quebec Charter* is highly equivocal. Indeed, s. 45 features two layers of equivocation. Rather than speaking of a right to an acceptable standard of living, s. 45 refers to a right to measures. Moreover, the right is not to measures that ensure an acceptable standard of living, but to measures that are susceptible of ensuring an acceptable standard of living. In my view, the choice of the term "susceptible" underscores the idea that the measures adopted must be oriented toward the goal of ensuring an acceptable standard

of living, but are not required to achieve success. In other words, s. 45 requires only that the government be able to point to measures of the appropriate kind, without having to defend the wisdom of its enactments. This interpretation is also consistent with the respective institutional competence of courts and legislatures when it comes to enacting and fine-tuning basic social policy.

94 For these reasons, I am unable to accept the view that s. 45 invites courts to review the adequacy of Quebec's social assistance regime. The *Social Aid Act* provides the kind of "measures provided for by law" that satisfy s. 45. I conclude that there was no breach of s. 45 of the *Quebec Charter* in this case.

95 Notwithstanding my conclusion that there is no breach of s. 45, I wish to make a brief comment on the issue of remedies. I agree with much that my colleague Bastarache J. says on the question of remedies. In particular, I agree that a breach of s. 45 cannot give rise to a declaration of invalidity, since such a remedy is available only under s. 52 of the *Quebec Charter*, which applies exclusively to s. 1 to s. 38. I further agree that s. 49 finds no application to a case such as this. However, I must respectfully disagree with Bastarache J. that it follows from the foregoing considerations that determining whether s. 45 has been breached is superfluous.

96 While it is true that courts lack the power to strike down laws that are inconsistent with the social and economic rights provided in Chapter IV of the *Quebec Charter*, it does not follow from this that courts are excused from considering claims based upon these rights. Individuals claiming their rights have been violated under the *Charter* are entitled to have those claims adjudicated, in appropriate cases. The *Quebec Charter* is a legal document, purporting to create social and economic rights. These may be symbolic, in that they cannot ground the invalidation of other laws or an action in damages. But there is a remedy for breaches of the social and economic rights set out in Chapter IV of the *Quebec Charter*: where these rights are violated, a court of competent jurisdiction can declare that this is so.

V. Conclusion

97 I would dismiss the appeal. I conclude that Quebec's social assistance scheme, as it stood from 1987 to 1989, did not violate s. 7 or s. 15(1) of the *Canadian Charter*, or s. 45 of the *Quebec Charter*. Accordingly, I would answer the constitutional questions as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

No.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In view of the answer to Question 1, it is not necessary to answer this question.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

In view of the answer to Question 3, it is not necessary to answer this question.

The following are the reasons delivered by

L'HEUREUX-DUBÉ J. (dissenting) —

I. Introduction

98 This appeal raises the question of the constitutionality of s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1 (since repealed). In my opinion, s. 29(*a*) does violate ss. 15 and 7 of the *Canadian Charter of Rights and Freedoms* (the "*Canadian Charter*") without justification, as well as s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"). Accordingly, I would allow the appeal.

99 In reaching these conclusions, I agree with my colleagues Bastarache and LeBel JJ., in the result, as to the violation of s. 15, and with my colleague Arbour J.'s reasons as to the violation of s. 7 of the *Charter*. As to s. 45 of the *Quebec Charter*, I am basically in agreement with the dissenting opinion of Robert J.A. (now Chief Justice) of the Quebec Court of Appeal (1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033), and therefore disagree with the opinion of LeBel J. on this issue.

100 Since I have some reservations and comments on each of the above analyses I set out the following remarks.

II. Analysis

A. *Section 15*

101 The present facts provide this Court with an opportunity to revisit the fundamental objectives of, and reaffirm its commitment to, the *Canadian Charter*'s equality guarantee.

102 The purpose of a s. 15 inquiry is to determine whether the claimant has received substantive equality or equal benefit before and under the law. Equality is denied when the claimant suffers the pernicious effects of a distinction drawn on the basis of an irrelevant characteristic. Such a distinction may be drawn on an enumerated or analogous ground and appear on the face of the law. Alternatively, the distinction may be facially neutral and the negative effects may uniquely be visited upon individuals who possess a personal characteristic that corresponds to the enumerated or analogous grounds. In either case, discrimination is the result.

103 The *Canadian Charter*'s structure dictates that even a finding that the claimant has been denied substantive equality is not the final step of the inquiry; it is possible for the infringement of s. 15 to be justified under s. 1. It is important to remember that the s. 15 inquiry precedes, and must always be kept distinct from, the s. 1 analysis. The evaluation of a s. 15 claim must always remain focussed on the particular claimant and his or her experience of the law.

104 The above comments should be uncontroversial, grounded as they are in this Court's equality jurisprudence. Yet it appears necessary to recall what the purposes of s. 15 are, and what they are not. Presumptively excluding from s. 15's protection groups which clearly fall within an enumerated category does not serve the purposes of the equality guarantee. Abstract discussion about the nature of particular grounds does not serve the purposes of s. 15. Blurring the division between the rights provisions and s. 1 of the *Canadian Charter*, by incorporating the perspective of the legislature in a s. 15 analysis, is at odds with this Court's approach to equality and surely does not serve the purposes of s. 15.

105 A majority of this Court has held that the objective of s. 15 is to affirm the dignity of individuals and groups by protecting them from unfair governmental action, which differentiates on the basis of characteristics that can be changed, if at all, only at great personal cost: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, at para. 13. The characteristics which fall within the scope of s. 15's protective ambit have been expressly enumerated by the legislature, or found to be analogous grounds by the judiciary: *Andrews v. Law Society of British Columbia*, 1989 CanLII 2 (SCC), [1989] 1 S.C.R. 143; *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497.

106 This Court has previously been divided over the question of whether certain characteristics should be recognized as analogous grounds. See, e.g., *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, on the question of whether marital status constitutes an analogous ground. In the present case, we are in the unusual circumstance of disagreeing about whether to respect s. 15's express wording. Those who would "typically" exclude youth from protection under the ground of age ignore both the plain language of the *Canadian Charter*, and the method that this Court has adopted for s. 15 inquiries.

107 Under the *Law* test, the presence of a distinction made on the basis of an analogous ground is essentially a threshold question that leads to the heart of the inquiry, the question of whether the distinction infringes human dignity and contradicts the purposes of s. 15. It would appear that some are reluctant to accept that an explicit legislative distinction drawn on the basis of an enumerated ground satisfies the threshold requirement that permits courts to proceed to a detailed contextual analysis under the third stage of the *Law* inquiry.

108 Age is an enumerated ground. This Court has concluded that once recognized, an analogous ground remains a permanent marker of suspect distinction in all contexts: *Corbiere*, *supra*. It would seem to follow that grounds explicitly enumerated in s. 15 were similarly permanent markers. Admittedly, the Constitution ousts the protection afforded by this ground in specific contexts. See *Constitution Act, 1867*, ss. 23, 29 and 99, and the discussion in P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 52-47. However, the *Canadian Charter* could have contained a general provision which excluded those below a certain age threshold from protection against discrimination, as provincial human rights codes have done. See, e.g., Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 10(1) "age". The *Canadian Charter* contains no such provision.

109 Any attempt to read the limited range of provincial human rights codes' age protections into s. 15 must fail. Provincial human rights codes in the employment context expressly exclude those 65 and over from protection on the grounds of age: Ontario *Human Rights Code*, ss. 5(1) and 10(1) "age". This Court has declined to follow this example in its s. 15 jurisprudence. It has held that those the age of 65 and over fall within the scope of s. 15's protection, although government action that discriminates on this basis may be saved under s. 1: *McKinney v. University of Guelph*, 1990 CanLII 60 (SCC), [1990] 3 S.C.R. 229; *Harrison v. University of British Columbia*, 1990 CanLII 61 (SCC), [1990] 3 S.C.R. 451; *Stoffman v. Vancouver General Hospital*, 1990 CanLII 62 (SCC), [1990] 3 S.C.R. 483; and *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22. This Court's jurisprudence on age discrimination has respected the express wording of s. 15, even in the face of contrary tendencies in quasi-constitutional statutes. I see no principled reason to depart from this history of fidelity to the *Canadian Charter*'s text and aspirations.

110 Moreover, any attempt to presumptively exclude youth from s. 15 protection, for the reason that age is a unique ground, misplaces the focus of a s. 15 inquiry. The proper focus of analysis is on the effects of discrimination, and not on the categorizing of grounds. In *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, at paras. 48 and 53, I wrote:

> We must remember that the grounds in s. 15, enumerated and analogous, are instruments for finding discrimination. They are a means to an end. By focussing almost entirely on the nature, content and context of the disputed ground, however, we have begun to approach it as an end, in and of itself. . . .
>
> We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects. [Emphasis deleted.]

111 I recently restated this position in *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, at para. 166. I remain convinced that a discrimination claim should be evaluated primarily in terms of an impugned distinction's effects, as they would have been experienced by a reasonable person in the claimant's position. The point of departure should not lie in abstract generalizations about the nature of grounds.

112 Since courts engaged in a s. 15 analysis should focus on the effects of an impugned distinction, they should also refrain from relying on the viewpoint of the legislature. At the s. 15 stage, courts should not be concerned with whether the legislature was well-intentioned. This Court has long recognized that an intention to discriminate is not a necessary condition for a finding of discrimination: *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, 1985 CanLII 18 (SCC), [1985] 2 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114; *Brooks v. Canada Safeway Ltd.*, 1989 CanLII 96 (SCC), [1989] 1 S.C.R. 1219; and *Andrews*, *supra*, at pp. 173-74. By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them: *Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at paras. 5, *per* McLachlin C.J. and L'Heureux-Dubé J., dissenting, and 51, *per* Bastarache J.

113 Of course, benign legislative intent may aid in saving a discriminatory distinction at s. 1, but that is a separate inquiry. In the earliest moments of its *Canadian Charter* jurisprudence, this Court insisted that the analysis of the right at issue should be kept separate from the inquiry into an impugned distinction's justification: *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103; *Andrews*, *supra*, at p. 182. As we enter the third decade of the *Canadian Charter*'s existence, I see no reason to depart from this fundamental division. Moreover, I am unable to imagine how a departure could result in anything but a weakening of the equality guarantee.

The *Law* Test

114 This Court has repeatedly affirmed the importance of protecting individuals and groups from the negative effects of discrimination, as these are defined from the perspective of the reasonable person in the claimant's position. The *Law* test is one such affirmation. I turn now to the question of how that test should be interpreted to ensure that human dignity remains the fundamental reference point for any evaluation of a s. 15 claim.

115 It is undisputed that s. 29(*a*) draws a distinction on an enumerated ground. All that remains under the *Law* test is to determine whether the impugned provision denies human dignity in purpose or effect. I begin by setting out two broad principles which should animate any application of *Law*: (1) discrimination need not involve stereotypes, and (2) the reasonable claimant is the perspective from which to evaluate a s. 15 claim.

(a) *Discrimination Without Stereotypes*

116 In addressing the question of stereotypes, it is worth quoting in full the unanimous Court in *Law*'s consolidation of various interpretive approaches to s. 15 (at para. 51):

> It may be said that the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration. Legislation which effects differential treatment between individuals or groups will violate this fundamental purpose where those who are subject to differential treatment fall within one or more enumerated or analogous grounds, and where the differential treatment reflects the stereotypical application of presumed group or personal characteristic, or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition or value as a human being or as a member of Canadian society. [Emphasis added.]

This passage presents the application of stereotypical characteristics, and the "effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition" as alternative bases for finding discrimination. The presence of a stereotype is therefore not a necessary condition for a finding of discrimination and support for this proposition can be found throughout this Court's equality jurisprudence.

117 In *Andrews*, McIntyre J. rejected the Court of Appeal's attempt to "define discrimination under s. 15(1) as an unjustifiable or unreasonable distinction" (p. 181), and reasoned that such a definition would undermine the division between s. 15 and s. 1 (p. 182). A distinction that is stereotypical is necessarily unjustifiable or unreasonable. Consequently, the presence of a stereotype is not determinative of a finding of a discrimination.

118 One may object that McIntyre J.'s assertion only demonstrates that the presence of a stereotype is not sufficient grounds for a finding of discrimination. However, both *Andrews* itself and this Court's subsequent jurisprudence on adverse effect discrimination make clear that the presence of stereotypes is also not a necessary condition for a finding of discrimination.

119 The distinction drawn in *Andrews* was discriminatory because it was irrelevant and singled out a group that was understood to fall within the ambit of s. 15's concern. McIntyre J. held (at p. 183):

> A rule which bars an entire class of persons from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.

McIntyre J. reached his conclusion without considering the question of stereotypes, and this Court's jurisprudence demonstrates that stereotypes need not be present for a finding of adverse effect discrimination.

120 A distinction that results in adverse effect discrimination need not, of course, include an intention to discriminate. In this Court's definitive statement on indirect discrimination, McLachlin J. (as she then was) held that adverse effects are "unwitting, accidental" (*British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, at para. 49). A neutral distinction, or one that "unwittingly" yields negative effects, is by definition not premised on a negative stereotype. Such distinctions yield, without justification, disproportionately negative impacts on groups recognized as being within the scope of an equality provision's protection. In *BCGSEU*, McLachlin J. held (at para. 33):

> The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground: see generally *Toronto-Dominion Bank*, *supra*, at paras. 140-41, *per* Roberston J.A. As this Court held in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, at para. 66, if a rule has a substantively discriminatory effect on a prohibited ground, it should be characterized as such regardless of whether the claimant is a member of a majority or minority group.

In *BCGSEU*, the facially neutral standard was discriminatory because it had the effect of disproportionately excluding women. As in *Andrews*, *supra*, an analysis of stereotypes was simply not necessary for the disposition of the case. Prejudicial effects giving rise to a s. 15 claim may result when a legislature simply fails to turn its mind to the particular needs and abilities of individuals or groups so as to provide equal benefit under the law to all members of society: *BCGSEU*, at para. 33; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624.

(b) *Dignity Through the Eyes of the Reasonable Claimant*

121 If a stereotype is not a necessary or sufficient condition for a finding of discrimination, there must be other relevant indicators. *Law* listed four contextual factors to which a claimant can refer to demonstrate that a distinction has the effect of demeaning his or her dignity. Before considering these, it would be helpful to revisit *Law*'s understanding of human dignity. I reproduce in full a particularly illuminating passage (at para. 53):

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the meaning of the equality guarantee does not relate to the status or position of an individual in society *per se*, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

122 This passage serves as a reminder that discrimination can arise in circumstances other than in the presence of stereotypes, and removes an ambiguity in the previously cited discussion of equality (see above, at para. 116). On one reading, the phrase "or otherwise has the effect of perpetuating or promoting the view that the individual is less capable, or less worthy of recognition", taken together with the phrase "stereotypical application of presumed group or personal characteristic" (see above, at para. 116), may be understood to suggest that discrimination only arises where there has been a message sent to the community at large that is demeaning to the claimant. By contrast, the present passage unequivocally reveals that dignity can be infringed even if the "message" is conveyed only to the claimant.

123 The passage makes clear that if individual interests including physical and psychological integrity are infringed, a harm to dignity results. Such infringements undermine the individual's self-respect and self-worth. They communicate to the individual that he or she is not a full member of Canadian society. Moreover,

this passage proposes a reasonableness standard when it discusses what the claimant "legitimately feels when confronted with a particular law". In these descriptions of human dignity, one can hear echoes of my position in the 1995 trilogy. In *Egan*, *supra*, I held (at para. 56) that the examination of whether a distinction is discriminatory

> should be undertaken from a subjective-objective perspective: i.e. from the point of view of the reasonable person, dispassionate and fully apprised of the circumstances, possessed of similar attributes to, and under similar circumstances as, the group of which the rights claimant is a member.

This Court has recently expressed its continuing support for this "reasonable claimant" standard in *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, at para. 55. See also *Corbiere*, *supra*, at para. 65; *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703, 2000 SCC 28, at para. 81; *Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R. 625, at para. 75.

124 These preliminary remarks about *Law* serve as reminders that stereotypes are not needed to find a distinction to be discriminatory, and that the reasonable claimant is the perspective from, and the standard by which to evaluate a discrimination claim. With these remarks in mind, it is now time to turn to a consideration of the *Law* factors.

(c) *Putting Effects First in Law*

125 The four factors in *Law* are: (1) pre-existing disadvantage, (2) relationship between grounds and the claimant's characteristics or circumstances, (3) ameliorative purposes or effects, and (4) the nature of the interest affected.

126 Although this Court made clear in *Law* that it is not necessary that all four factors be present for there to be a finding that a claimant's human dignity has been infringed, and indeed that the presence or absence of no factor is determinative, subsequent applications of the *Law* test have typically attempted to either refute or establish every factor. See e.g., *Corbiere*, *supra*, and *Lovelace*, *supra*.

127 In addition, although the Court in *Law* held that "the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists, pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group" (para. 63), it insisted that "although a distinction drawn on such a basis is an important *indicium* of discrimination, it is not determinative" (para. 65). Therefore, although pre-existing disadvantage is the factor the presence of which will most likely weigh in favour of a finding that human dignity is infringed, its absence does not inexorably lead to the conclusion that dignity has not been infringed.

128 Courts applying *Law* must keep these reservations in mind. Since not all the factors must be shown to exist, and since pre-existing disadvantage is a compelling, but not necessary condition, it is conceivable that the sole presence of another factor may be sufficient to establish an infringement of dignity. Moreover, given that the effects of an impugned distinction should be the focal point of a discrimination analysis, and that stereotypes are not necessary for a finding of discrimination, the severe impairment of an extremely important interest may be sufficient to ground a claim of discrimination. I foresaw this possibility in *Egan*, *supra*, when I wrote (at para. 65):

> [T]he more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact even with respect to groups that occupy a position of advantage in society.

It may be that particularly severe negative effects, as assessed under the fourth contextual factor in the third step of the *Law* test, may alone qualify a distinction as discriminatory. It is at least conceivable that negative effects severe enough would signal to a reasonable person possessing any personal characteristics, with membership in any classificatory group, that he or she is being less valued as a member of society. Therefore, even if we accept for the moment that youth are generally an advantaged group, if a distinction were to severely harm the fundamental interests of youth and only youth, that distinction would be found to be discriminatory.

129 These are the facts that are before this Court.

130 As a result of s. 29(*a*), adults under 30 were uniquely exposed by the legislative scheme to the threat of living beneath what the government itself considered to be a subsistence level of income. Of those eligible to participate in the programs, 88.8 percent were unable to increase their benefits to the level payable to those 30 and over. Ms. Gosselin was exposed to the risk of severe poverty as a sole consequence of being under 30 years of age. Ms. Gosselin's psychological and physical integrity were breached. There is little question that living with the constant threat of poverty is psychologically harmful. There is no dispute that Ms. Gosselin lived at times below the government's own standard of bare subsistence. In 1987, the monthly cost of proper nourishment was $152. The guaranteed monthly payment to young adults was $170. I cannot imagine how it can be maintained that Ms. Gosselin's physical integrity was not breached.

131 The sole remaining question is whether a reasonable person in Ms. Gosselin's position, apprised of all the circumstances, would perceive that her dignity had been threatened. The reasonable claimant would have been informed of the legislature's intention to help young people enter the marketplace. She would have been informed that those 30 and over have more difficulty changing careers, and that those under 30 run serious social and personal risks if they do not enter the job market in a timely manner. She would have been told that the long-term goal of the legislative scheme was to affirm her dignity.

132 The reasonable claimant would also likely have been a member of the 88.8 percent who were eligible for the programs and whose income did not rise to the levels available to all adults 30 years of age and over. Even if she wished to participate in training programs, she would have found that there were intervals between the completion of one program and the starting of another, during which the amount of her social assistance benefit would have plunged. The reasonable claimant would have made daily life choices in the face of an imminent and severe threat of poverty. The reasonable claimant would likely have suffered malnourishment. She might have turned to prostitution and crime to make ends meet. The reasonable claimant would have perceived that as a result of her deep poverty, she had been excluded from full participation in Canadian society. She would have perceived that her right to dignity was infringed as a sole consequence of being under 30 years of age, a factor over which, at any given moment, she had no control. While individuals may be able to strive to overcome the detriment imposed by merit-based distinctions, Ms. Gosselin was powerless to alter the single personal characteristic that the government's scheme made determinative for her level of benefits.

133 The reasonable claimant would have suffered, as Ms. Gosselin manifestly did suffer, from discrimination as a result of the impugned legislative distinction. I see no other conclusion but that Ms. Gosselin would have reasonably felt that she was being less valued as a member of society than people 30 and over and that she was being treated as less deserving of respect.

(d) *Law's Other Factors*

134 Since I have concluded that finding an individual or group to have suffered a severe harm to a fundamental interest, as a result of a legislative distinction drawn on either an enumerated or analogous ground, is sufficient for a court to conclude that the distinction was discriminatory, it is unnecessary to discuss the remaining *Law* factors. I will, however, do so briefly.

135 In respect of the second factor, there should be a strong presumption that a legislative scheme which causes individuals to suffer severe threats to their physical and psychological integrity as a result of their possessing a characteristic which cannot be changed does not adequately take into account the needs, capacity or circumstances of the individual or group in question. In the present circumstances, the impugned legislation sought to alleviate young adults' experience of poverty by providing them with training. However, the reason that young adults experienced poverty was not a lack of training, but rather a lack of available employment. In any case, a legislative scheme that exposes the members of an enumerated or analogous category, and only those members, to severe poverty *prima facie* does not take into consideration the needs of that category's members.

136 In respect of the third factor, I would like to address an apparent confusion. *Law* states at para. 72:

> An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation.

This passage makes clear that the ameliorative purpose must be for the benefit of a group less advantaged than the one targeted by the impugned distinction. The relevant ameliorative purpose under the third factor is not defined with reference to the group that suffers the disadvantage imposed by the impugned distinction.

137 I stipulated above that youth do not suffer pre-existing disadvantage for the purpose of showing that in circumstances such as the present, a severe negative effect under the fourth factor would be sufficient to establish an infringement of dignity. I did not concede the point, nor do I believe that it should be conceded. The motivation behind the present legislative scheme was precisely to help a young adult population that was in disadvantaged circumstances. If 23 percent of young adults were unemployed by comparison with 14 percent of the general active population, and if an unprecedented number of young people were entering the job market at a time when federal social assistance programs were faltering, I fail to see how young adults did not suffer from a pre-existing disadvantage.

138 It may be argued that in the long view of history, young people have not suffered disadvantage, and therefore, for the purposes of an equality analysis, a court need not consider young people to suffer from pre-existing disadvantage. This is, however, inconsistent with a basic premise of discrimination law. In *Brooks*, *supra*, this Court held that a disadvantage need not be shared by all members of a group for there to be a finding of discrimination, if it can be shown that only members of that group suffered the disadvantage. This Court held that a distinction drawn on the basis of pregnancy could be found to discriminate against women, since although not all women would become pregnant, only women could. The same conclusion was reached in *Egan*, *supra*, where it did not matter whether the particular claimants would have made net gains by being included in the governmental pension regime at issue. What mattered was that where there was a disadvantage, it fell solely on the basis of sexual orientation.

139 A unique constellation of circumstances caused a crisis of unemployment, at the historical moment in question, which threatened human dignity in ways that were particularly grievous for young adults. Only youth would suffer from the long-term harms to self-esteem that attend not participating in the workforce at a

young age. The reasoning in *Brooks*, *supra*, applied to the present circumstances should lead to the conclusion that while not all members of the class "young adults throughout time" suffered the particular threats to self-esteem that attend youth unemployment, only members of that class, or only "young adults at the relevant time", did. Application of the reasoning in *Brooks* should lead to the conclusion that young adults suffered from a pre-existing disadvantage.

140 The breach of s. 15 was not justified under s. 1 and I concur entirely with my colleague Bastarache J.'s s. 1 analysis on this point.

B. *Section 7*

141 I concur in my colleague Arbour J.'s thorough analysis of s. 7 of the *Canadian Charter* and for the reasons she expresses, I agree that s. 29(*a*) of the Regulation does violate s. 7. I would, however, like to offer a clarification. It is true that the legislature is in the best position to make the allocative choices necessary to implement a policy of social assistance. For a wide variety of reasons, courts are not in the best position to make such choices, and this is why this Court has historically shown judicial deference to governments in these matters. See, e.g., *Mahe v. Alberta*, 1990 CanLII 133 (SCC), [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Man.), s. 79(3), (4) and (7)*, 1993 CanLII 119 (SCC), [1993] 1 S.C.R. 839; and *Eldridge*, *supra*.

142 However, although governments should in general make policy implementation choices, other actors may aid in determining whether social programs are necessary. In the present case, the government stated what it considered to be a minimal level of assistance but a claimant can also establish with adequate evidence what a minimal level of assistance would be. An analogy with the jurisprudence on minority language rights instruction may be helpful. In such cases, plaintiffs are able to establish whether "numbers warrant" the provision of minority language instruction even though legislatures and executives are generally given deference with respect to the operational choices that result in facilities being provided. See e.g., *Mahe*, *supra*. The same logic should apply in cases such as the present one.

143 As regards s. 1, I do not share my colleague Arbour J.'s contextual analysis in all its refinements (paras. 349-58), and prefer the approach to legislative context offered by Gonthier J. in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68. The latter wrote (at para. 98):

> The role of this Court, when faced with competing social or political philosophies and justifications dependent on them, is therefore to define the parameters within which the acceptable reconciliation of competing values lies. [Emphasis in original.]

Nonetheless, substantially for the reasons Arbour J. expressed as well as those of Robert J.A.'s dissent in the Quebec Court of Appeal, I agree that the present violation of s. 7 was not justified.

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C. *Section 7 and Section 15*

144 In another context, s. 15 concerns informed my analysis of s. 7. This was appropriate because the provisions of the *Canadian Charter* are to be understood as mutually reinforcing (see, e.g., *R. v. Lyons*, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309, at p. 326; *R. v. Tran*, 1994 CanLII 56 (SCC), [1994] 2 S.C.R. 951, at p. 976). In addition, the equality provision is of foundational importance in the *Canadian Charter*. As McIntyre J. wrote in *Andrews*, *supra*, at p. 185:

> The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*.

Consequently, in *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, I brought the lens of the equality guarantee to the appellant's s. 7 claim to state-funded counsel in hearings where the Minister of Health and Community Services sought an extension of a custody order. I found that the claim could only be adequately addressed in light of the appellant's status as a single mother. I wrote (at para. 113):

> This case raises issues of gender equality because women, and especially single mothers, are disproportionately and particularly affected by child protection proceedings. . . .

145 Conversely, in the present and similar fact situations, judicial interpretations of s. 15 can be informed by s. 7. To explain why, I revisit my reasons in *Egan*. I wrote (at para. 63):

> [T]he nature, quantum and context of an economic prejudice or denial of such a benefit are important factors in determining whether the distinction from which the differing economic consequences flow is one which is discriminatory. If all other things are equal, the more severe and localized the economic consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*.

If, as in the present case, a harm is visited uniquely upon members of an analogous or enumerated group and is severe enough to give rise to a s. 7 claim, then there will be *prima facie* grounds for a s. 15 claim. This conclusion must follow from the above s. 15 analysis, which places individuals' experience of discrimination at the centre of judicial attention.

D. *Section 45 of the Quebec Charter*

146 I subscribe entirely to the exhaustive analysis of s. 45 of the *Quebec Charter* undertaken by Robert J.A. in his dissenting opinion in the Quebec Court of Appeal. For the reasons he expresses, I conclude as he does as to a violation of s. 45 of the *Quebec Charter* in the present case.

147 As Robert J.A. states (at p. 1092): [TRANSLATION] "Section 45 of the Quebec Charter thus bears a very close resemblance to article 11 of the *International Covenant on Economic, Social and Cultural Rights*", which, as the Court of Appeal notes, para. 10 of the *Report on the Fifth Session* of the United Nations Committee on Economic, Social and Cultural Rights further specifies as containing: "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels [of subsistence needs and the provision of basic services]" (*ibid*., at p. 1093).

148 I am also in agreement that the *Quebec Charter* [TRANSLATION] "was intended to establish a domestic law regime that reflects Canada's international commitments" (p. 1099) and that (at p. 1101)

> [TRANSLATION] the quasi-constitutional right guaranteed by section 45 to social and economic measures susceptible of ensuring an acceptable standard of living includes, at the very least, the right of every person in need to receive what Canadian society objectively considers sufficient means to provide the basic necessities of life.

III. Conclusion

149 In the result, I agree with the result reached by each of my colleagues Bastarache, Arbour and LeBel JJ. and would allow the appeal with costs throughout.

The following are the reasons delivered by

BASTARACHE J. (dissenting) —

I. Introduction

150 This case involves the constitutional review of a provision that existed in the regulations under Quebec's *Social Aid Act*, R.S.Q., c. A-16, between 1984 and 1989. That provision fixed the maximum benefits to be received by single adults under the age of 30 at a level approximately one third that of those 30 years of age and over.

151 The appellant has offered this Court a number of constitutional issues to consider. She claims, on behalf of herself and all single recipients of welfare in the province of Quebec who were under the age of 30 at some point between 1985 and 1989, that the benefits provision violates the right not to be deprived of security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*" or "*Charter*"), the right to equal treatment before and under the law, protected by s. 15 of the *Canadian Charter*, as well as the right to be provided with a decent level of support, guaranteed by s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*").

152 In making her claim, the appellant is seeking a declaration from this Court that the provision was constitutionally invalid pursuant to s. 52 of the *Constitution Act, 1982* and s. 45 of the *Quebec Charter*, as well as damages in the amount of $388,563,316 for benefits denied to the members of the appellant's group, pursuant to s. 24(1) of the *Canadian Charter* and the joint operation of ss. 45 and 49 of the *Quebec Charter*, from March 1985 to July 31, 1989.

153 In the end, I conclude that s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, violated the appellant's s. 15 right to equal benefit of the law, and that such discrimination was not justified under s. 1.

II. Legislative History

154 At issue in this case is the differential treatment of social assistance recipients under 30 years of age. This differential treatment is prescribed by s. 29(*a*) of the *Regulation respecting social aid*. To properly determine whether s. 29(*a*) is discriminatory, it is necessary to look at the section in its historical context as well as the context of its governing legislation and regulations.

155 The *Social Aid Act* of 1984 grew out of reforms to Quebec social policy that dated back to the late 1960s. The first *Social Aid Act* in Quebec was brought into force in 1970. Prior to that time, Quebec social policy focussed, through a variety of legislative Acts, on the needs of those citizens who were unable to work. The guiding principle for this combination of Acts was that the more incapable one was of working, the greater one's benefits would be. Even at that time, however, some benefits were provided to able-bodied persons. Under this regime, distinctions were made and benefits were based on whether or not one lived with one's parents, and whether one was under 30 years of age. For instance, under the pre-1970 law, a person under 30 who lived with his or her parents would receive $30 a month, while a person who lived on his or her own would receive $55. For those 30 and over, the benefits also varied based on whether they lived in a rural or urban setting. A person 30 and

over living alone in the city would be eligible for a $65 benefit, while one living with a parent would receive only $55.

156 The reforms of 1969-1970 sought to change the foundational principles of Quebec social policy, moving from a regime based on degree of incapacity to one based on need. Despite this emphasis on need, the distinction between those under 30 and those 30 and over was maintained and incorporated into the new legislation. Whereas the benefits of those 30 and over varied depending on whether or not they lived with their parents (from $75 to $106), those under 30 received only the $75 amount. In other words, those under 30 were deemed to be living with their parents, regardless of their actual circumstances.

157 Over the course of the next decade, the benefits for those 30 or over grew at a much faster rate than those for single persons under 30. Apart from several slight adjustments, the under-30 benefits remained stable, while the reforms of 1974 increased the benefits for those 30 and over by 45 percent. Other amendments made in 1975 indexed benefits for those 30 and over to the rate of inflation. By the time the under-30 benefits were indexed, in 1979, they had fallen to 36 percent of those of a similarly situated person 30 and over. In 1969, they had represented 84 percent of the full amount.

158 In the early 1980s, the Quebec government, responding to a deep and long-lasting crisis in the North American economy, once again considered reforming its *Social Aid Act*. Between 1981 and 1983, unemployment in Quebec had skyrocketed from traditional levels of around 8 percent to approximately 14 percent. Among young people, the levels of unemployment were even more pronounced. Youth unemployment in 1982 was 23 percent. The difference between youth unemployment and the rate for the general population had never been higher. During this period, the government was also concerned by a change in the composition of social assistance recipients. Between 1975 and 1983, the number of people under 30 on social assistance rose six-fold, to 85 000. This resulted in the proportion of social assistance recipients under 30 rising from 3 to 12 percent. The government was also witnessing an increase in the percentage of able-bodied recipients; it went from 41 percent in 1974 to 75 percent in 1983. At the same time, the government was seeing an increase in the number of recipients with a relatively high level of education.

159 In response to this grim picture, the government chose to focus on providing young people with the skills and education required for them to get jobs. At the centre of this new approach were three new programs designed to provide people on social assistance with work experience and education. These programs were, quite practically, entitled Remedial Education, Community Work and On-the-job Training. Under s. 29(*a*) of the new Regulation, social assistance beneficiaries under 30 would continue to receive a lower level of support (as of 1987 they received $170 per month) than their older counterparts (who were receiving $466 per month), but could have their benefits raised by participating in one of these programs.

160 The Remedial Education Program was designed to help social assistance recipients return to school to get their high school diploma. For admission to the program, one had to be a recipient of social assistance who had been out of school for more than nine months and who had been financially independent of his or her parents for at least six months. There is evidence that the illiterate were also excluded. While participating in a Remedial Education Program, the beneficiary would receive an increase of $196 per month in his or her social assistance benefits; the participant under 30 years of age was therefore left with $100 less than the base amount for the social assistance beneficiary 30 and over.

161 The On-the-job Training Program was designed to provide social assistance recipients with real job experience. A participant would be paired with a private or public organization and work for it on a full-time basis. During that time, he or she would receive specialized training. In order to qualify for this program, the

potential participant must have been out of school for at least 12 months. Holders of CEGEP or university degrees were excluded from the program. This placement would last one year. During the time that they participated, social assistance beneficiaries would receive an increase of $296 in their benefits, $100 of which was paid by their employer. This increase would leave a person under 30 with the same amount of benefits per month as the base amount for a person 30 and over.

162 In the Community Work Program, social assistance beneficiaries were paired with community organizations or governmental agencies in order to complete simple tasks. The goal of this program was to provide more rudimentary work-related skills, such as learning to show up on time, to dress properly for work, to file documents and to answer the telephone. Priority for admission to the program was given to those who had been on social assistance for at least one year. As in the case of the On-the-job Training Program, participants received a $296 increase in their benefits, $100 of which was paid by the community organization or government agency.

163 While all three of these programs were ostensibly designed for social assistance recipients under 30, at least one of the programs was in fact open to some persons 30 and over, who received the same increase in their benefits when they participated. Thus, a recipient under 30 would never receive the same amount as some similarly situated persons 30 and over, since the older person would receive the same extra benefit over and above the base benefit.

III. Factual Background

164 It was under this legislative and regulatory framework that the claimant and class representative in this case, Ms. Gosselin, received assistance between 1984 and her 30th birthday, in 1989. Louise Gosselin was born on July 9, 1959. Her life has not been an easy one. Much of her formative years was spent moving back and forth between her mother's home and various centres d'accueil and foster homes. Health problems, both physical and psychological, also constituted a burden. Despite her desire to finish school, her attempts always seemed to come up short.

165 On the job market, Ms. Gosselin's success was not any more marked. At various times she worked as a nurse's assistant and a waitress but, owing to physical or mental exhaustion, these jobs never lasted for long. Suicides were attempted, alcohol was abused, jobs were hard to come by, and depression ensued. Thus, from the time she was 18 Ms. Gosselin was, for the most part, reliant on social assistance — as was her mother, with whom she often lived.

166 In March of 1985, at the age of 25, Ms. Gosselin contacted her local CLSC (local community service centre) to find out how she might go about finding friends her own age. It was at that time that she was first informed of a program known as "Community Work". In May 1985, she applied and was accepted into the program, working for an organization called "Réveil des assistés sociaux". Through this program she became involved in various committees in which she learned about social assistance law and about the types of programs that were available to assist her. Her participation in the program helped her to meet people and to have more social interactions. However, the program only lasted one year. After she had completed it, she fell back onto the reduced amount and was forced to move back in with her mother. No one suggested another program to her.

167 Living with her mother at the age of 27 was not a comfortable situation; Ms. Gosselin hoped desperately that her luck would turn around. In October of 1986, she was forced, following a change in the building's by-laws, to move out of her mother's one-bedroom apartment. She lived in a variety of rooming houses, and maisons d'accueil, where she faced various types of harassment. At one point, she was able to get a job

cleaning homes, but was unable to continue after she was overcome with the fear of being fired. She reluctantly moved back in with her mother.

168 In November of 1986, she was granted a medical certificate due to her mental state; this allowed her to collect the full benefit under the regulations. She moved out of her mother's apartment in December of that year. A few months later, by happenstance, her father's neighbour offered to arrange a placement for her at Revenu Travail-Quebec as part of the On-the-job Training Program. She worked there for three months, before switching placements to work at a pet store, where she had wanted to work because of her love of animals. Unfortunately, allergies quickly became a problem and she had to leave after only a couple of weeks.

169 At this point, she fell back onto the reduced benefit and was hospitalized at a psychiatric hospital for two months. Released from the hospital in January 1988, she was once again considered able-bodied and allocated the reduced benefit. She moved through several rooming homes, paying $170 per month for rent while receiving only $188 per month in benefits. In March of 1988, she got her own apartment, paying a rent of $235 per month. To pay for it, she cleaned homes, earning extra money. In order to make ends meet, she ate most of her meals at her mother's house, but sometimes had to resort to soup kitchens. In May of 1988, she hurt her back and was granted a medical certificate.

170 In September of 1988, she enrolled in the Remedial Education Program and went back to school. While this raised her benefits to $100 less than the base amount, she was terrified that she would not succeed and would be forced back onto the reduced rate. After paying her rent and phone, she was left with only $150 per month, which she had to stretch scrupulously in order to buy food and bus tickets. Finally, in July of 1989, she turned 30 and was allocated the full social assistance benefit. When that benefit was added to the money she received for participating in the Remedial Education Program, her total monthly benefits rose to $739 per month.

IV. Relevant Statutory and Constitutional Provisions

171 *Social Aid Act*, R.S.Q., c. A-16, as amended by *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5 (repealed by *An Act respecting income security*, S.Q. 1988, c. 51, s. 92)

5. . . .

Ordinary needs are food, clothing, household and personal requirements and any other costs relating to the habitation of a house or lodging.

All other needs are special needs.

6. Social aid shall meet the ordinary and special needs of any family or individual lacking means of subsistence.

. . .

11. The Minister may propose a recovery plan to a family or individual who is receiving or who applies for social aid.

The recovery plan may include, in particular, the participation of an individual or a member of a family in a program of work activities or a training program established by the Minister in view of developing the recipient's qualifications for an employment.

The criteria of eligibility to a program established under the second paragraph may take the recipient's age into account.

11.1 The Government, by regulation, shall designate to which work activities programs or training programs sections 11.2 to 11.4 apply.

11.2 In the case of an individual or a family having no dependent child, needs relating to a recipient's participation in a designated program are special needs to the extent determined by regulation for each program.

In all other cases, needs described in the first paragraph are special needs to the extent determined by the Minister for each recipient, but not in excess of the amount determined by regulation.

31. In addition to the other regulatory powers assigned to it by this act, the Gouvernement [*sic*], subject to the provisions of this act, may make regulations respecting:

. . .

(*e*) the extent to which the ordinary needs of a family or individual may be met through social aid and the methods whereby such needs must be proven and appraised; in determining what the aid shall be, account may be taken of the age or capacity for work of an individual or of the members of a family having no dependent children, having had no children who are deceased, or the fact that a family or individual is living with a relative or a child;

Regulation respecting social aid, R.R.Q. 1981, c. A-16, r. 1

(This is the text of the pertinent sections of the Regulation as it appeared on April 17, 1985.)

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*
1	0	357 $
1	1	488
1	2 and over	526
2	0	568
2	1	615
2	2 and over	651

However, the ordinary needs can be accorded only insofar as the costs a household incurs for lodging on a monthly basis within the meaning of section 27 are equal to or greater than 85 $ for a family and 65 $ for a single person. The ordinary needs are reduced by the amount by which these costs fall short of these amounts.

29. Aid for ordinary needs shall not exceed:

(*a*) 121 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10.

35.0.1 Sections 11.2 to 11.4 of the Act shall apply to the following programs established by the Minister under section 11 of the Act:

(*a*) On-the-job Training Program;

(*b*) Community Work Program.

Section 11.2 of the Act shall also apply to the Remedial Education Program.

35.0.2 In order to develop employability, an amount of 150 $ is granted to the single person or to the adult of a family without dependent children for a complete month during which he participates in a program subject to section 35.0.1.

In the case of a participant in the Remedial Education Program whose work load established by the school is less than 60 hours per month, an amount of 150 $ is deducted on the basis of the number of hours of work in relation to 60.

35.0.5 The amount provided in section 35.0.2 or determined by the Minister under section 35.0.3, except for child care expenses, is reduced on the basis of unauthorized hours of absence under programs subject to section 35.0.1 for the said month with respect to the required hours of participation.

In the case of the Remedial Education Program, the deduction is established according to unauthorized hours of absence from classes under this program with respect to the monthly number of class hours.

35.0.6 No reduction is made when the unauthorized hours of absence do not exceed 5 % of the hours of participation established for a participant during the month.

35.0.7 The aid shall also meet the cost required by a person attending a vocational training course that makes this person eligible for an allowance under the National Vocational Training Program Act (S.C., 1980-81-82-83, c. 109).

This cost is equal to the amount of the allowance paid, as reduced under subparagraph *f* of section 40.

For recipients covered by section 29, the cost is equal to the same amount less the difference between ordinary needs under section 23 and the amount prescribed in section 29.

However, it shall not exceed:

i. for a family, 40 $ plus 5 $ per dependent child, plus 50 $ in the case of a family including only one adult;

ii. for a single person, 25 $;

The maximum provided in the fourth paragraph shall not apply to the month in which courses begin if aid for ordinary needs has been granted for at least 3 consecutive months without this paragraph having been applied during the six preceding months.

Section 35.0.2 was amended, effective August 1, 1985, by O.C. 1542-85, 24 July 1985, (1985) 117 O.G. II 3690, s. 1 as follows:

35.0.2 To assist in developing aptitudes for work, an amount is granted as a special need to the single person or to a spouse in a family without dependent children, for a complete month of participation in a program subject to section 35.0.1.

This amount is equal to the amount obtained when 100 $ is subtracted from the difference between the amount paid subject to the first paragraph of section 23, taking into account section 31, to a single person under 30 years of age and the maximum amount paid under section 29, taking into account section 31, to a single person under 30 years of age.

In the case of a participant in the Remedial Education Program whose course schedule is under 60 hours per month, the amount is reduced to a prorata of the number of actual course hours with respect to 60.

The Regulation was amended, effective April 30, 1986, by *Regulation respecting social aid (Amendment)*, O.C. 555-86, 23 April 1986, (1986) 118 O.G. II 605, ss. 1, 3:

23. The ordinary needs of a household shall be determined in terms of its members, each month, according to the following scale:

Adults	*Dependent children*	*Ordinary needs*
1	0	448
1	1	609
1	2 and more	659
2	0	712
2	1	769
2	2 and more	815

However, the ordinary needs of a household living with a parent or a child are reduced by 85 $.

In all other cases, the ordinary needs are reduced by the amount by which the costs incurred by the household for lodging on a monthly basis within the meaning of section 27 are less than 85 $ for a family or less than 65 $ for a single person.

29. Aid for ordinary needs shall not exceed:

(*a*) 163 $ per month, in the case of an individual capable of working and less than 30 years of age;

(*b*) twice the monthly amount prescribed in subparagraph *a* for a family without dependent children, where both consorts are able-bodied and under 30 years of age.

The amounts provided for in the first paragraph are increased by 8 $ per adult except:

(*a*) when the household lives with a parent or child;

(*b*) when a single person lives with a foster family;

(*c*) when the household lives in housing administered by a municipal housing bureau constituted under the Act respecting the Sociétéd'habitation du Québec (R.S.Q., c. S-8).

In the case of a family without children receiving uninterrupted aid following an application made before 1 July 1984, subparagraph *b* of the first paragraph does not apply if the said family had a child who died before 1 July 1984.

For the month in which the application was made, the amounts prescribed in the first paragraph represent the ordinary needs of the household. The latter are apportioned in the manner indicated in section 10. [Emphasis added.]

Charter of Human Rights and Freedoms, R.S.Q., c. C-12

10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

45. Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

49. Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

52. No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

53. If any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the Charter.

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.

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.

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

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

. . .

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Constitution Act, 1982

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.

Act respecting the Constitution Act, 1982, R.S.Q., c. L-4.2

1. Each of the Acts adopted before 17 April 1982 is replaced by the text of each of them as they existed at that date, after being amended by the addition, at the end and as a separate section, of the following:

"This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 in the 1982 volume of the Acts of the Parliament of the United Kingdom)."

The text so amended of each of these Acts constitutes a separate Act.

No such Act is to be construed as new law except for the purposes of section 33 of the Constitution Act, 1982; for all other purposes, it has force of law as if it were a consolidation of the Act it replaces.

Every provision of such an Act shall have effect from the date the provision it replaces took effect or is to take effect.

Such an Act must be cited in the same manner as the Act it replaces.

V. Judicial History

A. *Quebec Superior Court*, [1992] R.J.Q. 1647

172 In his reasons of May 27, 1992, Reeves J. ruled in favour of the defendant government, holding that the legislation in question did not infringe any of the rights claimed by the plaintiff.

173 With regard to the claim under s. 7 of the *Canadian Charter*, Reeves J. characterized life, liberty and security of the person as rights that do not include purely economic interests. He founded this conclusion on the fact that the right to property was specifically excluded from the *Canadian Charter* at the time of its drafting. Moreover, he noted that s. 7, along with ss. 8 to 14 of the *Canadian Charter*, fell under the heading "Legal Rights", thus requiring a link to the administration of justice. Finally, he held that the term "security of the person" did not apply to the benefit of social assistance because such a right would require the state to take positive actions. Reeves J. held that s. 7 protects only negative rights, such as the right to be free of any state intrusion upon the security of one's person.

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174 In analysing the discriminatory nature of the legislation under s. 15 of the *Canadian Charter*, Reeves J. emphasized the fact that not all differences in treatment will result in discrimination. He held that the essence of equality is a respect for differences, and that substantive equality did not necessarily signify uniformity of treatment — different people must sometimes be treated differently. He therefore concluded that the Act was not discriminatory because young adults generally have a better chance of integrating into the job market and need to be encouraged to do so. Moreover, he found that since participation in the employment programs would result, under the law, in an income for young adults equal to that of those 30 or over, equality could be achieved, and thus there was no discrimination.

175 On the s. 45 of the *Quebec Charter* issue, Reeves J. held that the term "provided for by law" limited the obligation that this section places on the government. As a result of this wording, he held that the government was free to limit the obligations that it undertook in providing financial and social assistance. More importantly, Reeves J. held that since s. 52 stipulates that "No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38", it does not apply to s. 45. He therefore concluded that s. 45 could not confer the right to damages and serves only as a general statement of policy by the Quebec legislature.

B. *Quebec Court of Appeal*, 1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033

176 The claimant appealed the case to the Quebec Court of Appeal. In its decision of April 23, 1999, the Court of Appeal dismissed the appeal, Robert J.A. dissenting. The court ruled in three separate judgments, each judge deciding differently with regards to the application of s. 15 of the *Canadian Charter*.

177 The three justices, Robert, Baudouin and Mailhot JJ.A., agreed that s. 7 was not violated. Their primary reason for reaching this conclusion was that s. 7 of the *Canadian Charter* was designed to protect legal rights. Here, they found that there was not a sufficient link between the appellant's claim and the justice system. They also rejected the appellant's argument that the government's institution of a social assistance program had somehow created a right to social assistance protected by the right to security of the person. In taking this position, Robert and Baudouin JJ.A., who both wrote on the issue, held that s. 7 of the *Canadian Charter* only applied to negative rights and not to the positive social rights being claimed by the appellant.

178 The three justices offered separate analysis of the s. 15 claim. Mailhot J.A. held that under the test set out by this Court in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497, the legislation did not constitute an infringement of s. 15. She held that, as in *Law*, the distinction that this legislation made on the basis of age, when viewed in the context of the legislation as a whole, is not an affront to human dignity.

179 Robert J.A. held that the legislation constituted a violation of s. 15 that was not demonstrably justified under s. 1. Having established that s. 29(*a*) of the Regulation created a distinction on the basis of the enumerated characteristic of age, Robert J.A. turned to the question of whether the legislation was substantively discriminatory under the terms of s. 15 of the *Canadian Charter*. In so doing, he examined the effects of the legislation and placed considerable weight on the evidence that 73 percent of all social assistance recipients under the age of 30 received only the reduced benefit. He found that there was enough evidence to show that the effect of the legislation was to deny to those under 30 an advantage of the law enjoyed by those 30 and over.

180 He was also particularly concerned by the fact that there were not enough places available in the programs in order for every young person on social assistance to have participated. Moreover, he found that, even when an individual did take part in one of the educational programs, there were periods, such as when they were on waiting lists, during which they only received the smaller amount. This weighed in favour of a finding of discrimination. He also noted that because the Remedial Education Program provided increased benefits amounting to $100 less than the base amount, only 11 percent of the young people in the group actually received the base amount allocated to all those 30 and over. He concluded that the legislation was discriminatory and harmful to the dignity of the appellant and members of her group; there was therefore a violation of s. 15 of the *Canadian Charter*.

181 While they agreed on the application of s. 15, Robert and Baudouin JJ.A. differed in their s. 1 analysis. Robert J.A. held that the provision was not demonstrably justifiable in a free and democratic society, while Baudouin J.A. found that the government had met its burden and upheld the law under s. 1.

182 In defining the objective of the legislation, Robert J.A. held that the differentiation served two objectives, [TRANSLATION] "(1) to avoid making the program too attractive, and (2) to encourage incitement to work and reintegration into the workplace" (p. 1073). Given the economic situation of the early 1980s, Robert J.A. found that these objectives, particularly that of encouraging integration into the workplace, were pressing and substantial.

183 Under the heading of minimal impairment, Robert J.A. found that the regime of conditional aid for young people did not limit the right as little as possible. For the most part, he based this finding on the fact that the option of participation in the employment programs was limited by the number of places made available, the lack of information offered to beneficiaries about these programs, and the various criteria which guaranteed that not all those who wished to participate would have that opportunity. The fact that the Remedial Education Program did

not result in a complete supplementation of the lower level of assistance was another factor that led him to conclude that the regime was not minimally impairing.

184 For the legislation to have been upheld at this stage of the *Oakes* test (*R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103), Robert J.A. held that the government would have had to have shown that the criteria for admission to the educational programs were flexible enough to allow anyone under the age of 30 to be admitted and that the government was acting in a reasonable manner in determining the conditions under which a young beneficiary would be able to receive an increase in assistance. In his view, it is reasonable to expect that the government should offer such flexibility given that young adults would otherwise receive assistance that was one third of that received by those 30 or over, well below a subsistence level. Robert J.A. therefore concluded that the distinction in benefits created by s. 29(*a*) of the Regulation could not be justified under s. 1 of the *Canadian Charter*.

185 Baudouin J.A. disagreed with Robert J.A.'s approach to the minimal impairment issue. He approached the analysis with considerable reticence, given the fact that, in his view, [TRANSLATION] "it is easy for the courts, several years after the alleged infringement, in an entirely different context and without the political, economic and social constraints of governments, to criticize their decisions and set themselves up as legislators" (p. 1045).

186 While he agreed that the educational programs put into place were not a success, he found that the failure of these programs could not be linked to the conditions that were placed on participation. In this case, he placed some responsibility on the members of the group for having chosen not to participate in the programs. Moreover, he disagreed with the importance that Robert J.A. gave to the fact that there were not enough spaces available for all those under 30 to have participated, holding that it would be absurd for the government to have been forced to open 75 000 places when not even the 30 000 available places were filled.

187 Thus, Baudouin J.A. concluded that the government had met its burden of showing that its programs were minimally impairing and that its deleterious effects were reasonably proportional to the salutary effects. In doing so, he emphasized that just because a program is not a success should not be enough for a court to conclude that the means were not proportional to the objective sought.

188 Because he was the only justice to find that there had been a *Canadian Charter* infringement that was not upheld by s. 1, Robert J.A. was the only one to deal with the issue of remedy. He held that the most appropriate remedy would be to declare both ss. 29(*a*) and 23 of the Regulation invalid, since it was clear that the government would not have adopted that regulation without s. 29(*a*). However, due to the consequences of such a declaration, he held that it should be suspended for a period.

189 Robert J.A. then rejected the appellant's claim for compensation for herself and the members of her class. In order for damages to be ordered following a s. 52 declaration of unconstitutionality, he held that there had to be some correlation between the remedy ordered under s. 52 and s. 24(1): *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679; *Guimond v. Quebec (Attorney General)*, 1996 CanLII 175 (SCC), [1996] 3 S.C.R. 347.

190 On the issue of s. 45 of the *Quebec Charter*'s application to this case, two separate sets of reasons were delivered by the Court of Appeal. Baudouin J.A., Mailhot J.A. concurring, held that s. 45 had not been infringed. In interpreting the wording of the section, Baudouin J.A. held that the legislature would not, through s.

45, have adopted an obligation as massive as that of providing social assistance, while setting out strict limitations for the other economic rights. He therefore held that s. 45, like the other sections in the economic rights chapter of the *Quebec Charter*, only provided Quebec residents with a right to be provided access to whatever social assistance might exist, without discrimination.

191 Upon examination of the context, as well as the language used in the adjoining sections, Robert J.A. held that s. 45 did in fact create a positive right to social assistance, and that it had been infringed. Whereas the other sections of the economic rights chapter of the *Quebec Charter* were drafted with explicit limitations, such as "to the extent provided by law" (emphasis added) in s. 44, in the case of s. 45 there is a specifically different phrasing that is not used in any other section. Robert J.A. held that these differences must mean something; he found that s. 45 did not contain an internal limitation.

192 Robert J.A. went on to hold that s. 45 had been infringed. Nevertheless, he found that no award for damages could be awarded under s. 49 because, in order to make such an order, there must be wrongful conduct by a party. He held that the fact that a provision is found to be unconstitutional does not amount to a finding of wrongful conduct on the part of the government.

193 The claimant appealed the Quebec Court of Appeal's decision to this Court.

VI. Issues

194 The following four constitutional questions were stated by the Chief Justice on November 1, 2000:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*.

195 The appellant also makes a claim under s. 45 of the *Quebec Charter*.

VII. Analysis

A. *Procedural Issues*

196 The history of this case spans three decades. On July 29, 1986, the appellant filed a motion to authorize a class action suit pursuant to art. 1002 of the Quebec *Code of Civil Procedure*, R.S.Q., c. C-25. On

December 11, 1986, Reeves J. of the Quebec Superior Court certified the group. He described the group as follows (at p. 1650):

> [TRANSLATION] Individuals capable of working, aged 18 to 30 years, who are currently receiving welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) and/or who received welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) during any period since April 17, 1985, and/or who become or will be recipients of welfare benefits under s. 29(a) of the Regulation respecting social aid adopted under the Social Aid Act (R.S.Q., c. A-16, s. 31) from this day until the date of judgment in the present matter.

The final date to exclude one's self from the class was February 8, 1987.

197 While the legislation in question existed in its disputed form between 1984 and 1989, the operation of Quebec's *Act Respecting the Constitution Act, 1982*, means that the *Social Aid Act* operated notwithstanding the *Canadian Charter* until June 23, 1987. The *Social Aid Act* was amended to make all benefits conditional on July 31, 1989. Thus, it is only between those dates that the *Canadian Charter* applied to the present case. On the other hand, the *Quebec Charter* applied for the entire period. Despite the divergence in applicable dates, I would agree with the holding of Reeves J. that the events that transpired over the entire period may be examined in order to determine the constitutionality of the legislation.

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198 As a result of this case being brought by means of a class action, the respondent raised two preliminary procedural issues before this Court. First, the government argues that a class action is an inappropriate method for bringing a direct action of invalidity. It contends that, pursuant to the holding of Gonthier J. in *Guimond*, *supra*, an action for damages cannot be coupled with a declaratory action for invalidity and that Reeves J. should not have authorized the bringing of the class action because the facts alleged did not justify the conclusions sought. However, as Gonthier J. held in *Guimond*, the rule against coupling an action for a s. 24(1) remedy with a direct action under s. 52 is only a general rule. It was certainly within the discretion of Reeves J. to allow the class to be certified. Admittedly, obtaining a s. 24(1) order for damages pursuant to a declaration of invalidity is an unlikely outcome for any *Canadian Charter* complainant. However, rather than creating a bar to litigants who might be seeking one or the other type of remedy, this analysis is best dealt with when determining the appropriate remedy.

199 The second preliminary issue argued by the respondent is that the Superior Court was not a competent court to hear the constitutional arguments since the complainants could have, at any time after June 23, 1987, made an application to be heard by the Social Affairs Commission. In support of this, the respondent relies on the holding of this Court that an administrative body that is expressly empowered by legislative mandate to interpret or apply any law necessary to reach its findings has the power to apply the *Canadian Charter*: *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, 1991 CanLII 57 (SCC), [1991] 2 S.C.R. 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, 1991 CanLII 12 (SCC), [1991] 2 S.C.R. 22.

200 While the above cases stand for the proposition that an administrative body could have jurisdiction to determine constitutional questions, they did not determine that such bodies have exclusive jurisdiction over such matters. In the later case of *Weber v. Ontario Hydro*, 1995 CanLII 108 (SCC), [1995] 2 S.C.R. 929, McLachlin J. (as she then was) held that when an administrative body has been granted the authority to make orders under an Act or collective agreement, such body may constitute a court of competent jurisdiction for the purposes of s. 24(1) of the *Canadian Charter*. McLachlin J. noted that mandatory arbitration clauses in labour statutes may deprive the courts of concurrent jurisdiction. That case did not, however, deal with the question of

whether a declaration of invalidity, such as the one being sought here, can be made by an administrative body. Indeed, La Forest J. held in *Cuddy Chicks*, *supra*, that such a body can only declare an impugned provision invalid for the purposes of the matter before it (p. 17).

201 In the context of this case, it would be inappropriate to decide what is the scope of the Social Affairs Commission's power to make orders pursuant to s. 24(1). Little, if any evidence has been advanced regarding the powers of the Commission, and the matter was not argued in any depth before this Court. Given that the Superior Court was the only forum that the appellant could choose in order to obtain a general declaration of invalidity, and that prior to 1990 it was considered to be the only appropriate forum for a determination of any of the constitutional questions raised, I do not believe that it would be advisable to halt the process at this late date for procedural reasons.

B. *Canadian Charter of Rights and Freedoms*

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202 The appellant advances arguments relating to both s. 7 and s. 15 of the *Charter*. When multiple *Charter* rights are advanced, there is always some question as to the proper manner in which to proceed. While it is generally sufficient to find that one of the rights is infringed and simply state that the other "need not be dealt with", this approach is sometimes unhelpful. Each case must be dealt with separately. In the recent case of *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, for instance, the complainant put forth claims based on both his s. 2(*d*) associational rights and his s. 15 equality rights. I held for the majority that the burdens imposed by ss. 2(*d*) and 15(1) differed in the sense that the latter focuses on the effects of underinclusion on human dignity, while the former is concerned with the ability to exercise the fundamental freedom of association (para. 28). In that case, at its core, the appellant's claim was concerned with his capacity to organize. I therefore began with a consideration of that right and, having found an unjustified *Charter* breach, did not have to proceed to a consideration of the s. 15(1) claim.

203 In this case, we are again faced with two *Charter* claims, based on rights that require different approaches. While s. 15 is concerned with the effect of over- or underinclusive legislation on the claimant's human dignity, s. 7 is concerned with the manner in which the state's actions interfere with a free-willed person's ability to enjoy his life, liberty and security interests. Any infringement of those rights by the state must be imposed in accordance with the principles of fundamental justice. Though both sets of rights are protected under the *Charter*, the two protect different interests. While it is important that the *Charter* be interpreted in a consistent fashion, the rights themselves must be interpreted in accordance with their individual terms. In a given situation, one right may be infringed while another is not. "*Charter* values" are an important concept that may help to inform a *Charter* right, but they cannot be invoked to modify the wording of the *Charter* itself.

204 In this case, the different nature of the two rights comes to the fore, and it is for this reason that, even though I have held that the legislation in dispute constitutes an unjustified infringement of s. 15, I have chosen to undertake an examination of s. 7 as well, in order to contrast the particular limits of the two rights.

(1) Section 7

205 Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The appellant in this case argues that the statutory framework that reduced benefits for those under 30 infringed her right to security of the person, since it had the effect of leaving her and the members of her class in a position of abject poverty that threatened both their physical and psychological integrity. In order to establish a s. 7 breach, the claimant must first show that she was deprived of her right to life, liberty or security of the person, and then must

establish that the state caused such deprivation in a manner that was not in accordance with the principles of fundamental justice.

206 The protection provided for by s. 7's right to life, liberty and security of the person is reflective of our country's traditional and long-held concern that persons should, in general, be free from the constraints of the state and be treated with dignity and respect. In *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, Dickson C.J. held that security of the person is implicated in the case of "state interference with bodily integrity and serious state-imposed psychological stress" (p. 56).

207 In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 60, Lamer C.J. held that, for a restriction of the right to security of the person to be made out:

> . . . the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference 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.

208 In this case, the appellant has gone to great lengths to demonstrate that the negative effects of living on the reduced level of support were seriously harmful to the physical and psychological well-being of those affected. Certainly, those who, like the appellant, were living on a reduced benefit were not in a very "secure" position. The remaining question at this first stage of the s. 7 analysis is, however, whether this position of insecurity was brought about by the state.

209 The requirement that the violation of a person's rights under s. 7 must emanate from a particular state action can be found in the wording of the section itself. Section 7 does not grant a right to security of the person, full stop. Rather, the right is protected only insofar as the claimant is deprived of the right to security of the person by the state, in a manner that is contrary to the principles of fundamental justice. The nature of the required nexus between the right and a particular state action has evolved over time.

210 In *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*"), Lamer J., as he then was, held that s. 7 was not necessarily limited to purely criminal or penal matters (p. 1175). Nonetheless, he did maintain that, given the context of the surrounding rights and the heading "Legal Rights" under which s. 7 is found, it was proper to conclude that "the restrictions on liberty and security of the person that s. 7 is concerned with are those that occur as a result of an individual's interaction with the justice system, and its administration" (p. 1173).

211 In *G. (J.)*, *supra*, Lamer C.J. again addressed the issue of whether s. 7 rights could be extended beyond the criminal law context, this time, with respect to the right to state-funded counsel for a parent at a custody hearing. In finding that such a right was contemplated by s. 7, he held that the subject matter of s. 7 was "the state's conduct in the course of enforcing and securing compliance with the law, where the state's conduct deprives an individual of his or her right to life, liberty, or security of the person" (para. 65). In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, I agreed with this statement of the law and concluded that s. 7 rights could be infringed in the context of an investigation under human rights legislation.

212 In *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48, the ambit of state action was expanded beyond the confines of a court room. In that case, a mother sought an injunction against the Child and Family Services agency's decision to apprehend her child without a warrant. While there was no judicial process at issue, she claimed that the action of the state in apprehending her child violated her s. 7 right to security of the person. L'Heureux-Dubé J. held that the claimant had been deprived of her right in accordance with the principles of fundamental justice, recognizing nevertheless that she had satisfied the first part of the s. 7 test. This can be explained by the fact that the seizure of the claimant's newborn child constituted a determinative government action.

213 Thus, in certain exceptional circumstances, this Court has found that s. 7 rights may include situations outside of the traditional criminal context — extending to other areas of judicial competence. In this case, however, there is no link between the harm to the appellant's security of the person and the judicial system or its administration. The appellant was not implicated in any judicial or administrative proceedings, or even in an investigation that would at some point lead to such a proceeding. At the very least, a s. 7 claim must arise as a result of a determinative state action that in and of itself deprives the claimant of the right to life, liberty or security of the person.

214 Some may find this threshold requirement to be overly formalistic. The appellant, for instance, argues that this Court has found that respect for human dignity underlies most if not all of the rights protected under the *Charter*. Undoubtedly, I agree that respect for the dignity of all human beings is an important, if not foundational, value in this or any society, and that the interpretation of the *Charter* may be aided by taking such values into account. However, this does not mean that the language of the *Charter* can be totally avoided by proceeding to a general examination of such values or that the court can through the process of judicial interpretation change the nature of the right. As held in *Blencoe*, *supra*, "[w]hile notions of dignity and reputation underlie many *Charter* rights, they are not stand-alone rights that trigger s. 7 in and of themselves" (para. 97). A purposive approach to *Charter* interpretation, while coloured by an overarching concern with human dignity, democracy and other such "*Charter* values", must first and foremost look to the purpose of the section in question. Without some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question.

215 In the *Charter*, s. 7 is grouped, along with ss. 8 to 14, under the heading "Legal Rights", in French, "*Garanties juridiques*". Given the wording of this heading, as well as the subject matter of ss. 8 to 14, it is apparent that s. 7 has, as its primary goal, the protection of one's right to life, liberty and security of the person against the coercive power of the state (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-9; *Prostitution Reference*, *supra*, *per* Lamer J.). The judicial nature of the s. 7 rights is also evident from the fact that people may only be deprived of those rights in accordance with the principles of fundamental justice. As Lamer J. held in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, such principles 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" (p. 503). It is this strong relationship between the right and the role of the judiciary that leads me to the conclusion that some relationship to the judicial system or its administration must be engaged before s. 7 may be applied.

216 To suggest that this nexus is required is not to fossilize s. 7. This Court has already held, in *G. (J.)*, *supra*, *Blencoe*, *supra*, and *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, that this link to the judicial system does not mean that s. 7 is limited to purely criminal or penal matters. In *K.L.W.*, *supra*, it was recognized that there need not be a link to a trial-like process. Individuals who find themselves subject to administrative processes may find that they have been deprived of their right to life, liberty or security of the person. The manner in which these various administrative processes will be reviewed has by no means been calcified. Nor has the interpretation of the "principles of fundamental justice" which apply to these processes. However, at the very least, in order for one to be deprived of a s. 7 right, some determinative state

action, analogous to a judicial or administrative process, must be shown to exist. Only then may the process of interpreting the principles of fundamental justice or the analysis of government action be undertaken.

217 In this case, there has been no engagement with the judicial system or its administration, and thus, the protections of s. 7 are not available. As will be discussed below, I have concluded that s. 29(*a*) of the Regulation, by treating individuals differently on the basis of their age, constitutes an infringement of the appellant's equality rights. However, s. 7 does not have the same comparative characteristics as the s. 15 right. The appellant's situation must be viewed in more absolute terms. In this case, the threat to the appellant's right to security of the person was brought upon her by the vagaries of a weak economy, not by the legislature's decision not to accord her more financial assistance or to require her to participate in several programs in order for her to receive more assistance.

218 The appellant and several of the interveners made forceful arguments regarding the distinction that is sometimes drawn between negative and positive rights, as well as that which is made between economic and civil rights, arguing that security of the person often requires the positive involvement of government in order for it to be realized. This is true. The right to be tried within a reasonable time, for instance, may require governments to spend more money in order to establish efficient judicial institutions. However, in order for s. 7 to be engaged, the threat to the person's right itself must emanate from the state.

219 In *G. (J.)*, *supra*, for instance, this Court held that the claimant had the right to be provided with legal aid to assist her during a child custody hearing. To the extent that that order required the government to spend money so as to ensure that the complainant was not deprived of her right to security of the person in a manner that was inconsistent with the principles of fundamental justice, such a right could be construed as "positive" and perhaps "economic". However, what was determinative in that case was that the claimant, pursuant to s. 7, was being directly deprived of her right to security of the person through the action of the state. It was the fact that the state was attempting to obtain custody of the claimant's children that threatened her security. It is such initial state action, one that directly affects and deprives a claimant of his or her right to life, liberty or security of the person that is required by the language of s. 7.

220 The appellant also directed our attention to the dissenting statements of Dickson C.J. in *Reference re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, in which he noted that a conceptual approach in which freedoms are said to involve simply an absence of interference or constraint "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" (p. 361). The question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore*, *supra*. In that case, I held that legislation that is underinclusive may, in unique circumstances, substantially impact the exercise of a constitutional freedom (para. 22). I explained that in order to meet the requirement that there be some form of government action as prescribed by s. 32 of the *Canadian Charter*, the legislation must have been specifically designed to safeguard the exercise of the fundamental freedom in question. The affected group was required to show that it was substantially incapable of exercising the freedom sought without the protection of the legislation, and that its exclusion from the legislation substantially reinforced the inherent difficulty to exercise the freedom in question. While the existence of the *Social Aid Act* might constitute sufficient government action to engage s. 32, none of the other factors enumerated in *Dunmore* are present in this case.

221 In *Dunmore*, I found that the Ontario *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, instantiated the freedom to organize and that without its protection agricultural workers were substantially incapable of exercising their freedom to associate. The legislation reinforced the already precarious position of

agricultural workers in the world of labour relations. In undertaking the underinclusiveness analysis, a complainant must demonstrate that he or she is being deprived of the right itself and not simply the statutory benefit that is being provided to other groups. Here, the *Social Aid Act* seeks to remedy the situation of those persons who find themselves without work or other assistance by providing them with financial support and job training so that they can integrate to the active workforce. As in *Delisle v. Canada (Deputy Attorney General)*, 1999 CanLII 649 (SCC), [1999] 2 S.C.R. 989, and *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, the exclusion of people under 30 from the full, unconditional benefit package does not render them substantially incapable of exercising their right to security of the person without government intervention. Leaving aside the possibilities that might exist on the open market, training programs are offered to assist in finding work and to provide additional benefits.

222 The appellant has failed to demonstrate that there exists an inherent difficulty for young people under 30 to protect their right to security of the person without government intervention. Nor has the existence of a higher base benefit for recipients 30 years of age and over been shown to reduce, on its own, or substantially, the potential of young people to exercise their right to security of the person. The fact that the remedial programs instituted by the reforms of 1984 might not have been designed in a manner that was overly favourable to the appellant does not help the appellant in meeting her burden. My concern here is with the ability of the appellant's group to access the right itself, not to benefit better from the statutory scheme. The appellant has failed to show a substantial incapability of protecting her right to security. She has not demonstrated that the legislation, by excluding her, has reduced her security any more than it would have already been, given market conditions.

223 For these reasons, I would hold that s. 29(*a*) of the Regulation does not infringe s. 7 of the *Canadian Charter*. The threat to the appellant's security of the person was not related to the administration of justice, nor was it caused by any state action, nor did the underinclusive nature of the Regulation substantially prevent or inhibit the appellant from protecting her own security. Such a result should not be unexpected. As I noted in *Dunmore*, *supra*, total exclusion of a group from a statutory scheme protecting a certain right may in some limited circumstances engage that right to such an extent that it is in essence the substantive right that has been infringed as opposed to the equality right protected under s. 15(1) of the *Charter*. However, the underinclusiveness of legislation will normally be the province of s. 15(1), and so it is to the equality analysis that we must now turn.

(2) Section 15

224 Section 15(1) of the *Charter* protects every individual's right to the equal protection and benefit of the law, without discrimination based on, among other grounds, age. As this Court has enunciated on numerous occasions, a purposive approach to this right must take into consideration a concern for the individual human dignity of all those subject to the law. As noted in the s. 7 analysis, while a concern for and understanding of the basic values underlying the *Charter* are important in order to give proper consideration to a *Charter* claim, such principles cannot be allowed to override the language of the *Charter* itself.

225 Among the grounds of prohibited discrimination enumerated under s. 15(1), age is the one that tends to cause the most theoretical confusion. The source of such confusion in implementing the s. 15(1) guarantee of age equality is rooted in our understanding of substantive equality. In protecting substantive equality, this Court has recognized that like people should be treated alike and, reciprocally, different people must often be treated differently. Most of the grounds enumerated under s. 15(1) tend to be characteristics that our society has deemed to be "irrelevant" to one's abilities. The problem with age is that because we all, as human beings trapped in the continuum of time, experience the process of aging, it is sometimes difficult to assess discriminative behaviour. Health allowing, we all have the opportunity to be young and foolish as well as old and crotchety. As Professor Hogg, *supra*, argues, "[a] minority defined by age is much less likely to suffer from the hostility, intolerance and prejudice of the majority than is a minority defined by race or religion or any other characteristic that the majority has never possessed and will never possess" (p. 52-54).

226 Moreover, whereas distinctions based on most other enumerated or analogous grounds may often be said to be using the characteristic as an illegitimate proxy for merit, distinctions based on age as a proxy for merit or ability are often made and viewed as legitimate. This acceptance of distinctions based on age is due to the fact that at different ages people are capable of different things. Ten-year-olds, in general, do not make good drivers. The same might be said for the majority of centenarians. It is in recognition of these developmental differences that several laws draw distinctions on the basis of age.

227 However, despite this apparent recognition that age is of a different sort than the other grounds enumerated in s. 15(1), the fact of the matter is that it was included as a prohibited ground of discrimination in the *Canadian Charter*. Recall that in *Law* Iacobucci J. referred to the remark in *Andrews* that it would be a rare case in which differential treatment based on one or more of the enumerated or analogous grounds would not be discriminatory: *Law*, *supra*, at para. 110. In contrast, some human rights laws do not include age as a ground of discrimination, or limit the ground to discrimination between the ages of 18 and 65: *Human Rights Code*, R.S.B.C. 1996, c. 210; *Quebec Charter*, s. 10. But the *Canadian Charter* does include age, without internal limitation. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC), [1999] 2 S.C.R. 203, McLachlin J. and I held that the grounds of discrimination enumerated in s. 15(1) "function as legislative markers of suspect grounds associated with stereotypical, discriminatory decision making" (para. 7). Legislation that draws a distinction based on such a ground is suspect because it often leads to discrimination and denial of substantive equality. This is the case whether the distinction is based on race, gender or age. While distinctions based on age may often be justified, they are nonetheless equally suspect. While age is a ground that is experienced by all people, it is not necessarily experienced in the same way by all people at all times. Large cohorts may use age to discriminate against smaller, more vulnerable cohorts. A change in economic, historical or political circumstances may mean that presumptions and stereotypes about a certain age group no longer hold true. Moreover, the fact remains that, while one's age is constantly changing, it is a personal characteristic that at any given moment one can do nothing to alter. Accordingly, age falls squarely within the concern of the equality provision that people not be penalized for characteristics they either cannot change or should not be asked to change.

228 The fact that the Regulation here makes a distinction based on a personal characteristic that is specifically enumerated under s. 15 should therefore raise serious concerns when considering whether such a distinction is in fact discriminatory. While not creating a presumption of discrimination, a distinction based on an enumerated ground reveals a strong suggestion that the provision in question is discriminatory for the purposes of s. 15. In recent years, this Court has stated that disrespect for human dignity lies at the heart of discrimination: *Egan v. Canada*, 1995 CanLII 98 (SCC), [1995] 2 S.C.R. 513, *per* L'Heureux-Dubé J.; *Miron v. Trudel*, 1995 CanLII 97 (SCC), [1995] 2 S.C.R. 418, *per* McLachlin J.; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. However, it is worth repeating that the concept of "human dignity" has essentially been brought to the fore in an effort to capture the essence of what differential treatment based on one of the grounds in s. 15 captures.

229 The framework for undertaking a s. 15 analysis was put forth most recently by this Court in *Law*, *supra*. In that case, this Court affirmed that the s. 15 analysis is to take place through a three-stage process: Is there differential treatment between the claimant and others, in purpose or effect; is the differential treatment based on one or more of the grounds enumerated under s. 15(1) or a ground analogous to those contained therein; does the law in question have a purpose or effect that is discriminatory within the meaning of the equality guarantee? (*Law*, at para. 88). At each stage of this process, the claimant bears the civil burden of proof. This burden remains constant no matter how serious the claim or how many people are potentially involved.

230 It is evident, in this case, and the respondent does not appear to dispute this point, that s. 29(*a*) of the Regulation creates a distinction between single social assistance recipients under the age of 30 and those 30 and over. Single recipients under the age of 30 have their base benefits capped at a level one third of that of those 30 and over. While they may participate in certain programs in order to increase their benefits, those 30 and over

do not have to do so. This results in the differential treatment of the two groups. Thus, the fundamental question that needs to be dealt with in any depth here is whether the distinction outlined in s. 29(*a*) is indicative that the government treats social assistance recipients under 30 in a way that is respectful of their dignity as members of our society. Evidence regarding the actual impact of the distinction will also be considered, although I conclude that the regulatory regime is discriminatory on its face.

231 In *Law*, *supra*, Iacobucci J. held that this third inquiry is to be assessed as by a reasonable person in the claimant's circumstances, having regard to several "contextual factors". The factors suggested in *Law*, while not exhaustive, are (1) pre-existing disadvantage, stereotyping, prejudice or vulnerability, (2) correspondence between the distinction drawn and the needs, capacity or circumstances of the claimant or others, (3) any ameliorative purpose or effects of the impugned law upon a more disadvantaged group or person, and (4) the nature and scope of the interest affected by the impugned law. Iacobucci J. noted that the presence or absence of any of these contextual factors is not determinative.

232 Interestingly, *Law*, also involved a claim that a legislative provision, by offering lower pension benefits to younger people, constituted age discrimination under s. 15. In that case, the claimant argued that provisions of the Canada Pension Plan that gradually reduced the survivor's pension for able-bodied surviving spouses without dependant children by 1/120th of the full rate for each month that the claimant's age was less than 45 at the time of the contributor's death was discriminatory. The effect of the legislation was to make 35 years of age the threshold age for receiving survivor benefits for persons not having attained the retirement age of 65. Those over 45 at the time of their spouse's death would receive full benefits, those under 35 would receive no benefits until they were 65, and those between 35 and 45 would receive a graduated amount until they were 65. After examining the contextual factors enunciated above, Iacobucci J. held that this distinction, though based on the enumerated ground of age, was not substantively discriminatory.

233 The fact that a certain legislative provision which limited the benefits to those under a certain age was found to be constitutional in one case does not necessarily lead to the same conclusion here. In order to determine in this case whether the legislation is respectful of the self-worth and dignity of the appellant, the legislation has to be examined in the context of both its overriding purpose and effects, as well as the situation of the appellant.

234 As this Court held in *Law* and *Egan*, *supra*, the s. 15 analysis must be undertaken from the perspective of the appellant. As this Court has previously agreed, the focus of the inquiry is both subjective and objective (*Law*, at para. 59):

> . . . subjective in so far as the right to equal treatment is an individual right, asserted by a specific claimant with particular traits and circumstances; and objective in so far as it is possible to determine whether the individual claimant's equality rights have been infringed only by considering the larger context of the legislation in question, and society's past and present treatment of the claimant and of other persons or groups with similar characteristics or circumstances.

Thus, while it is not enough for the appellant to simply claim that her dignity was violated, a demonstration, following the subjective-objective method previously described, that there is a rational foundation for her experience of discrimination will be sufficient to ground the s. 15 claim (*Lavoie v. Canada*, [2002] 1 S.C.R. 769, 2002 SCC 23, at para. 46). The factual basis upon which the court will come to a conclusion on this point is very different from the one that will be considered in the context of a s. 1 justification. The appellant in this case must demonstrate that the legislation treated recipients of social assistance under the age of 30 in a manner that would lead a reasonable person, similarly situated, to feel that he or she was considered less worthy of "recognition . . . as a member of Canadian society": *Law*, *supra*, at para. 88. There is no balancing of interests here. In order to demonstrate that her dignity is affected, the appellant may wish to deal with some of the factors enumerated in *Law*,

such as the manner in which the legislation emphasizes a pre-existing disadvantage or stereotype suffered by the appellant's group, the importance or nature of the right that is being withheld from the appellant's group, as well as the degree of care that the government took in crafting the legislation so as to take into account the actual needs and situation of the group's members.

(i) Pre-existing Disadvantage or Stereotype

235 The first contextual factor that was considered in *Law* was that of pre-existing disadvantage or prejudice. In *Law*, Iacobucci J. took notice of the fact that young widows are generally better situated to prepare for retirement than are older widows; there is no pre-existing disadvantage in their case. The respondent argues the same thing here, noting that young people are generally not considered to be routinely subjected to the sort of discrimination faced by some of Canada's discrete and insular minorities, and that they are not disadvantaged. While, in general, such a rule of thumb may hold true, it is precisely because of the generality of this type of consideration that distinctions based on enumerated or analogous grounds are suspect. The purpose of undertaking a contextual discrimination analysis is to try to determine whether the dignity of the claimant was actually threatened. In this case, we are not dealing with a general age distinction but with one applicable within a particular social group, welfare recipients. Within that group, the record makes clear that it was not, in fact, easier for persons under 30 to get jobs as opposed to their elders. The unemployment rate in 1982 had risen to 14 percent, with the rate among young people reaching 23 percent. As a percentage of the total population of people on social assistance, those under 30 years of age rose from 3 percent in 1975 to 12 percent in 1983. Thus, the stereotypical view upon which the distinction was based, that the young social welfare recipients suffer no special economic disadvantages, was not grounded in fact; it was based on old assumptions regarding the employability of young people. The creation of the assistance programs themselves demonstrates that the government itself was aware of this disadvantage.

236 The appellant argues that people on social assistance have always suffered disadvantage because they are victims of stereotypical assumptions regarding the reasons for being welfare recipients, and are therefore marginalized from society. In making such an argument, the appellant is not comparing social assistance recipients under 30 to those 30 and over, but instead, comparing the relative position of young social assistance recipients to members of society as a whole. This raises the question of determining what is the proper comparator.

237 In *Law*, no argument was made that widows, as a category, have been traditionally marginalized. It was recognized, however, that in determining whether a group has suffered previous disadvantage, the analysis need not necessarily adopt the comparator upon which the distinction is first made. The question to be examined here is not whether differential treatment has occurred, which has already been established, but whether the particular group affected has been traditionally marginalized, or has faced unfair stereotyping. In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37, Iacobucci J. noted that the claimant group (non-registered natives) had faced considerable discrimination, but refused to enter into a "race to the bottom" (para. 69) by deciding who is more disadvantaged. The same approach, should, in my view, be adopted here. There is no compelling evidence that younger welfare recipients, as compared to all welfare recipients, have been traditionally marginalized by reason of their age. But that does not end the inquiry.

238 The concern, when determining whether the differential treatment of a group is discriminatory, must, according to this Court in *Law*, be governed by an overarching concern for human dignity. The fact that people on social assistance are in a precarious, vulnerable position adds weight to the argument that differentiation that affects them negatively may pose a greater threat to their human dignity. The fact that their status as beneficiaries of social assistance was not argued as constituting a new analogous ground should not be a matter of concern at this stage of the analysis, since it has already been determined at the second stage of the *Law* test that the differentiation has been made on the basis of an enumerated ground. The issue, at this stage, is to determine whether, in the context of this case, a differentiation based on an enumerated ground is threatening to the appellant's human dignity. If the vulnerability of the appellant's group as welfare recipients cannot be recognized at this stage, can we really be said to be undertaking a contextual analysis?

(ii) Correspondence Between Grounds Upon Which Claim Is Based and the Actual Needs, Capacity or Circumstances of the Claimant

239 It is at this stage of the analysis that the contrast between the competing characterizations of the legislation put forth by the appellant and the respondent is most apparent. The appellant claims that the government did not take into account the real circumstances of young adults in crafting its legislation. In arguing this point, she relies on the estimate that, in reality, only 11.2 percent of young adults were able to receive the full amount of assistance.

240 The respondent, on the other hand, argues that while, as in *Law*, this legislation treated younger adults differently because their prospects for supporting themselves in the future were greater than that of their elders, this regulation, unlike that in *Law*, was specifically designed to assist those under 30. In support of this contention, the respondent presents a considerable amount of evidence demonstrating that the institution of the educational programs constituted a response to an alarmingly high rate of unemployment among young people, and was therefore designed to give them the skills necessary to enter the job market so that they could be more autonomous.

241 The witnesses for the respondent explained that their intention in developing the new system was to help young people in their particular situation. However, the language of much of the regulatory scheme appears, on its face, to suggest that the educational programs, and the monetary incentives that accompanied them, were blind as to the age of participants. Sections 32, 35.0.1 and 35.0.2 of the Regulation give no indication that such programs were specifically designed for young people. This is confirmed by the fact that while the programs ostensibly targeted those under 30, some people 30 and over did participate in the programs. In his judgment, Robert J.A. gave considerable weight to the fact that there were not enough places available in the programs to meet the needs of all beneficiaries under 30. When the programs were started, 30 000 places were opened, even though 85 000 single people under 30 were on social assistance. As was mentioned earlier, the programs were also open to persons 30 and over. I do not consider evidence of the number of places opened to be a significant factor in determining legislative purpose.

242 In my view, the treatment of legislative purpose at this stage of the s. 15(1) analysis must not undermine or replace that which will be undertaken when applying s. 1. Whether the distinction is made explicitly in the legislation, as compared with a facially neutral scheme, is immaterial when looking at legislative purpose. Indeed, this Court has adopted a unified approach to discrimination for claims under both the *Charter* and provincial human rights statutes, and affirmed that the method of discrimination is irrelevant. As McLachlin J. wrote for a unanimous Court in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, 1999 CanLII 652 (SCC), [1999] 3 S.C.R. 3, at paras. 47-48:

> In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the effect of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:
>
> > While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews*, *supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1), such that the onus may be satisfied by showing only a discriminatory effect. (Emphasis in original.)
>
> Where s. 15(1) of the *Charter* is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. [Emphasis in original.]

243 Whether a positive legislative purpose may be relevant under the *Law* analysis at the s. 15 stage is another matter. As is clear in the passage from *Law* that I have just reproduced, a claimant may demonstrate an infringement of s. 15(1) by either the legislative purpose or the effect. In the context, it is clear that Iacobucci J. is talking only about a detrimental purpose or effect, since it is nonsensical to think that a claimant might establish that a beneficial or benign purpose or effect infringes s. 15(1). It may be argued that a positive legislative intention might make some difference in the subjective-objective assessment of a distinction's impact on a claimant's human dignity, but the "principal concern", as McLachlin J. put it, remains the effect. Furthermore, any argument based on the positive legislative intention must take into account the impugned distinction. As stated earlier, the assumption that long-term benefits of training are greater for younger persons has nothing to do with the present need of all persons for a minimum amount of support and their likely response to the availability of training programs through penalties or incentives.

244 Indeed, giving too much weight here to what the government says was its objective in designing the scheme would amount to accepting a s. 1 justification before it is required. Commentators have already raised concerns with the blurring between s. 15 and s. 1: see e.g. C. D. Bredt and A. M. Dodek, "The Increasing Irrelevance of Section 1 of the Charter" (2001), 14 *Sup. Ct. L. Rev.* (2d) 175, at p. 182; Hogg, *supra*, at p. 52-27. In my view, it is highly significant whether certain factors are considered under s. 15 or s. 1. As the Chief Justice recently wrote for the majority of this Court in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, 2002 SCC 68, at para. 10:

> The *Charter* distinguishes between two separate issues: whether a right has been infringed, and whether the limitation is justified. The complainant bears the burden of showing the infringement of a right (the first step), at which point the burden shifts to the government to justify the limit as a reasonable limit under s. 1 (the second step). These are distinct processes with different burdens.

The point is that under the *Oakes* analysis, the legislative objective is not accepted uncritically. At the s. 15 stage, it is not appropriate to accept at face value the legislature's characterization of the purpose of the legislation and then use that to negate the otherwise discriminatory effects.

245 In any case, as I have noted, the legislature's intention is much less important at this stage of the *Law* analysis than the real effects on the claimant. The fundamental question, then, in this case, is not how the legislature viewed the scheme, nor how members of the majority would have viewed it in relation to the claimant group. The approach set out for us by *Law* is to ask how any member of the majority, reasonably informed, would feel in the shoes of the claimant, experiencing the effects of the legislation. This approach is essential: if people whom the legislature views as different are not demonstrably different at all, the measure should not be acceptable. In other words, this Court's holding that substantive equality can mean treating different people differently applies only where there is a genuine difference.

246 Moreover, unlike the situation in *Law*, in which the legislation in question gradually decreased the benefits from the age of 45 to 35, the *Social Aid Act* created a bright line at 30, a line which appears to have had little, if any, relationship to the real situation of younger people. As the appellant has demonstrated, and the respondent conceded, the dietary and housing costs of people under 30 are no different from those 30 and over. The respondent argued that those under 30 were more likely to live with their parents than those 30 and over. While this appears to have been true, the government had no empirical data to support that view when it adopted the Regulation; it was also shown that those over 25 were much less likely to live with their parents than those under 25. Thus, the decision to draw a bright line at the age of 30 appears to have little to do with the actual situation of the affected group.

247 No attempt appears to have been made by the government to actually identify those recipients who were living with their parents, either through the Regulation or through the screening and application process. In fact, no effort was made to establish what living conditions were and a presumption was adopted that all persons under 30 received assistance from their family. This was obviously untrue, as the appellant's personal experience has shown. It is worth mentioning here that this situation is very different from that in *Law*, where there was a rational basis for presuming that younger widows had fewer needs and superior means of meeting those needs than older widows. In contrast, the young in the present case have similar needs to their elders and their relative youth provides no advantage in meeting those needs.

248 While the government offered evidence to show that the programs it established targeted what it saw as the needs of those under 30, there does seem to have been a certain degree of reliance on the fact that, by happenstance, the distinction between those under 30 years of age and those 30 and over had traditionally existed in Quebec's social assistance laws. As the government economist Pierre Fortin noted in his report, speaking about the need to do something about the difficult situation facing young welfare recipients:

> [TRANSLATION] An opportunity was provided by the existence of the reduced scale for those capable of working who were under 30 years of age, which could be brought back up to the regular scale provided the recipient participated in one or other of the employability development measures.
>
> (P. Fortin, "Les mesures d'employabilité à l'aide sociale: origine, signification et portée" (February 1990), at p. 3)

The prior existence of the distinction between beneficiaries under 30 and those 30 and over was based upon older schemes which had sought to emphasize the "principle of parental responsibility" and which had been created within the context of much lower levels of youth unemployment. Thus, the relationship between the actual needs of welfare recipients under 30 and the provisions of the *Social Aid Act* and Regulation was not particularly strong. By relying on a distinction that had existed decades earlier and that did not take into account the actual circumstances faced by those under 30 in the 1980s, the legislation appears to have shown little respect for the value of those recipients as individual human beings. It created for them what it defined as substandard living conditions on the basis of their age. Where, as here, persons experience serious detriment and evidence shows that the presumptions guiding the legislature were factually unsupported, it is not necessary to demonstrate actual stereotyping, prejudice, or other discriminatory intention. Nor does a positive intention save the regulation. That is the lesson to be drawn from this Court's cases on indirect or effects discrimination: *BCGSEU*, *supra*; *Eldridge v. British Columbia (Attorney General)*, 1997 CanLII 327 (SCC), [1997] 3 S.C.R. 624; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, 1987 CanLII 109 (SCC), [1987] 1 S.C.R. 1114. I would therefore disagree with the Chief Justice's views as expressed at para. 38 of her reasons. She writes there that far from being stereotypical or arbitrary, the program was calibrated to address the particular needs and circumstances of young adults requiring social assistance. In my view it is more appropriate to characterize the government's action in this way: Based on the unverifiable presumption that people under 30 had better chances of employment and lower needs, the program delivered to those people two thirds less of what the government viewed as the basic survival amount, drawing its distinction on a characteristic over which those people had no control, their age.

249 Before turning to the next contextual factor, I wish to address the issue of evidence and the burden of proof necessary to demonstrate a *Canadian Charter* infringement. The Chief Justice is clearly influenced by what she perceives as the lack of evidence from other individuals besides Ms. Gosselin in support of the contentions of adverse effect. It appears to me that the Chief Justice is also influenced by the procedural fact that Ms. Gosselin's claim was authorized as a class action. It is clear that, in Quebec, to obtain authorization for a class action, the applicant must prove the existence of a group of persons harmed by facts deriving from a common origin: P.-C. Lafond, *Le recours collectif comme voie d'accès à la justice pour les consommateurs* (1996), at p. 400. Ms. Gosselin obtained authorization, and that authorization is not a live issue in this appeal, so it is established that she has proved the existence of such a group before the court. While even respecting the common law mechanism it is not necessary that common issues predominate or that the class members be identically situated *vis-à-vis* the opposing party (*Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 39, *per* McLachlin C.J.), the legislature in Quebec deliberately departed from the conception of

common interest by which all points at issue must be identical, questions of law as well as questions of fact. The legislative intention was for the class action to apply where the problem raised by a member of the group resembles without being identical to those raised by other members. See Lafond, *supra*, at pp. 405-6; *Code of Civil Procedure*, R.S.Q., c. C-25, art. 1003(*a*). The question of the extent of individual disadvantage suffered would become relevant much later, when calculating damages. At this stage, however, it would be a departure from past jurisprudence for this Court to refuse to find a *Canadian Charter* breach on the basis that the claimant had not proven disadvantage to enough others. As the Chief Justice wrote in *Sauvé*, *supra*, at para. 55: "Even one person whose *Charter* rights are unjustifiably limited is entitled to seek redress under the *Charter*."

(iii) Ameliorative Purpose

250 The respondent argues that the purpose of this legislation was ameliorative in that it was meant to improve the situation of unemployed youths through academic and experiential benefits, as opposed to exclusively pecuniary assistance. Quite simply, this is not a useful factor in determining whether this legislation's differential treatment was discriminatory. In *Law*, *supra*, Iacobucci J. held that a piece of legislation might be less harmful to a group's dignity if its purpose or effect is to help a more disadvantaged person or group in society. In that case, the fact that the purpose of the legislation was to aid elderly widows meant that the impact on the dignity of those under the age of 35 was lessened. Such is not the case here. In this case, the legislature has differentiated between the appellant's group and other welfare recipients based on what it claims is an effort to ameliorate the situation of the very group in question. Groups that are the subject of an inferior differential treatment based on an enumerated or analogous ground are not treated with dignity just because the government claims that the detrimental provisions are "for their own good". If the purpose and effect of the distinction really are to help the group in question, the government should be able to show a tight correspondence between the grounds upon which the distinction is being made and the actual needs of the group. Here, no correspondence has been shown between the lower benefit and the actual needs of the group, even though it may have been established that the programs were themselves beneficial. The only logical inference for the differential treatment is that younger welfare recipients will not respond as positively to training opportunities and must be coerced by punitive measures while older welfare recipients are expected to respond positively to incentives.

(iv) Nature of the Interest Affected

251 The more important the interest that is affected by differential treatment, the greater the chance that such differential treatment will threaten a group's self-worth and dignity. This determination will generally require both a qualitative assessment of the interest affected and a quantitative inquiry as to the extent to which it is denied to the claimant. This case deals with a social assistance program which, despite the admitted existence of a secondary objective of helping people integrate into the workforce, has as its stated purpose the provision of the basic necessities for those in need. Thus, when the government creates a distinction that in some cases will result in people receiving only one third of what it has deemed to be the bare minimum for the sustainment of life, the effect on the members of the group is severe. As Iacobucci J. held in *Law*, *supra*, citing L'Heureux-Dubé J. in *Egan*, *supra*: "the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question" (para. 74). Here, there is an obvious and important interest in having enough money to assure one's own survival.

252 In *Law*, the Court noted that the purpose and function of the impugned CPP provisions were not to remedy the immediate financial need experienced by widows and widowers, but rather to enable older widows and widowers to meet their basic needs in the long term. In this case, while it is admitted that dealing with long-term dependancy is one of the legislation's objectives, the short-term remedying of immediate financial needs continues to play a dominant role in the objectives of the legislation. The difference in the nature and importance of the interest affected — provision for basic needs immediately as opposed to over the long term — is one of the crucial distinctions between the present case and *Law*. The effect of the distinction in the present case is that the claimant and others like her would have had their income far below not just the government's poverty line, but its

basic survival amount. A genuine contextual approach will appreciate this distinction and will not find the result determined by the apparent similarities in that both cases address an age distinction for a government benefit.

253 In her submissions, the respondent argues that it was not the creation of a lower base level of support for young people that was responsible for the deplorable situation in which many of them found themselves during the early 1980s. Instead, she argues, what was being offered were skills to allow young persons to enter the workforce, thereby reinforcing their dignity and self-worth:

> [TRANSLATION] . . . work is universally recognized as an essential component of human dignity. . . .

254 This statement says nothing about the differential treatment of those offered opportunities to obtain training or work experience. Furthermore, what much of the government's reasoning neglects is that the global economic situation that created the need for a program to help young people was characterized by the fact that there were no jobs available. The reason that these young people were not in the labour force was not exclusively that their skills were too low, or that they were undereducated, but that there were no jobs to be had. This is not to question the wisdom of the government's programs, but to emphasize that the effect that the maintenance of this distinction had on the members of the group in question was real and severe given the economic context of the time. Even if one were to accept, as I do not, that the government's positive intention was a significant factor in diminishing the impact of the impugned law on human dignity, or that there was no implicit stereotype that young persons would not have participated in training programs absent severe deprivation, any reading of the evidence indicates that it was highly improbable that a person under 30, with the best intentions, could at all times until he or she was 30 years old be registered in a program and therefore receive the full subsistence amount. Not all programs were open to each welfare recipient, and there would inevitably be waiting periods between the completion of one program and the start of another. During such periods, persons under 30 would clearly be exposed to deep poverty unlike persons 30 and over, in a way going directly to their human dignity and full participation as equally valued members of society.

255 The situation of Ms. Gosselin herself is illustrative of the manner in which s. 29(*a*) operated and affected her basic human dignity. There is no necessity for her to bring evidence of actual deprivation of other named welfare recipients under the age of 30. From the inception of the legislative scheme in question, Ms. Gosselin spent some months participating in the programs, receiving full benefits, and some months between programs, receiving a reduced amount in benefits. During the times that she was participating in the programs, she benefited from the experience that the programs offered, as well as the increase in benefits that such participation provided her. But, being a person under 30 years of age, much of the time she was living in fear of being returned to the reduced level of support. At certain times, she was not immediately capable of entering into a program; then, as well as when a program ended, she was left to fall back on the lower benefit. When she was given the opportunity of participating in a program, she took advantage of it. But if her participation in a particular program did not work out, as when she discovered that she had an allergy to animals and could no longer work at the pet store, she was left to survive on the reduced amount until another placement was made available to her. The presumption that she could rely on her mother was not based on true fact. She was in reality forced to survive on less than the recognized minimum received by those 30 and over.

256 This threat to her living income, described by a government witness as "the stick" to accompany "the carrot", caused a great deal of stress to the appellant. This additional stress, which was not experienced by those recipients 30 and over, dominated the appellant's life. Even when she was able to live with her mother, the arrangement was not ideal. It was in fact a situation she expended a great deal of energy in avoiding. At certain times, living with her mother was not even an option, as when the rules in her mother's housing changed, preventing the appellant from sharing her mother's one-bedroom apartment. Undoubtedly, this is a situation that would be stressful for any person, but for the purposes of s. 15 what made the appellant's experience demeaning was the fact that she was placed in a position that the government itself admits is a precarious and unliveable one, while it provided that older recipients of social assistance would be permitted to participate in at

least one of the same programs and to receive an equivalent increase in benefits. Older recipients did not suffer a massive decrease in their benefits for failure to participate in a self-improvement program. This distinction was made simply on the basis of age, not need, opportunity or personal circumstances.

257 I wish to reiterate that, as this Court's jurisprudence makes clear, the fourth contextual inquiry focuses on the particular interest denied or limited in respect of the claimant, not the societal interests engaged by the legislature's broader program or another particular benefit purportedly being provided to the claimant. In my view, the interests that the Chief Justice discusses under the fourth inquiry of the *Law* test at para. 65 belong properly under the s. 1 justification. The interest denied to the appellant in this case was not "faith in the usefulness of education", but rather welfare payments at the government's own recognized subsistence level. Consideration of any "positive impact of the legislation" belongs in the proportionality analysis at s. 1.

258 In conclusion, the appellant has shown that in certain circumstances, and in her circumstances in particular, there were occasions when the effect of the Regulation's differentiation between those under 30 years of age and those 30 and over was such that beneficiaries under 30 could objectively be said to have experienced governmental treatment that failed to respect them as full persons. Given that this differential treatment was based on the enumerated ground of age, it was already suspect for the purposes of s. 15. The fact, among others, that no matter what she did, a beneficiary under 30 would never receive the same benefit as a beneficiary 30 or over participating in a similar program confirms, from the standpoint of the reasonable person, that such treatment would affect one's own feeling of self-worth. I would therefore find that the distinction made by s. 29(*a*) of the Regulation is discriminatory.

259 It can be argued that the government could not design a perfect program, and that in a program such as this, some people are bound to fall through the cracks. Indeed, the Chief Justice accepts this argument, noting that a government need not achieve a perfect correspondence between a benefit program and the actual needs and circumstances of the claimant group. But in light of the importance of the interest affected, this should not provide a bar to a finding that Ms. Gosselin's dignity was adversely affected. The severe harm suffered by the appellant as a result of the age-based distinction far exceeds the margin of imperfection Iacobucci J. contemplated in *Law*, *supra*, at para. 105. The respondent's claim that such treatment was in the best interest of the appellant is better left to the s. 1 analysis where the government can argue that the adverse effects that the legislation had on the appellant's dignity were justifiable given the practical, economic and social reality of designing a complex social assistance program. Indeed, this sort of reasoning is typical of reasoning under the *Oakes* test, at minimal impairment or proportionality, to determine whether a breach, once found, is justifiable: *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 S.C.R. 713. It is not what we associate with s. 15 reasoning, and in this case serves to make sustaining a breach much more onerous. As I noted earlier, the burden of proof is significant, too. The Chief Justice appears to believe that the appellant has the onus, under s. 15(1), to demonstrate not only that she is harmed, but also that the government program allows more than an acceptable number of other individuals to fall through the cracks. Given the government's resources, it is much more appropriate to require it to adduce proof of the importance and purpose of the program and its minimal impairment of equality rights in discharging its burden under s. 1.

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(3) Section 1

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260 Since it is found that the appellant's equality rights were infringed by the legislation, the burden falls on the government to prove that such a limit on her rights was a reasonable one that is demonstrably justifiable in a free and democratic society; see *Oakes*, *supra*, at pp. 136-37. In order to demonstrably justify such a limit, the government must show that the provision pursues an objective that is sufficiently important to justify limiting a *Charter* right, and that it does so in a manner that is (1) rationally connected to that objective, (2) impairs the right no more than is reasonably necessary to accomplish the objective, and (3) does not have a disproportionately severe effect on the persons to whom it applies; see *Oakes*, at pp. 138-39.

261 These criteria will be applied with varying levels of rigour depending on the context of the appeal; see *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 S.C.R. 877. In this case, we are presented with a law that attempts to remedy the financial situation of the chronically unemployed by providing them with cash benefits and training in order to ensure their subsistence and help them integrate into the workforce. The development of the training programs was obviously a complex process that involved the balancing of various interests, the expenditure of large sums of public money, and a consideration of many variables. Social policy is by no means an exact science; a certain degree of deference should be accorded in reviewing this type of legislation. That being said, the government does not have *carte blanche* to limit rights in the area of social policy.

262 In *Thomson Newspapers*, I held that part of what may lead to deference under a contextual approach to s. 1 is the fact that the legislation is meant to protect a vulnerable group. In such a case, the importance of deferring to the government's decision in balancing competing interests is highlighted. However, in this case, the government claims that the group that it is in fact trying to protect is the very same group whose rights have been infringed. This should militate against an overly deferential approach. If the government wishes to help people by infringing their constitutional rights, the courts should not, given the peculiarities of such an approach, be overly deferential in assessing the objective of the impugned provision or whether the means used were minimally impairing to the right in question.

(i) Objective — Pressing and Substantial

263 In his reasons, Robert J.A. held that for the purposes of the *Oakes* test, it is the objective of the distinction that should be analysed. In doing so, he determined that the distinction served two purposes: (1) to avoid attracting young adults to social assistance, and (2) to facilitate integration into the workforce by encouraging participation in the employment programs. The appellant argues that the objective of the distinction should be analysed in light of the legislation as a whole, in particular, the explicit objective of the legislation under s. 6 to provide supplemental aid to those who fall below a subsistence level. Furthermore, she argues that the objective of the legislation cannot, pursuant to this Court's decision in *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, be found to have "evolved". The respondent agrees with the double objective analysis of Robert J.A.

264 In my view, the double objective analysis of Robert J.A. is correct. While the s. 1 analysis must not take place in a contextual vacuum, when a specific legislative provision has been found to infringe a *Charter* right, the s. 1 analysis must focus on the objective of that particular provision. In cases such as *Vriend*, *supra*, in which this Court focussed on the legislation as a whole, it did so because the legislation was being challenged for underinclusion; thus, there was no specific provision to be considered. Here, s. 29(*a*) is clearly the impugned provision. The s. 1 analysis must therefore focus on the distinction it creates. If too much weight is given to the objective of the legislation as a whole, this will lead the court into an inquiry of what would be the best way to formulate an entire piece of legislation. That is the province of the legislature.

265 While the "shifting emphasis" argument accepted by Robert J.A. seems to suggest a novel approach to the s. 1 analysis, I believe it was appropriate to accept it in this case. This Court has normally held that the objectives of legislation cannot be found to have evolved over time. But in this case, it was a legislative act that signalled the change in emphasis: *Big M Drug Mart*, *supra*. In my view, the 1984 changes to the Act, which established the educational programs and provided for an increase in assistance for those who participated in them, constituted a legislative signal that the objective of the distinction in s. 29(*a*) had, to a certain degree, shifted.

266 Having found that the objective of the distinction had shifted towards encouraging the integration of young people into the workforce, and given the dire situation of that segment of the population during those years, I would find the objectives of s. 29(*a*) to be pressing and substantial.

(ii) Rational Connection

267 The appellant attacks the rational connection between the means used by the government and its dual objective on two fronts. First, she argues that the choice of age 30 as the point of distinction was made arbitrarily and that it had no bearing on the means by which the government would achieve its objective. She argues that the government distinguished beneficiaries on the basis of age 30 simply because that distinction already existed, and therefore, in the words of a government witness, because [TRANSLATION] "an opportunity was provided". She also argues that the level of assistance accorded to those under 30 who did not participate in the programs was arbitrary. In her view, if the purpose of selecting a low level of assistance was to encourage participation in the programs, then there should have been enough places available in the programs to accommodate everyone under the age of 30, which there was not.

268 The respondent agrees with Robert J.A.'s conclusion that while the connection between the means and the objective might not have been shown to be particularly strong, there was a logical link between the different treatment of those under 30 and the objective of encouraging the integration of these people into the workforce. She disagrees, however, with some of his analysis, emphasizing again that the distinction made in s. 29(*a*) has to be analysed in the context of the rest of the legislation and the economic situation of the time.

269 On this issue I am again in agreement with the findings of Robert J.A. There is a logical link between the provisions of the Regulation and the objective of integrating people under 30 into the workforce. It is logical and reasonable to suppose that young people are at a different stage in their lives than those 30 and over, that it is more important, and perhaps more fruitful, to encourage them to integrate into the workforce, and that in order to encourage such behaviour, a reduction in basic benefits could be expected to achieve that objective.

(iii) Minimal Impairment

270 It is on the issue of minimal impairment that Robert J.A. found that the legislation could not be upheld under s. 1. Again, I find myself in substantial agreement.

271 First, I would agree with Robert J.A.'s comments regarding the onus that the government must meet at this stage of the analysis. When analysing social legislation, it is true that the Court should avoid second-guessing government policy. The government need not have chosen the least drastic means at its disposal. Nonetheless, it must have chosen to infringe the right as little as was reasonably possible. The respondent argues that given the government's objectives and the evidence it put forth, the methods employed were reasonable and should therefore pass the minimal impairment test. I do not believe that this is the case.

272 The respondent argues that by allowing people under 30 to participate in programs in order to increase their benefits to the level of those 30 and over, the government demonstrated that the needs and concerns of young social assistance recipients were given careful consideration and were respected. She rejects the alternatives proposed by the appellant — such as the elimination of s. 29(*a*) or the creation of a universally conditional program — as either eliminating the objective completely or as being impossible to implement. An examination of the evidence, however, fails to demonstrate that such approaches would not have been appropriate. With regard to increasing the level of support provided to those under 30, the government insists that such an approach would have prevented it from achieving its objective of integrating young people into the workforce.

This is presumably based on the assumption that there would be less incentive to enter the workforce or to participate in the programs if the full benefit was provided unconditionally. However, this remains unproven in the record. There is nothing to show why the response of beneficiaries under 30 would have been different from that of older beneficiaries, and nothing to show why integration in the workforce would have been superior for participants under 30 as compared to older participants. Witnesses for the respondent repeatedly referred to the [TRANSLATION] "attraction effect" that would result from increasing the benefits of people under 30, but they failed to adduce any evidence of studies or previous experience to justify the hypothesis. Aside from supporting the contention that the provisions reflect a discriminatory and stereotypical view of irresponsible youth, such participation by some persons among those 30 and over demonstrates that tying the programs to reduced benefits was not the only option that was available to the government.

273 I also find the argument that the reforms of 1989 which made the programs universally conditional could not have been implemented earlier to be somewhat unconvincing. When the *Charter* was passed in 1982, a three-year delay was placed on the implementation of s. 15 in recognition of the effect it could have had on government legislation and the complexity of making appropriate changes. With the passage of the omnibus *Act respecting the Constitution Act, 1982*, the government of Quebec provided itself with two extra years to deal with the requirements of the equality provision. Therefore, as of 1982, the Quebec government had five years to consider the implications that the *Charter*'s equality provision would have for its *Social Aid Act*. Although the government demonstrated that such changes took 18 to 24 months to implement, it did not demonstrate why that process could not have begun at an earlier date.

274 Thus, it seems to me that the above alternatives cannot be characterized as unreasonable; certainly they would also have been less impairing. However, given the complexity of designing social assistance programs, I accept that the Court should not be in the business of advocating completely new policy directions for the legislature. At the time the legislation was passed, in 1984, it seems clear that the government believed that the continued distinction between those under 30 and those 30 and over was necessary in order to achieve its objective of facilitating the integration of young people into the workforce. Nevertheless, given the availability of the alternative approaches that would have been less impairing to the right, the onus is on the government to demonstrate that the approach it took was itself minimally impairing.

275 Like Robert J.A., upon examination of the manner in which the legislation in question was implemented, I have come to the conclusion that the government's initiative was not designed in a sufficiently careful manner to pass the minimally impairing test. As Robert J.A. held at p. 1084, the government has failed to show:

> [TRANSLATION]
>
> (1) that it set sufficiently flexible eligibility requirements for access to the programs; [and] (2) that it acted reasonably in determining the requirements for an increase in assistance, which was only possible through participation in the measures.

276 In assessing whether the legislation in place was minimally impairing to the right, the first fact that comes to light is that only 11 percent of social assistance recipients under the age of 30 were in fact enrolled in the employment programs that allowed them to receive the base amount allocated to beneficiaries 30 years of age and over. This in and of itself is not determinative of the fact that the legislation was not minimally impairing, but it does bring to our attention the real possibility that the programs were not designed in a manner that would infringe upon the appellant's rights as little as is reasonably possible. In examining the record, I have found four areas in which the structure of the legislation and the programs can be shown to have been designed in a manner that was not minimally impairing of the appellant's rights.

277 First, one major branch of the scheme, the Remedial Education Program, did not provide for full benefits for those who participated, leaving them $100 short of the base benefit. Thus, the government foresaw, in the creation of its programs, that a large number of even those who participated in the programs would, in return for their efforts, continue to receive less than the amount received by those 30 and over who were not participating in the programs. As mentioned earlier, the most uneducated, the illiterate, were originally left out of this program entirely. The government argues that the amount of assistance must be examined in tandem with the government student loan and bursary program. However, because the Remedial Education students were in high school, the government witness admitted that the only money that they would receive through student loans would be to pay for specific school-related expenses such as books and school supplies. As such, the student loan program did not raise the Remedial Education participant's benefits to the same level as those 30 and over. In reality, given that almost 50 percent of participants under 30 were involved with the Remedial Education Program, this meant that a very large portion of the participants would not be receiving the full amount of benefits that those 30 and over were receiving.

278 It might be argued that the value of the education and experience being derived from such programs cannot be calculated on a purely pecuniary basis. I would agree that the power of education can be invaluable to its recipient. However, the strength of this argument is diminished by the fact that the cost of this education is, in this case, the reduction of benefits that are supposed to guarantee certain standards of minimal subsistence. While the long-term value of the education and experience is certainly important, this must be balanced against the short-term need for survival that social assistance is intended to placate. Moreover, those people who participated in the programs who were not under 30 were not required to make a similar sacrifice.

279 Second, the design of the programs was not tailored in such a way as to ensure that there would always be programs available to those who wanted to participate. For instance, for a student who could not find a job after finishing school, the Remedial Education Program was only available after nine months. The On-the-job Training Program was only available after 12 months. This left the Community Work Program, which, given its very remedial nature, may not have been useful to everyone, and was prioritized for those who had been on social assistance for more than 12 months. The existence of this priority is itself evidence that the programs were not available to all applicants at all times. For someone who had completed CEGEP, the Remedial Education and On-the-job Training Programs would simply be unavailable. Even if he or she were then able to participate in the Community Work Program, this would only last for one year, after which the young social assistance recipient would, because of the 12-month limit on the program, be left with no program in which to participate. Take someone like Ms. Gosselin, whose prospects for moving into the private workforce, like many in her situation, do not, unfortunately, appear to have been very promising. After one year in a Community Work Program (and, if they could find one, a year in an On-the-job Training placement), she would be unable to receive the same benefit as someone 30 or over. Thus, in reality, the system of training and education gave social assistance recipients under 30 who were able to access programs two years to get a job before they had their benefit reduced to $170 per month — with some extra time available at a moderately reduced rate for those who had not yet received their high school diploma.

280 Another substantive flaw in the design of the programs was that faced by illiterate or severely undereducated persons, who were unable to participate in the Remedial Education Program. While ineligible for the Remedial Education Program, such persons would also face difficulty entering On-the-job Training, and would thus be left with the Community Work Program, which, as has been noted, was limited to one year. This flaw was apparently addressed in 1989 with the creation of a special literacy program, but it nonetheless serves as an example of another situation where even those participants who were willing to participate were at times unable to do so.

281 Third, in addition to the problems with the design of the programs, their implementation presented still more hurdles which young recipients were forced to overcome. For instance, when a person under 30 years of age found himself or herself on social assistance, he or she would have to organize a meeting with a

social aid worker. An “evaluation interview” would follow, sometimes several, in order to determine what type of program would be best suited to the recipient. This process would sometimes take several weeks. Then, once it was determined which program would be best, there was often another delay, as space in the program in which the recipient could participate had to be found. If, for instance, someone wanted to participate in the Remedial Education Program in June, he or she would have to wait until September, for school to start. In the case of the On-the-job Training Program, the process provided that one would have to wait until a suitable employer was found. Also, the employer had the final say as to whether he or she wished to hire a particular individual. This caused more delay. Once a placement was completed, this process was started all over again. Thus, in the course of his or her time on social assistance, a young person desiring to receive the full benefit of the programs would most likely spend at least a month or two on the reduced benefit.

282 Given the precarious situation of those on social assistance, even a short lapse in additional benefits was certainly enough to cause major difficulties in the recipients' lives, difficulties that someone 30 and over would not have to face. Ms. Gosselin herself spent a considerable amount of time between programs, this sometimes leading to periods of mental breakdown. One government witness described the situation of many of those young people on social assistance as being an existence “on the edge of capacity” — walking a tightrope along the border of aptness and inaptitude for work. Falling back onto the reduced amount was therefore a very real possibility that could have exaggerated effects on the capacity of young recipients to cope with life.

283 A fourth and final reason why the approach taken by the government was not reasonably minimally impairing was the fact that even though 85 000 single people under 30 years of age were on social assistance, the government at first only made 30 000 program places available. The respondent argues, and Baudouin J.A. agreed, that the government should not have been forced to open up places for everyone when it knew that not everyone would participate. I think this is right. The government did not have to prove that it had 85 000 empty chairs waiting in classrooms and elsewhere. However, the very fact that it was expecting such low levels of participation brings into question the degree to which the distinction in s. 29(*a*) was geared towards improving the situation of those under 30, as opposed to simply saving money. The government noted that many places did not have to be made available because 50 percent of young people were thought to be living with their parents. As noted earlier, this was not proven and if true would have left 50 percent of recipients in an unjustified state of deprivation. Also, it is by no means clear why young persons living at home would not want to take advantage of such programs if they provided them with an extra $296 per month. Moreover, it is not clear why, if the object of s. 29(*a*) was to encourage the integration of young people into the workforce, the government would not expect or want those on social assistance who were living at home to participate in the programs.

284 The government maintains that it always had more places available if the need arose, but the evidence has left me questioning how a program such as On-the-job Training which relied on private enterprises to provide jobs could provide an endless stream of positions for any young person on social assistance who wanted one. It also seems somewhat disingenuous to suggest that there were unlimited spaces in the program when the program profiles clearly outline that some groups were to be specifically targeted, others given preference. How can there be preferences when access to the programs is unlimited? It also seems odd that a government that claims it would not have been able to eliminate the reduced benefit level for people under 30 for economic reasons would have been able to support a program in which a significant portion of those persons participated in the programs and, therefore, had their benefits increased to the normal level. If legislation is found to infringe upon a group’s right and the government claims that the right is minimally impaired due to the operation of another program, the fact that only 20 percent of the affected group participates would seem to suggest that the right was not being reasonably infringed.

285 Accordingly, I would hold that, even according a high degree of deference, the respondent has failed to demonstrate that the provision in question constituted a means of achieving the legislative objective that was reasonably minimally impairing in respect of the appellant’s equality rights. Other reasonable alternatives to

achieve the objective were available. The approach taken by the government involved providing a vulnerable group with a base amount of money that was one third of the level the government itself had deemed to be a subsistence level for others and, moreover, the programs themselves were additionally found to have several important shortcomings. This was not minimally impairing of the right. The respondent has therefore failed to meet its burden of demonstrably justifying the limitation on the appellant's rights.

286 Even accepting the general approach of differentiating between those under 30 and those 30 and over that the legislature adopted to achieve its objectives, there are several other means by which the substantive equality of young people would have been considerably more respected and less impaired. First, as Robert J.A. suggested, the full benefit could have been extended to those individuals who had expressed their willingness to participate in a program, as opposed to requiring them to be at all times participating in programs that, by their design and implementation, did not allow for constant participation. Another approach, given the government's opinion that the majority of young people on welfare were living at home and therefore did not require the full benefit, would have been to tie the benefits to whether the recipient — whatever his or her age — was actually living at home. This was already being done for other recipients since anyone 30 and over living with family had his or her benefits reduced by $85. This would have had the effect of recognizing that many young people did not require the full amount of social assistance, while basing the amount awarded on their actual situation as opposed to the proxy of age.

287 Having found that the legislation was not minimally impairing of the appellant's right to equality, I would hold that the legislation was not a reasonable limit on the right that was demonstrably justified. The final branch of the *Oakes* test need not therefore necessarily be addressed. However, given the deleterious effect that the legislation had on the appellant's right it would, I believe, be useful to consider that branch of the test as well.

(iv) Proportionality

288 At this stage of the *Oakes* test, a court must determine whether the deleterious effects that a legislative provision has on a given rights holder are outweighed by the salutary effects of the same legislation in achieving the stated government objective. Here, again, I agree with Robert J.A. It is clear from the evidence that $170 per month is not enough money for one to live on. While the government claims that those under 30 had the right to increased benefits if they participated in the programs, there were clear holes in the programs which prevented certain individuals, at certain times, from accessing the additional benefits. Moreover, Remedial Education students never achieved parity. In fact, though this is not determinative, only 11 percent of single persons under 30 years of age who were on social assistance actually received what the government had determined to be the basic amount needed to support one's self. This constitutes a severe deleterious effect on the equality and self-worth of the appellant and those in her group. With respect to the salutary effects side of the equation, the government was not required to demonstrate that the programs had any actual significant salutary effect on the well-being of young people; it nevertheless had to demonstrate that the reduction in benefits would reasonably be expected to facilitate the integration of the younger social assistance beneficiaries in the workplace. This onus has not been met.

289 The respondent argues that government cannot be held responsible for the "partial failures" of legislation. She insists that the government had a real concern for the situation in which young people found themselves and attempted to craft a program that would benefit them. While the effects stage of the *Oakes* test should not be an opportunity for courts to punish governments for failed legislative undertakings, when the potential deleterious effects of the legislation are so apparent, I do not believe that it is asking too much of the government to craft its legislation more carefully. Given the economic data that the government has presented in evidence, it was entirely foreseeable that upon completion of the programs, the opportunities for young people to integrate into the workforce would continue to be limited. There was no justification presented for leaving them on the reduced benefit at that point in time, regardless of the problem of delays earlier discussed.

290 Accordingly, I find that s. 29(*a*) of the Regulation's *Charter* breach should not be upheld as a justified and reasonable limit under s. 1. In the legislative and social context of the legislation, which provided a safety net for those without means to support themselves, a rights-infringing limitation must be carefully crafted. In this case, the programs left too many opportunities for young people to fall through the seams of the legislation. This is borne out to some degree by the low participation rate among beneficiaries under the age of 30 and the fact that there was no basis for the assumption that beneficiaries under 30 were living with their parents and had lesser needs. While the respondent argues that no evidence was presented to show that most if any of the 73 percent of recipients under 30 were not participating in the programs for anything more than personal reasons, I would point out that at the s. 1 stage of analysis, it is the government's responsibility to show that the legislation limits the right as little as reasonably possible.

(4) Remedy

291 The appellant argued that if s. 29(*a*) was found to have been an infringement on her *Charter* rights, it should be declared invalid under s. 52(1) of the *Constitution Act, 1982*, and that she and the members of her class should be compensated for their losses under s. 24(1) of the *Charter*. Engaging in an elaborate analysis of the proper type of declaratory relief to extend in this case borders on the absurd, given the fact that the legislation in question has been repealed for over a decade. Determining, for instance, the proper duration for which any declaration might be suspended in order to give the government an opportunity to amend its legislation is a purely hypothetical exercise. Nonetheless, given the appellant's claim for pecuniary relief under s. 24(1), a brief outline of the factors to be considered in fashioning a declaration of invalidity in this case may be warranted.

292 In determining the appropriate remedy in the case of legislation that is found to violate a *Charter* right, courts must walk a fine line between fulfilling their judicial role of protecting rights and intruding on the legislature's role; *Schachter*, *supra*. Simply striking down s. 29(*a*) would have lead to the result that all social assistance beneficiaries would have received the full benefit unconditionally. The respondent has argued that the government would never have adopted such a measure, and more importantly, that it would have been unable, from a financial standpoint, to fulfill such a legislative commitment. It is in recognition of this that Robert J.A. held that s. 23 of the Regulation, which set the actual amounts of the benefits, should also be invalidated so that the legislative intent of the Act would not be distorted by the court. The problem that this approach raises is that it may in fact lead to an even more severe transgression of the legislature's intention; it could mean that the *Social Aid Act* no longer supplies anyone with benefits. At the very least, the provision of benefits unconditionally to those under 30 would help to fulfill the statute's objective of providing for the needy. To declare s. 23 invalid would be to completely eliminate the legislative objective.

293 In *Schachter*, *supra*, Lamer C.J. held that a delayed declaration of invalidity would be appropriate when striking down unconstitutional legislation if immediate relief (1) posed a danger to the public, (2) threatened the rule of law, or (3) deprived deserving persons of benefits. In this case, the invalidation of s. 29(*a*) would not pose a danger to the public, nor would it deprive deserving persons of benefits, since it would expand the category of beneficiaries. However, given the broad impact of this legislation on Quebec society, as well as the wide range of alternatives that might be taken in order to bring complex social legislation such as this into line with constitutional standards, I believe that suspension of the declaration would have been appropriate in this case. Given the large sums of money spent by legislatures on social assistance programs such as this and the complexity of the programs at issue, a court should not intrude too deeply into the role of legislature in this field. As noted earlier, given that the provision in question is no longer in force, this issue is moot. However, if the legislation was still in place, I would have ordered that the declaration of invalidity be suspended for a period of 18 months, the period that the government demonstrated would be required to implement changes to the legislation.

294 The appellant also requests that this Court make an order under s. 24(1) of the *Charter* compensating the members of her group for the difference between the full benefit and the reduced amount during the time they were on the reduced benefit. The appellant argues that without such an order, her rights will not have been given any real effect.

295 On this point, I find myself in substantial agreement with the conclusion of Robert J.A., who refused to grant a monetary award under s. 24(1). As Lamer C.J. held in *Schachter*, where a provision is struck down under s. 52, a retroactive s. 24(1) remedy will not generally be available. The appellant argues that the odd facts of this case may make it one of those extraordinary occasions in which a s. 24(1) remedy could be added to a s. 52 declaration. The facts of this case do not allow for such a result.

296 First, I agree with Robert J.A. that because this case involves a class action, there is more difficulty in ordering a s. 24(1) remedy. It would be impossible for this Court to determine the precise amount that was owed to each individual in the class. Who participated in the programs, and who did not, the number of months during which they did not participate, the amount of the shortfall in benefits at different times, are all impossible to determine.

297 Second, the significant cost that would be incurred by the government were it required to pay damages must be considered. As Lamer C.J. held in *Schachter*, while a consideration of expenses might not be relevant to the substantive *Charter* analysis, it is relevant to the determination of the remedy. Requiring the government to pay out nearly half a billion dollars, the amount requested, would have a significant impact on the government's fiscal situation, and potentially on the general economy of the province of Quebec.

298 Thirdly, as I have shown in my reasons, the creation of a social assistance program that is respectful of the equality rights of young people need not necessarily have involved increasing the benefit levels of those under 30 to the level of the 30-year-old beneficiaries. The government might have chosen to improve the coverage given by the programs to those under 30, or, as it did in 1989, to impose conditions on all beneficiaries.

299 Accordingly, I would deny the appellant's request for an order for damages pursuant to s. 24(1) of the *Charter*.

C. *Quebec Charter of Human Rights and Freedoms*

Section 45 of the *Quebec Charter*

300 The appellant also claims that s. 29(*a*) violated her s. 45 rights under the *Quebec Charter*. Section 45 of the *Quebec Charter* reads as follows:

> **45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.

The respondent argues that the terms "provided for by law" and "susceptible" have the effect of limiting the degree to which the government must act to provide a decent standard of living. She argues that the section means that the government need only provide, in an efficient manner, the assistance that it defines in its own legislation. In his reasons, Robert J.A. engaged in an extensive analysis of international human rights documents in order to offer context to the interpretation of the section, and in particular, the aforementioned terms. He found that in the context of the other social rights enumerated in the *Quebec Charter*, as well as the language of international social charters,

the terms “provided for by law” and “susceptible” should not be read restrictively. The appellant, likewise, argues that those terms, instead of limiting the right, create a positive obligation on the state to put in place social assistance by law.

301 When compared to the other social rights enumerated in the *Quebec Charter*, in particular those that are limited by the words “to the extent provided by law” (emphasis added) (e.g., s. 44), I would agree with the appellant that the term “provided for by law” should not be read too restrictively. In my view, the word “susceptible” defines the nature of the benefit to be provided which could encompass social programs such as the ones that were established under the legislation impugned in these proceedings. Thus, I would find that, on its face, s. 45 does create some form of positive right to a minimal standard of living.

302 There is no need, however, to enter into a lengthy examination of whether the legislation in question here provided for social assistance which met the standard required by s. 45. This is because the section must be interpreted in light of the remedial provisions of the *Quebec Charter*. Section 52 of the *Quebec Charter* reads as follows:

> **52.** No provision of any Act, even subsequent to the Charter, may derogate from sections 1 to 38, except so far as provided by those sections, unless such Act expressly states that it applies despite the Charter.

In my view, it is quite clear that the court has no power to declare any portion of a law invalid due to a conflict with s. 45. Section 52 simply cannot apply.

303 The appellant also argues that she should be entitled to damages pursuant to s. 49 of the *Quebec Charter*. Section 49 reads as follows:

> **49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

This Court interpreted s. 49 in *Béliveau St-Jacques v. Fédération des employées et employés de services publics inc.*, 1996 CanLII 208 (SCC), [1996] 2 S.C.R. 345. In that case, Gonthier J. held (at paras. 119-21) that:

> In my view, the first paragraph of s. 49 and art. 1053 *C.C.L.C.* are based on the same legal principle of liability associated with wrongful conduct . . . .
>
> It is thus clear that the violation of a right protected by the *Charter* is equivalent to a civil fault. The *Charter* formalizes standards of conduct that apply to all individuals. The legislative recognition of these standards of conduct has to some extent exempted the courts from clarifying their content. This recognition does not, however, make it possible to distinguish in principle the standards of conduct in question from that under art. 1053 *C.C.L.C.*, which the courts apply to the circumstances of each case. The violation of one of the guaranteed rights is therefore wrongful behaviour, which, as the Court of Appeal has recognized, breaches the general duty of good conduct. . . .
>
> The nature of the damages that may be obtained under the first paragraph of s. 49 reinforces the parallel with civil liability. It is understood that the moral and material damages awarded by a court following a *Charter* violation are strictly compensatory in nature. The wording of the provision leaves no doubt in this regard, since it entitles the victim of an unlawful interference with a protected right to obtain “compensation for the moral or material prejudice resulting therefrom”.

In *Quebec (Public Curator) v. Syndicat national des employés de l'hôpital St-Ferdinand*, 1996 CanLII 172 (SCC), [1996] 3 S.C.R. 211, L’Heureux-Dubé J. clarified this further by holding, for a unanimous Court (at para. 116), that:

> To find that there has been unlawful interference, it must be shown that a right protected by the *Charter* was infringed and that the infringement resulted from wrongful conduct. A person's conduct will be characterized as wrongful if, in engaging therein, he or she violated a standard of conduct considered reasonable in the circumstances under the general law . . . .

304 Thus, in order to substantiate a s. 49 claim against the government for having drafted legislation that violates a *Quebec Charter* right, one would need to demonstrate that the legislature has breached a particular standard of care in drafting the legislation. It seems to me unlikely that a government could, under s. 49, be held responsible for having simply drafted faulty legislation. This view was shared by Gonthier J. in *Guimond*, *supra*, at para. 13, where he quoted approvingly Delisle J.A.:

> [TRANSLATION] In terms of the civil law, there is no doubt that the Crown is not negligent when it enacts a law that is subsequently declared invalid, any more than the public official who attends to its implementation.

Thus, on the s. 45 issue, I would find that while the section appears to create some form of right to a statutory social assistance regime providing a minimum standard of living, in this case, that right is unenforceable; neither s. 52 nor s. 49 of the *Quebec Charter* applies.

305 The appellant argues that it makes no sense to have a section that is of no effect. My response to that is two-fold. First, no s. 49 remedy could be substantiated in this case because no wrongful conduct was found to exist. This does not mean that a private actor, or a state official, acting in a wrongful manner, could not, in another case, be found to have violated someone's s. 45 rights. In such a case, the court would be free to award damages. Secondly, even though the section does not provide for financial redress from the government in this case, the section is not without value. Indeed it is not uncommon for governments to outline non-judiciable rights in human rights charters. Courts are not the only institutions mandated to enforce constitutional documents. Legislatures also have a duty to uphold them. If, in this case, the court cannot force the government to change the law by virtue of s. 45, the *Quebec Charter* still has moral and political force.

VIII. Conclusion

306 For these reasons, I would allow the appeal. I would declare s. 29(*a*) of the Regulation unconstitutional. The constitutional questions are answered as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

Yes.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

No.

4. If so, is the infringement 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

307 ARBOUR J. (dissenting) — The facts, as well as the history of this litigation, are set out at length in my colleagues' opinions and I need not repeat them here. Essentially, the appellant asserts on her own behalf and on behalf of a class of claimants that a provision of the regulations under the *Social Aid Act*, R.S.Q., c. A-16, in force between 1984 and 1989 which provided for lesser benefits for single adults under the age of 30 than for those 30 and over was unconstitutional as violating ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*.

308 I would allow this appeal on the basis of the appellant's s. 7 *Charter* claim. In doing so, I conclude that the s. 7 rights to "life, liberty and security of the person" include a positive dimension. Few would dispute that an advanced modern welfare state like Canada has a positive moral obligation to protect the life, liberty and security of its citizens. There is considerably less agreement, however, as to whether this positive moral obligation translates into a legal one. Some will argue that there are interpretive barriers to the conclusion that s. 7 imposes a positive obligation on the state to offer such basic protection.

309 In my view these barriers are all less real and substantial than one might assume. This Court has never ruled, nor does the language of the *Charter* itself require, that we must reject any positive claim against the state — as in this case — for the most basic positive protection of life and security. This Court has consistently chosen instead to leave open the possibility of finding certain positive rights to the basic means of subsistence within s. 7. In my view, far from resisting this conclusion, the language and structure of the *Charter* — and of s. 7 in particular — actually compel it. Before demonstrating all of this it will be necessary to deconstruct the various firewalls that are said to exist around s. 7, precluding this Court from reaching in this case what I believe to be an inevitable and just outcome.

I. Preliminary Concerns

310 It is often suggested that s. 7 of the *Charter* cannot impose positive legal obligations on government. Before embarking on the usual textual, purposive and contextual analysis required in constitutional interpretation, it is therefore necessary to address the barriers that are traditionally said to preclude *a priori* a positive claim against the state under s. 7.

A. *Economic Rights*

311 There was some discussion in the courts below concerning whether s. 7 extends its protection to the class of so-called "economic rights". That discussion gets its impetus from certain dicta of Dickson C.J. in *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 S.C.R. 927. In *Irwin Toy*, Dickson C.J. compared the wording of s. 7 to similar provisions in the American *Bill of Rights* and noted the following, at p. 1003:

> The intentional exclusion of property from s. 7, and the substitution therefor of "security of the person" . . . leads to a general inference that economic rights as generally encompassed by the term "property" are not within the perimeters of the s. 7 guarantee.

This has no relevance to the present appeal. On its face, the statement purports to rule out of s. 7 only those economic rights that are generally encompassed by the term "property". The appellant in this case makes no claim that could reasonably be construed as a claim to a right of property. Indeed, the claim she does make — namely, to a level of social assistance adequate for the provision of her basic needs of subsistence — is one which Dickson C.J. explicitly excepted from his statement in *Irwin Toy*, at pp. 1003-4:

> This is not to declare, however, that no right with an economic component can fall within "security of the person". Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property-contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights.

This prudent exercise in judicial restraint was understandable given that, unlike the case here, the question was not directly relevant in *Irwin Toy*. The instant appeal, in contrast, makes obvious why "those economic rights fundamental to human life or survival" should not in fact be treated as of the same ilk as corporate-commercial economic rights. Simply put, the rights at issue here are so intimately intertwined with considerations related to one's basic health (and hence "security of the person") — and, at the limit, even of one's survival (and hence "life") — that they can readily be accommodated under the s. 7 rights of "life, liberty and security of the person" without the need to constitutionalize "property" rights or interests.

312 Indeed, the rights at issue in this case are so connected to the sorts of interests that fall under s. 7 that it is a gross mischaracterization to attach to them the label of "economic rights". Their only kinship to the economic "property" rights that are *ipso facto* excluded from s. 7 is that they involve some economic value. But if this is sufficient to attract the label "economic right", there are few rights that would not be economic rights. It is in the very nature of rights that they crystallize certain benefits, which can often be quantified in economic terms. What is truly significant, from the standpoint of inclusion under the rubric of s. 7 rights, is not therefore whether a right can be expressed in terms of its economic value, but as Dickson C.J. suggests, whether it "fall[s] within 'security of the person'" or one of the other enumerated rights in that section. It is principally because corporate-commercial "property" rights fail to do so, and not because they contain an economic component *per se*, that they are excluded from s. 7. Conversely, it is because the right to a minimum level of social assistance is clearly connected to "security of the person" and "life" that it distinguishes itself from corporate-commercial rights in being a candidate for s. 7 inclusion.

313 In my view, this tells decisively against any argument that relies upon a supposed economic rights prohibition within s. 7 of the *Charter*. There is, however, a related argument, advanced by Professor Hogg among others, to suggest that the kind of interest claimed by the appellant in this case cannot fall within the scope of s. 7 (P. W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.), vol. 2, at p. 44-12.1):

> The trouble . . . is that it accords to s. 7 an economic role that is incompatible with its setting in the legal rights portion of the Charter — a setting that the Supreme Court of Canada has relied upon as controlling the scope of s. 7.

As I understand the argument it purports to rule out the kind of interest claimed here, not so much because it has an economic component (though that is ostensibly part of the objection), but because it fails to exhibit the characteristics of a "legal right". I take this last point to be the real thrust of the objection, since the argument would lose its teeth against an historically recognized legal right which nevertheless also had an economic component: for example, the right to a trial by jury in certain criminal cases, which right inevitably involves incurring additional costs in the administration of justice. I will now turn to this specific issue.

B. *Legal Rights*

314 The argument is that s. 7 is an umbrella of legal rights and that ss. 8 to 14, using a kind of *ejusdem generis* rule, inform and limit its scope. This restrictive interpretation of s. 7 formed no part of the reasoning in *Irwin Toy* that excluded corporate-commercial property rights from s. 7. Rather, it seems to have had its genesis in the concurring reasons of Lamer J. (as he then was) in *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*"), at pp. 1171-74, where he observed that:

> [T]he guarantees of life, liberty and security of the person are placed together with a set of provisions . . . which are mainly concerned with criminal and penal proceedings. . . . It is significant that the rights guaranteed by s. 7 as well as those guaranteed in ss. 8-14 are listed under the title "Legal Rights", or in the French version "*Garanties juridiques*". The use of the term "Legal Rights" suggests a distinctive set of rights different from the rights guaranteed by other sections of the *Charter*. . . .
>
> . . .
>
> Section 7 and more specifically ss. 8-14 protect individuals against the state when it invokes the judiciary to restrict a person's physical liberty through the use of punishment or detention, when it restricts security of the person, or when it restricts other liberties by employing the method of sanction and punishment traditionally within the judicial realm.

315 This approach to s. 7, curtailing its footprint to "legal rights" of the type contained in ss. 8 to 14, has been attenuated in more recent cases. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, this Court held (at para. 46) that "[s]ection 7 can extend beyond the sphere of criminal law, at least where there is 'state action which directly engages the justice system and its administration'" (emphasis added). The recognition in that case that s. 7 protection extends beyond the criminal or penal context was in itself nothing new. What was noteworthy in Bastarache J.'s dictum was the suggestion, implied by his use of the phrase "at least", that s. 7 might even extend beyond the justice system and its administration. That his use of this phrase should be interpreted permissively rather than restrictively was later confirmed indirectly in *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519, 2000 SCC 48. In that case, this Court found that apprehension of a child by an agent of the state, pursuant to legislative authority and in the absence of a judicial order, constituted a deprivation of the parents' security of the person. While the Court went on to find the deprivation to be in conformity with the principles of fundamental justice, what is significant for present purposes is that the right to security of the person was found to be implicated by state action that had little relation to any judicial or quasi-judicial proceeding. The apprehension itself was entirely disconnected from the justice system and its administration and simply involved implementation of a legislative provision by a government official.

316 In the light of these recent developments, I think that there is considerable room for doubt as to whether the placement of s. 7 within the "Legal Rights" portion of the *Charter* is controlling of its scope. Moreover, the appeal to a *Charter* subheading as a way of limiting the kinds of interests that are protected by a rights-granting provision appears to be at odds with the generous and purposive approach that this Court has repeatedly identified as the proper approach to the interpretation of *Charter* rights: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295; *R. v. Therens*, 1985 CanLII 29 (SCC), [1985] 1 S.C.R. 613; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, 1990 CanLII 135 (SCC), [1990] 1 S.C.R. 425; *Young v. Young*, 1993 CanLII 34 (SCC), [1993] 4 S.C.R. 3; *R. v. S. (R.J.)*, 1995 CanLII 121 (SCC), [1995] 1 S.C.R. 451; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 S.C.R. 493. Indeed, it is more consistent with the kind of "legalistic" interpretation associated with cases decided under the *Canadian Bill of Rights*, R.S.C. 1985, App. III, and that Dickson J. (as he then was) specifically contrasted with the purposive approach in *Big M Drug Mart*, *supra*, at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.

> . . . 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. [Emphasis added; emphasis in original deleted.]

Whereas the course of s. 7 jurisprudence may have once supported a legalistic reliance on the subheading "Legal Rights" as a way of delimiting the scope of s. 7 protection, the more recent turn in s. 7 jurisprudence indicates that this interpretive device has been supplanted by a purposive and contextual approach to the recognition of constitutionally protected rights.

317 Finally, one should not underestimate the significance of the historical context in which Lamer J. made his comments in the *Prostitution Reference*, *supra*. At the time, almost all s. 7 cases involved challenges to state action in the context of criminal proceedings. It might then have appeared that this was the range of interests that s. 7 was meant to protect. The evolution of the case law no longer compels that conclusion. As s. 7 jurisprudence has developed, new kinds of interests, quite apart from those engaged by one's dealings with the justice system and its administration, have been asserted and found to be deserving of s. 7 protection. To now continue to insist upon the restrictive significance of the placement of s. 7 within the "Legal Rights" portion of the *Charter* would be to freeze constitutional interpretation in a manner that is inconsistent with the vision of the Constitution as a "living tree" which has always been part of the Canadian constitutional landscape. As this Court recognized in *Reference Re Provincial Electoral Boundaries (Sask.)*, 1991 CanLII 61 (SCC), [1991] 2 S.C.R. 158, at p. 180:

> The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed . . . . It also suggests that the past plays a critical but non-exclusive role in determining the content of the rights and freedoms granted by the *Charter*. The tree is rooted in past and present institutions, but must be capable of growth to meet the future.

318 In spite of this, some will suggest that we must distinguish cases like *K.L.W.*, *supra*, from the instant appeal on the basis that it is difficult to point to any affirmative state action in the present case which could properly be said to constitute a violation of one of the enumerated rights in s. 7. Whatever the merits of this argument, it is important to keep it distinct from the "Legal Rights" argument which has been the focus of the present discussion. The significance of cases like *Blencoe* and *K.L.W.* in the context of this discussion is that they make room for the kind of interest at issue in this appeal by relaxing any supposed requirement that the right claimed under s. 7 display the characteristics of a "legal right" similar in nature to those at stake in the administration of criminal justice. Whether these cases — or others — would also bar the present action by imposing another requirement of affirmative (or positive) state action as a *sine qua non* of s. 7 protection is a different question, to which I now turn.

C. *Negative vs. Positive Rights and the Requirement of State Action*

319 There is a suggestion that s. 7 contains only negative rights of non-interference and therefore cannot be implicated absent any positive state action. This is a view that is commonly expressed but rarely examined. It is of course true that in virtually all past s. 7 cases it was possible to identify some definitive act on the part of the state which could be said to constitute an interference with life, liberty or security of the person and consequently ground the claim of a s. 7 violation. It may also be the case that no such definitive state action can be located in the instant appeal, though this will largely depend on how one chooses to define one's terms and, in particular, the phrase "state action". One should first ask, however, whether there is in fact any requirement, in order to ground a s. 7 claim, that there be some affirmative state action interfering with life, liberty or security of the person, or whether s. 7 can impose on the state a duty to act where it has not done so. (I use the terms "affirmative", "definitive" or "positive" to mean an identifiable action in contrast to mere inaction.) No doubt if s. 7 contemplates the existence only of negative rights, which are best described as rights of "non-interference", then active state interference with one's life, liberty or security of the person by way of some definitive act will be

necessary in order to engage the protection of that section. But if, instead, s. 7 rights include a positive dimension, such that they are not merely rights of non-interference but also what might be described as rights of "performance", then they may be violable by mere inaction or failure by the state to actively provide the conditions necessary for their fulfilment. We must not sidestep a determination of this issue by assuming from the start that s. 7 includes a requirement of affirmative state action. That would be to beg the very question that needs answering.

320 It is not often clear whether the theory of negative rights underlying the view that s. 7 can only be invoked in response to a definitive state action is intended to be one of general application, extending to the *Charter* as a whole, or one that applies strictly to s. 7. As a theory of the *Charter* as a whole, any claim that only negative rights are constitutionally recognized is of course patently defective. The rights to vote (s. 3), to trial within a reasonable time (s. 11(*b*)), to be presumed innocent (s. 11(*d*)), to trial by jury in certain cases (s. 11(*f*)), to an interpreter in penal proceedings (s. 14), and minority language education rights (s. 23) to name but some, all impose positive obligations of performance on the state and are therefore best viewed as positive rights (at least in part). By finding that the state has a positive obligation in certain cases to ensure that its labour legislation is properly inclusive, this Court has also found there to be a positive dimension to the s. 2(*d*) right to associate (*Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94). Finally, decisions like *Schachter v. Canada*, 1992 CanLII 74 (SCC), [1992] 2 S.C.R. 679, and *Vriend*, *supra*, confirm that "[i]n some contexts it will be proper to characterize s. 15 as providing positive rights" (*Schachter*, *supra*, at p. 721). This list is illustrative rather than exhaustive.

321 Moreover, there is no sense in which the actual language of s. 7 limits its application to circumstances where there has been positive state interference. It is sometimes suggested that the requirement is implicit in the use of the concept of "deprivation" within s. 7. This is highly implausible. *The Shorter Oxford English Dictionary* (3rd ed. 1973), vol. 1, at p. 524, defines the term "deprive" in such a way as to include, not only active taking away, divesting, or dispossession, but also mere "keep[ing] out *of* [or] debar[ing] *from*". In other words, the concept of deprivation is sufficiently broad to embrace withholdings that have the effect of erecting barriers in the way of the attainment of some object.

322 Nor does the phrase "principles of fundamental justice" contain a requirement of positive state action by necessary implication, particularly when one rejects a restrictive interpretation of s. 7 confining it to a "Legal Rights" umbrella. If s. 7 were nothing more than a composite of the other "legal rights", one might think that it only comes into play when the machinery of justice is activated by the state. But I have already indicated why in my view we must reject the assumption that s. 7 protects only against the kinds of incursions one might expect to suffer in connection with one's dealings with the justice system and its administration. This obliterates the foundation for the idea that the phrase "principles of fundamental justice" includes an implicit requirement of positive state action. It also leaves s. 7 bereft of any trace of language that might contain a requirement of positive state action before a breach may occur.

323 In fact, the context in which s. 7 is found within the *Charter*'s structure favours the conclusion that it can impose on the state a positive duty to act. Even though s. 7 cannot be reduced to an "umbrella" of the "legal rights" contained in ss. 8 to 14, there is often overlap between the two. This Court has in the past emphasized the connection of these sections to s. 7 itself. In *Re B.C. Motor Vehicle Act*, *supra*, at pp. 502-3, Lamer J. indicated that ss. 8 to 14 are "illustrative" of the principles of fundamental justice that are referred to in s. 7 (see also, the *Prostitution Reference*, *supra*, at pp. 1171-72). Given this, if some of these "principles of fundamental justice" in ss. 8 to14 entrench positive rights, one should expect that s. 7 rights would also contain a positive dimension. No doubt this is what prompted Lamer C.J. to make the following observation in *Schachter*, *supra*, at p. 721: "the right to life, liberty and security of the person is in one sense a negative right, but the requirement that the government respect the 'fundamental principles of justice' may provide a basis for characterizing s. 7 as a positive right in some circumstances".

324 Finally, the case law is consistent with the view that s. 7 includes a positive dimension. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, 1999 CanLII 653 (SCC), [1999] 3 S.C.R. 46, at para. 107, this Court explicitly held that s. 7 provided a positive right to state-funded counsel in the context of a child custody hearing. Lamer C.J. put the point quite baldly: "The omission of a positive right to state-funded counsel in s. 10 . . . does not preclude an interpretation of s. 7 that imposes a positive constitutional obligation on governments to provide counsel in those cases when it is necessary to ensure a fair hearing."

325 One must resist the temptation to dilute the obvious significance of this decision by attempting to locate the threat to security of the person in *G. (J.)* in state action. It is of course true that the proceedings at issue in *G. (J.)* were initiated by the government. But Lamer C.J. pointed out that it was not the actions of the state in initiating the proceedings, *per se*, that gave rise to the potential s. 7 violation. Rather, "[t]he potential s. 7 violation . . . would have been the result of the failure of the Government of New Brunswick to provide the appellant with state-funded counsel . . . after initiating proceedings under Part IV of the *Family Services Act*" (*G. (J.)*, *supra*, at para. 91 (emphasis added)). This focus on state omission rather than state action is consistent with Lamer C.J.'s characterization of the state's obligation to provide counsel as a positive obligation. It is in the very nature of such obligations that they can be violated by mere inaction, or failure to perform the actions that one is duty-bound to perform.

326 In *Blencoe*, *supra*, this Court considered whether a state-caused delay in moving forward a human rights complaint violated the psychological integrity, and hence personal security, of the individual against whom the complaint was being made by subjecting him to prolonged and undue stigma. Bastarache J. stated at para. 57 that in order for state interference with an individual's psychological integrity to engage s. 7, "the psychological harm must be state imposed, meaning that the harm must result from the actions of the state" (emphasis deleted). This passage may appear to support the idea that positive state action is required to engage s. 7. There are, however, good reasons to find that it is not. For example, there are special problems relating to causation in the context of s. 7 claims involving psychological integrity which may support the need for a requirement of state action in such cases, without importing that requirement into s. 7 as a whole. Moreover, while this Court found on the particular facts of that case that there was no s. 7 violation, it also allowed that such state-caused delay might sometimes constitute a s. 7 violation, even if "only in exceptional cases" (*Blencoe*, at para. 83). In other words, *Blencoe* held that state-caused delay — the inertia (or lack of action) in moving a case forward — was not in itself incompatible with the s. 7 requirement that the impugned harm must result from "actions of the state". Therefore, *Blencoe* does not hold that all s. 7 protection is limited to cases in which one's life, liberty or security of the person is violated by positive state action. Quite the contrary, it implies that such protection will sometimes be engaged by mere state inaction.

327 Nor does there appear to be any support for the opposite conclusion in other case law emanating from this Court. Far from it, by impliedly sanctioning state inaction as a sufficient ground for making a s. 7 claim in at least some circumstances, *Blencoe* and *G. (J.)* are entirely consistent with other Supreme Court case law on point, sparse as it is. Thus, in *Dunmore*, *supra*, at para. 22, this Court held that "exclusion from a protective regime may in some contexts amount to an affirmative interference with the effective exercise of a protected freedom". *Dunmore* confirms that state inaction — the mere failure of the state to exercise its legislative choice in connection with the protected interests of some societal group, while exercising it in connection with those of others — may at times constitute "affirmative interference" with one's *Charter* rights. Thus in certain contexts, the state is under a positive duty to extend legislative protections where it fails to do so inclusively.

328 Of course, it may well be that in order for such positive obligations to arise the state must first do something that will bring it under a duty to perform. But even if this is so, it is important to recognize that the kind of state action required will not be action that is causally determinative of a right violation, but merely action that "triggers", or gives rise to, a positive obligation on the part of the state. Depending on the context, we might even expect to see altogether different kinds of state action giving rise to a positive obligation under s. 7. In the judicial context, it will be natural to find such a state action in the initiation by the state of judicial proceedings. In

the legislative context, however, it may be more appropriate, following cases like *Vriend* and *Dunmore*, to search for it in the state's decision to exercise its legislative choice in a non-inclusive manner that significantly affects a person's enjoyment of a *Charter* right. In other words, in certain contexts the state's choice to legislate over some matter may constitute state action giving rise to a positive obligation under s. 7.

329 The finding that s. 7 may impose positive obligations on the state brings us directly to a frequently expressed objection in the context of claims like the ones at issue in the present case that courts cannot enforce positive rights of an individual to the basic means of basic subsistence. The suggestion is that they cannot do so without being drawn outside their proper judicial role and into the realm of deciding complex matters of social policy better left to legislatures. I turn now to this concern.

D. *Justiciability*

330 I found the obstacles to positive claims considered in the last sections to be unfounded under a correct interpretation of the *Charter*. In contrast, the concern I discuss now may present a barrier to some claimants under particular circumstances. However, it does not do so in the present case for reasons I explain below. The ostensible difficulty that confronts the appellant here is the general assertion that positive claims against the state for the provision of certain needs are not justiciable because deciding upon such claims would require courts to dictate to the state how it should allocate scarce resources, a role for which they are not institutionally competent. Professor Hogg, *supra*, puts the point as follows (at p. 44-12.1):

> [This] involves a massive expansion of judicial review, since it would bring under judicial scrutiny all of the elements of the modern welfare state . . . . As Oliver Wendell Holmes would have pointed out, these are the issues upon which elections are won and lost . . . .

331 While the claim asserted here hardly in itself has the potential to bring "all of the elements of the modern welfare state" under judicial scrutiny, the concern raised by this justiciability argument is a valid one. Questions of resource allocation typically involve delicate matters of policy. Legislatures are better suited than courts to addressing such matters, given that they have the express mandate of the taxpayers as well as the benefits of extensive debate and consultation.

332 It does not follow, however, that courts are precluded from entertaining a claim such as the present one. While it may be true that courts are ill-equipped to decide policy matters concerning resource allocation — questions of how much the state should spend, and in what manner — this does not support the conclusion that justiciability is a threshold issue barring the consideration of the substantive claim in this case. As indicated above, this case raises altogether a different question: namely, whether the state is under a positive obligation to provide basic means of subsistence to those who cannot provide for themselves. In contrast to the sorts of policy matters expressed in the justiciability concern, this is a question about what kinds of claims individuals can assert against the state. The role of courts as interpreters of the *Charter* and guardians of its fundamental freedoms against legislative or administrative infringements by the state requires them to adjudicate such rights-based claims. One can in principle answer the question of whether a *Charter* right exists — in this case, to a level of welfare sufficient to meet one's basic needs — without addressing how much expenditure by the state is necessary in order to secure that right. It is only the latter question that is, properly speaking, non-justiciable.

333 Of course, in practice it will often be the case that merely knowing whether the right exists is of little assistance to the claimant. For, unless we also know what is required, or how much expenditure is needed, in order to safeguard the right, it will usually be difficult to know whether the right has been violated. This difficulty does not arise in the present case. Once a right to a level of welfare sufficient to meet one's basic needs is established, there is no question on the facts of this case that the right has been violated. This Court need not enter

into the arena of determining what would satisfy such a "basic" level of welfare because that determination has already been made by the legislature, which is itself the competent authority to make it.

334 Indeed, the very welfare scheme that is challenged here includes provisions that set out the basic amount. Section 23 of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, provides that the amount receivable is established according to the "ordinary needs" ("*besoins ordinaires*") of the recipients. The bare minimum a single adult aged 30 or over can receive is $466. This is the amount that was deemed by the legislature itself to be sufficient to meet the "ordinary needs" of a single adult. The present case comes before us on the basis that the government failed to provide a level of assistance that, according to its own standards, was necessary to meet the ordinary needs of adults aged 18 to 29. The only outstanding questions are whether this is in fact established and, if so, whether the claimants had a right to the provision of their ordinary needs.

335 Thus any concern over the justiciability of positive claims against the state has little bearing on this case. At any rate, these issues, to some extent, obscure the real question. At this stage we are less concerned with what, if anything, the state must do in order to bring itself under a positive obligation than with whether s. 7 can support such positive obligations to begin with. I have already indicated several reasons for thinking that it can. I now want to supplement these reasons by means of an interpretive analysis of s. 7. As it turns out, any acceptable approach to *Charter* interpretation — be it textual, contextual, or purposive — quickly makes apparent that interpreting the rights contained in s. 7 as including a positive component is not only possible, but also necessary.

II. Analysis of Section 7 of the *Charter*

A. *Textual Interpretation: The Language of Section 7*

336 My colleague Bastarache J. rightly notes that "[w]ithout some link to the language of the *Charter*, the legitimacy of the entire process of *Charter* adjudication is brought into question" (para. 214). With this in mind, I set out s. 7 in its entirety:

> **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. [Emphasis added.]

I have drawn attention to the conjunction in s. 7 for two reasons: first, it constitutes an integral part of the grammatical structure of the section; and second, up until now, it has not been the subject of much judicial attention.

337 This is surprising. The two parts of the section could as easily have been punctuated to form more or less separate sentences. Indeed the French version of s. 7 is so punctuated. It reads as follows:

> **7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

My reasons for emphasizing this grammatical point are straightforward. Past judicial treatments of the section have habitually read out of the English version of s. 7 the conjunction and, with it, the entire first clause. The result is that we typically speak about s. 7 guaranteeing only the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice. On its face, this is a questionable construction of the language of s. 7: for it equates the protection of the second clause alone with the protection of the section as a whole. We no doubt would be less likely to make this equation had the two clauses been punctuated rather than conjoined. As it turns out, moreover, our failure to have due regard for the structure of the

section has potentially dramatic consequences for the scope of the s. 7 guarantee. This was implicitly recognized by Lamer J. in *Re B.C. Motor Vehicles Act*, *supra*, at p. 500:

> 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. [Emphasis added.]

The quoted passage indicates that, from the earliest stages of s. 7 interpretation, this Court has considered it a very live issue whether the first clause in s. 7 involves some greater protection than that accorded by the second clause alone.

338 It is in fact arguable, as Professor Hogg, *supra*, points out (at p. 44-3), "that s. 7 confers two rights": a right, set out in the section's first clause, to "life, liberty and security of the person" full stop (more or less); and a right, set out in the section's second clause, not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice. Wilson J. explicitly considered this interpretation of s. 7 in *Operation Dismantle Inc. v. The Queen*, 1985 CanLII 74 (SCC), [1985] 1 S.C.R. 441, at p. 488. Although in that case she expressed misgivings regarding the feasibility of the interpretation, she ultimately left its status undecided. In fact, in *Re B.C. Motor Vehicle Act*, *supra*, at p. 523, which was heard later in the same year, she may have overcome her earlier misgivings and impliedly accepted the two-rights interpretation by stating that a deprivation of life, liberty or security of the person would require s. 1 justification even if the principles of fundamental justice were satisfied. Her statement in this regard is consistent with the notion that the first clause in s. 7 affords additional protection, over and above that afforded in the second clause, with the result that mere compliance with the principles of fundamental justice does not in itself guarantee that the rights to life, liberty and security of the person will not be violated.

339 The two-rights interpretation of s. 7 has fallen into relative obscurity since these latest references to it by Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra.* To some extent, this was to be expected. As indicated above, this Court has most often had occasion to visit issues of s. 7 interpretation in criminal, or quasi-criminal, contexts. In those contexts, there is little need to concern ourselves with any potentially self-standing right in the first clause of s. 7. Since what we are concerned with in such penal cases is the constitutional validity of positive state action that actively deprives individuals of their liberty, it is not surprising that the s. 7 analysis would focus only upon the second clause, which deals with those types of deprivation. *Re B.C. Motor Vehicles Act* was a case in point. Unlike Lamer J. in that case, however, we have not always been careful in such cases to delineate the scope of our s. 7 discussion. This has led to a general impression that s. 7 is reduced to the right contained in the second clause.

340 As I have already suggested, this is not a plausible construction of the text of s. 7. Only by ignoring the structure of s. 7 — by effectively reading out the conjunction and, with it, the first clause — is it possible to conclude that it protects exclusively "the right not to be deprived of life, liberty or security of the person except in accordance with the principles of fundamental justice". There may be some question as to how far, precisely, the protection of s. 7 extends beyond this, but that the section's first clause affords some additional protection seems, as a purely textual matter, beyond reasonable objection.

341 The instant appeal requires us to consider, perhaps for the first time, what this additional protection might consist of. Without wanting to limit the possibilities at this early stage of interpreting the first clause, there are at least two alternatives that present themselves. The first was alluded to by both Lamer and Wilson JJ. in *Re B.C. Motor Vehicle Act*, *supra.* In essence, it entails reading the first clause as providing for a

completely independent and self-standing right, one which can be violated even absent a breach of fundamental justice, but requiring a s. 1 justification in the event of such violation. This interpretation gets its starting point from the fact that the first clause of s. 7 makes no mention of the principles of fundamental justice. It follows, the thinking goes, that the right to life, liberty and security of the person provided for in the first clause can be violated even where the state conducts itself in accordance with the principles of fundamental justice. And since the justificatory analysis under s. 1 was, at an early stage of *Charter* jurisprudence, given a very limited role in the context of s. 7 violations primarily because it was thought that the violation of a right in breach of fundamental justice could almost never be justified, this interpretation restores to s. 1 a more active role to play in the context of at least some s. 7 violations.

342 Another possible interpretation of what the additional protection afforded by the first clause of s. 7 consists of focuses less on the omission of any reference to the principles of fundamental justice, and more on its failure to make any mention of the term "deprivation". There is indeed something plausible in the idea that, by omitting such language, the first clause extends the right to life, liberty and security of the person beyond protection against the kinds of state action that have habitually been associated with the term "deprivation". Essentially, this interpretation would suggest that by omitting the term "deprivation" in the first clause, the section implies that it is at most in connection with the right afforded in the second clause, if at all (see *supra*, at para. 321), that there must be positive state action in order to ground a violation; the right granted in the first clause would be violable merely by state inaction.

343 I need not decide here which of these two interpretations, if any, is to be preferred. Indeed, they do not appear to be mutually exclusive. For the purposes of the present appeal, it suffices to raise the following two points: first, either interpretation is preferable to the way s. 7 has habitually been interpreted to this point in time, not only textually but also, as I will now demonstrate, from the standpoints of contextual and purposive analysis; and second, either interpretation accommodates — indeed demands — recognition of the sort of interest claimed by the appellant in this case.

B. *Purposive Analysis*

344 The proper approach to the definition of the rights and freedoms guaranteed by the *Charter* is, as I have mentioned (at para. 316), a purposive one. In *Big M Drug Mart*, *supra*, Dickson J. stated at p. 344:

> The meaning of a right or freedom guaranteed by the *Charter* [is] to be ascertained by an analysis of the purpose of such a guarantee; it [is] to be understood, in other words, in the light of the interests it [is] meant to protect.
>
> . . . 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. [Emphasis deleted.]

An interpretation of s. 7 which reduces it to the right contained in the second clause — the "deprivation" clause — is seriously at odds with any purposive interpretation of the right to life guaranteed by the section. Indeed, if that interpretation were to be accepted, it would effectively denude the right to life of any purpose whatsoever, rendering it essentially vacuous.

345 Professor Hogg, *supra*, implies as much when he argues that "[s]o far as 'life' is concerned, the section has little work to do" (p. 44-6). This is only true, however, if we understand the s. 7 guarantee as it has been habitually understood. For in that case, the protection of the section would extend only to "deprivations" of life that were not in accordance with the principles of fundamental justice. And since "principles of fundamental justice" has so far been interpreted to invoke the basic tenets of the "legal system", narrowly defined to include only courts and tribunals that perform court-like functions, the purpose of guaranteeing the right to life would seem limited on

this interpretation to guarding against capital punishment, which is the only obvious way in which the "legal system", so defined, could potentially trench on a person's right to life. But, as Professor Hogg points out, such a purpose might just as well be served by s. 12 of the *Charter*, which protects individuals against cruel and unusual punishment. In effect, then, on this interpretation the s. 7 guarantee of the right to life would be purposeless, and the right itself emptied of any meaningful content.

346 One should not readily accept that the right to life in s. 7 means virtually nothing. To begin with, this result violates basic standards of interpretation by suggesting that the *Charter* speaks essentially in vain in respect of this fundamental right. More importantly, however, it threatens to undermine the coherence and purpose of the *Charter* as a whole. After all, the right to life is a prerequisite — a *sine qua non* — for the very possibility of enjoying all the other rights guaranteed by the *Charter*. To say this is not to set up a hierarchy of *Charter* rights. No doubt a meaningful right to life is reciprocally conditioned by these other rights: they guarantee that human life has dignity, worth and meaning. Nevertheless, the centrality of the right to life to the *Charter* as a whole is obvious. Indeed, it would be anomalous if, while guaranteeing a complex of rights and freedoms deemed to be necessary to human fulfilment within society, the *Charter* had nothing of significance to say about the one right that is indispensable for the enjoyment of all of these others.

347 Thus, in my view, any interpretation of the *Charter* that leaves the right to life such a small role to play is one that threatens to impugn the coherence of the whole *Charter*. Far from being a poor relation of other *Charter* rights — one which deserves protection merely as a negative right, while certain other *Charter* rights are granted recognition as full-blown positive rights — the right to life is, in a very real sense, their essential progenitor. So much so that to deny any real significance to the *Charter* guarantee of the right to life would be to undercut the significance of every other *Charter* guarantee.

348 A purposive interpretation of s. 7 as a whole requires that all the rights embodied in it be given meaning. But by leaving no meaningful role to be played by the right to life, the habitual interpretation of s. 7 threatens not only the coherence, but also the purpose of the *Charter* as a whole. In order to avoid this result, we must recognize that the state can potentially infringe the right to life, liberty and security of the person in ways that go beyond violating the right contained in the second clause of s. 7. Whether one chooses to characterize matters by stating: (a) that it is not merely active "deprivations" of life, liberty and security of the person (as opposed to the mere withholdings) that s. 7 is concerned with; or (b) that s. 7 can be violated even absent a breach of the "principles of fundamental justice"; the basic point is that s. 7 must be interpreted as protecting something more than merely negative rights. Otherwise, the s. 7 right to life will be reduced to the function of guarding against capital punishment — a possibly redundant function in light of s. 12 — with all of the intolerable conceptual difficulties attendant upon such an interpretation.

C. *Contextual Analysis*

349 Quite apart from its specific relation to the right to life guaranteed in s. 7, the structure and purpose of the *Charter* also provide relevant context for the interpretation of *Charter* rights more generally. This idea was implicit in this Court's dicta regarding constitutional interpretation in *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 S.C.R. 217, at para. 50:

> Our Constitution has an internal architecture, or what the majority of this Court in *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at p. 57, called a "basic constitutional structure". The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole.

What holds for "the Constitution as a whole" also holds for its constituent parts, including the *Charter*. Individual elements in the *Charter* are linked to one another, and must be understood by reference to the structure of the

Charter as a whole. Support for this interpretive approach can be located in *Big M Drug Mart*, *supra*, at p. 344: "the purpose of [any] right or freedom . . . is to be sought by reference to the character and the larger objects of the *Charter* itself".

350 Clearly, positive rights are not at odds with the purpose of the *Charter*. Indeed, the *Charter* compels the state to act positively to ensure the protection of a significant number of rights, including, as I mentioned earlier (at para. 320), the protection of the right to vote (s. 3), the right to an interpreter in penal proceedings (s. 14), and the right of minority English- or French-speaking Canadians to have their children educated in their first language (s. 23). Positive rights are not an exception to the usual application of the *Charter*, but an inherent part of its structure. The *Charter* as a whole can be said to have a positive purpose in that at least some of its constituent parts do.

351 Also instructive is s. 1. The great conceptual challenge faced by courts under s. 1 is to identify limitations to individual rights or freedoms that properly respect those rights or freedoms, without subverting them to majoritarian interests. Questions regarding the limits of individual rights can be characterized just as well in terms of delineating the scope of those rights. We can therefore expect to learn a great deal about rights definition in general, and in the context of this case specifically, by paying careful attention to the way in which this Court has handled such issues in the context of s. 1. Properly understood, the justificatory enterprise in s. 1 demonstrates that the rights-granting provisions in the *Charter* include a positive dimension.

352 This Court developed early on a general approach to s. 1 justification, focussing on the kinds of considerations appropriate to the justificatory analysis. That general approach was expressed in Dickson C.J.'s landmark judgment in *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at p. 135:

> It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and, second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the *Constitution Act, 1982*) against which limitations on those rights and freedoms must be measured.

We sometimes lose sight of the primary function of s. 1 — to constitutionally guarantee rights — focussed as we are on the section's limiting function.

353 Our oversight in this regard is perhaps exacerbated by the fact that the two functions served by s. 1 appear, at first blush, to conflict with one another. In what sense, after all, can one be said to be guaranteeing *Charter* rights, even as one places limits upon them? The answer lies in part in the other "limiting" sections (s. 33 and s. 38 of the *Constitution Act, 1982*): the justified limits to *Charter* rights that are permitted under s. 1 must not be confused with exceptions, denials, or other forms of restriction that would abrogate or derogate from the rights themselves (*Attorney General of Quebec v. Quebec Association of Protestant School Boards*, 1984 CanLII 32 (SCC), [1984] 2 S.C.R. 66, at p. 86). Dickson C.J. provides the remainder of the solution in the passage that follows, *Oakes*, *supra*, at p. 136:

> A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the Court to the very purpose for which the *Charter* was originally entrenched in the Constitution: Canadian society is to be free and democratic. The Court must be guided by the values and principles essential to a free and democratic society . . . . The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the *Charter* and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified. [Emphasis added.]

In this way, the two functions served by s. 1 are prevented from operating at cross purposes, as it were, because the very values that underlie and are the genesis of the rights and freedoms guaranteed by the *Charter* are the values that must be invoked in demonstrating that a limit on those rights and freedoms is justified. This "unity of values" underlying the dual functions of s. 1 ensures that due regard and protection is given to *Charter* rights even as justified limits are placed upon them (see L. E. Weinrib, "The Supreme Court of Canada and Section One of the Charter" (1988), 10 *Sup. Ct. L. Rev.* 469, at p. 483). In fact, it would not be far from the truth to state that the types of limits that are justified under s. 1 are those, and only those, that not only respect the content of *Charter* rights but also further those rights in some sense — or to use the language of s. 1 itself, "guarantee" them — by further advancing the values at which they are directed.

354 To say this is in part to recognize that limitations on rights are necessary if only to harmonize competing rights, or to give the fullest expression possible to conflicting rights. Freedom of religion, for example, can only be fulfilled for all by guarding against establishment, thereby ensuring the existence of the positive conditions necessary for all to express their own religious views: *Big M Drug Mart*, *supra*; *Plantation Indoor Plants Ltd. v. Attorney General of Alberta*, 1985 CanLII 71 (SCC), [1985] 1 S.C.R. 366. Freedom of the press cannot trump the right to a fair trial (see *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, 1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480), which in turn cannot override privacy interests (see *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411; *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 S.C.R. 668). In every case, the courts will search for the proper accommodation that will give the fullest expression to each of the clashing rights. See also *R. v. McClure*, [2001] 1 S.C.R. 445, 2001 SCC 14; *Smith v. Jones*, 1999 CanLII 674 (SCC), [1999] 1 S.C.R. 455.

355 In that sense, *Charter* rights and freedoms find protection in s. 1, not only because they are guaranteed in that section, but because limitations on some rights are required by the positive protection of others. This approach to s. 1 justification, which invokes the values that underpin the *Charter* as the only suitable basis for limiting those rights, confirms that *Charter* rights contain a positive dimension. Constitutional rights are not simply a shield against state interference with liberty; they place a positive obligation on the state to arbitrate competing demands arising from the liberty and rights of others.

356 In other words, the justificatory mechanism in place in s. 1 of the *Charter* reflects the existence of a positive right to *Charter* protection asserted in support of alleged interference by the state with the rights of others. If such positive rights exist in that form in s. 1, they must, *a fortiori*, exist in the various *Charter* provisions articulating the existence of the rights. For instance, if one's right to life, liberty and security of the person can be limited under s. 1 by the need to protect the life, liberty or security of others, it can only be because the right is not merely a negative right but a positive one, calling for the state not only to abstain from interfering with life, liberty and security of the person but also to actively secure that right in the face of competing demands.

357 This concludes my interpretive analysis of s. 7. In my view, the results are unequivocal: every suitable approach to *Charter* interpretation, including textual analysis, purposive analysis, and contextual analysis, mandates the conclusion that the s. 7 rights of life, liberty and security of the person include a positive dimension.

358 It remains to show that the interest claimed in this case falls within the range of entitlements that the state is under a positive obligation to provide under s. 7. In one sense it seems obvious that it does. As I have already suggested, a minimum level of welfare is so closely connected to issues relating to one's basic health (or security of the person), and potentially even to one's survival (or life interest), that it appears inevitable that a positive right to life, liberty and security of the person must provide for it. Indeed in this case the legislature has in fact chosen to legislate in respect of welfare rights. Thus determining the applicability of the foregoing general principles to the case at bar requires only that we analyse this case through the lens of the underinclusiveness line of cases, of which *Dunmore*, *supra*, is the chief example.

III. Application to the Case at Bar

359 As my colleague Bastarache J. observes, "[t]he question of whether a fundamental freedom can be infringed through the lack of government action was canvassed most recently in the case of *Dunmore*, *supra*" (para. 220). This Court recognized in that case that underinclusive legislation might in some contexts constitute "affirmative interference with the effective exercise of a protected freedom" (*Dunmore*, *supra*, at para. 22). In the process, we confirmed, at para. 23, L'Heureux-Dubé J.'s earlier comment in *Haig v. Canada*, 1993 CanLII 58 (SCC), [1993] 2 S.C.R. 995, at p. 1039, that "a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required".

360 The combined effect of these statements is at least two-fold. Most obviously, they stand for the proposition that the *Charter*'s fundamental freedoms can be infringed even absent overt state action. Mere restraint on the part of government from actively interfering with protected freedoms is not always enough to ensure *Charter* compliance; sometimes government inaction can effectively constitute such interference.

361 Beyond that, however, the statements also confirm that in some contexts the fundamental freedoms enumerated in the *Charter* place the state under a positive obligation to ensure that its legislation is properly inclusive. Indeed, as I have already stressed, positive rights distinguish themselves from negative rights precisely in that they are violable by mere inaction, such as the failure on the part of the state to include all those who should be included under a regime of protective legislation. Thus, in holding that the state cannot shield itself from *Charter* scrutiny under the pretext that underinclusive legislation does not constitute active interference with a fundamental freedom, *Dunmore* affirmed that the *Charter* provides for positive rights.

362 Of course, such positive rights to inclusion in a legislative regime had previously been recognized by this Court in the s. 15(1) context in *Vriend*, *supra*. In that case, a unanimous Court observed that there is nothing in the wording of s. 32 of the *Charter* "to suggest that a positive act encroaching on rights is required" (emphasis in original). Rather, s. 32 is "worded broadly enough to cover positive obligations on a legislature such that the *Charter* will be engaged even if the legislature refuses to exercise its authority" (*Vriend*, at para. 60, quoting D. Poithier "The Sounds of Silence: *Charter* Application when the Legislative Declines to Speak" (1996), 7 *Constitutional Forum* 113, at p. 115). The primary significance of *Dunmore*, from the perspective of the instant appeal, is that it extended the positive right to legislative inclusion to *Charter* claims going beyond the equality context.

363 It would, in my view, be inaccurate to suggest in the light of this that claims of underinclusion are the natural province of s. 15. I think it is preferable to approach such claims by first attempting to ascertain the threat that is posed by a given piece of underinclusive legislation. Where the threat is to one of the specifically enumerated fundamental rights and freedoms guaranteed by the *Charter*, it will be appropriate to entertain the claim of underinclusion under the section that provides for that freedom. Admittedly, there will be cases in which underinclusion is based on a prohibited ground and threatens human dignity, and therefore is properly treated under s. 15(1), even though it does not implicate any of the other enumerated *Charter* rights. To that extent, s. 15(1) is perhaps the proper venue for addressing certain kinds of claims of underinclusion *per se*.

364 But we must not conclude from this that claims based upon the underinclusiveness of legislation sit uneasily under the protection provided by other specifically enumerated *Charter* rights. As my colleague observes, total exclusion of a group from a statutory scheme protecting a certain right may in some circumstances engage that right to such an extent that the exclusion in essence infringes the substantive right as opposed to the equality right protected under s. 15(1).

365 *Dunmore* articulated the criteria necessary for making a *Charter* claim based on underinclusion outside the context of s. 15. In my view, these criteria are satisfied in this case. They are as follows:

1. The claim must be grounded in a fundamental *Charter* right or freedom rather than in access to a particular statutory regime (*Dunmore*, at para. 24).

2. A proper evidentiary foundation must be provided, before creating a positive obligation under the *Charter*, by demonstrating that exclusion from the regime constitutes a substantial interference with the exercise and fulfillment of a protected right (*Dunmore*, at para. 25).

3. It must be determined whether the state can truly be held accountable for any inability to exercise the right or freedom in question (*Dunmore*, at para. 26).

These criteria are directed at ensuring that the necessary conditions for making out virtually any *Charter* claim are in place. To begin with, the claim must be grounded in an appropriate *Charter* right. That is, it must be grounded in a substantive right outside of s. 15, rather than in exclusion from a statutory regime itself, which exclusion could at best implicate the equality guarantee. Beyond this, however, all successful *Charter* claims require that the claimant establish both that his or her right has been interfered with and that it is the government that is responsible for such interference. The second and third criteria are directed at establishing the presence of these two conditions. While establishing their presence is often a relatively straightforward matter in cases where it is the infringement of a negative right that is claimed — one must simply be able to point to a positive government action that infringes the right or freedom — the case is somewhat different here. Because claims based upon underinclusion essentially call upon the courts to find a positive obligation on the part of government to actively secure fulfilment of a *Charter* right, it would be both extremely difficult (if not impossible) for claimants to point to some positive state act that constitutes an interference with their *Charter* rights, and inappropriate to expect this of them. Instead, their claim will essentially be grounded in a lack of effective state action. We must be sensitive to this difference in conducting our analysis of the criteria. With this in mind, I will now consider each of them in turn.

A. *Is the Claim Grounded in an Appropriate Charter Right?*

366 In *Dunmore*, this Court distinguished underinclusion cases that are superficially similar such as *Haig*, *supra*, and *Native Women's Assn. of Canada v. Canada*, 1994 CanLII 27 (SCC), [1994] 3 S.C.R. 627 ("*NWAC*"), on the basis that the *Charter* claims made in the latter cases constituted nothing more than a demand for access to a particular statutory regime (at para. 24):

> [I]n *Haig*, the majority of this Court held that "(a) government is under no constitutional obligation to extend (a referendum) to anyone, let alone to everyone", and further that "(a) referendum as a platform of expression is . . . a matter of legislative policy and not of constitutional law" (p. 1041 (emphasis in original)). Similarly, in *NWAC*, the majority of this Court held that "[i]t cannot be claimed that NWAC has a constitutional right to receive government funding aimed at promoting participation in the constitutional conferences" (p. 654). In my view, the appellants in this case do not claim a constitutional right to general inclusion in [a statutory regime], but simply a constitutional freedom to organize a trade association. This freedom to organize exists independently of any statutory enactment . . . .

The instant appeal is also distinguishable from *Haig* and *NWAC*, and on all fours with *Dunmore* itself, in this respect.

367 Though it is true that the claimants in the present case attack the underinclusiveness of the regulations under the *Social Aid Act* under s. 15 on the basis that exclusion from the statutory regime on a prohibited ground in itself constitutes an affront to human dignity, their s. 7 claim is entirely independent of this. Under s. 7, their claim is not that exclusion from the statutory regime is illicit *per se*, but that it violates their self-

standing right to security of the person (and potentially their right to life as well). As in *Dunmore*, this right exists independently of any statutory enactment.

368 The distinction between the s. 7 claim and the s. 15 claim can be illustrated as follows: if it were the case that the claimants could meet their basic needs through means outside of the *Social Aid Act* — for instance through an independent government program providing for subsidized housing, food vouchers, etc., in exchange for the performance of works of public service — their s. 7 claim would entirely disappear, but their s. 15 claim would potentially remain intact inasmuch as it would still be open to them to argue that being forced to resort to these alternative means somehow violated their human dignity. The problem in this case, by way of contrast, is that exclusion from this statutory regime effectively excludes the claimants from any real possibility of having their basic needs met through any means whatsoever. Thus, it is not exclusion from the particular statutory regime that is at stake but, more basically, the claimants' fundamental rights to security of the person and life itself.

B. *Is there a Sufficient Evidentiary Basis to Establish that Exclusion from the Social Aid Act Substantially Interfered with the Fulfilment and Exercise of the Claimants' Fundamental Right to Security of the Person?*

369 In order to address adequately the question that is posed here, we must first be clear about what would be sufficient to constitute the required evidentiary basis. In *Dunmore*, *supra*, at para. 25, Bastarache J. stated the requirement as follows:

> [T]he evidentiary burden in these cases is to demonstrate that exclusion from a statutory regime permits a substantial interference with the exercise of protected s. 2(*d*) activity. Such a burden was implied by Dickson C.J. in the *Alberta Reference* . . . where he stated that positive obligations may be required "where the absence of government intervention may in effect substantially impede the enjoyment of fundamental freedoms" (p. 361). [Emphasis deleted.]

For clarity, Bastarache J. went on to add that "[t]hese dicta do not require that the exercise of a fundamental freedom be impossible, but they do require that the claimant seek more than a particular channel for exercising his or her fundamental freedoms" (para. 25 (emphasis added)).

370 In view of this, one must avoid placing undue emphasis on whatever (often remote) possibility there might have been that the claimants could have satisfied their basic needs through private means, whether in the open market or with the assistance of other private actors such as family members or charitable groups. There is simply no requirement that they prove they exhausted all other avenues of relief before turning to public assistance. On the contrary, all that is required is that the claimants show that the lack of government intervention "substantially impede[d]" the enjoyment of their s. 7 rights. This requirement is best put in language that mirrors that used by L'Heureux-Dubé J. in *Haig*, *supra*, that the claimants must show that government intervention was necessary in order to render their s. 7 rights meaningful.

371 There is ample evidence in this case that the legislated exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their s. 7 rights, in particular their right to security of the person. Welfare recipients under the age of 30 were allowed $170/month. The various remedial programs put in place in 1984 simply did not work: a startling 88.8 percent of the young adults who were eligible to participate in the programs were unable to increase their benefits to the level payable to adults 30 and over. In these conditions, the physical and psychological security of young adults was severely compromised during the period at issue. This was compellingly illustrated by the appellant's own testimony and by that of her four witnesses: a social worker, a psychologist, a dietician and a community physician. The sizeable volume of the appellant's record prohibits an exhaustive exposé of the dismal conditions in which many young welfare recipients lived. I will nevertheless outline the evidence illustrating how the exclusion of young adults from the full benefits of the social assistance regime amounted to a substantial interference with their fundamental right to security of the person and drove them to resort to other demeaning and often dangerous means to ensure their survival.

372 On $170/month, paying rent is impossible. Indeed, in 1987, the rent for a bachelor apartment in the Montreal Metropolitan Area was approximately $237 to $412/month, depending on the location. Two-bedroom apartments went for about $368 to $463/month. As a result, while some welfare recipients were able to live with parents, many became homeless. During the period at issue, it is estimated that over 5 000 young adults lived on the streets of the Montreal Metropolitan Area. Arthur Sandborn, a social worker, testified that young welfare recipients would often combine their funds and share a small apartment. After paying rent however, very little money was left to pay for the other basic necessities of life, including hot water, electricity and food. No telephone meant further marginalization and made job hunting very difficult, as did the inability to afford suitable clothes and transportation.

(1) Interference with Physical Security of the Person

373 The exclusion of welfare recipients under the age of 30 from the full benefits of the social assistance regime severely interfered with their physical integrity and security. First, there are the health risks that flow directly from the dismal living conditions that $170/month afford. Obviously, the inability to pay for adequate clothing, electricity, hot water or, in the worst cases, for any shelter whatsoever, dramatically increases one's vulnerability to such ailments as the common cold or influenza. According to Dr. Christine Colin, persons living in poverty are six times more likely to develop diseases like bronchial infections, asthma and emphysema than persons who live in decent conditions. Dr. Colin also testified that the poor not only develop more health problems, but are also more severely affected by their ailments than those who live in more favourable conditions.

374 Second, the malnourishment and undernourishment of young welfare recipients also result in a plethora of health problems. In 1987, the cost of proper nourishment for a single person was estimated at $152/month, that is 89 percent of the $170/month allowance. Jocelyne Leduc-Gauvin, a dietician, gave detailed evidence of the effects of poor and insufficient nourishment. Malnourished young adults suffer from lethargy and from various chronic problems such as obesity, anxiety, hypertension, infections, ulcers, fatigue and an increased sensitivity to pain. Malnourished women are prone to gynecological disorders, high rates of miscarriage and abnormal pregnancies. Children born to malnourished mothers tend to be smaller and are often afflicted by congenital deficiencies such as poor vision and learning disorders. Like many welfare recipients under the age of 30, the appellant suffered the consequences of malnutrition. As noted by Ms. Leduc-Gauvin, there is a sad irony in the fact that those who were left to fend for themselves on a lean $170/month — young adults aged 18 to 29 — in fact required a higher daily intake of calories and nutrients than older adults.

375 In order to eat, many young welfare recipients benefited from food banks, soup kitchens and like charitable organizations. But since these could not be relied upon consistently other avenues had to be pursued. While some resorted to theft, others turned to prostitution. Dumpsters and garbage cans were scavenged in search of edible morsels of food, exposing the hungry youths to the risks of food poisoning and contamination. In one particular case reported by Mr. Sandborn, two young adults paid a restauranteur $10/month for the right to sit in his kitchen and eat whatever patrons left in their plates.

(2) Interference with Psychological Security of the Person

376 The psychological and social consequences of being excluded from the full benefits of the social assistance regime were equally devastating. The hardships and marginalization of poverty propel the individual into a spiral of isolation, depression, humiliation, low self-esteem, anxiety, stress and drug addiction. According to a 1987 enquiry by Santé Québec, one out of five indigent young adults attempted suicide or had suicidal thoughts. The situation was even more alarming among homeless youths in Montreal, 50 percent of whom reportedly attempted to take their own lives.

377 In my view, this evidence overwhelmingly demonstrates that the exclusion of young adults from the full benefits of the social assistance regime substantially interfered with their fundamental right to security of the person and, at the margins, perhaps with their right to life as well. Freedom from state interference with bodily or psychological integrity is of little consolation to those who, like the claimants in this case, are faced with a daily struggle to meet their most basic bodily and psychological needs. To them, such a purely negative right to security of the person is essentially meaningless: theirs is a world in which the primary threats to security of the person come not from others, but from their own dire circumstances. In such cases, one can reasonably conclude that positive state action is what is required in order to breathe purpose and meaning into their s. 7 guaranteed rights.

C. *Can the State Be Held Accountable for the Claimants' Inability to Exercise their Section 7 Rights?*

378 In one sense, there appears to be considerable overlap between this third criterion for making out a successful underinclusion claim and the second criterion just discussed. In fact, once one establishes in accordance with the second criterion that a claimant's fundamental rights cannot be effectively exercised without government intervention, it is difficult to see what more would be required in order to demonstrate state accountability.

379 The absence of a direct, positive action by the state may appear to create particular problems of causation. Of course, state accountability in this context cannot be conceived of along the same lines of causal responsibility as where there is affirmative state action that causally contributes to, and in some cases even determines, the infringement. By contrast, positive rights are violable by mere inaction on the part of the state. This may mean that one should not search for the same kind of causal nexus tying the state to the claimants' inability to exercise their fundamental freedoms. Such a nexus could only ever be established by pointing to some positive state action giving rise to the claimants' aggrieved condition. While this focus on state action is appropriate where one is considering the violation of a negative right, it imports a requirement that is inimical to the very idea of positive rights.

380 Among the immediate implications of this is that the claimants in this case need not establish, in order to satisfy the third criterion, that the state can be held causally responsible for the socio-economic environment in which their s. 7 rights were threatened, nor do they need to establish that the government's inaction worsened their plight. Here, as in all claims asserting the infringement of a positive right, the focus is on whether the state is under an obligation of performance to alleviate the claimants' condition, and not on whether it can be held causally responsible for that condition in the first place.

381 All of which indicates that government accountability in the context of claims of underinclusion is to be understood simply in terms of the existence of a positive state obligation to redress conditions for which the state may or may not be causally responsible. On this view, the third criterion serves the purpose of ensuring not only that government intervention is needed to secure the effective exercise of a claimant's fundamental rights or freedoms, but also that it is obligatory. This accords with much of the dicta in *Dunmore* explaining how it is possible for government accountability to be established, not only by underinclusion that "orchestrates" or "encourages" the violation of fundamental freedoms, but also by underinclusion that "sustains" the violation (*Dunmore*, at para. 26). In conceiving of state accountability in terms of the breach of a positive duty of performance, it becomes possible for the first time to recognize how underinclusive legislation can violate a fundamental right by effectively turning a blind eye to, or sustaining, independently existing threats to that right.

382 A focus on state obligation was also the driving force behind this Court's finding in *Dunmore* that the government could be held accountable for the violation of the claimants' s. 2(*d*) rights in that case. It led to the search for a "minimum of state action" (para. 28) that would bring the government within reach of the *Charter* by engaging s. 32. Ultimately, the minimum of state action was satisfied in *Dunmore* by the mere fact that the government had chosen to legislate over matters of association. In this Court's view, that choice triggered a state obligation that invoked *Charter* scrutiny and removed any possibility of the state claiming lack of responsibility for the violation of associational rights (at para. 29):

> Once the state has chosen to regulate a private relationship such as that between employer and employee . . . it is unduly formalistic to consign that relationship to a "private sphere" that is impervious to *Charter* review. As Dean P. W. Hogg has stated, "(t)he effect of the governmental action restriction is that there is a private realm in which people are not obliged to subscribe to 'state' values, and into which constitutional norms do not intrude. The boundaries of that realm are marked, not by an *a priori* definition of what is 'private', but by the absence of statutory or other governmental intervention" (see *Constitutional Law of Canada* (loose-leaf ed.), at p. 34-27).

There can be no doubt that these dicta apply with equal force to the instant appeal.

383 The *Social Aid Act* is quite clearly directed at addressing basic needs relating to the personal security and survival of indigent members of society. It is almost a cliché that the modern welfare state has developed in response to an obvious failure on the part of the free market economy to provide these basic needs for everyone. Were it necessary, this Court could take judicial notice of this fact in assessing the relevance of the *Social Aid Act* to the claimants' s. 7 rights. As it happens, any such necessity is mitigated by the fact that s. 6 of the Act explicitly sets out its objective: to provide supplemental aid to those who fall below a subsistence level.

384 Additional support for the proposition that the *Social Aid Act* is directed at securing the interests that s. 7 of the *Charter* was meant to protect can be found in various statements made by the Quebec government in a policy paper that ultimately led to the reform of the social assistance regime in 1989, putting an end to the differential treatment between younger and older welfare recipients. This paper was published in 1987 by the government of Quebec, and signed by Pierre Paradis (the then Minister of Manpower and Income Security). It is entitled *Pour une politique de sécurité du revenu*. In it, the Quebec government unequivocally states that it [TRANSLATION] "recognizes its duty and obligation to provide for the essential needs of persons who are unable to work." It then goes on to state that it must [TRANSLATION] "resolutely tackle the deficiencies" of the social assistance programs, which, it admits, "remain barriers to the autonomy and emancipation of welfare recipients". On the same page, the government specifically identifies the difference in treatment between younger and older welfare recipients as such a deficiency, describing it as a [TRANSLATION] "problem".

385 At the very least, these statements indicate that the *Social Aid Act* constituted an excursion into regulating the field of interests that generally fall within the rubric of s. 7 of the *Charter*. Legislative intervention aimed at providing for essential needs touching on the personal security and survival of indigent members of society is sufficient to satisfy whatever "minimum state action" requirement might be necessary in order to engage s. 32 of the *Charter*. By enacting the *Social Aid Act*, the Quebec government triggered a state obligation to ensure that any differential treatment or underinclusion in the provision of these essential needs did not run afoul of the fundamental rights guaranteed by the *Charter*, and in particular by s. 7. It failed to discharge this obligation. The evidence shows that the underinclusion of welfare recipients aged 18 to 29 under the *Social Aid Act* substantially impeded their ability to exercise their right to personal security (and potentially even their right to life). In the circumstances, I must conclude that this effective lack of government intervention constituted a violation of their s. 7 rights.

IV. The Principles of Fundamental Justice

386 Under most circumstances, it would now be necessary to determine whether this *prima facie* violation of the appellant's s. 7 rights was "in accordance with the principles of fundamental justice". Such an inquiry appears to have no application to this case for two reasons. First, my analysis indicates that the protection of positive rights is most naturally grounded in the first clause of s. 7, which provides a free-standing right to life, liberty and security of the person and makes no mention of the principles of fundamental justice. Moreover, as Lamer J. observed in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503 "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." But positive rights, by nature violable by mere inaction on the part of the state, do not bring the justice system into motion by empowering agents of the state to actively curtail the life, liberty and security of the person of individuals. The source of a positive rights violation is in the legislative process, which is of course itself quite distinct from the "inherent domain of the judiciary" and "the justice system" as it has been traditionally conceived. Indeed, the kinds of considerations that would serve to justify the decision to enact one form of protective legislation over another "lie in the realm of . . . public policy", which this Court has specifically divorced from the principles of fundamental justice. The principles of fundamental justice therefore have little relevance in the present circumstances, which invoke the inherent domain of the legislature and not that of the justice system.

387 In view of this, any limitation that might be placed on the s. 7 right asserted in this case — if not in all cases where it is a positive right that is asserted — must be found, not in the principles of fundamental justice, but in the reasonable limits prescribed by law that can be justified in a free and democratic society. Accordingly, it is to s. 1 that we must turn.

V. Section 1 of the *Charter*

388 As is apparent from the above, there is an onerous burden placed on claimants who seek to establish a positive right violation under s. 7 of the *Charter*. Apart from the justiciability concern — which, though not an issue in this case, may at times present a significant obstacle in the way of finding such a violation — claimants are faced with the unenviable task of providing a sound evidentiary basis for the conclusion that their s. 7 rights are rendered essentially meaningless without active government intervention.

389 The difficulty faced by claimants in this regard is partially justified by the fact that, once a violation of s. 7 has been established and there is a shift in the burden of showing that the violation is demonstrably justified as a reasonable limit prescribed by law, a similarly onerous task awaits the government. Lamer C.J.'s comments in *G. (J.)*, *supra*, at para. 99, indicate why this must be so:

> Section 7 violations are not easily saved by s. 1. . . .This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by competing social interests. Second, rarely will a violation of the principles of fundamental justice . . . be upheld as a reasonable limit demonstrably justified in a free and democratic society.

Of course, only the first of these two rationales applies to the case at bar. Since there is no need to find that the violation of a positive right under s. 7 accords with the principles of fundamental justice, the second rationale does not come into play. To that extent, the violation of such a right may be somewhat easier to justify under s. 1. Still, the rights enshrined in s. 7, whether positive or negative, are of sufficient importance that they "cannot ordinarily be overridden by competing social interests".

390 There are, in addition, more general constraints on s. 1 justification discussed above, such that a limitation on *Charter* rights under that section will only be justified where it furthers the values at which the rights are themselves directed. These constraints magnify the difficulty of the government's task in showing that the impugned violation is justified.

391 In this case, the legislated differential treatment, or underinclusion, is purportedly directed at: (1) preventing the attraction of young adults to social assistance; and (2) facilitating their integration into the workforce by encouraging participation in the employment programs. Insofar as either of these "double objectives" is understood as being principally driven by cost considerations, it would fail (barring cases of prohibitive cost) to be pressing and substantial. However, it is possible to frame these objectives in such a way as to ensure that they are properly adapted to the justificatory analysis under s. 1 by focusing instead on their long-term tendency to promote the liberty and inherent dignity of young people. Thus framed, they might indeed satisfy the "pressing and substantial objective" requirement under *Oakes*.

392 The problem, in my view, is that subsequent stages of the *Oakes* analysis raise doubts concerning the appropriateness of framing the objectives in this manner. For example, it is difficult to accept that denial of the basic means of subsistence is rationally connected to values of promoting the long-term liberty and inherent dignity of young adults. Indeed, the long-term importance of continuing education and integration into the workforce is undermined where those at whom such "help" is directed cannot meet their basic short-term subsistence requirements. Without the ability to secure the immediate needs of the present, the future is little more than a far-off possibility, remote both in perception and in reality. We have already seen, for example, how the inability to afford a telephone, suitable clothes and transportation makes job hunting difficult if not impossible. More drastically, inadequate food and shelter interfere with the capacity both for learning as well as for work itself. There appears, therefore, to be little rational connection between the objectives, as tentatively framed, and the means adopted in pursuit of those objectives.

393 Moreover, I agree with Bastarache J.'s finding that those means were not minimally impairing in a number of ways: (1) not all of the programs provided participants with a full top-up to the basic level; (2) there were temporal gaps in the availability of the various programs to willing participants; (3) some of the most needy welfare recipients — the illiterate and severely undereducated — could not participate in certain programs; (4) only 30 000 program places were made available in spite of the fact that 85 000 single young adults were on social assistance at the time. As my colleague points out, this last factor in particular "brings into question the degree to which the distinction in s. 29(*a*) was geared towards improving the [long-term] situation of those under 30, as opposed to simply saving money" (para. 283). Thus, at the minimal impairment stage of the *Oakes* test, there is additional cause for doubting whether the legislated distinction at issue can be properly characterized as being directed at furthering the long-term liberty and dignity of the claimants.

394 This is sufficient, in my view, to establish that the government has not in this case discharged the always heavy burden of justifying a *prima facie* violation of s. 7 under s. 1. I note in passing that it will be a rare case indeed in which the government can successfully claim that the deleterious effects of denying welfare recipients their most basic requirements are proportional to the salutary effects of doing so in contemplation of long-term benefits, for reasons that are largely encompassed by my discussion of rational connection. This is not that rare case. For this reason among others, I find that the violation of the claimants' right to life, liberty and security of the person is not saved by s. 1.

VI. Section 15(1) of the *Charter*

395 Having found a violation of s. 7 of the *Charter*, it is not strictly necessary for me to determine whether the impugned provisions also violate s. 15(1). I am, however, in general agreement with my colleague Bastarache J.'s analysis and conclusions on that issue. As he does, I would find that the impugned provision of the regulations under the *Social Aid Act* infringes s. 15 of the *Charter* and that the infringement is not saved by s. 1. The infringement cannot be saved by s. 1 for substantially the same reasons discussed above in relation to the s. 7 violation.

VII. Section 45 of the Quebec *Charter*

396 I also agree with my colleague Bastarache J. that s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12, establishes a positive right to a minimal standard of living but that this right cannot be enforced under ss. 52 or 49 in the circumstances of this case. Indeed, s. 45 falls outside the expressly defined ambit of s. 52; it is consequently of no assistance to the appellant. Moreover, since there is no question of wrongful conduct or negligence on the part of the legislature, s. 49 cannot be resorted to either. The right that is provided for in s. 45, while not enforceable here, stands nevertheless as a strong political and moral benchmark in Quebec society and a reminder of the most fundamental requirements of that province's social compact. In that sense, its symbolic and political force cannot be underestimated.

VIII. Damages

397 Finally, I am in substantial agreement with the analysis of my colleague Bastarache J. with regard to remedy. Were the impugned provision of the Regulation still in force, I would have declared it unconstitutional pursuant to s. 52 of the *Constitution Act, 1982* as it violates the fundamental right to security of the person guaranteed under s. 7 of the *Charter*. I would have also ordered that the declaration of invalidity be suspended for a sufficient period of time to give the government an adequate opportunity to correct the legislation. However, the impugned social assistance regime having been repealed, this point is now moot.

398 The appellant also seeks monetary compensation for herself and for the members of her class. For the reasons invoked by Bastarache J., I too find this case ill-suited for the concomitant application of s. 52 of the *Constitution Act, 1982* and s. 24 of the *Charter*. I wish to note however that the financial impact of an hypothetical award on the province of Quebec would probably be less of a burden than surmised by my colleague. Indeed, the various remedial programs that failed to address the appellant's needs in this case were *Charter* proof until April 1989, protected as they were by a notwithstanding clause in their enabling statute (S.Q. 1984, c. 5, s. 4). This means that the programs' role in the *Charter* violation in this case could only be assessed within a 4-month window, representing the time between the expiry of the notwithstanding clause and the repeal of the impugned legislation.

399 Even though this affects the extent of the violation, it has no impact in my view on the usefulness of the whole of the evidence presented in this case as to the existence of the right and the nature of the infringement. The fact that *An Act to amend the Social Aid Act*, S.Q. 1984, c. 5, and the programs it enacted were shielded from the *Charter* until April 1989 is a matter that goes to the scope or extent of the breach. It does not change the fact that a breach occurred.

IX. Conclusion

400 For these reasons, I would allow the appeal and I would answer the stated constitutional questions as follows:

1. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* on the ground that it established a discriminatory distinction based on age with respect to individuals, capable of working, aged 18 to 30 years?

Yes.

2. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

3. Did s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, adopted under the *Social Aid Act*, R.S.Q., c. A-16, infringe s. 7 of the *Canadian Charter of Rights and Freedoms* on the ground that it deprived those to whom it applied of their right to security of the person contrary to the principles of fundamental justice?

Yes, the section infringed s. 7 by denying those to whom it applied of their right to security of the person.

4. If so, is the infringement justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

No.

English version of the reasons delivered by

LEBEL J. (dissenting) —

I. Introduction

401 I have read with interest the opinion of my colleague Justice Bastarache. I am in overall agreement with his reasons concerning the application of s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Canadian Charter*") and I concur in the disposition he proposes. However, while I acknowledge that the appellant was unable to establish a violation of s. 7 of the *Canadian Charter*, I am unable, with respect, to agree with the interpretation and application he suggests. Finally, in the discussion of s. 45 of the Quebec *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12 ("*Quebec Charter*"), I believe that certain unique aspects of the *Quebec Charter*, and the nature of the economic rights that it protects, merit a few additional comments.

II. Section 15 of the *Canadian Charter*

402 It is not disputed in this case that s. 29(*a*) of the *Regulation respecting social aid*, R.R.Q. 1981, c. A-16, r. 1, establishes a formal distinction between the appellant (and members of her group) and other social aid recipients based on a personal characteristic, namely age. The appeal essentially relates to the third element in the analysis under s. 15 of the *Canadian Charter*, which involves determining whether the distinction in issue is discriminatory. For the reasons given by my colleague Bastarache J., and for the following reasons, I am of the opinion that s. 29(*a*), when taken in isolation or considered in light of all employability programs, discriminates against recipients under 30 years of age.

403 Differential treatment becomes discriminatory when it violates the human dignity and freedom of the individual. This will be the case where the differential treatment reflects a stereotypical application of presumed personal or group characteristics, or where it perpetuates or promotes the view that the individual concerned is less capable or less worthy of respect and recognition as a human being or as a member of Canadian society.

404 It should first be noted that in this case, the distinction was based on a ground expressly enumerated in s. 15(1) of the *Canadian Charter*. In such circumstances, it is much easier to conclude that the distinction violates the innate dignity of the individual, as Iacobucci J. held in *Law v. Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC), [1999] 1 S.C.R. 497. However, when compared to the other enumerated or analogous grounds, age is unique in that a distinction based on age may, in some cases, reflect

the needs and abilities of individuals. In *Law*, for example, the Supreme Court upheld a distinction based on age in the Canada Pension Plan (CPP) on the ground that the distinction was not discriminatory. The CPP provided that a person must have reached the age of 35 in order to receive surviving spouse benefits. This Court reached that conclusion because the distinction based on age is justified by the actual (not stereotypical) capacity of individuals under the age of 35 to support themselves in the long term.

405 In this case, the distinction based on age, unlike the distinction at issue in *Law*, does not reflect either the needs or the abilities of social aid recipients under 30 years of age. The ordinary needs of young people are not so different from the needs of their elders as to justify such a pronounced discrepancy between the two groups' benefits. As well, young people are no more able to find or keep a job during an economic slowdown than are their elders. In fact, young people are the first to feel the impact of an economic crisis on the labour market. Because they have little experience or seniority, they are at the top of the list for termination and lay-off (see the report by Louis Ascah, *La discrimination contre les moins de trente ans à l'aide sociale du Québec: un regard économique* (1988)). Also, because the distinction made by the social aid scheme was justified by the fact that young people are able to survive a period of economic crisis better, I, like Bastarache J., am of the opinion that this distinction perpetuated a stereotypical view of young people's situation on the labour market.

406 My colleague McLachlin C.J. says that the Quebec government was under no illusions as to the ability of young people to keep a job in a period of economic crisis. In her view, the Quebec government knew perfectly well that they would be the first to suffer the negative effects of the difficulties in the economy. This was in fact the reason why the government created the employability programs, which were designed to make up for lack of training or experience. Those programs assisted young people to re-enter the labour market, while counteracting the negative effects on vocational development of prolonged periods out of the productive work force.

407 I am prepared to concede that the Quebec government knew that young people are particularly vulnerable during an economic slowdown. As well, I readily acknowledge that the government sincerely believed that it was helping young people by making the payment of full benefits conditional on participation in an employability program. Nonetheless, the distinction made by the social aid scheme did not reflect the needs of young social assistance recipients under the age of 30. By trying to combat the pull of social assistance, for the "good" of the young people themselves who depended on it, the distinction perpetuated the stereotypical view that a majority of young social assistance recipients choose to freeload off society permanently and have no desire to get out of that comfortable situation. There is no basis for that vision of young social assistance recipients as "parasites". It has been disproved by numerous experts. For instance, in a 1986 study prepared for the Quebec government's Commission consultative sur le travail (*Les jeunes et le marché du travail* (1986)), Professor Gilles Guérin wrote, *inter alia* (at p. 65):

> [TRANSLATION] An estimated proportion of 91% of young people (counting only those capable of working) perceive their situation on social aid as temporary and have a fierce desire to work, to have a "real" job, to collect a "real" wage, and to acquire socio-economic autonomy. An IQOP study shows that young people value being productive workers, that it is preferable in their eyes to hold a job, even one that does not interest them, than to be unemployed. The myth of the young social assistance recipient who is capable of working and is happy with social assistance is therefore completely false; work is what is most highly valued by the people around them, their friends and family and their neighbours, and by the young people themselves. [Emphasis added.]

408 As well, in *Le plein emploi: pourquoi?* (1983), L. Poulin Simon and D. Bellemare found that where income was equal, a majority of people in Quebec preferred work to unemployment. While the authors made no absolute statements, they came to substantially the same conclusions with respect to those statistics (at p. 66):

> [TRANSLATION] These results add to the doubt there might be as to the strictly utilitarian economic hypothesis that predicts that where income is equal, workers generally prefer not working to working. In our opinion, that hypothesis derives from a medieval view of economic reality, where work was a degrading activity with no intrinsic value; the serfs worked while the lords were content to amuse themselves. In an advanced industrial economy, the reality of work would seem to be quite a different matter.

409 Young social assistance recipients in the 1980s certainly did not latch onto social assistance out of laziness; they were stuck receiving welfare because there were no jobs available. Economists who studied the labour market during that period unanimously recognize the gradual but universal shrinkage in the number of jobs in the economy since 1966 (and especially since 1974) as the primary factor in the meteoric rise in the unemployment rate among young people. For instance, in his report "Le chômage des jeunes au Québec: aggravation et concentration (1966-1982)" (1984), 39 *Relations Industrielles* 419, the economist Pierre Fortin attributed three quarters of the rise in the average unemployment rate among all young people, from 6 percent to 23 percent, since 1966 to the general deterioration of the economy, together with young people's much greater vulnerability to any slowdown in overall employment prospects. In his view, the extreme sensitivity of the youth unemployment rate to general conditions in the economy confirms that a very large majority of young people want to work and are capable of doing productive work when there are jobs for them. Accordingly, the real solution to the youth unemployment rate, he says, lies in a full employment policy for all workers, and not a simple employment incentive mechanism incorporated as part of social assistance programs.

410 Obviously, it is too easy to pass harsh judgment on the actions of a government after the fact. I certainly do not intend to dispute the appropriateness of offering incentives to work that may legitimately be the subject of a political debate. However, even if the Quebec government could validly encourage young people to work, the approach adopted discriminates between social aid recipients under 30 years of age and those who are 30 years of age and over, for no valid reason, and perpetuates the prejudiced notion that the former tend to be happy being dependent on the state, even though they are better able to make a go of things than their elders during periods of economic slowdown. With due respect for the opinion of the Chief Justice, I do not believe that the only way for the Quebec government to secure participation in those programs was to make the payment of full benefits conditional on participation in an employability program. There is nothing in the evidence that establishes that the people who did participate in the programs would not have participated without a financial incentive, nor is there anything from which that can be assumed. In my view, the Quebec government could have achieved its objective of developing employability just as well without abandoning recipients under the age of 30 to these paltry benefits.

411 In addition to the underlying stereotypes, the social aid scheme has too many other defects that would be sufficient on their own to support a finding that s. 15 of the *Canadian Charter* was violated. My colleague Bastarache J. alluded to, *inter alia*, the restrictions placed on participation in employability programs. I will not repeat his comments, but I would like to add that the programs lasted for a maximum of 12 months. At the end of that time, recipients did not qualify for full benefits. They had to participate in an employability program again (and even several times) in order to avoid the harsh reality of reduced benefits. As well, if they were still unable to find a job, young social assistance recipients, even those who had participated in all the programs offered, would again receive the "small scale". In my view, once a recipient had participated in a program and made every effort to find a job, the scheme should have provided for payment of benefits equivalent to the benefits paid to recipients 30 years of age and over.

412 In addition to these inconsistencies in the system, the evidence shows that implementation of the programs was delayed by administrative constraints, and some recipients therefore had to wait several months before they were able to take part in an employability program. Louise Bourassa, director of work force and income security programs, in fact acknowledged in her testimony that the Department had received complaints that some recipients were on waiting lists. It appears that between the time someone registered for a program and the time the program started, reduced benefits continued to be paid.

413 All of these defects in the scheme, together with the preconceived ideas that underpinned it, necessarily lead to the conclusion that s. 29(*a*) of the *Regulation respecting social aid* infringed the equality right of recipients under 30 years of age. For the reasons given by Bastarache J., s. 29(*a*) is not saved by s. 1 of the *Canadian Charter*.

III. Section 7 of the *Canadian Charter*

414 Having regard to the foregoing conclusion, I see no point in any further consideration of whether s. 29(*a*) of the *Regulation respecting social aid* violated s. 7 of the *Canadian Charter*. While I agree with Bastarache J.'s conclusion that the appellant failed to establish a violation of s. 7, I would note that I agree with the part of the reasons of the Chief Justice in which she writes that it is not appropriate, at this point, to rule out the possibility that s. 7 might be invoked in circumstances unrelated to the justice system. In the case of s. 7, the process of jurisprudential development is not complete. With respect, I am afraid that an interpretation such as is suggested by Bastarache J. unduly circumscribes the scope of the section, in a manner contrary to the cautious, but open, approach taken in the decisions of this Court on the question. It having been established that s. 7 does not apply, we must now review the arguments made by the appellant concerning the interpretation and application of s. 45 of the *Quebec Charter*.

IV. Section 45 of the *Quebec Charter*

415 The appellant submits that s. 45 of the *Quebec Charter* recognizes the right to an acceptable standard of living, as a substantive right. She cites the dissenting opinion of Robert J.A. in the Court of Appeal (1999 CanLII 13818 (QC CA), [1999] R.J.Q. 1033), in which he found s. 45 to have independent legal effect, based on a difference between the wording of that section and of the other provisions that the *Quebec Charter* contains under the heading of social and economic rights. The respondent submits that s. 45 is no more than a mere policy statement, implementation of which may be ascertained from the relevant legislation. In the words of Baudouin J.A. in the Court of Appeal, the respondent argues that s. 45 does not authorize the courts to review the sufficiency of social measures that the legislature has chosen to adopt, in its political discretion. For the following reasons, I am of the opinion that while s. 45 is not without any binding content, it does not operate to place a duty on the Quebec legislature to guarantee persons in need an acceptable standard of living. That interpretation is supported by the wording and legislative history of s. 45, its position in the *Quebec Charter* and by the interaction between that section and the other provisions of the *Quebec Charter*.

A. *The Wording of Section 45 and its Placement in the Quebec Charter*

416 As Robert J.A. correctly observed, the *Quebec Charter* operates as a fundamental statute in the law of Quebec, and its unique nature is apparent in a variety of ways. First, it may be distinguished from other provincial human rights statutes in that its content goes well beyond the framework of mere prohibitions on discrimination. In addition to the very special importance that it assigns to the right to equality, the *Quebec Charter* protects a large number of other rights, including fundamental rights and freedoms and legal, political, social and economic rights. As well, while the *Canadian Charter* contains a justification clause that may apply to the violation of protected rights, the rights and freedoms guaranteed by the *Quebec Charter* are guaranteed without restriction, other than the restrictions inherent in the rights and freedoms themselves (with the exception, however, of the fundamental rights and freedoms in Chapter I, which may be justifiably limited under s. 9.1). In terms of remedies, the *Quebec Charter* differs from the *Canadian Charter* in that it offers various methods for compensating individuals whose rights are violated in private relationships. A final distinction worth noting is that the *Quebec Charter* is practically the only fundamental legislation in Canada, or even North America, that expressly protects social and economic rights.

417 Pierre Bosset writes that including economic and social rights in a document that solemnly affirms the existence of fundamental rights and freedoms must have some consequence. In his view, the recognition of those rights [TRANSLATION] "makes it necessary to consider the question of the protection of economic and social rights from a qualitatively different perspective, one that is appropriate to a constitutional instrument, and not as a mere branch of administrative law" (P. Bosset, "Les droits économiques et sociaux: parents pauvres de la Charte québécoise?" (1996), 75 *Can. Bar Rev.* 583, at p. 585). However, although the incorporation of social and economic rights into the *Quebec Charter* gives them a new dimension, it still does not make them legally binding. Robert J.A. is also of that opinion. In the case of s. 45 of the *Quebec Charter*, though, he creates an exception. He finds it to be binding, relying on a difference between the wording of s. 45 and the wording of the other provisions in the same chapter. In my view, that exception does not stand up to careful scrutiny of the chapter in question, the provisions of which are as follows:

> CHAPTER IV
>
> ECONOMIC AND SOCIAL RIGHTS
>
> **39.** Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing.
>
> **40.** Every person has a right, to the extent and according to the standards provided for by law, to free public education.
>
> **41.** Parents or the persons acting in their stead have a right to require that, in the public educational establishments, their children receive a religious or moral education in conformity with their convictions, within the framework of the curricula provided for by law.
>
> **42.** Parents or the persons acting in their stead have a right to choose private educational establishments for their children, provided such establishments comply with the standards prescribed or approved by virtue of the law.
> **43.** Persons belonging to ethnic minorities have a right to maintain and develop their own cultural interests with the other members of their group.
> **44.** Every person has a right to information to the extent provided by law.
> **45.** Every person in need has a right, for himself and his family, to measures of financial assistance and to social measures provided for by law, susceptible of ensuring such person an acceptable standard of living.
>
> **46.** Every person who works has a right, in accordance with the law, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being.
> **47.** Husband and wife have, in the marriage, the same rights, obligations and responsibilities.
>
> Together they provide the moral guidance and material support of the family and the education of their common offspring.
>
> **48.** Every aged person and every handicapped person has a right to protection against any form of exploitation.
>
> Such a person also has a right to the protection and security that must be provided to him by his family or the persons acting in their stead. [Emphasis added.]

418 Chapter IV is remarkable for the presence of both intrinsic and extrinsic limitations on the rights created in it. First, six of the ten sections in the chapter contain a reservation (worded differently from one section to another) indicating that the exercise of the rights they protect depends on the enactment of legislation. For instance, to cite a few examples, the right to free public education is guaranteed "to the extent and according to the standards provided for by law", the right of parents to have their children receive religious instruction in conformity with their convictions is guaranteed "within the framework of the curricula provided for by law" and the right to information is guaranteed "to the extent provided by law". As well, all of the rights in the chapter are excluded from the preponderance that s. 52 assigns to the other rights and freedoms guaranteed by the *Quebec*

Charter. Accordingly, any interference with any of those rights may not result in a declaration under s. 52 that the legislation in question is of no force and effect. Nonetheless, it is possible, under s. 49, to obtain cessation of any interference with such a right, and compensation for the moral or material prejudice resulting therefrom.

419 In the opinion of Robert J.A., the differences in wording among the sections in Chapter IV are not of merely aesthetic significance. He is of the view that the expression "provided for by law" used in s. 45 to qualify the financial assistance and social measures that the legislature must adopt in order to ensure an acceptable standard of living does not mean the same thing as the other expressions used in the other sections in Chapter IV. While those other expressions, in his view, indicate that the rights are granted only to the extent provided for by law, the expression "provided for by law" refers, rather, to the methods by which the legislature has committed itself to providing the measures to ensure an acceptable standard of living. That interpretation, he says, is consistent with Article 11(1) of the *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, to which s. 45 bears an undeniable resemblance:

> *Article 11*. 1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

420 The apparent similarity between s. 45 and Article 11(1) of the Covenant does not necessarily mean that the Quebec legislature intended to entrench the right to an acceptable standard of living in the *Quebec Charter*. In fact, the wording of s. 45 itself seems to negate that possibility. Section 45 does not guarantee the right to an acceptable standard of living, as Article 11(1) does; rather, it guarantees the right to social measures. In my view, that distinction supports the assertion that s. 45 protects a right of access to social measures for anyone in need. The fact that anyone in need is entitled not to measures to ensure him or her an acceptable standard of living, but to measures susceptible of ensuring him or her that standard of living, is also revealing. It seems to suggest that the legislature did not intend to give the courts the power to review the adequacy of the measures adopted, or to usurp the role of the legislature in that regard.

421 As well, the expression "provided for by law" must be considered in light of the other provisions of Chapter IV that have a direct impact on the financial resources of the state. Those provisions all contain a reservation (worded in different ways from one section to another). Those reservations confirm that the rights are protected only to the extent provided for by law. It would be most surprising if the Quebec legislature had committed itself unconditionally to ensuring an acceptable standard of living for anyone in need at the same time as limiting the exercise of all of the other rights that call for it to make a direct financial investment to what is prescribed by law (M.-J. Longtin and D. Jacoby, "La Charte vue sous l'angle du législateur", in *La nouvelle Charte sur les droits et les libertés de la personne* (1977), 4, at p. 24).

422 The final point is that the interpretation adopted by Robert J.A. does not seem to be supported by the opinions expressed during the parliamentary debates that led to the enactment of the *Quebec Charter*. The Quebec Minister of Justice referred to social and economic rights in the broader framework of a charter that was intended to be a synthesis of certain democratic values accepted in Quebec, Canada and the West, and described the rationale for those provisions as follows (*Journal des débats*, vol. 15, No. 79, November 12, 1974, at p. 2744):

> [TRANSLATION] These rights are of special importance. Some may say that in certain cases they are expressions of good intentions, but I think that the fact that they are recognized in a bill like this one will give them an important place in the context of the democratic values to which I have referred, that is, that a number of these social and economic rights in a way summarize certain things, certain principles, certain values that we hold dear in Quebec. Despite the fact that some of them are subject to the effect of other

government legislation, which I certainly do not deny, they nonetheless represent part of our democratic heritage. That is why we have included them in this Charter.

423 It therefore seems obvious that the Quebec legislature did not intend to give the social and economic rights guaranteed by the *Quebec Charter* independent legal effect. As well, there is nothing in the debates to suggest the intention of creating an exception with respect to s. 45.

B. *Case Law Concerning Section 45*

424 The Quebec courts have generally taken the position that s. 45, and all of the rights in Chapter IV of the *Quebec Charter*, were positive rights, the exercise of which depended on the enactment of legislation. In *Lévesque v. Québec (Procureur général)*, 1987 CanLII 964 (QC CA), [1988] R.J.Q. 223, the Court of Appeal held (at p. 226):

> [TRANSLATION] In 1975, in Chapter IV, Social and Economic Rights, the Charter granted all individuals the right to social measures, but because that provision does not prevail over the other laws of Quebec, the right to financial assistance must be determined under the appropriate legislation and regulations, in this case, the Act.

425 As well, in *Lecours v. Québec (Ministère de la Main d'œuvre et de la Sécurité du revenu)*, J.E. 90-638, the Superior Court held that s. 45 of the *Quebec Charter* did not grant a universal right to social assistance; that right must be provided by law.

426 There is, however, one decision of the Quebec Court of Appeal that is an exception. That judgment, in *Johnson v. Commission des affaires sociales*, [1984] C.A. 61, relied on s. 45 of the *Quebec Charter* in holding that a statutory provision declaring a person who is unemployed because of a labour dispute to be ineligible for social assistance could not be applied to a striker. Johnson and his wife had found themselves without income the day after a strike vote was held. Because he was not a union member, Johnson could not receive strike pay. He then tried to obtain unemployment insurance benefits, but was unsuccessful. As a last resort, he applied for social aid, which he was denied on the ground that s. 8 of the *Social Aid Act*, R.S.Q., c. A-16, excluded persons who had lost their job because of a labour dispute from benefits. He then challenged the validity of s. 8 on the ground that it was contrary to ss. 10 and 45 of the *Quebec Charter*.

427 Bisson J.A., writing for the Court of Appeal, held that s. 8 of the Act was not based on one of the grounds of discrimination listed in s. 10 of the *Quebec Charter* because being unemployed as a result of a labour dispute was not included in the concept of social condition. That did not conclude his analysis, and he went on to declare that s. 8 was of no force and effect as against the appellant on the ground that it was contrary to a number of the principles laid down in the *Quebec Charter* and in the *Social Aid Act* (at p. 70).

> [TRANSLATION] Having found that s. 8 was valid legislation, I am nevertheless compelled to acknowledge that, as happens in the case of some legislation, a provision that is perfectly legal may, inadvertently, produce effects that the legislature did not anticipate.
>
> That is the case with s. 8 as it relates to the appellants. The effect of that statutory provision, which was intended to prevent strikes being funded by social aid, is that because of the special situation of the appellants, s. 45 of the Charter must be applied.

428 It is difficult to view *Johnson* as an express recognition of the binding effect of s. 45. For one thing, it is obvious that the Court of Appeal was influenced by the exceptional circumstances in the case before it: a worker who had been on probation had been unable to participate in the strike vote and was not entitled to union benefits. The court was dealing with legislation that was perfectly valid but that produced effects the legislature had not anticipated. As Pierre Bosset, *supra*, points out, that case is in fact an atypical case, in which the basis for the judgment is extremely uncertain (at p. 593):

> [TRANSLATION] When restricted to the applicant's particular case, the declaration that the law was of no force and effect is perhaps not very dissimilar to a judgment in equity. However, we may also regard it as an implied application of the rule of interpretation stated in s. 53 of the *Charter*, which provides that if any doubt arises in the interpretation of a provision of the Act, it shall be resolved in keeping with the intent of the *Charter*.

429 Accordingly, other than in exceptional circumstances, it does not seem that s. 45 is capable of having independent legal effect. Robert J.A. thought that this interpretation should be rejected on the ground that it reduced s. 45 to a mere obligation that [TRANSLATION] "theoretically . . . could be no more than symbolic and purely optional" (p. 1100). His opinion, however, was not based on a proper assessment of the nature of the obligational content of s. 45. The right of access to measures of financial assistance and social measures without discrimination would not be guaranteed by the *Quebec Charter* were it not for s. 45, the reason for this being that s. 10 of the *Quebec Charter* does not create an independent right to equality. In the first decision on this point, *Commission des droits de la personne du Québec v. Commission scolaire de St-Jean-sur-Richelieu*, 1991 CanLII 1358 (QC TDP), [1991] R.J.Q. 3003, aff'd 1994 CanLII 5706 (QC CA), [1994] R.J.Q. 1227 (C.A.), the Human Rights Tribunal explained the complex interaction between the right to equality and economic and social rights, in that case the right to free public education, as follows (at p. 3037):

> [TRANSLATION] [W]hile the Charter allows for the exercise of the right to free public education to be affected by various statutory restrictions, and even for it to be subject to certain exceptions (such as charging tuition fees at the college and university level, for example), it prohibits limitations that have an effect on the exercise of that right that is discriminatory on one of the grounds enumerated in s. 10.

430 The symbiosis between s. 10 and the other rights and freedoms is a direct result of the wording of s. 10, which creates not an independent right to equality but a method of particularizing the various rights and freedoms recognized (*Desroches v. Commission des droits de la personne du Québec*, 1997 CanLII 24806 (QC CA), [1997] R.J.Q. 1540 (C.A.), at p. 1547). Section 10 sets out the right to equality, but only in the recognition and exercise of the rights and freedoms guaranteed. Accordingly, a person may not base an action for a remedy on the s. 10 right to equality as an independent right. However, a person may join s. 10 with another right or freedom guaranteed by the *Quebec Charter* in order to obtain compensation for a discriminatory distinction in the determination of the terms and conditions on which that right or freedom may be exercised (P. Carignan, "L'égalité dans le droit: une méthode d'approche appliquée à l'article 10 de la Charte des droits et libertés de la personne" in *De la Charte québécoise des droits et libertés: origine, nature et défis* (1989), 101, at pp. 136-37).

431 While it is true that the existence of that right of access is itself subject to the enactment of legislation, there is opinion that suggests that a minimum duty to legislate could be inferred from the inclusion of economic and social rights in the *Quebec Charter*. That idea is argued by Pierre Bosset, *supra*, at p. 602, who sees it as an alternative to the refusal by the Quebec courts to recognize the rights set out in Chapter IV of the *Quebec Charter* as having binding effect:

> [TRANSLATION] Unless we are to think that the legislature spoke for no purpose when it included economic and social rights in the *Charter*, we must take seriously the hypothesis of minimum obligational content, of a "hard core" of rights that may be asserted against the state, despite the fact that the provisions in question do not, properly speaking, prevail over legislation. The idea of a hard core, which is more in keeping with the spirit of the *Charter* and the way that we normally think about rights and obligations than

is the idea of a "purely optional" obligation, involves, at a minimum, the creation of a legal framework that favours the attainment of social and economic rights. Accordingly, failure to legislate — particularly where the way in which the right is worded expressly refers to the law — would be inconsistent with the obligations imposed by the *Charter*. Legislating solely as a matter of form, in legislation devoid of substance, would be no less problematic an idea.

432 However, that interpretation would not give the courts the power to review the adequacy of the measures adopted. Nonetheless, the task it would assign them might be incompatible with their function, which is to determine what types of measures are likely to allow for the exercise of rights.

433 In conclusion, the wording of s. 45 and its placement in the *Quebec Charter* confirm that it does not confer an independent right to an acceptable standard of living for anyone in need. That interpretation is the one most consistent with the intention of the Quebec legislature. Although it might be desirable, entrenching economic and social rights in a charter of rights is not essential to recognition of those rights in positive law. Social law had in fact developed in Quebec well before the enactment of the *Quebec Charter*.

V. Conclusion

434 For these reasons, the appeal should be allowed, in accordance with the disposition proposed by my colleague Bastarache J.

Appeal dismissed, L'HEUREUX-DUBÉ, BASTARACHE, ARBOUR *and* LEBEL JJ. *dissenting.*

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Solicitor for the respondent: The Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General for Ontario: The Ministry of the Attorney General, Toronto.

Solicitor for the intervener the Attorney General for New Brunswick: The Attorney General for New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: The Ministry of the Attorney General, Victoria.

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

Solicitor for the intervener Rights and Democracy (also known as International Centre for Human Rights and Democratic Development): David Matas, Winnipeg.

Solicitor for the intervener Commission des droits de la personne et des droits de la jeunesse: Commission des droits de la personne et des droits de la jeunesse, Montreal.

Solicitors for the intervener the National Association of Women and the Law (NAWL): Gwen Brodsky, Vancouver; Rachel Cox, Saint-Lazare, Quebec.

Solicitor for the intervener the Charter Committee on Poverty Issues (CCPI): Nova Scotia Legal Aid, Halifax.

Solicitors for the intervener the Canadian Association of Statutory Human Rights Agencies (CASHRA): McCarthy Tétrault, Montreal.

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

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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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.]
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> ("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)).